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 11 Inc.

12

13 **UNITED STATES DISTRICT COURT**

14 **CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**

15 **CV11 02682 ASWL JCG_X**

16 BLUEGEM SECURITY INC.,

17 Plaintiff,

18 vs.

19 TRUSTEER INC.,

20 Defendant.

CASE NO.

COMPLAINT FOR;

1) COPYRIGHT INFRINGEMENT
 2) CONTRIBUTORY COPYRIGHT
 INFRINGEMENT
 3) BREACH OF CONTRACT

DEMAND FOR JURY TRIAL

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CW-31

1 Plaintiff BlueGem Security Inc. alleges as follows:

2 **JURISDICTION AND VENUE**

3 1. Subject-matter jurisdiction exists under 28 U.S.C. §§ 1331 (federal
4 question) and 1338 (copyright) over BlueGem’s claims for copyright infringement
5 and contributory copyright infringement because these claims arise under the
6 Copyright Act, 17 U.S.C. § 101 *et seq.* Supplemental jurisdiction exists under 28
7 U.S.C. § 1367 over BlueGem’s claim for breach of contract because this claim
8 arises out of the same conduct as BlueGem’s copyright claims.

9 2. Specific personal jurisdiction over Defendant Trusteer Inc. exists
10 because Trusteer intentionally targeted the acts at issue in this case at California.
11 For example, Trusteer sold copies of the accused product, Rapport, to customers
12 located in California, both for use by those customers and for further distribution by
13 those customers to end users in California; purchased two copies of BlueGem Total
14 Privacy (“Total Privacy”), the BlueGem product from which Trusteer copied code,
15 from BlueGem in California; took sales from BlueGem, knowing that, because
16 BlueGem is based in California, the brunt of the harm would be felt in California;
17 and reduced the value of Total Privacy in California by copying Total Privacy
18 without permission. Trusteer’s customers in California include Alta Alliance Bank,
19 Bank of America, BBVA Compass, eBay, Farmers & Merchants Bank, PayPal,
20 SiebertNet, and Torrey Pines Bank.

21 3. Trusteer also consented to jurisdiction in this Court in the end-user
22 license agreement (EULA) that accompanied the copies of Total Privacy that it
23 purchased. *See* Ex. B § 15 (“The federal and state courts for California shall have
24 exclusive jurisdiction over any disputes, claims or controversies arising out of or
25 relating to this Agreement, and You hereby irrevocably waive any objection to the
26 jurisdiction of such courts over any such dispute, claim or controversy.”).

27 4. Venue is proper in this district under 28 U.S.C. § 1391(b)(2) because
28 Trusteer sold copies of the accused product to customers located in and around Los

1 Angeles both for use by those customers and for further distribution by those
2 customers to end users in and around Los Angeles. Trusteer's customers in and
3 around Los Angeles include Bank of America, BBVA Compass, eBay, Farmers &
4 Merchants Bank, PayPal, SiebertNet, and Torrey Pines Bank. Because Trusteer
5 intentionally sold the accused product to customers in this district, it would be
6 subject to personal jurisdiction in this district were this district a state and therefore
7 resides in this district for purposes of venue. *See* 28 U.S.C. § 1391(c). Accordingly,
8 venue is also proper in this district under 28 U.S.C. §§ 1391(b)(1) and 1400(a)
9 (copyright venue).

10 PARTIES

11 5. Plaintiff BlueGem Security Inc. is a Delaware corporation with its
12 principal place of business in Santa Clara County, California.

13 6. Defendant Trusteer Inc. is a Delaware corporation with its principal
14 place of business at 13 Noach Mozes Street, Tel Aviv 67442, Israel, and with its
15 principal United States office at 116 West 23rd Street, Suite 500, New York, New
16 York 10011. Trusteer may be served by serving its registered agent for service of
17 process in California, John Max Adams, at 20 Waterside Circle, San Rafael,
18 California 94903.

19 SUMMARY OF THE CASE

20 7. BlueGem is a computer-security company based in California.
21 BlueGem distributes software that protects computer users from keyloggers. A
22 keylogger is a program that records a user's keystrokes and sends a log of those
23 keystrokes to a hacker. The log can contain, for example, the user's bank login
24 name and password. Keyloggers are a major problem for financial institutions like
25 banks or brokerages that let users access their accounts online. This is because, by
26 using a keylogger to collect login information, a hacker can gain unauthorized
27 access to many users' financial accounts. In simple terms, BlueGem's software
28 protects against keyloggers by intercepting keystrokes between the keyboard

