

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

ACCELERATION BAY LLC,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 15-228 (RGA)
)	
ACTIVISION BLIZZARD, INC.)	
)	
Defendant.)	
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ACCELERATION BAY LLC,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 15-282 (RGA)
)	
ELECTRONIC ARTS INC.,)	
)	
Defendant.)	
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ACCELERATION BAY LLC,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 15-311 (RGA)
)	
TAKE-TWO INTERACTIVE SOFTWARE,)	
INC., ROCKSTAR GAMES, INC. and)	
2K SPORTS, INC.,)	
)	
Defendants.)	

JOINT LETTER REGARDING PROTECTIVE ORDER DISPUTE

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MORRIS, NICHOLS, ARSHT & TUNNELL
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Dated: November 23, 2015

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Attorneys for Defendants

Dear Judge Andrews:

The parties to the above-referenced patent infringement actions have largely agreed on the substance of a proposed protective order. Pursuant to the October 29, 2015 Scheduling Order and further direction from the Court, the parties set forth below brief statements in support of their respective proposals. Attached as Exhibit A hereto is a copy of the proposed protective order, showing the agreed upon provisions, with Plaintiff's and Defendants' further proposals respectively highlighted in yellow and blue.

Plaintiff's Statement

I. Defendants' Post-Grant Prosecution Bar is Unreasonably Broad (§ 10.7)

The parties agree to a prosecution bar applicable to unissued patent applications, but Defendants seek to extend that bar to cover *inter partes* review ("IPR") and reexamination proceedings, while Plaintiff contends that the bar should not extend to PTO proceedings occurring *after* the grant of a patent, where the "potential for inadvertent harm is greatly reduced." See *Eon Corp. IP Holdings v. Flo TV Inc.*, No. 1:10-cv-00812-RGA, D.I. 580, slip op. at 1 (D. Del. Aug. 29, 2013) (Andrews, J.) (Ex. 1), *aff'd* D.I. 542 (D. Del. Jul. 10, 2013) (Ex. 2).

Defendants fail to satisfy their burden of showing that there is an unacceptable risk of disclosure, which is balanced "against the potential harm to the opposing party from restrictions imposed on that party's right to have the benefit of counsel of its choice." *In re Deutsche Bank Trust Co. Ams.*, 605 F.3d 1373, 1378-80 (Fed. Cir. 2010). As Defendants have filed *six* IPR petitions against Plaintiff's patents, there is considerable potential harm in excluding litigation counsel from those proceedings. See *Two-Way Media Ltd. v. Comcast Cable Commc'ns*, 1:14-cv-01006-RGA, at 4-5 (Nov. 17, 2015) (Andrews, J.) (Ex. 3) (recognizing potential harm from including IPRs in prosecution bar as "'forcing Plaintiff to rely on less knowledgeable counsel . . . increasing costs and duplicating effort' and preventing Plaintiff from 'formulating a coherent and consistent litigation strategy.'"), quoting *Xerox v. Google*, 270 F.R.D. 182, 184 (D. Del. 2010).

The Court has previously declined to include post-grant proceedings within the scope of a prosecution bar, noting that such proceedings do "not raise the same risk of competitive misuse as does involvement in prosecution," and that there is "little risk that confidential information learned in litigation will be competitively used to draft claims that read on Defendants' products" because "only narrowing claim amendments may be made during post-grant proceedings." *Two-Way Media*, at 4 (Ex. 3), citing *Xerox*, 270 F.R.D. at 184-85 ("while claims may be broadened during prosecution to support new, tailor-made infringement allegations, amendments made during reexamination can only serve to *narrow* the original claims. Hence, no product that did not infringe a patent before reexamination could ever infringe that patent following reexamination.") (emphasis in original, footnotes omitted).

II. Defendants Propose Unreasonable Restrictions on Source Code Review

Defendants' proposals would unduly restrict the review of source code. *First*, in Section 1.10, Defendants propose that source code protection be extended to "engineering specifications, or schematics that define or otherwise describe in detail the algorithms or structure of software,"

sweeping in documents that merely discuss and describe the technology used in the accused products. These provisions should be limited to actual source code.

Second, in Section 8.4(a) Plaintiff proposes a 500 page limit of Source Code that may be printed. Given there are 4 to 8 accused products for each Defendant, each with multiple versions and thousands of pages of source code per version, Defendants' 250 page limit is insufficient.

Third, in Section 8.4(c) Plaintiff proposes that produced source code be made available electronically in its entirety at depositions of the producing party's witnesses, while Defendants unreasonably would limit the use of source code at depositions to pages specifically printed by the receiving party and would preclude source code marked as an exhibit from being appended to the deposition transcript. Because source code is integrated, it can be difficult to determine how to separate out excerpts of source code, and it will likely be necessary for the witnesses to refer to other portions of the code to answer questions. Source code printouts marked at deposition should be attached as exhibits to the transcript so that the transcript will be a complete record (the parties can agree to redact portions of the source code exhibits as needed).

