IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

AARON C. BORING AND CHRISTINE BORING, husband and wife respectively,	CIVIL DIVISION
Plaintiffs,	CASE NO. 08-cv-694 (ARH)
v.	
GOOGLE, Inc., a California corporation,	
Defendant.	

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION TO STAY PENDING PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES SUPREME COURT

AND NOW, comes Plaintiffs, Aaron C. Boring and Christine Boring, by and through the law firm of TECHNOLOGY & ENTREPRENEURIAL VENTURES LAW GROUP, P.C. and files this Brief in Support of Motion to Stay filed herewith:

A. **REASONS FOR GRANTING A STAY**

A stay of a case pending a determination of a petition for writ of certiorari is expressly contemplated by federal statutes. When a final judgment or decree of any court is subject to review by the United States Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to permit a party to obtain a writ of certiorari from the Supreme Court. 28 U.S.C.A. § 2101(f).

The decision to grant or deny such a stay pending certiorari rests in the court's sound discretion. *Barnes v. E-Systems,* 501 U.S. 1301 (1991), later proceeding (US) 1991 US LEXIS 4097.

A stay may be granted when: (1) there is a reasonable probability that four justices will vote to grant certiorari; (2) there is a fair prospect that a majority of the justices will find the decision below erroneous; and (3) a balancing of the equities weighs in the petitioner's favor. *Araneta v. United States,* 478 U.S. 1301 (1986).

B. **APPLICABILITY OF REASONS TO THIS CASE**

1. Twombly/Iqbal. *Bell Atlantic Corp. v. Twombly,* 127 S. Ct. 1955 (May, 2007) and *Ashcroft v. Iqbal,* 129 S. Ct. 1937 (May, 2009) were recently decided by the United States Supreme Court. In both cases, the Supreme Court ruled for dismissal, based upon statutory federal questions.

In *Twomby,* the ruling was 7-2. In *Iqbal*, the ruling was 5-4. This Court will take notice that Justice Souter and Justice Breyer found good cause to distinguish the circumstances in *Iqbal* from their prior votes in *Twombly,* with Justice Souter now speaking himself for the four-Justice dissent:

> *Twombly* does not require a court at the motion-to-dismiss stage to consider whether the factual allegations are probably true. We made it clear, on the contrary, that a court must take the allegations as true, no matter how skeptical the court may be. See *Twombly, 550 U.S., at 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929* (a court must proceed "on the assumption that all the allegations in the complaint are true (even if doubtful in fact)"); *id., at 556, 127 S. Ct. 1955, 167 L. Ed. 2d 929* ("[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable"); see also *Neitzke v. Williams, 490 U.S. 319, 327, 109 S. Ct. 1827, 104 L. Ed. 2d 338 (1989)* ("*Rule 12(b)(6)* does not countenance . . . dismissals based on a judge's disbelief of a complaint's factual allegations"). **The sole exception to this rule lies with allegations that are sufficiently fantastic to defy reality as we know it: claims about little green men, or the plaintiff's recent trip to Pluto, or experiences in time travel. That is not what we have here.**
>
> Under *Twombly*, the relevant question is whether, assuming the factual allegations are true, the plaintiff has stated a ground for relief that is plausible. That is, in *Twombly's* words, a plaintiff must "allege facts" that, taken as true, are "suggestive of illegal conduct."

Iqbal, at S.Ct. 1959 (emphasis added).

When four justices of the United States Supreme Court make statements about "**little green men, or the plaintiff's recent trip to Pluto, or experiences in time travel**" it demonstrates (at least to the undersigned) the gravity of the error asserted. The fact that the recent 2009 case of *Iqbal* was a 5-4 decision is material for consideration by this Court because, as more fully set forth herein, it demonstrates the probability that the minority would both vote for certiorari in this case, as well as convince at least one other member of the Supreme Court to vote in favor of reversal of one ruling in this case. In *Iqbal,* as stated below, there was a special heightened pleading standard to raise applicability of the federal statute which does not exist in this case.