1 controller and the operating system, encrypting these keystrokes, feeding dummy
2 keystrokes to the operating system in lieu of the actual keystrokes, and decrypting
3 the actual keystrokes when an authorized program is ready to use them. BlueGem
4 distributes two versions of its software: LocalSSL to institutional customers and
5 Total Privacy to individuals.¹

6 8. In 2007, Intel released the P35 chipset. A chipset is the set of
7 microchips on a computer's motherboard that allows the central processing unit
8 ("CPU" or "processor") to control and receive information from other parts of the
9 computer, including the keyboard. Intel releases a new chipset about once a year.
10 Soon after the release of the P35, BlueGem discovered from its customers that its
11 software no longer worked on computers with the P35 installed. With software
12 engineers in Korea, BlueGem developed additional software (the "Intel
13 Compatibility Code") that, when added to its existing products, made those products
14 compatible with the P35. The Intel Compatibility Code also makes BlueGem's
15 products compatible with the P45 and P55 chipsets and other chipsets related to the
16 P35 (collectively, the "Intel Chipsets").

17 9. Trusteer is one of BlueGem's competitors.² Trusteer is based in Tel
18

19 ¹ Keystroke encryption provides a layer of security that many computer-security
20 programs lack. Many of these programs focus on security at the network level. In
21 the online-banking example, security at the network level would be security between
22 the browser running on the end user's computer and the remote server running the
23 bank's online-banking software. By using a cryptographic protocol known as SSL
24 (Secure Sockets Layer), the user's password can be encrypted while it travels across
25 the Internet between the user's computer and the bank's remote server. BlueGem's
26 keystroke-encryption technology was originally called LocalSSL because it provides
27 the local analogue to the network security that SSL provides.

28 ² Trusteer describes itself as "the world's leading provider of secure browsing
services" and says that its software will "keep criminals away from the browser and
prevent the theft of any personally identifiable information." Trusteer Website,
www.trusteer.com (January 11, 2011). Trusteer's flagship product is called
(footnote continued)

1 Aviv and New York. It manufactures and distributes a product called Rapport. Like
2 LocalSSL and Total Privacy, Rapport protects against keyloggers. Most of
3 Trusteer's customers are institutions: banks, brokerages, and companies like eBay
4 and PayPal. These institutions license Rapport from Trusteer and distribute copies
5 of Rapport to their own customers. In late 2010, BlueGem discovered that Rapport
6 includes a nearly line-for-line copy of the Intel Compatibility Code. Without the
7 Intel Compatibility Code, Rapport would be ineffective against keyloggers on any
8 computer with one of the Intel Chipsets installed. This includes more than 50% of
9 the computers sold in and after 2008. Trusteer has never sought permission from
10 BlueGem to use the Intel Compatibility Code or paid any royalties to BlueGem for
11 its use of that code.

12 10. BlueGem's download logs reveal that, in 2008 and 2010, Trusteer
13 downloaded copies of Total Privacy. Like most software companies, BlueGem
14 distributes its products in machine-readable object code only. Programs called
15 disassemblers and decompilers can translate this object code back into human-
16 readable assembly code or source code. On information and belief, Trusteer
17 disassembled or decompiled one or both of these copies of Total Privacy to gain
18 access to the Total Privacy code, including the Intel Compatibility Code, in
19 assembly-code or source-code form. This was a breach of the end-user license
20 agreement that accompanied Total Privacy. On information and belief, Trusteer
21 then copied and modified the Intel Compatibility Code and included that code in
22 Rapport. Trusteer distributed Rapport, including the copied Intel Compatibility
23

24
25 Rapport. Rapport is a "lightweight security software solution that protects web
26 communication between enterprises, such as banks, and their customers and
27 employees." Trusteer Website, www.trusteer.com/product/trusteer-rapport (January
28 11, 2011). "Rapport is focused on preventing online fraud committed by financial
malware." *Id*

1 Code, to its customers, who further distributed Rapport to their customers.

2 18,156,048 copies of Rapport have been distributed to date. These acts constitute
3 copyright infringement and contributory copyright infringement.

4 11. The ability to block keyloggers – which Rapport could not do without
5 the Intel Compatibility Code – is a major feature of Rapport and one that Trusteer
6 emphasizes in marketing Rapport. For example, Trusteer commissioned a technical
7 report from RLR UK Ltd., an independent IT consulting firm, to verify that Rapport
8 was effective against keyloggers and posted this report on its website. Trusteer
9 commissioned and posted a similar report by the Malware Research Group of Zorin
10 Nexus Ltd. The following additional examples are from Trusteer’s website:

