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., 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	§ §	
Amazon and eBay.	§	

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

I.   INTRODUCTION

Eolas seeks an order directing Amazon and eBay to make available for all accused sites "like-code" to that already made available for eBay's "neighborhoods.ebay.com" and Amazon's "www.windowshop.com." Eolas's motion ignores the differences in structure and complexity between these relatively minor sites and Amazon's and eBay's principal websites, including "www.ebay.com" and "www.amazon.com." Nevertheless, Amazon and eBay have sought to resolve the parties' difference by collecting additional code that should moot the parties' substantive dispute over the scope of the source code production.

Amazon and eBay have produced and/or made available, in multiple forms and on multiple occasions, code that implements the website features Eolas has accused of infringement in this case. As early as May 2010, Amazon and eBay produced to Eolas the client-side HTML and JavaScript code for the features listed in Eolas's March 5, 2010 Infringement Contentions. Eolas waited until nearly a year after Amazon and eBay first produced the client-side code to object to the format of the production of that code—images associated with searchable text. In response, Amazon and eBay offered to and did make this code available on its source code machines in native form, which Eolas then declined to inspect. In addition, Amazon and eBay have also made available on their respective source code machines the server-side code modules for the accused features. eBay additionally made available certain source code files at an even higher level of abstraction, providing the code for the infrastructure for the inclusion of Flash features across the site.

What Eolas now apparently demands is that Amazon and eBay make available yet more code for the accused websites according to a file structure of Eolas' choosing, rather than how it is actually stored on Amazon and eBay's systems. Eolas's demands are unreasonable because they disregard the structure of the code for Amazon and eBay's principal sites. These websites

are dynamic and modular, with components that are used in conjunction with information from databases to generate specific pages on the fly. For example, a product page on the "www.amazon.com" website is composed of multiple modules (such as description, product media, reviews, etc.), each of which runs and is dynamically populated with the information about a specific product, and then combined together and sent to the user.

Amazon and eBay have provided the server-side code for the modules that implement the accused features, but of course have not produced the code for every page that could possibly be generated "on the fly" depending on the actions and identity of the end user, which would not only be irrelevant—it would be impossible, as no such server-side copy is kept. Nor have Amazon and eBay produced code for the numerous modules that are not accused of infringement. But in the spirit of compromise and to try to avoid motion practice, Amazon and eBay offered during the parties' Local Rule CV-7 meet and confer to supplement their production with server-side template code to the extent that such code has not already been provided—that code being that which creates the page structure into which the accused feature modules are inserted. Amazon and eBay are presently supplementing their source code machines to ensure that they include such code for the sites as to which Eolas's motion contends production is incomplete. These steps moot any genuine dispute over the scope of the source code production. Amazon and eBay's multiple productions of source code—extending above and beyond the code that implements the accused features—exceed what is required of Amazon and eBay and provide Eolas access to all of the code even arguably necessary for it to evaluate its infringement theories. Eolas apparently seeks either to compel production of the source code for Amazon and eBay's entire websites—including a huge breadth of code not even conceivably relevant to this action—or to compel production of that which does not exist: a simply organized

and self-contained code base that implements the accused features. The motion to compel should thus be denied.

II. FACTS

A. Amazon and eBay have already made repeated rounds of source code production for the accused features and are supplementing that production with additional code for the pages on which those features may be included.

