

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

ROSETTA STONE, LTD,)	
)	
Plaintiff,)	Civil No. 09-736
)	
VS.)	April 23, 2010
)	
GOOGLE, INC.,)	
)	
Defendant.)	
_____)	

REPORTER'S TRANSCRIPT

MOTIONS HEARING

BEFORE: THE HONORABLE GERALD BRUCE LEE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF: SKADDEN ARPS SLATE MEAGHER & FLOM LLP
BY: WARREN ALLEN, ESQ.
MITCHELL ETTINGER, ESQ.
DAVID LELAND, ESQ.
JENNIFER SPAZIANO, ESQ.

FOR THE DEFENDANT: ODIN FELDMAN & PITTLEMAN PC
BY: JONATHAN D. FRIEDEN, ESQ.
STEPHEN COBB, ESQ.
QUINN EMANUEL URQUHART OLIVER
BY: MARGRET CARUSO, ESQ.
JONATHAN OBLAK, ESQ.
ADAM BAREA, ESQ.

OFFICIAL COURT REPORTER: RENECIA A. SMITH-WILSON, RMR, CRR
U.S. District Court
401 Courthouse Square, 5th Floor
Alexandria, VA 22314

INDEX

ARGUMENT BY THE PLAINTIFF 4, 33

ARGUMENT BY THE DEFENDANT 25, 35

1 (Thereupon, the following was heard in open
2 court at 12:39 p.m.)

3 THE CLERK: 1:09 civil 736 Rosetta Stone,
4 LTD versus Google, Incorporated.

5 Would counsel please note your appearances
6 for the record.

7 MR. ALLEN: Good afternoon, Your Honor. My
8 name is Warren Allen. I'm here on behalf of plaintiff
9 Rosetta Stone.

10 With me are Mitchell Ettinger, David Leland
11 and Jennifer Spaziano from Skadden Aps.

12 THE COURT: All right, good afternoon.

13 MR. FRIEDEN: Good morning, Your Honor.
14 John Frieden, Oden Feldman & Pittleman for Google.

15 With me are Steven Cobb, Margret Caruso,
16 Adam Barea who is the general counsel for Google and
17 Jonathan Oblak.

18 THE COURT: Good afternoon.

19 I realize that there are several motions
20 here, and I have read and I think that what I would like
21 to do is to take up the plaintiff's motion for partial
22 summary judgment and the defendant's motion for summary
23 judgment, take them up both first. I can't tell who filed
24 first?

25 MR. ETTINGER: They were filed

1 simultaneously.

2 THE COURT: They were filed simultaneously.
3 All right, then plaintiff goes first.

4 MR. ETTINGER: Thank you, Judge.

5 Mitchell Ettinger on behalf of Rosetta
6 Stone, Your Honor.

7 As is my practice when I appear before you,
8 I have a handout instead of a demonstrative if I might
9 provide it.

10 THE COURT: All right. I'm open to
11 receiving it.

12 MR. ETTINGER: Copies have been provided to
13 opposing counsel, Judge, and there's a copy here for your
14 clerk as well.

15 THE COURT: Thank you.

16 We're taking up now Rosetta Stone's motion
17 for partial summary judgment as a liability; is that
18 right?

19 MR. ETTINGER: That's correct, Your Honor.
20 Your Honor, relying on the undisputed facts that have been
21 established through the filings of the motions for summary
22 judgment and the legal precedent, in other cases involving
23 the very same practices of Google, Inc, Rosetta Stone has
24 established that summary judgment as to liability should
25 be entered on its behalf.

1 And before I just walk through that analysis
2 to show you how the undisputed facts meet the elements of
3 trademark infringement if I might just spend five minutes
4 of the Court's time to introduce you to the lingo that
5 we've been living with in this case now for couple months.

6 It might help make it easier for the Court,
7 and I might confess that this may be all known to you, and
8 I'll go very quickly if it is. But for me it was all new
9 lingo.

10 And so, if I could get you just to turn to
11 tab one of the handout, Your Honor. This is a Google
12 search home page. So if you were to type in
13 www.Google.com, this is what would come up on your
14 computer. It basically is a page that allows a user to
15 enter a search term, and here you'll see that the terms
16 "Rosetta Stone" are entered in order to conduct a search
17 on Google.

18 The next page, Your Honor, is what is known
19 as search results pages.

20 THE COURT: I don't want you to think that I
21 am computer illiterate. I do use Google. I use Yahoo,
22 and I actually own a copy of Rosetta Stone.

23 MR. ETTINGER: Excellent. I can't speak to
24 you in a foreign language today, but.

25 THE COURT: ¿Sí, habla Español?

1 MR. ETTINGER: Nein.

2 THE COURT: Oh, okay.

3 MR. ETTINGER: Judge, if I can get you to
4 turn to the third page, I'll go very quickly and just
5 explain to you what I'm going to be talking about.

6 The key words that are highlighted in red,
7 those are the words that are sold at Google AdWords
8 auction. They admittedly are bid on by companies so that
9 when users like yourself or myself enter those key words,
10 a sponsored link will come up. A sponsored link, Judge,
11 is Google's version of a paid advertisement.

12 The sponsored links appear as you see on
13 this page on the top portion of the screen and in the kind
14 of a pale yellow box and all along the right-hand side.
15 Those sponsored links are the basis for this lawsuit.
16 That is what we are focused on.

17 THE COURT: So your view is that companies
18 like Google that sell space like a newspaper that sells --
19 the Washington Post sells full page ads may not use a
20 trademark term to determine where to place an
21 advertisement. And if they do so without the permission
22 of the trademark holder, that violates the Lanham Act and
23 unfair competition; is that right?

24 MR. ETTINGER: No, Your Honor. You've
25 stated Google's position quite well. That is not Rosetta

1 Stone's position. Google is not like an advertiser, like
2 a newspaper.

3 What Google does is Google offers trademark
4 terms both branded and unbranded for sale to third parties
5 so that their ads may be triggered when a user enters the
6 trademark term in its search engine. It's very different.

