

EXHIBIT A

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7
8 **UNITED STATES DISTRICT COURT**
9 **NORTHERN DISTRICT OF CALIFORNIA**
10 **SAN FRANCISCO DIVISION**

11 Canon, Inc.

12 Plaintiff,

13 v.

14 TCL Electronics Holdings, Ltd., et al.

15 Defendants.

Case No. 3:20-mc-80079-JCS

BRIEF OF *AMICUS CURIAE*
HULU, LLC

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INTRODUCTION

Hulu, LLC (“Hulu”) is a provider of both live and on-demand streaming video. Hulu is headquartered in Santa Monica, California. Since its initial release to the public in March of 2008, Hulu has offered streaming video-on-demand (“SVOD”) services, and in May of 2017 it launched the Hulu Live service, offering subscribers the ability to have access to the same TV channels provided by traditional cable providers, delivered through Hulu’s streaming Internet platform. Hulu’s SVOD and Live services are subscription-based, with an announced total of over 30 million subscribers as of December 2019.¹ Hulu’s services are available through a web browser-based platform, as well as on the platforms of numerous device makers, including Roku, Inc. (“Roku”).²

Hulu is not a party to the underlying litigation brought by Canon, Inc. (“Canon”) in the Eastern District of Texas.³ Nor is Hulu’s source code the subject of discovery in that litigation or the subject of Roku’s Motion To Modify And/Or Quash Plaintiff Canon Inc.’s Subpoena and For A Protective Order To Prevent Remote Source Code Review (ECF No. 1) (hereinafter “Roku’s Motion”). As Roku’s Motion correctly notes, however, the potential exposure of Roku’s source code to malicious actors poses a threat to Hulu’s own efforts to secure its streaming content and services. ECF No. 1 at 15 (“[A]ny breach could also compromise the intellectual property of Roku’s content partners, such as Netflix and Hulu.”). In addition, Hulu, like numerous other California-based technology companies

¹ See Declaration of Cameron W. Westin In Support of Brief of *Amicus Curiae* Hulu, LLC (filed concurrently herewith, hereinafter “Westin Decl.”) Ex. 1 (The Walt Disney Company, First Quarter Earnings for Fiscal 2020 (Feb. 4, 2020), available at <https://thewaltdisneycompany.com/app/uploads/2020/02/q1-fy20-earnings.pdf>).

² See Westin Decl., Ex. 2 (Hulu - Supported Devices, available at https://help.hulu.com/s/article/supported-devices?language=en_US).

³ *Canon Inc. v. TCL Elecs. Holdings Ltd.*, Case No. 2:18-cv-00546-JRG (E.D. Tex. Dec. 27, 2018).

1 involved in patent litigation in courts throughout the country, is also often required
 2 to make its own highly valuable and sensitive source code available for inspection
 3 during discovery. Hulu has significant and serious concerns about the diminished
 4 security to that source code if similar requests are granted in patent cases where
 5 Hulu’s source code has been or will be made available for inspection.

6 Hulu recognizes the unprecedented challenges posed to existing discovery
 7 procedures during the COVID-19 pandemic. Hulu appreciates and takes seriously
 8 the Court’s expectation that counsel and the parties will make extra efforts to
 9 resolve discovery issues amicably, ECF No. 12, and the Eastern District of Texas’s
 10 directive that parties advance the “goal of allowing code review to efficiently and
 11 effectively continue . . . while protecting the security of the source code—which is
 12 highly sensitive and valuable information—as best as possible under the
 13 circumstances,” U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS,
 14 Standing Order Regarding Pretrial Procedures in Civil Cases Assigned to Chief
 15 District Judge Rodney Gilstrap During The Present COVID-19 Pandemic, ¶ 19.
 16 Proposals such as Canon’s, however, which seek to force companies to expose their
 17 highly sensitive and valuable source code to the vulnerabilities inherent in remote
 18 inspection, do not protect that code “as best as possible under the circumstances.”
 19 Hulu, by and through its undersigned counsel, submits this amicus brief so that the
 20 Court may consider the implications of forcing remote review of source code to
 21 Hulu and other technology companies.

