

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

COMPLAINT OF GAMEFLY, INC.

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Docket No. C2009-1

**REPLY OF GAMEFLY, INC.,
TO RESPONSE OF THE UNITED STATES POSTAL SERVICE
TO MOTION FOR SCHEDULING CONFERENCE
(April 26, 2010)**

GameFly, Inc., respectfully replies to the April 21 response of the Postal Service to GameFly's April 14 motion for a scheduling conference. On the immediate subject of GameFly's motion, there is little disagreement. The Postal Service does not object to a conference, but asks that it take place no sooner than May 5, 2010. GameFly does not object to this request, but asks that the conference take place on May 5, or as soon as possible afterwards, for the reasons stated in GameFly's April 14 motion.

The Postal Service's further request that the conference agenda be limited to exclude any discussion of GameFly's outstanding discovery requests, however, should not go unanswered. There is no legal or equitable basis for allowing the Postal Service to delay further in providing complete answers to document requests that were served almost nine months ago. The Postal Service's suggestion that no one was responsible for the delay is untrue. And the notion that the overdue discovery is unfit even for discussion at the next scheduling conference is absurd. Allowing the Postal Service to ignore discovery deadlines in a complaint case effectively nullifies the complaint remedy.

BACKGROUND

The documents at issue are emails, stored in the Postal Service's centralized email databases, that are responsive to GameFly's first discovery requests. The discovery requests, which GameFly filed on July 31, 2009, sought (among other things) internal communications within the Postal Service, and external communications between the Postal Service and entities such as Netflix, concerning many of the defenses asserted by the Postal Service in this case.

The Postal Service began producing responsive documents and narrative answers on August 14, 2009.¹ The documents, however, appeared to have been limited to the results of manual searches by individual Postal Service employees. In late August, the Postal Service admitted to GameFly that the Postal Service had performed no search of its centralized email database. The Postal Service asserted that it had not managed to devise Boolean (i.e., LEXIS or Westlaw-like) search terms that produced a manageable number of hits. Postal Service counsel asked that GameFly draft search terms to help the Postal Service find the responsive documents in the database.²

This was an extraordinary request: parties in litigation are normally expected to take responsibility for figuring out how to search their own computer files for documents responsive

¹ The Postal Service objected to a subset of the document requests. Objections And Partial Objections Of The USPS To Discovery Requests Of Gamefly, Inc. (GFL/USPS-3(e), 4(e), 6(a)-(e) and (g)-(h), 7-8, 14(e), 15, 16(e)-(g), 20-21, 28-29, 31, 40, 41(c), and 51(c)) (August 10, 2009). The Commission ruled on the Postal Service's objections and GameFly's motion to compel in Presiding Officer's Ruling No. C2009-1/5 (September 28, 2009).

² See email from David M. Levy to Elizabeth A. Reed (Sept. 13, 2009 9:58 pm) (second paragraph) (reproduced at Attachment A, *infra*); email from Elizabeth A. Reed to David M. Levy (Sept. 14, 2009 4:25 pm) (third paragraph) (reproduced at Attachment B, *infra*).

to document requests. In an attempt to move the process forward, however, GameFly drafted a set of search terms and sent them to the Postal Service on September 24.³

Almost a month passed. On October 19, having heard nothing further, GameFly counsel phoned the Postal Service to inquire about the status of the database search. Postal Service counsel responded on October 20 that the Postal Service would get back to GameFly about any search terms that produced too many hits, but hoped to start producing responsive emails “ideally by next week.”⁴ On October 23, however, the Postal Service stated to GameFly that many of the search terms drafted by it were also likely to produce too many hits.⁵ On November 4, after further discussions, GameFly sent the Postal Service a revised set of search terms.⁶ “Could you let us know if your computer people can run these terms?” GameFly asked.⁷

Six weeks passed without any response. On December 14, GameFly raised the issue again in its motion to schedule a status conference. The motion specifically noted the overdue emails from the Postal Service’s “centralized email databases,” and the absence of any further communications from the Postal Service on this issue after November 4.⁸ In response, the Postal

³ See email from David M. Levy to Elizabeth A. Reed (Sept. 24, 2009 4:34 pm) (reproduced at Attachment C, *infra*); email from Elizabeth A. Reed to David M. Levy (September 30, 2009 12:01 pm) (reproduced at Attachment D, *infra*).

⁴ Email from Elizabeth A. Reed to David M. Levy (October 19, 2009 12:54 pm); email from Elizabeth A. Reed to David M. Levy (October 20, 2009 12:15 pm) (both reproduced at Attachment E, *infra*).

⁵ Email from Elizabeth A. Reed to David M. Levy (October 23, 2009 5:17 pm) (reproduced at Attachment F, *infra*).

⁶ Email from David M. Levy to Elizabeth A. Reed (November 4, 2009 12:10 am) (reproduced at Attachment G, *infra*).

⁷ *Id.*

⁸ Motion Of Gamefly, Inc., To Schedule Status Conference (December 14, 2009) at 2, ¶ (3).

