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

12
 13 GRISOFT, S.R.O.,
 14 Requestor,
 15 vs.
 16 GOOGLE, INC.,
 17 Witness.

Case No. 07-mc-80281-MMC

**NOTICE OF MOTION AND MOTION
 BY JOHN DOE TO QUASH
 SUBPOENA PURSUANT TO
 17 U.S.C. § 512(h)**

Date: March 14, 2008
 Time: 9:00 a.m.
 Judge: The Honorable Maxine M. Chesney
 Courtroom: 7, 19th Floor

21 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

22
 23 PLEASE TAKE NOTICE THAT ON March 14, 2008 at 9:00 a.m., or as soon thereafter
 24 as the matter by be heard in the above entitled Court located at 450 Golden Gate Ave., San
 25 Francisco, California, Movant John Doe will, and hereby does, move this Court for an order
 26 quashing the subpoena directed to Google, Inc., issued by this Court on January 3, 2008 at the
 27 request of Grisoft, S.R.O. (“Grisoft”), seeking, *inter alia*, the identity of Movant John Doe,
 28

1 because Grisoft is attempting to misuse the subpoena process pursuant to the Digital Millennium
2 Copyright Act (“DMCA”), 17 U.S.C. § 512, *et seq.*

3
4 **INTRODUCTION**

5 Movant John Doe (“Doe”) moves to quash the subpoena issued by Grisoft, S.R.O.
6 (“Grisoft”) because Grisoft is attempting to misuse the subpoena process pursuant to the Digital
7 Millennium Copyright Act (“DMCA”), 17 U.S.C. § 512, *et seq.* The DMCA only authorizes
8 subpoenas for alleged copyright claims, yet Grisoft’s request for the issuance of a subpoena is
9 really based upon alleged trademark claims. This Court should not countenance Grisoft’s
10 backdoor effort to obtain the constitutionally-protected identity of Doe by its exploitation of the
11 DMCA.
12

13 Doe maintains a constitutional right to speak namelessly. No subpoena can be
14 valid, whether issued pursuant to the DMCA or some other such means, if it seeks
15 constitutionally protected information. It is for this reason that courts have regularly held that
16 discovery requests of non-parties that attempt to pierce the anonymity of online users must be
17 carefully scrutinized to prevent the exact type of abuse Grisoft is attempting to perpetrate by its
18 subpoena.
19

20 Grisoft’s Request for the Issuance of a Subpoena Pursuant to 17 U.S.C. § 512(h)
21 of the DMCA (the “Subpoena”) must be evaluated only for Grisoft’s alleged copyright claims.
22 This Court should not consider any other claims Grisoft purports to have.¹ Specifically, this
23 Court must consider whether Grisoft has illustrated with any degree of specificity its ability to
24 establish a *prima facie* case of copyright infringement. On the face of its Subpoena, Grisoft must
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¹ Of course, Doe disputes that Grisoft has any such claims.

1 demonstrate ownership of the copyright and copying thereof. Here, Grisoft has failed to meet its
2 burden. Accordingly, this Court should quash the Subpoena served on Google.

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4 **STATEMENT OF ISSUES TO BE DECIDED**

5 Whether the subpoena seeking the identity of Movant John Doe must be quashed.

6 **RELEVANT FACTUAL/PROCEDURAL BACKGROUND**

7 On or about December 13, 2007, Grisoft filed a Request with this Court for the
8 issuance of a subpoena to Google purportedly in accordance with 17 U.S.C. § 512(h). Google
9 was served with the Subpoena on or about January 3, 2008.

10
11 By its Subpoena, Grisoft seeks various categories of Google documents pursuant
12 to the DMCA on account of the registrant of the domain name, <<avg-soft.com>> (the
13 “Website”), alleged infringement of Grisoft’s “copyrights and, coincidentally our client’s
14 [Grisoft] trademarks” relating to certain software known as “AVG.” To support its claims,
15 Grisoft states only “on information and belief” that the Website: 1) provides “screenshots of
16 Grisoft’s proprietary software; and 2) is distributing – for a fee – Grisoft’s proprietary software.”

17
18 Grisoft, however, refers broadly to its registered copyrights for the AVG software
19 but relies only upon its **trademark** registrations in support of its Subpoena under the DMCA. In
20 its takedown letter and the Appendix attached to its Subpoena as Exhibit B, Grisoft specifically
21 directs this Court only to various trademark registrations. In fact, nowhere in its Subpoena or
22 any of the accompanying documents does Grisoft establish with any scintilla of specificity that it
23 actually maintains a copyright for AVG.
24

25 In accordance with its custom and practice, Google notified Doe of Grisoft’s
26 subpoena request. Doe subsequently informed Google of its intent to file this Motion to Quash
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1 and requested that Google delay responding to the subpoena pending the resolution of this
2 Motion.

3
4 Specifically, the Subpoena requests three broad categories of documents relating
5 to the Website registrant:

6 1. Any and all documents identifying the proponent of the
7 sponsored website avg-soft.com.

8 2. Identify any and all facts related to the Proponent of the
9 “avg-soft.com” website, including name, company name, mailing
10 address, e-mail address, phone number and produce all documents
11 or correspondence evidencing such information.

