

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

ROBOCAST, INC., a Delaware corporation,

Plaintiff,

v.

YOUTUBE, LLC, a Delaware limited liability  
company; and GOOGLE LLC, a Delaware  
limited liability company,

Defendants.

C.A. No. 1:22-cv-00304-RGA-JLH

JURY TRIAL DEMANDED

ROBOCAST, INC.

Plaintiff,

v.

NETFLIX, INC.,

Defendant.

Case No. 1:22-CV-00305-RGA-JLH

**PLAINTIFF ROBOCAST, INC.'S LETTER TO U.S. MAGISTRATE JUDGE HALL  
REGARDING PROTECTIVE ORDER**

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Dear Judge Hall:

Robocast provides its positions regarding disputed provisions and the interpretation of the protective order (attached as Exhibit A) below.

**Source Code Directory vs. Manifest, ¶ 28(iii)**: The parties differ regarding the information that is to be provided in advance of a source code review session. Robocast's position is that a directory, in both electronic and printed form, should be provided which will include the name, location, and MD5 checksum of every source code and executable file on the source code review computer. Defendants argue that a manifest should be provided *in printed form only*, and that the manifest will only include the *number and volume* of source code files, and the directory structure. In other words, it will not include a list of the files themselves. The purpose of ¶ 28(iii) is to allow a party's counsel and its expert an opportunity to identify source code of interest in advance of a source code review session; that purpose is thwarted by Defendants' proposals as is described below:

**Fields Provided**: Defendants' proposal does not include any information about specific files. Instead, it only provides a general directory structure, severely impeding Robocast's ability to pre-identify files of interest. A single directory could contain dozens, hundreds, or even thousands of files. Without a listing of those files, Robocast and its expert's review session will take longer, wasting time for both parties and their expert(s). Further, Defendants' proposal lacks MD5 checksum information, which would allow Robocast to easily verify that the files listed in the directory are the same as those that are actually produced for inspection.

**Electronic Form**: Under Defendants' proposal, only a printed copy of its proposed source code manifest would be provided. Often source code directory listings are quite lengthy, potentially upwards of 100 or even 1,000 pages. So that Robocast and its expert may better prepare for a source code review session, they need the ability to search directory and file names in an efficient manner, which is impossible with a mere physical copy. Robocast also needs an electronic copy which can easily be shared with its expert. Under Defendants' proposal there is no requirement that the listing be provided to the attorneys and the expert who will actually be performing the review (as opposed to other counsel), further impeding Robocast's and its expert's ability to plan an efficient review session. An electronic copy is more easily shared between Robocast's counsel and expert, as it does not require hand carry, or a courier service.

**Designation**: Defendants' proposal states that the manifest it proposes should be designated HIGHLY CONFIDENTIAL – SOURCE CODE. But the directory and file listing requested by Robocast and the manifest proposed by Defendants contain *no source code whatsoever* as they do not provide the contents of *any* source code files. Directories and a file listing are not the same as source code. For clarity, Robocast does not object to designating the directory or manifest as “HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY.” This designation ensures the confidentiality of the listing.

**Use of a Laptop During Source Code Review Proceedings, ¶ 28(v)**: The parties agree, in ¶ 28(v) that a party can take notes during a source code review session. But under Defendants’ proposal, Robocast would have to take such notes by hand, as it would not be permitted to take notes electronically on a laptop. In order to ensure an efficient review session, Robocast should be permitted to take notes electronically on a laptop, which is not connected to the internet. Otherwise, the review session will take additional time, and the quality of such notes will suffer. Robocast’s provision would allow it to bring its own laptop for taking such notes. In the alternative, Robocast does not object to a Defendant providing a laptop for taking notes and a connected printer, which would allow Robocast to print its notes at the end of a daily review session before deleting them from the Defendant-provided laptop.

**Prosecution Bar, ¶ 38**: The parties disagree as to whether a prosecution bar should apply to post-grant review procedures, such as *inter partes* reviews and reexaminations. Defendants alleged, via email that the prosecution bar does not prohibit Robocast’s litigation counsel from representing it in IPRs of the asserted patents, but that is far from clear. Further, absent Robocast’s amendment, the bar could be read to bar any participation, by Robocast’s counsel, in other IPR proceedings and reexaminations related to the field of invention.

