

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

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

THE WEATHER UNDERGROUND, INC.,)
a Michigan Corporation,)
Plaintiff,)

vs.

) Case No. 2:09-CV-10756

NAVIGATION CATALYST SYSTEMS,) Volume I
INC., a Delaware corporation;)
BASIC FUSION, INC., a Delaware)
corporation; CONNEXUS CORP., a)
Delaware corporation; and)
FIRSTLOOK, INC., a Delaware)
corporation,)
Defendants.)

VIDEOTAPED DEPOSITION OF
JOHN B. BERRYHILL, Ph.D., ESQ.
Philadelphia, Pennsylvania
Tuesday, January 11, 2011

Reported By: Deborah A. Brazukas
CSR No. XI 01938
NDS Job No.: 140405

1 avoid legal liability. So I wouldn't
2 understand someone who is engaging in such
3 measures to be relying on some kind of
4 ignorance standard.

5 What I am saying is that we're
6 going to look at the totality of the
7 circumstances.

8 BY MR. SCHAEFER:

9 Q. Okay. So --

10 A. And whether -- whether what they were
11 doing is, you know, in some sense reasonable.

12 Q. You would -- you would agree that one of
13 the factors you would -- you would -- you would look
14 at and you would expect, that if someone is engaging
15 in domain tasting --

16 A. Uh-huh.

17 Q. -- one of the things that you would look
18 at -- would expect from them in terms --

19 A. Uh-huh.

20 Q. -- of their activity would be to
21 understand the ACPA. True?

22 A. To -- to the extent of their ability to
23 understand it, yes.

24 Q. Or to hire attorneys to help them
25 understand it. And --

1 A. Right.

2 Q. -- and -- and you would expect them to
3 do that if they were doing this in any sort of
4 serious fashion. True?

5 A. I would -- I would expect them to -- to
6 get some counsel on general guidelines, you know, of
7 the type that I've -- I've listed here where, you
8 know, you can't just -- you know, when you talk
9 about ignorance, there is -- or -- or -- or -- or
10 bad faith, you know, there -- there's always a
11 question of, well, to what degree does some kind of
12 willful blindness rise to the level of -- of bad
13 faith.

14 And when we talk about willful
15 blindness or turning a blind eye towards something,
16 that -- that -- that expression comes from the
17 English Admiral Nelson, who was actually blind in
18 one eye. And when -- when going into a hazardous
19 condition -- and -- and -- and his crew was
20 concerned that the Spanish Armada was on the horizon
21 ready to take them -- he took his telescope and he
22 put it up to his blind eye and looked through his
23 telescope and said, you know, I don't see them. All
24 right. That's willful blindness, and Nel -- or
25 otherwise called Nelsonian blindness; that is, I'm

1 not even making an effort here. And in fact, I'm
2 just putting on a show, knowing full well that I'm
3 not going to -- to, you know, see anything.

4 Q. And, Mr. Berryhill, I apologize. It's
5 1:22. I know you've got a call to get to.

6 A. Yes.

7 Q. So I -- I would just simply ask that
8 during the break, since we're going to continue this
9 type of testimony, that -- you know, that you not
10 talk to Mr. Delgado about the testimony or under --
11 and I can't require that. But understand that if I
12 do, I get to ask you about everything that you
13 discussed during the lunch break. So I would expect
14 you to remember what you discussed. Fair enough?

15 MR. DELGADO: Well, I'll just
16 note that the Federal Rules have been amended
17 so that any discussion between me and
18 Mr. Berryhill that would reflect my attorney
19 work product would be protected. So you can
20 make the request. But the rules allow me to
21 have the conversation.

22 Although honestly, I don't
23 anticipate talking to you, John.

24 MR. SCHAEFER: Sure. I would
25 just say -- just because I know this will come

1 up again -- I know it's your position that
2 you've taken in this case that because the
3 reports and depositions were essentially
4 required to be done prior to the effect of that
5 rule, that -- that the old rule applies and --

6 MR. DELGADO: That is -- that is
7 not my position at all.

8 MR. SCHAEFER: Okay. Well,
9 we'll -- we'll get to that if we need to
10 afterwards. Let's take a lunch break and let
11 John do what he needs to do.

