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 EXCLUDE THE EXPERT REPORT AND OPINION OF DR. KENT VAN LIERE

PORTIONS UNDER SEAL

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

preliminary injunction based on the first sale doctrine, despite evidence of consumer confusion). That is true because a reseller's use of a trademark "does not create a likelihood of confusion within the meaning of the [Lanham Act] statute." *Ballet Makers, Inc. v. U.S. Shoe Corp.*, 633 F. Supp. 1328, 1335 (S.D.N.Y. 1986); *see Brilliance Audio, Inc. v. Haights Cross Commc'ns, Inc.*, 474 F.3d 365, 369 (6th Cir. 2007) (noting that "trademark law is designed to prevent sellers from confusing or deceiving consumers about the origin or make of a product, which confusion ordinarily does not exist when a genuine article bearing a true mark is sold" (citation and quotation marks omitted)); *McCoy v. Mitsuboshi Cutlery, Inc.*, 67 F.3d 917, 924 (Fed. Cir. 1995) (holding that "the sale of genuine goods, even if unauthorized, cannot cause confusion and consequently cannot constitute trademark infringement"). In fact, confusion caused by a reseller's use of a trademark is "legally irrelevant" and should be excluded as it "might confuse the jury." *Mary Kay, Inc. v. Weber*, 601 F. Supp. 2d 839, 849 (N.D. Tex. 2009). Thus, it was improper for Dr. Van Liere to count as confused those respondents who indicated that Amazon.com's ad was endorsed by Rosetta Stone.

B. Coupon Cactus Lawfully Used Rosetta Stone's Trademarks.

Rosetta Stone argues that Coupon Cactus was not authorized to use the Rosetta Stone trademarks when Dr. Van Liere's survey was conducted in April and May 2009. (Opp. at 28-29.) But the actual screenshot used in the survey was created from Google.com on February 21, 2008. (Caruso Decl., ¶ 48 (showing that the filename of screenshot indicates that it was created on February 21, 2008).) [redacted]

[redacted] It was therefore improper for Dr. Van Liere to count as confused those respondents who identified Coupon Cactus's ad as endorsed by Rosetta Stone. Further, like Amazon, Coupon Cactus's ad directed consumers to genuine Rosetta Stone products (an undisputed point). Thus, Coupon Cactus's use of Rosetta Stone's trademarks was, like Amazon.com's use, permissible under trademark law. (*See*, *supra*, 5-6.) It was improper for Dr. Van Liere to count as "confused," for purposes of a "confusion" survey, those respondents who indicated that Coupon Cactus's ad was endorsed by Rosetta Stone.

Had Dr. Van Liere properly counted the respondents who stated that Amazon.com's and Coupon Cactus's ads were endorsed by Rosetta Stone, his survey would have demonstrated that ***no consumers*** (i.e., -3%) were confused. (Blair Decl., ¶ 18.) Dr. Van Liere's survey is therefore irrelevant and should be excluded.[1]

[1] Rosetta Stone argues that the opinions of Dr. Edward A. Blair, Google's confusion expert, should be given less weight because Dr. Blair did not conduct his own likelihood-of-confusion survey. (Opp. at 13-15.) That criticism is misguided. *First*, and contrary to Rosetta Stone's assertion, Google did not have sufficient to time to conduct a survey to rebut Dr. Van Liere's survey. Google did not receive Dr. Van Liere's report until December 14, 2009. (*See* Expert Report of Dr. Kent Van Liere, p. 13.). With a deadline for expert disclosures of January 13, 2010 (which presented significant holiday scheduling issues), Google would have had less than a month to conduct a responsive survey. (*See* Dkt. No. 38.) Rosetta Stone cannot seriously argue that Google should have designed and conducted a rebuttal confusion survey in less than a month, especially since Dr. Van Liere's survey took approximately two months to complete. (*See* Van Liere Depo., 30:3-11.) *Second*, there is no requirement that an expert conduct his own survey before his criticisms of another expert's survey will be considered. Indeed, Rosetta Stone cites no decision for that proposition, and court's routinely consider expert reports criticizing surveys from experts who did not conduct their own surveys. *See, e.g.*, *Smith v. Wal-Mart Stores, Inc.*, 537 F. Supp. 2d 1302, 1324-25 (N.D. Ga. 2008) (finding that a defendant's