12 3. Any and all documents or correspondence [*sic*], pertaining to
13 the Proponent’s application and subsequent enrollment in the
14 sponsored advertising program, including, but not limited to, date
15 applied, date enrolled, key terms chosen in connection with the
16 sponsored advertising, any other domains the Proponent is
17 currently advertising through your sponsored advertising program,
18 and all other documentation in connection with the Proponent’s
19 Google sponsored advertising program.²

17 ARGUMENT

18 It is well-established that civil subpoenas seeking information regarding
19 anonymous individuals raise First Amendment concerns. *See, e.g., Sony Music Entertainment v.*
20 *Does*, 326 F, Supp. 2d 556, 563 (S.D.N.Y. 2004). Because the First Amendment protects
21 anonymous speech and association, the use of the judicial process through the DMCA’s
22 subpoena powers to pierce anonymity is subject to a qualified privilege. *See Buckley v. Am.*
23 *Const. Law Fdn.*, 525 U.S. 182, 192 (1999). The Supreme Court has repeatedly “recognized that
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27 ²Even if the Subpoena complied with the terms of the DMCA, Grisoft is not permitted to
28 engage in a fishing expedition of the nature of Request No. 3. Assuming *arguendo* that Grisoft
appropriately stated a copyright claim relating to the Website, the DMCA does not authorize
Grisoft to issue a subpoena and take unfettered discovery regarding matters having no relevance
whatsoever to AVG software, the Website or any alleged infringement suffered by Grisoft.

1 ‘the line between speech unconditionally guaranteed and speech which may legitimately be
2 regulated... is finely drawn,’ ” and thus “ ‘[t]he separation of legitimate from illegitimate speech
3 calls for sensitive tools.’ ” *Blount v. Rizzi*, 400 U.S. 410, 417 (1971) (*quoting Speiser v. Randall*,
4 357 U.S. 513, 525 (1958)). In light of the Website registrant’s qualified privilege, Doe submits
5 that Grisoft’s Subpoena does not comport with the purpose of the DMCA. And therefore, Doe
6 asks this Court to quash the Subpoena.
7

8 Section 17 U.S.C. § 512(h) subpoenas were designed by Congress for a strictly
9 limited purpose – to identify a known case of copyright infringement – **not trademark**
10 **infringement**. It is patently obvious from the Subpoena that Grisoft is basically making
11 trademark-related claims, but seeking to take advantage of copyright laws. Section 512(h) does
12 not permit such a fishing expedition.
13

14 The Supreme Court has warned against the blurring of boundaries between
15 trademark and copyright law. *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23,
16 123 S.Ct. 2041, 156 L.Ed.2d 18 (2003). In *Dastar*, Twentieth Century Fox argued for an
17 interpretation of the Lanham Act that would have established a cause of action under trademark
18 law for “misrepresentation of authorship of noncopyrighted works.” *Id.* at 35. The Court
19 reasoned that this would cause an overlap with copyright law and rejected it. The Court warned
20 that disregarding the trademark/copyright law distinction “would create a species of mutant
21 copyright law.” *Id.* at 34.
22

23 Here, Grisoft’s strategy is clear. With a wink and a nod, Grisoft makes broad-
24 sweeping allegations of copyright infringement and attempts to rely upon its trademark
25 registrations hoping that Doe and Google would not recognize its transparent effort to misuse the
26 DMCA. Accordingly, Doe asks that this Court quash the Subpoena in its entirety.
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1 Alternatively, if this Court finds that Grisoft has stated a prima facie copyright
2 claim with sufficient specificity relating to AVG, the Court should still quash Grisoft’s
3 Document Request No. 3 in the Subpoena. Request No. 3 seeks the identity of “any other
4 domains” the registrant is “currently advertising through your sponsored advertising program,
5 and all other documentation in connection with the Proponent’s Google sponsored advertising
6 program.” Clearly, this request is beyond the scope of any reasonably related infringement claim
7 concerning AVG and is a blatant misuse of the subpoena provisions of the DMCA.
8

9 WHEREFORE, for the foregoing reasons, John Doe moves this Court to quash
10 Grisoft’s Subpoena Directed to Google Pursuant to 17 U.S.C. § 512(h).
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12
13 SAUL EWING LLP

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15 Dated: January 31, 2008

16 By: _____ /s/
Henry A. Platt

17 Attorneys for Movant
18 JOHN DOE
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1 **CERTIFICATE OF SERVICE**

2 I HEREBY CERTIFY that on this 1st day of February, 2008, I sent via electronic
3 and first-class mail a copy of the foregoing **NOTICE OF MOTION AND MOTION BY**
4 **JOHN DOE TO QUASH SUBPOENA PURSUANT TO 17 U.S.C. § 512(h)** to Michael L.
5 Meeks, Esquire, Pepper Hamilton LLP, 5 Park Plaza, Suite 1700, Irvine California 92614
6 (meeksm@pepperlaw.com) and Jennifer L. Lambert, Esquire, Pepper Hamilton LLP, 3000 Two
7 Logan Square, Eighteenth and Arch Streets, Philadelphia, PA 19103-2799
8 (lambertj@pepperlaw.com), Counsel for Requestor, Grisoft, S.R.O. and Google, Inc. c/o Google
9 Legal Support/DMCA Complaints, 1600 Amphitheatre Parkway, Mountain View, CA 94043
10 (legal-support@google.com).
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14 _____
15 /s/
16 Henry A. Platt
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