12 MR. DELGADO: Okay.

13 THE VIDEOTAPE OPERATOR: Going
14 off the video record. The time is 1:24. This
15 will end tape two.

16 (Whereupon, a luncheon recess was
17 taken.)

18 THE VIDEOTAPE OPERATOR: Okay.
19 Here begins tape three in the taped deposition
20 of John Berryhill. This will begin tape three
21 and please proceed.

22 BY MR. SCHAEFER:

23 Q. Okay. Mr. Berryhill, we were talking a
24 little bit about the bad faith factors that weren't
25 necessarily within the statute that you would want

1 to consider in the case of a bulk domain
2 registration or domain tasting situation. And you
3 had talked a little bit about willful blindness and,
4 you know, essentially the concept that someone's not
5 really trying.

6 A. Uh-huh.

7 Q. Okay. Any other factors besides willful
8 blindness, the quantity and quality of the caution
9 that they are exercising in view of trademarks,
10 whether or not they provide correct and accurate
11 information in the "who is" database, how that
12 person responds to trademark inquiries. That's what
13 I've got on my list. There may be more. But can
14 you think of anything else that you'd like to add to
15 the list that's not in the statute?

16 A. Yeah. One of the -- one of the problems
17 with intent generally -- trying to determine intent
18 as a matter of law is I think that I had referred to
19 a -- a totality of the facts. And, you know, these
20 things are facts intensive. And I, you know,
21 believe it is more of a -- more of a jury question,
22 really, for them to decide based upon the -- the
23 credibility and -- and what, you know, other
24 particular circumstances might be demonstrated in
25 the course of testimony and demeanor of the

1 witnesses and, you know, whether -- whether the jury
2 gets that -- that impression that, you know, this
3 person was the Zuccarini type, driven by a peculiar
4 animus toward trademarks and trademark attorneys, or
5 whether, you know, these people were, you know, more
6 like, you know, operators of a -- say a fishing
7 trawler where, if a tuna fishing boat puts out a
8 net, you know, they -- there's a risk that they're
9 going to catch some dolphins in that net. And we
10 have nets and fishing methods that have been
11 designed to limit my catch during fishing operations
12 of turtles and dolphins and so forth. But, you
13 know, they still get -- they still get caught up.
14 And I think that, you know, we can readily determine
15 whether a -- a fishing trawler has been operated in
16 a responsible manner or not.

17 Q. And using your dolphin analogy, so for
18 instance, if the -- the fishing boat operator were
19 to go to an area which everyone knows is heavily
20 populated with dolphins in order to throw their
21 nets, that's something you'd want to know, correct?

22 A. Well, oddly enough, dolphins tend to
23 accumulate above tuna schools. So --

24 Q. Perfect --

25 A. -- they're -- they're actually a -- a

1 fight about that in the -- in the late '90s with the
2 USPTO and certain information freedom advocates that
3 basically shamed the USPTO. But the quality of
4 information and its accessibility has been -- you
5 know, has -- has also improved over time.

6 Q. Okay. Let's do it this way. You don't
7 remember the exact date --

8 A. Uh-huh.

9 Q. -- by 2004, was a database of registered
10 U.S. trademarks available online?

11 A. A database of registered U.S.
12 trademarks, no.

13 Q. Okay. What about 2006?

14 A. No.

15 Q. Okay. What about today?

16 A. No.

17 Q. Okay. What is the -- what is the issue
18 with my question that you see? Database of U.S.
19 registered trademarks.

20 A. It's -- there is not a database of U.S.
21 registered trademarks. There is a database that
22 includes --

23 Q. Okay.

24 A. Do you want the list again?

25 Q. Yes.

1 A. It includes a bunch of stuff.

2 Q. It includes a bunch of stuff, including
3 registered trademarks, correct?

4 A. If one knows how to interpret the data
5 that's on the database.

6 Q. I'm not asking if anyone. If anyone
7 would go to a web browser and go to www.uspto.gov,
8 can click the search button and see the list of
9 companies that have registered trademarks; they
10 could do a search, correct?

