

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
(Alexandria Division)

ROSETTA STONE LTD.

Plaintiff,

v.

GOOGLE INC.

Defendant.

CIVIL ACTION NO. 1:09cv736  
(GBL / TCB)

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

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Recognizing that the facts in the record do not support its infringement claims, Rosetta Stone's Omnibus Motion in *Limine* seeks to create a contrived, alternate reality by excluding relevant evidence from the jury's consideration. This effort should be rejected.

Notwithstanding its ability to identify only five individuals who purchased allegedly counterfeit software after clicking on an ad on Google.com, Rosetta Stone has made advertising by counterfeiters the cover story for its claims against Google. This factual limitation has not stopped Rosetta Stone's witnesses from portraying Google as the only meaningful gateway to all counterfeit software. To better sell the illusion, Rosetta Stone now seeks, through its omnibus motion *in limine*, to exclude evidence that would give the jury a more complete picture of the extent of Rosetta Stone's counterfeiting problems and the exceedingly limited and unintentional role of Google in the distribution of counterfeit material. How better for Rosetta Stone to convince the jurors that Google is responsible for its counterfeiting problem and could single-handedly stop it than to preclude from their consideration the magnitude of that problem, the challenges it presents, and Rosetta Stone's efforts and ability to address it? Rosetta Stone's efforts to distort the jury's perception of the world in which Google must operate should be rejected. Topics 1 (end-user license agreements), 2 (Rosetta Stone's work with intellectual property enforcement agencies) and 3 (prevalence of software counterfeiting and piracy) of Rosetta Stone's motion *in limine* are each directly relevant to Google's defenses relating to advertising by counterfeiters and the attempt to exclude this relevant evidence should be denied.

Similarly misguided are Rosetta Stone's efforts to cut out of the picture seen by the jury significant evidence of Rosetta Stone's actions that confirm Google's objective good faith belief that its policies were consistent with trademark law. Topics 4 (Rosetta Stone's lobbying efforts) and 5 (Rosetta Stone's participation in groups dedicated to fighting search-engine advertising)

relate to Rosetta Stone's expressed goal of changing trademark law and public opinion so as to prohibit the conduct at issue. That Rosetta Stone viewed existing trademark law as insufficient to impose liability for Google's actions is highly probative of, and undermines, its allegations that Google's knowingly and intentionally infringed Rosetta Stone's trademarks.

Similarly, the evidence Rosetta Stone seeks to exclude through Topic 6 – compliments by Rosetta Stone employees to Google employees unrelated to trademark issues – also undercuts Rosetta Stone's allegations of bad intent. The goodwill between the companies' employees directly rebuts Rosetta Stone's express and implied assertions that Google's conduct with respect to Rosetta Stone was intentionally harmful, or at least, callous and indifferent. Further, Rosetta Stone asserts that it overpaid Google for its advertising services and deserves to have some of its payments refunded. It is appropriate for the jury to have a fair presentation of the extent of Google's efforts on Rosetta Stone's behalf.

Finally, Rosetta Stone's attempt to exclude a handful of documents produced after the close of discovery is unfounded and disingenuous. Rosetta Stone's topic number 7 seeks to exclude any documents produced after March 18, 2010. Rosetta Stone selected this arbitrary date as a "cut off" to exclude a modest late production by Google, while permitting Rosetta Stone to avail itself of the much larger production it made after the discovery cutoff. Rosetta Stone cannot show any prejudice from the handful of late produced documents, and given its own late production, its reasoning is specious. Further, Rosetta Stone's motion *in limine* overlaps its motion for sanctions, which was denied last week on the grounds that Rosetta Stone did not prove any prejudice or bad faith.

Rosetta Stone's motion *in limine* seeks judicial endorsement of its efforts to present to the jury an improperly narrow view of the facts, one that excludes compelling evidence that undermines Rosetta Stone's positions. The motion should be denied.

