C.A. NO. 09-2350

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

AARON C. BORING and CHRISTINE BORING, husband and wife,
Appellants,

v.

GOOGLE, INC., a California corporation,
Appellee.

Appeal from Western District of Pennsylvania
2:08-cv-00694

APPEAL FROM ORDER DATED FEBRUARY 17, 2009, DISMISSING PLAINTIFFS' AMENDED COMPLAINT, GRANTING DEFENDANT'S 12(B)(6) MOTION ON ALL COUNTS; APPEAL FROM ORDER DATED APRIL 6, 2009, DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION

REPLY BRIEF OF APPELLANTS AARON AND CHRISTINE BORING

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I. OVERVIEW.

Freedom begins with the right to be left alone. The Borings claim their right, as Americans, to be secure in their property, and to enjoy their property without intrusion or fear of intrusion. Google is a profiteer acting at its own risk for its profit. That is the balancing of it.

Google pooh-poohs the claim, and we understand their argument: Google is just like the "police," or a "lost driver" [Google Br. 28].[1] But, in point of fact, with such traditional examples, Google wants us to forget exactly the thing that is at issue: **the technology**. It is the 21st Century panoramic 360° "rolling" digital camera, with worldwide publishing through Google's pervasive indexing system, that gives this issue context.

We cannot deny: 1) Google has a new technology that is a social phenomenon; and 2) new technologies intrude in new ways.

The *recording*, *indexing*, *ease of* access and *dissemination* of data — some more or less personal — yields its own social concerns that requires this Court's attention.[2] The Borings ask this Court to give meaning to the truth: the expectation of seclusion is not absolute, it is relative. It is not secluded or not secluded, it is the expectation of seclusion *from* something. The Borings had an overt statement of their expectation of privacy, "**Private Road No Trespassing**" (emphasis added).

[1] Google Brief of Appellee, September 24, 2009 [hereafter, "**Google Br.**"]

[2] There is a circuitous irony to the fact that the Magistrate Judge was "Googling" [Opinion, A8] using the defendant Google's services on a 12(b)(6) motion, and that error is a cause for this appeal. The *recording*, *indexing, ease of* access and *dissemination* of data has its own new social concerns.

Yet, Google kept coming, tires crunching, and kept recording, and at the barrier of the Borings' home itself, kept recording, and, with nowhere to continue but to *drive into the pool*, turned around in the driveway, and kept recording.[3] Google was not on a street, Google was not taking pictures from the street, and no street was in view. But, Google published the pictures anyway, worldwide. [Borings' Br. 7-8]

An offense is contextual. This case, prima facie, is about a plaintiff who has pleaded seclusion and an overtly stated expectation of privacy, "**Private Road No Trespassing**" (emphasis added) [A31, ¶11]

[3] Google states, "**Based upon the factual allegations found within the four corners of the Amended Complaint**, the District Court properly concluded that the Borings have not shown they are entitled to relief." [Google Br. 13, emphasis added] Then, by very recent Appendix supplementation (only after the Borings had long written and served their Opening Brief) Google puts tangible things before this appellate court for review. These things are improper and immaterial for the question on appeal, but are addressed briefly below at Section II *in all prudence and caution*.

It is important to note that Google did not also attach, for the convenience of this Court, the picture where Google is close to the home, *i.e.,* closer to the home than SA-26 indicates. If this Court is inclined to review that picture as material to its determination on this appeal, it is available in the record at Docket 28, Exhibit 2:10. This case was not converted pursuant to Fed. R. Civ. P. 12(d).

Moreover, Google states, at Google Br. 37, that the review is *de novo*, and yet it still supplemented with tangible things to this Court.

Google has now designated every page of all the briefs below [Appendix Table of Contents, A36-A103], recently supplemented with tangible things [SA1-SA31] and cites 105 cases (approximately 1,380 words of *case citations*), far beyond anything considered by the Magistrate Judge. The Borings designated its 7-page pleading. [A29-35]

II. GOOGLE'S STATEMENT OF FACTS

Google, *incidentally by footnote*, begins its Statement of Facts:

> **Footnote 1: "This statement is based upon the allegations of the Amended Complaint, the images upon which the Plaintiffs' claims are based...and publicly available information that is subject to judicial notice. . ."**
>
> **Footnote 2: "The Court may take may take judicial notice. . ."**

[Google Br. 8; *see* n. 3, *supra*] This Court should note that Google does not simply say that judicial notice "*was taken*." Google cannot, because it was not. *See*, Fed. R. Evid. 201. Google's Statement of Facts is tied to the Klausner Declaration [SA-1], which was first designated with Google's Responsive Brief [*See,* n. 3, *supra*], and which was referenced only once in the *dicta* of footnote 1 of the Opinion; it was not referenced in the Opinion body. [Opinion, n. 1; A9]

1. **Allegations.** The Amended Complaint speaks for itself.