Service asserted that “the attorney responsible for this aspect of the case is not currently available” and (falsely) that “discussion among the parties . . . is still ongoing.”⁹

In Presiding Officer’s Ruling No. C2009-1/15 (Jan. 13, 2010), the Commission ordered both parties to file memoranda reporting on the status of discovery. In the interim, the question of a status conference would be kept “under advisement.” *Id.* at 11.

GameFly, in its status memorandum, reported that it had completed its initial discovery (i.e., discovery other than follow-up questions) on October 5, 2009, more than four months earlier; that the Postal Service had provided at least partial answers to all but a handful of questions; but that “the Postal Service has still not produced thousands of emails responsive to GameFly’s very first set of discovery requests”—i.e., the responsive emails in the Postal Service’s computerized email database.¹⁰

The Postal Service, in its status report, insisted that discovery was proceeding fine, and that the Commission should keep its hands off the process:

The progress achieved by the Postal Service demonstrates that the Postal Service and GameFly have worked together successfully to resolve discovery issues without the Commission’s involvement. This should allow the Commission to allocate its resources to other important and pressing matters.

Status Memorandum of the USPS (Feb. 8, 2010) at 5; *id.* at 6 (urging that the discovery proceed “without the involvement of the Commission”). The Postal Service made no mention of the long-overdue emails from its centralized email database, or the Postal Service’s radio silence on the issue since November 4. Nor did the Postal Service explain why it had failed to comply with

⁹ USPS Reply (December 22, 2009) at 6 n. 7.

¹⁰ Status Statement of GameFly, Inc. (Feb. 9, 2010) at 2.

the directive of the Presiding Officer to explain “what needs to be done to complete [the Postal Service’s] answer,” predict when the overdue emails would be produced, or commit to any date for completing the responses. *Cf.* Presiding Officer’s Ruling No. C2009/1-15 at 9.

Two more months passed. On April 12, unwilling to wait any longer, GameFly filed its direct case without the missing emails. On the same day, GameFly reminded Postal Service counsel that responses to GameFly “discovery responses” were still “outstanding,” adding that GameFly would be “filing a request for further procedural relief later this week.”¹¹ The Postal Service responded with an email essentially admitting that the Postal Service had simply forgotten about the overdue emails:

It is my understanding that we answered all your discovery requests. Please identify the discovery requests that you contend are outstanding.¹²

On April 15—the day after GameFly filed its present motion for scheduling conference—the Postal Service finally responded to GameFly’s November 4 email with a revised set of search terms. “These terms are based on the most recent [i.e., November 4] terms you provided to us,” the Postal Service explained. “If you approve these search terms, we will begin the process of applying them to our database.”¹³

¹¹ Email from David M. Levy to James M. Mecone (April 12, 2010 5:39 am) (reproduced as Attachment H, *infra*).

¹² Email from James M. Mecone to David M. Levy (April 12, 2010 10:30 am) (reproduced as Attachment I, *infra*).

¹³ Email from James M. Mecone to David M. Levy (April 15, 2010 3:44 pm) (reproduced as Attachment J, *infra*).

The next day, GameFly agreed to the proposed search terms, but suggested that the Postal Service might want to narrow one search term that reportedly would generate a large number of hits.¹⁴ GameFly has not heard back from the Postal Service since then.

ARGUMENT

It has become obvious that the Postal Service cannot be counted on to attend to its discovery obligations in a timely fashion without continuing oversight from the Commission. The overdue discovery responses indeed should be on the agenda of the scheduling conference. At the conference, a deadline should be set for producing the emails. And the deadline should be enforced.

The Postal Service's arguments to the contrary border on frivolous. The Commission's discovery rules do not authorize the Postal Service to ignore discovery deadlines just because the Postal Service thinks that it is too busy, or the case too unimportant, or the existing document production adequate. Those questions are for the Commission, not the Postal Service, to decide. And the ten-day window for the Postal Service to object to the discovery requests on grounds of relevant or undue burden expired months ago.

Moreover, objections of this kind would be unfounded even if timely. The justifications offered by the Postal Service for its preferential treatment of Netflix—e.g., that processing decisions are made in the field rather than at headquarters; that the treatment of Netflix mail is justified by cost savings; and that giving comparable service to other DVD rental companies would be infeasible—rest largely on facts particularly within the knowledge of the Postal Service

¹⁴ Email from David M. Levy to James M. Mecone (April 16, 2010 1:34 pm) (reproduced as Attachment K).

and its employees.¹⁵ Without discovery of emails and other Postal Service communications, GameFly would have no effective way to rebut the Postal Service's claims. The emails at issue are likely to be replete with such information, just as the documents produced so far have been.

Finally, the production of locally-stored emails has not avoided the need for discovery of the documents stored in the Postal Service's centralized email services. Experience has shown that corporate email databases often contain many important communications that have been lost, destroyed or removed from the local hard drives and files of the authors and original recipients of the emails. *See, e.g.,* Roger S. Haydock and David F. Herr, *Discovery Practice* (5th ed. 2009), chapter 27.

¹⁵ *See* Memorandum Of GameFly, Inc., Summarizing Documentary Evidence (filed April 12, 2010) at 52-63.

