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

TABLE OF CONTENTS

Despite stating repeatedly that they have produced "all" source code responsive to Eolas' requests,[1] Defendants eBay Inc. ("eBay") and Amazon.com, Inc. ("Amazon") now admit that they have certain additional source code that Eolas has been requesting, and will be making a "supplemental production" at an unspecified date in the future. While this additional source code would remedy a portion of Defendants' deficient productions, and would resolve a portion of Eolas' motion to compel (dkt. 714, hereinafter "Motion"), it does not provide all of the specific source code that Eolas has requested for use in its infringement analysis. Moreover, even if this supplemental production were to occur immediately, the lateness of this production will hinder Eolas' ability to conduct a proper review prior to the upcoming expert report deadline.[2] Given Defendants' nearly yearlong delay, which included Eolas' time and expense associated with *three* in-person reviews of an incomplete source code production, Eolas requests that the Court provide means to redress the shortness of time with respect to this new production, and also order the production of the additional code discussed herein.

I.   **DEFENDANTS ADMIT THEY HAVE HINDERED EOLAS' PRIOR SOURCE CODE REVIEWS**

In their opposition (dkt. 732, hereinafter "Opposition"), Defendants state that they are preparing a "supplemental production of website template code" that will provide Eolas "what it asks for: 'code which generates 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," and that Defendants will make this code "available . . . in the form that it is maintained in the ordinary course of their businesses." (Opp. at 7.) Defendants also state that they "have already assembled not only the bulk of the server-side template code but also complete code for one of [the] smaller accused sites, success.ebay.com, and will make all of that code available for inspection on its source code

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[1]   *See, e.g.*, Exhibits 5, 6 attached to the Declaration of J. Budwin in support of Motion (all exhibit citations are to exhibits attached to this declaration); *see also* Exs. 8, 10.

[2]   In its Order setting the discovery hearing on June 29, 2011, the Court also stayed the expert report deadline "until seven days after it rules on these [discovery] motions." Dkt. 694.

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machines." (Opp. at 5.) In these statements, Defendants admit two things: (1) they have had source code (*i.e.* the "template code") which they acknowledge Eolas has been seeking and they have not yet produced despite Eolas' repeated requests[3]; and (2) even this "template code" is not the "complete" code for the accused websites.

Eolas has been requesting the production of source code from Defendants for nearly a year. (*See* Mot. at 1-2, Mot. Ex. 2.) In response to Eolas' motion to compel, Defendants offer no explanation for why they have failed to produce the "template code" or the "complete" source code over that time. Rather, Defendants obfuscate, arguing (1) Eolas ignores the difference between the code for Defendants' small and large websites,[4] offering that (2) Defendants have already provided some source code,[5] and implying (3) Eolas seeks production of all of

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[3] Defendants incorrectly suggest that this supplemental production alone "should moot the parties' substantive dispute over the scope of the source code production." (Opp. at 1; *see also id.* at 6.)

[4] Although Defendants contend they will be producing template code for all websites, they suggest that Eolas ignores the difference between their small, self-contained websites and their larger and "complicated modular websites." (Opp. at 1, 5.) Even if true, this would not excuse Defendants' failure to provide the code for Defendants' other smaller websites, such as the "complete code for one of [the] smaller accused sites, success.ebay.com" that Defendants state will be included in their supplemental production. (Opp. at 5.)
As to the more complex websites, Defendants' offer to supplement demonstrates without a shadow of a doubt that this is a distinction without a difference - Defendants admit to having additional requested source code for small and large websites alike. Defendants have not suggested that production of this additional template source code is too difficult or burdensome, rather, up until the filing of Eolas' motion, they have denied that such additional source code exists by stating repeatedly that they have produced all available source code. *See* Mot. Ex. 5 (Nov. 19, 2010); Mot. Ex. 6 (Dec. 9, 2010); Mot. Ex. 8 (April 16, 2011). Only after Eolas inspected Defendants' source code *three* times, after Eolas' requested a Local Rule CV-7 meet and confer *four* times, and only on the eve of a motion to compel did Defendants admit that they have this code and offer it to Eolas.

[5] Defendants also seek to confuse the issue by stating that they already provided source code in multiple forms and on multiple occasions. (Opp. at 1, 6.) In each instance, Defendants' citations are to the May 4, 2010 document production and to the source code that Defendants made available in September 2010. (*See* Opp. at 6.) Eolas addressed each of these productions in its Motion, explaining why they were insufficient (and in the instance of the May 4, 2010 document production, why it simply is not source code) and cited prior correspondence on these points. *See* Mot. at 6-7 (citing Mot. Ex. 15 (May 4, 2010 production)); *see also* Mot. at 2-3 (citing Mot. Ex. 3 (September 2010 inspection)). Defendants did not respond to any of these points in their Opposition. Moreover, the last-minute offer to supplement their production establishes the inadequacy of Defendants' prior productions.

Defendants' source code.[6] None of these speak to the point that Defendants have failed to produce the requested and relevant source code, some of which they are now agreeing to provide.

II. DEFENDANTS' SUPPLEMENTAL PRODUCTION IS A GOOD START, BUT IS NOT SUFFICIENT

Defendants suggest that they cannot respond to Eolas' request for source code similar to the productions they made for http://www.neighborhoods.ebay.com and http://www.windowshop.com, because their other accused websites generate web pages dynamically. (Opp. at 2, 5, 7.) However, Eolas has been requesting such server-side source code since September 3, 2010.[7] This code has yet to be provided. Eolas has not raised a distinction based on whether Defendants' pages are small, relatively static web pages, or large, dynamically generated pages. This is a distinction that Defendants have manufactured in an attempt to excuse their failure to produce source code.

