

Frederick L. Cottrell, III  
Director  
302-651-7509  
Cottrell@rlf.com

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**BY CM/ECF**

The Honorable Jennifer L. Hall  
U.S. District Court  
District of Delaware  
844 North King Street  
Wilmington, DE 19801-3555

**Re: *Robocast, Inc. v. YouTube, LLC*, C.A. No. 22-304-RGA-JLH  
*Robocast, Inc. v. Netflix, Inc.*, C.A. No. 22-305-RGA-JLH**

Dear Judge Hall:

Defendants respectfully submit this letter for the June 2, 2023 discovery conference regarding the disputed terms of the Protective Order to be entered in the above-captioned cases. The parties' competing Protective Order provisions are set forth in Exhibit 1 and Defendants' proposed form of order is attached as Exhibit 2.

**Source Code:** The parties have no dispute over the language of the Protective Order defining "computer code" subject to "HIGHLY CONFIDENTIAL—SOURCE CODE" protection. Produced computer code, as defined by the Protective Order, is treated with the relevant source code protections, including being produced on the source code computer. Nevertheless, Robocast insists there is a dispute. Robocast contends "only actual source code files should be produced on the source code computer" and other "documents that so happen to contain 'snippets' of source code should be produced as normal." (Ex. 3). First, source code is source code, and Robocast has never explained why including other information with source code somehow renders it no longer worthy of protection as source code. Second, nothing in the definition of "computer code" or anywhere else in the proposed Protective Order limits material receiving "HIGHLY CONFIDENTIAL—SOURCE CODE" treatment to "source code files" or documents that exclusively contain source code and nothing else—or even uses Robocast's terms or defines their scope. Robocast's vague "dispute" should be rejected for this reason alone. In any event, Robocast's arguments about treatment of source code in other locations is at best premature. To the extent technical documents are produced with excerpts of source code redacted and subject to an AEO designation, in addition to a full version on the source code computer, Robocast can raise the issue at that time in the context of a concrete and ripe dispute. Third, source code is among Defendants' most sensitive confidential material, and disclosure of these materials would cause significant competitive harm regardless of the source. *Cf. Intellectual Ventures I LLC v. Altera Corp.*, C.A. No. 10-1065-LPS, Tr. at 26:12-25 (D. Del. July 10, 2012) ("In the Court's view, these hardware design materials and schematics and similar documents are analogous to software in a software case and, therefore, are worthy of some type of source code

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like protection.”) (Ex. 4). The parties agree on the proposed language in the Protective Order and Robocast’s vague dispute should be rejected.

**Paragraph 28(iii):** Defendants’ proposal should be adopted because it provides Defendants’ source code with the proper protection. First, the information Defendants propose be contained within the manifest, i.e., the number and volume of computer code files on the computer and the directory structure, is sufficient for the receiving party to understand the scope of the contents of the source code computer ahead of any review consistent with the purpose of this provision. Second, that the manifest be provided in printed form only is consistent with standard practice that source code—which is among Defendants’ most sensitive confidential information—is not provided in electronic format. There is also no need for the receiving party to keep the manifest post inspection as the producing party must provide a manifest before each review.

**Paragraph 28(v):** The parties agree that “no electronic or recording devices . . . be permitted” within the source code review room, yet Robocast inexplicably contends that laptops and tablets are somehow not electronic or recording devices and, thus, permissible inside the review room. Robocast is wrong, as laptops and tablets are clearly impermissible electronic devices. *See, e.g., Inventor Holdings, LLC v. Wal-Mart Stores Inc.*, C.A. No. 13-96 (GMS), 2014 WL 437020, at \*3 (D. Del. Aug. 27, 2014) (“[I]t is hard to imagine that a ‘personal laptop computer’, even one temporarily unable to function as a camera, or temporarily disconnected and temporarily incapable of supporting through USB or other means an ability to acquire and/or transmit information obtained from the stand-alone computer, would qualify as acceptable under the protective order.”). Further, Robocast wants its reviewers to be able to type notes but has not identified any problem with note taking by hand and does not propose any restriction on the proposed laptop or tablet’s capabilities to protect the code. Robocast rejected Defendants’ proposed compromise of typing notes on the source code review computer, which would then be printed and reviewed by a paralegal not involved in this case solely for compliance with the Protective Order. Robocast’s attempt to narrow the scope of “electronic or recording devices” would undermine the purpose of locking down the source code computer and review room.

