

LOS ANGELES

# Daily Journal

THURSDAY,  
SEPTEMBER 14, 2006

— SINCE 1888 —

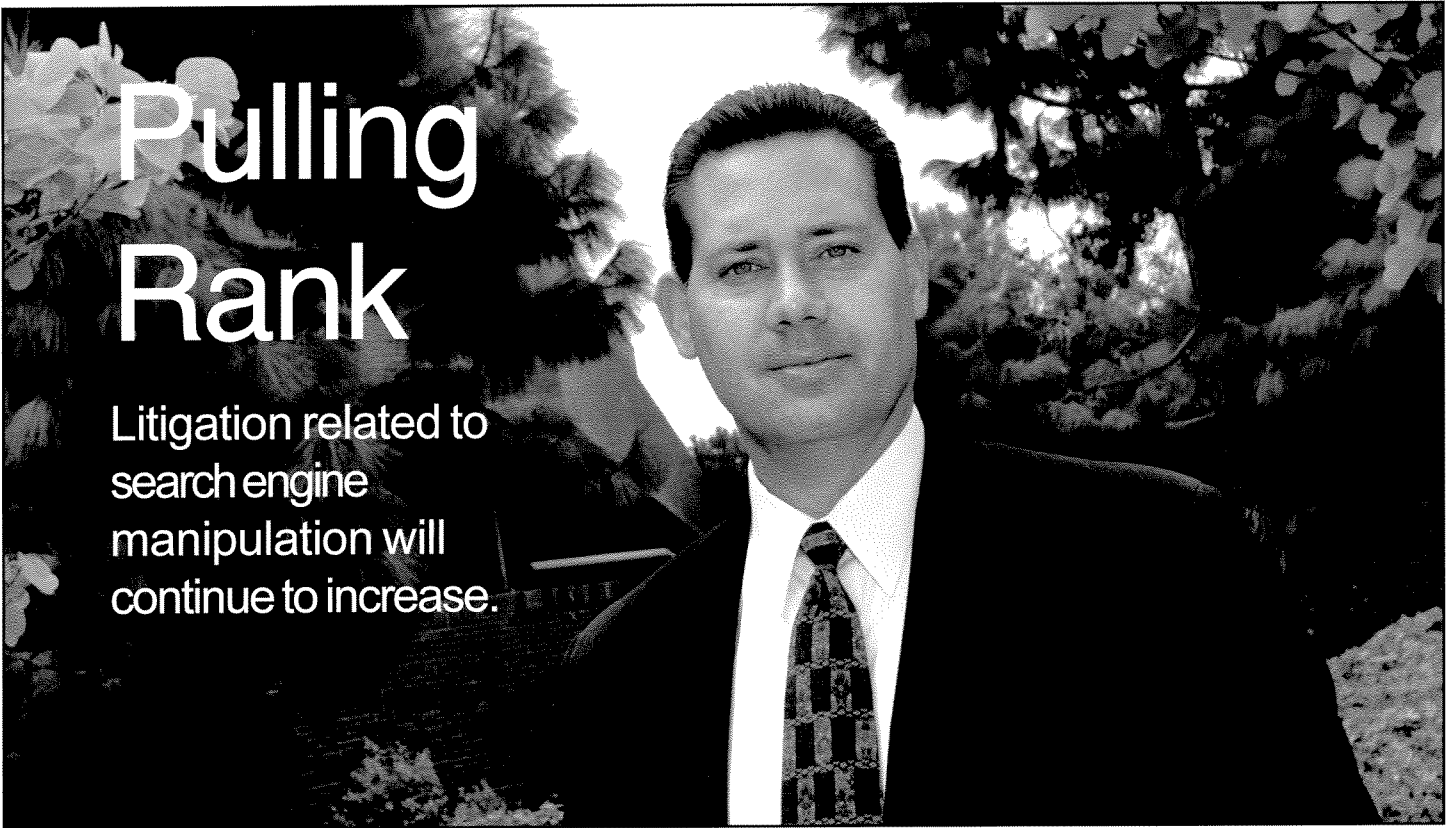
OFFICIAL NEWSPAPER OF THE LOS ANGELES SUPERIOR COURT AND UNITED STATES SOUTHERN DISTRICT COURT

## INTELLECTUAL PROPERTY

Daily Journal Supplement

# Pulling Rank

Litigation related to search engine manipulation will continue to increase.