III. DR. VAN LIERE'S METHODOLOGY IS FATALLY FLAWED

A survey should be designed to test what happens in the marketplace, not to produce a desired outcome. Here, however, Dr. Van Liere carefully crafted his survey methodology to produce a desired outcome. Therefore, it should be excluded.

A. Dr. Van Liere Failed To Sufficiently Replicate Actual Marketplace Conditions.

Rosetta Stone admits that Dr. Van Liere provided survey respondents with a manipulated screenshot of a Google search results page that had no clickable links and no ads paid for by Rosetta Stone. (Opp. at 17-21.) Rosetta Stone does not argue that consumers have ever been presented with a similar Google search results page in the actual marketplace. Instead, Rosetta Stone argues that a clickable link was unnecessary because Dr. Van Liere tested only for initial interest confusion (Opp. at 19) and that an advertisement from Rosetta Stone was unnecessary because Rosetta Stone only advertises on Google search to mitigate harm from Google's alleged infringing conduct (Opp. at 19-20). Neither of these "explanations" change the fact that respondents saw a manipulated screen shot, and this error justifies the exclusion of Dr. Van Liere's survey. *See Simon Prop. Group*, 104 F. Supp. 2d at 1052.

Rosetta Stone's argument that a clickable link was unnecessary because Dr. Van Liere tested only for initial interest confusion and "any 'contextual clues' provided to respondents by clicking the Sponsored Links would be irrelevant" to a measure of initial interest confusion fails. As discussed above, the Fourth Circuit has expressly declined to adopt initial interest confusion as a proper basis for imposing liability. (*See, supra*, at 3-4.) Indeed, in *Lamparello*, the Fourth

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expert was qualified to provide testimony about assumptions in plaintiff's survey, even though he conducted no survey for defendant); *E. & J. Gallo Winery v. Gallo Cattle Co.,* 967 F.2d 1280, 1293 (9th Cir. 1992) (same); *Pro-Football, Inc. v. Harjo*, 284 F. Supp. 2d 96, 110 (D.D.C. 2003) (same). *Third*, that Dr. Blair did not conduct a study is irrelevant to most of his criticisms—[redacted]

Circuit stated that, in the context of domain names, "a court must evaluate the allegedly infringing domain name in conjunction with the content of the website identified by the domain name." 420 F.3d at 316. Thus, under the Fourth Circuit's approach, the content of the site is at the heart of the likelihood of confusion analysis, and failure to provide respondents with these contextual clues fatally undermines Dr. Van Liere's survey results.

Similarly, Rosetta Stone's argument that a Rosetta Stone ad need not be included on the search results page shown to respondents because Rosetta Stone only advertises on Google search to mitigate harm from Google's alleged infringing conduct is misplaced. It is undisputed that, in the actual marketplace, respondents would have seen an ad from Rosetta Stone in response to the query "Rosetta Stone." It was therefore improper for Dr. Van Liere to intentionally distort the survey to remove the Rosetta Stone ad from the search page shown to respondents—what is at issue in this case is whether what Google actually displays to Google.com users constitutes actionable trademark infringement. *See Simon Prop. Group*, 104 F. Supp. 2d at 1042-44 (excluding survey for departing from and distorting the actual marketplace by eliminating content).

Dr. Van Liere's survey method failed to replicate actual marketplace conditions, and his survey, and any testimony regarding it, should therefore be excluded.