7 THE COURT: All right. But your fundamental
8 premise is that in connection with auctions of the words
9 that that violates Rosetta Stone's trademark rights.

10 MR. ETTINGER: It violates it when it
11 creates confusion as to the search results page. That's
12 what the Lanham Act holds.

13 THE COURT: Are we focused here on confusion
14 in general or confusion as to the source or origin of
15 goods and services?

16 MR. ETTINGER: The Lanham Act 1114 provides
17 for confusion. Confusion can be as to source or
18 sponsorship. It can be source of sponsorship of the goods
19 which we have in this case when we talk about pirates
20 which I'll get to in a moment. It can also talk about
21 sponsorship of the ads themselves and what is being
22 offered on the Internet. And we have survey evidence to
23 that effect to show that consumers are confused when they
24 see the sponsored links come up with the Rosetta Stone
25 trademark.

1 Not only -- Your Honor, not only is it
2 triggered by that, by the terms Rosetta Stone but the
3 marks themselves appear in the ads, and that's what
4 creates the confusion.

5 And that, Your Honor, is the 2009 policy
6 change at Google. And I want to make sure I walk you
7 through that quickly because that's really what's at heart
8 here.

9 So the sponsored links, every time someone
10 clicks on one of these sponsored links, Google gets paid.
11 They get paid.

12 Today if you went on and opened an AdWords
13 account, it would take you five to seven minutes. And if
14 you type in Rosetta Stone as your key word that you want
15 to advertise on, you would find that Google would get paid
16 somewhere between \$1.50 and \$3.30 every time someone
17 clicked on that sponsored link. That's how they make
18 90 percent of their income which is \$24 billion a year.

19 The organic search results which is depicted
20 on this page appears directly below the sponsored links.
21 That is not at issue in this case.

22 THE COURT: What does organic search results
23 mean?

24 MR. ETTINGER: This is the results that are
25 nonpaid. They are generated by Google's algorithm which

1 is I understand a trade secreted process that they use to
2 generate search results.

3 So Google's business model is to generate
4 search results in the organic section and above it to
5 place paid advertisements that are also relevant to the
6 search term or key word entered by the computer user.

7 THE COURT: So what is a search engine?

8 MR. ETTINGER: A search engine is Google.
9 Google is -- is the company that owns the search engine.

10 THE COURT: Well, I'm asking that because I
11 want your definition as a lawyer what a search engine is
12 in the context of the Internet. I just told you I
13 understand what Yahoo and Google are, but I want to hear
14 what your determination of what the term search engine
15 means.

16 MR. ETTINGER: Search engine is a mechanism
17 through which information is sorted, gathered and
18 displayed in response to a key word trigger.

19 THE COURT: So then the user has to be
20 motivated to search -- to go to one of these search
21 engines; that is right?

22 MR. ETTINGER: Your Honor, yes, that's true.

23 THE COURT: So then a person going to a
24 search engine would not necessarily be going there to buy
25 products or services. They would be looking to identify

1 products and services; is that right?

2 MR. ETTINGER: That's one possibility, Your
3 Honor. The confusion witnesses in this case have
4 testified that they went there for the purpose of finding
5 product.

6 THE COURT: I understand. Well, Amazon is
7 distinct from Google, isn't it? Amazon is where you go to
8 buy books and things; isn't that right?

9 MR. ETTINGER: Amazon does sell products,
10 yes, sir.

11 THE COURT: You don't go to Amazon to search
12 for terms like DNA or thing like that. You go there to
13 find books, products, right?

14 MR. ETTINGER: I think consumers in most
15 parts, yes, but I believe Amazon has it's one search
16 engine that might be powered by Google. I'm not certain,
17 Judge.

18 THE COURT: All right. But the point that
19 I'm trying to focus in on is if the object of going to a
20 search engine is to look for products, your view is that
21 the search engine may not employ any terms that are
22 trademark terms without the permission of the trademark
23 holder. Is that right?

24 MR. ETTINGER: Your Honor, under the unjust
25 enrichment claim that is correct. Under the trademark

1 claim we say you may not use trademark terms. You may not
2 sell them at auction to trigger third party ads where they
3 are likely to create confusion.

4 THE COURT: So if it was free there would be
5 no violation?

6 MR. ETTINGER: No, sir, there would not be.
7 It would not be.

8 THE COURT: So your objection is to the
9 business model here. And the business model in your view
10 exploits your trademark terms for which the trademark
11 owner ought to be compensated.

12 MR. ETTINGER: Ought to be compensated and
13 there should be no confusion as to consumer's choice. So
14 when someone goes on the Internet and knows the trademark
15 Rosetta Stone and the goodwill established in that mark,
16 that it means language learning software and they type in
17 those specific words instead of learn Spanish or learn a
18 foreign language, that they receive results on the search
19 results pages that are not confusing to the consumer.

20 And Judge, the question you just asked if
21 you could flip to the -- skip the next page. It's just
22 the landing page which is the page that you would go to if
23 you clicked on Rosetta Stone.com. You'll see there are
24 two types of searches that are identified on that page.
25 One is called branded search and one is called non-branded

1 search.

2 Branded search are searches that are based
3 on trademark terms. That is what is at issue in this
4 case.

5 Rosetta Stone is not claiming that
6 non-branded search which deal with generic terms violates
7 their rights as a trademark holder.

8 THE COURT: So then in your view, if someone
9 typed "Xerox" into the Google box, then Xerox -- the
10 holder of the trademark Xerox ought to be compensated; is
11 that right?

12 MR. ETTINGER: Under the unjust enrichment
13 theory if a user types in Xerox and Google displays
14 sponsored links, whether they relate to Xerox or not and
15 someone clicks on that link and pays Google, Google is
16 trading on the goodwill of Xerox's mark and earning money
17 on that mark and the trademark owner should be compensated
18 under unjust enrichment.