**I. EVIDENCE RELATING TO COUNTERFEIT AND OTHER ILLEGAL SALES (TOPICS 1, 2 AND 3) ARE DIRECTLY RELEVANT AND ADMISSIBLE**

The first three topics in Rosetta Stone's motion *in limine* all relate to the core of Rosetta Stone's claims – that Google knowingly and willfully infringed and diluted Rosetta Stone's trademark rights by permitting counterfeiters to advertise on Google's search results pages. This argument is premised on five individuals who allegedly purchased counterfeit software after clicking on a sponsored link on Google.com. To reinforce this slender reed, Rosetta Stone will attempt to portray Google as responsible for all counterfeiting and unauthorized sales that it cares about. This is not true, as shown by the very evidence Rosetta Stone seeks to exclude: [REDACTED]

[REDACTED] the prevalence of software counterfeiting and piracy and unauthorized sales, and [REDACTED]

[REDACTED] Rosetta Stone should not be allowed to present a deceptively cropped picture of its counterfeiting and unauthorized sales to the jury.

**A. The Prevalence of Counterfeiting and Piracy (Topic 3) Is Directly Relevant**

Rosetta Stone's suggestion that testimony or evidence regarding the prevalence of software counterfeiting and piracy is "irrelevant and not probative" strains credulity.

Rosetta Stone has made the issue of counterfeiting the centerpiece of its infringement argument. This compels a response by Google that puts into perspective its limited, albeit unintentional, role in the widespread counterfeiting activity that occurs on the internet. Rosetta Stone mentions the word "counterfeit" over 40 times in its motion for partial summary judgment,

including the very first paragraph in which it alleges that: “Google allows – and indeed encourages – third parties, including companies illegally selling pirated and counterfeit Rosetta Stone products, to pay to have their ads appear in Google’s search-results pages when Rosetta Stone’s trademarks are entered as search terms.” Dkt. 104 at 1. While this assertion alone opens the door to Google presenting a complete picture of the types of counterfeiting faced by consumers, Rosetta Stone’s witnesses go much farther in blaming Google for counterfeiting.

Several of Rosetta Stone’s have expressly testified that Google was responsible, either directly or indirectly, for a substantial majority of the counterfeit software found on the internet. Declaration of Jonathan Oblak (“Oblak Decl.”) Ex. 4 at 51:1-9, 163:16-168:25 (Google “provides a platform for these pirates who would never have any visibility in the United States without being able to purchase these AdWords from Google.”); Ex. 11 at 86:16-87:7, 89:1-17, 91:16-92:5 (“Google gives the incentive for these pirates and for these counterfeiters...”). This testimony includes the argument, offered by several Rosetta Stone witnesses, that Google “encourage[s]” counterfeiters because it does not censor the word “torrent” (which is used to refer to illegal software) from its “Suggest” function (which proposes possible searches to a user as they type a search query). *Id.* Ex. \_5 at 153:20-154:10. While the argument is simply false, and is subject to a motion *in limine*, Dkt. 190 at 20, the recurring theme from Rosetta Stone’s witnesses is to blame Google for a broad range of counterfeiting activities. To defend itself, Google must be allowed to introduce evidence that shows that it is not the cause of counterfeiting on the internet.

Evidence regarding the prevalence of counterfeiting and piracy is also necessary to rebut Rosetta Stone’s purported evidence of actual confusion. Rosetta Stone identified only five actual

confusion witnesses who will appear at trial – and in discovery identified only one other potential confusion witness.<sup>1</sup> Google argues that this confusion evidence is *de minimis*. If testimony of these five individuals goes to the jury, Google must be able to offer evidence regarding the scope of counterfeiting and piracy available on the internet, including the number of incidents Rosetta Stone has identified concerning other platforms—such as craigslist.com and spam email. This is necessary to put into perspective Rosetta Stone’s implication that the counterfeiting allegedly facilitated by Google is the sole threat it faces from the deceptful conduct of third parties. Oblak Decl., Ex 4 at 163:16-168:25, 268:20-272:15; Ex. 3 at 157:19-158:3. This requires that the jury be able to see that the alleged counterfeiting with any provable connection to Google reflects only a fraction of what exists.