2. **Images.** All proper evidence is "based upon" the pleadings at some level, but the Borings did not plead, for example, a contract where the claims are based upon something with self-evident reliability. *See*, *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410 (3d Cir. 1997). The images in Exhibit G of the Klausner Decl. are not the images upon which Borings' claim is based. Indeed, the Klausner Decl. appears to admit that fact by using double-off wording:

> **Attached hereto as Exhibit G are . . . images obtained in connection with Street View and associated with the address...."**

[SA-2 ¶9] The Court should note that Google did not simply say that these are the "published pictures" upon which the claims "are based." Google cannot, because they are not.

The pictures submitted do not move or have the multiple angles, traverse points, zoom capability and/or the superimposed directional ar-

rows which disclose the panoramic 360° nature. [Google Br. 24; A30 ¶7] They are not as seen in the marketplace, or that would be removed by Google's "mitigation system." Google selected static 1° pictures that fail to show the closest recorded location to the Borings' home at the turn-around point in front of the pool. [See n. 3, *supra*] The pictures lack any proper foundation whatsoever.

Google did not use available technologies to render a fair dynamic representation of Street View that makes the service — and the Borings' claim — so compelling. [*See,* Google Br. 1]

Indeed, the Exhibit G pictures fail to show how the driver kept coming, and coming, and kept recording and recording and recording, even when the driver was in front of the pool and had to turn around. Google kept recording. Google automatically publishes panoramic 360° pictures to the world using the latest technologies, and, yet, presents only a subset of pictures "in connection with Street View and associated with the address" to the Court. [SA-2 ¶9]

If Google's pictures show anything, they show the secluded nature of the property. [SA-26, not even the closest picture; *see* n. 3] What is it about SA-26 that does not clearly tell a driver that, in continuing forward, he or she will hit a house, swimming pool or garage: turn off the camera now and turn around? But the car kept coming, and coming, and recording, and recording. And then Google published anyway, worldwide.[4] Everyone fully understands that there is a website mitigation policy. [Borings' Brief 7-8; SA-27; A8] It is now three strikes: 1) past the

[4] The Borings are addressing Google's pictures out of prudence and caution only. Not because they are proper for submission to this Court. *See* n. 3*, supra*.

signage anyway; 2) going right up to the home anyway; and 3) publishing worldwide anyway. We understand that there is a mitigation policy. [Id.]

3. **Public Information "Subject to Judicial Notice."** The Magistrate Judge only mentioned the Klausner Decl. in *dicta,* so the Magistrate Judge did not need to be precise. Indeed, the Magistrate Judge never referred to the Klausner Decl. in the body of the Opinion, nor ever used words denoting taking notice. If the Magistrate Judge did consider those exhibits, it would be error for doing so, and further error for failing to consider the Borings' counter exhibits. [See, generally, n. 3]

Google turns the Opinion upside down: the body of the Opinion is *dicta,* and the footnote is controlling. [Google Br. 17, 37 and 48] Google carefully states that the "public information" placed before this Court is the subject matter of which the court "may take judicial notice" but, Google did not say that it occurred. [Google Br. 8]

Possibly, Google suggests that the pictures were an accurate reflection of the circumstances on the date and time represented in the pictures (which requires its own relevance foundation, as stated). Or, possibly, Google is suggesting "someone else did it too" such as for the proposition of a *legal right* to publish itself. There is a distinct difference between noticing the temperature on a certain date from a reliable scientific source, as distinguished from judicially noticing that scientific source's legal right to publish the weather because it has done so.

If we understand Google's point, Google's intrusion, trespass and worldwide publication was legally permitted in conclusion, because: Yahoo has published aerial pictures from 3,000 feet (5,000 feet, or 100,000 feet [being no record for the altitude]), while not trespassing, and because Yahoo's *legal right to publish* aerial photography is "capable of accurate

and ready determination by resort to sources whose accuracy cannot reasonably be questioned."[5] Or, no two reasonable people could differ that an aerial picture at 5,000 feet is the equivalent of being on the Borings' property in front of their door.

Yahoo's pictures support the claim of Google's right to publish, MapQuest's pictures support the claim of Yahoo's right to publish, Google's pictures support Yahoo, etc., round-robin.

The fact that judicial notice is taken for one purpose as reliable, does not mean that it is taken for another. For example, a governmental site may be reliable for textual mete and bounds information because that textual information is taken from submitted recorded deeds, but not reliable for the legal or factual integrity of its photography. ***Indeed, the undersigned hereby certifies that Allegheny County removed its picture of the Borings' home.*** [SA-10] Following is an itemized response:

> **Exhibit A., Search [¶3, SA4]:** The only page not included in the Klausner Decl. (Exhibits A or B) was the **Legal Disclaimer** page that is exactly the page that disclaims the reliability of the information, concluding "**Therefore, sale-to-assessed-value comparisons can be misleading.**" [SA-4, lower right hand corner] The link provided in the Klausner Decl. at SA-4 is directly accessible but is not the default page; it is a "deep link."[6]
>
> **Exhibit B., Assessment Record [¶4, SA5-SA12]:** Google refers repeatedly to the **Images** tab [**SA10**], which formerly contained a single-frame outdated picture of one side of the Borings' home. ***Allegheny County removed the picture from the website.*** The undersigned represents that the picture was removed by Allegheny County and is no longer published.

[5] Fed. R. Evid. 201(c).