19 With respect to trademark law, Xerox would
20 have a cause of action if the sponsored links displayed --
21 the sponsored links displayed by Google create confusion
22 to the consumer. That's what the trademark law provides,
23 and that's what this case is about.

24 And if Your Honor can --

25 THE COURT: Confusion as it relates to

1 advertising?

2 MR. ETTINGER: That's correct, Judge.

3 THE COURT: All right.

4 MR. ETTINGER: If I could take you to the
5 next page, I'm going to walk through quickly the Google
6 policies at issue and I'll get right into the meat of the
7 argument.

8 The Google's trademark policy has evolved
9 over time. Between 2000 and 2004, it did not permit
10 trademarks to be used as key words or to be used in the
11 sponsored link ads text at all. And during that time
12 period, they honored the trademark owner's right.

13 In 2004 -- in 2004 -- in March of 2004, they
14 conducted some experiments. And these experiments were
15 designed to determine whether or not there would be user
16 confusion if they used key words, trademark key words and
17 if they allowed trademarks to appear in ad texts.

18 Those internal experiments, Judge, conducted
19 by Google determined that there be high likelihood, high
20 likelihood of confusion if the trademark appeared in ad
21 text.

22 They changed their policy in 2004 after
23 those experiments opened up the market to keywords
24 including trademark terms. And when they did that, two
25 things significantly happened and these are all in the

1 undisputed facts.

2 There was -- they recognized there was a
3 significant potential for additional revenues which makes
4 sense because the branded terms are worth more than the
5 non-branded terms because they're well known and it's the
6 goodwill of those marks.

7 And secondly they told the public, the
8 people that bought Google stock that this may cause us
9 problems in the trademark world and we may be sued.

10 So as of 2004, that's one registration. So
11 as of 2004, now anybody can bid on a trademark key term,
12 including Rosetta Stone.

13 They went five years like that, went through
14 several lawsuits which we'll talk about in just a moment
15 because there's finding of law on use and commerce with
16 respect to their AdWords programs including one in this
17 court.

18 They go to 2009 and they say we can make
19 literally up to a billion dollars more a year,
20 conservatively a hundred million, but up to a billion
21 dollars more if we just let people put those trademarks in
22 ad texts. And they changed it.

23 In June of 2009, they went to a policy that
24 allows people to put trademarks in ad texts, non-trademark
25 owners as well as bid on them.

1 And Your Honor, within two months of that
2 change, the pirates and counterfeiters that began
3 appearing on the Google pages relating to my client's
4 trademark are overwhelming.

5 Between September of 2009 and February 28th
6 of 2010 during the pendency of this suit, 183 instances of
7 trademark infringement by pirates were noted to Google by
8 Rosetta Stone, 183 times, Judge.

9 Those are the ones that Rosetta Stone could
10 find. And so that is why we're here today. We're here
11 today to talk about why we're entitled to summary judgment
12 as a matter of law with respect to the infringement by
13 Google.

14 The Fourth Circuit teaches us in the *PETA*
15 case that there are four elements that the Court must find
16 in order to enter summary judgment.

17 THE COURT: Well, you should assume that
18 I've read your brief, and I'm not going to invite you to
19 read it to me now.

20 MR. ETTINGER: I won't do that.

21 THE COURT: Help me with your theory here
22 about the confusion. So, your view is that the confusion
23 focuses in on whether the person searching thinks that the
24 use of the trademark term confuses the consumer as to
25 who's conducting the advertisement, whether or not it's

1 been sponsored by Rosetta Stone or some pirate?

2 MR. ETTINGER: Yes, sir. That is one form
3 of the confusion. And the other form of the confusion is
4 that if they assume based on the Rosetta Stone marks
5 appearing in the ad links, that the goods being offered
6 for sale are authorized or manufactured by Rosetta Stone.

7 And, in fact, Your Honor, we have five
8 confusion witnesses, all of whom typed in the words
9 "Rosetta Stone" into the Google search engine, pressed
10 enter, saw links that said Rosetta Stone, buy it for \$148,
11 \$158 and I'll show you a couple of those in just a moment,
12 believing that they were buying software that had been
13 manufactured, endorsed and supported by Rosetta Stone.

14 THE COURT: But Google wasn't selling the
15 actual products, was it? It was these companies, whether
16 or not they were authorized or not that was selling them.

17 So your view is that this search engine is
18 responsible for the actual sales. If the sales were
19 pirated then, it was the search engine's fault.

20 If they were directed to Amazon.com and they
21 got an authorized version of Rosetta Stone, then that was
22 also Google's fault and Google is liable for that. Is
23 that right?

24 MR. ETTINGER: Judge, with a little twist,
25 okay, because that's not what I'm saying.

1 THE COURT: If you would focus in and tell
2 me what you are saying.

3 MR. ETTINGER: Okay, and that's fair enough.
4 What we're saying is that Google's business practice of
5 selling trademarks to third parties that display them in
6 sponsored links that create confusion is in and of itself
7 trademark infringement, end of case.

8 You do not need to establish that it's
9 counterfeit. You just need to show confusion. And that's
10 why I was going to *PETA*. *PETA* says there's four elements,
11 right, one that the plaintiff has a mark that's federally
12 registered and protected.

13 THE COURT: Well, I think the focus here
14 really is likelihood of confusion; isn't it?

15 MR. ETTINGER: Yes.

16 THE COURT: Isn't that where we're going?

17 MR. ETTINGER: Yes.

18 THE COURT: Well, let's go there fast
19 because I'm not going to -- you know, I don't need three
20 hours of oral argument on this. I want you to focus on
21 what you think your argument is.

22 MR. ETTINGER: Okay. The reason I was
23 saying that is because all of the elements other than
24 likelihood of confusion are in the undisputed facts, done.

25 THE COURT: I understand. But your theory

1 is that by having a search engine where a person is
2 looking for products, that the ultimate sale, if it's
3 counterfeit, is as a result of the exploitation of the
4 trademark term that was placed in the search engine.

