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

ROSETTA STONE LTD.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Civ. Action No. 1:09-cv-00736(GBL/TCB)**
	)	
GOOGLE INC.,	)	
	)	
Defendant.	)	
	)	

ROSETTA STONE'S PROPOSED JURY INSTRUCTIONS

Plaintiff Rosetta Stone Ltd. ("Rosetta Stone") respectfully submits the following proposed jury instructions. Rosetta Stone requests and reserves the right to amend, modify, withdraw and/or supplement the instructions before or during the trial of this matter. Rosetta Stone intends to submit further proposed jury instructions depending upon and based upon rulings issued in connection with any motions *in limine* or other pre-trial or trial motions, and the evidence and theories proffered by the parties during the course of the trial.

Respectfully submitted,

April 26, 2010

/s/

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PROPOSED PRELIMINARY INSTRUCTIONS

JURY INSTRUCTION NO. 1
Opening Instructions

MEMBERS OF THE JURY:

You have now been sworn as the jury to try this case. As the jury you will decide the disputed questions of fact. As the Judge, I will decide all the questions of law and procedure. From time to time during the trial and at the end of the trial, I will instruct you on the rules of law that you must follow in making your decision.

Soon, the lawyers for each of the parties will make what is called an opening statement. Opening statements are intended to assist you in understanding the evidence. What the lawyers say is not evidence.

After the opening statements, the parties will call witnesses and present evidence. After all the evidence is completed, the lawyers will again address you to make final arguments. Then I will instruct you on the applicable law. You will then retire to deliberate on a verdict.

Keep an open mind during the trial. Do not decide any fact until you have heard all the evidence, the closing arguments, and my instructions.

Pay close attention to the testimony and evidence. If you would like to take notes during trial, you may do so. If you do take notes, be careful not to get so involved in the note taking that you become distracted and miss part of the testimony. Your notes are to be used only as aids to your memory, and if your memory should later be different from your notes, you should rely on your memory and not your notes. If you do not take notes, rely on your own independent memory of the testimony. Do not be unduly influenced by the notes of other jurors. A juror's notes are not entitled to any greater weight than the recollection of each juror concerning the testimony. Even though the court reporter is making stenographic notes of everything that is said,

a typewritten copy of this testimony will not be available for your use during deliberations. On the other hand, any exhibits admitted into evidence will be available to you during your deliberations.

Until this trial is over, do not discuss this case with anyone and do not permit anyone to discuss this case in your presence. Do not discuss the case even with the other jurors until all of the jurors are in the jury room actually deliberating at the end of the case. If anyone should attempt to discuss this case or to approach you concerning the case before that time, you should inform the Court immediately. Hold yourself completely apart from the people involved in the case – the parties, the witnesses, the attorneys and persons associated with them. It is important not only that you be fair and impartial but that you also appear to be fair and impartial.

Do not make any independent investigation of any fact or matter in this case. You are to be guided solely by what you see and hear in this trial. Do not learn anything about the case from any other source, including by doing your own research on the Internet or by any other means. This is particularly important in this case as it involves the Internet.

During the trial, it may be necessary for me to confer with the lawyers out of your hearing or to conduct a part of the trial out of your presence. I will handle these matters as briefly and as conveniently for you as I can, but you should remember that they are a necessary part of any trial.

It is now time for me to instruct you on some details about the case.

AUTHORITY: Fifth Circuit Pattern Jury Instructions – Civil § 1.1 (2006), http://www.lb5.uscourts.gov/juryinstructions/2006CIVIL.pdf (modified).

JURY INSTRUCTION NO. 2
Claims and Defenses

To help you follow the evidence I will give you a brief summary of the positions of the parties.

Rosetta Stone develops and sells technology-based language learning products and services. Google owns and operates an Internet search engine.

In this lawsuit, Rosetta Stone has asserted seven claims against Google. These claims are federal trademark infringement, federal contributory trademark infringement, federal vicarious trademark infringement, federal trademark dilution, trademark infringement under Virginia law, unfair competition under Virginia law, and unjust enrichment under Virginia law.

A trademark is a word, a name, a symbol, a device, or a combination of them indicating the source of goods or services. The owner of a trademark has the right to exclude others from using that trademark subject to certain defenses. Rosetta Stone has registered with the United States Patent and Trademark Office the following four trademarks: ROSETTA STONE, ROSETTA STONE LANGUAGE LEARNING SUCCESS, ROSETTASTONE.COM, and ROSETTA WORLD. Rosetta Stone has registered its ROSETTA STONE trademark with the Commonwealth of Virginia. These are collectively referred to as Rosetta Stone's trademarks or marks.

I will now explain Rosetta Stone's claims in more detail.

First, Rosetta Stone has brought a federal trademark infringement claim against Google. Rosetta Stone contends that Google has used Rosetta Stone's trademarks in a manner that is likely to confuse consumers. Google denies this claim.

Second, Rosetta Stone has brought a federal contributory trademark infringement claim against Google. Rosetta Stone contends that Google's customers have infringed the Rosetta

Stone trademarks and that Google is liable for that infringement because (1) Google intentionally induces its customers to infringe Rosetta Stone's trademarks or (2) Google allowed its customers to display infringing Sponsored Links knowing or having reason to know that the customer would infringe Rosetta Stone's trademarks. Google denies this claim.

Third, Rosetta Stone has brought a federal vicarious trademark infringement claim against Google. Rosetta Stone contends that Google is liable for its customers' infringement of Rosetta Stone's trademarks because Google and its customers exercise joint control over the infringing advertisements. Google denies this claim.

Fourth, Rosetta Stone has brought a federal trademark dilution claim against Google. Rosetta Stone contends that Google's use of Rosetta Stone's trademarks has diluted the distinctive quality of Rosetta Stone's trademarks by eroding the public's exclusive identification of those marks with Rosetta Stone. Google denies this claim.

Fifth, Rosetta Stone has brought a trademark infringement claim under Virginia law against Google. Rosetta Stone contends that Google has used Rosetta Stone's state registered trademark in a manner that infringes Rosetta Stone's state registered trademark and is likely to confuse consumers. Google denies this claim.

Sixth, Rosetta Stone has brought an unfair competition claim under Virginia law against Google. Rosetta Stone contends that Google and its customers are unfairly competing with Rosetta Stone by using Rosetta Stone's trademarks in a manner that is likely to confuse consumers. Google denies this claim.

Seventh, Rosetta Stone seeks recovery for damages under a legal concept known as unjust enrichment. Rosetta Stone contends that Google knowingly and without authorization from Rosetta Stone, has auctioned Rosetta Stone's trademarks to Google's customers, resulting

in millions of dollars of revenue for Google. Rosetta Stone contends that Google's retention of revenue from the auction of Rosetta Stone's trademarks would be inequitable, resulting in Google being unjustly enriched. Google denies this claim.

Rosetta Stone has the burden of proving its claims by a preponderance of the evidence.

AUTHORITY: 3 O'Malley, Grenig, and Lee, *Federal Jury Practice and Instructions* § 101.03 (modified) (5th ed. 2000) (hereinafter "FJP&I"); 15 U.S.C. §§ 1114(1), 1117(a), 1125(c).

JURY INSTRUCTION NO. 3
Burden of Proof

I must now instruct you about the burden of proof. When a party has the burden of proof on any claim or defense, that means it has the burden of proving to you the existence or nonexistence of the facts relevant to its clams or defenses. If a party has the burden of proof by a "preponderance of the evidence," that means the evidence must persuade you that the claim or defense is more probable than not. You should base your decision on all the evidence, regardless of which party presented it.

AUTHORITY: 3 FJP&I § 101.41 (modified).

JURY INSTRUCTION NO. 4
Province of Judge and Jury

After all the evidence has been heard and arguments and instructions are finished, you will meet to make your decision. You will determine the facts from all the testimony and other evidence that is presented. You are the sole and exclusive judge of the facts. I must stress that you are required to accept the rules of law that I give you, whether or not you agree with them.

The law permits me to comment on the evidence in the case during the trial or while instructing the jury. Such comments are only expressions of my opinion as to the facts. You may disregard these comments entirely, because you are to determine for yourself the weight of the evidence and the credibility of each of the witnesses.

AUTHORITY: 3 FJP&I § 101.10 (modified).

JURY INSTRUCTION NO. 5
Jury Conduct

To insure fairness, you must obey the following rules:

1. Do not talk to each other about this case or about anyone involved with this case until the end of the trial when you go to the jury room to decide on your verdict.

2. Do not talk with anyone else about this case or about anyone involved with this case until the trial has ended and you have been discharged as jurors. "Anyone else" includes members of your family and your friends. You may tell people you are a juror, but do not tell them anything else about the case.

3. Outside the courtroom, do not let anyone tell you anything about the case, or about anyone involved with it until the trial has ended. If someone should try to talk to you about the case during the trial, please report it to me immediately.

4. During the trial you should not talk with or speak to any of the parties, lawyers or witnesses involved in this case – you should not even pass the time of day with any of them. It is important not only that you do justice in this case, but that you also give the appearance of doing justice.

5. Do not read any news stories or articles about the case, or about anyone involved with it, or listen to any radio or television reports about the case or about anyone involved with it.

6. Do not consult dictionaries or reference materials, search the Internet, websites, blogs, or use any other electronic tools to obtain information about this case or to help you decide the case. Do not try to find out information from any source outside the confines of this courtroom.

7. Do not make up your mind during the trial about what the verdict should be. Keep an open mind until after you have gone to the jury room to decide the case and you and the other jurors have discussed all the evidence.

8. If you need to tell me something, simply give a signed note to the marshal to give to me.

AUTHORITY: 3 FJP&I § 101.11 (modified); Proposed Model Jury Instructions: The Use of Electronic Technology to Conduct Research on or Communicate about a Case (Judicial Conference Committee on Court Administration and Case Management, December 2009).

JURY INSTRUCTION NO. 6
Questions by Jurors – Prohibited

I do not permit jurors to ask questions of witnesses or of the lawyers. Please do not interrupt the lawyers during their examination of witnesses.

If you are unable to hear a witness or a lawyer, please raise your hand immediately and I will see that this is corrected.

AUTHORITY: 3 FJP&I § 101.16 (modified).

JURY INSTRUCTION NO. 7
Publicity During Trial

If there is publicity about this trial, you must ignore it. Do not read anything on any medium, including the Internet, or listen to any television or radio programs about the case. You must decide this case only from the evidence presented in the trial.

AUTHORITY: 3 FJP&I § 101.19.

JURY INSTRUCTION NO. 8
Evidence in the Case

The evidence in the case will consist of the following:

1. The sworn testimony of the witnesses, no matter who called a witness.

2. All exhibits received in evidence, regardless of who may have produced the exhibits.

3. Any facts to which the parties have agreed or stipulated.

4. All facts that may have been judicially noticed by me. When I declare that I will take judicial notice of some fact or event, you must accept that fact as true.

Statements and arguments of the lawyers are not evidence in the case, unless made as an admission or stipulation of fact.

If I sustain an objection to any evidence or if I order evidence stricken, that evidence must be entirely ignored.

You are to consider only the evidence in the case. But in your consideration of the evidence you are not limited to the statements of the witnesses. In other words, you are not limited solely to what you see and hear as the witnesses testified. You may draw, from the facts that you find have been proved, such reasonable inferences or conclusions as you feel are justified in light of your experience.

AUTHORITY: 3 FJP&I § 101.40 (modified).

JURY INSTRUCTION NO. 9
Evidence for a Limited Purpose

Some evidence is admitted for a limited purpose only. When I instruct you that an item of evidence has been admitted for a limited purpose, you must consider it only for that limited purpose and for no other purpose.

AUTHORITY: 3 FJP&I § 101.40 (modified).