Finally, Defendants would not permit a receiving party to use a computer to take notes while reviewing source code. *See* Section 8.8. Forcing parties only to handwrite notes during review is unreasonably obstructive given the amount of code, is not a common requirement and, given that the protective order already precludes improper disclosure of code, provides at best only a marginal increase in the security of the source code. Counsel are available at the Court's convenience should Your Honor have any questions.

Defendants' Statement

¶ 1.10. Source Code Definition. Defendants have invested hundreds of millions of dollars in the source code for their games. It is their most important asset. *See Via Vadis Controlling GmbH v. Skype, Inc.*, (D.Del. 2/12/13) ("Source codes are the most sensitive and confidential property . . . extreme measures are ordered to protect their confidentiality") (DX1 at *3). Defendants propose the source code definition of the "Model Protective Order" for patent cases from the Northern District of California. (DX2 at ¶ 2.9). Other courts have adopted that definition, noting that the Northern District "has substantial expertise in this area of law, and its model order reflects the cumulative wisdom of the court and the bar in that jurisdiction." *See, e.g., Telebuyer, LLC v. Amazon.com, Inc.*, (W.D. Wash. July 7, 2014) (DX3 at *3). Plaintiff's overly restrictive definition protects only the final version of the human-readable code to be compiled into machine-executable code. Plaintiff, a non-practicing entity with no products of its own, ignores the practical, in-house engineering realities of how R&D is actually conducted in software companies and fails to account for how employees exchange the source code materials, such as, *e.g.*, exchanging portions of code via printouts and emails. The definition of "source code" needs to include this highly valuable information so it is protected.

¶ 8.1(c). Defendants' proposal exceeds the Default Standard for Source Code and allows Plaintiff to install any reasonable additional tools. Defendants' should not be forced to purchase plaintiff's inspection software. *Xpoint Tech., Inc. v. Intel Corp.*, (D.Del. 2/22/10) (DX9 at 9-10).

¶ **8.4(c)**. Plaintiff's demand that all five defendants bring source code for all accused products to depositions is unduly burdensome and risks harm to Defendants incommensurate to any incremental benefit to Plaintiff. *Trans Video Elec. Ltd. v. Time Warner Cable Inc.*, (D.Del. 1/22/15) (DX4). Plaintiff may print portions of Defendants' source code for use in depositions. There is no reason at all to burden Defendants, and threaten the security of their source code, by requiring it be provided at multiple insecure locations. Defendants' proposal for disposal of hard copies of source code used at depositions is routine and reasonable. *See, e.g.*, DX2 at ¶ 9(e).

¶¶ **8.4(a); 8.8**. *See Inventor Holdings, LLC v. Wal-Mart Stores Inc.*, (D.Del. 8/27/14) (DX5 at pp. 5-6 (no laptops in source code room) and p. 8 (250 page limit for printing source code)).

¶ **10.7. Prosecution Bar**. Again to protect Defendants' critical source code, a limited prosecution bar should be entered to prevent those who actually review highly confidential source code (as discussed above) from participating in post grant review proceedings. This limited prosecution bar outweighs any prejudice that Plaintiff may suffer. This Court has previously entered such orders and should do so here. *E.g., CallWave Commc'ns LLC v. AT&T Mobility, LLC*, (D.Del. 4/11/14) (DX6 at 40-41). Plaintiff's proposal would allow its litigation counsel to handle IPR claim construction strategy and make distinctions over the prior art using their knowledge of Defendants' source code to help "thread the needle" (i.e., crafting proposed claim constructions and arguments to distinguish prior art without impacting its infringement positions). *Versata Software, Inc. v. Callidus Software Inc.*, (D.Del. 3/12/14) (DX7).

In view of this Court's ruling in *Two-Way Media Ltd. v. Comcast Cable Communications LLC et al.*, (D.Del. 11/17/15) (DX8), Defendants adopted Judge Robinson's *Versata* protective order, which provides for a source code-based "limited prosecution bar" for post-grant proceedings applying only to those people who have reviewed Defendants' highly confidential source code. Under Defendants' proposal, litigation counsel may participate in post-grant proceedings as long as the participating attorneys are shielded from highly confidential source code. As Judge Robinson and the Federal Circuit recognized, "strategically amending or surrendering claim scope during prosecution" can implicate competitive decision-making thus giving rise to a risk of inadvertent use of confidential information learned in litigation." *Id.* (citing *In re Deutsche Bank Trust Co.*, 605 F.3d 1373, 1380 (Fed. Cir. 2010)). Here, Plaintiff has asserted six patents which include more than 100 claims and specifications exceeding more than 30 figures and 30 columns of text. Plaintiffs' complaint accuses multiple features and there are presently more than 12 accused games. Defendants have filed 6 IPR petitions (directed to three asserted patents), each of which presents opportunity for strategic narrowing of claims. The risk of inadvertent use of Defendants' source code is high. And, the burden to plaintiff is minimal. It was formed in August 2014 and does not have longstanding relationship with its counsel.

¶ **11**. Defendants' proposal for in camera inspection is the traditional and reasonable method.