5 So that means that if someone is looking for
6 a Sony television and they type in Google "Sony
7 televisions", so they can find out who sells Sony
8 televisions, and it turns out that one of the persons
9 selling Sony televisions is selling knockoffs, that the
10 search engine is liable.

11 That's very different than a case where
12 Amazon which may be selling Sony televisions is selling
13 out of their warehouse counterfeit televisions for which
14 they could perhaps be held liable for trademark
15 infringement.

16 Help me with how I distinguish those two
17 different business models because I'm having difficulty
18 understanding.

19 MR. ETTINGER: Fair enough. The difference
20 is that with Google, Google says to its clients, you may
21 bid on this trademark term and you may use it in ad text.
22 And if you turn to page five, I'll give you the perfect
23 example, tab five.

24 Its policy change in 2009 said that any one
25 who they believe sells products associated with Rosetta

1 Stone can put it in ad text. So if you look under tab
2 five, the trademark infringement, our theory is very
3 simple, that upon the entry of Rosetta Stone and the
4 serving of this results page which this is a real results
5 page, Judge, the serving of this results page results in
6 confusion, and that is because you cannot tell from
7 looking at these links which of these particular companies
8 are offering legitimate authorized original Rosetta Stone
9 software. You can't tell.

10 THE COURT: So is Google making a statement
11 to the public that that's what this is?

12 MR. ETTINGER: Google's trademark policy
13 says as follows --

14 THE COURT: No, no. My question was very
15 precise. Is the representation of this page by Google a
16 statement to the consumer that these links are to genuine
17 authorized products owned by Rosetta Stone?

18 MR. ETTINGER: Both direct and implied.
19 They do it directly, Judge, by saying this is our
20 trademark policy. Only authorized resellers -- only
21 authorized resellers may display the trademark term and ad
22 text. That is their public policy.

23 So, anyone who goes on the Internet is
24 comforted by knowing that only authorized resellers are
25 supposed to be here, number one.

1 Number two is implied is that they, Google
2 touts, and this is why they make so much money, that they
3 give you the most relevant responses to your searches.

4 And if you're looking for Rosetta Stone,
5 here it is. So now when a user goes in, types "Rosetta
6 Stone", presses enter, I can't tell which of these links
7 are selling genuine. And in fact, Your Honor, this very
8 page, this search page was shown to two senior trademark
9 counsel at Google during their depositions and they could
10 not tell.

11 It turns out, Judge, that the second link --
12 THE COURT: Well, they couldn't tell -- as I
13 understand it from reading the briefs, Rosetta Stone can't
14 tell unless it actually has a software to examine; is that
15 right?

16 MR. ETTINGER: That is not correct, Judge.

17 THE COURT: It's not. So then you're able
18 to online just look at a version of Rosetta Stone to
19 determine if it's genuine or not?

20 MR. ETTINGER: Judge, the question is not
21 copyright infringement.

22 THE COURT: No, I've asked you a specific
23 question. Can you answer my question?

24 MR. ETTINGER: Yes, sir.

25 THE COURT: Can Rosetta Stone go online and

1 determine whether or not a copy being offered for sale of
2 Rosetta Stone software is authentic or not?

3 MR. ETTINGER: They can tell you from
4 looking at the link whether it's an authorized reseller or
5 not.

6 THE COURT: You did not answer my question.
7 If you think you've answered my question, it's okay. My
8 question is very precise and that was whether Rosetta
9 Stone could go online, look at a version of software that
10 is on a disc and ascertain online whether or not it was
11 authentic? Can you answer that question?

12 MR. ETTINGER: I think I can.

13 THE COURT: All right, I'm listening.

14 MR. ETTINGER: I think I have, but I'll try
15 again. They cannot do the physical examination, Judge,
16 because they don't have it. That's given. I accept --

17 THE COURT: But Windows can actually do
18 these examinations online and tell you whether or not
19 you're using an authorized version of Windows. You're
20 saying Rosetta Stone does not have that capacity; is that
21 right?

22 MR. ETTINGER: No, Judge, because when you
23 get to this point on the search page, you don't get access
24 to the software.

25 THE COURT: No, but you're saying that there

1 were pirates out there selling your product. And I assume
2 that you have some way of know who is a pirate and who is
3 not, which means at some point, you either are able to
4 secure the product from the alleged pirate and examine it
5 or you have some way of doing it online.

6 Am I inferring inaccurately about that
7 process?

8 MR. ETTINGER: No, sir. In fact, these are
9 not downloadable products. They're sold in boxes. And I
10 think that's our disconnect.

11 Once Rosetta Stone gets a copy of the
12 pirated product, of course, they can tell because they can
13 look at the code and see that it's counterfeit.

14 THE COURT: So how would Google ascertain
15 whether or not the seller was selling authorized copies?

16 MR. ETTINGER: Simple. All they need to do
17 is ask the trademark owner whether or not they're selling
18 their mark to an authorized reseller. It's a simple task.

19 THE COURT: So then the only people can
20 resell Rosetta Stone are individuals -- companies
21 authorized by Rosetta Stone?

22 MR. ETTINGER: That is their policy, Judge.
23 That is Google's policy.

24 THE COURT: All right. Now I'm asking you
25 what Rosetta Stone's policy is.

1 MR. ETTINGER: Of course.

2 THE COURT: And my question is whether only
3 a Rosetta Stone authorized seller can sell their products?

4 MR. ETTINGER: That is correct, Judge.

5 THE COURT: All right.

6 MR. ETTINGER: And so Google, its business
7 model and its policy is only authorized resellers are
8 allowed to bid on the marks, only authorized resellers use
9 the marks in the ad text.

10 And in practice it does not work, and if I
11 can get you to turn just for a moment to the -- and this
12 will bring it home, to tab three.

13 Tab three, Judge, is a synopsis of the 183
14 complaints that were made to Google between the time
15 period of September 2009 and February 2010.

16 Okay. If you turn to the second page, it
17 shows you a Google search result that has a pirated
18 software in the top right-hand side.