Defendants suggest that they will provide *template source code*, which Eolas understands to mean the source code that "creates the page structure into which the accused feature modules are inserted." (Opp. at 2.) While helpful, and within the scope of what Eolas seeks to compel, this is only a part of the source code needed. In addition to the template code, the Defendants should also produce the source code for each of the modules that relate to the accused features. The template code is sufficient to show the architecture of the page, but the modules are needed to show the content of the page. Only by producing both will Defendants have provided what Eolas requests, namely the "code which generates the web pages." (Mot. Ex. 7; Opp. at 7.)

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[6]   Defendants assert that Eolas seeks production of all of Defendants' source code, and that production of "complete code" would be "enormously overbroad, unduly burdensome" and would have no bearing on the case. (*See* Opp. at 6; *see also* 2-3.) This is not so. Eolas has provided targeted requests for code, it has provided instructions as to what source code it seeks (Mot. Ex. 2), and it even walked Defendants through each accused website and accused functionality, providing pictures and detailed descriptions to explain the requests. (Mot. Ex. 7.).

[7]   Eolas clearly stated its correspondence of September 3, 2010 that its "infringement contentions may reference activities which take place on the server. This server-side code needs to be produced." Mot. Ex. 2.

Defendants' opposition recognizes the need to produce both the template source code and the server-side code for the modules themselves[8] but these statements belie the fact that this production is not complete. *See* Mot. Ex. 3, 7, 9, 11. For example, Amazon has not yet provided server-side source code for the *Autocomplete* feature/module, which is prominently identified in Eolas' March 2010 infringement contentions.

Moreover, as to the feature/module source code that Amazon did provide in September 2010, (*see* Mot. Ex. 4), such code was produced without reference to any template code. As such, Eolas cannot meaningfully make use of this server-side code. Eolas requested such information,[9] but to date Defendants have provided none. At this stage, to address this issue as to Amazon, Eolas would accept Amazon's provision of the template code as well as Amazon's agreement that the following files are representative of all the techniques that Amazon uses to embed Flash content in these accused web pages sent to clients:

Swfobject.m.208703	(Bates – AMAZON-SC00001419-24)
Flash-embed.mi.221394	(Bates – AMAZON-SC00001446-47)
Video-composite.m.260610	(Bates – AMAZON-SC00001346-50)
Get_streaming_resource.mi.305215	(Bates – AMAZON-SC00001357-64)
FlashPagelayout1.jsp.127357	(Bates – AMAZON-SC00000838-39)
IncaFlashPageletLayout1.jsp.200485	(Bates – AMAZON-SC00000844-45)
WebStoreFlashPageletLayout1.jsp.186030	(Bates – AMAZON-SC00000848-49)

Eolas would also need Amazon to agree that the following files are representative of the client-side techniques Amazon uses to provide the *Shoveler* and *Autocomplete* functionalities:

AmazonShoveler.js.283067	(Bates – AMAZON-SC00001448-66)
Autocomplete.js.378915	(Bates – AMAZON-SC00001637-63)

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[8]   *See* Opp. at 2 ("Amazon and eBay have provided the server-side code for the modules that implement the accused featueres . . . .").

[9]   Mot. Ex. 3 (letters from Rappaport to Ankrum (Nov. 2, 2010)(requesting an index)).

With respect to eBay, it appears that, other than for http://www.neighborhoods.ebay.com, eBay has not provided source code implementing the embedding of Flash objects.[10] Eolas therefore asks that the Court order production of source code related to these additional features/modules.[11] Moreover, eBay has not yet provided source code for its *AutoComplete* functionality. What eBay has produced in this regard through its document production (Bates EBAY-E00008425-46) consists of non-native images and OCR'ed documents that are incomplete reproductions of source code files. This cannot properly be called "source code." (*See* Mot. at 8, Mot. Ex. 20.)

For these reasons, it is not sufficient that Defendants merely provide the template source code — the template code must be produced to reference the code modules for the accused features, and additional source code from each module that relates to each accused feature must be provided as well.

III.   DEFENDANTS' PRODUCTION WILL BE LATE AND PREJUDICES EOLAS

Defendants have not provided a date certain when they will provide the supplemental source code production referred to in their opposition. Eolas should not be prejudiced by Defendants' continued delay and the need to return to California for a *fourth* in-person source code inspection. The Court should order that Defendants' source code production including the code requested through this motion, be made available immediately on source code computers in Texas (where Eolas' experts are working). Eolas also requests the Court grant Eolas leave to supplement its expert reports for these Defendants,[12] allowing Eolas no less than three weeks from the date Defendants' supplemental code is made available for their expert submissions.

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[10]   The source code for http://www.neighborhoods.ebay.com does not appear to correspond to the multiple techniques Eolas observes on the client side for embedding Flash objects on eBay's other websites.

[11]   eBay's production of v4 Flash Infrastructure" (noted at Opp. at 4) is not specific to any of its accused websites. At this point, Eolas can only presume that a review of Defendants' native code together with the template code will provide Eolas with what it needs.

[12] As the Court has not yet set the deadline for expert reports, Eolas requests the deadline for expert submissions as to these Defendants be set for three weeks from the date of Defendants' supplemental production only if the deadline would otherwise have passed by that time.

DATED: June 27, 2011

Respectfully submitted,

McKOOL SMITH P.C.

By: /s/ *Mike McKool*

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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 27, 2011. Local Rule CV-5(a)(3)(A).

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/s/ Joshua Budwin
Joshua Budwin

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