CONCLUSION

Seven months ago, the Presiding Officer emphasized the “overarching concern that progress be made to streamline the completion of discovery so that resolving this case in a timely manner is not in jeopardy.” Presiding Officer’s Ruling No. C2009-1/5 (Sept. 28, 2009) at 2. The passage of time has only heightened the urgency of this concern. As GameFly noted in its April 14 motion for a scheduling conference, each month of delay costs GameFly approximately \$732,000 in extra postage—an amount almost equal to the total net income earned by GameFly during the entire first half of its current fiscal year.

Respectfully submitted,

David M. Levy
Matthew D. Field
Alexandra Megaris
Venable LLP
575 7th Street, N.W.
Washington, DC 20004
(202) 344-4800

Counsel for GameFly, Inc.

April 26, 2010

Attachment A

Levy, David M.

From: Levy, David M.
Sent: Sunday, September 13, 2009 9:58 PM
To: Elizabeth A. Reed (elizabeth.a.reed@usps.gov)
Cc: Kenneth N. Hollies (kenneth.n.hollies@usps.gov); Daniel J. Foucheaux Jr. (Daniel.j.foucheaux@usps.gov); 'Weidner, Keith E - Washington, DC'
Subject: GameFly -- loose ends

Liz --

This is a follow-up on a couple of items that we discussed by phone about a week ago.

First, as you know, we still have not seen many of the emails responsive to our July 31 discovery requests. During our last phone call, you said that you were going to send us the search terms used by the USPS and the number of hits produced by each combination of search terms, so that we could work with you to devise better focused search terms. When can we expect to see those?

Second, we still have not received a cross-reference identifying the data request to which each document applies. This was requested by instruction 4 to our interrogatories, an instruction to which the Postal Service has not objected. You indicated that you and Ken would not be able to prepare such a cross-reference as quickly as Keith could, and that the cross-reference probably would need to wait for his return until vacation. I asked you to confirm that the USPS would be providing the cross-reference. Please do so; otherwise we'll need to file a motion to compel to protect GameFly's interests.

Thanks,
David

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Attachment B

Levy, David M.

From: Reed, Elizabeth A - Washington, DC [Elizabeth.A.Reed@usps.gov]
Sent: Monday, September 14, 2009 4:25 PM
To: Levy, David M.
Subject: Additional USPS Documents Available for Inspection: GameFly Complaint
Attachments: Liz Reed_4.pdf; Liz Reed.pdf; Liz Reed_2.pdf; Liz Reed_3.pdf

David:

Attached is a batch of documents, scanned into four separate PDF files, that the Postal Service is making available for your inspection, in response to GameFly's discovery requests in Docket No. C2009-1. Per the previous practice when you inspected documents at USPS Headquarters, these documents have been stamped confidential.

Please let me know if you have any trouble reading any of these files and I will transmit a hard copy to you.

On another note, I received your e-mail regarding the search strings and the cross-referencing table. I will send you an e-mail shortly with the search strings we used and the estimated number of hits per search string. And I'll get back to you tomorrow on the cross-referencing table issue.

Thanks,

Liz

Attachment C

Levy, David M.

From: Levy, David M.
Sent: Thursday, September 24, 2009 4:34 PM
To: 'Reed, Elizabeth A - Washington, DC'
Cc: Keith E. Weidner (Keith.E.Weidner@usps.gov); Daniel J. Foucheaux Jr. (Daniel.j.foucheaux@usps.gov); Field, Matthew
Subject: GameFly complaint -- search terms for emails

Liz --

This responds to your email of September 14, 2009, and to your request that GameFly propose a list of specific searches for the Postal Service to run to find emails responsive to certain of GameFly's first set of discovery requests. We have used the search strings you provided us as a guide to the proper syntax, but please make any necessary corrections to enable the searches to run on your system.

In addition to the terms listed below, please produce all 959 documents returned by the "Netlix AND Plunkett AND NSA" search the Postal Service ran within Netflix.com addresses.

Please run the following searches:

- 1.di scriminat! [run within the Netflix.com address searches USPS previously ran]
- 2."ma nual processing" AND Netflix ~5 request
- 3.DVD ~10 br eakage AND automat!
- 4.DVD ~10 br eakage AND (manual or cull!)
- 5.Netflix AND (cull! OR manual) AND efficien!
- 6.Netflix AND (cull! OR manual) AND operation!
- 7.Netflix AND (cull! OR manual) AND discriminat!
- 8.Netflix AND (process! ~5 efficien!)
- 9.Netflix AND (process! ~10 "service standard")
10. DVD AND "automated versus manual"
11. DVD AND (process! ~5 efficien!)
12. DVD AND (process! ~10 "service standard")
13. Blockbuster AND (manual OR cull OR automat! OR breakage) [run within blockbuster.com addresses]

14. "black market NSA" [search for documents dated from January 1, 2005, to present]
15. ("Reed ~3 Hastings) OR "Tom Dillon" OR "Andrew Reudich" OR "David Hyman") AND DVD
16. Netflix AND DVD [limited to documents in which "Timothy J. May" or "Tim May" appears in the to, from, cc, or bcc field]
17. Netflix AND DVD [limited to documents in which "Bill Henderson" or "William J. Henderson" appears in the to, from, cc, or bcc fields; further limited to documents dated between January 18, 2006 and February 28, 2007]

Please contact Matt Field or me as soon as possible if you have any questions about the search strings we have developed, or if any of the search strings produces an unmanageably large number of hits.