19 If you turn to the next page, Judge, that is
20 the landing page, in other words the page that you go to
21 when you click on that link, for Language Tools Mall.com.
22 And you see the Rosetta Stone yellow box. You see a
23 slashed price for the pricing and consumers are absolutely
24 confused as to whether or not that's genuine.

25 And there is no question that that makes

1 sense because their own trademark counsel can't tell you.

2 If you go to the next page, Judge, it shows
3 you all of the dates in February where this ad appeared on
4 Google search pages, February 1, February 7, February 11
5 through 19, February 20th, 21st, 22nd, 23rd and 24th.

6 Every day that this occurs, Rosetta Stone
7 calls Google and says infringement is happening.
8 Infringement is happening.

9 THE COURT: I just have one additional
10 question then I want to hear from the other side.

11 Is Rosetta Stone required to establish any
12 damages in connection with its trademark dilution claim?
13 And if so, how are you damaged?

14 MR. ETTINGER: We do not need to establish
15 monetary damages under dilution. We just need to show
16 that the mark could be tarnished. And certainly, when
17 there is counterfeiters involved, tarnishment is presumed
18 by law. We do not have to diminution in value of the
19 mark. We just need to show that it's either becoming
20 generic or it's being hurt in some way because of the
21 association with the counterfeiters.

22 THE COURT: So is the tarnishment taking
23 place by the pirate seller or is it taking place by the
24 advertisement on Google?

25 MR. ETTINGER: Both, Your Honor, because the

1 confusion created as to the association of these pirates
2 with Rosetta Stone.

3 THE COURT: Thank you. I've asked you all
4 the questions I have. I'll give you a chance to respond.
5 Thank you.

6 MR. ETTINGER: Thank you, Judge.

7 MS. CARUSO: Good afternoon, Your Honor.
8 Just for the record, I'd like to clarify that --

9 THE COURT: And tell me your name again,
10 please.

11 MS. CARUSO: Margret Caruso.

12 THE COURT: Yes, Ms. Caruso.

13 MS. CARUSO: That Mr. Berea is senior
14 litigation counsel at Google. However, he's not general
15 counsel.

16 THE COURT: All right, thank you.

17 MS. CARUSO: Your Honor, Rosetta Stone is
18 attempting to use trademark law to inhibit competition.
19 It's very clear what it wants. It's what you started out
20 with in your questions to Mr. Ettinger. It wants Google
21 to stop any advertiser from displaying an advertisement
22 when content is shown on Google's search results page that
23 includes Rosetta Stone's name.

24 It's remarkable because it is quite similar
25 to what happens in the non-Internet world. For example,

1 if a company wanted to contact the Washington Post and run
2 an advertisement that said we're selling great plasma
3 screen televisions and we want those to be featured next
4 to every story you run about the Super Bowl that's coming
5 up. That's where we want them to appear.

6 And in telling that to the Washington Post,
7 they're of course saying I want this keyed to -- I want
8 you to use this with the licensed registered trademark of
9 the NFL, the Super Bowl, and that's where I want this to
10 shown up.

11 And of course when companies contact the
12 television stations that are broadcasting the Super Bowl,
13 they say I want my advertisement to appear during the
14 Super Bowl. That's the group of people that I want to
15 reach.

16 And Rosetta Stone is saying on the Internet,
17 that's not okay. The only advertising that can show up is
18 advertising that we say, Rosetta Stone says is okay. It
19 doesn't matter if what the consumer enters is a search for
20 reviews of Rosetta Stone or best price for Rosetta Stone,
21 discounts for Rosetta Stone.

22 Consumer --

23 THE COURT: Well, help me with the confusion
24 issue here because I think that we all need to focus on
25 what the confusion is.

1 Is it sufficient to show that consumers are
2 confused about whether or not the product was endorsed by
3 Rosetta Stone or is the Court to focus on confusion as to
4 the source or origin of goods?

5 MS. CARUSO: Your Honor, the Court should
6 here focus on confusion as to the source or origin of
7 goods.

8 THE COURT: Or services.

9 MS. CARUSO: Yes. And I don't think that I
10 heard an argument from Rosetta Stone that there's
11 confusion as to whether Rosetta Stone is endorsing
12 Google's searches. The confusion that they're asserting
13 is that consumers will be confused as to the source of the
14 advertisements --

15 THE COURT: Well, I think that --

16 MS. CARUSO: -- and the product advertised.

17 THE COURT: I think that Rosetta Stone is
18 saying that the confusion in the consumer's mind is that
19 they will think that they're being linked to authorized
20 versions of Rosetta Stone when they're not, and that is a
21 source of confusion about the advertisement of the sources
22 of goods.

23 MS. CARUSO: Right, a couple of things
24 there. First, Google's 2009 policy, even though the case
25 starts in 2004 and they have damages they're asserting for

1 that whole 2004 to mid 2009 period, the 2009 policy allows
2 the resellers of a product to use the trademark in the
3 text of their ad to identify what they're selling.

4 I want to clarify that it's not just
5 authorized resellers, not just who Rosetta Stone says we
6 approve this person, but it's any person who is selling a
7 genuine good.

8 And so, for example, Amazon is an authorized
9 reseller of Rosetta Stone, but there could quite possibly
10 be resellers of Rosetta Stone products, for example,
11 purchased Rosetta Stone off of Amazon and are reselling it
12 themselves or perhaps someone received it as a gift and
13 have decided that they don't want to learn that language
14 and they're going to resell the product that they
15 purchased.

16 So, even though that person isn't an
17 authorized reseller that would be consistent with Google's
18 policy for that genuine copy to be advertised.

19 The -- as to the ads they claim are for
20 counterfeit products, it's very important in this case to
21 understand the scope of what we're talking about here.
22 And Rosetta Stone has identified 183 complaints they've
23 made over the course of 179 days. This is in marked
24 contrast to the 284,000 complaints that Tiffany made to
25 eBay in the case recently affirmed by the Second Circuit

1 in which no liability was found.

