Rosetta Stone LTD v. Google Inc. Doc. 144

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)

DEFENDANT GOOGLE INC.'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF ITS MOTION TO DISMISS COUNT VII OF ROSETTA STONE'S AMENDED COMPLAINT

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INTRODUCTION

Rosetta Stone attempts to circumvent the broad immunity provided to Google by the Communications Decency Act ("CDA") by transforming the act for which Google gets paid—allegedly, unjustly—from clicks on ads to Google's "business strategy" of allowing advertisers to bid on trademark terms as keywords. This expedient argument is contradicted by the allegations of Rosetta Stone's own complaint, which recognizes that Google gets paid for ads appearing on its website when ads are clicked on. Rosetta Stone does not allege any other payment event, such as the advertiser's choice of keyword or even the display of an ad. Because third parties create the content of the ads, Google's publication of those ads is protected by the CDA. Independently, Rosetta Stone's unjust enrichment claim is untimely and insufficiently pled. For each of these reasons independently, it should be dismissed.

ARGUMENT

I. ROSETTA STONE'S UNJUST ENRICHMENT CLAIM IS BARRED BY THE COMMUNICATIONS DECENCY ACT.

Rosetta Stone asserts that its unjust enrichment claim, based on third-party use of Rosetta Stone's trademarks as keywords "does not relate in any way" to the content of the advertisements displayed on Google's website. (Rosetta Stone's Opposition Memorandum ("Opp.") at 4.) That is factually illogical. *See Demetry v. Lasko Products, Inc.*, 284 Fed. App'x 14, 15 (4th Cir. 2008) (noting that a "court is not required 'to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences'" (quoting *Veney v. Wych*, 293 F.3d 726, 730 (4th Cir. 2002)). Google does not earn any money simply because it has made a policy decision. It is not until a search engine user decides that a particular ad may be useful that Google earns revenue from advertising on its search results page. (Compl. ¶ 32, 63). The user's decision—i.e., the action that triggers the money owed to Google that Rosetta

Stone claims is unjust—is purely driven by content provided by third-party advertisers. To the extent that decision is not based on the content of the ad, but instead only by the advertiser's decision to bid on a certain keyword—a choice invisible to the search engine users—Rosetta Stone concedes that the advertisers choose that, too. (Opp. at 4)

Moreover, Rosetta Stone's position that its purported unjust enrichment claim does not relate in any way to the content of the ads displayed on Google's website represents a remarkable departure from established law. (Opp. at 4, 7) Rosetta Stone's assertion that payments made to Google constitute unjust enrichment hinges on a finding that use of Rosetta Stone's trademarks in a keyword is unlawful. This determination can only be made on an ad-by-ad basis because, as a matter of law, certain "unauthorized" uses of trademarks are permissible. For example, Google's receipt of payment for advertising that uses "Rosetta Stone" to sell a book about, or a reproduction of, the actual Rosetta Stone discovered in 1799, could not be unjust to Rosetta Stone. *See* 15 U.S.C. § 1115(b)(4) (setting forth the statutory fair use defense). Likewise, ads such as "**Rosetta Stone Software,** Amazon.com/RosettaStone Fastest Way To Learn A Language Ships Free. Amazon Official Site" in response to a query for "Rosetta Stone at Amazon," cannot be assumed to be wrongful, even at the pleading stage. *See Prestonettes Inc. v. COTY*, 264 U.S. 359, 368 (1924) (holding that a "trade mark only gives the right to prohibit the use of it so far as to protect the owner's good will against the sale of another's product as his" not the right to preclude all uses in commerce.); *see also Shell Oil Co. v. Commercial Petroleum, Inc.*, 928 F.2d 104, 107 (4th Cir. 1991) ("trademark law does not apply to the sale of genuine goods bearing a true mark, even if the sale is without the mark owner's consent.")

As even these two examples illustrate, Google's "business strategy" is not intrinsically unlawful in its application. Accordingly, only an ad-by-ad analysis of the *content* of the ads can

ground a finding of liability under an unjust enrichment claim. Because the CDA prevents Google from being held liable for the content of those ads, created by third parties, Rosetta Stone's claim must be dismissed. *E.g., Jurin v. Google Inc.*, 2010 WL 727226 (C.D. Cal. March 1, 2010) (dismissing unjust enrichment claim, and others, as barred by the CDA). Indeed, Google's decision of where to place advertising on its site, and its reliance on keywords supplied by advertisers as a factor in that decision falls squarely within the "exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content." *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).