Thanks,

David

Attachment D

Levy, David M.

From: Reed, Elizabeth A - Washington, DC [Elizabeth.A.Reed@usps.gov]
Sent: Wednesday, September 30, 2009 12:01 PM
To: Levy, David M.
Cc: Weidner, Keith E - Washington, DC; Foucheaux, Daniel J - Washington, DC; Field, Matthew
Subject: RE: GameFly complaint -- search terms for emails

David:

I have forwarded these search strings on to get them processed and run on our system. I don't see any problems with the syntax you used for each search string. However, we cannot retrieve messages through this system as far back as 2005 and 2006, so #14 and #17 below will be more limited than you've requested.

I will let you know if any issues crop up with any of these search strings, but I don't anticipate any.

Also, in light of P.O. Ruling No. 5 on Monday, are there any other search strings you'd like us to run? Just let me know.

Thanks,

Liz

From: Levy, David M. [mailto:DMLevy@Venable.com]
Sent: Thursday, September 24, 2009 4:34 PM
To: Reed, Elizabeth A - Washington, DC
Cc: Weidner, Keith E - Washington, DC; Foucheaux, Daniel J - Washington, DC; Field, Matthew
Subject: GameFly complaint -- search terms for emails

Liz --

This responds to your email of September 14, 2009, and to your request that GameFly propose a list of specific searches for the Postal Service to run to find emails responsive to certain of GameFly's first set of discovery requests. We have used the search strings you provided us as a guide to the proper syntax, but please make any necessary corrections to enable the searches to run on your system.

In addition to the terms listed below, please produce all 959 documents returned by the "Netlix AND Plunkett AND NSA" search the Postal Service ran within Netflix.com addresses.

Please run the following searches:

- 1.di scriminat! [run within the Netflix.com address searches USPS previously ran]
- 2."ma nual processing" AND Netflix ~5 request
- 3.DVD ~10 br eakage AND automat!
- 4.DVD ~10 br eakage AND (manual or cull!)

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- 5.Netflix AND (cull! OR manual) AND efficien!
- 6.Netflix AND (cull! OR manual) AND operation!
- 7.Netflix AND (cull! OR manual) AND discriminat!
- 8.Netflix AND (process! ~5 efficien!)
- 9.Netflix AND (process! ~10 "service standard")
- 10. DVD AND "automated versus manual"
- 11. DVD AND (process! ~5 efficien!)
- 12. DVD AND (process! ~10 "service standard")
- 13. Blockbuster AND (manual OR cull OR automat! OR breakage) [run within blockbuster.com addresses]
- 14. "black market NSA" [search for documents dated from January 1, 2005, to present]
- 15. (("Reed ~3 Hastings) OR "Tom Dillon" OR "Andrew Reudich" OR "David Hyman") AND DVD
- 16. Netflix AND DVD [limited to documents in which "Timothy J. May" or "Tim May" appears in the to, from, cc, or bcc field]
- 17. Netflix AND DVD [limited to documents in which "Bill Henderson" or "William J. Henderson" appears in the to, from, cc, or bcc fields; further limited to documents dated between January 18, 2006 and February 28, 2007]

Please contact Matt Field or me as soon as possible if you have any questions about the search strings we have developed, or if any of the search strings produces an unmanageably large number of hits.

Thanks,

David

 U.S. Treasury Circular 230 Notice: Any tax advice contained in this communication (including any attachments) was not intended or written to be used, and cannot be used, for the purpose of (a) avoiding penalties that may be imposed un Code or by any other applicable tax authority; or (b) promoting, marketing or recommending to another party any tax-related matter addressed herein. We provide th disclosure on all outbound e-mails to assure compliance with new standards of professional practice, pursuant to which certain tax advice must satisfy requirement form and substance.

 This electronic mail transmission may contain confidential or privileged information you believe you have received this message in error, please notify the sender by rep transmission and delete the message without copying or disclosing it.

Attachment E

Levy, David M.

From: Reed, Elizabeth A - Washington, DC [Elizabeth.A.Reed@usps.gov]
Sent: Tuesday, October 20, 2009 12:15 PM
To: Levy, David M.
Cc: Weidner, Keith E - Washington, DC
Subject: RE: GameFly E-mail Searches

David,

Just to update you further, I spoke with our client in IT who is responsible for running these e-mail searches. There was apparently an issue with server space which is the reason for the delay. But, this has been cleared up so we will be able to process the queries by the end of this week, and determine how many "hits" each query pulled up. For any query with a large number of hits, it could take a couple weeks to retrieve all the e-mails. But I told him that once we complete the initial process this week, we'd like him to just start retrieving the e-mails for the queries with the smallest number of hits first, so we can review those and start turning over documents to you as soon as possible, ideally by next week. For any of the queries with a lot of hits, I'll let you know how many hits we got, and we can decide whether to further narrow those particular queries, and run a new search, or just begin the process of retrieving all those e-mails as well.