11 A. There are x-ray machines that one can
12 purchase and take x-rays. I can take an x-ray of
13 Mr. Delgado's chest. I cannot diagnose any
14 condition he might have from that x-ray.

15 Q. I don't understand.

16 A. Okay.

17 Q. In 2004 --

18 A. Uh-huh.

19 Q. -- could someone who wanted to do a
20 search of U.S. registered trademarks --

21 A. Uh-huh.

22 Q. -- go to the internet --

23 A. Uh-huh.

24 Q. -- uspto.gov, click the search button
25 and do a search on the U.S. registered trademark

1 system -- on the U.S. trademark system? Could they
2 do a search? One of the buttons is whether or not
3 you want to see registered live trademarks versus --

4 A. If you know how to -- yeah. Yeah.
5 It -- it takes some expertise, both in terms of
6 conducting the search and in terms of interpreting
7 the results.

8 Q. And the law in the United States, and
9 you certainly know this as a trademark attorney --

10 A. Uh-huh.

11 Q. -- says that if it's in -- if it is
12 available through the USPTO as a registered
13 trademark, the public has constructive notice of
14 that trademark, correct?

15 A. Oh, of -- of those published in the
16 Gazette, yeah. You're talk -- you're asking about
17 the -- about the database. It's the Gazette that
18 gives public notice.

19 Q. Okay. But the trademarks in the Gazette
20 that get registered --

21 A. Right.

22 Q. -- also go into the USPTO system and are
23 searchable, correct?

24 A. With other things.

25 Q. Sure.

1 question on the floor right now. So --

2 A. Uh-huh.

3 Q. -- with regards to Exhibit No. 254, the
4 Microsoft domain name --

5 A. Right.

6 Q. -- in this article, you indicate that
7 if -- this is a no-brainer case under the UDRP,
8 correct?

9 A. I -- nope, nope, nope. Those weren't my
10 conditions. Default no-brainer cases.

11 This may mean something in some
12 language. That might be used, you know, for, you
13 know -- I don't know what it might mean in -- in
14 Greek or something like that.

15 Q. Your article says in connection with
16 PPC --

17 A. Uh-huh.

18 Q. -- which is park pages?

19 A. Yes.

20 Q. Okay.

21 A. Yes. In an English language article
22 written for English language readers.

23 Q. So again, back to my hypothetical --

24 A. Uh-huh.

25 Q. -- I'm going to throw up a PPC page, a

1 parking page on this.

2 A. Yes.

3 Q. Okay. What is your legal advice to
4 me --

5 A. Yeah. Yeah.

6 Q. -- to register or not register, and why?

7 A. You?

8 Q. Me?

9 A. You, Enrico?

10 Q. Me, Enrico.

11 A. Enrico, I would suggest that you not
12 register this domain name.

13 Q. Why?

14 A. Because you have clearly taken it from
15 an article which is written for people who are not
16 very sophisticated. It is not a legal opinion, does
17 not include a full set of qualifiers. And, you
18 know, I would -- I would suggest that perhaps you
19 find some other name to register.

20 Q. The reason that you would not want me to
21 register the domain on Exhibit 254 is because --

22 A. Uh-huh.

23 Q. -- you believe that if sued by
24 Microsoft, I would be found guilty of -- or liable
25 under the ACPA for bad faith cybersquatting; true?

1 A. They would certainly make that claim and
2 you would -- you would likely incur a lot of expense
3 defending yourself against it, yes.

4 Q. And you believe that I would have a
5 serious risk of -- of losing that case, correct?

6 A. You would have a serious risk of losing
7 that case, yes.

8 Q. In fact, I might even be, as noted in
9 the article, an idiot for registering it; true?

10 A. Well, you know, a default no-brainer
11 case is you don't win if you don't show up. And,
12 you know, what -- what's interesting is -- is may I
13 -- may I write a -- a domain name down on a piece of
14 paper?

15 Q. Well, I would love to let you do that.
16 But your attorney will have a chance to do that.
17 We've got a lot to get through.

