

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

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ORIGINAL

ROSETTA STONE LTD.,

Plaintiff,

Civil Action No.

vs.

1:09cv736

GOOGLE, INC.,

Defendant.

VIDEOTAPED DEPOSITION OF KENT. D. VAN LIERE, Ph.D.

Wednesday, January 13, 2010

Job No. 233898

PAGES 1 - 146

1 representing plaintiff, Rosetta Stone, Ltd.

09:07:30

2

3

KENT D. VAN LIERE, Ph.D.,

4

having first been duly sworn, testified as

5

follows:

09:07:39

6

7

EXAMINATION

8

BY MS. CARUSO:

9

Q. Good morning, Mr. Van Liere.

10

A. Van Liere.

09:07:48

11

Q. Van Liere.

12

How are you this morning?

13

A. Fine.

14

Q. Good.

15

You understand that you are under oath,

09:07:51

16

same as if you were in a courtroom?

17

A. I do.

18

Q. So that we have a clean transcript, I ask

19

that you wait until I finish asking my questions

20

before you start answering.

09:08:01

21

Do you understand that?

22

A. I do.

23

Q. And you agree to do that?

24

A. I do.

25

Q. Good.

09:08:06

1 I understand you've been deposed before -- 09:08:07

2 A. Yes.

3 Q. -- is that correct?

4 So you're familiar with the types of
5 questions lawyers usually ask at the beginning of a 09:08:13
6 deposition about whether you're taking any
7 medication right now?

8 I don't know if you're usually asked that
9 question, but have you taken any medication within
10 the last 24 hours? 09:08:27

11 A. No.

12 Q. Okay. Have you ever been arrested?

13 A. No.

14 Q. Let's talk about other things then.

15 When were you first contacted in connection 09:08:37
16 with this case?

17 A. I don't recall the exact date, but it was
18 sometime in probably January, February of 2009.

19 Q. Who did you speak with at that time?

20 A. I believe I was initially contacted by 09:08:54
21 Terry Ross.

22 Q. What did you discuss with him?

23 A. I believe he just simply indicated that
24 they had a case involving Rosetta Stone in which
25 they may need a likelihood-of-confusion survey and 09:09:10

1 asked if I was available to do it. 09:09:14

2 Q. And what did you say?

3 A. Yes.

4 Q. Have you worked with Mr. Ross before?

5 A. Yes. 09:09:22

6 Q. In what matters?

7 A. I'll understand that the matters that are

8 confidential, that I won't discuss because they are

9 confidential. But as far as cases where I have been

10 disclosed and been used by Mr. Ross, it would be the 09:09:42

11 American Airlines versus Google case.

12 Q. Without identifying the parties for the

13 confidential matters, how many times have you worked

14 with Mr. Ross in a consulting capacity?

15 A. With Mr. Ross specifically, I don't know 09:10:06

16 that there are any others.

17 Q. What about with any other attorneys at

18 Gibson, Dunn & Crutcher?

19 A. There may have been maybe another two or

20 three matters in which I was involved. 09:10:15

21 Q. Have you worked with any lawyers at

22 Mr. Ross's current firm, Crowell & Moring, before?

23 A. Not that I'm aware of.

24 Q. Do you have a written retainer agreement

25 concerning your services in this case? 09:10:34

1 measure the extent to which consumers who enter 10:13:15
2 Rosetta Stone trademarks into the Google search bar
3 are confused and believe that the return-sponsored
4 links are either owned by or endorsed by Rosetta
5 Stone. 10:13:35

6 Q. What type of confusion did you test?

7 Are you familiar with the phrase
8 "initial-interest confusion"?

9 A. I've heard that term.

10 Q. Are you familiar with the phrase 10:13:55
11 "point-of-purchase confusion"?

12 A. I've heard that term.

13 Q. Do you have an understanding of what
14 "point-of-purchase confusion" means?

15 A. I have a general understanding that 10:14:08
16 consumers -- that there is theories about consumers
17 being involved in phases of a process of making a
18 decision to purchase and then purchasing it, and
19 that those -- the language of those two things are
20 related to, you know, phases of that process. 10:14:27