Please let me know if you have any questions on this. Hopefully by Friday we'll be able to tell you the number of hits per query after they run through the system this week.

Thanks,

Liz

From: Reed, Elizabeth A - Washington, DC
Sent: Monday, October 19, 2009 12:54 PM
To: 'Levy, David M.'
Subject: GameFly E-mail Searches

Hi David,

I understand from Keith that you left him a message about the status of the e-mail searches. I am still waiting to hear back from our clients on where that stands and what the ETA is. I will hopefully hear back from them by the end of the day. Let me know if you have any other questions on the e-mail searches/search terms.

Thanks,

Liz

Attachment F

Levy, David M.

From: Reed, Elizabeth A - Washington, DC [Elizabeth.A.Reed@usps.gov]
Sent: Friday, October 23, 2009 5:17 PM
To: Levy, David M.
Cc: Weidner, Keith E - Washington, DC; Hollies, Kenneth N - Washington, DC
Subject: FW: GameFly complaint -- search terms for emails
Attachments: Gamefly_Emails6.xls; Gamefly_Emails4.xls; Gamefly_Emails5.xls

David,

We wanted to forward this on for you to look over. My inclination would be for us to prioritize any of the queries with less than 1000 or so e-mails, and get those reviewed and produced as soon as we can. Then, for any queries that are still in the tens of thousands, perhaps we could work on narrowing those queries further.

The attached files give you an idea of the number of "hits" per query, for the ones that have been processed so far. We should have more information on the remaining queries on Monday.

Let me know if you have any questions - maybe it might be good to set up a telecon on Monday to discuss how best to proceed.

Thanks,

Liz

From: Muir, Charles W - Washington, DC
Sent: Friday, October 23, 2009 5:00 PM
To: Reed, Elizabeth A - Washington, DC
Subject: RE: GameFly complaint -- search terms for emails
Importance: High

Liz,

As we discussed earlier in the week I have been formulating your queries for the Gamefly case. Your 17 queries below have resulted in 20 queries to be applied to the archive. With 2 archives (San Mateo and Eagan) that will be 40 separate queries.

Today I have run 24 of the 40 queries and identified the number of emails in each in the three attached spreadsheet documents. My intention is to run the remaining 16 queries over the weekend. At this time I have not brought back any of the email resulting from the queries. First I wanted to advise you of several changes to your queries based upon limitations of the query syntax the Archive uses.

To wit: You queries #8, 9, 11 and 12 all contain both a wildcard statement and a word proximity search. The archive query language will not allow both constructs in the same term. So, for example your #12 search calls for:

DVD AND (process! ~10 "service standard") – In English, find any email with the term "DVD" and all occurrences of words beginning in "Process" within 10 words of the literal "service standard"

In the archive query language this should equate to:

DVD AND ("process* "service standard"~10) – which unfortunately receives an error in that the proximity ~10 cannot be used in the same statement with the wildcard process*.

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So, I made a change to the query to get it to function close to what was intended. The following was used to successfully execute the query"

DVD AND (process* AND "service standard") – This ignores the proximity, but still results in emails with both derivatives of process and the literal "service standard" somewhere in the same email. The other alternative is to have you formulate a list of derivatives of process and build a very large query statement with all possible combinations of process. The changes I made will result in a larger set of email being returned, but not miss any emails where the two terms were truly within 10 words of each other.

The number of emails returned so far is 599,689 which seems less than the original total of over 1,5M. The emails returns range in size from 3 to 192,335 emails for the queries. I think I will have enough space on the archive to stage the emails for transfer, but transferring anything over 25,000 emails from a single query might be problematic.

Each of the attached spreadsheets shows the exact query I used, and the number of resulting emails. Unless I hear otherwise from you when I finish the queries I will start transferring any results of less than 15,000 emails.

Charlie Muir
Information Catalog Program
Corporate Information Security
Information Technology
U.S. Postal Service
Ph. 202-268-3192 or 202-268-4437 (Office)
Ph. 202-286-1476 (Mobile)

Attachment G

Levy, David M.

From: Levy, David M.
Sent: Wednesday, November 04, 2009 12:10 AM
To: Reed, Elizabeth A - Washington, DC
Cc: 'Weidner, Keith E - Washington, DC'; Field, Matthew; Megaris, Alexandra
Subject: Gamefly database search terms
Attachments: database search terms.doc

Liz --

Attached are revised search strings to try. We revised only the search strings that produced more than 1,000 hits (except for one, which we expanded because the original search was very narrow).

The changes consisted essentially of reinserting word proximity qualifiers in a way that would avoid having wildcard and word proximity qualifiers in the same phrase, a combination that we understand your database search engine cannot execute. We considered the alternative of imposing restrictions on the "To" and "From" fields, but the number of "key" players, and the risk of excluding relevant comments from Postal Service field employees whom we don't yet know about, make this alternative unattractive to us.

Could you let us know if your computer people can run these terms?

