

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

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

Plaintiff/Counterclaim
Defendant,

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

v.

Magistrate Judge R. Steven Whalen

GOOGLE INC.,
a Delaware corporation

Defendant/Counterclaim
Plaintiff.

Andrew Kochanowski
Sommers Schwartz, P.C.
2000 Town Center, Suite 900
Southfield, MI 48075

Michael H. Baniak
Baniak Pine & Gannon
150 N. Wacker Drive, Suite 1200
Chicago, IL 60606

Attorneys for NetJumper Software, L.L.C.

Kathleen A. Lang (P34695)
L. Pahl Zinn (P57516)
DICKINSON WRIGHT PLLC
500 Woodward Avenue, Suite 4000
Detroit, MI 48226-3425
(313) 223-3500

Frank E. Scherkenbach
FISH & RICHARDSON P.C.
225 Franklin Street
Boston, MA 02110-2804

Howard G. Pollack
FISH & RICHARDSON P.C.
500 Arguello Street, Suite 500
Redwood City, CA 94063

Attorneys for Google Inc.

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

I. INTRODUCTION

Despite having ample opportunity to submit so-called demonstrative evidence to the Court, either with its briefing or at oral argument, NetJumper waited until after its expert was deposed, after briefing was concluded, and after oral argument to submit its freshly-minted CD-ROM video evidence to the Court. This further attorney argument by NetJumper's trial counsel, Mr. Kochanowski, is an untimely submission, unsupported hearsay, and irrelevant and prejudicial. For any and all of these reasons, the CD-ROM should be stricken from the record.

II. THE CD-ROM IS UNTIMELY; NETJUMPER SAYS "SO WHAT."

NetJumper largely ignores Google's arguments on the untimeliness of the filing of CD-ROM. Skirting this issue, NetJumper argues that Google was "on notice" that the CD-ROM existed, even though it admits it did not timely provide a copy to Google or the Court. NetJumper's Response Brief in Opp. to Google's Mot. to Strike ("Resp.") at 3, 5.

NetJumper redirects the Court to its novel "corollary argument" theory, which is to suggest that information does not need to be timely filed under the briefing schedule if it is "corollary" information that has been repackaged in a different format. Resp. at 3-6. NetJumper provides no authority whatsoever to support any of its irrelevant argument on this point – or for that matter anything else in its brief.¹

Whether the video presentation was served on Google with prior "notice" or is "corollary" and simply restates the assertions NetJumper already presented makes no difference: what matters is that Plaintiff improperly presented attorney argument outside the confines of the briefing schedule and the hearing. Thus, the CD-ROM is untimely and should be stricken from the record.

¹ NetJumper also asserts that the video on the CD-ROM is "merely a visual aid to the Court of the way the CyberPilot Pro program operates and how certain screenshots of webpages contained in the NetJumper's opposition brief came about." Resp. at 6. NetJumper's statement is misleading for a number of reasons, including that the video was made the day before the hearing, not in September when NetJumper's opposition to Google's summary judgment was filed.

III. THE CD-ROM IS HEARSAY: THERE IS NO “COROLLARY ARGUMENT” EXCEPTION TO HEARSAY.

The CD-ROM is an out-of-court statement made by Mr. Kochanowski to prove the truth of the matter asserted: that CyberPilot functions only in one particular way and so it is not prior art. Fed. R. Evid. 801(c). NetJumper’s arguments to the contrary fail to address the hearsay issue: there is no “corollary argument” exception to hearsay, nor is the hearsay problem solved if the Court could somehow verify Mr. Kochanowski’s attorney argument with information that is not before it.² If Mr. Kochanowski wanted to give a demonstration to the Court, he should have done so with NetJumper’s briefing or at oral argument where it could be rebutted by Google, for example with its own demonstrative evidence. Instead, NetJumper submitted its video in a manner that foreclosed Google from mounting any challenge to its source and accuracy.

Furthermore, NetJumper asserts that “Google’s argument that the video is not corroborated by a declaration or affidavit is unfounded.” Resp. at 7. However, Google did not assert that the video was “not corroborated;” rather, Google argued that the video was “unaccompanied by any declaration or affidavit explaining its origin or provenance.” Google’s Brief in Sup. of Mot. to Strike at 3. Indeed, the video was simply submitted to the court – and to Google – without *any* explanation. In its brief, NetJumper attempts to brush aside the requirements of Rule 56(e) of the Federal Rules of Civil Procedure by contending that “Dr. Galler’s affidavit supports the video presentation.” Resp. at 7. Yet Dr. Galler’s affidavit was sworn to in September while the video was made nearly three months later. In signing his declaration in September, Dr. Galler cannot possibly have foreseen – let alone encompassed – materials created in the future. In this regard, NetJumper’s arguments further underscore the hearsay problem of the CD-ROM by explaining that Mr. Kochanowski’s statements and actions in the video are supported by Dr. Galler’s affidavit.