The opinions Rosetta Stone cites cannot salvage its claim. As this Court previously recognized, the District of New Jersey's decision in *800-JR Cigar, Inc. v. GoTo.com, Inc.*, 437 F. Supp. 2d 273, 295 (D.N.J. 2006), denied CDA immunity because the defendant did not qualify as an interactive service provider—not the standard under the CDA. Transcript of Motion Hearing at 30, *Rosetta Stone Ltd. v. Google Inc.*, Civ. No. 1:09cv736 (Sept. 18, 2009); (citing 437 F. Supp. 2d at 295 (holding that defendant was not an interactive service provider because it did not "provide access to the Internet like service providers such as AOL")). Further, the *JR Cigar* court did not have before it that third parties were responsible for selecting keyword triggers, which, here Rosetta Stone has conceded. Opp. at 4 (noting that "it is true that a third party selects the trademarks" in the keyword in Google's Keyword Selection Tool).

Nor does the Ninth Circuit's decision in *Barnes v. Yahoo!*, 570 F.3d 1096 (9th Cir. 2009), justify Rosetta Stone's attempt to avoid the CDA. In *Barnes*, a Yahoo! employee specifically told the plaintiff that she would "personally walk the [complained of] statements over to the division responsible for stopping [the complained of content] and they would take care of it." 570 F.3d at 1099. The *Barnes* court determined that the CDA does not provide immunity from

promissory estoppel claims premised on a "clear and well defined" promise, to which both parties make "objective manifestations of intent" to bind themselves to the agreement. *Id.* at 1107-08 (citation and quotation marks omitted); *see also Goddard v. Google*, 640 F. Supp. 2d, 1193, 1201 (N.D. Cal 2009) (distinguishing *Barnes* as having "rested on a promise that scarcely could have been clearer or more direct").

Unlike the facts in *Barnes*, Rosetta Stone alleges neither a "clear and well defined" promise nor an "objective manifestation of intent" to be bound to any agreement. Accordingly, Rosetta Stone's Opposition offers no legitimate reason to deny Google's motion based on the CDA.

II. ROSETTA STONE'S UNJUST ENRICHMENT CLAIM IS TIME BARRED.

After arguing that its claim relates exclusively to Google's "strategic business decision" of allowing bidding on trademarks as keywords—a decision made in 2004 (Compl. ¶ 44)—Rosetta Stone changes tack and asserts that its unjust enrichment claim is not time-barred because each separate bid by an advertisers inflicts a separate injury and creates a separate cause of action. (Opp. at 8-9). Rosetta Stone cannot have it both ways: the practice at issue cannot be viewed as a single business policy divorced from advertisers' content choices for the purpose of defeating the CDA defense and as separate incidents arising from each clicked-on ad for purposes of escaping the statute of limitations.

Even accepting that each action giving rise to Rosetta Stone's "claim" is separate, the statute of limitations nonetheless bars Rosetta Stone's claim because *Google*'s complained of actions started in 2004—well before the statutory cut-off. (Compl. ¶ 44.) In an attempt to distinguish the precedent cited by Google, Rosetta Stone characterizes the alleged misappropriation in *GIV, LLC v. IBM Corp.*, 2007 WL 1231443 (E.D. Va. 2007), as occurring "on a date certain." (Opp. ¶ 9.) However, Rosetta Stone ignores that the defendant continued to

"manufacture, import and sell" the infringing technology through the filing of the complaint, thereby continuing the complained of conduct. *Id.* at *1. Like the unjust enrichment arising from the alleged misappropriation of the plaintiff's intellectual property rights in *GIV*, the alleged unjust enrichment here arises from actions Google first took at a time outside of the three year statute of limitations.

Rosetta Stone's citations to the contrary are unfounded or irrelevant. In *Primrose Development Corp. v. Benchmark Acquisition Fund Limited Partnership*, 47 Va. Cir. 296 (Va. Cir. Ct. 1998), the court determined that the plaintiff's cause of action for unjust enrichment accrued when the defendant first failed to pay expected quarterly payments and that the plaintiff's "claim for unjust enrichment must therefore have been brought within three years of" that date. *Id.* at 298. Because that first date on which a payment was not made was within the three year statute of limitations, the court held that the unjust enrichment action was not time barred. *Id.* at 296. It did *not* hold, as Rosetta Stone argues (Opp. 8-9), that the defendant's subsequent failures to make quarterly payments—which continued until the date the action was filed inflicted new injuries giving rise to separate causes of action. Thus, *Primrose* supports that any unjust enrichment cause of action accrued when Google "failed for the *first time* to pay the fees . . . that were due." *Id.* at 296 (emphasis added). Similarly, *Davis v. Davis*, 190 Va. 468 (1950), held that the plaintiff's cause of action arose "when the breach of the appellant's duty *first occurred*"—i.e., when the money at issue first became payable. *Id.* at 478 (emphasis added).

Rosetta Stone's reliance on cases involving numerous instances of damage to real property, each unique in harm, serves it no better. In *Hampton Roads Sanitation District v. McDonnell*, 234 Va. 235 (1987), the court emphasized that the sewage discharges at issue "were

not continuous." 234 Va. at 239; *accord Norfolk & Western Railway Co. v. Allen*, 118 Va. 428, 429 (1915), ("the defendant's own evidence shows that this operation was not continuous, but only at intervals"). In contrast, Rosetta Stone argues that Google engages in "continuing conduct," which began in 2004. (Opp. at 9.) As such, any unjust enrichment cause of action Rosetta Stone theoretically has against Google is barred by the three year statute of limitations.