Regards,
David

Revised database search terms for those searches that produced over 1,000 results

Original: "manual processing" AND "Netflix Request"~5 AND automat*

Revised: "manual processing" AND (Netflix ~5 request OR requested OR requesting) AND autom*

Original: netflix AND (cull* OR manual) AND efficien*

Revised: (1) Netflix AND (cull* OR manual) ~10 efficien*
(2) Netflix AND (cull* OR manual) ~5 efficien*

Original: netflix AND (cull* OR manual) AND operation*

Revised: (1) Netflix AND (cull* OR manual) ~10 operation*
(2) Netflix AND (cull* OR manual) ~5 operation*

Original: netflix AND (cull* OR manual) AND discriminat*

Revised: (1) Netflix AND (cull* OR manual) ~10 discriminat!
(2) Netflix AND (cull* OR manual) ~5 discriminat!

Original: Netflix AND (process* AND efficien*)

Revised: (1) Netflix AND (process OR processing OR processed) ~5 (efficient OR efficiently OR efficiency)

Original: Netflix AND (process* AND "service standard")

Revised: (1) Netflix AND (processing OR processed OR process) ~10 "service standard"
(2) Netflix AND (processing or processed OR process) ~5 "service standard"
(3) Netflix AND process* ~10 "service standard"

Original: DVD AND (process* AND efficien*)

Revised: (1) DVD AND (processing OR processed OR process ~5 efficient OR efficiently)
(2) DVD AND process* ~5 efficien*

Original: DVD AND (process* AND "service standard")

Revised: (1) DVD AND (processing OR processed OR process) ~10 "service standard"
(2) DVD AND (processing OR processed OR process) ~5 "service standard"
(3) DVD AND process* ~10 "service standard"

Attachment H

Levy, David M.

From: Levy, David M.
Sent: Monday, April 12, 2010 5:39 AM
To: 'Mecone, James M - Washington, DC'
Cc: Foucheaux, Daniel J - Washington, DC
Subject: GameFly complaint
Attachments: 10-04-12 Glick Direct [GFL-T-1], App. A--PROPRIETARY.xls; 10-04-12 Glick Direct [GFL-T-1]--PROPRIETARY.pdf; 10-04-12 GFL document roadmap--PROPRIETARY.pdf

Jim --

GameFly has decided to proceed with the filing of its case-in-chief without waiting for resolution of the motion to unseal or the outstanding discovery responses. Attached are the proprietary versions of our filing. We have filed under seal all discussions of information that is still the subject of a claim of protection.

Could you let me know what is the last page number of the documents that we sent back to you (or, more precisely, to Keith Weidner)? I'll send you a CD with the pages you don't have.

We will be filing a request for further procedural relief later this week.

Regards,
David

4/26/2010

Attachment I

Levy, David M.

From: Mecone, James M - Washington, DC [James.M.Mecone@usps.gov]
Sent: Monday, April 12, 2010 10:30 AM
To: Levy, David M.
Subject: RE: GameFly complaint

It is my understanding that we answered all your discovery requests. Please identify the discovery requests that you contend are outstanding.

James M. Mecone
US Postal Service Law Department
475 L'Enfant Plaza, SW
Washington, DC 20260-1137
+ 1 202 268 6525
Fax + 1 202 268 6187
James.M.Mecone@usps.gov

From: Levy, David M. [mailto:DMLevy@Venable.com]
Sent: Monday, April 12, 2010 5:39 AM
To: Mecone, James M - Washington, DC
Cc: Foucheaux, Daniel J - Washington, DC
Subject: GameFly complaint

Jim --

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We will be filing a request for further procedural relief later this week.

Regards,
David

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4/26/2010

recommending to another party any tax-related matter addressed herein. We provide th disclosure on all outbound e-mails to assure compliance with new standards of professional practice, pursuant to which certain tax advice must satisfy requirement form and substance.

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Attachment J

Levy, David M.

From: Mecone, James M - Washington, DC [James.M.Mecone@usps.gov]
Sent: Thursday, April 15, 2010 3:44 PM
To: Levy, David M.
Subject: RE: GameFly complaint
Attachments: Revised Search Terms.pdf

The attachment contains revised search terms and an explanation of how we developed them. These terms are based on the most recent terms you provided to us. If you approve these search terms, we will begin the process of applying them to our database.

James M. Mecone
US Postal Service Law Department
475 L'Enfant Plaza, SW
Washington, DC 20260-1137
+ 1 202 268 6525
Fax + 1 202 268 6187
James.M.Mecone@usps.gov

From: Levy, David M. [mailto:DMLevy@Venable.com]
Sent: Tuesday, April 13, 2010 6:57 PM
To: Mecone, James M - Washington, DC
Cc: Megaris, Alexandra
Subject: RE: GameFly complaint

Jim --

Postal Service lawyers us months ago that the Postal Service had not yet searched its centralized email database (s) for documents responsive to a number of our early discovery requests. On two occasions, the Postal Service asked us to devise Boolean search terms because the preliminary searches done by the USPS were producing too many hits. We twice submitted proposed Boolean terms. The last we heard from the USPS on this was in early November.

Elizabeth Reed should remember these exchanges. Also, attached are pdfs of a few emails that should help refresh recollections.