21 Q. What phase of the process did you assess
22 confusion for?

23 A. Well, I don't want -- the way we've done
24 the work, it would not be -- it would depend on the
25 mind-set that the consumer had, and some might have 10:14:47

1 been in a prepurchase mode, some may have been in a 10:14:50
2 search mode. So the experiment itself is not set up
3 to be one specific kind. Whatever the, you know,
4 individuals in our sample had in their mind is the
5 range of those. It's not post-purchase confusion, I 10:15:05
6 will say that.

7 Q. Indeed.

8 In taking the survey, were respondents
9 allowed to click on the links --

10 A. No. 10:15:24

11 Q. -- that were displayed?

12 So they never -- the pages that the
13 advertisement is linked to were never displayed to
14 them?

15 A. I'm understanding you to mean if you click 10:15:37
16 on a link and it takes you to a different page?

17 Q. Correct.

18 A. That's correct. The only page they ever
19 saw was the search-results page, that's correct.

20 Q. No one can purchase Rosetta Stone software 10:15:49
21 directly from a link that appeared on that Google
22 test stimulus of the search-result page; correct?

23 MR. ROSS: Object. There is an element of
24 confusion there. Can I explain my confusion or do
25 you want me to just shut up? 10:16:12

1 MS. CARUSO: Sure. 10:16:14

2 MR. ROSS: I think the confusion is, you
3 know, you could purchase because they don't go
4 anywhere, as opposed to nobody can purchase in
5 clicking a link if it were a live link. See what I 10:16:20
6 am saying? You've collapsed two different things in
7 one sentence.

8 MS. CARUSO: I want to be clear that I
9 address your objection, Mr. Ross.

10 So your objection is no one can purchase 10:16:36
11 anything because that wasn't part of the survey
12 conditions?

13 MR. ROSS: It was physically impossible.
14 You couldn't go anyplace.

15 MS. CARUSO: Right. 10:16:47

16 Q. If someone was actually going to purchase a
17 product, they wouldn't purchase it just from the
18 search-result page; right?

19 A. You're asking me a technical question or
20 are you asking me what consumers think? 10:17:08

21 Because it is true that even in some of the
22 responses we see here consumers act as though
23 clicking on them is somehow directly taking them to
24 a purchase place. So that word "direct" is kind of
25 an unusual word here. 10:17:25

1 But I don't have an understanding that on a 10:17:27
2 search-results page, that I can put in my credit
3 card anywhere on that page and receive back the
4 software.

5 Q. Right. 10:17:35

6 So in the -- going back to the phases of
7 making a purchasing decision that you were talking
8 about earlier, no one was presented with an
9 opportunity to see information -- no one was
10 presented with the opportunity to look at the 10:17:54
11 product that was being advertised?

12 A. I'll just say that you correctly
13 understand. You cannot click on any of the links in
14 our testing control stimuli and, therefore, you
15 never see a page beyond the search-results page, 10:18:14
16 whatever that page might or might not have included.

17 Q. So irrespective of what was in the mind-set
18 of the respondents when they entered in "Rosetta
19 Stone," which you said you didn't make any
20 assumptions about, just mattered that they could 10:18:40
21 read the card and put it in --

22 A. And, just to be clear, I also said and that
23 they were set up to understand this was about
24 searching for information, about learning a language
25 and all that as well. 10:18:54

1 Q. Okay. Whatever phase they might have been 10:18:56
2 interested in exploring Rosetta Stone to, the test
3 condition limited their ability to pursue to its
4 natural conclusion any actual purchasing decisions?

5 MR. ROSS: I'm just going to object to the 10:19:28
6 form of the question. That's got several
7 assumptions built in it as to his past testimony.
8 It's also got a lot of vague and ambiguous
9 statements.

