

EXHIBIT A

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DIVISION OF TEXAS
3 MARSHALL DIVISION

4 FPX, LLC d/b/a FIREPOND,) Civil Action No.
5 Individually and on Behalf) 2:09-cv-00142-TJW
6 of All Others Similarly)
7 Situated,)

8 Plaintiff,)

9 v.)

10 GOOGLE, INC., YOUTUBE, LLC,)
11 AOL, LLC, TURNER BROADCASTING)
12 SYSTEM, INC., MYSPACE, INC.)
13 AND IAC/INTERACTIVECORP,)

14 Defendants.)

15 THE RODNEY A. HAMILTON LIVING) Civil Action No.
16 TRUST and JOHN BECK AMAZING) 2:09-cv-00151-TJW-CE
17 PROFITS, LLC, Individually and)
18 on Behalf of All Others)
19 Similarly Situated,)

20 Plaintiffs,)

21 v.)

22 (1) GOOGLE INC.; and)
23 (2) AOL LLC,)

24 Defendants.)
25

26 DEPOSITION OF ITAMAR SIMONSON, Ph.D.,
27 taken on behalf of Plaintiffs, at 601
28 South California Avenue, Palo Alto,
29 California, commencing at the hour
30 of 10:09 a.m., Thursday, September 2,
31 2010, before Adrienne L. Andreini,
32 Certified Shorthand Reporter, License
33 No. 4804.

1 APPEARANCES

2 For the Plaintiffs:

3 RUSS, AUGUST & KABAT

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8 For the Defendants:

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10 By: CARL C. BUTZER, Attorney at Law
11 - and -
12 SHANNON ZMUD TEICHER, Attorney at Law
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15 (214) 953-6000

16 For the Defendant GOOGLE, INC.:

17 GOOGLE, INC.

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1 Do you believe that you could have constructed
2 a survey to disprove those results?

3 A. It's not even clear what his results were, but
4 let's say if I decided that I could make sense out of at
5 least some of his results, conducting a survey for such
6 claims -- And I don't want to go too much beyond the
7 scope of the question, but as I understand it, the
8 claims -- or the class in this case -- or the classes in
9 this case are alleging that there is mass confusion
10 pretty much between all trademark keywords and all
11 sponsor links, or most of them.

12 Now, trademarks fall into many different
13 categories. They vary on numerous different things.
14 Sponsor links vary on many different things. The
15 similarity or relation between sponsor links and
16 trademarks vary on many different things, and there are
17 many other differences described in my report.

18 So now you have to wonder, how can I go about
19 trying to prove or evaluate such a mega claim, if you
20 will. It's very challenging just because I think the
21 claim, as a marketing expert and consumer behavior, I
22 think to me it just makes no sense.

23 But putting that aside, I guess in theory you
24 could take a random sample of categories, a random
25 sample of trademarks, a random sample of actual sponsor

1 links and conduct maybe a hundred, 200 surveys and
2 evaluate whether the claim that it doesn't matter, there
3 is always confusion between trademarks used as keywords
4 and sponsor links is supported.

5 It seems to me that the results of such
6 investigation, extremely expensive as it might be, are
7 so obviously -- to me, it seems they are so obvious. It
8 just cannot be because it goes against the most basic
9 principles of consumer judgment. It's as if you're
10 suggesting there's always likelihood of confusion, any
11 mark, any other mark, there is confusion. We know that
12 not to be true, just cannot be true. Each case has its
13 unique characteristics, and you have to investigate each
14 case separately.

15 So that was the long version of the answer to
16 your question, but what I'm trying to say is I guess in
17 theory it could be done. Would be extremely challenging
18 and I think the results would be something we could
19 predict, so maybe there's no point in bothering. One
20 thing -- bothering to try.

21 But one thing is sure: Dr. Maronick -- and I
22 think he said during his deposition -- he didn't
23 really test for commonality. In fact, he outlined
24 various theories that he had as to when there is
25 confusion, when there is no confusion. He didn't test

1 that, but he had all kinds of theories that he
2 articulated.

3 Q. Thank you. You went a little bit beyond the
4 scope of that, but I wanted to hear it. We'll get back
5 to that. All right.

6 You said something about you probably can
7 predict the results of such a survey. Why do you say
8 that?

9 A. I think I -- as I just explained, it would --
10 it would be akin to saying take any trademark or any two
11 trademarks or any trademark in an ad, match the two,
12 there is confusion between them. That's ...