JURY INSTRUCTION NO. 10
Direct and Circumstantial Evidence

"Direct evidence" is direct proof of a fact, such as testimony by a witness about what the witness said or heard or did. "Circumstantial evidence" is proof of one or more facts from which you could find another fact. You should consider both kinds of evidence. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. You are to decide how much weight to give any evidence.

AUTHORITY: 3 FJP&I § 101.42.

JURY INSTRUCTION NO. 11
Expert Witnesses

In this case, you're going to have expert witnesses. When knowledge of technical subject matter may be helpful to the jury, a person who has special training or experience in that technical field, called an expert witness, is permitted to state his or her opinion on those technical matters. However, you are not required to accept that opinion. As with any other witness, it is up to you to decide whether to rely upon it.

AUTHORITY: Fifth Circuit Pattern Jury Instructions – Civil § 2.19 (2006), http://www.lb5.uscourts.gov/juryinstructions/2006CIVIL.pdf (modified).

JURY INSTRUCTION NO. 12
Deposition Testimony

Certain testimony may be presented to you through what is called a deposition. A deposition is a set of sworn, recorded answers to questions asked of a witness in advance of the trial. Under some circumstances, a witness's testimony may be presented, under oath, in the form of a deposition. Some time before this trial, the witness was questioned under oath. A court reporter was present and recorded the testimony. The questions and answers will be shown or read to you. The deposition testimony is entitled to the same consideration as if the witness had been present and had testified from the witness stand in court before you. If the deposition testimony is read to you, do not place any significance on the behavior or tone of voice of any person who is reading the questions or answers from that deposition.

AUTHORITY: Ninth Circuit Manual of Model Jury Instructions – Civil § 2.4 (2007), http://207.41.19.15/web/sdocuments.nsf/civ (modified).

JURY INSTRUCTION NO. 13
Credibility of Witnesses

In deciding the facts, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, part of it, or none of it. In considering the testimony of any witness, you may take into account many factors, including the witness's opportunity and ability to see or hear or know the things the witness testified about; the quality of the witness's memory; the witness's appearance and manner while testifying; the witness's interest in the outcome of the case; any bias or prejudice the witness may have; other evidence that may have contradicted the witness's testimony; and the reasonableness of the witness's testimony in light of all the evidence. The weight of the evidence does not necessarily depend upon the number of witnesses who testify about it.

AUTHORITY: 3 FJP&I § 101.43 (modified).

JURY INSTRUCTION NO. 14
Judge's Questions to Witnesses

During the trial, I may sometimes ask a witness questions. Please do not assume that I have any opinion about the subject matter of my questions.

AUTHORITY: 3 FJP&I § 101.30.

JURY INSTRUCTION NO. 15
Stipulations

Rosetta Stone and Google have entered into stipulations as to certain facts. A stipulation is an agreement among the parties that a certain fact is true. You should therefore treat those facts as having been proved.

AUTHORITY: 3 FJP&I § 101.48 (modified).

JURY INSTRUCTION NO. 16
Ruling on Objections

When a lawyer asks a question or offers an exhibit into evidence and a lawyer on the other side thinks it is not permitted by the rules of evidence, that lawyer may object. If I overrule the objection, the question may be answered or the exhibit received into evidence. If I sustain the objection, the question cannot be answered and the exhibit cannot be received into evidence.

If I sustain an objection to a question or the admission of an exhibit, you must ignore the question and must not guess what the answer to the question might have been. In addition, you must not consider evidence that I have ordered stricken from the record.

AUTHORITY: 3 FJP&I § 101.49.

JURY INSTRUCTION NO. 17
Outline of Trial

Trials proceed in the following way: First, each side may make an opening statement. An opening statement is not evidence. It is simply an outline to help you understand what that party expects the evidence will show. A party is not required to make an opening statement.

The plaintiff will then present evidence, and counsel for the defendant may cross-examine the witnesses called to testify by the plaintiff. Then the defendant may present evidence, and counsel for the plaintiff may cross-examine the witnesses called to testify by the defendant.

After the evidence has been presented, I will instruct you on the law that applies to the case and the attorneys will make closing arguments.

After that, you will go to the jury room to deliberate on your verdict.

AUTHORITY: Ninth Circuit Manual of Model Jury Instructions – Civil § 1.19 (2007), http://207.41.19.15/web/sdocuments.nsf/civ (modified).

JURY INSTRUCTION NO. 18
The Use of Electronic Technology to Communicate About the Case

Until you retire to deliberate, you may not discuss this case with anyone, even your fellow jurors. After you retire to deliberate, you may begin discussing the case with your fellow jurors, but you cannot discuss the case with anyone else until you have returned a verdict and the case is at an end. I hope that for all of you this case is interesting and noteworthy. I know that many of you use cell phones, Blackberries, the Internet and other tools of technology. You also must not talk to anyone about this case or use these tools to communicate electronically with anyone about the case. This includes your family and friends. You may not communicate with anyone about the case on your cell phone, through e-mail, Blackberry, iPhone, text messaging, or on Twitter, through any blog or website, through any Internet chat room, or by way of any other social networking websites, including Facebook, My Space, LinkedIn, and YouTube.

AUTHORITY: Proposed Model Jury Instructions: The Use of Electronic Technology to Conduct Research on or Communicate about a Case (Judicial Conference Committee on Court Administration and Case Management, December 2009).

PROPOSED POST-TRIAL INSTRUCTIONS

JURY INSTRUCTION NO. 19
General Introduction

Now that you have heard the evidence and the arguments, it is my duty to instruct you about the applicable law. It is your duty to follow the law as I will state it and to apply it to the facts as you find them from the evidence in the case. Do not single out one instruction as stating the law, but consider the instructions as a whole. You are not to be concerned about the wisdom of any rule of law stated by me. You must follow and apply the law.

The lawyers have properly referred to some of the governing rules of law in their arguments. If there is any difference between the law stated by the lawyers and as stated in these instructions, you are governed by my instructions. Nothing I say in these instructions indicates that I have any opinion about the facts. You, not I, have the duty to determine the facts.

You must perform your duties as jurors without bias or prejudice as to any party. The law does not permit you to be controlled by sympathy, prejudice, or public opinion. All parties expect that you will carefully and impartially consider all the evidence, follow the law as it is now being given to you, and reach a just verdict, regardless of the consequences.

AUTHORITY: 3 FJP&I § 103.01 (modified).

JURY INSTRUCTION NO. 20
Evidence in the Case

Unless you are otherwise instructed, the evidence in the case consists of the sworn testimony of the witnesses regardless of who called the witness, all exhibits received in evidence regardless of who may have produced them, and all facts and events that may have been admitted or stipulated to.

Statements and arguments by the lawyers are not evidence. The lawyers are not witnesses. What they have said in their opening statement, closing arguments, and at other times is intended to help you interpret the evidence, but it is not evidence. However, when the lawyers on both sides stipulate or agree on the existence of a fact, you must, unless otherwise instructed, accept the stipulation and regard that fact as proved.

Any evidence to which I have sustained an objection and evidence that I have ordered stricken must be entirely disregarded.

AUTHORITY: 3 FJP&I § 103.30 (modified).

JURY INSTRUCTION NO. 21
Preponderance of the Evidence

"Establish by a preponderance of the evidence" means to prove that something is more likely so than not so. In other words, a preponderance of the evidence means such evidence as, when considered and compared with the evidence opposed to it, has more convincing force, and produces in your minds belief that what is sought to be proved is more likely true than not true. This standard does not require proof to an absolute certainty, since proof to an absolute certainty is seldom possible in any case.

In determining whether any fact in issue has been proved by a preponderance of the evidence you may, unless otherwise instructed, consider the testimony of all witnesses, regardless of who may have called them, and all exhibits received in evidence, regardless of who may have produced them.

You may have heard of the term "proof beyond a reasonable doubt." That is a stricter standard that applies in criminal cases. It does not apply in civil cases such as this. You should, therefore, put it out of your minds.

AUTHORITY: 3A FJP&I § 159.49, 3 FJP&I § 104.01 (modified).

JURY INSTRUCTION NO. 22
"Direct" and "Circumstantial" Evidence – Defined

Generally speaking, there are two types of evidence that are generally presented during a trial – direct evidence and circumstantial evidence. "Direct evidence" is the testimony of a person who asserts or claims to have actual knowledge of a fact, such as an eyewitness. "Indirect or circumstantial" evidence is proof of a chain of facts and circumstances indicating the existence or nonexistence of a fact.

As a general rule, the law makes no distinction between the weight or value to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence. You are simply required to find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

AUTHORITY: 3 FJP&I § 104.05 (modified).

JURY INSTRUCTION NO. 23
"Inferences" Defined

You are to consider only the evidence in the case. However, you are not limited to the statements of the witnesses. In other words, you are not limited to what you see and hear as the witnesses testify. You may draw, from the facts that you find have been proved, such reasonable inferences as seem justified in light of your experience.

"Inferences" are deductions or conclusions that reason and common sense lead you to draw from facts established by the evidence in the case.

AUTHORITY: 3 FJP&I § 104.20.

JURY INSTRUCTION NO. 24
Expert Witness

The rules of evidence ordinarily do not permit witnesses to testify as to opinions or conclusions. An exception to this rule exists for "expert witnesses." An expert witness is a person who, by education and experience has become expert in some art, science, profession, or calling. Expert witnesses may state their opinions as to matters in which they profess to be expert, and may also state their reasons for their opinions.

You have heard the testimony of four experts in this case. Rosetta Stone presented the testimony of Kent D. Van Liere and James Malackowski. Google presented the testimony of Edward Blair and Michael Wagner.

You should consider each expert opinion received into evidence in this case, and give it such weight as you think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound, or if you feel that it is outweighed by other evidence, you may disregard the opinion entirely.

AUTHORITY: 3 FJP&I § 104.40 (modified).

JURY INSTRUCTION NO. 25
Charts and Summaries Not Received in Evidence

Certain charts and summaries that have not been received into evidence have been shown to you in order to help explain the contents of records, documents, or other evidence in the case. They are not themselves evidence or proof of any facts. If they do not correctly reflect the facts or figures shown by the evidence in the case, you should disregard these charts and summaries and determine the facts from the underlying evidence.

AUTHORITY: Ninth Circuit Manual of Model Jury Instructions – Civil § 2.12 (2007), http://207.41.19.15/web/sdocuments.nsf/civ (modified).

JURY INSTRUCTION NO. 26
Charts and Summaries Received in Evidence

Certain charts and summaries have been received into evidence to illustrate information brought out in the trial. Charts and summaries are only as good as the underlying evidence that supports them. You should therefore, give them only such weight as you think the underlying evidence deserves.

AUTHORITY: Ninth Circuit Manual of Model Jury Instructions – Civil § 2.13 (2007), http://207.41.19.15/web/sdocuments.nsf/civ (modified).

JURY INSTRUCTION NO. 27
Oral Statements or Admissions

Evidence as to any oral statements or admissions, claimed to have been made outside of court by a party to any case, should always be considered with caution and weighed with great care. The person making the alleged statement or admission may not have expressed clearly the meaning intended, or the witness testifying to an alleged admission may have misunderstood or may have misquoted what was actually said.

However, when an oral statement or admission made outside of court is proved by reliable evidence, that statement or admission may be treated as trustworthy and should be considered along with all other evidence in the case.

AUTHORITY: 3 FJP&I § 104.53.

JURY INSTRUCTION NO. 28
Discrepancies in Testimony

You are the sole judges of the credibility of the witnesses and the weight their testimony deserves. You may be guided by the appearance and conduct of the witness, or by the manner in which the witness testifies, or by the character of the testimony given, or by evidence contrary to the testimony.

You should carefully examine all the testimony given, the circumstances under which each witness has testified, and every matter in evidence tending to show whether a witness is worthy of belief. Consider each witness's intelligence, motive and state of mind, and demeanor or manner while testifying.