The questions presented in *Twombly* and *Iqbal* are of the highest importance because they set forth the standard by which the Courts are open to the public to redress a claim. To the extent that the decision impairs access to the Courts, it interferes with a Constitutionally protected right. The power to tax is the power to destroy, and the power to filter pleadings against inferences is the power to destroy. Plaintiffs' claims and relief sought were dismissed based upon *Twombly* and *Iqbal.*[1] Plaintiffs seek only a full and fair day in court to make their case.

For example, under *Twombly* and *Iqbal*, this Court dismissed Plaintiffs' punitive damage claim against Google. Yet, Google's Vice President Matt Sucherman admits a pre-publication obligation, stating:

> **Common sense dictates that only the person who films and uploads a video to a hosting platform could take the steps necessary to protect the privacy and obtain the consent of the people they are filming.**[2]

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[1] See, this Court's Opinion, dated February 17, 2009 ("**Dismissal Opinion**"), at P. 3, *Boring v. Google,* 598 F.Supp. 2d 695, 699 (W.D. Pa. 2009); Third Circuit Opinion, dated January 25, 2010 ("**Third Circuit Remand**"), Page 17, *Borings v. Google,* 2010 U.S.App. LEXIS 1891 *22 (3d Cir. 2010).

[2] Matt Sucherman, *CNN/Money* attached hereto as Exhibit 1. http://money.cnn.com/2010/02/24/technology/Google_Italy_privacy_conviction.

And then, according to *The Press Democrat,* Google's Larry Yu stated that Google does not seek advance information about private roads, because it "would have slowed down deployment of Street View."[3]

By Google's own admission, Google admits it has an affirmative responsibility to pre-filter its own content but doing so would slow down deployment. This point is mentioned not to litigate the facts of the case in this filing, but to demonstrate that Plaintiffs' case, such as Justice Souter might say, is not about little green men. Plaintiffs claim that Google disregards property rights and that disregard manifests itself in trespasses and the publication of unfiltered content.[4]

Apart from confusion over the application of the *Twombly/Iqbal* principles,[5] such as the four-Justice dissent in *Iqbal,* even the United States Congress also has taken notice of the problem of inappropriate dismissals. To wit, the Open Access to the Courts Act of 2009 (House Bill 4115) using a "beyond doubt" standard, and the Notice Pleading Restoration Act of 2009 (Senate Bill 1504), expressly overruling *Twombly* and *Iqbal* to the extent that those rulings burdened a claim to be pleaded beyond the well-established principles of *Conley v. Gibson,* 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).[6]

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[3] Larry Yu, *The Press Democrat,* http://news.google.com/newspapers?nid=1673&dat=20080821&id=lbAjAAAAIBAJ&sjid=qSQEAAAAIBAJ&pg=6937,4285450, attached hereto as Exhibit 2.

[4] Even more telling, on this very date, now by strong-arm scare tactic to bear down on individual rights to protect their private property and privacy interests, Google, a $34B company, served a so-called Offer of Judgment attached hereto as Exhibit 3 seeking costs for the litigation against Mr. and Mrs. Boring. *See,* Amended Complaint, at ¶¶ 11, 17, 19 (pleading disregard).

[5] See, e.g., *Riley v. Vilsack,* 665 F. Supp. 2d 994, *; 2009 U.S. Dist. LEXIS 98548 (W.D. Wis. October 22, 2009) (the problem is that *Iqbal* and *Twombly* contain few guidelines to help the lower courts discern the difference between a "plausible" and an implausible claim and a "conclusion" from a "detailed fact." The descriptions of plausibility provided by the Court were short on specifics. E.g., *Iqbal*, 129 S.Ct. at 1949 (plausibility is "not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully"). Similarly, the Court did not describe what it meant by "conclusory statements" except to say that a complaint must provide "factual context," *Id.* at 1954, or "factual enhancement," *Id.* at 1949.)

[6] See Exhibit 4.

The point by the undersigned is not *per se* that Congress will, would or could pass the laws being considered,[7] but that elected officials of both the United States Senate and the United States House of Representatives have determined that the questions at issue here are important. More importantly, the inherent expression in proposing such laws is to redress injury done that is ripe for correction. There is no injury that is more important for consideration than injury done by a Court or a judge.