22 HULU’S AMICUS POSITIONS

23 I. Roku’s Motion Has Ramifications for Hulu’s Interests, Which Should Be 24 Considered in Deciding Roku’s Motion

25 “District courts frequently welcome amicus briefs from non-parties
 26 concerning legal issues that have potential ramifications beyond the parties directly
 27 involved or if the amicus has unique information or perspective that can help the
 28 court beyond the help that the lawyers for the parties are able to provide.” *Ctr. for*

1 *Biological Diversity v. Jewell*, 2013 WL 4127790, at *4 (N.D. Cal. Aug. 9, 2013)
2 (quoting *NGV Gaming, Ltd. v. Upstream Point Molate, LLC*, 355 F. Supp. 2d 1061,
3 1067 (N.D. Cal. 2005)). “There are no strict prerequisites that must be established
4 prior to qualifying for amicus status; an individual seeking to appear as *amicus*
5 must merely make a showing that his participation is useful to or otherwise
6 desirable to the court.” *Infineon Techs. N. Am. Corp. v. Mosaid Techs., Inc.*, 2006
7 WL 3050849, at *3 (N.D. Cal. Oct. 23, 2006) (quoting *In re Roxford Foods Litig.*,
8 790 F. Supp. 987, 997 (E.D. Cal. 1991)).

9 Roku’s Motion, and the risk to Hulu’s source code that Roku’s Motion seeks
10 to avoid, has direct ramifications for Hulu. Hulu’s streaming content is provided
11 securely on compatible devices from numerous manufacturers, including various
12 digital media players sold by Roku.⁴ The content provided by Hulu’s services and
13 its technology drives the demand for Hulu’s subscription services, and comes from
14 content partners including networks, cable television providers, studios, and from
15 Hulu’s own developed content. Declaration of Brett Henry In Support of Brief of
16 *Amicus Curiae* Hulu, LLC (filed concurrently herewith, hereinafter “Henry Decl.”)
17 at ¶ 4. Hulu has strict obligations to its content providers to maintain their content
18 in a secure and piracy-free environment. Henry Decl., ¶ 5. Hulu must do so in an
19 environment where it receives *millions* of malicious requests for data from hackers
20 *per day*. Henry Decl., ¶ 6. Hulu thus expends significant efforts to ensure that all
21 of its device manufacturing partners’ systems, including Roku’s, contain the
22 strongest security measures possible to protect its services’ content from being
23 improperly downloaded and pirated. For example, Roku’s native development kit
24 (“NDK”) is extremely restrictive, and only a subset of Hulu programmers has
25

26 ⁴ See Westin Decl., Ex. 3 (Hulu | Roku Channel Store, available at
27 <https://channelstore.roku.com/details/2285/hulu>); Ex. 4 (Hulu - Supported Roku
28 Models, available at https://help.hulu.com/s/article/supported-roku?language=en_US). See also ECF No. 1 at 2, 15.

1 access to it. Henry Decl., ¶ 15. Were Roku’s source code to be exposed publicly or
 2 to malicious actors—a possibility that would increase significantly due to remote
 3 review (*see* ECF No. 1 at 13-14)—Hulu’s content would also be less protected from
 4 such hacking, and its relationship with content partners could in turn be irreparably
 5 damaged. Henry Decl., ¶¶ 16-17.

6 Moreover, Canon’s attempt to force Roku to expose its source code to the
 7 risks inherent in remote review has ramifications for Hulu and other technology
 8 companies beyond the immediate dispute. Hulu, like Roku, is often required to
 9 make its own highly sensitive and valuable source code available for inspection in
 10 connection with patent litigations.⁵ To do so, Hulu, like Roku, depends on
 11 protective orders that limit this inspection to standalone computers that are isolated
 12 from the Internet and local or external networks.⁶ Canon’s request that the Eastern
 13 District of Texas modify the protective order under which Roku’s source code was
 14 originally produced would mean that Hulu, as well as other technology companies
 15 subject to discovery in the legal process, may similarly be forced to forego the time-
 16 tested practice of source code review on secured standalone computers for the
 17 inherently more vulnerable risks associated with connecting that source code and
 18 transmitting it on the Internet.

19 **II. Imposing Remote Review of Source Code in Patent Litigation Is**
 20 **Inherently and Incurably Insecure**

21 The industry standard of permitting source code review only on standalone

22 _____
 23 ⁵ Like Roku in the underlying Eastern District of Texas litigation, Hulu is also
 24 regularly subpoenaed to make its source code available for inspection in connection
 25 with litigations where Hulu is not a party. Westin Decl., Ex. 5 (third party
 subpoena for Hulu source code in *Uniloc 2017 LLC v. Vudu, Inc.*, C.A. No. 19-183
 (CFC) (D. Del. Jan. 30, 2019)).