Eolas served its infringement contentions regarding Amazon and eBay's accused website features in this case on March 5, 2010, which comprise approximately 1,000 pages as to Amazon and approximately 2,000 pages as to eBay.[1] *See* Declaration of Andrew Perito in Support of Amazon and eBay's Opposition to Eolas's Motion to Compel Production of Source Code ("Perito Decl.") ¶ 2. In turn, Amazon and eBay produced only three months later, on May 4, 2010, the client-side HTML and JavaScript code for the accused features listed in Eolas's contentions. Perito Decl. Exs. 1 & 2 (5/4/2010 Biyiasis Letters). As Eolas acknowledges, this production was of TIFF images accompanied by OCR'ed text, a searchable format. *See* Mot. at 6. Amazon and eBay affirmatively directed Eolas to this production of code for the accused features *the very first time* that Eolas complained regarding the scope of Amazon and eBay's source code production, *see* Budwin Decl. Ex. 5 (11/19/10 Ankrum Emails) ("At the outset, [Amazon/eBay] notes that it has already produced code for the accused features and functionalities identified in Eolas' March 5, 2010 infringement contentions months ago in May 2010."). This is directly contrary to Eolas's allegations that Amazon and eBay somehow sought to conceal this production or mislead Eolas by failing to designate it as highly confidential source code. *See* Mot. at 6; Budwin Decl., Ex. 16 (5/20/11 Rappaport Email).

In addition to this early production of client-side code, Amazon and eBay repeatedly made available for inspection on their respective source code machines server-side code,

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[1] That Eolas objects to Amazon and eBay's initial production of code as "voluminous" is surprising in light of the size and scope of Eolas's Infringement Contentions. *See* Mot. at 6.

including code that dynamically generates the client-side code that implements the accused features. Unlike the publicly available client-side code that Amazon and eBay already produced free from confidentiality restriction, Amazon and eBay provided this highly confidential server-side code under the Protective Order and designed it accordingly as "CONFIDENTIAL - ATTORNEYS' EYES ONLY - SOURCE CODE." *See* Budwin Decl., Ex. 4 (9/3/2010 Ankrum Letters). The code produced by eBay also includes its "v4 Flash Infrastructure," code that is used to generate the pages that incorporate Flash across eBay's sites. As explained to Eolas, this code is less relevant than what eBay had already produced because it operates at a higher level than the May 4, 2010 production of code, but eBay nevertheless produced it to try to satisfy Eolas's additional requests. *See* Budwin Decl., Ex. 17.

After Eolas first objected in May of 2011 to the form of Defendant's production of client-side code, *see* Budwin Decl., Ex. 15 (5/20/11 Rappaport Email), Ex. 16 (5/24/11 Rappaport Email), Amazon and eBay also offered to make their previously produced client-side code available on their respective source code machines, *see* Budwin Decl., Ex. 18 (5/23/11 Perito Email), Ex. 19 (6/7/11 Mehta Email). Eolas refused these offers. Budwin Decl., Ex. 20 (6/8/11 Martin Email).

Finally, at the parties' Local Rule CV-7 meet and confer on June 17, 2011, in an attempt to ensure that Amazon and eBay reached as far as reasonably possible to make available any code that would even arguably be relevant to Eolas's infringement contentions, Amazon and eBay offered to make available the server-side template code in cases where such code had not already been provided. *See* Perito Decl. at ¶ 3. But Eolas proceeded with motion practice under the incorrect assumption that it is practical to collect and produce a simply-organized and self-contained code base that implements the accused features. In order to moot the issues, Amazon

and eBay have already assembled not only the bulk of the server-side template code but also complete code for one of smaller accused sites, success.ebay.com, and will make all of that code available for inspection on its source code machines.[2]

B. **Eolas requests additional, differently structured source code for sites from which code pertaining to the accused features has already been produced.**

Eolas's motion purports to request "source code in the form maintained by eBay and Amazon in the ordinary course of their business." Mot. at 9. But what the motion seeks more specifically is code that is stored in the form produced for Amazon's "www.windowshop.com" and eBay's "neighborhoods.ebay.com" websites. These source code productions were of relatively small and self-contained code. But Eolas incorrectly assumes that the code for Amazon and eBay's principal sites—very large and complicated modular websites—is maintained according to the same structure. Though Eolas's Motion to Compel assumes that "eBay and Amazon possess such code in the ordinary course of their business" and contends that Amazon and eBay have not offered an explanation as to why this code is not available in the form Eolas has requested for the other accused websites, *see* Mot. at 10 & n.23, Amazon and eBay have articulated the precise source of this disconnect to Eolas, *see* Budwin Decl., Ex. 23 (6/10/11 Mehta Email). Eolas's requests for code "as written by [Amazon and eBay's] engineers" simply does not account for the complexity of Amazon and eBay's pages, for which the client-side code is largely created dynamically. *See id.* This misunderstanding lies at the heart of the parties' dispute.