- 11 • On the features page, the second listed feature is “[b]locks Keyloggers
12 and screen grabbing.”³
- 13 • On the technology page, Trusteer describes keystroke encryption
14 exactly: “Key-stroke Lockdown – Rapport prevents tampering and
15 reading of data by encrypting sensitive information from the moment it
16 is typed into the keyboard until it reaches the browser. Trusteer
17 encrypts keystrokes very low in the operating system’s kernel and
18 keeps them encrypted inside the kernel and user space to achieve this
19 goal.”⁴
- 20 • On the frequently-asked-questions (FAQ) page, under “How exactly
21 does Rapport protect me?,” the first answer is “Keylogging. A
22 Keylogger is a malicious software that resides unnoticed inside your
23 computer. The keylogger records keystrokes (i.e. each time you type
24

25 ³ Trusteer Website, www.trusteer.com/product/trusteer-rapport (January 12, 2011)
26 (under the “Features & Benefits” tab).

27 ⁴ *Id.* (under “Technology” tab).
28

1 something on the keyboard) and then sends this information to the
2 attacker. By grabbing your sign-in credentials and other sensitive
3 information and sending them to the attacker, keyloggers enable the
4 attacker to sign into your accounts. Rapport encrypts your keystrokes
5 and prevents keyloggers from reading sensitive information.”⁵

- 6 • Also on the FAQ page, under “What attacks does Rapport protect
7 against?,” the third entry is “Keyloggers. A Keylogger is malicious
8 software that hides inside your computer. The keylogger records
9 keystrokes (i.e. each time you type something on the keyboard) and
10 then sends this information to the attacker. By grabbing your sign-in
11 credentials and other sensitive information and sending them to an
12 attacker, keyloggers enable an attacker to login to your accounts,
13 impersonate you and initiate fraudulent transactions.”⁶
- 14 • In a whitepaper entitled “Anti-Keylogger Myths,” Trusteer considers
15 several options for combating keyloggers and concludes that keystroke
16 encryption “is the strongest solution available against keyloggers” and
17 notes that Rapport uses keystroke encryption.⁷
- 18 • In a press release entitled “Frost and Sullivan Report Says Trusteer
19 Addresses the Need to Protect Information from the Keystroke to its
20 Endpoint,” Trusteer again emphasizes keystroke encryption and claims
21 that its ability to protect data “from the key stroke” has created “a new
22 market segment” and given Trusteer “a major advantage.” The press

23
24 ⁵ Trusteer Website, www.trusteer.com/support/faq/about-rapport (January 12,
2011).

25 ⁶ *Id.*

26 ⁷ Trusteer Website, ww.trusteer.com/sites/default/files/Anti_Keylogger_Myths.pdf
27 (paper dated 2007) (last visited January 12, 2011).

1 release emphasizes as a feature of Rapport “[e]ncrypting customer
2 keystrokes at the keyboard driver level.”

- 3 • In dozens of other press releases, including many jointly issued by
4 Trusteer and particular Trusteer customers, Trusteer touts Rapport’s
5 effectiveness against keyloggers.⁸

6 12. Many of Trusteer’s customers also tout blocking keyloggers as a
7 principal feature of Rapport. For example:

- 8 • Luther Deaton, the CEO of Central Bank, said in a press release:
9 “Trusteer’s Rapport product enables us to offer our customers a free
10 and transparent security mechanism that protects them and the bank
11 from a myriad of internet crime schemes including keystroke loggers.”
12 • Somerset Hills Bank, on its security web page, says that “Rapport
13 protects against sophisticated attacks like . . . capturing keystrokes or
14 log-in information.”
15 • Royal Bank of Scotland (RBS) and NatWest Bank on their security
16 web pages both state that “Rapport encrypts keystrokes from the
17 keyboard driver to the browser.”
18 • ING Direct in a press release says that “Trusteer Rapport protects
19 consumers from identity theft and malware threats including . . .
20 keyloggers.”

21 13. As relief for Trusteer’s copyright infringement, contributory copyright
22 infringement, and breach of contract, BlueGem seeks compensatory damages equal
23 to a reasonable royalty for Trusteer’s use of the Intel Compatibility Code, the
24 decline in value of LocalSSL and Total Privacy, and the profits from sales of
25

26 ⁸ Trusteer Website, www.trusteer.com/company/press-releases/2011 (January 12,
27 2011).
28

1 LocalSSL and Total Privacy that BlueGem would have made if Rapport were unable
2 to block keyloggers on computers with one of the Intel Chipsets installed. The
3 customers for which BlueGem competed against Trusteer and who ultimately
4 became customers of Trusteer include Bank of Montreal, CIBC, eBay, HSBC, ING
5 Direct USA, ING Direct Canada, PayPal, Royal Bank of Scotland, and Santander.
6 BlueGem also seeks disgorgement of the profits that Trusteer realized from its use
7 of the Intel Compatibility Code and an award of attorneys' fees and costs incurred in
8 prosecuting this action. Finally, BlueGem seeks preliminary and permanent
9 injunctions barring Trusteer from continuing to copy and distribute the Intel
10 Compatibility Code without a license from BlueGem.