10 To the extent you can answer, go ahead and 10:19:39
11 answer if you understand.

12 THE WITNESS: Now I forgot. What was the
13 question?

14 (Whereupon the reporter read the record as
15 follows: 10:20:00

16 "Question: Whatever phase they might have
17 been interested in exploring Rosetta Stone
18 to, the test condition limited their
19 ability to pursue to its natural conclusion
20 any actual purchasing decisions?) 10:19:44

21 THE WITNESS: Again, I'll just repeat that
22 the way the test is set up, they cannot click on any
23 link, and, therefore, they don't ever look at a link
24 beyond the search-results page, yes.

25 //

1 BY MS. CARUSO: 10:20:15

2 Q. Do you think if a consumer was interested
3 in purchasing a product, it would want -- the
4 consumer would want to do more than just look at the
5 advertisement for a website page? 10:20:26

6 MR. ROSS: So I'm going to object on the
7 grounds that's calling for speculation as to what's
8 in the mind of other people, but go ahead and
9 answer.

10 THE WITNESS: Sorry, what was that one 10:20:38
11 again?

12 (Whereupon the reporter read the record as
13 follows:

14 "Question: Do you think if a consumer was
15 interested in purchasing a product, it 10:20:38
16 would want -- the consumer would want to do
17 more than just look at advertisement for a
18 website page?")

19 THE WITNESS: I've not done any research to
20 say with certainty among some sample of consumers 10:21:00
21 who do a search result how often they simply look at
22 the search-results page, how often they click
23 through to one or more of the links. So I don't
24 have a specific understanding of how often those
25 things occur. Certainly some consumers may look 10:21:15

1 beyond the search-results page. 10:21:22

2 BY MS. CARUSO:

3 Q. But that doesn't matter to you in forming
4 your conclusion in this case?

5 A. No. The experiment, as I've conducted it, 10:21:32
6 asked them about the degree to which they're
7 confused as they look at search-results page.

8 Q. Did you attempt to identify what, if
9 anything, about the search-results page caused the
10 confusion that you identified? 10:22:07

11 A. Yes.

12 Q. What did you determine?

13 A. Well, the experiment is set up with a test
14 and a control to measure the degree to which the
15 allegedly infringing part of the search-results 10:22:26
16 page, which in this case is the sponsored links, is
17 causing confusion above what confusion would exist
18 in a noninfringing world, which is the net confusion
19 I've reported.

20 Q. Beyond just generally the links causing 10:22:49
21 confusion, is there anything that you identified
22 about the links, the sponsored links, that led to
23 the confusion you identified in your experiment?

24 I'll give you some examples: the placement
25 on the page, the horizontal-sponsored links you 10:23:15

1 identified versus the vertical ones, the ranking in 10:23:19
2 the vertical order, the wording of the
3 advertisement, the presence of the Rosetta Stone
4 name in the destination URL, presence of Rosetta,
5 any of its trademarks in the creative text of the 10:23:36
6 advertisement or the title.

7 Did you identify any of those things as
8 being the cause of the confusion you identified?

9 A. If I understand your question, the way this
10 experiment is set up, it tests the allegedly 10:23:49
11 infringing elements of the search-results page
12 against a noninfringing control. And many of the
13 elements you've just described are attributes of the
14 search results in the sponsored area, but the test
15 is designed to test all those things, which are part 10:24:18
16 of the alleged infringement.

17 So all of those are potentially
18 contributing causes to the confusion we find.

19 Q. But your opinion doesn't specify which of
20 those things causes the confusion or which may not 10:24:34
21 cause confusion?

22 MR. ROSS: I just object. That assumes
23 that there is a mono cause, that there is a single
24 cause here, as opposed to multiple causes. So it
25 assumes a fact that is not in evidence. 10:24:47

1 of people that said a link was either a Rosetta 10:56:31
2 Stone company site or endorsed by Rosetta, then were
3 asked the why and did not give an answer. I
4 don't -- I don't believe there is very much of that
5 in the data, if it's in there at all. But, 10:56:44
6 secondly, for purposes of calculating confusion, we
7 did not use the verbatims.