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[2] Eolas' Motion to Compel seeks production of code from the site "www.ebaygreenteam.com/ns/buy-green.html," but during the deposition of former eBay employee Xiaodi Zhang, Eolas' counsel marked as Ex. 15 a document listing "ebaygreenteam.com" under the heading "Dropped" in the column titled "Accused Product or Website." *See* Perito Decl., Ex. 3. It is thus unclear whether Eolas maintains its infringement allegations against "www.ebaygreenteam.com."

III. DISCUSSION

To the extent that Eolas's motion seeks production of all code from the accused websites, such a request falls well outside the bounds of even the liberal discovery permitted under Federal Rule of Civil Procedure 26(b). An unbounded production of "the complete code for [Amazon and eBay's] websites," as Eolas suggest its reviewers were searching for, *see* Mot. at 4, would be enormously overboard, unduly burdensome, and require the disclosure of source code that has absolutely no bearing on any of the issues in the case. The bulk of Eolas's motion, however, apparently is directed toward the re-production of code that either has already been produced or made available on Defendant's source code machines. Amazon and eBay's current production of code, in combination with the additional template code that Amazon and eBay are collecting, should moot any reasonable scope for Eolas's requested relief.

A. **Eolas's substantive request for additional code is largely moot, as Amazon and eBay have made available all relevant code and are supplementing to complete the production of template code for the sites Eolas's motion identifies.**

As Amazon and eBay have explained repeatedly to Eolas, *see* Budwin Decl., Exs. 5, 6, 9, 11, 14, Amazon and eBay have produced the code that implements the accused features, that is, the relevant functional code modules that implement the accused functionality. Amazon and eBay's production of the client-side HTML and JavaScript code for the accused features identified in Eolas's Infringement Contentions occurred in May 2010. This client-side code that was originally produced to Eolas as searchable images has now also been offered to Eolas for inspection on Amazon and eBay's source code computers. In addition, Amazon and eBay have made available for inspection on their source code computers the server-side code used to render the accused functionality on Amazon and eBay's accused pages. Nevertheless, Eolas persists that it is missing certain code that it needs to prove infringement.

In fact, with the supplemental production of website template code that Amazon and eBay are currently undertaking, Eolas will have what it asks for: "code which generates the webpages" on the accused sites, that is, the code that creates the underlying pages into which the modules that implement the accused features are inserted, in addition to the code for the features themselves. *See* Mot. at 3 (quoting Budwin Decl., Ex. 7). Amazon and eBay will make this code available—as they have for other server-side code—in the form that it is maintained in the ordinary course of their businesses.

B.   Eolas seeks code in a form that largely does not exist for Amazon and eBay's principal sites.

As explained above, Eolas persists in asserting that code produced by Amazon and eBay must be available in some other form on Amazon and eBay's servers or in the hands of its engineers. While certain client-side code is also available in static form on the server, the bulk of Amazon and eBay's accused features and pages are dynamically generated and served to users "on the fly," that is, at the time a user of a website browses to that page or clicks on a particular feature. This code is not stored on Amazon and eBay's site except as the server-side code. And as explained above, Amazon and eBay have already made available—in the form that it is stored on the Amazon and eBay's systems—the server-side code that generates the accused features.

IV.   CONCLUSION

For the foregoing reasons, Amazon and eBay respectfully request that Eolas's motion be denied.

Dated: June 24, 2011   Respectfully submitted

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that all counsel of record who are deemed to have consented to electronic mail are being served with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3) on this 24th day of June 2011.

                                                         /s/ Andrew L. Perito
                                                         Andrew L. Perito