UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

NET JUMPER SOFTWARE, L.L.C.
a Michigan limited liability corporation,

Plaintiff/Counterclaim Defendant,

v.

GOOGLE INC.,
a Delaware corporation

Defendant/Counterclaim Plaintiff.

Civil Action No. 04-70366-CV
Hon. Julian Abele Cook

Magistrate Judge R. Steven Whalen

/

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GOOGLE'S MOTION TO STRIKE FROM EVIDENCE THE CD-ROM FILED WITH NETJUMPER'S NOTICE OF AMENDED FILING

Google Inc. ("Google") hereby moves pursuant to Rules 7 and 16 of the Federal Rules of Civil Procedure, E.D. Mich. Local Rule 7.1 and 26.2, and the Stipulated Scheduling Order entered on September 12, 2005, concerning the briefing schedule for Google's motion for summary judgment, to strike from evidence the CD-ROM filed with NetJumper Software L.L.C.'s Notice of Amended Pleading, which was filed with the Court on December 20, 2005. The CD-ROM is untimely, hearsay, irrelevant, and prejudicial. This Motion is supported by the accompanying Brief in Support, the pleadings, and hearing transcript from Google's motion for summary judgment.

Pursuant to E.D. Mich. Local Rule 7.1(a), Google conferred with counsel for NetJumper Software L.L.C. ("NetJumper") and explained the nature of this motion and the legal basis, but was unable to obtain the concurrence in the relief sought.

Respectfully Submitted,

Dated: January 3, 2006

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BRIEF IN SUPPORT OF GOOGLE'S MOTION TO STRIKE FROM EVIDENCE THE CD-ROM FILED WITH NETJUMPER'S NOTICE OF AMENDED FILING

STATEMENT OF THE ISSUE

Whether Google's Motion to Strike should be granted and Plaintiff NetJumper's belated submission of a CD-Rom to this Court be stricken.

Google responds "YES".

I. INTRODUCTION

One week *after* the Court held a hearing on Defendant Google Inc.'s ("Google") summary judgment motion, Plaintiff NetJumper Software, L.L.C. ("NetJumper") filed new "evidence" in the form of a CD-ROM purportedly depicting the operation of the prior art CyberPilot Pro program ("CyberPilot") in a video presentation. The video is a reenactment by NetJumper's trial counsel (Andrew Kochanowski) of an alleged reenactment by NetJumper's technical expert (Bernard Galler) of CyberPilot operating with the prior art Microsoft Internet Explorer browser ("Explorer").

NetJumper's belated submission should not be accepted for several reasons. First, Google did not even rely upon CyberPilot operating with Explorer to anticipate the '172 Patent. (*See* Google Reply Brief at 8.) Rather, Google chiefly relied upon the CyberPilot tutorial, and to a limited extent upon CyberPilot operating with the prior art Netscape Navigator Web browser ("Netscape"). As such the video is irrelevant to the issues before the Court. Further, NetJumper's video "reenactment" and configuration of the CyberPilot in operation is inaccurate and misleading.[1] Finally, NetJumper had ample time to present this so-called evidence at the summary judgment hearing but elected not to do so.

Google requests that NetJumper's CD-ROM be stricken from the evidentiary record because it is untimely and unsupported by any declaration, it is inadmissible hearsay, and it is more confusing than probative.[2]

II. FACTS

In its motion for summary judgment of invalidity filed on August 17, 2005, Google relied upon the CyberPilot Pro prior art, which is a software program that facilitates Internet browsing and that is substantially identical to the described embodiment of the '172 Patent. (*See* Corrected

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[1] The video begins, "This is a demonstration of the CyberPilot Pro as produced by Google in this litigation. This is the same copy that was used during the demonstration ... by Professor Bernard Galler in support of NetJumper's opposition to the summary judgment motion..." Google did not rely upon or even produce CyberPilot operating with Explorer.

[2] It is not even clear under what authority NetJumper made the subject filing or what NetJumper has "amended" with its filing.

