IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

Eolas Technologies Incorporated,	§	
	§	
Plaintiff,	§	**Civil Action No. 6:09-CV-00446-LED**
	§	
vs.	§	
	§	
Adobe Systems Inc., Amazon.com, Inc.,	§	**JURY TRIAL**
Apple Inc., Argosy Publishing, Inc.,	§	
Blockbuster Inc., CDW Corp.,	§	
Citigroup Inc., eBay Inc., Frito-Lay, Inc.,	§	
The Go Daddy Group, Inc., Google Inc.,	§	
J.C. Penney Company, Inc., JPMorgan	§	
Chase & Co., New Frontier Media, Inc.,	§	
Office Depot, Inc., Perot Systems Corp.,	§	
Playboy Enterprises International, Inc.,	§	
Rent-A-Center, Inc., Staples, Inc., Sun	§	
Microsystems Inc., Texas Instruments Inc.,	§	
Yahoo! Inc., and YouTube, LLC	§	
	§	
Defendants.	§	

EOLAS' MOTION TO COMPEL PRODUCTION OF SOURCE CODE
FROM EBAY INC. AND AMAZON.COM, INC.

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Plaintiff Eolas Technologies Incorporated ("Eolas") files this motion to compel the production of source code withheld by Defendants eBay Inc. ("eBay") and Amazon.com, Inc. ("Amazon"). eBay and Amazon share common counsel in this action, and the issues with respect to their deficient source code production are similar.

I.   BACKGROUND

Eolas has accused certain eBay and Amazon websites of infringing two of Eolas' patents, U.S. Patent Nos. 5,838,906 and 7,599,985. The Court's Discovery Order (dkt. 247), as modified by subsequent orders, required all defendants to produce source code for their accused websites no later than September 2010. The Court's Protective Order (dkt. 423) specified the format of the source code production and the procedures used to review that code. Despite this, eBay has failed to produce source code for sixteen of its seventeen accused websites in the format in which it is kept in the ordinary course of business (*e.g.,* preserving the native file and directory structure of such code as it exists on Defendants' servers).[1] Likewise, Amazon has failed to produce source code for two of its three accused websites in the format in which it is kept in the ordinary course of business.[2] As detailed herein, Eolas has gone to great lengths to resolve this issue without the involvement of the Court. However, eBay and Amazon's refusal to provide the source code Eolas needs to prepare its expert reports necessitates this motion.

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[1]   eBay's accused websites include: http://antiques.shop.ebay.com, http://art.shop.ebay.com, http://baby.shop.ebay.com, http://business.shop.ebay.com, http://cell-phones.ebay.com, http://coins.ebay.com, http://computers.ebay.com, http://dolls.shop.ebay.com, http://electronics.ebay.com, http://neighborhoods.ebay.com, http://photography.shop.ebay.com, http://services.ebay.com, http://success.ebay.com, http://video-games.ebay.com, http://www.ebay.com/, http://www.ebaygreenteam.com/ns/buy-green.html, and http://www.motors.ebay.com. Of these, only http://neighborhoods.ebay.com appears to have been produced with the native file and directory structure intact.

[2]   Amazon's accused websites include: http://www.amazon.com, http://webstorebyamazon.amazon.com, and http://www.windowshop.com. Of these, only http://www.windowshop.com appears to have been produced with the native file and directory structure intact.

A. eBay and Amazon Have Withheld Source Code And Made Eolas' Repeated Inspections Meaningless

Defendants were required to produce all source code for each website accused of infringement in this case by September 2010.[3] Leading up to this deadline, Eolas offered to reduce the burden by giving defendants the opportunity to designate one or more versions of their accused source code as representative of other accused source code.[4] On September 3, 2010, two days after the deadline, Eolas noted eBay and Amazon's complete lack of source code production.[5] At the same time Eolas provided guidance with respect to the format of the source code production:

> As another example, for certain claims, our infringement contentions may reference activities which take place on the server. This server-side code needs to be produced. Moreover, to the extent that the client-facing website code has been compressed, obfuscated, had comments removed, etc., we still need the original, non-altered form of the source code for the website to be produced.[6]

Both eBay and Amazon responded that day, stating "[eBay's/Amazon's] source code is ready for inspection and was available for inspection upon providing the notice required by the Court's August 12 Extension Order."[7]

Consistent with this invitation, Eolas first inspected eBay and Amazon's source code on

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[3]   *See* Dkt. 247. Initially set for July 16, 2010, Defendants moved for extensions of time to produce their source code, which Eolas did not oppose. The Court granted the extensions (Dkts. 366, 381), extending the deadline first to August 9, 2010, and then to September 1, 2010.