Pennsylvania Senator Arlen Specter and many others, in good faith, are correcting an injury as they perceive it. Such as it was for Justices Souter and Breyer, who voted in the majority in *Twombly,* and yet dissented in *Iqbal.* The reasons that the United States Supreme Court should grant certiorari in this case are many, to wit:

1. *Twombly* and *Iqbal,* if improperly applied, deny a person's the access to make claims in the federal courts and the right to trial or relief, based upon the subjective views of individual judges without evidence, in violation of constitutional rights. The right to trial is a highly important right.

2. The applicability of *Twombly* and *Iqbal* are held universally applicable to virtually every federal complaint. Accordingly, errors of interpretation and any precedent or guidance associated therewith will pervade the entire federal judicial process. The nature of conflict and issue will recur and is occurring. Errors become systemic.

3. The introduction of United States Congressional legislation amplifies that the issue is important, socially pervasive, and recognized as worthy of attention.

4. *Twombly* and *Iqbal* are recent decisions in which the Circuits of these United States are split or are contrary to the Supreme Court's rulings. To wit:

    a. Plaintiffs incorporate by this reference their Third Circuit Opening Appeal Brief, Reply Brief and Petition for Rehearing En Banc, all public Third Circuit Court record, which address the

[7] Whether such laws create separation of powers questions, or whether the laws provide for substantive rights or processes that catch the differential, are fine points of law and drafting to be debated in due course. The point is that there is an important issue that both Congress and the four-Justice dissent cry for resolution.

issues in detail, particularly regarding the difference in pleading elemental facts, compound facts and abstract facts.[8]

b. This Court interprets *Twombly* and *Iqbal* to authorize, condone or otherwise require "googling" or other *ex parte* investigation on a 12(b)(6) motion to dismiss on the pleadings.[9]

c. This Court's rationale and the Third Circuit's rationale, under *Twomby* and *Iqbal* are disjointed: this Court references that offense cannot be found as a matter of law in the pictures that were taken by and through a trespass, while the Third Circuit removes the effect of the pictures[10] and opines, as a matter of law, that offense cannot be found in the entry to property without a gate. Both of these rulings are made in spite of Google admitting that it was, in fact, on Plaintiffs' property and did, in fact, take pictures during the claim of trespass and published without pre-filtering.

5. The Third Circuit ignored Plaintiffs' ostensibly pleaded "Private Road No Trespassing" sign.[11] And, to the contrary, implicated general federal common law by requiring the pleading of a "gate" for a privacy action. Ignoring pleaded facts, and requiring specific facts to be pleaded, is contrary to both *Twombly* and *Iqbal,* and is the creation of new federal general common law elements of state law claims in violation of *Erie R. Co. v. Tompkins,* 58 S.Ct. 817 (1938).

6. In both *Twombly* and *Iqbal,* the claims were dismissed. Accordingly, the decisions appear to encourage dismissals. Lack of guidance and subjectiveness of the plausibility determinations allow cases to be decided without evidence on the unspoken biases of judges. The Supreme Court would benefit to select a case for review that could provide a basis for reinstatement of claims and relief in order to provide guidance and counter-balancing clarifications for the Bar. Such clarifications would apparently also preserve Congressional resources by clarifying the standards in a manner making the aforesaid proposed laws moot.

7. *Iqbal* presented a question regarding Fed.R.Civ.P. 9, and generally pleading intention. However, the *Iqbal* standard was based upon a statutory standard of pleading intent by term of art and standard higher than at

[8] Plaintiffs' Third Circuit Petition for Rehearing En Banc, Page 2.
[9] Dismissal Order, 598 F.Supp. 2d, at 700.
[10] Third Circuit Opinion, 2010 U.S.App. LEXIS 1891 *10.
[11] Amended Complaint, at ¶6.

common law.[12] In granting certiorari, the Supreme Court can clarify:

a. Federal courts may have more authority under *Twombly* and *Iqbal* for federal substantive questions of law than for state-based substantive questions of law.

b. Federal claims versus state law claims, and the interplay of pleading elements of a state law claim within the federal notice pleading standards (particularly state law claims developed within a fact-pleading jurisdiction, such as in this case).

c. Distinctions in pleading statutory rights versus common-law rights. In *Twomby* and *Iqbal*, the principles were based upon federal statutory rights. In granting certiorari, the Supreme Court can clarify applicability for state based common law rights.