Consider the witness's ability to observe the matters as to which the witness has testified, and whether the witness impresses you as having an accurate recollection of these matters. Also, consider any relation each witness may have with either side of the case, the manner in which each witness might be affected by the verdict, and the extent to which the testimony of each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses may or may not cause you to discredit such testimony. Two or more persons seeing an event may see or hear it differently.

In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

After making your own judgment, you will give the testimony of each witness such weight, if any, that you may think it deserves. In short, you may accept or reject the testimony of any witness, in whole or in part.

In addition, the weight of the evidence is not necessarily determined by the number of witnesses testifying to the existence or nonexistence of any fact. You may find that the testimony of a small number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

AUTHORITY: 3 FJP&I § 105.01.

JURY INSTRUCTION NO. 29
Effect of Prior Inconsistent Statements or Conduct

Evidence that, at some other time while not under oath a witness who is not a party to this action has said or done something inconsistent with the witness's testimony at the trial, may be considered for the sole purpose of judging the credibility of the witness. However, such evidence may never be considered as evidence of proof of the truth of any such statement.

Where the witness is a party to the case, and by such statement or other conduct admits some fact or facts against the witness's interest, then such statement or other conduct, if knowingly made or done, may be considered as evidence of the truth of the fact or facts so admitted by such party, as well as for the purpose of judging the credibility of the party as a witness.

An act or omission is "knowingly" done, if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

AUTHORITY: 3 FJP&I § 105.09.

JURY INSTRUCTION NO. 30
Parties' Failure to Produce Evidence

You have heard testimony about evidence which has not been produced. In particular, Rosetta Stone contends that Google at one time possessed documents relating to additional consumer confusion experiments conducted in or about 2004 as well as additional documents relating to the consumer confusion experiments and studies that have been discussed during the course of the trial. However, Google contends that it was not able to locate such documents. If you find that Google could have produced the evidence, and that the evidence was within Google's control, and that this evidence would have been material in deciding among the facts in dispute in this case, then you are permitted, but not required, to infer that the evidence would have been unfavorable to Google. In deciding whether to draw this inference, you should consider whether Google had a reason for not producing this evidence, and whether this reason was explained to your satisfaction. Again, any inference you decide to draw should be based on all of the facts and circumstances in this case.

AUTHORITY: *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148 (4th Cir. 1995).

JURY INSTRUCTION NO. 31
Summary of Contentions

I will now repeat the summary of each side's contentions in this case that I provided to you at the start of the trial. I will then provide you with detailed instructions on what each side must prove to win on each of its contentions.

In this lawsuit, Rosetta Stone has asserted seven claims against Google. These claims are federal trademark infringement, federal contributory trademark infringement, federal vicarious trademark infringement, federal trademark dilution, trademark infringement under Virginia law, unfair competition under Virginia law, and unjust enrichment under Virginia law.

As I will instruct you in a moment, a trademark is a word, a name, a symbol, a device, or a combination of them indicating the source of goods or services. The owner of a trademark has the right to exclude others from using that trademark subject to certain defenses. Rosetta Stone has registered with the United States Patent and Trademark Office the following four trademarks: ROSETTA STONE, ROSETTA STONE LANGUAGE LEARNING SUCCESS, ROSETTASTONE.COM, and ROSETTA WORLD. Rosetta Stone has registered its ROSETTA STONE trademark with the Commonwealth of Virginia. These are collectively referred to as Rosetta Stone's trademarks or marks.

I will now explain Rosetta Stone's claims in more detail.

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induces its customers to infringe Rosetta Stone's trademarks or (2) Google allowed its customers to display infringing Sponsored Links knowing or having reason to know that the customer would infringe Rosetta Stone's trademarks. Google denies this claim.

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Fourth, Rosetta Stone has brought a federal trademark dilution claim against Google. Rosetta Stone contends that Google's use of Rosetta Stone's trademarks has diluted the distinctive quality of Rosetta Stone's trademarks by eroding the public's exclusive identification of those marks with Rosetta Stone. Google denies this claim.

Fifth, Rosetta Stone has brought a trademark infringement claim under Virginia law against Google. Rosetta Stone contends that Google has used Rosetta Stone's state registered trademark in a manner that infringes Rosetta Stone's state registered trademark and is likely to confuse consumers. Google denies this claim.

Sixth, Rosetta Stone has brought an unfair competition claim under Virginia law against Google. Rosetta Stone contends that Google and its customers are unfairly competing with Rosetta Stone by using Rosetta Stone's trademarks in a manner that is likely to confuse consumers. Google denies this claim.

Seventh, Rosetta Stone seeks recovery for damages under a legal concept known as unjust enrichment. Rosetta Stone contends that Google knowingly and without authorization from Rosetta Stone, has auctioned off Rosetta Stone's trademarks to Google's customers, resulting in millions of dollars of revenue for Google. Rosetta Stone contends that Google's

retention of its revenues from the auctioning of Rosetta Stone's trademarks would be inequitable resulting in Google being unjustly enriched. Google denies this claim.

Rosetta Stone has the burden of proving its claims by a preponderance of the evidence.

AUTHORITY: 3 FJP&I § 101.03 (modified); 15 U.S.C. §§ 1114(1), 1117(a), 1125(c).

JURY INSTRUCTION NO. 32
Definition of Trademark

A trademark is a word, a name, a symbol, a device, or a combination of them indicating the source of goods or services. The owner of a trademark has the right to exclude others from using that trademark subject to certain defenses.

One who uses a confusingly similar imitation of the trademark of another may be liable for damages.

AUTHORITY: 3A FJP&I § 159.41 (modified); Ninth Circuit Manual of Model Jury Instructions – Civil § 15.1 (2007), http://207.41.19.15/web/sdocuments.nsf/civ (modified); 15 U.S.C. § 1127; *George & Co., LLC v. Imagination Entm't Ltd.*, 575 F.3d 383, 392 (4th Cir. 2009); *Perini Corp. v. Perini Constr., Inc*., 915 F.2d 121, 124 (4th Cir. 1990).

JURY INSTRUCTION NO. 33
Definition of a Mark

A "mark" is a shorthand, generic reference to cover all categories of marks, including trademarks and service marks. It is a word, name, symbol, or device or any combination thereof used to identify and distinguish goods or services and to indicate their source.

AUTHORITY: 3A FJP&I § 159.40 (modified).

JURY INSTRUCTION NO. 34
Obtaining a Trademark

A person acquires the right to exclude others from using a trademark by being the first to use the trademark in the marketplace. Rights in a trademark are obtained only through commercial use of the trademark.

AUTHORITY: 3A FJP&I § 159.02; *Emergency One, Inc. v. Am. Fire Eagle Engine Co., Inc.*, 332 F.3d 264, 267-68 (4th Cir. 2003).

JURY INSTRUCTION NO. 35
Right to Exclusive Use

When a manufacturer or seller has established a trademark by use on or in association with a product before anyone else, subject to certain defenses, the right to use the trademark becomes an exclusive right and the mark is that person's property. With certain exceptions, no other person can use the same or similar words, symbols, designs, or devices in any manner likely to cause confusion, mistake or deception.

AUTHORITY: 3A FJP&I § 159.29; *Emergency One, Inc. v. Am. Fire Eagle Engine Co., Inc.*, 332 F.3d 264, 267-68 (4th Cir. 2003); *Lone Star Steakhouse & Saloon, Inc. v. Alpha of Va., Inc.*, 43 F.3d 922, 931-32 (4th Cir. 1995).

JURY INSTRUCTION NO. 36
Registered Trademarks

The law provides that a party may not use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark of another in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive.

AUTHORITY: 3A FJP&I § 159.10 (modified); 15 U.S.C. § 1114.

JURY INSTRUCTION NO. 37
Purpose of Trademark Law

The trademark laws balance three often-conflicting goals: (1) protecting the public from being misled about the nature and source of goods and services, so that the consumer is not confused or misled in the market; (2) protecting the rights of a business to identify itself to the public and its reputation in offering goods and services to the public; and (3) protecting the public interest in fair competition in the market.

The balance of these policy objectives varies from case to case, because they may often conflict. Accordingly, each case must be decided by examining its specific facts and circumstances, which you are to evaluate.

In my instructions, I will identify types of facts you are to consider in deciding if Google is liable to Rosetta Stone for violating trademark law. These facts are relevant to whether Google is liable for:

(1) infringing Rosetta Stone's trademarks by using its federally registered trademarks in a manner likely to confuse consumers;

(2) infringing Rosetta Stone's trademarks by using its state registered trademark in a manner likely to confuse consumers;

(3) unfairly competing by using Rosetta Stone's trademarks in a manner likely to confuse consumers;

(4) the trademark infringement of its customers by intentionally inducing those customers to infringe Rosetta Stone's trademarks;

(5) the trademark infringement of its customers by continuing to sell trademarks as keywords to entities that it knows or has reason to know are infringing Rosetta Stone's trademarks;

(6) the trademark infringement of its customers by exercising joint control over the infringing advertisements; and

(7) diluting Rosetta Stone's trademarks by eroding the public's exclusive identification of those marks with Rosetta Stone.

AUTHORITY: Ninth Circuit Manual of Model Jury Instructions – Civil § 15.4 (2007), http://207.41.19.15/web/sdocuments.nsf/civ (modified); 15 U.S.C. §§ 1114, 1125; *George & Co., LLC v. Imagination Entm't Ltd.*, 575 F.3d 383, 392-93 (4th Cir. 2009); *U.S. v. Hon*, 14 U.S.P.Q.2d 1959, 1961 (2d Cir. 1990), *cert. denied*, 498 U.S. 1069 (1991); 1 J. Thomas McCarthy, *McCarthy on Trademarks & Unfair Competition*, § 2:2 (4th ed. 2008) (hereinafter "McCarthy").

JURY INSTRUCTION NO. 38
Federal Trademark Infringement – Elements and Burden of Proof

With certain exceptions, a registered trademark is infringed when a person or entity uses it or a phrase similar to it in a manner likely to confuse consumers. The test is not one of actual confusion. Rather, Rosetta Stone is required to prove a likelihood of confusion.

To establish trademark infringement, Rosetta Stone has the burden of proving each of the following by a preponderance of the evidence:

1. Rosetta Stone possesses the Rosetta Stone trademarks;

2. Google used the Rosetta Stone trademarks;

3. Google's use of the Rosetta Stone trademarks occurred in commerce;

4. Google used the Rosetta Stone trademarks in connection with the sale, offering for sale, distribution, or advertising of goods and services; and

5. Google used the Rosetta Stone trademarks in a manner likely to confuse consumers.

If you find that Rosetta Stone has proved these five things, your verdict should be for Rosetta Stone. If, on the other hand, Rosetta Stone has failed to prove any of these five things, your verdict should be for Google.

You may find infringement as to one or more of Rosetta Stone's trademarks. In other words, it is not necessary for Rosetta Stone to prove that all of its trademarks were infringed for you to find in favor of Rosetta Stone.

I will instruct you on how to apply each of these elements to the evidence before you.

AUTHORITY: 3A FJP&I § 159.20 (modified); 15 U.S.C. §§ 1114; *Carefirst of Maryland, Inc. v. First Care, P.C.*, 434 F.3d 263, 267 (4th Cir. 2006); *PETA v. Doughney*, 263 F.3d 359, 364 (4th Cir. 2001); *Petro Shopping Ctrs., L.P. v. James River Petroleum, Inc.*, 130 F.3d 88, 91 (4th Cir. 1997).

JURY INSTRUCTION NO. 39
Federal Trademark Infringement – Elements – Ownership and Use

I have determined as a matter of law that Rosetta Stone's trademarks are valid and protectable and that Rosetta Stone owns the trademarks. I also have determined that Google has used Rosetta Stone's trademarks in commerce in connection with the sale, offering for sale, distribution, or advertising of goods and services. Therefore, I instruct you that you must find that Rosetta Stone has established the first four elements of a trademark infringement claim. The only issue for you to decide is the fifth element – whether Google used Rosetta Stone's trademarks in a manner that is likely to confuse consumers.