2 And Rosetta Stone does not argue that that
3 case was wrongly decided. They don't argue what the
4 Second Circuit's reasonings was for. They say it's
5 factually distinguishable. And the reason they say that
6 is because eBay didn't know the identity of the
7 counterfeiters. And they cite in footnote eleven of both
8 their reply brief and their opposition to summary judgment
9 motion, they quote a sentence from the Tiffany decision in
10 which the Court says that the demand letters, the cease
11 and desist letters Tiffany sent didn't identify particular
12 sellers.

13 The Court in the next sentence, however,
14 immediately goes on to say that in Tiffany's notices of
15 claimed infringement of which there were more than
16 284,000, the counterfeit listings were identified.

17 So here we're talking about a much more
18 narrow scope. And unlike eBay, Google is not the venue
19 for the sales. It's a step further even removed from
20 that.

21 THE COURT: Well, that's something that I'm
22 focused on and maybe it's time for you to tell me how I
23 should distinguish between a search engine which does not
24 sell products and one that does. You just referred to
25 eBay, but you could use Amazon as well.

1 Is a search engine required to obtain a
2 trademark owner's permission to sell those terms to those
3 who might want to bid for placement on a search page?

4 MS. CARUSO: Absolutely not, Your Honor.

5 THE COURT: Why not?

6 MS. CARUSO: There is -- they only would be
7 if there was confusion that resulted. If for some reason
8 consumers looked at all of those search result pages
9 and -- search results, sponsored links and thought that
10 they all were Rosetta Stone websites or they all were
11 offering Rosetta Stone products when they all weren't
12 offering Rosetta Stone products.

13 Google doesn't actually ever hold on to
14 those products. It has its policies in place. It does
15 its best to enforce them. But up and to the point where
16 Google has actual knowledge or a reason to suspect a
17 particular counterfeiter is infringing, it does not have
18 any obligation under any case that Rosetta Stone has cited
19 to take down that ad. And that is *Hard Rock Cafe* cites
20 that, and --

21 THE COURT: But Google helps these
22 advertisers design their ad, don't they? I mean, they
23 can't just put anything on a Google page. It has to look
24 a certain way. It has to confirm to Google's certain
25 policies and doesn't Google suggest how the sponsored

1 links ought to present themselves? So doesn't that change
2 it some to make Google a contributing force in the alleged
3 trademark infringement?

4 MS. CARUSO: Your Honor, it doesn't. To the
5 extent that Google is involved with the overall appearance
6 of ads at all, for example, and the fact that they have a
7 title line, the fact that they have a URL link, the fact
8 that they make suggestions generally to everyone saying
9 it's a good idea to end with a call to action or if you
10 have a discount to say so and don't use misspellings,
11 things like that, that is a mere link in the chain along
12 the lines.

13 To impose contributory or vicarious
14 infringement basically Google needs to be in cahoots with
15 these guys. They have to -- if you look at all the cases
16 in which that level of liability is imposed and it's, you
17 know, you got the *Bauer Lamp* case where the defendant was
18 held to be liable for getting the manufacturer to make a
19 lamp after he said to the plaintiff there is a personal
20 vendetta between them and that I'm going to ruin your
21 business. I'm going to copy your lamp and I'm going to
22 sell it for cheaper price, and I'm going to put you out of
23 business.

24 There is no evidence in the record remotely
25 close to that here.

1 THE COURT: All right. I have one
2 additional question and that is with respect to the
3 dilution claim, trademark dilution claim, is the plaintiff
4 required to sustain damages, that is to say diminution in
5 revenue or value in order to state a claim?

6 MS. CARUSO: Your Honor, the antidilution
7 act does not require that they prove that they have. They
8 have to prove that they are -- that the accused action is
9 likely to tarnish or dilute their trademark brand.

10 And we submit here it is not likely to do
11 that when this use has been going on for the past six
12 years and their brand awareness has gone through the roof.
13 Their brand equity has gone nothing but up. They can't
14 say it's likely to be harmed when it's just gone up and up
15 and up.

16 And even these confusion witnesses they talk
17 about who purchased the counterfeit products, they don't
18 even have a negative opinion of Rosetta Stone.

19 It's not a case where a fake Gucci handbag
20 or Prada bag, someone sees a shoddy work of craftsmanship
21 and thinks less of that trademark owner because of that.

22 THE COURT: All right. I've asked you the
23 questions I have. Thank you very much.

24 MS. CARUSO: Thank you, Your Honor.

25 THE COURT: Brief reply.

1 MR. ETTINGER: Just a brief one, Judge.

2 You asked the question of counsel whether or
3 not Google's involvement in the ad process. The answer is
4 very much so. They have a tool called Quest, okay. And
5 they call this the query suggestion tool internally.
6 Externally it's called the search engine -- search inquiry
7 tool. They don't use the word suggestion because they
8 don't want to have trademark law cases brought because
9 they're suggesting trademarks to their customers.

10 This tool is designed to assist the person
11 who wants to advertise on Google to enter into a search
12 engine the name of the company that it wants to see its
13 key words. In other words, if someone wants to sell
14 Rosetta Stone software, pirated or otherwise, they can
15 type into the little tool, www.RosettaStone.com and see
16 all of the suggested search terms that they should use in
17 order to trigger their ads.

18 Secondly they have what they call the key
19 word insertion tool. When you open an AdWords account and
20 you tell them what your key word is, Rosetta Stone,
21 automatically it populates it for you in your domain. It
22 tells you that's the best way, that's the best way to sell
23 your product.

24 This case is about a company that makes a
25 lot of money on these trademarks and all that -- a lot of

1 money on these trademarks.

2 THE COURT: I'm not focused on the amount of
3 money. I'm focused on whether or not it violates the law.

4 MR. ETTINGER: Right, and that's exactly
5 where I'm going, Judge. What you heard from Google today
6 is it could only happen 189 times in six months. We have
7 so many ads. We're selling so many ads. You can't hold
8 us responsible for this. That's their business model.