[4]   *See, e.g.*, Ex. 1 (letter from Budwin to All Counsel (July 28, 2010) attached to the Declaration of Joshua Budwin, submitted herewith ("Budwin Dec'l"), as are all exhibits identified in this Motion. Eolas repeated this offer numerous times. *See also* Ex. 2 (letter from Budwin to All Counsel (Sept. 3, 2010)); Ex. 3 (letters from Rappaport to Ankrum (Nov. 2, 2010)).

[5]   Ex. 2 (letter from Budwin to All Counsel (Sept. 3, 2010)).

[6]   *Id.* (emphasis added) (client-side code is also called user-side or receive-side code).

[7]   Ex. 4 (letters from Ankrum to Budwin (Sept. 3, 2010) (separate letters from Amazon and eBay). These letters did not mention Defendants' document production from May 2010 of the requested code, addressed below.

October 18-19, 2010 on computers made available in the California offices of their legal counsel. Finding deficiencies in the source code made available at that time, Eolas wrote to eBay and Amazon explaining the deficiencies and requesting that additional code be made available for inspection pursuant to Section 13(a) of the Protective Order. Eolas specifically requested production of "code for all versions of [the accused] websites as they existed . . . ."[8] eBay and Amazon responded that they had already produced code for the accused features and functionalities and that they contested that "additional code needs to be produced."[9] [10]

With the representation that all requested code had been produced, Eolas performed a second source code inspection on January 24-28, 2011. Despite the prior correspondence on this issue, Eolas again found eBay and Amazon's production of source code deficient – for the same reasons expressed in October 2010. Having had two prior reviews frustrated, and to ensure that eBay and Amazon would make available the needed code, on March 30, 2011, Eolas sent explicit, detailed requests to both eBay and Amazon pinpointing the requested code with screenshots and file names.[11] Eolas specifically requested the "code which *generates* webpages" on the various accused websites, and provided further clarification that Eolas "expect[s] the

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[8] Ex. 3 (letters from Rappaport to Ankrum (Nov. 2, 2010) (emphasis added)). Eolas also noted that some of Amazon's code appeared to be entirely absent, while for other code from both defendants, directories were not identified by date or by other meaningful label so that a reviewer could determine what had been produced. *Id.* Eolas again requested that defendants provide an index of the production with dates and version numbers. *Id.*

[9] Ex. 5 (letters from Ankrum to Budwin (Nov. 19, 2010)) (separate letters from Amazon and eBay).

[10] eBay and Amazon summarize their positions following a phone conference as follows: "Both eBay and Amazon have produced and/or made available for inspection all versions of the source code that implement the functionality that [Amazon/eBay] understand were accused of infringement in our infringement contentions, to the extent such code is within the present possession, custody or control of eBay or Amazon, subject to a reasonable and diligent search." Ex. 6 (email from Lee to Budwin (Dec. 9, 2010)).

[11] Ex. 7 (letters from Rappaport to Reines (March 30, 2011)) (separate letters for Amazon and eBay walking through each accused website and accused functionality, and providing pictures).

production to include not only the files used to provide the HTML content (including, but not limited to any .htm, .html, .asp, .aspx .php, .jsp, and .cs files), but also the associated javascript, CSS, SWF and other files that are *used for embedding* interactive content [on] the webpage" for the accused websites and functionalities. (*Id.* (emphasis added).) Eolas then scheduled a third review of eBay and Amazon's source code.[12]

On the Saturday prior to the Monday morning when the third scheduled source code inspection (April 18-22, 2011) was to commence, eBay and Amazon repeated their prior "qualifications,"[13] and added that they did not believe "source code implementing the accused functionalities is missing from the source code already produced and/or made available."[14] With the further representation that no code was missing, Eolas elected to proceed with this third source code review. However, once again eBay and Amazon failed to make available for inspection the requested source code. In an attempt to resolve this issue while onsite at the inspection, Eolas' technical team demonstrated to counsel for eBay and Amazon the absence of the requested source code. Eolas' technical team pointed to the one website for which eBay had produced the appropriate source code on the source code computer: http://neighborhoods.ebay.com/, and inquired where like-code for the other eBay websites could be found. Likewise, Eolas' technical team was unable to locate complete code for Amazon's accused websites other than the website http://www.windowshop.com, which counsel for Amazon provided to Eolas for the first time during this inspection. Despite this interaction with Eolas' technical team, counsel for eBay and Amazon either would not or could not point out the location of the other requested code in native form, or verify that it had been produced. (*Id.*)

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[12]   *Id.*

[13]   *See* Ex. 6 (email from Lee to Budwin (Dec. 9, 2010)).