AUTHORITY: Ninth Circuit Manual of Model Jury Instructions – Civil § 15.7 (2007), http://207.41.19.15/web/sdocuments.nsf/civ (modified); 15 U.S.C. §§ 1065, 1115(b); *GEICO v. Google, Inc.*, No. 1:04CV507, 2005 WL 1903128 (E.D. Va. Aug. 8, 2005); *GEICO v. Google, Inc.*, 330 F. Supp. 2d 700 (E.D. Va. 2004); *Rescuecom Corp. v. Google Inc.*, 562 F.3d 123 (2d Cir. 2009); *George & Co., LLC v. Imagination Entm't Ltd.*, 575 F.3d 383, 393 (4th Cir. 2009).

JURY INSTRUCTION NO. 40
Federal Trademark Infringement – Elements – Presumption of Confusion

You may presume that Rosetta Stone has established a likelihood of confusion if you conclude that Rosetta Stone has proven any of the following:

1. that the intentional copying of Rosetta Stone's trademarks in connection with a Google Sponsored Link was "motivated by an intent to exploit the goodwill created" by the Rosetta Stone trademarks;
2. that Rosetta Stone's trademarks or similar marks were being used in connection with a Google Sponsored Link in the same geographic area for the same class of goods or services; or
3. that the domain name used in any Sponsored Link appearing on a Google search-results page was identical to a Rosetta Stone trademark.

Google may rebut this presumption by proving, by a preponderance of the evidence, that no such likelihood of confusion exists. If Google does not rebut the presumption by a preponderance of the evidence, you should conclude that Rosetta Stone has established a likelihood of confusion.

AUTHORITY: *Shakespeare Co. v. Silstar Corp. of Am.*, 110 F.3d 234, 240-41 (4th Cir. 1997); *Larsen v. Terk Techs. Corp.*, 151 F.3d 140, 149 (4th Cir. 1998); *Polo Fashions, Inc. v. Craftex, Inc.*, 816 F.2d 145, 148 (4th Cir. 1987); *Int'l Bancorp, L.L.C. v. Societe Des Bains De Mer Et Du Cercle Des Estrangers A Monaco*, 192 F. Supp. 2d 467, 483 (E.D. Va. 2002), *aff'd*, 329 F.3d 359 (4th Cir. 2003); *PETA v. Doughney*, 113 F. Supp. 2d 915, 919-20 (E.D. Va. 2000), *aff'd*, 263 F.3d 359 (4th Cir. 2001); *Phillip Morris U.S.A., Inc. v. Shalabi*, 352 F. Supp. 2d 1067, 1073 (C.D. Cal. 2004); *Gen. Motors Corp. v. Autovation Techs., Inc.*, 317 F. Supp. 2d 756, 761 (E.D. Mich. 2004); *Gucci Am., Inc. v. Duty Free Apparel*, 286 F. Supp. 2d 284, 287 (S.D.N.Y. 2003); *Fila U.S.A., Inc. v. Kim*, 884 F. Supp. 491, 494 (S.D. Fla. 1995).

JURY INSTRUCTION NO. 41
Federal Trademark Infringement – Elements – Likelihood of Confusion – Factors

If you do not find that a likelihood of confusion can be presumed, you must determine whether Rosetta Stone has otherwise demonstrated that there is a likelihood of confusion. In determining whether there is or will be a likelihood of confusion caused by the use of the Rosetta Stone trademarks by Google, you may draw on your common experience as citizens of the community. In addition to the general knowledge you have acquired throughout your lifetimes, you should also consider the following factors:

1. Actual confusion;

2. The strength or distinctiveness of Rosetta Stone's trademarks;

3. The similarity of the trademarks used by Google in its AdWords program and the Rosetta Stone trademarks;

4. The similarity of the goods offered on Google's search-results pages when a Rosetta Stone trademark is used as a search query;

5. The similarity of the facilities used to market the goods in question;

6. The similarity of the advertising used to market the goods in question;

7. Google's intent in selecting the particular trademarks that it elected to use;

8. The quality of the products offered on Google's search-results pages when a Rosetta Stone trademark is used as a search query; and

9. The sophistication of the consumers.

These factors are helpful in determining whether a likelihood of confusion exists, but not all these factors are always relevant or equally emphasized in each case. No one factor or consideration is conclusive, but each aspect should be weighed in light of the total evidence presented at trial.

I will now instruct you about how these factors should be applied to the factual determinations that you will make in this case.

AUTHORITY: 3A FJP&I § 159.25 (modified); *George & Co., LLC v. Imagination Entm't Ltd.*, 575 F.3d 383, 393 (4th Cir. 2009); *Carefirst of Maryland, Inc. v. First Care, P.C.*, 434 F.3d 263, 267 (4th Cir. 2006); *Lamparello v. Falwell*, 420 F.3d 309, 314-15 (4th Cir. 2005); *Sara Lee Corp. v. Kayser-Roth Corp.*, 81 F.3d 455, 463-64 (4th Cir. 1996); *Anheuser-Busch, Inc. v. L. & L. Wings, Inc.*, 962 F.2d 316, 318 (4th Cir. 1992); *Pizzeria Uno Corp. v. Temple*, 747 F.2d 1522, 1527 (4th Cir. 1984).

JURY INSTRUCTION NO. 42
Federal Trademark Infringement – Elements – Likelihood of Confusion – Factors – Actual Confusion

The first factor is actual confusion. Examples of actual confusion are where a consumer believes that one party has permission to use the other's trademark; where a consumer believes that there is an association or sponsorship between the parties, between their respective trademarks, or between their products offered under those trademarks; or where a consumer mistakes the products offered on Google's search-results page for those of Rosetta Stone. Even a few instances of actual confusion may be sufficient, taken by themselves, to establish a likelihood of confusion.

If Google's use of Rosetta Stone's trademarks has led to instances of actual confusion, this strongly suggests a likelihood of confusion. However, actual confusion is not required for a finding of likelihood of confusion. Even if actual confusion has not occurred, Google's use of identical or similar trademarks may still be likely to cause confusion.

AUTHORITY: *Resorts of Pinehurst, Inc. v. Pinehurst Nat'l Corp.*, 148 F.3d 417, 422-23 (4th Cir. 1998); *Sara Lee Corp. v. Kayser-Roth Corp.*, 81 F.3d 455, 467 (4th Cir. 1996); *Lone Star Steakhouse & Saloon, Inc. v. Alpha of Va., Inc.*, 43 F.3d 922, 937 (4th Cir. 1995); *Pizzeria Uno Corp. v. Temple*, 747 F.2d 1522, 1527 (4th Cir. 1984); *Kos Pharms., Inc. v. Andrx Corp.*, 369 F.3d 700, 720 (3d Cir. 2004); *X-It Prods., LLC v. Walter Kidde Portable Equip., Inc.*, 155 F. Supp. 2d 577, 623 (E.D. Va. 2001).

JURY INSTRUCTION NO. 43
Federal Trademark Infringement – Elements – Likelihood of Confusion –Factors – Actual Confusion – Survey Evidence

Because evidence of actual confusion often is not available, a consumer survey conducted according to accepted survey principles often is offered as a proxy for evidence of actual confusion. These surveys measure the subjective mental associations and reactions of prospective consumers to the goods and services at issue. The results of a consumer survey are entitled to substantial weight when the survey is carefully designed and impartially conducted.

Rosetta Stone has presented the testimony of Kent D. Van Liere who conducted a consumer survey regarding Google's use of Rosetta Stone's trademarks. If you find that Dr. Van Liere's survey constitutes evidence of actual confusion among a substantial or "appreciable" number of prospective consumers, then you may treat this as strong evidence of a likelihood of confusion. An appreciable number is not necessarily a majority, and can be much less than a majority. Generally, net levels of confusion above 10 percent may be considered evidence of a likelihood of confusion of an appreciable number of prospective consumers.

AUTHORITY: *Sara Lee Corp. v. Kayser-Roth Corp.*, 81 F.3d 455, 466-67 & n.15 (4th Cir. 1996); *Tools USA and Equip. Co. v. Champ Frame Straightening Equip., Inc.*, 87 F.3d 654, 661 (4th Cir. 1996); *Teaching Co. L.P. v. Unapix Entm't, Inc.*, 87 F. Supp. 2d 567, 590 (E.D. Va. 2000).

JURY INSTRUCTION NO. 44
Federal Trademark Infringement – Elements – Likelihood of Confusion – Factors – Strength of Marks Generally

The second factor is the strength of Rosetta Stone's trademarks. Trademark law protects distinctive or strong trademarks. On the other hand, trademarks that are not as distinctive or strong are referred to as "weak" marks and receive less protection from infringing uses. Marks that are not distinctive are not entitled to any protection. The strength of trademarks is an important factor to consider in determining whether Google's use of trademarks identical to or similar to Rosetta Stone's trademarks creates a likelihood of confusion, mistake or deception. A trademark's strength is measured in terms of its conceptual strength and commercial strength.

AUTHORITY: *George & Co., LLC v. Imagination Entm't Ltd.*, 575 F.3d 383, 393 (4th Cir. 2009); *CareFirst of Md., Inc. v. First Care, P.C.*, 434 F.3d 263, 269 (4th Cir. 2006).

JURY INSTRUCTION NO. 45
Federal Trademark Infringement – Elements – Likelihood of Confusion – Factors – Strength of Mark – Conceptual Strength

A trademark's conceptual strength can be classified in one of four groups in descending order of strength: (1) arbitrary or fanciful; (2) suggestive; (3) descriptive; and (4) generic.

1. Arbitrary Marks

The first category of trademark is known as arbitrary marks. An arbitrary mark is considered to be an "inherently distinctive" trademark. An inherently distinctive trademark is considered a strong trademark and is clearly protectable. Inherently distinctive trademarks involve the arbitrary, fanciful or fictitious use of a word or phrase to identify the source of a product. An arbitrary trademark is a word that does not describe or have any relevance to the particular product it is meant to identify. Rather, it may be a common word used in an unfamiliar way, e.g., apple as the name of a company that manufactures computers. Although the word "apple" is the name of a fruit, it does not tell us anything about computers. Or it can be a newly created word that did not exist before, for example, Clorox for bleach, or an unusual combination of common words, for example, Dr. Pepper for a soft drink.

2. Suggestive Marks

The next category of trademarks is suggestive marks. These trademarks are also inherently distinctive, but are considered weaker (at least initially) than arbitrary trademarks. Unlike arbitrary trademarks, which are in no way related to what the product is or the product's characteristics, suggestive trademarks suggest some characteristic or quality of the product offered under the trademark. If the consumer must use some degree of imagination or reasoning to understand what the product is, the trademark does not overtly describe the product's features, but rather suggests them. Examples of suggestive trademarks are Coppertone for suntan lotion and Orange Crush for soda.

3. Descriptive Marks

The third category of trademarks is descriptive trademarks. These marks directly identify or describe some aspect, characteristic, or quality of the product to which they are affixed in a straightforward way that requires no exercise of imagination to be understood. Examples of descriptive trademarks are Coca-Cola for soft drinks, TV Guide for a magazine identifying television programs and dates and times for them, Yellow Pages for a telephone directory, Pocket Book for paperback books, and Rich 'n Chips for chocolate chip cookies.

4. Generic Marks

The fourth category of trademarks is entitled to no protection at all. They are generic words that give the general name or type of the product. They are part of our common language and are used to identify all such similar products. They are the common name for the product to which they are affixed. An example of a generic trademark is Vitamins for a multi-pack of vitamins.