13 For example, I went to Safeway, I bought
14 Tropicana orange juice. When I get to the checkout,
15 they give me a coupon for Minute Maid, and I'm saying,
16 "Well, I bought one brand of orange juice, they gave me
17 another brand. It must have been approved, sponsored or
18 sourced from the maker of Minute Maid." And there are
19 numerous other cases.

20 It just flies in the face of everyday
21 experience, because, by that theory, there should be
22 massive confusion all the time among all kinds of marks
23 and ads that consumers are exposed to on a daily basis.

24 Q. But let's stay focused on -- on the case at
25 hand in terms of we're dealing with the Internet, we're

1 dealing with sponsored links, we're talking about your
2 predictions vis-a-vis a complicated survey that you
3 might conduct.

4 Is -- Is it your prediction -- Would it be your
5 prediction without conducting a survey that no consumers
6 are ever confused by an affiliation between the
7 potential -- well, let's use an affiliation between a
8 sponsored link and a registered trademark-holder.

9 MR. BUTZER: Objection. Form.

10 THE WITNESS: No consumer ever?

11 MR. RUSS: Q. Yeah.

12 A. I don't know. In real life, consumers -- there
13 is one or two to three consumers that are confused
14 between anything.

15 Q. Okay.

16 A. So, therefore, I could never say no consumer
17 would be confused because there's some background noise,
18 if you will, there's some level of confusion that's part
19 of our lives, has nothing to do with specifically with
20 keywords and sponsor links. It just -- There is some
21 confusion, and someone out there might be confused.

22 Q. You were retained by Google in this case.

23 A. Yes. I believe so. I don't know what's the
24 legal def- -- legally speaking, but I believe so, yes.

25 Q. And --

1 connection with keywords and sponsored links, and I
2 believe your testimony was that it would be very
3 difficult to do but you'd start with a survey of, you
4 know, a hundred random trademarks, a hundred random
5 sponsored links or more and see where that led you. Was
6 that kind of accurate?

7 A. Something like that --

8 MR. BUTZER: Objection. Form.

9 THE WITNESS: -- in different categories. So
10 you'll need to draw a sample of sufficient size,
11 obviously, a separate sample for each one, say 400
12 respondents for each one of these, define the
13 universe -- or the respondent universe according to the
14 topic of that particular sub-survey, and so on.

15 So you would need to design each survey as if
16 it was, if you will, your American Airlines case, just
17 multiplied by at least a hundred.

18 MR. RUSS: Q. Would you agree that
19 constructing such a survey would be a fairly difficult
20 task?

21 A. Implementing such a survey would be a difficult
22 task, yes.

23 Q. And it would be expensive.

24 A. It would be.

25 Q. Have you ever conducted a -- a presurvey or

1 sample survey before conducting a real extensive survey
2 just to see what you think you were going to find in the
3 marketplace?

4 A. I --

5 MR. BUTZER: Objection. Form.

6 THE WITNESS: I normally do not do that.

7 MR. RUSS: Q. Have you ever come across that
8 being done by any other experts?

9 A. I think some people do that.

10 Q. Now, if I understood your report, what --
11 your -- your opinion is that one could never conduct a
12 survey to determine general consumer experiences in
13 connection with Internet search engines because each
14 consumer's prior experiences with Internet search
15 engines is different. Is that --

16 A. Not even close, no. Not at all.

17 Q. Okay.

18 A. As I indicated, I conducted a survey.

19 Q. Okay.

20 So you can conduct a survey about consumers'
21 understanding of search engines and how they relate to
22 keywords.

23 A. Yes, I could.

24 Q. Okay.

25 A. Of course, to make it general, to the extent

1 that the allegations in a litigation context are very
2 general and broad, you need to address a wide range of
3 conditions. But if you're asking me can you do a survey
4 to assess consumers' understanding and confusion and so
5 on in the context of search -- using search engine and
6 sponsor links, yes, you can do that, obviously trying to
7 approximate [phonetic] marketplace conditions as closely
8 as possible.

9 Q. So if one wants to conduct their search on
10 digital cameras, one can input a search inquiry through
11 a search engine, like type in "digital camera," and see
12 what comes up; right?

13 A. Yeah.

14 MR. BUTZER: Objection. Form.

15 THE WITNESS: I could do that.

16 MR. RUSS: Q. But if a consumer sees an
17 advertisement for, let's say, Nikon cameras -- Let's
18 suppose a consumer bought a Nikon camera in the past and
19 he is thinking -- he or she is thinking about buying
20 another camera and creates an inquiry, wants to see --
21 find out about Nikon cameras, so they type in "Nikon
22 camera" specifically.

