

1 P. CRAIG CARDON, Cal. Bar No. 168646
 BRIAN R. BLACKMAN, Cal. Bar No. 196996
 2 KENDALL M. BURTON, Cal. Bar No. 228720
 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
 3 Four Embarcadero Center, 17th Floor
 San Francisco, California 94111-4106
 4 Telephone: 415-434-9100
 Facsimile: 415-434-3947
 5

6 TIMOTHY H. KRATZ (*Admitted Pro Hac Vice*)
 LUKE ANDERSON (*Admitted Pro Hac Vice*)
 7 MCGUIRE WOODS, L.L.P
 1170 Peachtree Street, N.E., Suite 2100
 8 Atlanta, Georgia 30309
 Telephone: 404.443.5500
 9 Facsimile: 404.443.5751

10 Attorneys for DIGITAL ENVOY, INC.

11 UNITED STATES DISTRICT COURT
 12 NORTHERN DISTRICT OF CALIFORNIA
 13 SAN JOSE DIVISION

14 DIGITAL ENVOY, INC.,

15 Plaintiff/Counter defendant,

16 v.

17 GOOGLE, INC.,

18 Defendant/Counterclaimant.
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Case No. C 04 01497 RS

**DIGITAL ENVOY, INC.'S NOTICE OF
 MOTION AND RULE 56(F) MOTION**

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1 **I. INTRODUCTION**

2 Pursuant to Federal Rule of Civil Procedure 56(f), Digital Envoy moves for a continuance
3 of Google’s motions for summary judgment until such time as the completion of fact discovery
4 and a ruling on Digital Envoy’s Motion to Compel.

5 **II. ARGUMENT AND CITATION OF AUTHORITY**

6 Digital Envoy principally contends that Google’s motion for summary judgment should be
7 denied as there are either genuine issues of material fact or that there are not and Digital Envoy is
8 the party entitled to summary judgment. Digital Envoy respectfully submits that the record before
9 the Court amply establishes those points.

10 Fed.R.Civ.P. 56(f) provides as follows:

11 Should it appear from the affidavits of a party opposing the
12 motion that the party cannot for reasons stated present by
13 affidavit facts essential to justify the party’s opposition, the
14 court may refuse application for judgment or may order a
continuance to permit affidavits to be obtained or depositions to
be taken or discovery to be had or may make such other order
as is just.

15 Digital Envoy brings this motion in the alternative on three issues. First, Google claims
16 that its alleged belief that it was entitled to use Digital Envoy’s proprietary information in
17 AdSense was reasonable. Among other factual and legal responses, Digital Envoy has asked
18 witnesses regarding Google’s policies and procedures in place to prevent such an innocent
19 violation of a license. Digital Envoy has specifically requested 30(b)(6) testimony on this issue.
20 (See Kratz Supplemental Declaration, Ex. 10). To the extent the Court is inclined to accept
21 Google’s self serving claim that “it thought it could do what it did” defense, despite (1) the
22 negotiated terms of the contract preventing the conduct, (2) the assurances at time of contracting
23 that it would not do what it did, (3) the stated understanding immediately after the time of the
24 contract that the information was under license and had to be treated accordingly, (4) the stated
25 understanding during the term of the contract that it could not do what it did, and (5) the complete
26 lack of evidence that the persons implementing AdSense reviewed the license agreement at all,
27 then Digital Envoy requests the opportunity to inquire of Google whether it had any procedures in
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1 third parties involved in Digital Envoy's business. In support of this motion and in opposition to
2 Google's motions, Digital Envoy has submitted a publicly available copy of an Insertion Order
3 between Google and Epinions. (Kratz Supplemental Declaration, Ex. 15). That document contains
4 the following provision:

5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]

9 Further, in the Ask Jeeves agreement, Google warrants that it has full power and authority
10 to perform its obligations and agrees to indemnify Ask Jeeves against any claim to the contrary
11 (which claim Digital Envoy can bring against all of Google's AdSense partners). To the extent the
12 Court is inclined to accept Google's attack on Digital Envoy's Lanham Act claim despite (1)
13 Digital Envoy's allegations that Google improperly sold Digital Envoy's technology as its own,
14 (2) Google's failure to submit evidence to the contrary, (3) evidence documenting Google's
15 program to convince the third party web sites not to geo-locate on their own but instead accept
16 Google's offer of such service, (4) Google's general marketing of the geo-location services in
17 connection with the AdSense program, and (5) the contracts available in the public domain that
18 establish Google does palm off Digital Envoy's proprietary information as its own, then Digital
19 Envoy requests the opportunity to obtain full discovery concerning Google's negotiations and
20 agreements with its AdSense partners, and the agreements with AdWords customers.

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III. CONCLUSION

Accordingly, Digital Envoy respectfully requests in the alternative to a denial of Google's motions, that the Court continue its consideration of the motions until such time as Google has provided full discovery on the issues raised therein.

DATED: May 2, 2005

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By _____ /s/ Brian Blackman
P. CRAIG CARDON
BRIAN R. BLACKMAN

TIMOTHY H. KRATZ (*Pro Hac Vice To Be Applied For*)
LUKE ANDERSON (*Pro Hac Vice To Be Applied For*)
MCGUIRE WOODS, L.L.P
1170 Peachtree Street, N.E., Suite 2100
Atlanta, Georgia 30309
Telephone: 404.443.5706
Facsimile: 404.443.5751

Attorneys for DIGITAL ENVOY, INC.