[14]   Ex. 8 (email from Perito to Rappaport (April 16, 2011)).

Having had three prior source code reviews over a five month period frustrated, on April 26, 2011, Eolas once again wrote eBay and Amazon, detailing deficiencies. Eolas explained that it could not square this lack of code with counsel's prior representations that they had produced "all versions" of the website code and that they do "not understand that source code implementing the accused functionalities is missing . . . ."[15] Once again, Eolas was able to provide eBay and Amazon with examples of what Eolas was seeking, namely relevant source code for each accused website produced in the same format as the productions for http://neighborhoods.ebay.com and http://www.windowshop.com. (*Id.*)

To resolve the matter more expeditiously and without the need for further reviews, Eolas offered several alternatives. Namely, rather than require Eolas to conduct further source code reviews, Eolas offered eBay the following alternatives: (i) eBay "will not point to the absence of nonproduced source code to argue that Eolas has failed to meet its burden of proof on infringement," (ii) eBay will agree to use the source code for http://neighborhoods.ebay.com as representative of the missing code, (iii) eBay will produce the requested code by sending printouts or permitting a fourth inspection and agreeing to bear the expenses, or (iv) eBay will make counsel available for a Local Rule CV-7 meet and confer "without delay." (*Id.*) Rather than unambiguously agree to any of these options, eBay instead responded to Eolas' requests with the same ambiguous language insisting that its code production was not deficient.[16]

Exasperated with three prior reviews frustrated and its months-long efforts at compromise rejected, Eolas simply requested: "[i]f the requested code is present please simply tell us where it is (*e.g.,* by directory name)."[17] Rather than identify the location of the missing

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[15]   Ex. 9 (letter from Rappaport to Perito (April 26, 2011).

[16]   Ex. 10, email from Perito to Rappaport (May 3, 2011).

[17]   Ex. 11, email from Rappaport to Perito (May 3, 2011). This email also included a request

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code for Eolas, the parties instead informally met and conferred on May 10, 2011, where at a further effort at compromise Eolas agreed to a fourth inspection of eBay's source code.[18] Once again, this fourth review confirmed the absence of the requested source code. Shortly thereafter, Eolas made its third request for a Local Rule CV-7 meet and confer. (*Id.*)

On May 14, 2011, rather than engage in the Local Rule CV-7 meet and confer, eBay instead — and for the first time — indicated that its source code production obligations had been satisfied through a May 4, 2010 document production.[19] However, as explained below, eBay's production of "source code" as TIFF images and OCR'ed text files—as opposed to in native form on a source code review machine as contemplated by paragraph 13 of the Protective Order—is not only deficient because it is missing necessary information, it also unnecessarily hinders and impairs Eolas' ability to inspect the code.

B. Defendants' May 4, 2010 Document Productions Fail to Satisfy Eolas' Request For Source Code.

In correspondence dated May 20, 2011, Eolas explained why eBay's May 4, 2010 production of non-native source code as TIFF images and OCR'ed text files (rather than made available for inspection on a source code review machine in native form) was a far cry from a sufficient production of source code—particularly in light of the Court's Discovery and Protective Orders.[20] The source code printouts pointed to by eBay are not only voluminous, they are not subject to review using source code review tools and they also lack the directory structure necessary to determine the relationship between the many files that constitute a website and the

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for a meet and confer, should counsel for eBay not identify the location of the missing code. This was Eolas' second request for a meet and confer leading up to this motion.

[18]   Ex. 12 (email from Fasone to Mehta (May 12, 2011)).

[19]   Ex. 13 (email from Perito to Fasone (May 14, 2011)).

[20]   Ex. 15 (email from Rappaport to Perito and Mehta (May 20, 2011)).

variable names used therein. The eBay and Amazon's reliance on production of partial reproductions of "source code" in non-native form amounts to a hindrance and interference with Eolas' source code review, in violation of the Protective Order. Dkt. 423 at ¶ 13(b).

