

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

ROSETTA STONE LTD.,)
)
 Plaintiff,)
)
 vs.)
)
 GOOGLE INC.,)
)
 Defendant.)

Civ. Action No. 1:09-cv-00736(GBL/TCB)

ROSETTA STONE LTD.'S OPPOSITION TO
GOOGLE INC.'S OMNIBUS MOTION *IN LIMINE*

FILED IN PART UNDER SEAL

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Rosetta Stone Ltd. respectfully submits this opposition to Google Inc.’s omnibus motion *in limine*. For the reasons that follow, Google’s motion should be denied.

INTRODUCTION

Through this action, Rosetta Stone challenges Google’s unauthorized use and sale of the Rosetta Stone Marks¹ as keywords that trigger third-party Sponsored Links that appear on Google’s search-results pages when a user queries a Rosetta Stone Mark. To prove its claim for trademark infringement, Rosetta Stone must demonstrate that (1) it possesses the Rosetta Stone Marks; (2) Google used the Rosetta Stone Marks; (3) Google’s use of the Rosetta Stone Marks occurred in commerce; (4) Google used the Rosetta Stone Marks in connection with the sale, offering for sale, distribution, or advertising of goods and services; and (5) Google used the Rosetta Stone Marks in a manner likely to confuse consumers. 15 U.S.C. § 1114; *PETA v. Doughney*, 263 F.3d 359, 364 (4th Cir. 2001). It is undisputed that the first four elements are met here and that the only open issue with respect to trademark infringement is whether Google used the Rosetta Stone Marks in a manner likely to confuse consumers.

Through its omnibus motion *in limine*, Google requests that the Court exclude evidence that bears directly on this key issue. For example, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹ The “Rosetta Stone Marks” include ROSETTA STONE, ROSETTA STONE LANGUAGE LEARNING SUCCESS, ROSETTASTONE.COM and ROSETTA WORLD.

[REDACTED]

Google also seeks to exclude (i) the prior deposition testimony of its current President, its former Chief Trademark Counsel and its former Group Product Manager regarding [REDACTED]

[REDACTED] (ii) evidence [REDACTED]

[REDACTED]

[REDACTED] of the fact that this Court found in 2005 that the use of

GEICO's trademark in the text of Sponsored Links resulted in a likelihood of confusion; and (iii)

anecdotal evidence regarding Rosetta Stone customer confusion arising from Google's trademark

practices. All such evidence is highly relevant to the questions of confusion, knowledge and

intent.

As discussed below, no reason exists for the Court to exclude this competent, admissible, relevant and compelling evidence. Google's motion *in limine* should be denied.

ARGUMENT

I. EVIDENCE REGARDING THIRD-PARTY TRADEMARK COMPLAINTS AND PRIOR LITIGATION IS RELEVANT AND ADMISSIBLE

In response to the Court's order directing Google to produce a subset of the trademark complaints it has received from third parties, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Rosetta Stone is aware of at least ten

lawsuits in which trademark owners have contended that Google's practices infringed their

trademarks.² In one of the lawsuits, this Court found the evidence before it "sufficient to

establish a likelihood of confusion regarding those Sponsored Links in which [plaintiff's

trademark] appears either in the heading or text of the ad." *GEICO v. Google, Inc.*, No.

1:04CV507, 2005 WL 1903128 (E.D. Va. Aug. 8, 2005).³ [REDACTED]