8. *Twombly* and *Iqbal* are both "conduct" cases. This Court and the Third Circuit impermissibly extended the principles to Plaintiffs' punitive damage claims. The nature of pleading conduct and pleading damages is distinct.

9. The procedures under *Twombly* and *Iqbal* encourage logistical pleading games by creating an incentive to not plead early, and then to wait until later post-discovery to amend.

10. This case presents an excellent opportunity to test the standards of pleading, because there is nothing else that can be pleaded to test the metes and bounds of the *Twomby/Iqbal* standard. Accordingly, this case tests the question as a matter of fundamental social standards in light of the right to trial on claims and for relief. It is an excellent representation of the problem; more so, with the "googling" as stated.

2. Exercise of the Supreme Court's Supervisory Power

The United States Supreme Court has the prime responsibility for the proper functioning of the federal judiciary. The grant of certiorari in cases involving federal jurisdiction, practice, and procedure reflects that responsibility. *See Supreme Court* Practice 9th Ed., Eugene Gressman, *et. al.* (BNA 2007), §4.15. Supreme Court

[12] *See, Iqbal,* at 1948 ("Under extant precedent purposeful discrimination requires more than 'intent as volition or intent as awareness of consequences.'")

Rule 10(a) expressly recognizes the grant of certiorari when a federal decision, "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power."

In the Dismissal Opinion, this Court admits "googling" the Plaintiffs and Mr. Moskal on the 12(b)(6) motion on the pleadings and expressly states a finding of facts.[13] Respectfully, Plaintiffs' position is that the "googling" by this Court is error, wrong and unfair. There is no way to determine the scope and content of the "googling" and so it inherently taints the entire proceeding. Moreover, the authority to date is supportive.[14] It is beyond the precise point, yet notable, that the "googling" by this Court is with the very services of the defendant, Google, giving an additional impression of bias.

Plaintiffs assert that "googling" by the trial judge on a Fed.R.Civ.P. 12(b)(6) motion to dismiss clearly violates the standards of review, as well as implicates a violation of Fed.R.Evid. 201 (judicial notice). Moreover, ex parte "googling" implicates violation of the Code of Conduct for United States Judges, Canon 3A(4) (ex parte communications) and 3C(1)(a) (recusal for independent knowledge of disputed facts).

The Third Circuit did not address this Court's "googling" as such, but opined obliquely only to the portion of this Court's Dismissal Opinion relating to filing under seal.[15] Based upon the Third

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[13] Dismissal Order, 598 F.Supp. 2d 695, 699 [Mr. Zegarelli had not yet filed an appearance, his appearance was filed only after the entry of the Dismissal Order.]

[14] Third Circuit Opinion, 2010 U.S.App. LEXIS 1891 *12 (compounded use of defendant's services not addressed). *See, Judicial Ethics and the Internet: May Judges Search the Internet in Evaluating and Deciding a Case*? 16 NO. 2 Prof. Law. 2 (2005) (ABA Center for Professional Responsibility); www.abanet.org/judicialethics/ABA_MCJC_ approved.pdf (discussion of the Model Code); *The Temptations of Technology,* Cynthia Gray, the American Judicature Society, 2009); New York Advisory Opinion 08-176 (www.nycourts.gov/ip/judicialethics/_ opinions/08-176.htm); Ind. Code of Judicial Conduct Rule 2.9(C) (no independent investigation extending to all mediums, including electronic).