In evaluating whether there is good cause to impose a prosecution bar, a Court must balance the risk of inadvertent disclosure or competitive use of confidential information against restrictions on the party’s right to have the benefit of its counsel of choice. *In re Deutsche Bank Tr. Co. Americas*, 605 F.3d 1373, 1380 (Fed. Cir. 2010). As this Court has held, involvement in post-grant proceedings does not raise the same risk of competitive misuse as involvement in prosecution because in post-grant proceedings—including reexaminations and *inter partes* reviews—the patentability of only existing claims is assessed and only narrowing amendments can be made; thus there is “little risk that confidential information learned in litigation will be competitively used to draft claims that read on [d]efendants’ products.” *Two-Way Media Ltd. v. Comcast Cable Commc’ns, LLC*, No. CV 14-1006-RGA, 2015 WL 7257915, at \*2 (D. Del. Nov. 17, 2015); *see also Ameranth, Inc. v. Pizza Hut, Inc.*, No. 3:11-CV-01810-JLS, 2012 WL 528248, at \*7 (S.D. Cal. Feb. 17, 2012) (holding that a prosecution bar should not apply to reexaminations because claims can only be narrowed). Any potential risk to Defendants is further minimized by the fact that the patents-in-suit have expired, and cannot be amended. Thus, the prosecution bar in this case should not apply to post-grant proceedings.

**Export Control, ¶ 51**: Robocast’s and Defendants’ proposals state that the parties will “comply with all applicable export control statutes and regulations. *See, e.g.*, 15 C.F.R. § 734.” But Defendants’ proposal includes numerous additional requirements. As the parties seeking the more onerous provisions, Defendants bear the burden of showing good cause for their additions. Fed. R. Civ. P. 27(c). To date, Defendants have provided no rationale which would justify their additional provisions. Robocast reserves the right to respond to any they raise.

**Cross-Use in Event of Case Settlement, ¶ 52**: This paragraph addresses the situation where one Defendant settles, but another remains. Defendants’ proposal *only* allows for Robocast to retain documents from the settling defendant if the settling party has *explicitly agreed* to designate the document “for cross use” or the Court has done so. A settling party would have no reason to

agree to such a designation, and an order from the Court would require unnecessary briefing, increasing the burden on the remaining parties and the Court.

Robocast's proposal reasonably provides that so long as a document has been cited in any expert report, discovery response, transcript, exhibit list, or other court filing *of one or both of the non-settling parties*, it may be retained while the case remains active. Robocast's proposal eliminates the possibility that a document, which applies to the remaining case, has been destroyed. As one example, Defendants may jointly rely on one or more of their internal documents for claim construction. Under Defendants' proposal, the document could be destroyed despite the Court's or another party's reliance on it. Robocast's proposal does not jeopardize the confidentiality of the settling party's information as it requires that the remaining parties continue to treat such materials under the confidentiality designation provided by the settling party.

**Whether Non-Source Code Documents That Happen to Contain Source Code Should be Produced on the Source Code Computer:** Defendants contend that any document that contains even an iota of source code is properly designated as HIGHLY CONFIDENTIAL - SOURCE CODE under the protective order, and may therefore be produced for inspection in its entirety solely on the Source Code Computer. This presents several issues. First, Defendants' position prejudices Robocast, as printing out such a document would count against its page limit of 750 pages under ¶ 28(vi). Thus, a large document describing the infringing process but containing only limited snippets of source code could easily swallow up much if not all of Robocast's permitted pages. Second, a document with limited excerpts of source code would not convey the full functionality described in the source code itself. As such a designation of HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY is more appropriate. Third, Robocast cannot print more than 30 consecutive pages under ¶ 28(vi). Piecemeal printouts of isolated sections would render the resulting printouts far less useful, as they would lack context. Fourth, to the extent Defendants offer to produce a redacted version of any such document under a lesser confidentiality designation, the readability of such a document would be significantly reduced. For these reasons, only source code itself should be produced on the source code computer, in line with ¶ 3 of the protective order, which describes source code as "computer code."

Dated: May 26, 2023

Respectfully submitted,

/s/ Stephen B. Brauerman

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Cc: Counsel of Record (via E-Filing)