² See, e.g., *GEICO v. Google, Inc. et al.*, 1:04-cv-00507-LMB-TCB (E.D. Va. filed May 4, 2004); *Google Inc. v. Am. Blind & Wallpaper Factory, Inc.*, 5:03-cv-05340-JF (N.D. Cal. counterclaim filed Nov. 26, 2003); *Rescuecom Corp. v. Google Inc.*, 5:04-cv-01055-NAM-GHL (N.D.N.Y. filed Sept. 7, 2007); *Am. Airlines Inc. v. Google Inc.*, 4:07-cv-00487-A (N.D. Tex. filed Aug. 16, 2007); *Soaring Helmet Corp. v. Bill Me Inc. et al.*, 2:09-cv-00789-JLR (W.D. Wash. filed June 6, 2009); *Ascentive, LLC v. Google, Inc.*, 2:09-cv-02871-JS (E.D. Pa. filed June 25, 2009); *Flowbee Int'l Inc. et al. v. Google, Inc.*, 2:09-cv-00199 (S.D. Tex. filed Aug. 13, 2009); *Jurin v. Google Inc.*, 2:09-cv-03065-MCE-KJM (E.D. Cal. filed Nov. 3, 2009); *Parts Geek, LLC v. U.S. Auto Parts Network, Inc. et al.*, 3:09-cv-05578-MLC-LHG (D.N.J. filed Nov. 2, 2009); *Dazzlesmile et al. v. Epic Adver. et al.*, 2:09-cv-01043-PMW (D. Utah filed Nov. 23, 2009).

³ In asserting that Judge Brinkema granted judgment as a matter of law in Google's favor on the issue of whether "the mere use by Google of the GEICO trademark as a search term or
(cont'd)

[REDACTED] Google *broadened* its trademark policy in the United States in June 2009 to expressly permit certain of its customers to use trademarks in Sponsored Link text.

[REDACTED]

[REDACTED]

[REDACTED] This evidence, however, is relevant to Google’s knowledge and intent – both of which are factors to be considered in determining likelihood of confusion. *See Johnson & Johnson Consumer Cos., Inc. v. Aini*, 540 F. Supp. 2d 374, 392 & n.31 (E.D.N.Y. 2008) (finding evidence of prior trademark infringement lawsuits admissible as evidence of intent and knowledge: “While these other cases alone do not definitely demonstrate that Defendants acted in bad faith here with respect to Plaintiff’s trademark, they do present some evidence of Defendants’ intent At a minimum, these lawsuits should have served to instruct Defendants to exercise greater diligence in ensuring that the products they sold, particularly those they received from questionable sources, did not infringe on others’ trademarks.”).

The cases cited by Google for the contrary position – none of which involved a claim for trademark infringement – are inapposite as they involved evidence of complaints arising from “dissimilar events,” evidence involving “different decision-makers” and “different departments,”

(cont’d from previous page)

keyword . . . violates either the Lanham Act or Virginia common law” (Google Mem. at 5), Google mischaracterizes Judge Brinkema’s opinion. Based on the factual record before her, which consisted principally of an expert survey that she rejected in significant part, she found that the “plaintiff has failed to establish a likelihood of confusion stemming from Google’s use of GEICO’s trademark as a keyword and has not produced sufficient evidence to proceed on the question of whether the Sponsored Links that do not reference GEICO’s marks in their headings or text create a sufficient likelihood of confusion to violate either the Lanham Act or Virginia common law.” *GEICO*, 2005 WL 1903128, at *7. She did not hold that Google’s sale of trademarks as keywords is not actionable.

and “collateral misconduct.” (See Google Mem. at 3.)⁴ [REDACTED]

[REDACTED] prior lawsuits, moreover, are relevant to damages as Google’s knowledge demonstrates willfulness – “having knowledge that one’s conduct constitutes infringement or showing reckless disregard for [trademark] owner’s rights.” *Agri-Supply Co. Inc. v. Agrisupply.com*, 457 F. Supp. 2d 660, 666 (E.D. Va. 2006). Possessing [REDACTED]

[REDACTED] a judicial finding that Google’s use of GEICO’s trademark in the text of Sponsored Links resulted in a likelihood of confusion, Google nevertheless *broadened* its United States trademark policy to expressly permit certain customers to use trademarks in the text of