11 **FIRST CAUSE OF ACTION**

12 **(Copyright Infringement)**

13 14. "To establish infringement, two elements must be proven: (1)
14 ownership of a valid copyright, and (2) copying of constituent elements of the work
15 that are original." *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S.
16 340, 361 (1991). Computer programs like Total Privacy and the Intel Compatibility
17 Code are copyrightable in the United States. *See, e.g., Asset Marketing Systems, Inc.*
18 *v. Gagnon*, 542 F.3d 748, 755 n.5 (9th Cir. 2008). BlueGem is the assignee of the
19 copyrights in Total Privacy and the Intel Compatibility Code. Completed and
20 submitted registration forms for Total Privacy and the Intel Compatibility Code are
21 attached as Exhibit A. BlueGem is also the assignee of the copyrights in all versions
22 of LocalSSL, including those versions of LocalSSL of which Total Privacy is a
23 derivative work.

24 15. "Computer programs are initially written in a 'source code,' which is a
25 symbolic language, often using English words and common mathematical symbols,
26 that humans can read. The source code is then translated, through a mechanical
27 process known as compilation or assembly, into 'object code,' which is a
28 concatenation of 1s and 0s readable by computer. Although a skilled programmer

1 can read and understand small sections of object code, it is virtually impossible to
2 develop a working understanding of a program by examining only its object code.
3 As a result, most commercial programs are sold only in object code form, and can
4 be run only 'as is' by the ordinary user." *Bateman v. Mnemonics, Inc.*, 79 F.3d
5 1532, 1539 n.17 (11th Cir. 1996) (*quoting* 3 Melville B. Nimmer & David Nimmer,
6 Nimmer on Copyright § 13.03[F] n. 271 (1995)).

7 16. Programs called decompilers or disassemblers can reverse this process
8 of compilation or assembly. A decompiler takes object code and translates it back
9 into equivalent source code. *See, e.g., Sega Enterprises Ltd. v. Accolade, Inc.*, 977
10 F.2d 1510, 1514 n.2 (9th Cir. 1992). A disassembler takes object code and
11 translates it into an intermediate language called assembly language. Assembly
12 language is more difficult to read than source code because it more closely reflects
13 the operation of the computer and, conversely, is more remote from English. A
14 command that might be expressed in one line of source code might take several lines
15 of assembly code to express.

16 17. Copyright protects "computer programs in their flow chart, source and
17 assembly phases." *Data Cash Systems, Inc. v. JS&A Group, Inc.*, 480 F. Supp.
18 1063, 1066 n.4 (N.D. Ill. 1979) (*quoted in Lotus Development Corp. v. Paperback*
19 *Software Int'l*, 740 F. Supp. 37, 45 (D. Mass. 1990) (collecting cases)). The right to
20 control copying of computer programs in all their forms is analogous to the
21 exclusive right to translate a literary work into other languages, *see, e.g.*, 17 U.S.C.
22 §§ 106 (granting exclusive right to create derivative works), 101 (defining
23 translation as a type of derivative work); *Suntrust Bank v. Houghton Mifflin Co.*,
24 268 F.3d 1257, 1261 n.9 (11th Cir. 2001). BlueGem's copyright in Total Privacy
25 and the Intel Compatibility Code therefore protects these programs in both their
26 source-code and assembly-code forms.

27 18. "Because direct evidence of copying is not available in most cases,
28 plaintiff may establish copying by showing that defendant had access to plaintiff's

1 work and that the two works are ‘substantially similar’ in idea and in expression of
2 the idea.” *Smith v. Jackson*, 84 F.3d 1213, 1218 (9th Cir. 1996). Trusteer had
3 access to Total Privacy and the Intel Compatibility Code because it downloaded at
4 least two copies of Total Privacy that contained the Intel Compatibility Code and,
5 upon information and belief, disassembled or decompiled these copies of Total
6 Privacy. By disassembling or decompiling Total Privacy, Trusteer gained access to
7 the assembly code and/or source code that BlueGem’s copyrights protect.