² In this regard, NetJumper argued that the CD-ROM video “presentation of the search can be performed by anyone utilizing the CyberPilot Pro program, and it is nothing more than a demonstration that can be easily replicated by any individual.” Resp. at 6.

IV. THE CD-ROM'S PROBATIVE VALUE IS SUBSTANTIALLY OUTWEIGHED BY ITS PREJUDICIAL AND CONFUSING NATURE; NETJUMPER'S ARGUMENTS TO THE CONTRARY OBFUSCATE THE FUNDAMENTAL ISSUE.

While in the untimeliness section of its brief, NetJumper downplays the significance of the narrated video on the CD-ROM as “*merely a visual aid* to the Court of the way the CyberPilot Pro program operates and how certain screenshots of webpages contained in NetJumper’s opposition brief came about,” in the prejudice section of its brief NetJumper inflates it as “a *more demonstrative presentation* to assist the Court in its understanding of the issues, and was submitted for this purpose.” *Compare*, Resp. at 6 to Resp. at 8 (emphasis added). NetJumper, as with its opposition to Google’s summary judgment motion, confuses the issues.

Google asserted that CyberPilot, which worked with Netscape Navigator, anticipates the ’172 Patent. Google primarily relied on the CyberPilot tutorial for its analysis, which shows CyberPilot with Netscape Navigator. This analysis is explained in Prof. Hardin’s declaration in support of Google’s motion for summary judgment at Exhibit F. Prof. Hardin’s Exhibit F is an invalidity chart analyzing each claim and citing the text, page numbers, and graphics from the CyberPilot tutorial, which is attached as Exhibit B to Mr. Stark’s *unchallenged* declaration. However, NetJumper and Dr. Galler have conveniently chosen to ignore this fact because they find it easier to refute their own independent arguments for the invalidity of NetJumper’s patent.³

NetJumper extends its feigned misunderstanding of Google’s arguments for invalidity to the CD-ROM, which, like Dr. Galler’s declaration, pairs CyberPilot with a different piece of software – Internet Explorer, which is neither depicted in the CyberPilot tutorial nor used in Google’s briefing on the prior art – and manipulates its operation to disguise the true nature and

³ NetJumper’s opposition brief also characterizes the CD-ROM as containing “a video depiction of NetJumper’s counsel *performing internet searches* while utilizing the CyberPilot Pro program. Any individual using the program can perform the same *search*.” Resp. at 6 (emphasis added). Google notes that NetJumper’s marquee issue in its opposition to Google’s motion for summary judgment was that CyberPilot could not perform a search on the Internet: “First and foremost, CyberPilot cannot anticipate any of Claims 1-8 because *it is not software for use with a ‘search.’*” See NetJumper’s Response to Defendant Google’s Motion for Summary Judgment of Non-Infringement and Invalidity of the ’172 Patent, at 32 (emphasis added).

functionality of the CyberPilot prior art. Such manipulation implicates the precise concern of the line of cases including *U.S. v. Baldwin*, 418 F.3d 575, 579-80 (6th Cir. 2005) – also ignored in its entirety by NetJumper – that clearly signals the evidentiary perils involved in re-creation testimony. Because of the lack of authentication described above and NetJumper’s one-dimensional reenactment of Dr. Galler’s re-creation of a different piece of prior art not used by Google in its briefing (CyberPilot with Internet Explorer), its probative value is outweighed by its prejudicial and confusing nature.

V. CONCLUSION

The NetJumper CD-ROM presents an irrelevant view of CyberPilot and obfuscates the issues in this case. This late-filed, hearsay, and irrelevant attorney argument is far less beneficial to the Court than it is confusing and prejudicial to Google. Google respectfully requests that it be stricken from evidence, and if not, that Google be granted an opportunity to take discovery on these materials and respond with a rebuttal.

Respectfully submitted,

By: /s/ L. Pahl Zinn

L. Pahl Zinn
DICKINSON WRIGHT PLLC
500 Woodward Avenue, Suite 4000
Detroit, MI 48226-3425
(313) 223-3500
pzinn@dickinson-wright.com
Attorney No. P57516

Attorneys for Google Inc

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CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that on January 27, 2006, I electronically filed the foregoing Reply Brief in Support of Google's Motion to Strike From Evidence the CD-ROM Filed With NetJumper's Notice of Amended 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:

Michael H. Baniak
baniak@bpglaw.com

Andrew Kochanowski
akochanowski@sommerspc.com

DICKINSON WRIGHT PLLC

By: /s/ L Pahl Zinn
L. Pahl Zinn (P57516)
500 Woodward Avenue, Ste. 4000
Detroit, MI 48226
Tel: (313) 223-3500
Fax: (313) 223-3598
pzinn@dickinsonwright.com