⁴ For example, in *Vukadinovich v. Zentz*, a Section 1983 action against a city and several police officers, the court excluded evidence of prior complaints against the officers because they “arose from dissimilar events and were filed for a number of different reasons,” noting that “to be admissible, such evidence must pertain to events similar to the events of the instant case.” 995 F.2d 750, 756 (7th Cir. 1993). In *Palmer v. Board of Regents of the University System of Georgia*, a Title VII action, the court affirmed the exclusion of evidence relating to other lawsuits against the University System, finding that they “involved different decision-makers, different departments, and different hiring processes.” 208 F.3d 969, 973 (11th Cir. 2000). In *Westmont Tractor Company v. Touche Ross & Company*, an unpublished accounting case, the court affirmed the district court’s decision to exclude evidence regarding an unrelated transaction that the court found to be “collateral.” 862 F.2d 875, 1988 WL 126273, at *2. *Lifshitz v. Walter Drake & Sons, Incorporated* did not involve allegations of wrongdoing at all but rather the defendant’s attempt to introduce a design certificate that undermined the plaintiff’s assertion that his product was original. 806 F.2d 1426, 1431-32 (9th Cir. 1986). The court affirmed the exclusion of this evidence, finding that there was a “substantial danger” that the “jury would mistakenly conclude that the case before it involved a patent issue.” *Id.* at 1432. And in *Coursen v. A.H. Robins Company, Incorporated*, a products liability case involving the Dalkon Shield, the court affirmed the district court’s decision to exclude evidence that the defendant published false pregnancy rates, finding that “the overwhelming thrust of this evidence was to have the jury believe that because defendant lied about the effectiveness of the Dalkon Shield, it lied about the safety of the device as well.” 764 F.2d 1329, 1335 (9th Cir. 1985).

Sponsored Links. This evidence demonstrates, at a minimum, Google's reckless disregard for trademark owners' rights and therefore is relevant to damages.⁵

Again, the cases cited by Google for the contrary position are inapposite as they all involve situations where the plaintiff sent the defendant a cease and desist letter. (Google Mem. at 3-4.) The fact that courts have declined to find willful infringement where a defendant in good faith disagrees with a single trademark holder's claim of infringement does not support the conclusion that [REDACTED] and a court finding of confusion are irrelevant to the question of willfulness. In any event, none of the cases cited by Google suggests that prior complaints of trademark infringement are not *admissible*.

Contrary to Google's assertion, the complaints are not being offered to show that Google engaged in other acts of infringement or caused confusion as to other trademarks. (Google Mem. at 4-5.) Instead they are being offered to show that, during the relevant time frame and at the time Google decided to broaden its United States trademark policy, Google had received [REDACTED] a court finding of confusion. Because the trademark complaints are not being offered for the truth of the matters asserted in them but rather to demonstrate Google's knowledge and intent, they are not hearsay.

Nor is such evidence unfairly prejudicial. While Google understandably does not want the jury to know that it had received [REDACTED]

⁵

[REDACTED]

and a judicial finding of confusion at the time it broadened its policies in 2009, the admission of this relevant, admissible evidence is entirely appropriate.⁶

II. THE PRIOR DEPOSITION TESTIMONY OF CURRENT AND FORMER GOOGLE EMPLOYEES IS RELEVANT AND ADMISSIBLE

In its Rule 26(a)(3) disclosures, Rosetta Stone designated deposition testimony from Google co-founder and president Larry Page, its former Chief Trademark Counsel Rose Hagan (who was designated as a 30(b)(6) witness in this case), and its former Group Product Manager Prashant Fuloria. The testimony identified by Rosetta Stone was given in actions that raised the *same* claims regarding the *same* practices that Rosetta Stone challenges here. [REDACTED]

[REDACTED] As discussed below, no reason exists to exclude the proposed testimony.

A. Larry Page's Prior Testimony Is Relevant And Admissible

In January 2007, Google co-founder and president Larry Page was compelled to testify in a case involving American Blind and Wallpaper Factory's claim that Google's trademark practices resulted in trademark infringement. Rosetta Stone intends to present the following testimony by Mr. Page:

⁶ The cases cited by Google in support of its prejudice argument are factually distinguishable. (See Google Mem. at 6-7.) For example, in *Adams v. Cooper Industries, Inc.*, a case arising out of contamination caused by chemical emissions from an electric plant, the court excluded epidemiological studies regarding the incidence of cancer in two zip codes. No. 03-476-JBC, 2006 WL 3759619, at *3 (E.D. Ky. Dec. 19, 2006). In *Hott v. VDO Yazaki Corporation*, a sexual harassment case, the court excluded "rumors and innuendo regarding sexual affairs at VDO and speculation that promotions at VDO were regularly awarded to the sexual partners of supervisors." No. 94-00064-H, 1996 WL 650966, at *1-2 (W.D. Va. Nov. 6, 1996). And in *Fiberglass Insulators, Inc. v. Dupuy*, the court excluded, pursuant to Federal Rule of Evidence 408, "statements made by attorneys in the course of settling prior related litigation between the same parties," finding that "the public policy of encouraging settlement . . . requires exclusion of such testimony. 856 F.2d 652, 652 (4th Cir. 1988).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Far from supporting Google's motion *in limine*, the fact that Judge Buchanan granted Google's motion for a protective order, thereby precluding Rosetta Stone from deposing Mr. Page in this case, supports the conclusion that Mr. Page's testimony should be admitted. (*Id.*) In this regard, Google cannot have it both ways – it cannot preclude Mr. Page from being deposed in this case because he is too important and too busy to sit for a deposition and then seek to exclude his prior deposition testimony on the ground that it was offered in different litigation. No reason exists to exclude this relevant testimony.

B. The Prior Testimony Of Rose Hagan And Prashant Fuloria Is Relevant And Admissible

Nor is there any reason to exclude the prior testimony of Rose Hagan and Prashant Fuloria. Google asserts that this testimony should be excluded because it “relates to Google’s conduct under a trademark policy that has since changed significantly.” (Google Mem. at 9.) Such argument, however, ignores the fact that this action challenges both Google’s 2004 policy *and* its 2009 policy. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

● [REDACTED]

● ● ●

● [REDACTED]

[REDACTED]

[REDACTED]

- [REDACTED]

- [REDACTED]

- [REDACTED]

- [REDACTED]

- [REDACTED]

- [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁷ Unless otherwise noted, exhibit references herein are to the exhibits appended to the Declaration of Jennifer L. Spaziano in Support of Rosetta Stone Ltd.’s Opposition to Google Inc.’s Omnibus Motion *in Limine*.

⁸ [REDACTED]

[REDACTED]

C. Rosetta Stone Timely Disclosed Its Intent To Present This Testimony

Perhaps recognizing the baselessness of its objections to the substance of this prior deposition testimony, Google also asserts that the testimony should be excluded because it was not identified in Rosetta Stone’s Rule 26(a)(1) disclosures. (Google Mem. at 11-13.)⁹ This argument is specious. As a threshold matter, nothing in Rule 26(a)(1) requires a party to identify the testimony that it intends to offer at trial. Lay witness trial testimony is governed by Rule 26(a)(3). As Google acknowledges, Rosetta Stone did identify the proffered testimony in its exhibit and witness disclosures pursuant to Rule 26(a)(3). (Google Mem. at 12; *see also* Dkt. 141 at 6.) This was not a late disclosure – it was a timely disclosure made in accordance with the Federal Rules.¹⁰

In any event, Rosetta Stone expressly stated in its Supplemental Rule 26(a)(1) disclosures, served by agreement on March 19, 2010, that it may use all documents produced by Google to Rosetta Stone to support its claims in this lawsuit. (Oblak Ex. 2.) The deposition transcripts at

⁹ Although Google states that this argument applies to Mr. Page and Mr. Fuloria, throughout the discussion Google also refers to the testimony of Ms. Hagan. (Google Mem. at 11-13.)

¹⁰ Because Rosetta Stone’s disclosures were appropriate, the five-factor analysis conducted by Google at pages 11 through 13 of its brief is irrelevant.

issue were produced by Google to Rosetta Stone.¹¹ Thus, Google’s assertion that Rosetta Stone failed to identify this prior testimony in its Rule 26(a)(1) disclosures is simply untrue. In fact, Google was on notice of Rosetta Stone’s intent to use these transcripts as early as March 1, 2010, when Rosetta Stone advised Google that many of the deposition transcripts produced by Google were not final copies and requested that Google either (i) produce final copies to Rosetta Stone or (ii) agree that the produced copies could be used as final copies for purposes of this case. (Ex. 5.) [REDACTED]

[REDACTED] Google’s claims of “surprise” thus are absurd.