Rosetta Stone has also opened the door to evidence regarding the prevalence of counterfeiting by attempting to rely on as evidence of “actual confusion,” customer complaints contained in two Rosetta Stone databases. *Id.* Ex. 5 at 277:12-278:18, 290:3-11. Those complaints include anecdotal reports of customers purchasing counterfeit goods, but almost none of the complaints identify Google. Dkt. at 152. Rosetta Stone’s counterfeiting reports actually links sales of counterfeit products to other internet sources, such as Craigslist, eBay, and others. As those reports confirm, Google is barely mentioned at all. *Id.* Thus, notwithstanding Rosetta Stone’s contention that “[w]hat happens on websites of other search engines and online

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<sup>1</sup> Counsel for Rosetta Stone asserted during oral argument on April 23, 2010, that Rosetta Stone could have presented more than five confusion witnesses, but was hamstrung by the limit of five third-party deposition per side. This is at odds with the factual record. It has made no proffer, nor offered declarations from any other purportedly confused individuals. Further, in discovery, Rosetta Stone identified only six confusion witnesses in total. If Rosetta Stone is aware of additional confusion witnesses, it has withheld such clearly responsive information.



marketplaces such as eBay and Craigslist is irrelevant,”<sup>2</sup> Dkt. 180 at 3, the very evidence Rosetta Stone relies upon compels inquiry into the prevalence of other outlets for counterfeiting on the internet. Rosetta Stone cannot simply censor those aspects of its evidence that undercut its efforts to blame Google.

Legally, Google does not have an affirmative duty to monitor its website for counterfeit activity. *Tiffany Inc. v. eBay, Inc.*, 576 F. Supp. 2d 463, 469 (S.D.N.Y. 2008) (“For contributory trademark infringement liability to lie, a service provider must have more than a general knowledge or reason to know that its service is being used to sell counterfeit goods. Some contemporary knowledge of which particular listings are infringing or will infringe in the future is necessary.”); *Hendrickson v. eBay Inc.*, 165 F. Supp. 2d 1082, 1095 (C.D. Cal. 2001) (eBay does not have an affirmative duty to monitor its website for potential trademark violations); *Hard Rock Cafe Licensing Corp. v. Concession Servs.*, 955 F.2d 1143, 1148 (7th Cir. 1992) (no affirmative duty to take precautions against the sale of counterfeit goods)). However, Rosetta Stone clearly intends to argue that Google does not do enough to detect and/or prevent advertising by counterfeiters. Oblak Decl. Ex. 4 at 51:1-9, 163:16-168:25; Ex. 5 at 153:20-155:1; Ex. 10 at 71:22-73:22; 137:4-138:8; Ex. 11 at 85:1-25, 88:2-4, 103:23-106:4. But the jury cannot determine whether Google does “enough” to respond to Rosetta Stone’s complaints without first knowing the extent of the problem. Rosetta Stone contends that Google should know when someone is advertising counterfeit products even though Google never has physical possession of the advertised products and even though those products are not actually sold on or through Google.com. The jury needs to understand that there are many other sites were those

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<sup>2</sup> The contention is also perplexing given that Rosetta Stone seeks damages relating to clicks relating to eBay. See Oblak Decl. Ex. 12, relied upon by Rosetta Stone’s damages expert, James Malackowski

actions occur and which Rosetta Stone independently pursues and for which Google cannot legally be held responsible.

[REDACTED]

Rosetta Stone complains of the difficulty that it faces in stopping counterfeiters, arguing that Google, in many respects, is better positioned to halt their conduct. Oblak Decl. Ex. 11 at 120:23-122:15. [REDACTED]

[REDACTED]

[REDACTED] This wide range of outlets through which counterfeit software is available illustrates the challenges that Google faces in detecting and preventing counterfeit products.

These challenges are further exacerbated by the availability of low-priced, unauthorized, but genuine, Rosetta Stone product. Such product, offered by, or obtained from, consumers no longer satisfied with their purchase, [REDACTED]

[REDACTED]

[REDACTED] assertion that a creation of a minimum price filter, even if otherwise technologically feasible, would bar only the sale of counterfeit products. *Id.* Ex. 5 at 78:18-84:7, 228:25-229:17; Ex. 9 at 58:18-59:13. The direct efforts of Rosetta Stone's enforcement team in this regard further confirm this point. *Id.* Ex. 5 at 56:25-58:5.

[REDACTED]

[REDACTED]

[REDACTED] Rosetta Stone has more permanent and effective means of addressing counterfeiting than trying to change Google's trademark policies. In addition, to the extent law enforcement and private agencies specifically designed to fight counterfeiters have difficulty doing so, this provides further evidence of the unreasonableness of Rosetta Stone's expectation concerning Google's ability to identify and permanently block sophisticated criminal enterprises. That obligation falls on Rosetta Stone and the intellectual property enforcement agencies it employs. *See, e.g., Tiffany v. eBay*, 2010 WL 1236315, at \*7 (2d Cir. April 1, 2010) (putting burden on eBay to "guarantee the genuineness of all of the purported [] products offered on its website would unduly inhibit the lawful resale of genuine [] goods.").