[6] The "**Legal Disclaimer**" page is interposed when approaching from the Allegheny County Assessments Home page. The **Legal Disclaimer** page is also viewable from http://www2.county.allegheny.pa.us/RealEstate/**Default**.aspx. (emphasis added). The flow from the Assessments Home Page is: http://www.county.allegheny.pa.us/opa/index.aspx (Off. Prop. Assess. Home) > http://www2.county.allegheny.pa.us/RealEstate/Default.aspx (Legal Notice) > http://www2.county.allegheny.pa.us/RealEstate/Search.aspx (the submitted Google Search page).

Exhibit C., D. and E., Aerial Photographs [¶¶5-7, SA-16]: It does not follow that an aerial photograph at 5,000 feet is probative of the right to trespass on the Borings' land, past signage, take pictures and publish them worldwide. The pictures are fundamentally distinct: "**at 5,000 feet**" is not "**on my property at my door, past 'Private Road No Trespassing Signage.'**" The pictures are not reasonable equivalents for any proposition at issue in this case.

Exhibit F, Boring Deed [¶8, SA-18]: Google apparently expended resources to obtain the Deed later when it should have done so earlier.

Exhibit G, "Pictures Associated/in Connection" [¶9, SA-21]: Discussed separately, above.

Exhibit H, "Mitigation Removal" [¶10, SA-27]: As a legal issue, the existence of a mitigation, after the fact, is not appropriate for consideration on a 12(b)(6) demurrer, before the fact. As a factual issue, if anything, it demonstrates the limited market, complexity, equipment, education and cost necessary for a regular person who "has discovered" a problem even to manage it.[7]

For the reasons stated, whether or not judicial notice was taken, for the reasons mentioned above, there would be in error.

III. STANDARD OF PLEADING

Google asserts the complexity of *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) for the most simple privacy and trespass pleading case. These causes of action are not derived from complex statutes that require technical analysis to raise the foundation of the statutory intent.

> **A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.**

[7] It would be an excellent mall survey, and the relevant market would be general society, not computer users. Since Google chooses to have a opt-out mitigation system, rather than an opt-in system that would naturally protect rights, Google should consider a television advertisement and newsprint campaign. In addition, possibly have telephone numbers to allow persons, such as senior citizens, the ability to easily determine if they are affected, or if there is an "inappropriate image" [SA-28] so as to use the simple procedure made available by Google. [Google Br. 24] It may be simple to get a drink of water if you are in China, but, of course, you have to get there.

Id., at 1949. If anything is tortured long enough it might scream, but, in fact, the error below is not from the pleading of the basic claim of conduct *liability*, it is because the Magistrate Judge finally adjudicated *damages* using improper facts and making improper speculations against the required standard, as a matter of law. [Borings' Brief pp. 6, 14] Liability and damage questions are distinct. Certainly, regarding the trespass count, with Google's inclusion of SA-21, this Court now sees the truth of what the Borings previously asserted. [Borings' Brief, p. 13., ¶6 ("assured summary judgment on liability").

IV. PRIVACY.

Google cited approximately 50 cases regarding the privacy count. The Magistrate Judge only cited four cases, and, accordingly, did not rely upon many of Google's cited cases in rendering the Opinion. The Borings welcome Google to cite these "facts and circumstances cases" but, even a simple review of privacy rights cases demonstrate that privacy rights issues are naturally fact-specific because each context is unique. The necessity for Google to use so many cases is a self-evident admission that privacy questions are fact specific.

It appears that Google scoured for any case where the plaintiff was unsuccessful, and applied any supportive out-of-context rule. For example, Google cited to government cases, prisoner cases, criminal investigation cases, and cases that were tried or for which evidence was adduced in due course (which is exactly the relief sought in this appeal).

Because of the volume of cases, please see the attached "**Privacy Distinction Table**," Addendum 1, p. 23 which is incorporated herein by this reference. We address the distinctions in the attached table.

Cutting through Google's barrage of cases, there appears to be a fundamental reality disconnect by Google on the legal/factual convergence within a claim. Google keeps stating that it is the reasonable equivalent to an invited "guest" and "police officer" [Google Br. 14], and that an aerial view from 5,000 feet or so is the reasonable equivalent of physically entering land, past signage and physically sitting on someone's driveway. [Google Br. 42] The Borings disagree.

Because the Borings may conditionally imply a request for the public service of the government to which it pays taxes and has a matched conditional expectation in that context, does not mean that the Borings waive their private property rights to Google and countless other profiteers, seriatim, with panoramic 360° cameras taking pictures for worldwide publication. Even Allegheny County removed its picture.

But, let us take a step back and think about the effect of Google's argument. The case was dismissed with Google *physically sitting on* the Borings' *driveway* (1,000 feet from mailboxes and the public road junction) with *no* "*street*" in "*view*." The reason:

> **The Borings, common people, have no gate [Google Br. 2], no fence surrounding the property or guard dog,[8] the government took a picture [Google Br. 22] (now removed from its website),[9] the notice of the recorded deed is ineffectual [SA-17], Yahoo has aerial pictures from thousands of feet [SA-13], MapQuest has aerial pictures from thousands of feet [SA-15], Live Search has aerial pictures from thousands of feet [SA-16], airplanes take aerial pictures from thousands of feet [Google Br. 28], the "[Borings'] property is visible from the air" [Google Br. 8], "[Barbara Streisand] has taken no steps to preclude persons passing by in airplanes from seeing into her back yard." [*Streisand,*[10]*,* P32:L14, Google's Br., attached].**

[8] Docket No. 11, Motion to Dismiss (first), pg. 2.

