

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
(Alexandria Division)

ROSETTA STONE LTD.

Plaintiff,

v.

GOOGLE INC.

Defendant.

CIVIL ACTION NO. 1:09cv736 (GBL /
TCB)

DECLARATION OF EDWARD A. BLAIR, PH.D.

I, Edward A. Blair, declare as follows:

1. I am over eighteen (18) years of age. The statements made herein are true and correct and are of my own personal knowledge. I make this declaration in connection with Defendants' Motion for Summary Judgment and Motion to Exclude the Expert Report of Kent Van Liere.

Background

2. I am Michael J. Cemo Professor of Marketing & Entrepreneurship and Chairman of the Department of Marketing and Entrepreneurship in the C.T. Bauer College of Business at the University of Houston in Houston, Texas. A professional resume showing further information is attached as Appendix 1 to the Expert Report I submitted in this action.

3. I was asked to evaluate the survey and report provided in this matter by Dr. Kent Van Liere and provide my opinion as to the likelihood of confusion in this matter. In connection with this engagement, in addition to relying upon my experience in the field generally, I reviewed the Complaint, Defendant's Answer to Plaintiff's Complaint and Affirmative Defenses, Expert Report of Kent Van Liere and its attached exhibits, an Excel file of Dr. Van Liere's survey data, and Internet search results.

4. I wrote a report, dated January 20, 2010, detailing my considered opinion regarding Dr. Van Liere's survey, as well as the basis and reasons therefore, a true and correct copy of which is attached as Exhibit A. This report accurately reflects my true opinion.

5. Since the completion of my report, I have reviewed certain additional information, including the deposition transcripts of Dr. Van Liere and Van Leigh, who I understand to be a Rosetta Stone employee. I have also reviewed a collection of screen shots that I understand Rosetta Stone provided to Dr. Van Liere and from which he chose the screen shot to base the test and control conditions of his survey, and a Prospectus filed with the SEC by Rosetta Stone.

6. In view of this additional information, I submit this declaration to provide more detail and numeric specificity to the issues I discussed in my deposition and my report.

Dr. Van Liere erroneously counted respondents who provided disqualifying answers to a filter question as if they were respondents to the confusion questions.

7. As noted in my report, the control condition Dr. Van Liere used was flawed because the control listings did not simply differ from the test listings in being unpaid vs. paid; they also differed in the nature of the sites listed. Most of the test listings were for sites that appeared to sell Rosetta Stone products or offer related promotions, while most of the control listings were for sites that relate to the historical Rosetta Stone artifact, and none of the control listings except the company website appeared to sell Rosetta Stone products or offer related promotions. Dr. Liere could have mitigated this problem by creating a more balanced control. One way he might have done this was by using search results from a query that was not for "Rosetta Stone" alone, but was more clearly tied to language learning software, such as "Rosetta Stone software" or "Rosetta Stone Spanish." I understand that the screen shots provided to him by Rosetta Stone

included screen shots of such results. However, Dr. Van Liere chose a screen shot without any commercial Rosetta Stone links in the organic results except for its own.

8. In his deposition, Dr. Van Liere indicated that he attempted to address the imbalance in the links with a preliminary “filter question” that he said was intended to focus respondents’ attention on commercial listings. *See* Van Liere Deposition 90:9-14. This filter question was: “Which link or links, if any do you think sells Rosetta Stone language software products?” *See* Van Liere Deposition 89:23-90:14. Respondents who indicated that a link did not sell Rosetta Stone products were filtered out, and were not asked the confusion questions for that link.

9. However, in calculating his results, Dr. Van Liere ignored the fact that respondents were filtered, and many respondents were therefore not even asked the confusion questions for any of the target links. Not surprisingly, there were more of these respondents in the control condition. This is because respondents in that condition—where only two of the eleven links actually referred to Rosetta Stone, the plaintiff here, or its products—were less likely to identify any of the target links as selling Rosetta Stone products.

10. In ignoring the filtering, Dr. Van Liere treated respondents who said “no” to the filter question as if they said “no” to the confusion questions. In his calculation, these respondents contribute to the denominator (or base) of the confusion rate, but not the numerator, exactly as if they had been asked the confusion questions and said “no.” To put it another way, these respondents are treated as if they *could have* indicated confusion but did not. This is inappropriate. The filter question was not intended to provide evidence regarding confusion, but rather to address the imbalance in test and control links by focusing respondents on commercial listings. The proper base for calculating the confusion rate is those respondents who were actually asked the confusion questions for the target links.

11. If one takes the filtering into account, and calculates confusion rates among only respondents who were actually asked the confusion questions for the target links, confusion rates in the test and control conditions are as follows.