Google should not be deprived of these categories of evidence that are necessary to show the challenges that exist in detecting counterfeiters and preventing them from advertising on Google.com. Rosetta Stone's request to exclude such evidence in order to create a misleading picture of the counterfeiting issue should be denied.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

*Synergistic Int'l, LLC v. Korman*, 470 F.3d 162, 175 (4th Cir. 2006) (holding that “willfulness is a proper and important factor in an assessment of whether to make a damages award”). Rosetta Stone’s own view that trademark law did not adequately prohibit bidding on trademarked keywords is compelling evidence that Google’s trademark policy was not objectively unreasonable.

[REDACTED]

[REDACTED]

[REDACTED] Motion in Limine at 6-8. The testimony and documents are to the contrary.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

not clearly prohibit Google's actions. Google cannot willfully infringe if the law is ambiguous as to what constituted infringement. *U.S. v. Critzer*, 498 F.2d 1160, 1162 (4th Cir. 1974) ("It is settled that when the law is vague or highly debatable, a defendant- actually or imputedly- lacks the requisite intent to violate it.").

[REDACTED]

**III. EVIDENCE REGARDING ROSETTA STONE'S COMPLIMENTS TO GOOGLE (TOPIC 6) ARE DIRECTLY RELEVANT AND ADMISSIBLE**

Rosetta Stone seeks to exclude evidence and argument regarding compliments and expressions of gratitude from Rosetta Stone employees regarding the work done for them by Google's customer services representatives (Topic 6). This evidence is directly relevant to Rosetta Stone's contentions that Google acted in bad faith and was not responsive to Rosetta Stone's concerns.

Throughout this case Rosetta Stone has attempted to portray Google as acting in callous disregard of Rosetta Stone's interests and somehow not treating it the way it (erroneously) perceived Google as treated other corporations. For example, Google's COO, Eric Eichmann, testified to Rosetta Stone's desire for a "clean page where [it] could just have organic search results with Rosetta Stone on top" just like other companies like Banana Republic, Zappos and Apple. Oblak Decl. Ex. 3 at 89:13-24; 91:22-94:3; *see also* Ex. 11 at 220:9-221:5; Ex. 17. Rosetta Stone's contention is misplaced, as Google does not enter into commercial agreements to provide "clean pages," *Id.* Ex. 1 at 167:13-171:3; Ex. 2 at 142:1-145:1, or provide them favorable treatment. Simple searches reveal that many of the companies cited by Rosetta Stone as purported examples of favored treatment show that competitors are free to bid on their trademark terms. *Id.* Ex. 19. Google did not treat Rosetta Stone any differently. Indeed, as demonstrated by extensive evidence Rosetta Stone seeks to exclude, Rosetta Stone's employees felt that Google actually went above and beyond in providing advertising service. *Id.* Ex. 8 at 134:15-135:10.<sup>3</sup> Rosetta Stone's contention that it was mistreated by Google cannot be rebutted fairly if Google is prevented from showing the favorable opinions of Rosetta Stone's employees.

Evidence showing that Rosetta Stone's employees valued the services provided by Google are also highly relevant because, as part of its damages, Rosetta Stone claims that it "overpaid" Google for advertising services. Oblak Decl. ¶ 20 (Rosetta Stone over paid more than \$2.8 million to Google). Documents and testimony of Rosetta Stone employees who actually interacted with Google on a day to day basis rebut the assertion that Rosetta Stone did

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<sup>3</sup> Some Rosetta Stone executives complained cynically that Google's AdWords team proposed advertising strategies intended to generate revenue for Google but provide no benefit to Rosetta Stone. Oblak Ex. 11 at 65:22-70:12. Rosetta Stone should not be able to launch unfounded attacks on Google's motivations while preventing Google from responding with contrary evidence of the gratitude shown by Rosetta Stone's employees for efforts undertaken by Google on their behalf.

not receive value for its services. Rosetta Stone employees called Google employees “superheroes,” told them “You guys rock!,” and asked for a Google team picture to “mount and frame in gold for all to see.” *Id.* Exs. 16-17. They testified that Google was very helpful in managing Rosetta Stone’s AdWords account. *Id.* Ex. 6 at 101:17-104:15, 119:4-122:4; Ex. 8 at 109:17-112:5. These Rosetta Stone employees did not, apparently, share the view of Rosetta Stone’s management (or lawyers) that Google was treating Rosetta Stone unfairly, was unresponsive to Rosetta Stone’s concerns, or was failing to provide value for its services. Google is entitled to show this complete picture of its relationship with Rosetta Stone.