[9] *See,* p. 6, *infra*.

[10] *Streisand v. Adelman,* No., SC 077-257 (Super. Ct. Los Angeles Co. Dec. 31, 2003)

On these factors, who is safe? What property is safe? The Borings are just everyday people.

The Borings are not injured as a matter of law because they have not installed a fence and because they receive sunshine into their yard. Must we become "hermits" not to be ogled? Must we now concede the sun?

> **"The Borings' yard is visible from the air..."** [Google Br. 8] **[Streisand] has taken no steps to preclude persons passing by in airplanes from seeing into her back yard.** [*Streisand,* p. 32:L14, emphasis supplied].

Amber waves of grain, guard dogs, fences and opaque domes.

Google correctly admits that Appellants pleaded the "**Private Road No Trespassing**" sign, and then asserts, as if required, that there is no averment of a fence or gate that would "keep a person from approaching." [Google Br. 2] Google's presupposition is that Americans must have, and must plead, barriers of power to prevent entry. [Google Br. 2] Google blames the Borings, common people, for not fencing themselves in against Google, and uses aerial photography at 5,000 feet for the proposition that Google is rightful to be at on the Borings' driveway.

> **Google's requirement of a barrier fence is as illogical as arguing law-abiding citizens must incarcerate themselves from the criminals.**

Through pleading rules, Google puts us at unhappy war with ourselves, mere words not being enough. The idea of necessary gates and guard dogs is abhorrent to the principles of a free and civilized society, although, it is admitted that such things are necessary to defend against rodents and wild dogs. We are not brutes. Words should be enough.

After reviewing Google's many cases, there is a tool that assists in analyzing the nature of the claim for the underpinning offensiveness, in light of our shrinking world:

Offense = (Seclusion Interest x Expanse of View) x Intent[11]

Seclusion Interest. This is the factum to be secluded. For example, a high Seclusion Interest would be a factum of a person's naked body in the bathroom. A low Seclusion Interest would be a factum openly existing in a heavily travelled public park. The factum of view at the doorstep is distinct from an aerial photograph at 5,000 feet.

Expanse and Nature of View. This is the expansiveness of the viewer, nature of the view, how and if recorded. For example, a police officer, guest and Google may all see exactly the same factum of the Seclusion Interest; however, the guest is effectively two eyes, and the police may be two eyes plus an official recorded report for viewing within the Police department. Google is effectively worldwide unlimited viewing of the factum, with pervasive recording and indexing. It is this factor that adjusts for the reality of access, recording, indexing, ease of access and dissemination of data.

Intention. Intention is the cause for the view of the factum, and whether the motive is incidental or self-interested. For example, someone living on the coastline, might expect a parasailer to float overhead and see into a backyard with his or her naked eye. However, that is distinct from a situation where the parasailer has an intention to pry. A police officer would be low intention, presumably operating for the public good.

That said, the entire issue is that the Magistrate Judge finally determined that the conduct could not be "highly offensive to a reasonable person" *as a matter of law.* [Opinion, A7] Reasonable expectation is a

[11] Simply stated: what is the thing that is being viewed, who is viewing it and what is their intention for the view?

function of the context.[12] I might have the expectation that the government will intrude without waiving a right for Google to intrude.

In the Borings' case, the Seclusion Interest is the Borings' home. The home is secluded off of a private road, past "Private Road No Trespassing" signage. The photographs taken are not public views that can be seen without a violation trespass. However, because, in fact, people rightfully on the land may see the home at times, the weight of the factor is medium.

As to the Expanse and Nature of View, Google's recording mechanism, in 360° photography, in conjunction with pervasive indexing and dissemination, this factor is the extreme high.

As to Intention, Google is a commercial enterprise motivated by self-interested profit. Google operates with the specific intention to acquire the pictures that it did, in fact, acquire. Moreover, Exhibit G to the Klausner Decl. identifies, by Google's own admission, that the Google driver kept coming toward the Borings' home, and kept recording. Then, thereafter, returned to Google without removing the pictures and indexing them and publishing them throughout the world without advance notice or opt-in. Google does not send advance community notices, nor does it provide the pre-visit or pre-publication opt-in. Google does not assert any community programs to educate senior citizens and others, for example, who are not educated with technology to simply remove a property. Accordingly, this factor is the extreme high.

[12] I may thank you for telling me I have an object in my nostril when we are alone. But, I would be offended if you should do so from a podium with a crowd of listeners, and, more particularly, if you laugh and point. The object in my nostril is a constant in all cases, but the context is distinct and the final offense variable. The result is controlled by the entire context, not merely the constant. It is no defense from the podium for the offense that I would thank you for the conduct if we were alone.