TOM KURTZ for the Daily Journal

By Robert S. Gerber

Suppose three businesses — BigWidgets, WidgetMart, and WeRWidgets — compete on the Web. They all sell widgets, they all are reputable businesses, their Web sites are all similar, and competition among them is fierce. Interestingly, when a Web surfer types “widget” into BigSearch, a leading search engine, the first search result shown is the current market leader, BigWidgets. WidgetMart appears much farther down in the results. WeRWidgets does not even show up in the search results.

WeRWidgets investigates and finds out that a BigSearch technician has manually deleted WeRWidgets’ Web site from the results, even though BigSearch’s automated system otherwise would have put the company high in the search result rankings. WeRWidgets discovers further that BigSearch did this after being requested to do so by WidgetMart, who alleged that WeRWidgets was “maliciously manipulating” BigSearch’s search results (an untrue allegation). Furthermore, WeRWidgets finds out that

BigWidgets is in fact maliciously manipulating BigSearch’s results by using a link-sharing system (groups of Web sites entering into an agreement to link to one another to help boost their ratings in search engine results). WeRWidgets considers suing its competitors and BigSearch for damages and injunctive relief.

WeRWidgets’ research discloses that search engine Web sites and Web portals are in constant

action by advertisers that alleged click fraud (for example, when a company repeatedly clicks on its competitor’s ads in order to drive up the competitor’s costs of advertising).

Portals also provide services unrelated to search services (such as news feeds, links to other helpful Web sites and free e-mail services) to attract visitors. But a primary way

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competition for more Internet traffic, as a means of supporting the advertising services that constitute their revenue streams. The more people who visit the site, the more people will click on advertising links, and the more valuable an advertising spot on the portal will be. For example, WeRWidgets learns that Google recently announced a \$90 million settlement in a class

that portals keep customers coming back to them is to maintain and improve the relevance of their search results. No one wants search results that contain links to Web sites with irrelevant content. For example, the surfer performing a search for “rental car agencies in San Diego” typically is not looking for results that include links to pornographic Web sites.

Even the best portals use automated systems that sometimes produce less-than-optimal results. With billions of Web pages on the Internet, it would be impossible for any serious site to offer search results that were not obtained by means of an automated system. These systems, using software sometimes called a “spider” or “crawler,” automatically examine and catalog the data, characteristics and details of millions upon millions of Web sites constantly, creating an automated search database. The operations of many of these automated systems are proprietary and trade secrets, and some are even patented.

However, any automated system can be fooled. People can, through trial and error alone, figure out what kind of Web site data, characteristics or details a portal’s algorithms use to rank search results. These people can then manipulate their own Web sites (or others’ sites, for example through linking) to produce a higher ranking in the portal’s search results. This is commonly known as Search Engine Optimization (and people or companies who perform this work are referred to as “SEOs”). Similarly, automated results can be manually or automatically modified by portals’ employees, either directly or through software filters. For example, a portal simply could program its servers never to display the Web site www.url.com in response to any search query.

But what manner of manipulation may be actionable? WeRWidgets decides to find out.

Its complaint against BigWidgets, WidgetMart and BigSearch alleges a variety of claims. First, it sues BigWidgets for unfair competition. It alleges that BigWidgets is using “unfair” and “fraudulent” tactics to trick BigSearch into displaying BigWidgets’ site first in the results when a search is done for “widgets” (including using “WeRWidgets” in its metatags). BigWidgets responds in its answer that it merely complies with the suggestions made by BigSearch for improving Web site standing (such as having other sites link to its site) and that none of its techniques is unlawful, fraudulent or unfair. And moreover, they are equally available to WeRWidgets through a variety of SEOs. It also alleges that hundreds of other companies use the same techniques to improve their rankings with BigSearch.