AUTHORITY: FJP&I § 159.62 (modified); *George & Co., LLC v. Imagination Entm't Ltd.*, 575 F.3d 383, 393-95 (4th Cir. 2009); *CareFirst of Md., Inc. v. First Care, P.C.*, 434 F.3d 263, 267 (4th Cir. 2006); *Retail Servs., Inc. v. Freevies Publ'g*, 364 F.3d 535, 538-39 (4th Cir. 2004); *Sara Lee Corp. v. Kayser-Roth Corp.*, 81 F.3d 455, 463-64 (4th Cir. 1996); *Pizzeria Uno Corp. v. Temple*, 747 F.2d 1522, 1527 (4th Cir. 1984); *Teaching Co. L.P. v. Unapix Entm't, Inc.*, 87 F. Supp. 2d 567, 575-79 (E.D. Va. 2000).

JURY INSTRUCTION NO. 46
Federal Trademark Infringement – Elements – Likelihood of Confusion – Factors – Strength of Mark – Commercial Strength

If you determine that Rosetta Stone's trademarks are arbitrary, then you need not consider their commercial strength, because arbitrary marks are considered strong trademarks and are clearly protectable. If you determine that Rosetta Stone's trademarks are suggestive or descriptive, you must consider the commercial strength of the trademarks.

Commercial strength considers the marketplace and asks whether present or prospective customers understand the owner's trademark to refer to a particular business enterprise. A trademark that starts out weak because it is descriptive or suggestive may nonetheless become commercially strong and acquire recognition among prospective purchasers. This market recognition is called the trademark's "secondary meaning." A phrase acquires a secondary meaning when it has been used in such a way that its primary significance in the minds of the prospective purchasers is the identification of the product with a particular, single source, regardless of whether consumers know who or what that source is. An example of a trademark with secondary meaning is Coca-Cola. Although Coca-Cola is a descriptive trademark, it is nonetheless a strong trademark because of its commercial strength.

You may consider the following factors in determining whether Rosetta Stone's trademarks have commercial strength:

1. Advertising and Amounts Spent Thereon. To what degree and in what manner Rosetta Stone may have advertised its trademarks or the products offered under those trademarks, and the amount spent thereon.

2. Purchaser Perception. Whether the people who purchase the products that bear Rosetta Stone's trademarks associate the trademarks with Rosetta Stone. This can be shown either by consumer studies or market research.

3. Sales Volume. The amount of sales of Rosetta Stone's products sold under its trademarks, including dollar and unit sales.

4. Media Attention. Whether Rosetta Stone's trademarks or products offered under them have been the subject of unsolicited media attention and coverage.

5. Plagiarize. Whether others have attempted to copy Rosetta Stone's trademarks.

6. Length and Extent of Use. The length of time and manner in which Rosetta Stone used its trademarks.

This list is by no means complete and you may have heard other factors of commercial strength throughout this trial.

If you find that the Rosetta Stone trademarks are descriptive or suggestive trademark, but that they have commercial strength, you can find that they are strong trademarks.

AUTHORITY: Ninth Circuit Manual of Model Jury Instructions – Civil § 15.9 (2007), http://207.41.19.15/web/sdocuments.nsf/civ (modified); *George & Co., LLC v. Imagination Entm't Ltd.*, 575 F.3d 383, 395-96 (4th Cir. 2009); *CareFirst of Md., Inc. v. First Care, P.C.*, 434 F.3d 263, 269 (4th Cir. 2006); *Perini Corp. v. Perini Constr., Inc.*, 915 F.2d 121, 125 (4th Cir. 1990); *Teaching Co. L.P. v. Unapix Entm't, Inc.*, 87 F. Supp. 2d 567, 579-80 (E.D. Va. 2000).

JURY INSTRUCTION NO. 47
Federal Trademark Infringement – Elements – Likelihood of Confusion – Factors – Similarity of the Marks

The third factor is the similarity of the trademarks used by Google in its AdWords program and Rosetta Stone's trademarks. The trademarks Google uses in its AdWords program and Rosetta Stone's trademarks should be compared by looking at them as a whole, rather than breaking them up into their component parts for comparison. Trademarks are not to be evaluated in a side-by-side comparison test. It is the overall impression created by the trademark from the ordinary consumer's cursory observation in the marketplace that will or will not lead to a likelihood of confusion, not the impression created from a meticulous comparison in court. Your comparison of the trademarks thus should be as follows: (1) consider the trademarks in their entirety and as they appear in the marketplace; (2) compare the trademarks' appearance, sound, and meaning; and (3) consider that similarities weigh more heavily than differences. Trademark infringement does not require exact copying. A finding of similarity in the marks' appearance, sound, or meaning is sufficient to support a finding of a likelihood of confusion.

AUTHORITY: *CareFirst of Maryland, Inc. v. First Care, P.C.*, 434 F.3d 263, 271 (4th Cir. 2006); *Sara Lee Corp. v. Kayser-Roth Corp.*, 81 F.3d 455, 465 (4th Cir. 1996); *Lone Star Steakhouse & Saloon, Inc. v. Alpha of Va., Inc.*, 43 F.3d 922, 936 (4th Cir. 1995); *Pizzeria Uno Corp. v. Temple*, 747 F.2d 1522, 1534-35 (4th Cir. 1984); *IDV North Am., Inc. v. S & M Brands, Inc.*, 26 F. Supp. 2d 815, 825 (E.D. Va. 1998).

JURY INSTRUCTION NO. 48
Federal Trademark Infringement – Elements – Likelihood of Confusion – Factors – Similarity of the Goods and Services the Trademarks Identify

The fourth factor is the similarity of the goods offered on Google's search-results pages when a Rosetta Stone trademark is used as a search query. In considering this factor, the goods in question need not be identical or in direct competition with each other. Goods are related if they would be thought by consumers to come from the same source if sold under the same mark. It is enough if both parties offer products relating to the same industry, or although intended for different purposes, the products could be used for the same purpose. The weight you give to the similarity of the products depends on the strength of Rosetta Stone's trademarks. If you find that Rosetta Stone's trademarks are strong, you should give less weight to the similarity of the products. If you find that Rosetta Stone's trademarks are weak, you should give more weight to the similarity of the products.

How much weight you give to the similarity of the products also depends on the similarity of the parties' marks. The more similar the parties' trademarks are, the less similar the parties' respective products need to be. Likewise, the less similar the parties' marks are, the more similar the parties' respective products need to be.

AUTHORITY: *George & Co., LLC v. Imagination Entm't Ltd.*, 575 F.3d 383, 397 (4th Cir. 2009); *Sara Lee Corp. v. Kayser-Roth Corp.*, 81 F.3d 455, 465-66 (4th Cir. 1996); *Lone Star Steakhouse & Saloon, Inc. v. Alpha of Va., Inc.*, 43 F.3d 922, 936-37 (4th Cir. 1995); *Pizzeria Uno Corp. v. Temple*, 747 F.2d 1522, 1535 (4th Cir. 1984).

JURY INSTRUCTION NO. 49
Federal Trademark Infringement – Elements – Likelihood of Confusion – Factors – Similarity of Facilities

The fifth factor is the similarity of the facilities used to market the goods in question. If Rosetta Stone and the third parties purchasing Sponsored Links on Google's search-results pages when a Rosetta Stone trademark is used as a search query use similar facilities to sell their products and services, this factor weighs in favor of a finding of likelihood of confusion. Similarity of facilities includes the channels of distribution used by the parties to sell or advertise their products and services. If you find that the products or services are distributed in wholly dissimilar channels of distribution, this factor does not weigh in favor of a finding of likelihood of confusion.

AUTHORITY: *See Lone Star Steakhouse & Saloon, Inc. v. Alpha of Va., Inc*., 43 F.3d 922, 937 (4th Cir. 1995); *Playboy Enters. v. AsiaFocus Int'l*, No. Civ.A. 97-734-A, 1998 WL 724000, at *7 (E.D. Va. April 10, 1998); *Card Serv. Int'l v. McGee*, 950 F. Supp. 737, 741 (E.D. Va. 1997), *aff'd*, 129 F.3d 1258 (4th Cir. 1997).

JURY INSTRUCTION NO. 50
Federal Trademark Infringement – Elements – Likelihood of Confusion – Factors – Similarity of Advertising

The sixth factor is the similarity of the advertising used to market the goods in question. If Rosetta Stone and the third parties purchasing Sponsored Links on Google's search-results pages when a Rosetta Stone trademark is used as a search query advertise in similar or related media, this factor weighs in favor of a finding of likelihood of confusion. If you find that the products are advertised in wholly dissimilar media, this factor does not weigh in favor of a finding of likelihood of confusion.

AUTHORITY: *Lone Star Steakhouse & Saloon, Inc. v. Alpha of Va., Inc*., 43 F.3d 922, 937 (4th Cir. 1995); *Pizzeria Uno Corp. v. Temple*, 747 F.2d 1522, 1535 (4th Cir. 1984); *Playboy Enters. v. AsiaFocus Int'l,* No. Civ.A. 97-734-A, 1998 WL 724000, at *7 (E.D. Va. April 10, 1998); *Card Serv. Int'l v. McGee*, 950 F. Supp. 737, 741 (E.D. Va. 1997), *aff'd*, 129 F.3d 1258 (4th Cir. 1997).

JURY INSTRUCTION NO. 51
Federal Trademark Infringement – Elements – Likelihood of Confusion – Factors – Defendant's Intent

The seventh factor is Google's intent in selecting the particular trademarks that it elected to use. If a party chooses a trademark with the intent of causing confusion, you can presume likelihood of confusion. However, an intent to confuse consumers is not required for a finding of trademark infringement.

Direct evidence of intentional copying is evidence of intent to confuse. It is however not necessary to show intentional copying to prove intent. The alleged infringer's awareness of the owner's trademark and subsequent use of a similar trademark is a factor in determining intent. If Rosetta Stone demonstrates extensive advertising and long-term use of its trademarks, you should presume that Google knew of Rosetta Stone's trademarks. Continued use of Rosetta Stone's trademarks after the dispute with Rosetta Stone arose also may be a factor for you to consider in finding whether there was an intent by Google to deceive the public or create an association with Rosetta Stone's trademarks. If Google has been sued in similar infringement cases in the past, this evidence also can be used to find that Google knew what a trademark was and was unlikely to mistake clearly infringing behavior for non-infringing behavior.

AUTHORITY: *Sara Lee Corp. v. Kayser-Roth Corp.*, 81 F.3d 455, 466 (4th Cir. 1996); *Lone Star Steakhouse & Saloon, Inc. v. Alpha of Va., Inc*., 43 F.3d 922, 937 (4th Cir. 1995); *Pizzeria Uno Corp. v. Temple*, 747 F.2d 1522, 1535 (4th Cir. 1984); *Daddy's Junky Music Stores, Inc. v. Big Daddy's Family Music Ctr.*, 109 F.3d 275, 286-87 (6th Cir. 1997); *Bambu Sales, Inc. v. Ozak Trading Inc.*, 58 F.3d 849, 854 (2d Cir. 1995); *Playboy Enters., Inc. v. Chen*, 45 U.S.P.Q.2d 1400, 1410 (C.D. Cal. 1997); *Tamko Roofing Prods. v. Ideal Roofing*, 282 F.3d 23, 33-34 (1st Cir. 2002); *Fleischman Distilling Corp. v. Mailer Brewing Co.*, 314 F.2d 149, 157, n.8 (9th Cir. 1963).

JURY INSTRUCTION NO. 52
Federal Trademark Infringement – Elements – Likelihood of Confusion – Factors – Quality of Products

The eighth factor is the quality of the products offered on Google's search-results pages when a Rosetta Stone trademark is used as a search query. If you find that the products offered on Google's search-results pages when a Rosetta Stone trademark is used as a search query are cheap or counterfeit copies of Rosetta Stone's trademark-protected products, you may treat this as evidence of likelihood of confusion.

AUTHORITY: *Sara Lee Corp. v. Kayser-Roth Corp.*, 81 F.3d 455, 467 (4th Cir. 1996).