Even had Rosetta Stone failed to appropriately disclose its intent to use this deposition testimony, there would be no prejudice – much less “incurable prejudice” – to Google. Rosetta Stone intends to present the prior testimony of current and former *Google* employees. [REDACTED]

[REDACTED] Google, which has possessed the deposition transcripts at issue since the time the depositions were taken, of course, was free throughout the course of discovery to depose these individuals and elicit such testimony. That it did not do so provides no basis for excluding this highly relevant, admissible evidence.

¹¹ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

12

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

IV. EVIDENCE REGARDING GOOGLE’S “SUGGESTION” OF TORRENT WEBSITES TO ITS USERS IS RELEVANT AND ADMISSIBLE

As Google explains in its motion *in limine*, when an Internet user inputs a search query, a drop down box appears suggesting possible searches that may complete or refine the user’s query. (Google Mem. at 20.) When an Internet user inputs “Rosetta Stone” as a search query on Google’s home page, two of the possible searches *suggested* by Google are “Rosetta Stone Torrent” and “Rosetta Stone Spanish Torrent.” A “torrent” site is a site that offers the free – and illegal – download of pirated software. For example, the first link that typically appears when a user clicks on the Google suggested torrent link is thepiratebay.org, a notorious site for illegally downloading software. Google’s inclusion of and refusal to filter the term torrent from its “Google Suggest” tool is indicative of its disregard for the intellectual property rights of third parties and therefore relevant to the issues in this case. *See Agri-Supply Co. Inc.*, 457 F. Supp. 2d at 666 (defining willfulness in trademark infringement context as “having knowledge that one’s conduct constitutes infringement or *showing reckless disregard for [trademark] owner’s rights*”) (emphasis added). Google seeks to exclude evidence and argument referring to “Rosetta Stone Torrent” in the Google Suggest tool on the ground that Google does not “turn[] a blind eye toward counterfeiting.” (Google Mem. at 20.) Such argument, however, is an argument Google can make to the jury. It does not provide a basis for excluding this relevant evidence.

V. ANECDOTAL EVIDENCE OF ROSETTA STONE CUSTOMER CONFUSION IS ADMISSIBLE

Throughout the course of discovery, Rosetta Stone has produced anecdotal evidence of individuals who have been confused by Google Sponsored Links involving Rosetta Stone's products. For example, in its verified interrogatory responses, Rosetta Stone stated that:

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Google asserts that such evidence is excludable hearsay because it “would not have the ability to cross examine the source of the complaint, assess if and how the customer actually used Google, or determine the precise source of any alleged confusion.” (Google Mem. at 22.) The Fourth Circuit, however, has expressly rejected this argument. *See Lyons P’ship L.P. v. Morris Costumes Inc.*, 243 F.3d 789, 804 (4th Cir. 2001). In *Lyons Partnership*, the Fourth Circuit vacated the district court’s finding against plaintiff on its trademark infringement claims finding that the district court erroneously had excluded as “unreliable hearsay” anecdotal

evidence of actual confusion between plaintiff's "Barney" the dinosaur character and defendant's "Duffy" the dragon character. *Id.* In particular, the plaintiff presented a school principal that testified that when she wore the Duffy costume, children shouted "Barney," parents who testified that when they rented the Duffy costume for birthday parties, children believed that the person dressed as Duffy was Barney, and newspaper clippings where reporters erroneously described Duffy as Barney. *Id.* The Fourth Circuit reasoned that plaintiff "did not offer the children's statements or the newspaper articles to prove the truth of the matter asserted – i.e., that the persons wearing the Duffy costume were in fact Barney – but rather merely to prove that the children and the newspaper reporters *expressed their belief* that those persons were Barney." *Id.* (emphasis in original). The Fourth Circuit concluded: "This was direct evidence of the children's and the reporters' reactions and not hearsay. Accordingly, it could not have been excluded as such." *Id.* The Fourth Circuit added that the evidence was "highly probative of actual confusion" and noted that "the existence of actual confusion is often dispositive of a trademark infringement analysis." *Id.* (citing *Sara Lee Corp. v. Kayser-Roth Corp.*, 81 F.3d 455, 467 (4th Cir. 1996)).