In order to properly prepare its expert reports on infringement, Eolas needs to analyze infringement from the native version of the source code, with the file names and directory structure intact. The TIFF images and OCR'ed text files in eBay's production appear to have been produced by printing out the "page sources" or "view source" view of the accused websites.[21] eBay or its counsel appear to have generated these pages, which do not even contain complete file names as a result of their processing, specifically for this litigation. These printouts are the code that the user's computer receives when visiting the website, which differs from the code as it exists on eBay's servers or as written by eBay's engineers.[22] Eolas explained that in light of these deficiencies, the May 4, 2010 production of TIFF and OCR'ed documentation was not a production of "source code" as it is maintained in the ordinary course of eBay's business.[23]

C. Eolas' Fourth Attempted Inspection and Defendants' Further Delays

In light of the foregoing, on May 20, 2011 Eolas requested once again that eBay make the

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[21]   *See, e.g.* Ex. 14 (sample from eBay's May 4, 2010 production). Unlike source code properly produced in this case, eBay's production is not a production of source code as it is ordinarily kept in Defendants' businesses, it is ellipsed and removes information about folder structure and file names, it has been TIFF'ed and OCR'ed, it was also not provided on a source code computer for inspection.

[22]   Anyone can obtain the documents produced in TIFF and OCR'ed form that eBay now calls "source code." Moreover, both the TIFF and OCR'ed documents contained truncated path and file names in their header/footer, such that ellipses remove vital information about each file. Finally, these TIFF images and OCR'ed text files are unreviewable by source code review tools, though the use such tools are contemplated by Section 13(b)(i) of the Protective Order. *See* Dkt. 423 at 19 ("The Receiving Party's Outside Counsel and/or experts may request that commercially available software tools for viewing and searching Confidential Source code or Restricted Material be installed on the Source Code Computer . . . .")

[23]   *See* Ex. 15 (email from Rappaport to Perito and Mehta (May 20, 2011)) (explaining these distinctions).

requested source code available for inspection on the source code review computers in its native and non-altered form.[24] In response to this, eBay "offer[ed] to make available in native form on its source code review machine the code for eBay pages previously produced on May 4, 2010."[25] In response to five unanswered requests over the course of two weeks seeking to confirm the June 13-15, 2011 inspection date, eBay emailed that the "source code" they were agreeing to provide would be only a "re-download" of the "publicly available" code that "can be downloaded by any public user" by using the "'view page source' function . . . ."[26] eBay inaccurately referred to this code as "native code." (*Id.*) Clearly however, this code would not be the native version of the source code as it exists on eBay's servers or as written by eBay's engineers.

Lacking any reason to re-inspect the same deficient publicly-available non-native TIFF and OCR'ed "source code" — despite eBay's earlier promise to provide the native code — Eolas abandoned its pending inspection and for a fourth time requested a Local Rule CV-7 meet and confer, to be conducted no later than June 10.[27] Eolas also once again set out in detail the reasons why eBay's source code production, "created for the purpose of litigation," was deficient, rather than being "human-readable and contain[ing] comments, meaningful identifiers, whitespace, and indentation" and "provided in a manner that preserves its native folder structure." (*Id.*) Despite having refused multiple prior requests for a formal meet and confer on

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[24]   Ex. 17 (email from Rappaport to Perito and Mehta (May 20, 2011)).

[25]   Ex. 18 (email from Perito to Rappaport and Fasone (May 23, 2011)).

[26]   Ex. 19 (email from Mehta to Rappaport and Fasone (June 7, 2011) (8:09 PM)).

[27]   Ex. 20 (email from Martin to Mehta (June 8, 2011) (indicating Eolas' intention to move to compel the source code)). Eolas had to follow-up on this request twice before eBay responded at the end of the business day on June 10th. *See* Ex. 21_ (email from Fasone to Mehta (June 9, 2011)), and Ex. 22 (email from Martin to Mehta (June 10, 2011) (noting Eolas' desire to include this issue in the June 29th hearing on other discovery issues)).

the source code production issues, and despite Eolas' multiple inspections and attempts and

compromise, eBay asserted that "[t]he issues identified in your email are not ripe for a LR 7 meet

and confer."[28] On June 13, 2011 Eolas for the fifth time requested a formal meet and confer to

take place on June 14 or 15,[29] which eBay and Amazon finally agreed to attend June 17, 2011.