9 Their policy states that they won't sell to
10 people that are not selling authentic goods. They do it
11 routinely and put the burden on the trademark owners to
12 police their business that are making all this money. And
13 that's what the trademark law does not permit.

14 That confusion is a direct infringement and
15 the analysis stops as soon as that ad posts, as soon as
16 you see that sponsored links and you press enter at
17 Rosetta Stone and you see those links and the confusion
18 exists then and there and that's what needs to be
19 enjoined.

20 The scope of the -- the scope of any such
21 remedy will be determined by the fairness of the actions.
22 But what needs to be enjoined is them selling the marks to
23 anybody and everybody for money. That's what has to stop
24 and that's what this case is all about.

25 THE COURT: Thank you very much.

1 Ms. Caruso, do you want to take up Google's
2 motion for summary judgment? I only have a few questions
3 about it. I think we've covered some of it already.

4 MS. CARUSO: Yes, Your Honor. I'm happy to
5 address your questions.

6 THE COURT: Your keyword "bidding process"
7 does involve the use of trademark terms, right?

8 MS. CARUSO: Yes, Your Honor, it does.

9 THE COURT: So you are selling those words
10 in order to decide where ads are placed on a Google search
11 page; is that right?

12 MS. CARUSO: Not exactly. Those words are
13 used to determine where ads are placed. They -- but, the
14 words are not themselves sold.

15 Google makes money when ads are clicked
16 through. So it's the space and then the effectiveness of
17 the ad that determines when Google makes money.

18 So, what Google is selling is the
19 advertising space. But the way the companies wind up
20 there is triggered by them telling Google when you do your
21 search engine function and you do the commercial side of
22 it, we would like to appear there.

23 So, as Your Honor noted at the outset, the
24 search engine function returns relevant results. And
25 Mr. Ettinger distinguished between organic results and the

1 sponsored links.

2 And the organic results is almost like if
3 you were to go into a building and ask for Tylenol. What
4 you are told in response would depend on if you went into
5 a drugstore or a library. And Google doesn't know which
6 set of information you're looking for just because you
7 asked, you know, that question.

8 But it will return how it identifies things
9 in the organic results but then recognizes that there is a
10 separate market on those for commercial responses. And it
11 identifies the organic results by looking for those
12 trademarks through its algorithmic process and on the
13 commercial side it identifies those links, those
14 advertisements through identification in the keyword tool.

15 THE COURT: So in the old world it might be
16 like having a dictionary to search for words and then
17 having a separate document called a Yellow Pages that is
18 filled with commercial advertisement for which people pay
19 a fee in order to be in that book.

20 MS. CARUSO: Yes, Your Honor.

21 THE COURT: So in many ways, Google is like
22 the Yellow Pages online.

23 MS. CARUSO: That's correct.

24 THE COURT: The only reason you're looking
25 in the Yellow Pages is because you're looking as a

1 consumer for services; is that right?

2 MS. CARUSO: That's right.

3 THE COURT: And so the only reason to go to
4 Google would be to search for services?

5 MS. CARUSO: Yes.

6 THE COURT: Now, would someone think that
7 the Yellow Pages themselves were the vendor of services or
8 goods?

9 MS. CARUSO: I certainly don't think so,
10 Your Honor. Nothing in the record here would support
11 that.

12 THE COURT: All right. I don't think I need
13 you all to argue all these things in your briefs. I have
14 read your briefs. Hopefully, you believe that. Okay.
15 Thank you.

16 Mr. Ettinger.

17 MR. ETTINGER: May I, Your Honor?

18 THE COURT: I want you to take up the
19 question I just asked Ms. Caruso.

20 MR. ETTINGER: Very well.

21 THE COURT: A dictionary and a Yellow Pages,
22 one is searching for something. Is that right? Is Google
23 in effect a dictionary and Yellow Pages online?

24 MR. ETTINGER: Your Honor, if you want to
25 characterize it that way, that's fine, but let's take the

1 analogy all the way out.

2 If you look up Rosetta Stone in a Yellow
3 Page, do you expect to see competitors of Rosetta Stone
4 there? Do you expect to see unauthorized users of the
5 Rosetta Stone software? Do you expect to see people that
6 don't have any right to use the mark under Rosetta Stone?
7 That is the huge difference. It's like going --

8 THE COURT: Well, that is a -- that is a
9 difference I will grant you. But the way the page is
10 displayed as you showed it to me, there's something called
11 a sponsored link --

12 MR. ETTINGER: Right.

13 THE COURT: -- which suggests that the person
14 viewing the page should know that this is an ad being paid
15 for by someone who has paid Google money to display their
16 ad adjacent to a dictionary-type search result. Is that
17 right?

18 MR. ETTINGER: The answer to that is
19 twofold, Judge. One is you would hope that most people
20 know that sponsored links means ads. But Google's own
21 documents which we have in the papers before say there's
22 great confusion between the organic search and the paid
23 search. And the confusion witnesses to a T testified I
24 didn't know what sponsored links meant.

25 One person thought that sponsored link,

1 instead of calling it an advertisement, thought it meant
2 it was sponsored by Google, actually testified. She's got
3 an MBA from Stanford. This is not a silly lady. It's not
4 very clear.

5 THE COURT: Five people out of the thousands
6 who I assume use Google every day to click on it and
7 perhaps look for your company's ads.

8 Is there a way -- how much money does
9 Rosetta Stone pay Google for these ads that you pay for
10 that you've described in your complaint?

11 MR. ETTINGER: I think the number of over
12 the course of years is about \$3 million for the five-year
13 period.

14 THE COURT: Has the revenue increased during
15 that five-year period for Rosetta Stone?

16 MR. ETTINGER: Has the revenue, of course,
17 Your Honor.

18 THE COURT: So the advertising has been very
19 effective? Is that what you're telling me?

20 MR. ETTINGER: The Internet has been very
21 effective, of course, but that's not its source.

22 THE COURT: I know that you -- just give me
23 one second. I can't talk as fast as you can.

24 MR. ETTINGER: I apologize.

25 THE COURT: The question, though, is one of

1 whether Rosetta Stone contends that the money you've spent
2 on advertising here was not beneficial where you in a
3 sponsored ad used your trademark term which appeared at
4 the top of the page you just showed me on -- I think of
5 page two of tab one where you showed me your Rosetta Stone
6 trademark.

