

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

FPX, LLC d/b/a FIREPOND,
Individually and on Behalf of All Others
Similarly Situated,

Plaintiff,

v.

GOOGLE, INC., YOUTUBE, LLC, AOL,
LLC, TURNER BROADCASTING
SYSTEM, INC., MYSPACE, INC. AND
IAC/INTERACTIVECORP,

Defendants.

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§ Civil Action No. 2:09-cv-00142-TJW
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§ CLASS ACTION COMPLAINT
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THE RODNEY A. HAMILTON LIVING
TRUST and JOHN BECK AMAZING
PROFITS, LLC, Individually and on Behalf
of All Others Similarly Situated,

Plaintiffs,

v.

(1) GOOGLE INC.; AND
(2) AOL LLC,

Defendants.

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§ Civil Action No. 2:09-cv-00151-TJW-CE
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§ CLASS ACTION COMPLAINT
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DECLARATION OF DR. ITAMAR SIMONSON

I, Itamar Simonson hereby declare and state as follows:

1. My name is Itamar Simonson, I am over the age of 21, of sound mind, have never been convicted of a felony, am competent to make this Declaration, and every statement herein is within my personal knowledge and is true and correct.

2. I am the Sebastian S. Kresge Professor of Marketing at the Graduate School of Business, Stanford University. I hold a Ph.D. in Marketing from Duke University, Fuqua School of Business, a Master's degree in business administration (MBA) from the UCLA Graduate School of Management, and a Bachelor's degree from The Hebrew University with majors in Economics and Political Science.

3. My field of expertise is consumer behavior, marketing management, trademark infringement from the consumer's perspective, survey methods, and human judgment and decision making. Most of my research has focused on buyers' purchasing behavior, the effect of product characteristics (such as brand name, price, features), the competitive context, and marketing activities (such as promotions, advertising) on buying decisions, and trademark infringement from the customer's perspective.

4. I have been retained by Defendants in this matter to (1) evaluate, based on principles of consumer behavior and marketing, whether it is meaningful or possible to generalize across members of the proposed class and sponsored links with respect to the alleged likelihood of confusion and the distinctiveness of their respective marks, and (2) to evaluate the surveys submitted by Dr. Thomas J. Maronick (the "Maronick Surveys").

5. Attached to this declaration as exhibit "1" is a true and correct copy of the document entitled "Expert Report of Dr. Itamar Simonson" (the "Report").

6. The Report includes my curriculum vitae (Exhibit "A" of the Report) and a further summary of my relevant fields of expertise, research experience, various awards received, articles published and courses taught at the graduate and doctoral levels.

7. The Report also outlines my conclusions regarding the issues presented to me for evaluation. I concluded, for obvious reasons that are grounded in basic principles of consumer

behavior and marketing, the contention that the plaintiffs' allegations could possibly apply across all of the proposed class members and sponsored links is clearly wrong and not meaningful.

Factors that lead to this conclusion include:

a. Keywords and trademarks vary greatly in terms of their distinctiveness, consumer recognition, type, legal status, and other characteristics that affect any conceivable likelihood of confusion.

b. Sponsored links vary greatly in terms of their content, heading, their context, and other characteristics that might affect any conceivable likelihood of confusion.

c. The degree of similarity or any perceived association between the search term and sponsored links vary greatly depending on the specific combination of keyword and particular sponsored links.

d. There are also great differences in terms of consumers' experience and familiarity with product categories, search engines, and sponsored links. Furthermore, consumers differ greatly in terms of their more general familiarity with common marketing practices, such as the marketing practice of targeting ads to consumers based on their revealed interests and preferences.

e. Relatedly, there are large differences in terms of consumers' familiarity with the specific trademarks or other keywords being used (and any entity/object behind it) as well as with the company/product/organization advertised or represented by the sponsored link.

f. There are large differences with respect to consumers' degree of care and level of involvement with respect to the goods or services offered by the company or good/service that is the subject of the search.

8. It is thus neither possible nor meaningful to make any generalizations about likelihood of confusion across numerous different marks, sponsored links, and consumer “universes” without investigating each case separately.

9. In addition, I concluded that the Maronick Surveys made no attempt to test for any commonality across the proposed class members and did not even try to test for the alleged likelihood of confusion pertaining to the trademarks of the class representatives. Accordingly, even if the surveys were properly conducted, they would not have provided pertinent information regarding the other members of the proposed class. Furthermore, the surveys violated virtually all of the basic principles and standards of likelihood of confusion surveys, making the “findings” meaningless and redundant. In particular:

a. The Maronick Surveys failed to follow any recognized methodology or even test for any relevant likelihood of confusion (or initial interest confusion);

b. The surveys relied on a series of slanted, leading questions that informed respondents what the “correct” answers were and merely asked for their approval;

c. The Maronick Surveys failed to include any controls;

d. The Maronick Surveys failed to ask the respondents to explain their answers;

e. The Maronick Surveys failed to approximate marketplace conditions or present the relevant stimuli to respondents as they are seen by consumers in reality;

f. The surveys’ respondent universe failed to represent the relevant consumers’ universes;

g. The results of the Maronick Surveys were not validated.

h. The surveys’ methodology and Dr. Maronick’s deposition testimony indicate a persistent lack of familiarity with the most basic principles of likelihood of confusion surveys

(such as the meaning of a control, the importance of not revealing to respondents the “right, expected” answer, and the commonly used survey methods).

10. Each one of the flaws is sufficient to make the Maronick Survey unreliable. The combination of such fatal flaws indicates that the surveys provide no pertinent information and are simply irrelevant.

11. Additional support and analysis for my conclusions is provided in the Report, which is incorporated for all purposes as if fully set forth herein.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on this 15 day of September, 2010.

A handwritten signature in black ink that reads "I. Simonson". The signature is written in a cursive style with a long, sweeping underline.

ITAMAR SIMONSON, Ph.D.