WeRWidgets alleges that WidgetMart and BigSearch conspired to cause anti-competitive harm. In defense, WidgetMart and BigSearch allege that there was no agreement between the two of them (and thus no conspiracy) and that WidgetMart was merely exercising free speech in informing BigSearch about WeRWidget’s alleged conduct.

BigSearch also argues that its search results constitute free speech, and therefore it cannot be sued; the rankings are matters of opinion, which cannot be demonstrated as true

or false. But WeRWidgets replies that BigSearch’s manual manipulation of its results constitutes false advertising, because BigSearch tells its advertisers and customers on its Web site that its results are “objective” and “automatic.” Because BigSearch also sells “sponsored” advertising (or “paid for” results) next to these alleged “objective” (or “not paid for”) search results, WeRWidgets argues the speech is commercial and thus subject to less protection. WeRWidgets also argues that BigSearch has an anti-competitive intent in banning Web sites from its “unpaid” results, because when it does so it forces them, as a practical matter, to buy “sponsored” advertising spots, instead. These practices, WeRWidgets argues, makes BigSearch’s speech both commercial and inherently misleading, and thus actionable. WeRWidgets also accuses BigSearch of tortious interference with prospective economic advantage, because customers searching for it or its widgets on BigSearch’s site will not find WeRWidgets and instead will be diverted to its competitors.

**But what if a company specifically uses the competitive mark in a way that disclaims any association with its competitor? Is that still misleading? Moreover, at least one court has held that it is acceptable to purchase domain names or advertising search terms that effectively constitute one’s own mark, even if specifically done to manipulate search results.**

Only a few of WeRWidget’s theories have been analyzed legally in published court opinions. Certainly, the unauthorized and misleading use of competitors’ trademarks in the metatags of a Web site, in order to manipulate search results, have been subject to attack since *Brookfield Communications Inc. v. West Coast Entertainment Corp.*, 174 F.3d 1036 (9th Cir. 1999). But what if a company specifically uses the competitive mark in a way that disclaims any association with its competitor? Is that still misleading? Moreover, at least one court has held that it is acceptable to purchase domain names or advertising search terms that effectively constitute one’s own mark, even if specifically done to manipulate search results. See *Nissan Motor Co.*

*v. Nissan Computer Corp.*, 204 F.R.D. 460 (C.D. Cal. 2001). But is this true even if the purchasing company already dominates or monopolizes a market?

Some courts have held that search engines have some legal leeway in manipulating their own results. In *Search King Inc. v. Google Technology Inc.*, 2003 WL 21464568 (W.D. Okla. May 27, 2003), the plaintiff sued Google for allegedly “purposefully and maliciously” decreasing the ranking of its Web sites under a theory of tortious interference with contractual relations. The plaintiff argued that Google decreased its “page rank” in order to deter the plaintiff’s customers from using its advertising services. Google defended on First Amendment grounds, arguing that its search results were matters of protected, subjective opinion. The district court agreed, finding there was no conceivable way to prove that the relative significance assigned to a given Web site by Google was “false.” However, in that case, the district court was not presented with, and did not address, an argument of possible false advertising. Here, BigSearch advertised that its search results were “objective.” Does that make a difference?

In a pending case, *KinderStart.com v. Google Inc.*, C06-2057 (N.D. Cal. 2006), the plaintiff seeks to have this question answered. KinderStart alleges that its child services search engine business was destroyed after Google manually manipulated Google’s search results to effectively exclude KinderStart. It also alleges that Google falsely stated on its Web site that Google’s results were objective and “completely automated,” when Google “does in fact monitor, manipulate and censor the output and content” of Google’s search results. KinderStart has alleged claims for violations of the First Amendment, attempted and actual monopolization, violations of the Communications Act (47 U.S.C. Section 201 et seq.), unfair competition, defamation and libel, and negligent interference with prospective economic advantage. KinderStart already has had one motion to dismiss granted against it, so whether any of these claims will survive is unclear.

But one thing is clear: As consumers rely more and more on the Internet for work, shopping, financial management and other tasks, they undoubtedly will look more and more to portals to help guide their daily interactions with the Internet. Because how a company “ranks” determines how much the company “banks,” we can expect search result manipulation to be a hot topic of litigation for years to come.

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