[15] Filing under seal is a fact of different character than the independent research of a trial judge regarding pleaded facts, using the Defendant Google's services. *See,* Third Circuit Opinion, 2010

Circuit's express opinion, it further appears that the Third Circuit also conducted independent *ex parte* research or communication in that it indicated that "we are told"[16] information about Google's use of the pictures without citing to the record, and, in fact, no record exists for the proposition.

Accordingly, it appears that the Third Circuit condones this Court's "googling" as part of a 12(b)(6) determination. The Supreme Court's supervisory power is required to clarify the appropriateness of "googling" (as the defendant or otherwise) in light of the intertwined applicable Federal Rules of Civil Procedure, Federal Rules of Evidence, and Code of Conduct for United States Judges.

Conclusion

For the foregoing reasons, there is a reasonable probability that four justices will vote to grant certiorari, there is more than a fair prospect that a majority of the justices will find at least one portion of the decision below requiring correction, and a balancing of the equities weighs heavily in the Plaintiffs' favor. Plaintiffs request that the Motion to Stay be granted.

Dated: April 7, 2010

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U.S.App. LEXIS 1891, at *12.

[16] Third Circuit Opinion, 2010 U.S.App. LEXIS 1891, at *21.

CERTIFICATE OF SERVICE

The undersigned hereby certifies service of process of a true and correct copy of this document as follows:

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CNNMoney.com

Italy convicts Google execs over uploaded video

By Hibah Yousuf, staff reporter

February 24, 2010: 7:52 AM ET

NEW YORK (CNNMoney.com) -- A judge in Milan found three Google executives guilty Wednesday of violating Italy's privacy code over a video that was uploaded on the search giant's video platform, the company said.

After being notified about the video -- which showed students bullying an autistic classmate -- by Italian police in 2006, Google took the video down within hours, said Matt Sucherman, the company's vice president and deputy general counsel for Europe, the Middle East and Africa, in a blog post.

He added that the company continued to work with authorities to help identify the student who uploaded the video, and she and other students involved were sentenced to 10 months of community service by a court in Turin, Italy. The video was uploaded to Google Video, prior to the company's purchase of YouTube.

Sucherman said a public prosecutor in Milan then indicted four Google executives -- senior vice president and chief legal officer David Drummond, chief privacy counsel Peter Fleischer, marketing executive Arvind Desikan and former chief financial officer George Reyes -- for criminal defamation and violation of the country's privacy code.

All but Desikan were found guilty of the privacy charge, and the judge found all four executives not guilty of criminal defamation.

Google said it plans to appeal the court's decision because its employees "had nothing to to do with the video in question" and for its implications on Internet freedom and censorship.

"In essence this ruling means that employees of hosting platforms like Google Video are criminally responsible for content that users upload," Sucherman said. "Common sense dictates that only the person who films and uploads a video to a hosting platform could take the steps necessary to protect the privacy and obtain the consent of the people they are filming."

Following the sentencing, Google's lawyer Giuseppe Banan told reporters that legal codes do not require Google, the Internet or any other company to control content before it is uploaded to the Web.

CNNMoney.com

But prosecutor Alfredo Robledo said "the right of enterprise cannot rule over that of dignity of the human being," and expressed his satisfaction with the judge's ruling.

In his blog post, Sucherman argued that Google acted in harmony with European Union law, which protects hosting providers as long as they remove illegal content once notified of its existence.

Sucherman said if Web sites such as Blogger, YouTube, and other social networks are held responsible for the text, photos, and videos uploaded to them, "then the Web as we know it will cease to exist, and many of the economic, social, political and technological benefits it brings could disappear."

Google is also being investigated by European antitrust officials, who have received complaints about the search giant's practices from three different European Internet companies.

THE PRESS DEMOCRAT

BEIJING OLYMPICS
INCREDIBLE & INVINCIBLE

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Stories in Sports; updates at pressdemocrat.com

THURSDAY, AUGUST 21, 2008 WWW.PRESSDEMOCRAT.COM SANTA ROSA, CALIFORNIA

signed a deal Wednesday to place a U.S. missile defense base just 115 miles from Russia – a move followed swiftly by a new warning from Moscow of a possible military response.