**Paragraph 38:** Robocast agrees that its attorneys and others who have access to Defendants’ AEO and source code designated materials should not be permitted to draft or amend claims as part of original prosecution of patents in the agreed field of the alleged inventions, but Robocast simultaneously wants an exception to the prosecution bar that extends to all post-grant review proceedings where they would be able to draft and amend claims. This exception would render the prosecution bar meaningless. Robocast’s counsel will have broad access to Defendants’ most sensitive confidential information, including Defendants’ source code, but they wish to be free to draft or amend patent claims in the agreed field of the alleged inventions in the context of post-grant proceedings where amending claims is sometimes permitted. Excepting *all* post-grant review proceedings from the prosecution bar would create the exact risk that the prosecution bar is intended to mitigate in the first place—amending or drafting claims in prosecution based on Defendants’ highly-confidential information. Counsel and consultants who have reviewed Defendants’ highly-confidential information should not be permitted to use this information to draft or amend patent claims in the same, agreed field—something that Robocast agrees with in the context of original prosecution. Indeed, courts in this District have extended prosecution bars to post-grant proceedings based on access to source code, which Robocast’s counsel will have access to here. *See, e.g., Versata Software, Inc. v. Callidus Software, Inc.*, No. 12-931-SLR, 2014

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WL 1117804, \*1, 2 (D. Del. March 12, 2014); *Inventor Holdings, LLC v. Wal-Mart Stores Inc.*, No. 13-CV-96 (GMS), 2014 WL 4370320, at \*2 (D. Del. Aug. 27, 2014). In addition, no exception to the prosecution bar is needed for Robocast's litigation counsel to continue participating in the IPRs of the Asserted Patents, as those patents are expired and their claims cannot be amended, so Robocast has no interest in its proposed exception that outweighs the need to protect Defendants.

**Paragraph 51:** The parties agree that export controls apply to each party's information and that the Protective Order should include a statement regarding export controls. The only question is which statement is appropriate. The export control provision proposed by Defendants is the most effective to protect Defendants' information as well as promote compliance with applicable laws. U.S. export control laws restrict export of technical information, and Defendants have a strong interest in complying with those laws and protecting their technical information. Defendants' proposal is consistent with important provisions of U.S. export control laws (*see, e.g.*, 15 C.F.R. § 734-36) and other protective orders entered in this District, and therefore should be adopted. *See, e.g., IPA Techs. Inc. v. Google LLC*, C.A. No. 18-318 (RGA), D.I. 60 (D. Del. Aug. 20, 2019) (adopting protective order with similar export control provision) (Ex. 5); *Data Engine Techs. LLC v. Google LLC*, C.A. No. 14-1115-LPS, D.I. 33 (D. Del. Apr. 8, 2015) (“[A]s [defendant]’s sourcecode is entitled to stringent protection, that sourcecode may be referenced in other Protected Information, and the burden on Plaintiff (e.g., having to ‘purge’ a laptop before unrelated foreign travel or taking a different laptop on such travel) is not so strenuous as to outweigh [defendant]’s interests.”) (Ex. 6).

**Paragraph 52:** Robocast wants to freely cross-use documents between the Google and Netflix cases. Given Defendants are unrelated entities involved in separate cases, there is no basis for Robocast to retain and use one Defendant's protected information in litigating against the other Defendant(s). As a compromise, Defendants have proposed that parties be permitted to retain documents “designated for cross-use in the non-settled case by agreement of the settling party or by order of the Court.” This is in line with other orders from this District regarding the treatment of confidential documents where multiple defendants are involved. *See, e.g., AstraZeneca LP v. Sigmapharm Labs., LLC*, No. 15-1000-RGA (D. Del. Apr. 26, 2016) (D.I. 71 at ¶ 16) (“absent written consent from the producing party, Plaintiffs may not produce or otherwise make available Defendant's Protected Information to any other Defendant”) (Ex. 7).

Respectfully,

/s/ Frederick L. Cottrell, III

Frederick L. Cottrell, III (#2555)

cc: All Counsel of Record (via email)