JURY INSTRUCTION NO. 53
Federal Trademark Infringement – Elements – Likelihood of Confusion – Factors – Sophistication of the Consumers

The ninth factor is the sophistication of the consumers. The more sophisticated the potential consumers of the goods, the more careful and discriminating the reasonably prudent consumer exercising ordinary caution may be. On the other hand, relatively unsophisticated consumers are less likely to take a great deal of care in distinguishing between goods before purchasing, and are more likely to be attracted to, and confused by, imitations of a particular mark. In this case, you should consider the sophistication of potential consumers with respect to their knowledge and understanding of the Internet and, in particular, the manner by which advertisements are presented on Google's search-results pages.

AUTHORITY: *Sara Lee Corp. v. Kayser-Roth Corp.*, 81 F.3d 455, 467 (4th Cir. 1996); *Perini Corp. v. Perini Constr., Inc.*, 915 F.2d 121, 127 (4th Cir. 1990).

JURY INSTRUCTION NO. 54
Federal Trademark Infringement – Initial Interest Confusion

If you conclude that Google has not used Rosetta Stone's trademarks in a manner that is likely to confuse consumers, Google still may be liable for trademark infringement if Google's use of Rosetta Stone's trademarks caused initial interest confusion. In the Internet context, initial interest confusion occurs where the plaintiff's trademark is used in a manner calculated to capture initial consumer attention. It is not necessary for Rosetta Stone to show that Internet users actually transact business with third party advertisers, or that they actually believe such advertisers are related to Rosetta Stone, only that they were misdirected to such advertisers' websites through at least initial interest confusion.

If you find that Rosetta Stone has proved initial interest confusion by a preponderance of the evidence, then you must find for Rosetta Stone.

AUTHORITY: *GEICO v. Google, Inc.*, No. 1:04CV507, 2005 WL 1903128, at *4 (E.D. Va. Aug. 8, 2005); *Brookfield Commc'ns, Inc. v. W. Coast Entm't Corp.*, 174 F.3d 1036, 1064 (9th Cir. 1999); *Door-Oliver, Inc. v. Fluid-Quip, Inc.*, 94 F.3d 376, 382 (7th Cir. 1996); *Mobil Oil Corp. v. Pegasus Petroleum Corp.*, 818 F.2d 254 (2d Cir. 1987); *Grotrian v. Steinway & Sons*, 523 F.2d. 1331, 1341-42 (2d Cir. 1975); *Bihari v. Gross*, 119 F. Supp. 2d 309, 319 (S.D.N.Y. 2000).

JURY INSTRUCTION NO. 55
Derivative Liability – Inducing Trademark Infringement

Rosetta Stone also seeks to hold Google liable for inducing its customers to infringe Rosetta Stone's trademarks. Google is liable for trademark infringement by its customers if Google intentionally induced those customers to infringe Rosetta Stone's trademarks.

Rosetta Stone has the burden of proving each of the following by a preponderance of the evidence:

1. Customers using Google's advertising services infringed Rosetta Stone's trademarks; and

2. Google intentionally induced the customers to infringe Rosetta Stone's trademarks.

If you find that Rosetta Stone has proved these two things, then you must find for Rosetta Stone. If, on the other hand, you find that Rosetta Stone did not prove these two things, then you must find for Google.

AUTHORITY: 3A FJP&I § 159.24 (modified); *Inwood Labs. v. Ives Labs.*, 456 U.S. 844, 853-54 (1982); *Lockheed Martin Corp. v. Network Solutions, Inc.*, 194 F.3d 980, 983-84 (9th Cir. 1999); *Rolex Watch USA, Inc. v. Meece*, 158 F.3d 816, 828 (5th Cir. 1998); *Bauer Lamp Co., Inc. v. Shaffer*, 941 F.2d 1165 (11th Cir. 1991); *Transdermal Products, Inc. v. Performance Contract Packaging, Inc.*, 943 F. Supp. 551, 553 (E.D. Pa. 1996).

JURY INSTRUCTION NO. 56
Derivative Liability – Contributory Trademark Infringement

Rosetta Stone also asserts a claim for contributory trademark infringement. Google is liable for contributory trademark infringement if it supplied a service to another knowing or having reason to know that the other person or entity will use the service to infringe Rosetta Stone's trademarks.

To succeed on its contributory trademark infringement claim, Rosetta Stone has the burden of proving each of the following by a preponderance of the evidence:

1. Google provided an advertising service;

2. Individuals and/or entities used Google's advertising service to infringe Rosetta Stone's trademarks;

3. Google exercises control and monitoring over its advertising service; and

4. Google knew or had reason to know that individuals and/or entities would use its advertising service to infringe Rosetta Stone's trademarks.

If you find that Rosetta Stone has proved these four things, then you must find for Rosetta Stone. If, on the other hand, you find that Rosetta Stone did not prove these four things, then you must find for Google.

AUTHORITY: 3A FJP&I § 159.23 (modified); *Inwood Labs. v. Ives Labs.*, 456 U.S. 844, 853-54 (1982); *Tiffany v. eBay, Inc.*, – F.3d --, 2010 U.S. App. LEXIS 6735, at *41 (Apr. 1, 2010); *Lockheed Martin Corp. v. Network Solutions, Inc.*, 194 F.3d 980 (9th Cir. 1999); *Fonovisa v. Cherry Auction*, 76 F.3d 259, 265 (9th Cir. 1996); *Hard Rock Cafe Licensing Corp. v. Concession Servs., Inc.*, 955 F.2d 1143, 1148 (7th Cir. 1992); *Rolex Watch USA, Inc. v. Meece*, 158 F.3d 816, 828 (5th Cir. 1998); *Getty Petroleum Corp. v. Island Transp. Corp.*, 878 F.2d 650, 656 (2d Cir. 1989); *Diane von Furstenberg Studio v. Snyder*, No. 1:06cv1356(JCC), 2007 WL 2688184, at *4-5 (E.D. Va. Sept. 10, 2007); *Habeeba's Dance of the Arts, Ltd. v. Knoblauch*, 430 F. Supp. 2d 709, 714-15 (S.D. Ohio 2006).

JURY INSTRUCTION NO. 57
Derivative Liability – Vicarious Trademark Infringement

Rosetta Stone also asserts a claim for vicarious trademark infringement. Vicarious trademark infringement occurs when a defendant and the infringer exercise joint control over the infringing product.

To succeed on this claim, Rosetta Stone has the burden of proving each of the following by a preponderance of the evidence:

1. Customers using Google's advertising service have infringed Rosetta Stone's trademarks; and

2. Google and its customers exercise joint control over the advertisements.

If you find that Google controls the appearance of the Sponsored Links that appear on its search-results pages and the use of Rosetta Stone's trademarks in the Sponsored Links, then you must find that Google and its customers exercise joint control over the advertisements.

If you find that Rosetta Stone has proved each of these things, then you must find for Rosetta Stone. However, if you find that Rosetta Stone did not prove each of these things, then you must find for Google.

AUTHORITY: Model Jury Instructions: Copyright, Trademark and Trade Dress Litigation, Instruction No. 2.4.6 (2008) (hereinafter "MJI") (modified); *Hard Rock Cafe Licensing Corp. v. Concession Services, Inc.* 955 F.2d 1143, 1150 (7th Cir. 1992); *Perfect 10, Inc. v. Visa Int'l Service Ass'n*, 494 F.3d 788, 807-808 (9th Cir. 2007); *GEICO v. Google, Inc.*, 330 F. Supp. 2d 700, 705 (E.D. Va. 2004); *Louis Vuitton Malletier, S.A. v. Akanoc Solutions*, 591 F. Supp. 2d 1098, 1113 (N.D. Cal. 2008).

JURY INSTRUCTION NO. 58
State Trademark Infringement – Generally and Elements

Rosetta Stone has asserted a claim of state trademark infringement with respect to its state registered ROSETTA STONE trademark. Rosetta Stone's state and federal trademarks claims are the same except the state trademark infringement claim is premised on a trademark that has been registered with the Commonwealth of Virginia. To succeed on this claim, Rosetta Stone has the burden of proving each of the following by a preponderance of the evidence:

1. Rosetta Stone possesses the Rosetta Stone trademark;

2. Google used the Rosetta Stone trademark;

3. Google's use of the Rosetta Stone trademark occurred in commerce;

4. Google used the Rosetta Stone trademark in connection with the sale, offering for sale, distribution, or advertising of goods and services; and

5. Google used the Rosetta Stone trademark in a manner likely to confuse consumers.

If you find that each of the elements on which Rosetta Stone has the burden of proof has been proved by a preponderance of the evidence, your verdict should be for Rosetta Stone. If, on the other hand, Rosetta Stone has failed to prove any of these elements by a preponderance of the evidence, your verdict should be for Google.

I have determined as a matter of law that Rosetta Stone possesses the Rosetta Stone trademark and that Google used the Rosetta Stone trademark in commerce in connection with the sale, offering for sale, distribution, or advertising of goods and services. Therefore, I instruct you that you must find that Rosetta Stone has met the first four elements of the infringement test. The only issue for you to decide is the fifth element – whether Google used Rosetta Stone's state registered ROSETTA STONE trademark in a manner likely to confuse consumers. In determining whether this element has been proved, you should apply the same standard that you

apply to determine whether there was a likelihood of confusion in the federal trademark infringement context.

AUTHORITY: *Renaissance Greeting Cards, Inc. v. Dollar Tree Stores, Inc.*, 405 F. Supp. 2d 680, 688 (E.D. Va. 2005) (citations omitted), *aff'd*, 2007 WL 1031703 (4th Cir. Mar. 30, 2007).

JURY INSTRUCTION NO. 59
State Unfair Competition – Generally and Elements

Rosetta Stone has brought a state unfair competition claim. This claim is very similar to a claim for federal trademark infringement. Rosetta Stone has the burden of proving by a preponderance of the evidence that:

1. Rosetta Stone possesses the Rosetta Stone trademark;

2. Google used the Rosetta Stone trademark;

3. Google's use of the Rosetta Stone trademark occurred in commerce;

4. Google used the Rosetta Stone trademark in connection with the sale, offering for sale, distribution, or advertising of goods and services; and

5. Google used the Rosetta Stone trademark in a manner likely to confuse consumers.

If you find that each of the elements on which Rosetta Stone has the burden of proof has been proved by a preponderance of the evidence, your verdict should be for Rosetta Stone. If, on the other hand, Rosetta Stone has failed to prove any of these elements by a preponderance of the evidence, your verdict should be for Google.

I have determined as a matter of law that Rosetta Stone possesses the Rosetta Stone trademark and that Google used the Rosetta Stone trademark in commerce in connection with the sale, offering for sale, distribution, or advertising of goods and services. Therefore, I instruct you that you must find that Rosetta Stone has met the first four elements. The only issue for you to decide is the fifth element – whether Google used Rosetta Stone's state registered ROSETTA STONE trademark in a manner likely to confuse consumers. In determining whether this element has been proved, you should apply the same standard that you apply to determine whether there was a likelihood of confusion in the federal trademark infringement context.

AUTHORITY: *See Lone Star Steakhouse & Saloon v. Alpha of Va.*, 43 F.3d 922, 930 n.10 (4th Cir. 1995); *GEICO v. Google, Inc.*, 330 F. Supp. 2d 700, 702 n.3 (E.D. Va. 2004).

JURY INSTRUCTION NO. 60
Federal Trademark Dilution

Rosetta Stone also has asserted a federal dilution claim against Google. Rosetta Stone contends that Google's use of Rosetta Stone's trademarks in its AdWords program and in third parties' Sponsored Link advertisements has diluted the distinctive quality of Rosetta Stone's trademarks.

Dilution is the lessening of the capacity of a famous trademark to identify and distinguish goods or services. Distinctiveness refers to the ability of the famous trademark to uniquely identify a single source and thus maintain its selling power. The purpose of the anti-dilution laws is to protect against the erosion of the trademark's value, or the tarnishment of a trademark's image.