David

From: Mecone, James M - Washington, DC [mailto:James.M.Mecone@usps.gov]
Sent: Monday, April 12, 2010 10:30 AM
To: Levy, David M.
Subject: RE: GameFly complaint

It is my understanding that we answered all your discovery requests. Please identify the discovery requests that you contend are outstanding.

4/23/2010

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From: Levy, David M. [mailto:DMLevy@Venable.com]
Sent: Monday, April 12, 2010 5:39 AM
To: Mecone, James M - Washington, DC
Cc: Foucheaux, Daniel J - Washington, DC
Subject: GameFly complaint

Jim --

GameFly has decided to proceed with the filing of its case-in-chief without waiting for resolution of the motion to unseal or the outstanding discovery responses. Attached are the proprietary versions of our filing. We have filed under seal all discussions of information that is still the subject of a claim of protection.

Could you let me know what is the last page number of the documents that we sent back to you (or, more precisely, to Keith Weidner)? I'll send you a CD with the pages you don't have.

We will be filing a request for further procedural relief later this week.

Regards,
David

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1. Revised database search terms for those searches that produced over 1,000 results

Original: "manual processing" AND "Netflix Request"~5 AND automat*

Revised: "manual processing" AND (Netflix ~5 request OR requested OR requesting)
AND autom*

Original: netflix AND (cull* OR manual) AND efficien*

Revised: (1) Netflix AND (cull* OR manual) ~10 efficien*
(2) Netflix AND (cull* OR manual) ~5 efficien*

Original: netflix AND (cull* OR manual) AND operation*

Revised: (1) Netflix AND (cull* OR manual) ~10 operation*
(2) Netflix AND (cull* OR manual) ~5 operation*

Original: netflix AND (cull* OR manual) AND discriminat*

Revised: (1) Netflix AND (cull* OR manual) ~10 discriminat!
(2) Netflix AND (cull* OR manual) ~5 discriminat!

Original: Netflix AND (process* AND efficien*)

Revised: (1) Netflix AND (process OR processing OR processed) ~5 (efficient OR
efficiently OR efficiency)

Original: Netflix AND (process* AND "service standard")

Revised: (1) Netflix AND (processing OR processed OR process) ~10 "service
standard"
(2) Netflix AND (processing or processed OR process) ~5 "service standard"
(3) Netflix AND process* ~10 "service standard"

Original: DVD AND (process* AND efficien*)

Revised: (1) DVD AND (processing OR processed OR process ~5 efficient OR
efficiently)
(2) DVD AND process* ~5 efficien*

Original: DVD AND (process* AND "service standard")

Revised: (1) DVD AND (processing OR processed OR process) ~10 "service standard"
(2) DVD AND (processing OR processed OR process) ~5 "service standard"
(3) DVD AND process* ~10 "service standard"

2. Now the original queries with identifiers added for linking previously described search results:

Here numbers are added to identify where this original query was. The first item marked "4-3 Original" corresponds to "Gamefly4_emails.xls" and the 3rd query described therein. The second item "5-1 Original" corresponds to "Gamefly5_Emails.xls" first query, and so on.

4-3 **Original:** "manual processing" AND "Netflix Request"~5 AND automat*

Revised: "manual processing" AND (Netflix ~5 request OR requested OR requesting)
AND autom*

5-1 Original: netflix AND (cull* OR manual) AND efficien*

Revised: (1) Netflix AND (cull* OR manual) ~10 efficien*

(2) Netflix AND (cull* OR manual) ~5 efficien*

5-2 Original: netflix AND (cull* OR manual) AND operation*

Revised: (1) Netflix AND (cull* OR manual) ~10 operation*

(2) Netflix AND (cull* OR manual) ~5 operation*

5-3 Original: netflix AND (cull* OR manual) AND discriminat*

Revised: (1) Netflix AND (cull* OR manual) ~10 discriminat!

(2) Netflix AND (cull* OR manual) ~5 discriminat!

5-4 Original: Netflix AND (process* AND efficien*)

Revised: (1) Netflix AND (process OR processing OR processed) ~5 (efficient OR efficiently OR efficiency)

6-1 Original: Netflix AND (process* AND "service standard")

Revised: (1) Netflix AND (processing OR processed OR process) ~10 "service standard"

(2) Netflix AND (processing or processed OR process) ~5 "service standard"

(3) Netflix AND process* ~10 "service standard"

6-3 Original: DVD AND (process* AND efficien*)

Revised: (1) DVD AND (processing OR processed OR process ~5 efficient OR efficiently)

(2) DVD AND process* ~5 efficien*

6-4 Original: DVD AND (process* AND "service standard")

Revised: (1) DVD AND (processing OR processed OR process) ~10 "service standard"

(2) DVD AND (processing OR processed OR process) ~5 "service standard"

(3) DVD AND process* ~10 "service standard"

3. To convert the query requests to IAP query format we performed several steps resulting a new query that works on the IAP archive:

Converting the revised query (1) above results in the following IAP query conversion:

DVD AND "(processing OR processed OR process) (service standard)"~10

a. The first conversion is replacing all the open and close double quotes ("and") with straight quotes ("). Our query language ignores open/close quotes and will only react to straight quotes. Unfortunately Microsoft Word automatically generates open/close quotes by default. ICP deals with this by usually expressing straight quotes through Excel although we have patched our Word applications in ICP to generate only straight quotes. Thus, we are on the lookout for these subtle differences.

b. Next the syntax for word proximity searches is different.