See, also, Wolfson citing Hill v. National Collegiate Athletic Assoc., 7 Cal. 4th 1, 865 P.2d 633, 648 (Ca. 1994) (the degree of the intrusion, the context, conduct and circumstances surrounding the intrusion as well as the intruder's motives and objectives, the setting into which he intrudes, and the expectations of those whose privacy is invaded); *Dietemann v. Time,* 449 F.2d 245, 249 (9th Cir. 1971) ("[o]ne who invites another to his home or office takes a risk ... that the visitor may repeat all he hears and observes when he leaves. But he does not and should not be required to take the risk that what is heard and seen will be transmitted by photograph or recording, or in our modern world, in full living color and hi-fi to the public at large or to any segment of it that the visitor may select.").

We are tricked with our prejudices about what is usual for the many, but for which there is no record in this case. It may be that some people, in finding their property surveilled, would dismiss it without care because they live on main public road and do not purchase their property for seclusion. [A30, ¶5] As the issue is stated in this case, it is the averment, assumed true for the pleading, that the Borings are secluded. [Borings' Br. 2, 11-12] The Borings have a reasonable expectation that, in a civilized society, signage will be obeyed, such as other words of notice.

After discovery, and adducing evidence of facts, Google may bring a motion for summary judgment, demonstrating positive evidence that the private road and driveway are frequently travelled, etc., if that is the evidence. However, during the pleading stage, a trial judge has no basis to tell a plaintiff, on the one hand, that amendment will be futile, and on the other hand, require the plaintiff to plead facts that "convince."

Finally, for this *federal pleading* case, Google attached the 45-page *Streisand* case: a California state court trial opinion (not applicable here), using a unique state statute and law (not applicable here), for a public figure (not applicable here), from airspace (not applicable here), without a physical trespass (not applicable here), **post evidentiary hearing** (not applicable here), not tested by appeal (not applicable here).[13]

V. TRESPASS.

Fed. R. Civ. P. 8, expressly commands that substantive justice be done apart from technicalities in Federal court. It does, however, require a demand for the relief sought. Indeed, that the request was made: Plaintiff made the claim for compensatory and punitive damages. [A32, ¶¶17-19 and Prayer for Relief]

Google asserts, such as the Magistrate Judge below, that the Borings must plead nominal damages *at the inception of their case*. But, that is a euphemism. The real command by the Magistrate Judge is that a plaintiff must **concede** compensatory damages *at the inception of their case, as a matter of law*. Conceding compensatory damages is not a simple concession; it is tantamount to conceding the most essential nature of the case and a waiver of an entire theory of recovery.

Google calls the pictures taken as "**unremarkable**" [Google Br. 1] with the disregard of an ocean for its drops. But, Google makes its fortune on publishing "**unremarkable**" pictures. Each drop contributes to the value of the whole and cannot be disregarded.

[13] Google's use of the *Streisand* case to this Court amplifies the need for this appeal. If Google is using the *Streisand* case here, it is reasonable to assume that it would use the Magistrate Judge's ruling below for the 9th Circuit Court of Appeals. The Magistrate Judge's ruling must be tested because the implications are grave.

> **Landowner owns White Acre. Surveyor recognizes that, if Surveyor could publish the characteristics of White Acre, Surveyor could make a fortune. Surveyor cannot perform the survey without physically entering the land for inspection. Surveyor enters the land and takes the survey. Surveyor does not seek permission, entering the land without permission. The land is not injured. The characteristics of the land were never previously commercialized. Surveyor publishes the White Acre data and makes a fortune.**

From a damage calculation perspective, the fact that Surveyor does that deed one-time on White Acre, or multiple times on White Acre, or multiple times on multiple properties, or one-time for each different property, making it easier or harder to assess damages, is an accident of math. That is why we have experts. But each drop made its contribution to the whole of the ocean.

From common-sense experiential perspective, the Surveyor could have sought permission, but that would take time and cost money. So Surveyor takes the shot without permission and disregards property rights, until someone pushes back. It is for such an example that the Restatement of Restitution 2d (Draft) sets forth, as follows:

> **§ 40. Trespass and Conversion, Comment b. Measure of Recovery. ...Restitution is justified in such cases because the advantage acquired by the defendant is one that should properly have been the subject of negotiation and payment...The more difficult issues of valuation are accordingly those in which the defendant has made a use of the claimant's property for which there is no ordinary market; or in which the defendant has bypassed any market by taking without asking, or by proceeding in the face of a refusal. Valuation in such cases resists any precise formula, and courts exercise a wide discretion in fixing a price for the benefit in question—in other words, a measure of liability—that will correspond to the unjust enrichment of the defendant. The one constant factor in such cases is that values will be more liberally estimated against a conscious wrongdoer...**

Id., §40. Although Google does not want it to be so, Restatement of Restitution 2d (Draft) is a perfect match on this case. [Borings' Br. 26] It is an objective and well-reasoned statement of recovery for compensatory damages within the traditional framework of torts; it is supported by

existing case law in Pennsylvania and not contradicted. [Borings' Br. 24.] Importantly, it is an objective statement of how compensatory damages exist with traditional torts when "trees" are not the subject-matter of what was taken from the trespass, but data. The Restatement contemplates perfectly the fact that, as we move more to intellectual data rights, the law must accommodate valuations for intangibles.