For many Poles, whose country has been a staunch U.S. ally in Iraq and Afghanistan, the accord represented what they believed would be a guarantee of safety for themselves in the face of a newly assertive Russia.

Negotiators sealed the deal last week against a backdrop of Russian military action in Georgia, a former Soviet republic

TURN TO **POLAND**, PAGE A5

Google claims right to post photos from private land

Analysis shows more than 100 private roads in Sonoma County entered by company's map team

By NATHAN HALVERSON
THE PRESS DEMOCRAT

Don't expect privacy in your front yard, even if your house is located one mile down a private, dirt road.

In a sweeping legal claim, Google recently stated it has the right to enter private roads and driveways to take photographs of people and their property, and then publish the images online.

From Sonoma County to Humboldt County and as far away as Australia, the Internet giant has already posted photographs taken on private property.

"It isn't just a privacy issue; it is a trespassing issue with their own photos as evidence," said Betty Webb, a Humboldt County resident.

Webb said Google drove up her private road and past two "No Trespassing" signs to photograph her property.

"They really went off the track to get to our address. We are over 1,200 feet from a county road," she said in an e-mail.

The panoramic images taken by Google can be viewed by anyone with an Internet connection using its free mapping tool, Street View.

In Sonoma County, the company has sent its car-mounted cameras up more than a hundred private roads, driving past "No Trespassing" signs, through open gates and even skirting a barking watchdog. It has also covered hundreds of miles of public roads from Sonoma to Timber Cove, and most of the cities and thoroughfares in between.

While the U.S. Supreme Court affirmed the right of individuals and companies to capture images on public

TURN TO **GOOGLE**, PAGE A4

INSIDE

DEADLY PLANE CRASH IN SPAIN

153 die, 19 survive after flight taking off from Madrid plows into trees near runway, ignites
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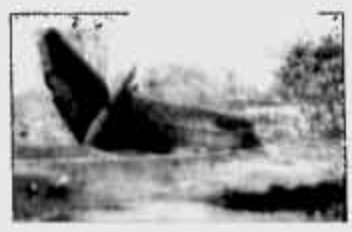

BEYOND THE POLKA

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HOPING TO STAY IN PETALUMA

San Francisco lawyer for Belarus exchange student says teen's visa is valid through Christmas **EMPIRE**

GOOGLE: Legal analysts question company's right to drive onto private land and take photos

CONTINUED FROM PAGE A1

property. Google's more ambitious claim to take photographs on private property is being challenged in federal court in Pennsylvania.

A Pittsburgh couple sued Google in April for trespassing and invasion of privacy after a camera-equipped car drove up their private road and driveway, and then posted the pictures online.

Google's ambitious mapping goal, which the company hopes will improve its $4 billion in annual profits, has drawn the ire of privacy advocates and homeowners, and driven some law experts to question its legality.

On private roads

Sonoma County maintains 1,381 miles of public roads, excluding city streets. Beyond that, hundreds of private roads extend to secluded homes tucked into the county's most remote regions.

Some of these private roads look remarkably similar to public roads, while others are gated roads that serve as long, dirt driveways.

Google has driven up both types of private roads in Sonoma County, going through open gates and past private property signs.

The Press Democrat analyzed the extent of Google's incursion onto private property using digital maps provided by the county of Sonoma. The analysis found Google had photographed along more than 100 private roads.

A Google spokesman said it does not request data about private roads from counties before sending out its fleet of camera-equipped drivers. Such requests would have slowed down the deployment of Street View, he said.

While Google claims it has the right to photograph from private roads, it tries to avoid it, said spokesman Larry Yu.

"Our policy is to not drive on private land," Yu said.

But Yu could only give two examples of how Google enforces that policy. The company trains drivers thoroughly, he said, declining to elaborate. And Yu said Google tries to hire local drivers, who are expected to intuit the difference between a public and private road.

Yu initially stated drivers were given specific routes to follow. But a Street View driver, who asked to remain anonymous for employment reasons, said he was simply told to drive around Sonoma County and collect images. Yu retracted his assertion after learning of the driver's statement.