26 ⁶ *See, e.g., DivX, LLC v. Hulu, LLC*, 2:19-cv-1606 (PSG)(DFMx), ECF No. 111, 15
 27 (C.D. Cal. Mar. 5, 2019); *Sound View Innovations, LLC v. Hulu, Inc.*, 2:17-cv-
 04146-JAK-PLA, ECF No. 57, 16 (C.D. Cal. June 2, 2017); *Transvideo Elec., Ltd.*
 28 *v. Hulu, Inc.*, 13-cv-1399 (LPS), ECF No. 43, 20 (D. Del. Aug. 7, 2013).

1 non-Internet connected computers is based on the established understanding that
2 source code made available for inspection on a computer connected to the Internet
3 is more vulnerable to malicious access or hacking by unauthorized third parties.
4 *See, e.g.,* Westin Decl., Ex. 6 (Loren et al., *Computer Software-Related Litigation,*
5 *Discovery and the Overly-Protective Source Code*, Fed. Courts Law Review Vol. 6,
6 Issue 1 (2012)) at 59 (“Prohibiting the stand-alone computer from being connected
7 to the internet or existing internal networks is an appropriate solution to guard
8 against unauthorized access via the ‘back door’ of the Internet or an Intranet in the
9 same office.”). Indeed, this District’s Model Protective Order for Patent Cases
10 anticipates source code being made available for inspection and provides for
11 precisely these protections, requiring that “source code shall be made available for
12 inspection on a secured computer in a secured room without Internet access or
13 network access to other computers.” U.S. DISTRICT COURT FOR THE NORTHERN
14 DISTRICT OF CALIFORNIA, Model Stipulated Protective Order for Litigation
15 Involving Patents, Highly Sensitive Confidential Information, and/or Trade Secrets,
16 § 9(c).

17 As noted in Section I, *supra*, Hulu relies on such protections in connection
18 with discovery of its own source code, making its source code available for
19 inspection by opposing counsel and experts only on standalone computers with no
20 connectivity to the Internet, and in secure facilities at outside counsel’s office in
21 order to strictly control who has access, what tools can be connected to the
22 reviewing device, and what devices are brought into and out of the review room.

23 The risk posed by the exposure of its highly sensitive and valuable source
24 code is so great that Hulu imposes restrictions on its own engineers’ access to that
25 code. Their access is limited to only the portions of the source code necessary to
26 perform their assigned tasks, rather than to the vast swaths of source code that may
27 be made available during litigation. Henry Decl., ¶ 9. Moreover, Hulu engineers
28 are not permitted any access to source code unless they are physically on the

1 premises at Hulu, or utilizing Hulu’s secure and heavily regulated virtual private
2 network (“VPN”). Henry Decl., ¶ 10. That VPN access, like all access, is limited
3 to the portions of code necessary to complete the engineer’s assigned tasks, guarded
4 by multi-factor authentication requirements, and monitored to ensure that engineers
5 do not violate established security protocols during use or attempt to venture
6 beyond their authorized portions of the source code. *Id.* To implement these
7 security protocols, Hulu spends significant financial and physical security resources
8 every time an engineer is authorized to access its source code remotely. *Id.* No
9 such authorization can be provided in connection with outside experts or opposing
10 counsel in the course of litigation, due to the heightened risk and lack of complete
11 control over their activities, whether malicious or merely lacking in the necessary
12 security protocols. Henry Decl., ¶ 11.

13 Allowing remote review of Hulu’s source code by opposing counsel and their
14 retained experts would introduce myriad security challenges, even if those counsel
15 and experts acted according to the protocols proposed by Canon. *See* ECF No. 1 at
16 9-10. Counsel and experts cannot be permitted to review the source code remotely
17 via their own personal computers, because Hulu would be unable to evaluate
18 whether those computers were free from malware or other malicious software
19 through which an unauthorized third-party might access the source code. Henry
20 Decl., ¶ 13. Instead, Hulu would be required to prepare and provide, for each
21 counsel conducting the review and for each expert, a computer and monitoring
22 equipment securely connected to its VPN (or containing encrypted versions of the
23 source code itself), and ship these materials to the reviewing experts. Henry Decl.,
24 ¶ 13. For each individual reviewing the source code, Hulu would then need to
25 employ one person to monitor an expert’s activities via a Wi-Fi or cellular camera
26 during the review, while another person monitors usage of the computer to ensure
27 no improper activity occurs. Henry Decl., ¶ 12; *see also* ECF No. 1 at 13-15. Even
28 if Hulu had the ability to enforce such supervision and surveillance for limited

1 periods of time during regular business hours, the cost in resources and employee
2 time to Hulu (multiplied by each individual granted remote access to the source
3 code) would be significant, if not prohibitive.