The syntax you used for a word proximity search is:

Firstword ~10 secondword

This is to match all occurrences of the "firstword" within 10 words of "secondword". The IAP syntax is similar, but a little different. The same query must be restated to say:

"firstword secondword"~10

In this case the "firstword" is replaced by the phrase:

(processing OR processed OR process) and the "secondword" by the phrase:
(service standard)

This conversion works successfully on the IAP archive.

The second type of conversion uses wildcards;

The syntax you used for a wildcard is:

Process! Or Process* (when you were attempting to match our previous IAP format in the request)

While it seems logical to replace the phrase **(processing OR processed OR process)** with the wildcard **process*** it is not allowed in the IAP query syntax when it is inside the phrase of a word proximity search.

4. Here is a full list of the correlated original queries, revised queries, converted queries, and the results from performing the query:

4-3 Original: "manual processing" AND "Netflix Request"~5 AND automat*

Revised: "manual processing" AND (Netflix ~5 request OR requested OR requesting) AND autom*

9-1IAP: "manual processing" AND ("Netflix request"~5 OR requested OR requesting) AND autom* - **works – 38,000+ hits.**

5-1 Original: netflix AND (cull* OR manual) AND efficien*

Revised: (1) Netflix AND (cull* OR manual) ~10 efficien*

(2) Netflix AND (cull* OR manual) ~5 efficien*

9-3IAP: 1 Netflix AND "(cull* OR manual) efficien*"~10 – **error**

9-4IAP 2: Netflix AND "(cull* OR manual) efficien*"~5 - **error**

5-2 Original: netflix AND (cull* OR manual) AND operation*

Revised: (1) Netflix AND (cull* OR manual) ~10 operation*

(2) Netflix AND (cull* OR manual) ~5 operation*

10-1IAP 1: Netflix AND "(cull* OR manual) operation*"~10 - **error**

10-2IAP 2: Netflix AND "(cull* OR manual) operation*"~5 - **error**

5-3 Original: netflix AND (cull* OR manual) AND discriminat*

Revised: (1) Netflix AND (cull* OR manual) ~10 discriminat!

(2) Netflix AND (cull* OR manual) ~5 discriminat!

10-3IAP 1: Netflix AND "(cull* OR manual) discriminat*"~10 - **error**

10-4IAP 2: Netflix AND "(cull* OR manual) discriminat*"~5 -**error**

5-4 Original: Netflix AND (process* AND efficien*)

Revised: (1) Netflix AND (process OR processing OR processed) ~5 (efficient OR efficiently OR efficiency)

9-2IAP 1: Netflix AND "(process OR processing OR processed) (efficient OR efficiently OR efficiency)"~5 – **works – 4 hits, appear to be only emails we have exchanged discussing gamefly query logic.**

6-1 Original: Netflix AND (process* AND "service standard")

Revised: (1) Netflix AND (processing OR processed OR process) ~10 “service standard”

(2) Netflix AND (processing or processed OR process) ~5 “service standard”

(3) Netflix AND process* ~10 “service standard”

11-1IAP 1: Netflix AND "(processing OR processed OR process) (service standard)"~10 – **works – 4 hits.**

11-2IAP 2: Netflix AND "(processing OR processed OR process) (service standard)"~5 – works – 4 hits.

11-3IAP 3: Netflix AND "process* (service standard)"~10 – error

6-3 Original: DVD AND (process* AND efficien*)

Revised: (1) DVD AND (processing OR processed OR process ~5 efficient OR efficiently)

(2) DVD AND process* ~5 efficien*

11-4IAP 1: DVD AND "(processing OR processed OR process) (efficient OR efficiently)"~5 – works – 4 hits

12-1IAP 2: DVD AND "process* efficien*"~5 - error

6-4 Original: DVD AND (process* AND "service standard")

Revised: (1) DVD AND (processing OR processed OR process) ~10 "service standard"

(2) DVD AND (processing OR processed OR process) ~5 "service standard"

(3) DVD AND process* ~10 "service standard"

12-2IAP 1: DVD AND "(processing OR processed OR process) (service standard)"~10 – works – 4 hits

12-3IAP 2: DVD AND "(processing OR processed OR process) (service standard)"~5 – works – 4 hits

12-4IAP 3: DVD AND "process* (service standard)"~10 - error

Attachment K

Levy, David M.

From: Levy, David M.
Sent: Friday, April 16, 2010 1:34 PM
To: 'Mecone, James M - Washington, DC'
Subject: RE: GameFly complaint

Jim --

This is fine. Except do you really want to do the search that generates 38,000 hits? I'm open to suggestions from your IS people on how to narrow that.

David

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Sent: Thursday, April 15, 2010 3:44 PM
To: Levy, David M.
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