8 19. BlueGem’s download logs show two purchases. The first purchase was
9 on October 7, 2008. The purchaser stated that his name was Jeff Moon and that he
10 was from Turkey. He gave his email address as jeffmoon@walla.com. Walla! is a
11 well known web portal and email service provider, analogous to Yahoo!, in Israel,
12 where Trusteer is based.⁹ The purchase came from the IP address 62.90.53.2, an IP
13 address from Israel. And the hostname for the computer from which the purchase
14 came was out.trusteer.com. The second purchase was on July 8, 2010. The
15 purchaser identified himself as Mickey Boodaei, gave a shipping address of 13
16 Noach Mozes, Tel-Aviv 67442, Israel, and gave the email address
17 webmaster@trusteer.com. The address on Noach Mozes is the address of Trusteer’s
18 offices in Israel. Mickey Boodaei is Trusteer’s CEO.

19 20. Rapport is substantially similar to Total Privacy and the Intel
20 Compatibility Code. In particular, the code that makes Rapport compatible with the
21 Intel Chipsets is almost line-for-line identical with the Intel Compatibility Code.
22 Even though the Intel Compatibility Code is only one part of Total Privacy, copying
23 the Intel Compatibility Code infringes BlueGem’s copyright in Total Privacy
24 because the Intel Compatibility Code is an essential part of Total Privacy. *See, e.g.,*

25
26
27 ⁹ See Entry for “Walla!” on Wikipedia, en.wikipedia.org/wiki/Walla! (January 12,
28 2011)

1 *CyberMedia, Inc. v. Symantec Corp.*, 19 F. Supp. 2d 1070, 1077 (N.D. Cal. 1998).
2 The Intel Compatibility Code is essential because it is necessary to block keyloggers
3 on all computers with one of the Intel Chipsets installed and the Intel Chipsets were
4 installed on more than 50% of the computers sold in and after 2008.

5 21. Further evidence of copying, as opposed to independent development,
6 is that Rapport includes idiosyncratic features of the Intel Compatibility Code that
7 Trusteer would have had no reason to include if it had written the code
8 independently. *See, e.g., CyberMedia*, 19 F. Supp. 2d at 1077 (identifying
9 typographical errors as evidence of copying); *BP Chemicals Ltd. v. Jiangsu Sopo*
10 *Corp.*, 420 F.3d 810, 813 (8th Cir. 2005) (same); *Perry v. Zupan*, No. CIV S-04-
11 868, 2007 WL 570260 at *2, *2 n.4 (E.D. Cal.) (identifying “typographical errors in
12 the source code and other features unique to plaintiff’s program” as evidence of
13 copying); *Perry v. Zupan*, No. CIV S-04-868, 2005 WL 3020051 at *2–*3 (E.D.
14 Cal.) (same).

15 22. For example, Rapport uses the same two conditions as Total Privacy
16 and the Intel Compatibility Code to check for a particular model of Toshiba laptop.
17 Rapport checks to see whether the computer it is running on is a single-core
18 machine and, if so, whether a certain keyboard environmental variable is equal to
19 negative one. This is a nonstandard, ad hoc way of checking for a particular
20 computer that happened to cause problems for Total Privacy. There is no reason
21 that Trusteer would have written code to identify this particular model of Toshiba
22 laptop in this way, or even would have attempted to identify that particular model of
23 Toshiba laptop at all, if Trusteer had developed Rapport’s code independently.
24 Moreover, as part of its operation, Total Privacy replaces the user’s keystroke with
25 the dummy keystroke 0xFA (the number 250 in hexadecimal notation) after reading
26 and encrypting the user’s keystroke. Rapport uses the same dummy variable. There
27 is no reason why Trusteer would have used the same dummy keystroke value if it
28 had developed this part of Rapport independently.

1 23. Trusteer’s copyright infringement injured BlueGem because Trusteer
2 failed to pay BlueGem a reasonable royalty for Trusteer’s use of Total Privacy and
3 the Intel Compatibility Code; because Trusteer’s infringement reduced the value of
4 LocalSSL and Total Privacy; and because Trusteer’s infringement caused customers
5 to buy Rapport who otherwise would have bought LocalSSL or Total Privacy either
6 instead of or in addition to Rapport. Trusteer’s infringement also allowed Trusteer
7 to realize profits from Rapport that it would not otherwise have realized. As relief,
8 BlueGem seeks compensation for these injuries, disgorgement of this profit, an
9 award of attorneys’ fees and costs, and preliminary and permanent injunctions
10 requiring Trusteer to cease its infringement.

11 **SECOND CAUSE OF ACTION**

12 **(Contributory Copyright Infringement)**

13 24. “[O]ne contributorily infringes when he (1) has knowledge of another’s
14 infringement and (2) either (a) materially contributes to or (b) induces that
15 infringement.” *Perfect 10, Inc. v. Visa Int’l Service Ass’n*, 494 F.3d 788, 795 (9th
16 Cir. 2007); *see also Dream Games of Arizona, Inc. v. PC Onsite*, 561 F.3d 983, 995
17 (9th Cir. 2009). Trusteer both materially contributed to and induced its customers’
18 infringement of BlueGem’s copyrights in Total Privacy and the Intel Compatibility
19 Code.