III. ROSETTA STONE'S AMENDED COMPLAINT DOES NOT STATE A CLAIM FOR UNJUST ENRICHMENT.

Rosetta Stone's claim for unjust enrichment, as pled, is insufficient. As a preliminary matter, Rosetta Stone implicitly concedes that Virginia law does not permit such a claim when the parties have an actual contract. *Tabler v. Litton Loan Servicing, LP*, 2009 WL 2476532 at *4 (E.D. Va. 2009) (citing *Acorn Structures, Inc. v. Swantz*, 846 F.2d 923, 926 (4th Cir. 1988)). Although Rosetta Stone alleged that it should have paid less for its advertising on Google because it was entitled to a non-competition auction bid (Compl. ¶ 123), Rosetta Stone has apparently now decided not to pursue that theory. (Opp. at 11-12) (no longer referencing its payments to Google). Accordingly, at a minimum, all allegations based on Rosetta Stone's theory that "Google unjustly derived a benefit from Rosetta Stone in the form of higher payments from Rosetta Stone," (Compl. ¶ 123), should be stricken.

Rosetta Stone's remaining theory that it should receive Google's revenue received from third parties also fails. A claim for unjust enrichment does not merely require that the defendant receive a benefit that the plaintiff wants; rather, the plaintiff must "adduc[e] other facts to raise an implication that the defendant promised to pay the plaintiff for such benefit." *Nedrich v. Jones*, 245 Va. 465, 476 (1993) (citing *Mullins v. Mingo Lime & Lumber Co.*, 176 Va. 44, 51 (1940)); *see also, e.g., Appleton v. Bondurant & Appleton, P.C.* 2005 WL 517491, at *5 (Va. Cir. Ct. Feb. 28, 2005) ("[E]ven though the defendant may have benefited from the plaintiff's

services, the latter cannot recover unless he can show sufficient additional facts that imply a promise to pay.").

Rosetta Stone fails to pled "acts of the parties or any circumstances which, according to the ordinary course of dealing, and the common understanding of man, show a natural intent to contract." *Weitzel v. Brown-Neil Corp.*, 152 F. Supp. 540, 549 (N.D. W.Va. 1957) (finding no valid, enforceable implied contract under this standard). For example, Rosetta Stone does not allege that it negotiated with Google about its trademark policy and was led by Google to believe it would be paid for use of its trademarks as keywords. Nor does Rosetta Stone allege it has ever had a license by which it was paid by a third party for the right to use Rosetta Stone's trademarks in bidding on keywords. Instead, Rosetta Stone implicitly asserts that a promise to pay can *always* be implied from the consideration received. (Opp. at 11) Under Rosetta Stone's theory, it is necessary only that the defendant knows it has something that the plaintiff wants. That is not the law.

CONCLUSION

Based on the foregoing reasons, the Court should dismiss Count VII of Rosetta Stone's First Amended Complaint.

Respectfully Submitted,

GOOGLE INC.
By counsel

/s/

Jonathan D. Frieden, Esquire (VSB No. 41452)
Stephen A. Cobb, Esquire (VSB No. 75876)
ODIN, FELDMAN & PITTLEMAN, P.C.
9302 Lee Highway, Suite 1100
Fairfax, Virginia 22031
(703) 218-2100
(703) 218-2160 (facsimile)
jonathan.frieden@ofplaw.com
stephen.cobb@ofplaw.com

Margret M. Caruso, Esquire (Admitted *Pro Hac Vice*)
QUINN, EMANUEL, URQUHART & SULLIVAN, LLP
555 Twin Dolphin Drive, Suite 560
Redwood Shores, California 94065
(650) 801-5101
(650) 801-5100 (facsimile)
margretcaruso@quinnemanuel.com
Counsel for Defendant Google Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5th day of April, 2010, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

Warren Thomas Allen, II, Esquire
SKADDEN ARPS SLATE MEAGHER & FLOM LLP
1440 New York Ave NW
Washington, DC 20005-2111
202-371-7126
Fax: 202-661-9063
Email: wtallen@skadden.com
Counsel for Plaintiff Rosetta Stone Ltd.

/s/
Jonathan D. Frieden, Esquire (VSB No. 41452)
Stephen A. Cobb, Esquire (VSB No. 75876)
ODIN, FELDMAN & PITTLEMAN, P.C.
9302 Lee Highway, Suite 1100
Fairfax, Virginia 22031
(703) 218-2100
(703) 218-2160 (facsimile)
jonathan.frieden@ofplaw.com
stephen.cobb@ofplaw.com
Counsel for Defendant Google Inc.