With Google's inclusion of SA-21, this Court now sees the truth of what the Borings previously asserted. [Borings' Brief, p. 13., ¶6 ("assured summary judgment on liability").

Google asserts that the Borings, in federal court, failed to satisfactorily plead damages, even though damages are not an element of the claim. Google implies that there is a "general federal common law" *element* of damage in every federal pleading.

Google is physically on the Borings property without permission, but there is no trespass because the *Borings failed* to *concede* compensatory damages (even though damages are not a prima facie element of the claim, as a matter of law), and there are no punitive damages because the *conduct* is prejudged from the pleadings as not outrageous as a matter of law and "public record" [id.] (including with use of "googling" by the defendant's own indexing service), so Google's liability is, best case, $1. Similarly, the Magistrate Judge stated:

> **[This] does not change the Court's conclusion that the allegations in the Amended Complaint fail to establish a plausible claim of entitlement to punitive damages.**

[Reconsideration, A20] This conclusion is either because: a) the Borings could have outrageous conduct but did not technically plead nominal damages; or b) the Borings do not have a plausible claim for punitive damages on the merits irrespective of pleading nominal damages. If the former, it

effectively contradicts much of the essence of the privacy claim ruling; if the latter, the case is, in result, $1, *as a matter of law.*[14]

Finally, Google says the Borings "chose to not use the simple [internet] option Google affords for removing images...." [Google Br. 1]. If Google requests it, then Google should compensate for it. Google can compensate for the required computer equipment, software, Internet connection, our training, the opportunity cost, the baby-sitter, lost time at work, driver for taking children to football games, and everything else people are doing to try to make it through their own busy day. Google is a probabilities expert. Inertia is invaluable.

VI. PUNITIVE DAMAGES.

Since motive of the tortfeasor is involved in punitive damage assessments, it presupposes discovery into the intent, making it improper to dismiss at the pleading stage. *See Feld v. Merriam*, 506 Pa. 383, 395 (Pa. 1984) *citing Chambers v. Montgomery*, 411 Pa. 339, 345 (Pa. 1963) ("the act itself together with all the circumstances including the motive of the wrongdoers..." must be considered in reviewing the punitive damages claim); *Martin v. Johns-Mansville*, 508 Pa. 154, 172 (Pa. 1985) (outrageous

[14] Google points to the Borings not requesting a second pleading amendment. [Google Br. 57]. The amendment would be to concede compensatory damages. But Google does not push the point too hard though, because the logistics demonstrate additional error of the Magistrate Judge. Step 1: The Borings indicate they could amend [Opposition to Motion to Dismiss, Docket 25]; Step 2: As a result of that statement, the Magistrate Judge indicates in the Opinion "This Court concludes any attempted amendment would be futile." [Opinion, A15]; Step 3: The Borings file for reconsideration of the Order [Reconsideration, Docket 45]; Step 4: The Magistrate Judge denies reconsideration, indicating a failure to request to amend that preceded the Order where the Magistrate Judge indicated amending would be futile. [Reconsideration, A19] In the Reconsideration Motion, the Magistrate Judge, for the first time, also referenced the cases not cited by the parties, nor are cited in the Opinion as a basis for the ruling; these cases are addressed in Borings' Br. 22-24.

conduct are "acts done with bad motive or with reckless indifference to the interest of others."); *see also Franklin Music v. ABC*, 616 F.2d 528 (3d Cir. 1979) (court must look for *evidence* of aggravated conduct involving bad motive or reckless indifference).

VII. INJUNCTION.

Google argues the case is to be reviewed *de novo*, attaches documents, and now argues waiver in motion practice below. [*See*, n. 4, *supra*; Google Br. 55] Google misses the point of pleading the injunction request. The injunction is not only to keep Google from returning, but also to require the destruction and return of the pictures which would be removed from the mitigation website. It also serves a social interest of informing others, by public record, that the courts will enforce the fundamental interest of private property as recorded in government records.

Furthermore, Google does not represent, and, in fact, does not disclose, exactly what Google does with the pictures that may have been taken in violation of law.

The Magistrate Judge used the term "**virtual mapping**" in rendering the Opinion. [Opinion, A8] Not having a record or having adduced evidence, the term is completely undefined by the Magistrate Judge. We should be careful with the term.

When Google seeks to minimize its broad intention and raise a more *necessary elemental* social value proposition, it is a "**map**" maker. [Google Br. 16] However, when it suits Google's argument to overcome privacy implications, it identifies its purpose as "**automatically recording the view that anyone would see while driving on the street.**" [Google Br. 1].

Street View is not just a map service "**of the streets,**" it is a pervasive recording, indexing and publishing service "**from the streets**." MapQuest may be a virtual **mapping** service; Google "Street View," so-named, is a virtual **street view** service that has a map component. Maps and street views (particularly if humans are included in the pictorial view) have different social values. Publication of street views include people and faces. Google admits as much. [*See,* SA-30 "A Face"] Children are people and children have faces.