B. Dr. Van Liere Failed To Use An Adequate Control Stimulus.

Rosetta Stone contends that Dr. Van Liere's survey shows that Sponsored Links are more likely to confuse consumers than organic links — not that commercial links, or links that refer to Rosetta Stone software, are more likely to confuse consumers than non-commercial links or links that refer to Rosetta Stone the historical artifact. (Opp. at 5.) To test this proposition, Dr. Van Liere should have chosen a control stimulus that controlled for the differences in the balance of

sponsored and organic links. Dr. Van Liere did not do that. Instead, he selected a control stimulus that displayed far fewer commercial links and far fewer links referring to Rosetta Stone software than what was presented in his test condition. His survey is therefore unreliable. *See THOIP v. Walt Disney Co.*, 2010 WL 447049, at *14 (S.D.N.Y. Feb. 9, 2010) (excluding survey for failing to use an adequate control).

Rosetta Stone argues that Dr. Van Liere's control was proper because it "is identical to the test stimulus except that the control does not include the Sponsored Links." (Opp. at 21.) However, Rosetta Stone ignores that by removing its Sponsored Link, which is a commercial link, Dr. Van Liere skewed the ratio of both commercial to non-commercial links and links referring to Rosetta Stone (the plaintiff) to links referring to other Rosetta entities, including those affiliated with the historical Rosetta Stone artifact. This change fundamentally altered the nature of the page in a way beyond what was being tested in the survey.

Rosetta Stone tries to downplay the effects of this fundamental change by arguing that the organic links presented on both pages are identical. This misses the point that the overall number of links, in both the organic and sponsored link results, do not contain the same ratio of commercial-to-non-commercial links and plaintiff-to-non-plaintiff links. Thus, the results of the survey could simply show that respondents were more likely to believe that commercial links that refer to Rosetta Stone language learning software are more likely to be endorsed by Rosetta Stone, the language learning company, than non-commercial links referencing the Rosetta Stone artifact. This sheds no light on the relevant question of confusion here.

Rosetta Stone's assertion that "Google's real complaint is not with the manner in which Dr. Van Liere created the control stimulus, but with the selection of the screenshot on which both the test and control stimuli are based" is incorrect. (Opp. at 22.) Google's complaint is with

both. As discussed, the creation of the control failed to adjust for the effects of removing the sponsored link on the balance of the types of links present on the search results page. Dr. Van Liere's selection of an unbalanced Google screenshot exaggerated the effects of the first error. For example, had Dr. Van Liere selected a screenshot that had Amazon.com in both the organic and Sponsored Link sections, the control would have been more balanced and the survey would have been able to measure the differences in confusion between the Amazon.com link as a Sponsored Link and the same link as an organic result. (Caruso Decl., Exs. 11, 13, 16, 17.) Dr. Van Liere's failure to do so renders his results meaningless.[2]

Moreover, Dr. Van Liere did not simply choose a representative Google search result page. Rosetta Stone provided him with a number of screenshots of Google search results. (Caruso Decl., Exs. 8-19.) Four of those screenshots contained links to Amazon.com in both the sponsored and organic links. (Caruso Decl., Exs. 11, 13, 16, 17.) But he chose a search results page that displayed no commercial link to Rosetta Stone in its organic results—and no Sponsored Link that did not refer to Rosetta Stone (the plaintiff) or contain an ad critical of Rosetta Stone. (Caruso Decl., Ex. 19.) That was improper. It is equivalent to testing whether a 60-second commercial is confusing by displaying a single screenshot of that commercial, rather than the entire commercial. Dr. Van Liere should have selected a control that was typical of Google search result pages. He did not. He chose a control stimulus that displayed fewer commercial sites as organic links than is typical, thereby distorting the survey results.

[2] Rosetta Stone argues that Google has no grounds to complain about the number and types of links on the selected search results page because Google determines what links will show. (Opp. at 19-21.) Dr. Van Liere actually altered the search results page in his study, so it is not correct to say that Google determined the layout of these pages. Dr. Van Liere was also provided with a number of different possible screen shots to use (Google's search results page can change on a query by query basis depending on the time and location of a search). Yet he plainly chose the one he thought would give *the* most favorable results to Rosetta Stone.