Brief in Supp. of Google's Motion for Summary Judgment ("Brief") at 5.) Google chiefly relied upon the CyberPilot tutorial, which explains this prior art in detail and shows actual screen shots from a computer running CyberPilot in conjunction with Netscape. (Declaration of Randall Stark filed in support of Google's Motion for Summary Judgment ("Stark Dec.") Ex. B; Declaration of Joseph Hardin in Support of Google's Motion for Summary Judgment ("Hardin Dec.") Ex. F.) Google also relied, to a limited extent, on a re-created working copy of CyberPilot as used with Netscape, as shown in the CyberPilot tutorial and in the '172 Patent. (*See*, e.g., Stark Dec., Ex. B at 13 and '172 Patent, Fig. 4.)

On September 12, 2005, the Court granted a stipulated briefing schedule setting September 27 as the deadline for NetJumper to file its opposition to Google's summary judgment motion. The Court also permitted Google to file its reply brief 14 days prior to the motion hearing. NetJumper timely filed its opposition brief, Google timely filed its reply brief, and the court held a hearing on December 14, 2005. The CD-ROM at issue and video recreation by counsel that it contains were neither referred to nor relied upon by NetJumper in its opposition papers.

At the hearing, both parties offered oral argument and employed slide presentations. Both parties provided printed versions of the slides to the Court and to each other. NetJumper intimated during the hearing that it intended to present a DVD to the Court. However, no such presentation was made and no DVD (or CD-ROM) was provided by NetJumper at the hearing – at least not to counsel for Google. On December 20, NetJumper filed its slide presentation and a "CD containing the CyberPilot Pro" with the Court and served, by U.S. mail, a copy on Google. This was the first time Google was provided this CD-ROM.

III. ARGUMENT

A. The filing of the CD-ROM is untimely and should not be permitted.

Local Rule 7-1(d) sets forth the briefing schedule for dispositive motions. Here, NetJumper's brief in opposition to Google's summary judgment motion was due under the stipulated schedule by September 27, 2005. NetJumper timely filed its opposition on September

27 and Google timely submitted its reply brief on November 3. NetJumper neither filed nor sought leave to file additional briefing or documents. The court did not solicit additional briefing or evidence from the parties, and NetJumper has not shown any excusable neglect for its failure to timely file or present the CD-ROM. *See U.S. v. Thompson*, 82 F.3d 700, 702 (6th Cir. 1996) (citing *Pioneer Inv. Servs. Co. v. Brunswick Assocs.*, 507 U.S. 380, 388 (1993)). Accordingly, any pleadings and "evidence" NetJumper now presents are untimely and improper. Google has been given no opportunity to rebut their contents as it would have if NetJumper had timely submitted the CD-ROM as an attachment to Dr. Galler's declaration or in support of Plaintiff's opposition brief. This submission is just an attempt to present extraneous, *ex parte* briefing and argument in violation of the stipulated briefing schedule entered by the Court and E.D. Mich. Local Rule 26.2. If NetJumper wanted to present this information, which was apparently at its disposal during the hearing, it should have presented it then.

B. The CD-ROM is inadmissible hearsay.

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Fed. R. Evid. 801(c). Hearsay is inadmissible except as provided elsewhere in the Federal Rules of Evidence. Fed. R. Evid. 802; *Dawson v. City of Kent*, 682 F. Supp. 920, 922 (N.D. Ohio 1988).

The CD-ROM is hearsay. It is also unaccompanied by any declaration or affidavit explaining its origin or provenance. Fed.R.Civ.P. 56(e). In the CD-ROM, Mr. Kochanowski narrates as he explains ***his*** reenactment of ***Dr. Galler's*** reenactment of CyberPilot in operation.[3] The CD-ROM presentation depends on statements made and conclusions drawn by Dr. Galler, all of which are offered to prove the truth of the matter asserted – that CyberPilot operates in a particular way and that it does not invalidate the '172 Patent. But neither the narrator, nor the

[3] Dr. Galler could not get CyberPilot or Netscape to work so he went to Mr. Kochanowski's office to use CyberPilot. There, the program was configured for Explorer but not for Netscape, as identified and analyzed by Google in its papers. (*See* Google Reply Brief, Exhibit 1 (Galler Depo. at 51:15-53:1).) Moreover, there is no foundation for Dr. Galler to compare (let alone for counsel to compare) the functionality of CyberPilot working with Netscape to CyberPilot working with Explorer.

operator of the computer, nor the sponsor of the CD-ROM is Dr. Galler. As such, the contents of the submission are entirely hearsay and Google can find no exception to the rule barring its admission.