11A. Confusion results for respondents who were asked the confusion questions for at least one target link			
	Test	Control	Net
% Confused	75%	73%	2%

12. Therefore, with the filtering question appropriately treated as a filter, there is no significant difference in confusion rates between the test and control conditions. This shows that the difference in confusion rates reported by Dr. Van Liere between the test and control conditions is attributable to the fact that many respondents in the control condition were not even asked the confusion questions.

Dr. Van Liere improperly counted as confused on the “endorsement” question those who explained that their response was based on the belief the advertisers sold Rosetta Stone products.

13. As discussed in my report, use of the word “endorsement” in the survey was problematic. This is due in part to many consumers’ belief that a company reselling a product is endorsed by the provider of that product. This is reflected in the respondents’ narrative responses explaining why they replied that a particular advertiser was endorsed by Rosetta Stone. Many respondents gave some version of the following reasons: the site sells Rosetta Stone products, offers discounts/coupons/rebates on Rosetta Stone products, and/or is a reputable merchant that sells many products. If respondents who gave these answers are excluded from the confusion calculation, but Dr. Van Liere’s calculations are not otherwise changed, “confusion” rates in the test and control conditions are as follows.

13A. Confusion results excluding respondents who said they thought a listing was endorsed solely because it sells Rosetta Stone products, offers discounts/coupons/rebates, and/or is a reputable merchant			
	Test	Control	Net
% Confused	34%	29%	5%

14. Therefore, with “endorsement confusion” responses based on an affirmative explanation by the respondent that the site was endorsed because it sells Rosetta Stone products, offers discounts/coupons/rebates, and/or is a reputable merchant, removed from those counted as confused, leaving intact all of Dr. Van Liere’s other counting methodologies, the “net confusion” rate drops to 5%.

Dr. Van Liere erroneously counted as confused those respondents identifying Amazon.com and CouponCactus as endorsed by Rosetta Stone.

15. Dr. Van Liere did not count as confused those who answered that they thought the “Rosetta Stone (software)” Wikipedia article was endorsed by Rosetta Stone. Van Liere Report ¶ 40. Dr. Van Liere testified in his deposition that this exclusion was because Rosetta Stone “contributes to the content and reviews the content of the Wikipedia entry about them” and thus “they are endorsing the content in the sense that they are monitoring it and contributing to it.” Van Liere Deposition 84:23-85:7. The basis for this understanding is unclear from Dr. Van Liere’s report or his deposition.

16. Assuming for the sake of this issue that Dr. Van Liere correctly excluded from his confusion count those who thought the “Rosetta Stone (software) Wikipedia article was endorsed by Rosetta Stone, Dr. Van Liere should have treated the respondents who identified Amazon.com and CouponCactus as endorsed by Rosetta Stone the same way based on Rosetta Stone’s relationships with those companies.

17. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Amazon.com is an [REDACTED] reseller for Rosetta Stone—one that Rosetta Stone referred to in an SEC filing as an “select retailer.” See Rosetta Stone Inc. Form S-1 - Prospectus Summary p. 1. Given that Rosetta Stone had official relationships with these sites, Dr. Van Liere should have considered them “endorsed” as well. Accordingly, he should not have counted as confused respondents who identified these two links as endorsed by Rosetta Stone.

18. If the Amazon and CouponCactus listings in the test condition are treated the same as the Wikipedia software listing in the control condition – that is, if respondents who said that these listings are endorsed by the Rosetta Stone company are not counted as confused – then confusion rates in the test and control conditions are as follows.

18A. Results if Amazon and CouponCactus “endorsement” answers are not counted as confused			
	Test	Control	Net
% Confused	27%	30%	-3%

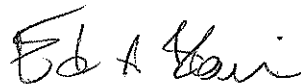
19. Therefore, with “endorsement confusion” responses based on an affirmative answer of the Amazon.com or CouponCactus links explanation removed from those Dr. Van Liere counted as confused, leaving intact all of his other counting methodologies, the “net confusion” rate drops to the point that those in the test condition are *less* confused than those in the control.

Concluding remarks

20. In my opinion, analysis of Dr. Van Liere’s survey and resulting data demonstrates that Dr. Van Liere’s survey does not show a likelihood of confusion regarding the source of advertised goods or Rosetta Stone’s affiliation or “endorsement” of links. It simply shows that respondents tend to believe that Rosetta Stone endorses websites that appear to sell its products or offer related promotions such as coupons or rebates.

21. I reserve the right to supplement these opinions based on further review of information or any additional arguments or facts that may be presented to me.

I declare under penalty of perjury that the foregoing is true and correct and that this Declaration was executed on March 26, 2010, at Houston, Texas.



Edward A. Blair, Ph.D.