II.   ARGUMENT

Eolas is entitled to "discovery regarding any nonprivileged matter that is relevant to any

party's claim or defense." Fed. R. Civ. P. 26(b)(1). Information is relevant if the discovery

appears "reasonably calculated to lead to the discovery of admissible evidence." *Id*. Eolas seeks

source code from the websites of eBay and Amazon that will go directly to proving infringement,

such as Eolas has been able to do with the source code eBay and Amazon produced from their

respective http://neighborhoods.ebay.com and http://www.windowshop.com websites. Eolas has

requested the missing source code repeatedly, and made multiple attempts to inspect it, but has

received only diversion and delay.[30]

There should be no doubt that Eolas has repeatedly requested the production of source

code in the form maintained by eBay and Amazon in the ordinary course of their business, and as

written by their engineers. Such natively produced code — made available for inspection on a

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[28]   Ex. 23 (email from Mehta to Martin (June 10, 2011)).

[29]   Ex. 24 (email from Martin to Mehta (June 13, 2011).

[30]   After clearly requesting this information on September 3, 2010 (Ex. 2), November 2, 2010 (Ex. 3), March 30, 2011 (Ex. 7), making follow up requests on April 7, 2011 (Ex. 25), April 13, 2011 (Ex. 26), April 15, 2011 (Ex. 27), and further explaining exactly what Eolas is seeking on April 26, 2011 (Ex. 9)(specifically pointing out that Eolas is seeking code in a format that eBay has already provided for the http://neighborhoods.ebay.com website), May 3, 2011 (Ex. 11), May 12, 2011 (Ex. 28)(email from Fasone to Mehta), May 20, 2011 (Ex. 15) and June 8, 2011 (Ex. 20)(email from Martin to Mehta), not to mention the numerous informal meet and confers and Eolas' attempt through its technical inspectors at one of the three attempted inspections, Defendant's counsel writes in response to the *fourth* request for a meet and confer: "To allow us to have a meaningful discussion, please identify in advance specifically what disputes Eolas believes there to be and what relief it intends to seek." *See* Ex. 29 (email from Mehta to Martin (June 14, 2011)).

source code review computer as required by paragraph 13 of the Protective Order — would include the native file and directory structure of such code.[31] There should also be no doubt that eBay and Amazon possess such code in the ordinary course of their businesses — as the code has to be written by an engineer and as the websites have to be served from a server. Likewise, there should be no doubt that eBay and Amazon understand the format of the code production Eolas seeks, as eBay has produced exactly the requested code from its http://neighborhoods.ebay.com website and Amazon has produced exactly the requested code from its http://www.windowshop.com website.[32] Finally, there should be no doubt that what Eolas seeks is not beyond comprehension or is not reasonable — every other defendant in this case has managed to produce source code in the proper format (and eBay and Amazon have even managed to do so for one of their many websites).

III. CONCLUSION

For the foregoing reasons, Eolas respectfully requests that this Court enter an order compelling eBay and Amazon to produce the requested source code for each of the accused websites without further delay.

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[31] *See* Ex. 2 (Sept. 3, 2010 letter) and Ex._3 (Nov. 2, 2010 letters), even though Defendants' counsel tries to suggested to the contrary. *See* Ex. 23 (email from Mehta to Martin (June 10, 2011)).

[32] Not one of Defendants' responses either in writing or during a meet or confer have addressed this point, or offered an explanation as to why such source code is not available for the other accused websites.

DATED: June 20, 2011

Respectfully submitted,

McKOOL SMITH P.C.

By: ___/s/ *Mike McKool*_____

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CERTIFICATE OF CONFERENCE

The undersigned certifies that the parties have complied with Local Rule CV-7(h)'s meet-and-confer requirement. On June 17, 2011, counsel for Eolas Mike McKool, Lindsay Martin and I conducted a personal conference by telephone with Edward Reines and Aaron Perito, counsel for eBay and Amazon regarding the issues discussed in this motion. The discussions ended conclusively in an impasse, leaving an open issue for the Court to resolve.

/s/ Joshua Budwin
Joshua Budwin

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a). As such, this document was served on all counsel who have consented to electronic services on June 20, 2011. Local Rule CV-5(a)(3)(A).

/s/ Joshua Budwin
Joshua Budwin