C. The CD-ROM's probative value is substantially outweighed by its prejudicial and confusing nature.

According to Federal Rule of Evidence 403, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice or confusion of the issues. Fed. R. Evid. 403. Evidence taking the form of a reenactment of an earlier event is probative if the conditions of the experiment were identical with or similar to the conditions of the earlier event. *U.S. v. Baldwin*, 418 F.3d 575, 579-80 (6th Cir. 2005) (citations omitted) (affirming district court's refusal to admit a videotaped reenactment that was not "similar to the events that it purports to reenact."); *see also Persian Galleries, Inc. v. Transcontinental Ins. Co.*, 38 F.3d 253 (6th Cir. 1994). The central question is "whether the demonstration is sufficiently close in appearance to the original accident to create the risk of misunderstanding." *Fusco v. General Motors Corp.*, 11 F.3d 259, 263-64 (1st Cir. 1993). When the evidence may go before a jury,

> [t]he concern lies not with use of tape or film . . . but with the deliberate recreation of an event under staged conditions. Where that recreation could easily seem to resemble the actual occurrence, courts have feared that the jurors may be misled because they do not fully appreciate how variations in the surrounding conditions, as between the original occurrence and the staged event, can alter the outcome.

Id.; *see also McKnight v. Johnson Controls, Inc.*, 36 F.3d 1396, 1402 (8th Cir. 1994) (noting that "[t]he closer the experiment gets to simulating the [actual event], the more similar the conditions of the experiment must be to the [actual event] conditions."). The party seeking to introduce reenactment evidence bears the burden of establishing a foundation of similarity between the reenactment and the conditions that existed at the time of the actual event. *Nachtsheim v. Beech Aircraft Corp.*, 847 F.2d 1261, 1278 (7th Cir. 1998).

In *Lekkas v. Mitsubishi Motors Corp.*, 2005 WL 2989899 (N.D. Ill. 2005), the district court granted a motion to strike from evidence a videotaped reenactment of an automobile

accident alleged to be substantially similar to the actual event. *Id.* at *2-4. The party introducing the videotape failed to establish a foundation of similarity between the reenactment and the conditions existing at the time of the event. *Id.* at *4. The court therefore held that "the danger of confusion substantially outweighs the probative value of the videos." *Id.*

Here, although NetJumper has presented the disk to the Court and not to a jury, the concerns of Federal Rule of Evidence 403 persist. The video presentation is an inaccurate reenactment of the CyberPilot software and does not even squarely address Google's invalidity contentions – that the CyberPilot tutorial, as well as the CyberPilot Pro program working with the prior art Netscape Navigator Web browser, anticipates the '172 Patent.[4] The presentation's superficial similarity to the actual functioning of CyberPilot is not probative but confusing to the Court and highly prejudicial to Google because Google has had no opportunity to observe the actual source of the submission, nor to examine the participants, in order to assess and rebut any potentially relevant subject matter.

D. If the Court considers the CD-ROM, the Google requests an opportunity to respond.

If the CD-ROM is admitted as part of the record, Google respectfully requests an opportunity to respond by (1) inspecting the computer hardware and software used to create the CD-ROM (including having the opportunity to question counsel or his consultants about the circumstances surrounding the creation of the CD-ROM); and (2) filing a short submission of its own commenting on the CD-ROM contents.

[4] Even so, in the video Mr. Kochanowski refers to the New Map dialog box (Stark Dec., Ex. B (page 5)) as a "search box," (at 0:01:13). Yet NetJumper's opposition brief stated of CyberPilot: "Nor can it be said that it constructs a 'search window' of any kind separate from the 'first and second icons...". (Opp. at 33.)

IV. CONCLUSION

NetJumper's submission of the CD-ROM is untimely, inadmissible hearsay, and more prejudicial and confusing than probative. For these reasons, Google respectfully requests that the Court strike NetJumper's CD-ROM from evidence and enter the proposed Order attached as Exhibit 1.

Respectfully Submitted,

Dated: January 3, 2006

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CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that on January 3, 2006 I electronically filed the foregoing Google's Motion to Strike From Evidence the CD ROM Filed With NetJumper's Notice of Admended Filing with the Clerk of the Court for the Eastern District of Michigan using the ECF System which will send notification to the following registered participants of the ECF System as listed on the Court's Notice of Electronic Filing: Andrew Kochanowski and Michael H. Baniak.

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