I will now give you some specific instructions to apply in considering this claim.

AUTHORITY: MJI No. 2.6.1 (modified); 15 U.S.C. § 1125(c)(1); *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC*, 507 F.3d 252, 264-65 (4th Cir. 2007).

JURY INSTRUCTION NO. 61
Federal Trademark Dilution – Liability

Rosetta Stone has the burden of proving by a preponderance of the evidence that:

(1) Rosetta Stone owns one or more famous trademarks that are distinctive;

(2) Google is making commercial use of one or more marks that are identical or nearly identical to Rosetta Stone's trademarks; and

(3) Google's use of a trademark that is identical to or nearly identical to Rosetta Stone's trademarks is likely to cause dilution by blurring or tarnishment.

For purposes of the dilution analysis, there is no requirement that Rosetta Stone prove that (1) Google and Rosetta Stone are direct competitors; (2) Google's conduct has resulted in any actual confusion; (3) Google's conduct has created any likelihood of confusion; or (4) Rosetta Stone suffered any actual injury. Rather, Rosetta Stone needs to show only that its business reputation is likely to be injured, or that the distinctive value of its trademarks is likely to be diluted.

AUTHORITY: MJI No. 2.6.1 (modified); 15 U.S.C. § 1125(c)(1); *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC,* 507 F.3d 252, 264-65 (4th Cir. 2007).

JURY INSTRUCTION NO. 62
Federal Trademark Dilution – "Famous Mark"

To prevail on its claim for trademark dilution, Rosetta Stone must prove by a preponderance of the evidence that at least one of its marks is "famous." A mark is "famous" if it is a mark that is distinctive, inherently or through acquired distinctiveness, and is widely recognized by the general consuming public of the United State as a designation of source of the goods or services of the trademark owner.

In determining whether Rosetta Stone's trademarks possess the requisite degree of recognition, you may consider several factors I will describe to you in a moment. These factors are only suggestions and may not constitute all of the possible types of evidence indicating whether a trademark possesses the requisite degree of recognition. The presence or absence of any one particular factor on this list should not necessarily determine whether a mark possesses the requisite degree of recognition. You should consider all the relevant evidence in making your determination. The factors you should consider are:

(1) the duration, extent, and geographic reach of advertising and publicity of Rosetta Stone's trademarks;

(2) the amount, volume, and geographic extent of sales of goods or services offered under Rosetta Stone's trademarks;

(3) the extent of actual recognition of Rosetta Stone's trademarks; and

(4) whether Rosetta Stone's trademarks were federally registered.

Here, the parties agree that Rosetta Stone's trademarks were federally registered. Therefore, you must find that the fourth factor in proving the requisite degree of recognition favors Rosetta Stone.

AUTHORITY: MJI No. 2.6.2 (modified); 15 U.S.C. § 1125(c)(2)(A).

JURY INSTRUCTION NO. 63
Federal Trademark Dilution – "Identical or Nearly Identical"

To prevail on its claim for trademark dilution, Rosetta Stone must prove by a preponderance of the evidence that Google used one or more trademarks that were identical or nearly identical to those owned by Rosetta Stone.

"Identical or nearly identical" does not mean that the two marks have to be exactly the same. The marks are considered "identical or nearly identical" if a significant segment of the consuming public would see the two marks as essentially the same.

AUTHORITY: 15 U.S.C. § 1125(c); *Thane Int'l, Inc. v. Trek Bicycle Corp.*, 305 F.3d 894, 905-07 (9th Cir. 2002); *Jada Toys, Inc. v. Mattel, Inc.*, 496 F.3d 974, 981 (9th Cir. 2007).

JURY INSTRUCTION NO. 64
Federal Trademark Dilution – Likelihood of Dilution

Dilution can happen in two ways: blurring or tarnishment.

Blurring occurs when the association arising from the similarity between trademarks used by Google with the trademarks used by Rosetta Stone impairs the distinctiveness of Rosetta Stone's trademarks. In determining whether a trademark is likely to cause dilution by blurring, you may consider all relevant factors, including the following:

(1) the degree of similarity between trademarks used by the defendant and the famous trademark;

(2) the degree of inherent or acquired distinctiveness of the famous trademark;

(3) the extent to which the owner of the famous trademark is engaging in substantially exclusive use of the trademark;

(4) the degree of recognition of the famous mark;

(5) whether the defendant intended to create an association with the famous trademark; and

(6) any actual association between trademarks used by the defendant and the famous trademark.

If you find that Google has used Rosetta Stone's actual marks, that weighs in favor of a finding of blurring.

Tarnishment occurs if Google is using trademarks that are identical or nearly identical to Rosetta Stone's trademarks in such a way that harms the reputation of Rosetta Stone's trademarks by degrading the public's positive associations with the trademark or linking Rosetta Stone's trademarks to products of shoddy quality. If you find that Rosetta Stone's marks have been linked to counterfeit products, that weighs in favor of a finding of tarnishment.

If Rosetta Stone proves dilution either by blurring or by tarnishment, then you should find for Rosetta Stone. Rosetta Stone is not required to prove both blurring and tarnishment.

AUTHORITY: MJI at 198-99 (modified) 15 U.S.C. §§ 1125(c)(2)(B), 1125(c)(2)(C); *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC*, 507 F.3d 252, 264-65 (4th Cir. 2007); *Diane von Furstenberg Studio v. Snyder*, No. 1:06cv1356(JCC), 2007 WL 2688184 (E.D. Va. Sept. 10, 2007); *PETA, Inc. v. Doughney*, 113 F. Supp. 2d 915 (E.D. Va. 2000), *aff'd*, 263 F.3d 359 (4th Cir. 2001); *America Online, Inc. v. LCGM, Inc.*, 46 F. Supp. 2d 444 (E.D. Va. 1998).

JURY INSTRUCTION NO. 65
Federal Trademark Dilution – Likelihood of Confusion Is Evidence of Dilution

To prevail on its trademark dilution claim, Rosetta Stone need not prove likelihood of confusion. However, if you find that an appreciable number of consumers are confused by Google's use of one or more trademarks that were identical or nearly identical to those owned by Rosetta Stone, this is evidence that Rosetta Stone's trademarks are being diluted.

AUTHORITY: *Nabisco, Inc. v. PF Brands, Inc.*, 191 F.3d 203, 219 (2d Cir. 1999); *James Burrough, Ltd. v. Sign of Beefeater, Inc.*, 540 F.2d 266, 274-75 n.16 (7th Cir. 1976); *Guess?, Inc. v. Tres Hermanos*, 993 F. Supp. 1277, 1285 (C.D. Cal. 1997).

JURY INSTRUCTION NO. 66
Unjust Enrichment – Generally

I am now going to instruct you on the law governing Rosetta Stone's unjust enrichment claim.

Under Virginia law, a plaintiff may sue a defendant under a theory known as unjust enrichment. Unjust enrichment occurs when one party has received a benefit at the expense of another. An injustice would occur if that party is allowed to keep that benefit without paying for it. A benefit for purposes of an unjust enrichment claim is any form of advantage that has a measurable value.

AUTHORITY: *Kern v. Freed Co., Inc.*, 224 Va. 678, 680 (1983); *Marine Development Corp. v. Rodak*, 225 Va. 137, 140-43 (1983); *Datastaff Technology Group, Inc. v. Centex Constr. Co., Inc.*, 528 F. Supp. 2d 587, 598-99 (E.D. Va. 2007).

JURY INSTRUCTION NO. 67
Unjust Enrichment – Elements

To succeed on its unjust enrichment claim, Rosetta Stone has the burden of proving each of the following by a preponderance of the evidence:

(1) Rosetta Stone conferred a benefit on Google;

(2) Google knew of the benefit and should reasonably have expected to pay Rosetta Stone; and

(3) Google accepted or retained the benefit without paying for its value.

The word "conferred" in this context includes situations in which the defendant, without authorization, takes a benefit from the plaintiff even when the plaintiff has not voluntarily bestowed the benefit on the defendant.

If you find that Rosetta Stone has proved each of these things by a preponderance of the evidence, your verdict should be for Rosetta Stone. If, on the other hand, Rosetta Stone has failed to prove any of these things by a preponderance of the evidence, your verdict should be for Google.

AUTHORITY: *Nossen v. Hoy*, 705 F. Supp. 744-45 (E.D. Va. 1990); *In re Bay Vista of Va., Inc.*, No. 2:09cv46, 2009 WL 2900040, at *5 (E.D. Va. June 2, 2009).

JURY INSTRUCTION NO. 68
Remedies – Types

If you decide for Rosetta Stone on the question of liability on any of its claims, then you should consider the amount of money to award Rosetta Stone.

If you decide for Google on the question of liability, then you should not consider this issue.

AUTHORITY: 15 U.S.C. § 1117(a); *Teaching Co. Ltd. P'ship v. Unapix Entm't., Inc.*, 87 F. Supp. 2d 567, 588-92 (E.D. Va. 2000).

JURY INSTRUCTION NO. 69
Remedies – Trademark Infringement – Actual or Statutory Notice – Registered Marks

In order for Rosetta Stone to recover damages, Rosetta Stone has the burden of proving by a preponderance of the evidence that Google had either statutory or actual notice that Rosetta Stone's trademarks were registered.

Google had statutory notice if any of the following factors is satisfied:

1. Rosetta Stone displayed with its trademarks the words "Registered in U.S. Patent and Trademark Office" or

2. Rosetta Stone displayed with its trademarks the words "Reg. U.S. Pat. & Tm. Off." or

3. Rosetta Stone displayed its trademarks with the letter "R" enclosed within a circle (i.e., ®).

Damages are awarded from the time of notice on.

AUTHORITY: FJP&I § 159.90 (modified); 15 U.S.C. § 1111.

JURY INSTRUCTION NO. 70
Remedies – Trademark Infringement and Unfair Competition – Actual Damages

If you find for Rosetta Stone on any of its trademark infringement claims or on its unfair competition claim, and if you find that Google has statutory notice or actual notice of Rosetta Stone's registered trademarks, you must consider what amount of money to award to Rosetta Stone as damages.

Damages consist of the amount of money required to compensate Rosetta Stone for the injury caused by Google's infringement and unfair competition. Rosetta Stone must prove its damages by a preponderance of the evidence.

You should consider whether any of the following exists, and if so to what extent, in determining Rosetta Stone's damages:

1. Any loss of Rosetta Stone's profits on lost sales as a result of Google's infringement and unfair competition, which consists of the revenue Rosetta Stone would have earned but for Google's infringement and unfair competition, less the expenses Rosetta Stone would have sustained in earning those revenues;

2. Any excess payments Rosetta Stone made to Google; and

3. Any other facts that bear on Rosetta Stone's damages.

AUTHORITY: FJP&I § 159.91 (modified); 15 U.S.C. § 1117(a); *Teaching Co. L.P. v. Unapix Entm't, Inc.*, 87 F. Supp. 2d 567, 588-92 (E.D. Va. 2000); *BASF Corp. v. Old World Trading Co.*, 41 F.3d 1081, 1092 (7th Cir. 1994).

JURY INSTRUCTION NO. 71
Remedies – Trademark Infringement and Unfair Competition – Damages – Defendant's Profits

In addition to Rosetta Stone's damages, Rosetta Stone may recover the profits Google gained from its trademark infringement and unfair competition. Profit is determined by deducting expenses from gross revenue. Gross revenue is all of the money Google received due to its use of Rosetta Stone's trademarks. Rosetta Stone is required only to provide Google's gross revenue. Google is required to prove any expenses that it claims should be deducted in determining its profits. Rosetta Stone is entitled to recover Google's total profits from its use of Rosetta Stone's trademarks, unless Google proves that a portion of the profit is due to factors other than the use of the trademark.