Google recognizes this legal principle, but argues that it has no application here because "Rosetta Stone is not offering this evidence to show consumers' confusion about *something*, it is offered by Rosetta Stone to tie Google to that confusion." (Google Mem. at 23.) To the extent Google's objection is based on the content of the testimony proffered – and its application to the facts of this case – such objection goes to the weight of the evidence, not its admissibility. As to Google's "double hearsay" argument, this provides no basis for the broad motion *in limine* Google requests as certain Rosetta Stone witnesses, including for example expected witness

Jason Calhoun, have spoken directly to confused consumers. The “double hearsay” issue should be addressed at trial.¹⁴

VI. EVIDENCE REGARDING GOOGLE’S TRADEMARK POLICIES FOR FOREIGN JURISDICTIONS IS ADMISSIBLE FOR MANY PURPOSES

Finally, Google argues that the Court should exclude reference to Google’s trademark policies for foreign jurisdictions because such policies “are not relevant to its compliance with U.S. trademark law.” (Google Mem. at 25-26.) This argument stems from the fact that Google’s 2004 policy change, which permitted customers to bid on trademarks as keywords, applied only in the United States and Canada, and its 2009 policy change, which permitted certain customers to use trademarks in Sponsored Link text, applied only in the United States.

Although Rosetta Stone does not intend to introduce Google’s trademark policies for foreign jurisdictions as evidence of Google’s violation of United States law, the fact that Google has different practices in the United States than it has in other jurisdictions is relevant to *many* issues in this case. For example, the fact that Google’s 2004 policy change was implemented only in the United States and Canada demonstrates that (i) the 2004 and 2009 policy changes at issue were not necessary to Google’s business; (ii) the practices at issue in this case do not affect Google’s search engine in any respect; and (iii) Google can stop the infringing conduct. These facts are relevant to the jury’s understanding of the practices that Rosetta Stone challenges,

¹⁴ In a footnote, Google suggests that the Court should exclude the testimony of confusion witness Steve Dubow because “he did not purchase his allegedly counterfeit Rosetta Stone software through a sponsored link advertisement.” (Google Mem. at 24.) Although Mr. DuBow could not confirm at his deposition where the link from which he purchased counterfeit software appeared, his records show that he purchased the software on October 6, 2009 from bossdisk.com, a Sponsored Link that Rosetta Stone complained to Google about on the very same day, October 6, 2009. (*See* Dkt. 183 at 10.) Google has not – and cannot – offer any evidence to establish that the bossdisk.com website appeared in its organic search results.

Google's "functionality" argument¹⁵ and Google's liability for the infringement of its customers. Google's concern that the jury might conclude that Google treats foreign trademarks owners better than it does U.S. trademark owners, or that foreign trademark policies have some bearing on whether Google violated U.S. law (Google Mem. at 25), can be addressed through appropriate limiting instructions.

CONCLUSION

For all the foregoing reasons, Google's omnibus motion *in limine* should be denied.

Respectfully submitted,

April 27, 2010
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¹⁵ As set forth in Rosetta Stone's opposition to Google's motion for summary judgment (Dkt. No. 147) and its reply brief in support of its motion for partial summary judgment (Dkt. 164), Google's "functionality" argument has nothing to do with the functionality doctrine that can serve to bar a party from obtaining trademark rights. However, Rosetta Stone anticipates that Google will attempt to argue to the jury that its use of the Rosetta Stone Marks is merely "functional" – a fact that is belied by Google's practices outside the United States.

CERTIFICATE OF SERVICE

I hereby certify that on April 27, 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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