Currently, Google is the only known company that has the power to systematically traverse the physical earth and to record "street view" events, and to index and record this information in its privately owned database. Accordingly, it cannot be said exactly which "virtual mapping" services were used by the Magistrate Judge in rendering the statistical analysis of comparable companies, or viability. [Opinion, A8; Borings' Br. notes 4 and 5, and accompanying text]

Nevertheless, removal from the mitigation system does not command action onto Google under compulsion of law. Irrespective of whether the pictures continue to be published by Google, the Borings assert that the pictures are retained in the internal database, subject to mischief, misuse and/or replication, and the Borings' request that their pictures be destroyed under command of law is appropriate.

VIII. CONCLUSION AND PRAYER FOR RELIEF.

This case revolves around the presupposition in the assessment of damage *as a matter of law* in a pleading.

Google's technology, with its methodology for implementation, is a social phenomenon. There is no equivalent.

It is speculation to prejudge the general ordinary, *as a matter of law,* in the context of the unique singular extraordinary. The result of the assessment yields a triable fact, because the question is new by formulaic definition.

Google cites cases and makes arguments that move us away from considering exactly the elements of the context that are the cause for this dispute. We merely add this bright-line to Google's examples and the cited case law: "**and was the example or defendant, as the case may be: a) on an uninvited private-interest profit mission; and b) recording, indexing and publishing the results throughout the world?**"

As stated in the Borings' Brief at p. 2, offense is contextual. On these facts, this is a case of first impression, and so the averment of offense must be permitted to survive to test the question. The Borings are assured summary judgment for trespass liability.

Some cases just need to be tried because there is no legal or factual basis to rule that no two reasonable people will differ in result, *as a matter of law,* with these facts, *in this context.*

Indeed, a jury may have a farmer, a computer technician, a librarian, a senior citizen, a college student, someone still using a rotary telephone, a naturalist, a police officer, a newly naturalized citizen, a historian, a single mother with children, and a corporate executive. Each of these people, together as a microcosm of our American society, will judge these facts, *in this context*. And, each will find excuse or offense in such factor as their respective life history, education and conscience dictates.

The Magistrate Judge stated that the Borings failed to partake of Google's mitigation website removal system. Let the senior citizen, the college student, the rotary dial telephone user and the computer technician battle that question out in the jury room. That is the very purpose of juries and jury rooms. If that may be ugly in particular, it is certainly beautiful in essence.

Freedom begins with the right to be left alone. Security in property is not an incidental right, it is a fundamental right – if not the seminal principle upon which the United States of America was founded. We know that technology and property rights are not irreconcilable, there just needs to be an incentive.

> **It is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of citizens and one of the noblest characteristics of the late Revolution. The freemen of America did not wait till usurped power had strengthened itself by exercise and entangled the question in precedents. ... We revere this lesson too much ... to forget it."**

James Madison "Memorial and Remonstrance," in Rives and Fendall, Letters and Other Writings of James Madison, 1:163.

> **I believe there are more instances of the abridgement of the freedom of the people by gradual and silent encroachments of those in power, than by violent and sudden usurpations....This danger ought to be wisely guarded against.**

James Madison. Jonathan Elliot, ed. The Debates in the Several State Conventions on the Adoption of the Federal Constitution, 5 vols. 3:87. Philadelphia: J.B. Lippincott Company, 1901.

The Borings seek reinstatement of the Amended Complaint, Counts I, II, III and V (with the claim for punitive damages), with a directive to Google to answer in due course.

Date: October 8, 2009

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ADDENDUM A
PRIVACY DISTINCTION TABLE

* Cited by the Magistrate Judge. Columns are Name, Jurisdiction, Evidence, Trespass and Description

Name	Jur	Evd	Trsp	Pub	Description
Aquino	EDPa	Yes	No	Yes	Publication of newsworthy events such as divorce events of famous people
Benitez	ILApp	Yes	No	No	Peephole case
Borse *	3rd	No	No	No	Employment rights case; drug testing; no trespass; not requiring publication does not mean not pertinent
Burger	PA	Yes	No	No	Release of medical records case; invasion of privacy never argued
CA v Ciraolo	CaApp	Yes	No	No	Search warrants not required for aerial surveillance with naked eye; no profit motive
Cason	FLS	No	No	Yes	Unflattering publication of biographical data; privacy claim not dismissed
Cmw v Robbins	PaS	Yes	No	No	Governmental investigation of accused criminals, aerial surveillance; no profit motive
DeAngelo	PaS	No	No	No	Business solicitations alleged intrusion
DeBlasio	PaCmw	No	No	No	Jail cell case; no expectation of privacy
Diaz	EDPa	No	No	No	Debt collection case; found for plaintiff; inverse assumption that permitting a case to proceed on inferences is not equal to denying it from proceeding with inferences
Frankel	EDPa	No	No	No	Interference by termination of employment contract for refusal to divorce for religious reasons
GTE Mobilnet	TXApp	Yes	No	No	Construction of cell tower overlooking property; no trespass; no recording or publication; case went to jury
Harris *	PaS	Yes	No	Yes	Newspaper/Media case publishing welfare recipient information; no intentional intrusion
ICU Investigat.	ALS	Yes	No	No	Surveillance of a workers compensation claimant; expect investigation/intrusion when file claim
Jenkins	PaS	Yes	No	Yes	Publication of moral crimes of public record
Johnson	6th	Yes	Yes	No	Governmental investigation of accused criminals; no profit motive; no publication