AUTHORITY: FJP&I § 159.92 (modified); 15 U.S.C. § 1117(a); *Sweetwater Brewing Co., LLC, Great Am. Restaurants, Inc.*, 266 F. Supp. 2d 457, 466 (E.D. Va. 2003); *X-It Prods., L.L.C. v. Walter Kidde Portable Equip.*, 155 F. Supp. 2d 577, 624-25 (E.D. Va. 2001); *Teaching Co. L.P. v. Unapix Entm't, Inc.*, 87 F. Supp. 2d 567, 589 (E.D. Va. 2000); *Black & Decker (U.S.) Inc. v. Pro-Tech Power Inc.*, 26 F. Supp. 2d 834, 855-56 (E.D. Va. 1998); *United States Olympic Committee v. Union Sport Apparel*, No. 82-276-A, 1983 WL 51932, at *5 (E.D. Va. Jan. 24, 1983); *Badger Meter, Inc. v. Grinnell Corp.*, 13 F.3d 1145, 1156-57 (7th Cir. 1994).

JURY INSTRUCTION NO. 72
Remedies – Intentional Trademark Infringement

If you find that Google infringed Rosetta Stone's trademarks, you must also determine whether Rosetta Stone has proven that, at the time Google used Rosetta Stone's trademarks, Google acted willfully. Google acted willfully if it knew that it was infringing Rosetta Stone's trademarks or if it acted with indifference to Rosetta Stone's trademark rights.

AUTHORITY: FJP&I § 159.93 (modified); Ninth Circuit Manual of Model Jury Instructions – Civil § 15.27 (2007), http://207.41.19.15/web/sdocuments.nsf/civ (modified); 15 U.S.C. § 1117(a); *Teaching Co. L.P. v. Unapix Entm't, Inc.*, 87 F. Supp. 2d 567, 590 (E.D. Va. 2000).

JURY INSTRUCTION NO. 73
Remedies – Federal Trademark Dilution – Willfulness

If you find that Google willfully intended to trade on the recognition of Rosetta Stone's trademarks or willfully intended to harm the reputation of Rosetta Stone's trademarks, then you may properly award to Rosetta Stone Google's profits from the sale of its products or services you find caused dilution or Rosetta Stone's actual business damages and losses. Monetary loss should be calculated in the same manner as for trademark infringement and unfair competition.

AUTHORITY: 15 U.S.C. §§ 1117(a) 1125(c)(5); *Ringling Bros-Barnum & Bailey Combined Shows, Inc. v. Utah Div. of Travel Dev.*, 955 F. Supp. 598, 600, 603 (E.D. Va. 1997).

JURY INSTRUCTION NO. 74
Remedies – State Trademark Infringement and Unfair Competition – Punitive Damages

If you award monetary recovery to Rosetta Stone on its state trademark infringement or unfair competition claim, and if you further believe by the preponderance of the evidence that Google acted with actual malice toward Rosetta Stone or acted under circumstances amounting to a willful and wanton disregard of Rosetta Stone's rights, then you may also award punitive damages to Rosetta Stone to punish Google for its actions and to serve as an example to prevent others from acting in a similar way.

"Actual malice" is a sinister or corrupt motive such as hatred, personal spite, ill will, or a desire to injure the plaintiff.

AUTHORITY: Virginia Model Jury Instructions (Civil) Nos. 9.080, 9.090 (2010) (modified) (hereinafter "VMJI").

JURY INSTRUCTION NO. 75
Remedies – Unjust Enrichment – Measure of Damages

If you find for Rosetta Stone on its claim of unjust enrichment, then the measure of Rosetta Stone's recovery is the reasonable value of the benefit conferred on Google. In determining what that reasonable value is, you may consider all of the facts in the case, including the nature of the benefit and the value of the benefit that the parties themselves placed thereon. Rosetta Stone must prove the reasonable value of the benefit by the preponderance of the evidence.

AUTHORITY: VJMI No. 45.500 (modified); *Cochran v. Phillips*, 197 Va. 483, 488 (1955); *Marine Development Corp. v. Rodak*, 225 Va. 137, 141 (1983); *Hendrickson v. Meredith*, 161 Va. 193, 201 (1933).

JURY INSTRUCTION NO. 76
Remedies – Unjust Enrichment – Reasonable Proof of Damages

The burden is on Rosetta Stone to prove by the preponderance of the evidence that it sustained damages. Rosetta Stone is not required to prove the exact amount of its damages, but it must show sufficient facts and circumstances to permit you to make a reasonable estimate of them. If it fails to do so, then it cannot recover such damages.

AUTHORITY: VMJI 45.510 (modified).

JURY INSTRUCTION NO. 77
Remedies – Prejudgment Interest

If you find in favor of Rosetta Stone on any of its claims, you also may award Rosetta Stone prejudgment interest. Prejudgment interest is awarded to compensate a plaintiff for the loss sustained by not receiving the amount to which it was entitled at the time it was entitled to receive it.

If you decide to award Rosetta Stone prejudgment interest, you must fix the date at which the interest shall begin.

AUTHORITY: Va. Code §§ 6.1-330.53, 8.01-382; *see X-It Products, LLC v. Walter Kidde Portable Equip., Inc.*, 228 F. Supp. 2d 494, 500, 543 (E.D.Va. 2002); *United Phosphorus, ltd. v. Midland Fumigant, Inc.*, 205 F.3d 1219, 1237 (10th Cir. 2000); *Gorenstein Enters., Inc. v. Quality Care-USA, Inc.*, 874 F.2d 431, 436 (7th Cir. 1989); *Ramada Inns, Inc. v. Gadsen Motel Co.*, 804 F.2d 1562, 1568 (11th Cir. 1986); *Hospitality Int'l v. Mahtani*, No. 2:97CV87, 1998 WL 35296447, at *14 (M.D.N.C. Aug. 3, 1998); *Vanwyk Textile Sys., B.V. v. Zimmer Mach. America, Inc.*, 994 F. Supp. 350, 390-91 (W.D.N.C. 1997); McCarthy at § 30:93.

JURY INSTRUCTION NO. 78
Stipulations

The parties have agreed to certain facts as follows:

1. The plaintiff, Rosetta Stone Ltd. ("Rosetta Stone") develops and sells technology-based language learning products and services.

2. The defendant, Google Inc. ("Google") owns and operates an Internet search engine.

3. Rosetta Stone claims trademark rights in four marks, ROSETTA STONE, ROSETTA STONE LANGUAGE LEARNING SUCCESS, ROSETTASTONE.COM, and ROSETTA WORLD. Each of these has been registered with the United States Patent and Trademark Office.

4. Rosetta Stone identifies itself, together with the products and services that it offers, using the Rosetta Stone marks in different advertising media, including television and radio commercials, magazine advertisements, kiosks in public places, and the Internet.

5. Rosetta Stone advertises, promotes and uses the Rosetta Stone marks through several channels, including print, direct mail, radio, television and on-line.

6. At times, Rosetta Stone has had certain authorized resellers, including Amazon.com, Barnes & Noble, and Borders, which sell authentic Rosetta Stone products originating from Rosetta Stone.

7. To use Google's search engine, users enter a word or phrase query into the search box and press enter. Google then returns a search results page displaying a list of links to websites that Google has determined to be relevant to the users' query.

8. Google's search results pages display unpaid search results ("organic links"). They may also display paid ads ("sponsored links") adjacent to the organic results through Google's AdWords program.

9. Google is paid by its AdWords advertisers on a "cost-per-click" basis. When a Google user "clicks" on a Sponsored Link in Google's search results page, the advertiser pays Google for the click.

10. Rosetta Stone has participated in Google's AdWords program since 2002. Rosetta Stone and Google have a contract governing Rosetta Stone's AdWords advertising.

11. Since 2004, Google's trademark policy has permitted advertisers to use trademarked terms as keyword triggers for advertisements. Under the 2004 trademark policy, in response to a trademark owner's request, Google agreed to remove uses of a trademark within certain text of an ad, including its title.

12. In 2009, Google revised its trademark policy to also permit certain types of advertisers to include trademarked terms in the text of their ads. The 2009 policy allows, in addition to the brand owner and certain entities authorized by the brand owner, advertisers who (l) actually resell legitimate products bearing the trademark; (2) sell components, replacement parts of compatible products corresponding to the trademark; or (3) provide non-competitive information about the goods or services corresponding to the trademark term, to include the trademark in ad text.

13. Google' s AdWords policy prohibits the sale or promotion of counterfeit goods or services.

14. Google has a team of employees whose responsibilities include responding to complaints about ads that violate certain of its AdWords policies, including its anti-counterfeit policy.

15. Google has a Safety and Enforcement team that also works to address problems with fraud and counterfeiting.

You must take these facts to be true for the purposes of this case.

AUTHORITY: 3 FJP&I § 101.48 (modified); Written Stipulation of Uncontested Facts [Docket No. 142].

JURY INSTRUCTION NO. 79
Election of Foreperson; Duty to Deliberate; Communications With Court; Cautionary; Unanimous Verdict; Verdict Form

You must follow the following rules while deliberating and returning your verdict:

First, when you go to the jury room, you must select a foreperson. The foreperson will preside over your discussions and speak for you here in court.

Second, it is your duty, as jurors, to discuss this case with one another in the jury and try to reach agreement.

Each of you must make your own conscientious decision, but only after you have considered all the evidence, discussed it fully with the other jurors, and listened to the views of the other jurors.

Do not be afraid to change your opinions if the discussion persuades you that you should. But do not make a decision simply because other jurors think it is right, or simply to reach a verdict. Remember at all times that you are judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

Third, if you need to communicate with me during your deliberations, you may send a note to me through the marshal or bailiff, signed by one or more jurors. I will respond as soon as possible either in writing or orally in open court. Remember that you should not tell anyone – including me – how your votes stand numerically.

Fourth, your verdict must be based solely on the evidence and on the law that I have given to you in my instructions. The verdict must be unanimous. Nothing I have said or done is intended to suggest what your verdict should be – that is entirely for you to decide.

Finally, the verdict form is simply the written notice of the decision that you reach in this case. You will take this form to the jury room, and when each of you has agreed on the verdict,

your foreperson will fill in the form, sign and date it, and advise the marshal or bailiff that you are ready to return to the courtroom.

AUTHORITY: FJP&I § 103.50 (modified).

JURY INSTRUCTION NO. 80
The Use of Electronic Technology to Communicate about the Case

During your deliberations, you must not communicate with or provide any information to anyone by any means about this case. You may not use any electronic device or media, such as telephone, cell phone, smart phone, iPhone, Blackberry or computer; the Internet, any Internet service, or any text or instant messaging service; or any Internet chat room, blog, or website such as Facebook, My Space, LinkedIn, YouTube or Twitter, to communicate to anyone any information about this case or to conduct any research about this case until I accept your verdict.

AUTHORITY: Proposed Model Jury Instructions: The Use of Electronic Technology to Conduct Research on or Communicate about a Case (Judicial Conference Committee on Court Administration and Case Management, December 2009).

JURY INSTRUCTION NO. 81
Communications Between Court and Jury During Jury's Deliberations

If it becomes necessary during your deliberations to communicate with me, you may send a note by a bailiff, signed by your foreperson or by one or more members of the jury. No member of the jury should ever attempt to communicate with me by any means other than a signed writing, and I will never communicate with any member of the jury on any subject touching the merits of the case otherwise than in writing, or orally here in open court.

You will note from the oath about to be taken by the bailiffs that they too, as well as all other persons, are forbidden to communicate in any way or manner with any member of the jury on any subject touching the merits of the case.

I will now dismiss you to the jury room so that you may begin your deliberations.

AUTHORITY: FJP&I § 106.08 (modified).

CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2010 I will electronically file the foregoing with the Clerk of the Court using the CM/ECF system which will then send a notification of such filing (NEF) to the following:

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April 26, 2010
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