Residents who want images removed must contact Google through an online form found in its Street View help section.

Google's view

Google's stated mission is to "organize the world's information and make it universally accessible and useful."

But in collecting Street View images on four continents, the company might have overstepped its bounds, according to legal experts.

Google's claim to legally photograph on private roads is derived, in part, from its assertion that privacy no longer exists outdoors because of satellite and aerial photography.

"Today's satellite-image technology means that even in today's desert, complete privacy does not exist," according to a legal document filed by Google in an effort to dismiss the Pittsburgh couple's lawsuit.

However, satellite images provide significantly different details than photographs taken from the ground, according to photography analysts.

With Street View, it is possible to see into homes, locate windows and doors, and glean other valuable information, said George Reiss, owner of Imaging Forensics in Fountain Valley.

"The angle of aerial photographs don't allow it to show much of that kind of detail," Reiss said.

Blocking Google

Google also claimed the Pittsburgh couple, Aaron and Christine Boring, did not have an expectation to privacy because they did not go far enough to keep people off their private dirt road.

"There is nothing around their home intended to prevent the occasional entry by a stranger onto their driveway. There is no gate, no 'keep out' sign, nor guard dog standing watch," Google's legal team wrote in a motion to dismiss the lawsuit.

But in Sonoma County, Google's own cameras caught it going through a gate, past a "No Trespassing" sign, and by a dog standing watch.

On Orr Ranch Road, a private street outside of Santa Rosa, Google drove its car past a "Private Road" sign and continued photographing for nearly a mile. Near Freestone, the company drove past a "No Trespassing" sign and through a gate to take photographs from a dirt road that passed through someone's yard. The images allowed Internet users to see inside someone's living room window.

On Simone Road, a private drive near Sonoma, a dog is captured stalking alongside Google's car.

Right to privacy

Americans have broad rights to photograph under the First Amendment of the Constitution. But Roger Myers, who provides legal council to the California First Amendment Coalition, said he would caution a photojournalist from walking up a private dirt road to take photographs.

"The journalist would want to talk to their lawyer before they do that," Myers said. "I wouldn't be comfortable saying don't worry about it because there is aerial photography."

Eric Biber, an assistant professor of law at UC Berkeley, said California court's can be quick to enforce trespass laws.

"The court system is often very protective of people's rights to keep people off their land," Biber said. "It may be hard for (Google) to avoid liability."

But Google's lawyers contend its camera-equipped cars have as much right to go up someone's private road as a UPS delivery truck or telephone repair technician.

"Google, like any other member of the public, was privileged to briefly drive up plaintiffs' driveway," Google said in court documents.

Google claimed that "turning around in a private driveway while photographing the exterior of a home is not a substantial intrusion."

If people want to keep Google off their private road, they might have to install an electronic gate that only opens after a driver agrees to the terms of entry, said Chris Ridder, a residential fellow at Stanford Law School's Center for Internet and Society.

"That's where we are headed in a few years," he said. "It's something we have to come to grips with: The tension between new technology and privacy."

You can reach Staff Writer Nathan Halverson at 521-5494 or nathan.halverson@pressdemocrat.com.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

AARON C. BORING and CHRISTINE BORING, husband and wife respectively, Plaintiffs, v. GOOGLE INC., a California corporation, Defendant.	)	Civil Action No. 08-cv-694 (ARH)

DEFENDANT GOOGLE INC.'S RULE 68 OFFER OF JUDGMENT

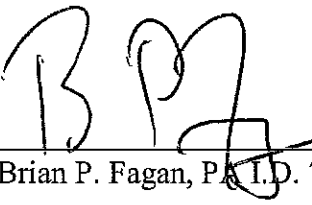
Pursuant to Rule 68 of the Federal Rules of Civil Procedure, defendant Google Inc. ("Google") hereby offers to allow judgment to be taken against it as follows: Google shall pay to Plaintiffs the sum of $10.00, which is the total amount that Google shall be obligated to pay on account of any liability claimed herein and which shall include any liability for costs of suit and attorneys' fees incurred by Plaintiffs. Such amount shall be paid within thirty (30) days after Google and Plaintiffs jointly file a dismissal of this action with prejudice.