7 So I assume that first sponsored ad at the
8 top of that page is yours. Is that right?

9 MR. ETTINGER: Yes, sir.

10 THE COURT: So you wouldn't be wasting your
11 money to place it there. You put it there because you
12 want it to pop up at the same time your term was entered
13 by the search; isn't that right?

14 MR. ETTINGER: Your Honor, yes. And think
15 of the temerity of the argument that the trademark owner
16 has to pay to have its own name come when and bid against
17 people who are not authorized to use the term and pay more
18 for that ad to come up because they're selling it to
19 unauthorized people. More people --

20 THE COURT: Is it uncommon for an advertiser
21 in radio to pay more for an advertisement during drive
22 time than to pay for a midday advertising?

23 MR. ETTINGER: I would hope so.

24 THE COURT: All right. Well, is there any
25 real difference here then in terms of the marketplace

1 governing the placement of their ad?

2 MR. ETTINGER: Your Honor, they're selling a
3 mark that they have no rights to. To --

4 THE COURT: They're selling words that --
5 and I agree with you. They're selling words that relate
6 to your mark.

7 MR. ETTINGER: Your Honor, they're selling
8 our mark. It's the mark. It's --

9 THE COURT: Well, I have difficulty with
10 that argument. I understand why you say it, and I've read
11 your brief and I understand that. But they're not
12 selling -- they're selling placement on a page according
13 to you through their bidding process that involves
14 exploitation of your mark; is that right?

15 MR. ETTINGER: No, sir. They're selling the
16 right to use -- to have this ad pop up when the mark is
17 entered. And in fact, Judge, they price it by the term.
18 They don't price it by the ad space. They price it by the
19 value of that term.

20 THE COURT: I understand. That's the
21 marketplace. I don't have any problem with that. I think
22 that fundamentally we'll have to decide as a matter of law
23 whether or not they can do that or not.

24 And so as I understand your argument,
25 though, that means that someone like a used car dealer who

1 is selling Fords without the permission from Ford before
2 they could advertise that they were selling Ford Fusions
3 at their used car dealership. And in the absence of
4 permission from Ford to advertise that in a television ad,
5 then that used car company would be violating Ford's
6 trademark rights; is that right?

7 MR. ETTINGER: No, Judge. They'd only be
8 violating the trademark rights if they caused confusion.
9 And I bring you back to that because that's what 1114
10 requires.

11 THE COURT: Well, I've asked you about
12 confusion and you're focused on five people who are
13 confused about a sponsored links when I assume given that
14 you spent \$23 million on these ads with Google --

15 MR. ETTINGER: \$3 million.

16 THE COURT: \$3 million. And we're not
17 talking about five people on the Internet when there are
18 millions of users.

19 So I know that that's not the substance of
20 your argument because that is a very weak argument. You
21 know that and I know that.

22 What I'm focused on is confusion as a source
23 or origin of goods where the search engine itself does not
24 sell products. And your view is that because there may be
25 links to pirated goods, that violates the law.

1 I think I understand your theory. And I
2 don't know the answer to it, and I guess I'm going to have
3 to decide this sooner or latter.

4 MR. ETTINGER: May I make one comment about
5 the five confusion witnesses? I can't -- I don't want to
6 talk about them. I just want to talk generally.

7 In this circuit, in this court, we get five
8 nonparty depositions, five. If you want to give me ten
9 more, I'll bring you ten more. If you want to give me 20
10 more, I'll bring you 20 more, Your Honor.

11 The point is --

12 THE COURT: Well, you know, we're well
13 passed that stage now. And I appreciate your argument and
14 I know you have an issue involving the survey.

15 Let me tell you all I don't need to have an
16 argument about the expert witness and Dr. Van Liere's
17 report. I've read that and I'm going to give you all a
18 ruling on that. I don't need to have argument on that.

19 I think that I've asked you all the
20 questions that I have concerning the matters that have
21 been briefed. And as I said at the outset, I did not plan
22 to have you all reiterate every single thing that you said
23 in every single brief.

24 MR. ETTINGER: Your Honor, it's always a
25 pleasure to appear before you.

1 THE COURT: Thank you very much. I
2 appreciate your patience.

3 We're now in recess. Thank you.

4 MR. ETTINGER: Are we to stay here, Judge,
5 for your decision or are you going to --

6 THE COURT: I'm good, but I'm not that good.
7 No, I'm not going to do that from the bench. This is way
8 too much. And whatever I do, I want you all to understand
9 what I'm doing and why, so I'm going to write an opinion.

10 But I'll give you a ruling soon because I
11 know we have a trial date on May 3rd.

12 MR. ETTINGER: We want to know whether to go
13 to work all weekend or not, but I assume we'll just go to
14 work.

15 THE COURT: I think that it's safe to
16 continue trial preparation. Thank you.

17 (Proceeding concluded at 1:30 p.m.)
18
19
20
21
22
23
24
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATE OF REPORTER

I, Renecia Wilson, an official court reporter for the United State District Court of Virginia, Alexandria Division, do hereby certify that I reported by machine shorthand, in my official capacity, the proceedings had upon the motions in the case of Rosetta Stone vs. Google.

I further certify that I was authorized and did report by stenotype the proceedings and evidence in said motions, and that the foregoing pages, numbered 1 to 44, inclusive, constitute the official transcript of said proceedings as taken from my shorthand notes.

IN WITNESS WHEREOF, I have hereto subscribed my name this 5th day of May , 2010.

/s/
Renecia Wilson, RMR, CRR
Official Court Reporter