

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

PERSONAL AUDIO, LLC,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 17-1751-CFC-CJB
)	
GOOGLE LLC,)	
)	
Defendant.)	

MEMORANDUM ORDER

At Wilmington, Delaware this 15th day of February, 2019.

WHEREAS, Plaintiff Personal Audio, LLC (“Plaintiff” or “PA”) has moved for relief against Defendant Google LLC (“Defendant” or “Google”) regarding several discovery disputes, (D.I. 308),¹ and the Court² has considered the parties’ letter briefs, (D.I. 320, 323, 337), and heard argument on January 28, 2019, (D.I. 353 (hereinafter, “Tr.”));

NOW, THEREFORE, IT IS HEREBY ORDERED that:

1. With regard to PA’s request that Google provide “information regarding the number of devices that have downloaded/installed/activated Google Play Music [‘GPM’][,]” (responsive to Interrogatories 19-26 and 45; Request for Production Nos. 39, 79, 101 and 109-113; and September 19, 2018 Request for Production Nos. 13-15), (D.I. 320 at 1-3), the Court **GRANTS-IN-PART** and **DENIES-IN-PART** the request as follows.

¹ The parties filed a joint motion seeking resolution of discovery disputes, because in addition to the disputes pressed by PA, Google sought adjudication of four other disputes. On January 31, 2019, the Court issued a separate Order addressing Google’s disputes. (D.I. 347)

² This case has been referred to the Court to hear and resolve all pretrial matters, up to and including the resolution of case-dispositive motions. (Docket Items, December 13, 2017 and September 10, 2018)

a. One category of information that PA identifies as missing from Google's productions is the number of [REDACTED] of GPM. (D.I. 320 at 2) Google responds that it is in the process of producing this information. (Tr. at 11-12, 36-37) Absent further order of the Court, by no later than **February 22, 2019**, Google shall produce information regarding the number of [REDACTED] for the relevant time period (to the extent it has not done so already).

b. A second category of information that PA identifies as missing from Google's productions is the number of [REDACTED] of GPM. (D.I. 320 at 2; Tr. at 25) During the discovery dispute teleconference, PA focused primarily on this information, explaining that it would be helpful to have this data separate from "[REDACTED] [REDACTED]" and so that PA could investigate its belief that there is an "under accounting error . . . embedded in [REDACTED]." (Tr. at 30-31; *see also id.* at 35) In support of its belief that Google must maintain this information as a separate data component, PA points to a statement from Google regarding the Play Console (which provides statistics data for applications including GPM) indicating that as of July 17, 2018, "[p]re-installs [will be] included in [installation] metrics[.]" (D.I. 337, ex. A at 1 (quoting *id.*, ex. 5 at 1); Tr. at 30-31) In response, Google asserts that with respect to data regarding "[REDACTED] . . . its reasonable search did not locate [any] responsive information." (D.I. 323 at 3; *see also id.* at 2 n.3) However, Google states that it produced a spreadsheet early in the discovery period that details [REDACTED] (GOOG-PA-00007080-00007118, hereinafter "Spreadsheet 7080"), and that spreadsheet includes the cumulative data for both: [REDACTED] [REDACTED] (D.I. 323 at 1; Tr. at 37, 44).