Rosetta Stone also argues that Dr. Van Liere properly counted as not confused those respondents who correctly answered the "filter" survey question ("Which links or links if any . . . sells Rosetta Stone language software products?), even though those respondents were not asked the subsequent survey questions designed to test confusion ("[W]hich links or links, if any, are endorsed by the Rosetta Stone company?"). In support of this argument, Rosetta Stone asserts that it is reasonable to assume that respondents who did not believe a link sold Rosetta Stone software would not believe that the link was owned or endorsed by Rosetta Stone. (Opp. at 23-24.) But that assumption is methodologically unsound. Respondents could very well have believed that some of the links, though not selling Rosetta Stone's product, were owned or endorsed by Rosetta Stone. In fact, under Dr. Van Liere's definition of "endorsed" (which was never explained to respondents), the Wikipedia entry for Rosetta Stone was "endorsed" by Rosetta Stone, even though it did not actually sell Rosetta Stone products. Because Dr. Van Liere never gave these respondents the opportunity to express confusion, they should not have been included as not confused in the calculation of confusion rates.[3] Tellingly, when they are omitted, the "net confusion rate" becomes 5%. (Blair. Decl., ¶¶ 13-14.)

C. Dr. Van Liere Failed To Target The Appropriate Universe Of Consumers.

"Selection of the proper universe [in a survey] is so critical that even if the proper questions are asked in a proper manner, if the wrong persons are asked, the results are likely to be irrelevant." *Smith v. Wal-Mart Stores, Inc.*, 537 F. Supp. 2d 1302, 1343 (N.D. Ga. 2008) (quotation marks and citation omitted). Dr Van Liere's selection of an overbroad universe renders his survey irrelevant.

[3] Rosetta Stone's argument that the properly-calculated confusion rates of 75% and 73% were "excessively high" does not show that "Google's proposed protocol is flawed," so much as it shows that Dr. Van Liere's survey methodology, and in particular its failure to define the term "endorsed," was flawed.

Rosetta Stone acknowledges that the relevant universe here consists of "United States consumers who would potentially use Google's search services to gather information about the purchase of products and services from Rosetta Stone or to purchase products and services from Rosetta Stone." (Opp. at 25.) For a user to conduct such a search on Google.com, the user must be able to recall the brand Rosetta Stone and enter that brand as a search query. Only consumers with *unaided* brand recall would be able to do so. Dr. Van Liere did not survey such a population.

Rosetta Stone argues, without evidence, that Dr. Van Liere's screening question, which tested for *aided* brand recall, "adequately ensured that the respondents were sufficiently familiar with Rosetta Stone" and that "restricting the survey to only [consumers with unaided brand recall] would be inappropriate." (Opp. at 26.) Rosetta Stone's failure to explain how someone with only aided brand recall could search for Rosetta Stone without prompting by an interviewer is unsurprising, as there is no reasonable justification. [redacted]

Rosetta Stone further argues that Dr. Van Liere's decision to conduct the surveys in malls *without* Rosetta Stone kiosks was proper because "the malls were specifically selected to ensure the population was representative of consumers who might be seeking information about Rosetta Stone's products." (Opp. at 27.) Rosetta Stone cites to no evidence to support this statement. To the contrary, Dr. Van Liere's report indicated that the cities and malls were actually selected only to ensure *geographical* and not economic or educational representativeness. (Caruso Decl., Ex. 45.) Moreover, though Dr. Van Liere's screening questions targeted particular age and

gender quotas, they did not seek representative quotas for educational level or income. (*Id.* at ¶ 18.) [redacted] (Caruso Decl., Exs. 34, 35, 69 at 86:20-88:1.) Indeed, it is particularly problematic that Dr. Van Liere excluded the very malls Rosetta Stone chose to invest resources in, presumably on the basis that those mall goers were most likely to purchase its products and instead focused on other malls in the same cities.

Dr. Liere's failure to target the appropriate universe of consumers renders his survey unreliable, and his survey and any testimony regarding it should be excluded.