23 Do you think under those circumstances that
24 there's a good chance that the consumer is seeking
25 information about Nikon cameras only and not other

1 cameras generally?

2 MR. BUTZER: Objection. Form.

3 THE WITNESS: That -- I don't know. There're
4 probably different consumers. Some consumer's thinking
5 about Nikon camera, others may consider different
6 brands. So perhaps you have what we call in the
7 literature consideration sets. So I may consider Nikon
8 and Cannon and --

9 MR. RUSS: Q. But that's not really my
10 question, so let me focus in on my question.

11 I think based on your report -- and I'm not
12 trying to characterize it now, so you don't have to
13 respond -- different consumers have different
14 understandings of what search engines are and what
15 sponsored links are and it depends on their experiences
16 on the Internet, how often they use it, et cetera. So
17 we're not going to get into that for a moment.

18 Let's just talk about a situation where a
19 consumer -- Let's assume a consumer knows what they're
20 doing and they know how to do a general inquiry. If
21 they're interested in digital cameras generally, they'll
22 do a general inquiry.

23 A. (Nods head up and down.)

24 Q. But here in this example I'm giving you, a
25 consumer specifically thought about Nikon-brand cameras

1 and is inquiring about Nikon-brand cameras.

2 In a situation where the consumer makes a
3 decision to search Nikon cameras, do you think there's a
4 likelihood that the consumer's interested in
5 purchasing -- potentially purchasing a Nikon camera?

6 A. Yes --

7 MR. BUTZER: Objection. Form.

8 THE WITNESS: -- it's a possibility.

9 MR. BUTZER: Objection. Form.

10 MR. RUSS: Q. Do you believe that there is a
11 way to prepare a survey to determine whether what I just
12 asked you about would be a consumer expectation? In
13 other words, could you test whether a consumer who says,
14 "I was looking for a specific" -- who's looking for
15 Nikon cameras, whether that consumer expects, when it --
16 when it does a search, that it's going to find
17 information related to Nikon cameras?

18 A. I'm not sure I understand the question.

19 Q. Let me rephrase it.

20 If you wanted to establish that the consumer
21 that takes the time to identify a specific registered
22 trademark in a search like Nikon cameras, if you want to
23 determine whether a consumer expected that a sponsored
24 link that came up on the search page would be related
25 somehow to Nikon cameras, you could test for that;

EXHIBIT B

1 Katten Muchin Rosenman LLP, 2900 K Street, NW,
2 North Tower, Suite 200, Washington, DC 20007,
3 before Paula G. Satkin, Registered Professional
4 Reporter and Notary Public.

5 Job No. 266375

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1 Q. Why was Neiman Marcus not one of
2 the marks that you surveyed in this case?

3 A. Well, looking at this exhibit,
4 both the other two search engines -- the
5 sponsored links are well-known brands, so one
6 wouldn't expect to find Neiman Marcus, buy
7 Neiman Marcus clothes at a Bergdorf or
8 Bloomingdales stores. Clearly they were
9 competitive. Searchers were not likely to
10 think, yes, I can buy clothes from Neiman Marcus
11 at Bloomingdales.

12 Q. Why was that important to your
13 work in this case?

14 A. Again, I was trying to find out
15 for sponsored links the likelihood if they are
16 to buy directly from those. It seems to me if
17 you get one that is a direct competitor that the
18 answer is going to be no, I know both brands.
19 The equivalent example would be can I buy
20 Dunkin' Donuts at McDonald's or Krispy Kreme
21 donuts. Clearly not.

22 Q. You wouldn't expect any consumer
23 confusion with respect to those two you just
24 mentioned?

25 A. That is correct, I would not.

1 of the actual sponsored link; correct?

2 A. Yes.

3 Q. And Bloomingdales and Neiman
4 Marcus are competitors; true?

5 A. I believe they are. I don't know,
6 but I believe they are.

7 Q. Right. And the second was?

8 MR. BUTZER: Bergdorf.

9 THE WITNESS: Bergdorf.

10 BY MR. MORAN:

11 Q. Bergdorf Goodman; right?

12 A. Yes.

13 Q. We have those in Texas, too.

14 And they're competitors of Neiman
15 Marcus, as well; right?

16 A. I believe so.

17 Q. And the reason you discarded that
18 one as a possible stimuli in this case is
19 because there would be no confusion in that
20 regard; true?

21 MR. FENSTER: Object to form.

22 THE WITNESS: They're less
23 susceptible to initial interest confusion but,
24 again, the fact a consumer could think there is
25 a relationship between the Neiman Marcus one and