4 Despite such efforts, the risks inherent in allowing remote review of source
5 code by multiple individuals in connection with litigation cannot be eliminated.
6 Source code made available for third party inspection on computers connected to
7 the Internet is inherently more vulnerable to malicious activity. Henry Decl., ¶ 8.
8 For example, even when source code is stored on a computer in encrypted form,
9 during review the source code may necessarily be unencrypted inside a computer's
10 memory, or on the screen itself. Henry Decl., ¶ 14; *see also* Westin Decl., Ex. 6
11 (Loren et al., *Computer Software-Related Litigation*) at 23. This unencrypted
12 source code is particularly susceptible to hacking. *Id.* Making source code
13 available for inspection on standalone computers significantly reduces these risks
14 by limiting that unencrypted viewing to an isolated room with no Internet
15 connection and no available recording devices. *Id.*

16 Thus, even under the best of circumstances, assuming total compliance with
17 applicable protective orders by opposing counsel and their experts, requiring remote
18 review of Hulu's source code by an opposing litigants' attorneys and experts
19 presents unjustifiable costs and risks to Hulu. These costs and risks to Hulu would
20 multiply with each additional individual reviewing the code. Henry Decl., ¶ 13.

21 **III. The Potential Consequences of Making Source Code Available for** 22 **Remote Review Are Significant**

23 The potential consequences, both to Hulu's content and its business
24 relationships, of unsecure remote reviewing of *Roku's* source are discussed above.
25 *See* Section I, *supra*. The potential consequences of *Hulu's* source code being
26 subjected to such insecure protocols are, to Hulu, far greater.

27 Hulu's source code is among its most vital assets. Henry Decl., ¶ 7. That
28 source code is the product of investing enormous sums of money and countless

1 person-hours on the part of Hulu’s engineers over the companies’ twelve years of
2 existence, *id.*, resulting in numerous filed and issued U.S. patents and the
3 development of countless additional trade secrets.⁷ If, however, this proprietary
4 source code were to be made publicly available, the source code’s value could
5 irreparably be destroyed. *See* Westin Decl., Ex. 6 at 21 (“[I]n this age of rapid and
6 global dissemination, parties fear that if proprietary source code being disclosed
7 were to be leaked to the outside world the value could be totally destroyed in a
8 matter of hours, if not minutes, and could never be recaptured.”).

9 Moreover, were Hulu’s operating system (“OS”) source code to become
10 publicly available, malicious actors could hijack that code to essentially sell access
11 to a free and uncontrolled version of Hulu, or download and pirate Hulu’s
12 proprietary and copyrighted content. Henry Decl., ¶ 18. Hulu would thus lose its
13 paying subscribers drawn to Hulu’s content and its proprietary user interface, and
14 its ability to sell advertisements contained in that content (Hulu’s other primary
15 source of revenue). Moreover, such a scenario would deeply impair Hulu’s
16 relationships with its content providers, and thus Hulu’s entire business model. *Id.*

17 CONCLUSION

18 Hulu’s source code, like that of numerous technology companies located in
19 this District and throughout the State, is among its most valuable assets. Placing
20 that source code at increased risk of falling into the hands of malicious actors
21 presents dire consequences for Hulu and its business.

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26 ⁷ *See* Westin Decl., Ex. 7 (U.S. Patent and Trademark Website listing 151 issued
27 U.S. Patents and published U.S. patent applications assigned to Hulu, LLC,
28 available at [https://assignment.uspto.gov/patent/index.html#/patent/search/
resultAssignee?assigneeName=HULU%20LLC](https://assignment.uspto.gov/patent/index.html#/patent/search/resultAssignee?assigneeName=HULU%20LLC)).

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 13, 2020, a true and accurate copy of the BRIEF OF AMICUS CURIAE HULU, LLC was electronically filed with the Court to be served by operation of the Court’s electronic filing system.

Dated: May 13, 2020

Respectfully submitted,

By: /s/ Brett J. Williamson

Brett J. Williamson