Google identifies this spreadsheet as the “operative spreadsheet” with respect to the kind of data that PA is looking for. (Tr. at 63-64) On the face of the spreadsheet, it is not clear that the [REDACTED] listed includes [REDACTED] (D.I. 323, ex. A; *see also* Tr. at 52, 58-59), and it does not appear that Google made this expressly clear to PA at least in written form, (*see, e.g.*, D.I. 320, ex. 2.1 at 16-17; D.I. 320 at 2 (PA indicating that Spreadsheet 7080 appears not to contain [REDACTED])). Google faults PA for failing to learn during Mr. Igor Razumeiko’s deposition that the spreadsheet includes data for [REDACTED] (D.I. 323 at 2), but it does not appear that Mr. Razumeiko referenced the spreadsheet when questioned about [REDACTED]; instead, he testified that he did not know the number of [REDACTED] (D.I. 320, ex. 5 at 65-67). In the Court’s view, while Spreadsheet 7080 undisputedly contains important data, PA does not have a clear picture of how the data in this spreadsheet was generated (and until somewhat recently, did not have a clear picture of exactly what data was included in the spreadsheet).³ And the Court can understand why PA may have some questions about how it is that Google does not maintain [REDACTED] separately, in light of Google’s statement in July 2018 that “installation metrics” would now include “pre-install[ation]” data. (D.I. 337, ex. A at 1; *id.*, ex. 5 at 1) To that end, the Court has recently granted PA’s request to compel the deposition of Google’s employee Mr. Peter Nguyen regarding Google’s data analytics and metrics. (Docket Item, February 6, 2019) To the extent that Mr. Nguyen cannot provide sufficient information relating to Spreadsheet 7080 and the topic of preinstallations of GPM (i.e., whether the spreadsheet includes preinstallation data, and whether there are any Google records of preinstallation-only data) during this deposition, PA

³ That said, PA could have asked Mr. Razumeiko more questions regarding this spreadsheet during his deposition; if it had, it might have obtained more answers about these topics.

may thereafter utilize the Court's discovery dispute procedures to attempt to obtain further information on these topics.⁴

c. With respect to the remainder of PA's arguments that Google be compelled to provide information regarding the number of devices that have downloaded/installed/activated GPM, (D.I. 320 at 1-3), the Court is persuaded that such additional requested information appears to be cumulative of data already produced by Google (e.g., information regarding [REDACTED]) and/or unsupported by any authority (e.g. PA's request that Google seek information from third parties regarding the number of GPM pre-installations on third-party devices), (D.I. 323 at 2-3).⁵ On this record, then, the Court does not have a sufficient basis to order Google to produce such additional information.

2. The next dispute relates to PA's request that Google be compelled to make a witness available for a number of Rule 30(b)(6) deposition topics as to which (1) Google's first witness, Mr. Razumeiko, was designated but assertedly unprepared, or (2) PA was unable to address with Mr. Razumeiko in light of the 7-hour deposition time limit. (D.I. 320 at 3) Several of the topics at issue relate to Google's data analytics and metrics. (*Id.*, exs. 11.1, 11.3) As to these topics, the Court DENIES PA's request. To the extent that Mr. Razumeiko did not have responsive information, much of the testimony that PA highlights relates to spreadsheets produced by Google that Google located and produced, but has been unable to determine the source of the data therein. (D.I. 320 at 4 (citing *id.*, ex. 5 at 128-29, 130, 136, 140, 142)) The

⁴ In noting this, the Court is not suggesting that PA is entitled to further discovery, only that it may seek it if necessary.

⁵ With respect to PA's request for information that supports the number of installations of GPM displayed on Google's website, (D.I. 320 at 2; *id.*, ex. 9 at 2), Google has represented that Spreadsheet 7080, in conjunction with the [REDACTED] that it will be producing, constitutes the information in its possession, custody and control that best relates to that number of installations, (D.I. 323 at 1; Tr. at 38-39).

remainder of the testimony to which PA cites does not persuade the Court that Mr. Razumeiko's deposition should be continued. (*Id.* at 4; D.I. 323 at 4)⁶