20 25. Trusteer’s customers infringed BlueGem’s copyright in at least two
21 ways. Trusteer’s customers’ internal use of Rapport is direct copyright infringement
22 because Rapport includes code copyrighted by BlueGem. “The loading of
23 copyrighted computer software from a storage medium (hard disk, floppy disk, or
24 read only memory) into the memory of a central processing unit (‘CPU’) causes a
25 copy to be made. In the absence of ownership of the copyright or express
26 permission by license, such acts constitute copyright infringement.” *MAI Systems*
27 *Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 518 (1993); *see also Iconix, Inc. v.*
28 *Tokudai*, 457 F. Supp. 2d 969, 995 (“according to the Ninth Circuit, running

1 copyrighted software without ownership of the copyright or a license to run the
2 software, constitutes copyright infringement”).

3 26. Trusteer’s customers are also direct infringers because they distribute
4 literally millions of copies of Rapport, including the code stolen from BlueGem, to
5 their own customers. Trusteer’s bank customers, for example, not only use Rapport
6 themselves, but also distribute Rapport to their own customers. Each such
7 distribution is an act of copyright infringement. *See* 17 U.S.C. § 106(3) (granting
8 the exclusive right “to distribute copies . . . of the copyrighted work to the public by
9 sale or other transfer of ownership, or by rental, lease, or lending”).

10 27. The Trusteer customers who are direct infringers include Alliance Bank
11 of Arizona; Alliance & Leicester; Alta Alliance Bank; Amegy Bank; BancFirst;
12 BankFIRST; Bank of America; Bank of Cyprus UK; Bank of Montreal; Bank of
13 Nevada; BBVA Compass; BOK Financial; Boursorama; Carolina First Bank;
14 Central Bank of Kentucky; Charter One; CIBC; CoBiz Financial; Commerce Bank
15 of Washington; Coutts; Coventry Building Society; eBay; Ever Bank; Fifth Third
16 Bank; First Direct; First Independent NV; F&M Bank; Hancock Bank; Harris Bank;
17 HSBC; Huntington National Bank; ING DIRECT Canada; ING DIRECT USA;
18 iTransfer; Mercantile Bank; National Bank of Arizona; NatWest; NBC Bank;
19 Nedbank; Nevada State Bank; PayPal; Peoples Bank of Ohio West Virginia,
20 Kentucky, and Missouri; President’s Choice Financial; PSECU; RBS Citizens; The
21 Royal Bank of Scotland; Santander; ShareBuilder; SiebertNet; Somerset Hills Bank;
22 Standard Bank; SunTrust; Synovus; Torrey Pines Bank; Ulster Bank;
23 USAmeriBank; Valley National; Vectra Bank; and Zions Bank.

24 28. Trusteer had knowledge of its customers’ infringement because
25 Trusteer knew that a critical part of Rapport was copyrighted by BlueGem. Because
26 Trusteer knew that Rapport included code copyrighted by BlueGem, it knew that its
27 customers could not run (and thereby create copies of) Rapport and could not further
28 distribute Rapport to their own customers without committing copyright

1 *Durell v. Sharp Healthcare*, 183 Cal. App. 4th 1350, 1367 (2010).

2 33. The contract is the EULA, a copy of which is attached as Exhibit B.
3 Trusteer consented to the EULA when it downloaded and installed Total Privacy.
4 The EULA is a form of clickwrap agreement, so called because a user must click a
5 box on his or her computer screen to accept the agreement before the software will
6 run. Clickwrap agreements are enforceable contracts because they require users to
7 manifest assent to their terms before gaining the benefit of using the software. *See,*
8 *e.g., Oracle Corp. v. SAP AG*, No. C 07-1658, 2008 WL 5234260 at *7 (N.D. Cal.)
9 (“Many courts have found clickwrap agreements to be enforceable.”); *Exceptional*
10 *Urgent Care Center I, Inc. v. Protomed Medical Management Corp.*, No. 5:08-cv-
11 284, 2009 WL 2151181 at *8 (M.D. Fla.) (“where, as here, software is used by a
12 customer, and a responsible agent of the customer is aware of the EULA, the EULA
13 is binding and enforceable”).