D. Dr. Van Liere Failed To Provide Respondents A Definition Of "Endorsed."

Rosetta Stone admits the only type of confusion Dr. Van Liere claims to have found in his survey is confusion as to "endorsement" by Rosetta Stone. (Opp. at 8.) Although this Court dismissed Rosetta Stone's endorsement claim, Rosetta Stone argues that Dr. Van Liere's survey is nevertheless relevant because "confusion as to affiliation, endorsement, or association is actionable under 15 U.S.C. § 1114(1)." (Opp. at 10.) The cases Rosetta Stone cites discuss confusion as to sponsorship, and do not state that endorsement and sponsorship are the same thing. *See AMP Inc. v. Foy,*, 540 F.2d 1181, 1184 (4th Cir. 1976) ("The public is protected from being confused as to the *sponsorship* of goods or services purchased." (emphasis added)); *Anheuser-Busch, Inc. v. L & L Wings, Inc.,* 962 F.2d 316, 318 (4th Cir. 1992) ("In other words, an unauthorized use of a trademark infringes the trademark holder's rights if it is likely to confuse an 'ordinary consumer' as to the source or *sponsorship* of the goods." (emphasis added; citation omitted)). Even if endorsement confusion was actionable under § 1114(1), Rosetta Stone fails to explain how that claim would be any different from the endorsement claim this Court already dismissed.

In any event, given that the relevancy of Dr. Van Liere's survey hinges entirely on its supposed finding of endorsement confusion and the lack of clarity as to exactly what "endorsement" means, Dr. Van Liere's failure to provide a definition of the term to respondents is particularly troubling. Indeed, Rosetta Stone's entire argument about why Wikipedia was "endorsed" and Amazon.com, [redacted] and Coupon Cactus, [redacted], were not, illustrates precisely how ambiguous the term endorsement is in the context of Dr. Van Liere's survey. Reasonable minds could differ about whether a site is "endorsed" (as used in the survey) by someone who contributes to its content, or whether a site is "endorsed" because it is permitted to resell the endorser's products. Without having provided more clarity to the respondents, it is impossible to know whether their definitions of "endorsement" reflect actionable confusion under the Lanham Act.[4]

To make matters worse, Dr. Van Liere ignored the one piece of information gathered from respondents that could have indicated whether their confusion was actionable or not. Although respondents were asked why they thought the particular site was endorsed by Rosetta Stone, Dr. Van Liere failed to take that into account in calculating his confusion rates. Thus, if a respondent indicated that he thought Rosetta Stone "endorsed" Amazon.com *because* it allowed Amazon.com to sell its products, that respondent would not be confused, though Dr. Van Liere would have counted him as so. This was precisely the type of error for which the court in *Mary Kay, Inc. v. Weber* criticized Dr. Van Liere. 601 F. Supp. 2d 839, 849 (N.D. Tex. at 2009) (holding that Dr. Van Liere should have considered explanations given as to why respondents were confused because some believed that defendant's site was affiliated with plaintiff only

[4] Contrary to Rosetta Stone's assertion, the fact that one of Google's counsel used the word "endorsement" in a deposition without defining the word has absolutely nothing to do with whether Dr. Van Liere's failure to define this critical word in the context of his survey was proper.

because they sold plaintiff's products). In *Mary Kay*, the court excluded "the bald assertion that forty five percent of interviewees were confused" because that number included legally irrelevant confusion. *Id.* at 849. Similarly here, Dr. Van Liere's opinions, data, and testimony regarding legally irrelevant confusion should be excluded.

CONCLUSION

Based on the foregoing reasons and all papers submitted by Google in connection with its Motion to Exclude, the Court should exclude Dr. Van Liere's survey and any testimony regarding it.

Respectfully Submitted,

GOOGLE INC.
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14th day of April, 2010, I electronically filed Google Inc.'s Reply Memorandum of Law in Further Support of Its Motion to Exclude the Expert Report and Opinion of Dr. Kent Van Liere with the Clerk of Court using the CM/ECF system, which then sent a notification of such filing (NEF) to the following:

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