3. The additional topics at issue relate to the operation of the accused product. PA asserts that it was unable to fully question Mr. Razumeiko with respect to technical topics because: (1) Google supplemented its response to a contention interrogatory relating to non-infringement following Mr. Razumeiko's deposition, on the last day of fact discovery; and (2) Google refused to bring a source code computer to the deposition. (D.I. 320 at 5) As for the latter argument, the Court is not persuaded that it justifies a further deposition. PA did not sufficiently explain what authority would support requiring a source code computer to be accessible during a deposition, or why a source code computer was necessary for questioning (as opposed to printed source code that was provided). (*See id.*); *see also, e.g., Int'l Bus. Machs. Corp. v. The Priceline Grp. Inc.*, Civil Action No. 15-137-LPS, 2016 WL 6305981, at *2 (D. Del. Sept. 29, 2016). But with regard to the former argument, the Court is persuaded that limited additional Rule 30(b)(6) deposition time should be allocated. Google's supplemental interrogatory response seems detailed and substantive, (D.I. 320, ex. 2.1 at 18-46), and PA credibly asserts that it thus did not have the opportunity to question the witness fully as to the non-infringement issues that are now in the case. *Cf. Intellectual Ventures I LLC v. Toshiba Corp.*, 221 F. Supp. 3d 534, 551 (D. Del. 2016) (ordering defendant to make the company's Rule 30(b)(6) witness(es) for the asserted patent available for further depositions regarding

⁶ Moreover, as noted above, the Court has granted PA's request to take the deposition of Mr. Nguyen. PA intends to question Mr. Nguyen regarding: (1) the metrics that Google keeps; (2) the format in which those metrics are kept; (3) how those metrics relate to each other and to the distribution of GPM; and (4) the meaning and origin of various Google-produced spreadsheets relating to such metrics. (D.I. 335 at 2) Thus, on the issue of data analytics and metrics, PA may well obtain additional discovery-related information.

defendant's new non-infringement arguments, which were not produced until after fact discovery closed). Therefore, the Court GRANTS-IN-PART PA's request that Google be ordered to make a witness available on Rule 30(b)(6) Topics 2, 6 (a-c, e, f), 7 (b, c), 8 and 9 (Notice 1), in that Google shall make such a witness available for up to three hours of additional deposition time.

4. With regard to PA's request that the Court order the continuation of the Rule 30(b)(6) depositions topics for which Mr. Alex Feng was designated (i.e., Notice 2, topics 9 and 14 and Notice 3, topics 7 and 8), (D.I. 320 at 5), the Court DENIES the request. With respect to PA's complaint that Mr. Feng was insufficiently prepared for Notice 2, topic 14 because he responded that he did not know whether there is any "other value to Google for GPM other than just as a generator of revenue[,]" (D.I. 320 at 5 (internal quotation marks and citation omitted)), the Court notes that that topic is all about "[t]he value of Google Play, Google Play Music and Android Music to You *as a generator of revenue*[,]" (*id.*, ex. 11.2 (emphasis added)). Mr. Feng cannot be faulted for not knowing the answer to a question for which he was not designated. Otherwise, Google sufficiently pointed to portions of Mr. Feng's deposition testimony demonstrating that Mr. Feng provided substantive responses (either right away, or after coming back to the topic later in the deposition) regarding the types of ads that appear on GPM and the revenues associated with them. (D.I. 323 at 5 (citing D.I. 320, ex. 14 at 75-79, 124-28, 180-81))

5. Finally, with respect to PA's request that the Court order the continuation of certain deposition topics for which designated witnesses have not yet testified, (D.I. 320 at 5), the Court DENIES AS MOOT the request, in light of Google's response that a number of upcoming depositions would satisfy its obligations in this respect, (D.I. 323 at 5).

6. Because this Memorandum Order may contain confidential information, it has been released under seal, pending review by the parties to allow them to submit a single, jointly

proposed, redacted version (if necessary) of the document. Any such redacted version shall be submitted by no later than **February 19, 2019** for review by the Court, along with a motion for redaction that includes a clear, factually detailed explanation as to why disclosure of any proposed redacted material would “work a clearly defined and serious injury to the party seeking closure.” *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786 (3d Cir. 1994) (internal quotation marks and citation omitted). The Court will subsequently issue a publicly-available version of its Memorandum Order.



Christopher J. Burke
UNITED STATES MAGISTRATE JUDGE