Jones	PA DC	No	No	Yes	Publication of surrender to a television show host on a murder charge; not private life when surrender to News Columnist
Kelleher	EDPA	Yes	No	Yes	Employment context; MSJ; City employee sues Mayor Asst. for publicizing emails regarding her suspension to media; City Guidelines say no expectation of privacy in emails.
Kline	3rd	Yes	No	No	Workplace employee surveillance; no private place
Konopka	MDPa	Yes	No	No	Workplace surveillance; listening to recording found at workplace desk w/o consent
Mulligan	EDPa	Yes	No	No	Insurance investigation surveillance; worker's comp claimant no privacy expectation re: claim investigation; public view
Oliver	US	Yes	Yes	No	Criminal action re: police actions; open fields case; holds area around home protected; no profit motive
Pacitti	EDPa	Yes	Yes	No	Entry during remodeling; no recording; no publication
Pappa Unum	MDPa	No	Yes	No	Insurance investigation surveillance; expect investigation/intrusion when file claim; no publication
Pro Golf *	PA	No	No	Yes	Commercial disparagement; privacy not pleaded; statute of limitations ruling only
Schiller	ILApp	No	No	No	Neighbors capturing non-private data; public could view garage/driveway; no profit motive
Shorter	DSC	Yes	Yes	No	Insurance company ignores signage; no publication involved; expect investigation/ intrusion when file claim
ST v Chaussee	Wash App	Yes	No (Prob Cause)	No	Governmental investigation of accused criminals; no profit motive
ST v Domicz	NJS	Yes	No	No	Governmental investigation of accused criminals; no profit motive; Google no implied consent; no publication
Streisand	CaS	Yes	Aerial	Yes	Famous person; aerial; specific state interest
Strickland	PaS	Yes	No	No	Wrongful termination claimed from publicity surrounding collection lawsuit
Tucker	EDPa	Yes	No	No	Company investigation of violation of policy; questions to spouse; no

					trespass; no citation by court for "difficult standard to satisfy"; MSJ not pleading stage
US v Evans	7th	Yes	Yes	No	Governmental investigation of accused criminals; no profit motive; no publication; Defendant did not present evidence of privacy expectation at hearing
Vaughn	TXapp	Yes	No	No	Neighbor watching neighbor without blinds drawn; no profit motive; no publication
Ventling	SDSD	Yes	No	No	Governmental investigation of accused criminals; no profit motive; still photo unpublished
Wells	EDPa	Yes	No	No	Dicta cited; wrongful termination case; release of terms of separation agreement; no publication
Wolfson *	EDPa	Yes	No	Yes	Intrusive actions of press doing article on high salaries of U.S. Healthcare executives; not dismissed, rather, Defendants enjoined from invading privacy; customs/motives/ setting needs developed
Woodside	EDPA	No	No	No	Defaulting Debtors, who were licensed attorneys, claimed Defendant's collection efforts (ordering sheriff to inventory property for sale, attaching bank accounts) was invasion of their privacy; Court found that by defaulting on debt, they voluntarily consented to such collection efforts and so not offensive.

ATTORNEY CERTIFICATE OF BAR MEMBERSHIP

I, Gregg Zegarelli, certify on the date specified below, that I am admitted as an attorney of the United States Court of Appeals for the Third Circuit and that I am a member of the bar in good standing.

Date: October 8, 2009

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I, Dennis M. Moskal, certify on the date specified below, that I am admitted as an attorney of the United States Court of Appeals for the Third Circuit and that I am a member of the bar in good standing.

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CERTIFICATE OF COMPLIANCE

I, Gregg Zegarelli, certify that this Brief complies with the type-volume limitations of Fed.R.App.P. 32(a)(7)(B) because it contains 6,385 words, including Addendum 1, but excluding parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii). I further certify that this Brief complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and the type style requirements of Fed.R.App.P. 32(a)(6) because it has been prepared in a non-proportionally spaced typeface using Microsoft Word 2003 with 10.5 point Courier New typeface.

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CERTIFICATION OF IDENTICAL BRIEFS AND VIRUS SCAN

I, Gregg Zegarelli, certify that the text of the E-Brief and the ten (10) hard copies of the brief are identical and are submitted on this same date. I further certify that the .PDF file enclosed was scanned for viruses by Kasperski anti-virus document verification.

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CERTIFICATE OF SERVICE

The undersigned certify that on this date ten (10) true and correct copies of **Appellants' Reply Brief** were served on Marcia M. Waldron, Clerk of Court of the U.S. Court of Appeals for the Third Circuit located at 21400 U.S. Courthouse, 601 Market Street, Philadelphia, PA 19106 by Federal Express courier as provided by Federal Rule of Appellate Procedure 25(a)(2)(B)(ii), and on the following counsel of record pursuant to 3rd Cir. L.A.R. 113.4(a) as Filing Users and by U.S. First Class Mail, postage prepaid, as provided by Federal Rule of Appellate Procedure 25(c):

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