14 34. The relevant provisions of the EULA include:

- 15 • The licensee “may not reverse engineer, disassemble, decompile, or
16 translate the Software, or otherwise attempt to derive the source code of
17 the Software, or authorize any third party to do any of the foregoing.”
18 Ex. B § 2.
- 19 • The license is “a limited, non-exclusive, personal license to install,
20 perform and use the Software, in machine-readable form only.” Ex. B
21 § 1.
- 22 • The license is limited to installation, performance, and use “for Your
23 own personal or internal business use . . . in accordance with the
24 instructions, specifications and documentation provided with the
25 Software.” Ex. B § 1.
- 26 • The license specifically provides that the licensee “may not use or copy
27 the Software, or any copy thereof, in whole or in part, except as
28 expressly provided in this Agreement.” Ex. B § 2. It also provides that

1 the licensee “may not modify, reproduce, create derivative works of,
2 distribute, sell, resell, lend, loan, lease, license, sublicense or transfer
3 (except as expressly provided herein) the Software or any portion
4 thereof.” *Id.* Further, it provides that the licensee’s and its agents’ use
5 of the software “must be consistent with the terms, conditions and
6 restrictions set forth in this Agreement.” *Id.*

7 35. BlueGem performed under the EULA by delivering Total Privacy and
8 otherwise satisfying all terms of the EULA.

9 36. Trusteer breached the EULA in at least the following respects: (1) by
10 reverse engineering, disassembling, decompiling, translating, and attempting to
11 derive the source code of Total Privacy in violation of § 2; (2) by installing and
12 using Total Privacy in other than machine-readable form in violation of § 1; (3) by
13 using Total Privacy for an external use, namely, for partial inclusion in Rapport for
14 sale to third parties in violation of § 1; and (4) by modifying, reproducing, creating
15 derivative works of, and distributing those parts of Total Privacy that were included
16 in Rapport in violation of § 2.

17 37. These breaches injured BlueGem in that they allowed Trusteer to block
18 keyloggers on computers with one of the Intel Chipsets installed and, as a result,
19 caused BlueGem to lose sales to Trusteer and decreased the value of LocalSSL and
20 Total Privacy. Trusteer is liable for compensatory damages for these injuries.

21 **PRAYER FOR RELIEF**

22 38. BlueGem Security Inc. respectfully requests:

- 23 a. compensatory damages equal to a reasonable royalty for Trusteer’s use
24 of Total Privacy and the Intel Compatibility Code;
25 b. compensatory damages equal to the decline in value of LocalSSL, the
26 Intel Compatibility Code, and Total Privacy caused by the unauthorized
27 inclusion of the Intel Compatibility Code in Rapport;
28 c. disgorgement, under 17 U.S.C. § 504(b), of all profits that Trusteer

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derived from its infringement and contributory infringement of BlueGem's copyrights in the Intel Compatibility Code and Total Privacy;

- d. a preliminary injunction preventing Trusteer from copying, distributing, or creating derivative works from the Intel Compatibility Code or Total Privacy;
- e. a permanent injunction preventing Trusteer from copying, distributing, or creating derivative works from the Intel Compatibility Code or Total Privacy; requiring that Trusteer remove the Intel Compatibility Code and all code from Total Privacy from all Trusteer products; and requiring that Trusteer inform its customers of its infringement and recall all copies of its products that contain the Intel Compatibility Code or any other code from Total Privacy;
- f. a reasonable attorney's fee and costs under 17 U.S.C. § 505;
- g. prejudgment and postjudgment interest and costs of court; and
- h. all other relief to which BlueGem is entitled at law or in equity.

DATED: March 30, 2011

Respectfully submitted,

Ekwan E. Rhow
BIRD, MARELLA, BOXER, WOLPERT,
NESSIM, DROOKS & LINCENBERG, P.C.

By: 
Ekwan E. Rhow
Attorneys for Plaintiff BlueGem Security Inc.

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DEMAND FOR JURY TRIAL

Pursuant to Local Rule 38-1, Plaintiff BlueGem Security Inc. demands trial by jury on all issues so triable.

DATED: March 3^o, 2011

Respectfully submitted,

Ekwan E. Rhow
BIRD, MARELLA, BOXER, WOLPERT,
NESSIM, DROOKS & LINCENBERG, P.C.

By: 
Ekwan E. Rhow
Attorneys for Plaintiff BlueGem Security Inc.

**UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA
CIVIL COVER SHEET**

I (a) PLAINTIFFS (Check box if you are representing yourself <input type="checkbox"/>) BlueGem Security Inc.	DEFENDANTS Trusteer Inc.
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(b) Attorneys (Firm Name, Address and Telephone Number. If you are representing yourself, provide same.) Ekwan E. Rhow - SBN. 174604 Bird, Marella, et al. 1875 Century Park East, 23rd Floor Los Angeles, CA 90067-2561 Tel: 310-201-2100 Fax: 310-201-2110	Attorneys (If Known)
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II. BASIS OF JURISDICTION (Place an X in one box only.) <input type="checkbox"/> 1 U.S. Government Plaintiff <input type="checkbox"/> 3 Federal Question (U.S. Government Not a Party) <input type="checkbox"/> 2 U.S. Government Defendant <input checked="" type="checkbox"/> 4 Diversity (Indicate Citizenship of Parties in Item III)	III. CITIZENSHIP OF PRINCIPAL PARTIES - For Diversity Cases Only (Place an X in one box for plaintiff and one for defendant.) <table style="width:100%; border-collapse: collapse;"> <tr> <td style="text-align: center;">PTF</td> <td style="text-align: center;">DEF</td> <td></td> <td style="text-align: center;">PTF</td> <td style="text-align: center;">DEF</td> </tr> <tr> <td style="text-align: center;"><input type="checkbox"/> 1</td> <td style="text-align: center;"><input type="checkbox"/> 1</td> <td>Citizen of This State</td> <td style="text-align: center;"><input checked="" type="checkbox"/> 4</td> <td style="text-align: center;"><input type="checkbox"/> 4</td> </tr> <tr> <td colspan="2"></td> <td style="text-align: center;">Incorporated or Principal Place of Business in this State</td> <td colspan="2"></td> </tr> <tr> <td style="text-align: center;"><input type="checkbox"/> 2</td> <td style="text-align: center;"><input type="checkbox"/> 2</td> <td>Citizen of Another State</td> <td style="text-align: center;"><input type="checkbox"/> 5</td> <td style="text-align: center;"><input checked="" type="checkbox"/> 5</td> </tr> <tr> <td colspan="2"></td> <td style="text-align: center;">Incorporated and Principal Place of Business in Another State</td> <td colspan="2"></td> </tr> <tr> <td style="text-align: center;"><input type="checkbox"/> 3</td> <td style="text-align: center;"><input type="checkbox"/> 3</td> <td>Citizen or Subject of a Foreign Country</td> <td style="text-align: center;"><input type="checkbox"/> 6</td> <td style="text-align: center;"><input type="checkbox"/> 6</td> </tr> <tr> <td colspan="2"></td> <td style="text-align: center;">Foreign Nation</td> <td colspan="2"></td> </tr> </table>	PTF	DEF		PTF	DEF	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Citizen of This State	<input checked="" type="checkbox"/> 4	<input type="checkbox"/> 4			Incorporated or Principal Place of Business in this State			<input type="checkbox"/> 2	<input type="checkbox"/> 2	Citizen of Another State	<input type="checkbox"/> 5	<input checked="" type="checkbox"/> 5			Incorporated and Principal Place of Business in Another State			<input type="checkbox"/> 3	<input type="checkbox"/> 3	Citizen or Subject of a Foreign Country	<input type="checkbox"/> 6	<input type="checkbox"/> 6			Foreign Nation		
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IV. ORIGIN (Place an X in one box only.)

1 Original Proceeding
 2 Removed from State Court
 3 Remanded from Appellate Court
 4 Reinstated or Reopened
 5 Transferred from another district (specify):
 6 Multi-District Litigation
 7 Appeal to District Judge from Magistrate Judge

V. REQUESTED IN COMPLAINT: JURY DEMAND: Yes No (Check 'Yes' only if demanded in complaint.)

CLASS ACTION under F.R.C.P. 23: Yes No **MONEY DEMANDED IN COMPLAINT: \$** 18,000,000

VI. CAUSE OF ACTION (Cite the U.S. Civil Statute under which you are filing and write a brief statement of cause. Do not cite jurisdictional statutes unless diversity.)

Total Privacy and The Intel Compatibility Code

VII. NATURE OF SUIT (Place an X in one box only.)

OTHER STATUTES <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce/ICC Rates/etc. <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Act <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Info. Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes	CONTRACT <input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loan (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	TORTS PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Fed. Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury-Med Malpractice <input type="checkbox"/> 365 Personal Injury-Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 463 Habeas Corpus-Alien Detainee <input type="checkbox"/> 465 Other Immigration Actions	TORTS PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability BANKRUPTCY <input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 CIVIL RIGHTS <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 American with Disabilities - Employment <input type="checkbox"/> 446 American with Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	PRISONER PETITIONS <input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus/Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition FORFEITURE/PENALTY <input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other	LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act PROPERTY RIGHTS <input checked="" type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS - Third Party 26 USC 7609
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FOR OFFICE USE ONLY: Case Number: CV11 02682

AFTER COMPLETING THE FRONT SIDE OF FORM CV-71, COMPLETE THE INFORMATION REQUESTED BELOW.

