

1 KEKER & VAN NEST, LLP
2 MICHAEL H. PAGE - #154913
3 710 Sansome Street
4 San Francisco, CA 94111-1704
5 Telephone: (415) 391-5400
6 Facsimile: (415) 397-7188

7 Attorneys for Defendant
8 LYCOS INC.

9 UNITED STATES DISTRICT COURT
10 CENTRAL DISTRICT OF CALIFORNIA
11 SANTA ANA DIVISION

12 MARK MISHAK, dba
13 INEEDATV.COM,

14 Plaintiff,

15 v.

16 GOOGLE, INC., AMERICAN
17 ONLINE, INC., NETSCAPE, INC.,
18 MICROSOFT NETWORK, INC., ASK
19 JEEVES, INC. EXCITE, INC.,
20 WEBCRAWLER, INC., YAHOO,
21 INC., CONVERSA, INC., LYCOS,
22 INC., HOTBOT INC., ALTAVISTA
23 INC., CRAIGSLIST INC., RESPOND
24 INC., INFOSEEK INC., YELLOW
25 PAGES INC., PLANETSEARCH INC.,
26 PRONET INC., NORTHERNLIGHT
27 INC., LUCKYSURF INC., COMFIND
28 INC., LIQUIDPRICE INC.,
EARTHLINK INC., DOES 1-100,

Defendants.

Case No. CV07-8258 CAS (JCRx)

**DEFENDANT LYCOS'S MOTION
TO DISMISS, OR IN THE
ALTERNATIVE FOR MORE
DEFINITE STATEMENT**

Date: April 28, 2008
Time: 10:00 a.m.

Date Comp. Filed: December 20, 2007

Trial Date: None

1 Defendant Lycos, Inc. ("Lycos") HEREBY GIVES NOTICE to all parties
2 and their attorneys of record that on April 28, 2008, at 10:00 a.m., or as soon
3 thereafter as counsel may be heard in the above-captioned Court, located at 312 N.
4 Spring Street, Los Angeles, CA 90012, it will, and hereby does, move this Court
5 for an order dismissing this matter with prejudice.

6 Lycos's motion is brought under Federal Rule of Civil Procedure 12(b)(6)
7 and relevant case law, on the ground that the First Amended Complaint ("FAC")
8 fails to state a cause of action against Lycos. In the alternative, Lycos moves for a
9 more definite statement pursuant to Rule 12(e).

10 This motion is made following conferences of counsel pursuant to L.R. 7-3
11 which took place on January 23, 2008 and February 7, 2008. Since that time,
12 Plaintiff's counsel has stated his intention to either dismiss this matter or withdraw
13 as counsel, but has not done neither, and has ignored repeated requests to meet and
14 confer or to extend Lycos' time to respond.

15 I. INTRODUCTION

16 As this Court is already aware from Google *et al.*'s unopposed Rule 11
17 motion, the complaint in this action is wholesale fantasy. The purported business
18 of the Plaintiff Mark Mishak does not exist. His purported trademark appears to be
19 a copyright registration. No advertiser on Google or any of its partners has *ever*
20 used his claimed trademark in any way. The outright fabrications go on and on.
21 Accordingly, and after repeated efforts to get Plaintiff's counsel to withdraw his
22 complaint, we were forced to bring a Rule 11 motion seeking dismissal and fees.
23 That motion is unopposed, and is set for argument on March 31, 2008.

24 In the meantime, however, Mishak has served one defendant, Lycos, while
25 foregoing service on all others. This is not, apparently, a tactical choice. Rather,
26 Mishak's counsel sent his initial complaint to all defendants by mail, apparently
27 under the mistaken impression that this was a proper means of service. It is not, in
28 most states. But Lycos (contrary to the allegations of the FAC) is headquartered in

Massachusetts, where mail service of summons on corporations is recognized, and thus by accident Lycos is the sole served defendant to date.

Mishak's counsel previously agreed to an extension of time for Lycos, so that the response times for the various defendants could be coordinated. But the other defendants still have not been served (despite repeated offers to accept and acknowledge service), and Mishak's counsel has now simply ignored four separate requests for a further extension. Accordingly, Lycos is forced to file the instant motion. It is a simple one, because Mishak's complaint contains no allegations of any acts constituting trademark infringement by Lycos or any other defendant.

II. ARGUMENT

Mishak's FAC purports to be one for trademark infringement. As set forth in our previous Rule 11 motion, however, Mishak has simply copied, wholesale, a three-year-old complaint filed against Google in New York by American Blind & Wallpaper Factory ("American Blind"), and then replaced the names (while keeping the factual allegations). And where those allegations don't fit, he simply ellipses them out. The result is a complaint that fails to state any claim for myriad reasons.

First, Mishak fails to allege ownership of a trademark, without which one cannot allege its infringement. Instead, at Paragraph 32 of the FAC, he simply states that he owns "the following trademark:" and cites Exhibit 1 to the FAC. But Exhibit 1 is a copy of a *copyright* registration form for an unspecified web page.

Second, Mishak fails to allege any *use* of his nonexistent trademark. Instead, in the paragraphs (FAC ¶¶ 55-56) copied from the *American Blind* complaint, Mishak has replaced the allegations of infringement of American Blind's marks with ellipses, leaving no allegations of any use of any purported trademarks. A trademark infringement complaint requires, at a minimum, a claim that the defendant has used the mark at issue in commerce.

Third, because Mishak has simply copied a complaint against Google,

1 AOL, Ask Jeeves, Earthlink, and Netscape, the FAC contains no allegations of any
2 conduct by Lycos. Instead, the factual allegations concerning non-Google
3 companies are directed at those specific companies. FAC ¶ 59. Other than being
4 added to the caption, and a single sentence stating (incorrectly) that Lycos is a
5 Delaware corporation doing business in California, there are no allegations
6 concerning Lycos in the FAC whatsoever. Nor could there be: Lycos is not an
7 advertising partner of Google.

8 *Fourth*, Mishak does not identify any competitor to whom he contends any
9 of his non-existent customers have been diverted. Absent a claim of confusion (in
10 the form of a claim that consumers were confused into purchasing a competitor's
11 goods by misuse of the plaintiff's marks), Mishak has no claim.

12 These are but four of literally dozens of fatal defects in Mishak's FAC, and
13 each individually mandate dismissal. Accordingly, Lycos moves this Court for an
14 order dismissing the FAC with prejudice, or in the alternative, for a more definite
15 statement setting forth with particularity the claims Mishak seeks to state against
16 Lycos.

17 Respectfully Submitted,
18 Dated: March 20, 2008 KEKER & VAN NEST, LLP

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21 By: /Michael H. Page
22 MICHAEL H. PAGE
23 Attorneys for Defendant
24 LYCOS, INC.
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