8 Q. Going back to the test stimulus, Exhibit D.
9 You were talking earlier about the idea that in your
10 opinion it's all of the sponsored links together 10:57:09
11 that cause confusion, not -- you didn't look at it
12 on an ad-by-ad basis; is that correct?

13 MR. ROSS: Just going to object that
14 misstates his prior testimony.

15 BY MS. CARUSO: 10:57:23

16 Q. Dr. Van Liere, did you look at confusion on
17 an ad-by-ad basis?

18 A. No, I did not calculate confusion on an
19 ad-by-ad basis.

20 Q. If any one of these ads showed a very low 10:57:46
21 confusion rate when looked at individually, for
22 example, zero or one percent, would that affect your
23 conclusion in any way?

24 A. I believe I've stated, and I want to be
25 clear about the nature of the experiment here. The 10:58:07

1 experiment is testing the degree to which people are 10:58:09
2 confused about anything that appeared in this
3 sponsored area, in this case the six links. And so
4 cumulatively they all contribute to the confusion
5 associated with the sponsored links. 10:58:24

6 So some of those links may have had more or
7 less on an individual basis, but the test was not
8 about individual links; it was about the cumulative
9 confusion and net confusion associated with the
10 sponsored links. 10:58:40

11 Q. And so if a respondent chose any one of
12 these sponsored links in response to the questions,
13 he or she was counted as confused?

14 A. I think I agree with what you said, but
15 just to be specific about the calculation, in the 10:59:01
16 test, you were counted as confused if you thought
17 any of these six sold Rosetta Stone company products
18 and/or believed that that site then took you to a
19 Rosetta Stone company website or was endorsed by
20 Rosetta Stone. 10:59:23

21 Q. Okay. And there were six opportunities in
22 the test condition for someone to be confused on any
23 given question?

24 A. Yes.

25 Q. If there had been eight different 10:59:40

1 opportunities in any specific question for someone 10:59:44
2 to be confused, would you expect there to be a
3 higher confusion number?

4 A. I don't want to speculate what would happen
5 if we had used four or two or eight or nine. We 10:59:56
6 chose six because this was generally reflective of
7 what we saw in the other kinds of searches, as
8 opposed to what we said before, you know, just one
9 or two versus ten or fifteen.

10 But I don't know how the confusion would 11:00:13
11 have moved around based simply on the count of them,
12 which is the attribute that you're currently
13 referring to.

14 Q. In all your work as an expert, have you
15 encountered any set of facts by which the more 11:00:28
16 opportunity someone is given to express confusion,
17 the more likely it is they will express confusion?

18 A. I don't think I have seen any research of
19 that character.

20 Q. Okay. Looking back at the control, the 11:00:48
21 next page of Exhibit D, this was the control that
22 was used in your experiment; right?

23 A. Yes.

24 Q. How big of a computer screen was used in
25 the experiments? 11:01:11

1 STATE OF CALIFORNIA)

2 :ss

3 COUNTY OF SAN MATEO)

4 I, CYNTHIA MANNING, CSR No. 7645, a
5 Certified Shorthand Reporter of the State of
6 California, do hereby certify:

7 That the foregoing proceedings were taken
8 before me at the time and place herein set forth;
9 that any witnesses in the foregoing proceedings,
10 prior to testifying, were placed under oath; that a
11 verbatim record of the proceedings was made by me
12 using machine shorthand which was thereafter
13 transcribed under my direction; further, that the
14 foregoing is an accurate transcription thereof.

15 I further certify that I am neither
16 financially interested in the action, nor a relative
17 or employee of any attorney of any of the parties.

18 IN WITNESS WHEREOF, I have this date
19 subscribed my name.

20
21 DATED: *January 25, 2010*

22
23 *Cynthia Manning*^{DD}
24 CYNTHIA MANNING, CSR No. 7645

25