Additionally, prohibiting testimony regarding compliments extended by Rosetta Stone employees to Google employees would inevitably deprive Google of evidence directly relevant to its responsiveness to and success at combating trademark and counterfeiting issues. Most of the Rosetta Stone employees whose praise is now the subject of exclusion are the very same who are, or were, responsible for communicating with Google regarding trademark enforcement efforts. Chris Klipple, April Garvey and Nicole Tabatabai have all worked with Google on both sales and trademark enforcement efforts. Oblak Decl. Ex. 6 at 307:16-308:7; Ex. 7 at 70:12-73:6; 96:23-97:6; Ex. 8 at 24:12-25:11; 38:8-40:12. Thus, their praise for Google is inevitably intertwined with both of these efforts. Excluding evidence on the basis of whether it is sales or trademark related involves a hair-splitting exercise for which the untangling effort between “permissible” and “impermissible,” as defined by Rosetta Stone, is not justified.

**IV. DOCUMENTS PRODUCED AFTER MARCH 18 (TOPIC 7) SHOULD NOT BE EXCLUDED**

Discovery in this case closed on March 12, 2010. Dkt. 54. Rosetta Stone’s Topic 7 asks the Court to exclude 17 documents (144 pages) produced after the arbitrary date of March 18. Conveniently for Rosetta Stone, excluding document produced after its self-selected March 18

date would allow it to use the more than 17,000 pages (899 documents) Rosetta Stone produced after the close of discovery but prior to March 18. Oblak Decl. ¶ 25. Thus, Rosetta Stone does not sincerely move to have this Court enforce a rule by which all post-discovery-cut-off documents are excluded. *Cf.* Motion in Limine at 12 (internal quotations omitted).

Even if Rosetta Stone were allowed to select its own deadline after which document production should be excluded, Google's production after that deadline should not be bared here because it was harmless. The authority cited by Rosetta Stone confirms that documents will not be excluded if "the violation is substantially justified or harmless." *Nelson-Salabes, inc. v. Morningside Dev., LLC*, 284 F.3d 505, 512 n.10 (4<sup>th</sup> Cir. 2002). The production of an extra 17 documents totaling 144 pages of documents in a case in which Google has produced over 132569 documents totaling 497061 pages is, indeed, harmless. Oblak Decl. ¶ 24; *Thurston v. Borden Waste-Away Service, Inc.*, 1998 WL 456441, at \*2 (N.D.Ind. 1998) (motion to strike denied because production of documents after close of discovery was harmless). Having itself failed to complete its document production by March 12, Rosetta Stone is hardly in position to seek exclusion of evidence based on Google's late production of a handful of documents. Moreover, Rosetta Stone makes no argument as to how it has been prejudiced by these documents which were produced within a month of the discovery cut off.

Finally, Rosetta Stone also seeks exclusion of approximately 28 documents produced between April 14 and 21 that were the subject of its April 16, 2010 motion for sanctions against Google. Judge Buchannan heard argument on the motion on April 23 and denied Rosetta Stone's motion in its entirety. The Court's ruling confirms that Rosetta Stone had not shown any prejudice from the production of the 28 additional documents and that Google acted in good faith regarding its modest production of documents. Oblak Decl. ¶ 23. Rosetta Stone has no basis to



revive its failed argument of prejudice as to those documents, or any real basis to claim prejudice in connection with 17 documents (totaling 144 pages) produced a week earlier.

Rosetta Stone's invitation to this Court to draw a line for permissible and impermissible post-discovery cut off document productions that favors Rosetta Stone and disfavors Google should be declined.

### CONCLUSION

For the foregoing reasons, Google respectfully requests that the Court deny Rosetta Stone's Motion *in Limine* in its entirety.

Dated: April 27, 2010

Respectfully Submitted,

GOOGLE INC.  
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 27<sup>th</sup> day of April, 2010, I electronically filed the forgoing with the Clerk of Court using the CM/ECF system, which then sent a notification of such filing (NEF) to the following:

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