Pursuant to Rule 68, this offer is revocable and unconditional, and lapses by operation law if not accepted within ten (10) days. Evidence of this offer is not admissible except in a proceeding to determine costs. If the judgment finally obtained by Plaintiffs is not more favorable than this offer, Plaintiffs must pay all costs incurred after the date Google made this offer.

This offer is made for the purposes specified in Rule 68 and is not to be construed as an admission that Google is liable in this action, or that Plaintiffs have suffered any damages.

Dated: April 6, 2010

KEEVICAN WEISS BAUERLE & HIRSCH LLC

By: 

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CERTIFICATE OF SERVICE

I hereby certify, this 6th day of April, 2010, that a true and correct copy of the foregoing **DEFENDANT GOOGLE INC.'S RULE 68 OFFER OF JUDGMENT** was served via electronic mail to the following counsel of record for Plaintiffs:

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Open Access to Courts Act of 2009 (Introduced in House)

HR 4115 IH

111th CONGRESS

1st Session

H. R. 4115

To amend title 28, United States Code, to provide a restoration of notice pleading in Federal courts, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

November 19, 2009

Mr. NADLER of New York (for himself, Mr. JOHNSON of Georgia, Mr. CONYERS, Mr. SCOTT of Virginia, Mr. DELAHUNT, Ms. JACKSON-LEE of Texas, Ms. CHU, Mr. MICHAUD, Ms. KILPATRICK of Michigan, and Mr. COHEN) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend title 28, United States Code, to provide a restoration of notice pleading in Federal courts, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the `Open Access to Courts Act of 2009'.

SEC. 2. NOTICE PLEADING RESTORATION.

(a) In General- Chapter 131 of title 28, United States Code, is amended by adding at the end the following:

`Sec. 2078. Limitation on dismissal of complaints

`(a) A court shall not dismiss a complaint under subdivision (b)(6), (c) or (e) of Rule 12 of the Federal Rules of Civil Procedure unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to relief. A court shall not dismiss a complaint under one of those subdivisions on the basis of a determination by the judge that the factual contents of the complaint do not show the plaintiff's claim to be plausible or are insufficient to warrant a reasonable inference that the defendant is liable for the misconduct alleged.

`(b) The provisions of subsection (a) govern according to their terms except as otherwise expressly provided by an Act of Congress enacted after the date of the enactment of this section or by amendments made after such date to the Federal Rules of Civil Procedure pursuant to the procedures prescribed by the Judicial Conference under this chapter.'.

(b) Clerical Amendment- The table of sections at the beginning of chapter 131 of title 28, United States Code, is amended by adding at the end the following new item:

`2078. Limitation on dismissal of complaints.'.

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Notice Pleading Restoration Act of 2009 (Introduced in Senate)

S 1504 IS

111th CONGRESS

1st Session

S. 1504

To provide that Federal courts shall not dismiss complaints under rule 12(b)(6) or (e) of the Federal Rules of Civil Procedure, except under the standards set forth by the Supreme Court of the United States in Conley v. Gibson, 355 U.S. 41 (1957).

IN THE SENATE OF THE UNITED STATES

July 22, 2009

Mr. SPECTER introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To provide that Federal courts shall not dismiss complaints under rule 12(b)(6) or (e) of the Federal Rules of Civil Procedure, except under the standards set forth by the Supreme Court of the United States in Conley v. Gibson, 355 U.S. 41 (1957).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the `Notice Pleading Restoration Act of 2009'.

SEC. 2. DISMISSAL OF COMPLAINTS IN FEDERAL COURTS.

Except as otherwise expressly provided by an Act of Congress or by an amendment to the Federal Rules of Civil Procedure which takes effect after the date of enactment of this Act, a Federal court shall not dismiss a complaint under rule 12 (b)(6) or (e) of the Federal Rules of Civil Procedure, except under the standards set forth by the Supreme Court of the United States in Conley v. Gibson, 355 U.S. 41 (1957).