18 A. Okay.

19 Q. You know --

20 A. Because I --

21 Q. In this article --

22 A. Okay.

23 Q. -- in the fourth paragraph, you state,
24 There has been a mixed history of trying to educate
25 UDRP panelists on the line between no-brainer

1 typosquats connected to PPC --

2 A. Uh-huh.

3 Q. -- and cases which there are subtle but
4 important distinctions.

5 A. Uh-huh.

6 Q. Okay. Do you see that paragraph?

7 A. I do see that paragraph.

8 Q. And then you say, the Microsoft
9 situation is one thing. And that's the domain we
10 have on Exhibit 254.

11 A. Uh-huh.

12 Q. The one thing is -- what you're
13 referring to is that this domain on 254 is a
14 no-brainer typosquat connected to PPC, true?

15 A. The Microsoft situation, you know,
16 where -- I mean, this is not a legal opinion. This
17 is -- this is -- this is not written for lawyers.
18 And you're -- you're applying a degree of analysis
19 to a piece that was written, intended for an
20 audience that is relatively unsophisticated, and to
21 whom most of the concepts that we've been throwing
22 around all day are completely foreign.

23 And had this been written on an
24 academic level would be incomprehensible and -- and
25 useless. This was written for a -- a magazine that

1 gets handed out at -- at domain conferences where,
2 you know, one has to assume one's audience is --
3 is -- it may have never even heard of a trademark
4 before in their life. So, you know, take it for
5 what it is. It's -- it -- it's a popular -- it's
6 written for an audience that is different from the
7 way that you're -- you want to analyze it.

8 Q. Okay. That is to say if it was --

9 A. Uh-huh.

10 Q. -- a sophisticated client --

11 A. Uh-huh. Yep.

12 Q. -- it would be even more dramatic -- if
13 a -- if a sophisticated client came to you and said,
14 hey, I got this domain, 254, and -- and I'm
15 wondering should I register, I'm going to put a
16 parking page on it, okay --

17 A. Uh-huh.

18 Q. -- it would be even worse than a -- a
19 no-brainer typosquat?

20 A. Yeah.

21 Q. And you wouldn't expect the question to
22 even be asked?

23 A. It depends. It depends. And -- and
24 what this -- what this article captured was a -- a
25 moment in time and -- where there were some very

1 divergent views among UDRP panelists in how to
2 approach automated advertising situations. And
3 it -- it -- it was intended to address a then
4 current issue where there was a disputed approach
5 among UDRP panelists to these sorts of cases.

6 Now, you -- you're going to make
7 further changes to an exhibit that -- that has been
8 marked and commented upon; is that correct?

9 Q. That is correct. I'm actually going to
10 write Microsoft underneath it to see how many
11 character differences there actually are between the
12 word Microsoft and this example domain.

13 A. Uh-huh.

14 Q. Okay. So now on 254, I'll put my ES
15 underneath. I -- I actually wrote the word
16 Microsoft.com underneath to see how many differences
17 there were --

18 A. Uh-huh.

19 Q. -- in characters.

20 A. Uh-huh.

21 Q. It looks like there's one, two, three,
22 four, five, six -- six different characters --

23 A. Uh-huh.

24 Q. -- than Microsoft.com in your example.

25 A. Uh-huh.

1 Q. Does that look correct?

2 A. I -- you know, I don't -- I -- I am not
3 a developer of string comparison algorithms. If it
4 were dollhouse furniture, and they were using the
5 name microsofa, it would be a closer string match.
6 But I would tell you that microsofa, for the purpose
7 of selling dollhouse furniture, may be a legitimate
8 thing to do because the name descriptively refers to
9 very small items of furniture. And, you know, it's
10 only -- it's only -- you know, it would be a closer
11 string match. And that's -- you know, I am not a --
12 an expert in the numerical characterization of
13 string similarity.

14 Q. Okay. But in any event, that's not
15 microsofa --

16 A. Uh-huh.

17 Q. -- the domain name that we're looking at
18 on that exhibit; it appears to be a nonsense word,
19 correct? It doesn't look like any word you've ever
20 seen before?

21 A. In the -- yeah, there are hundreds of
22 languages. I only barely know two.

23 Q. In fact, in your article, you refer to
24 it as a typo squat, correct?

25 A. In most circumstances, there would be a

1 high likelihood that it would be in the typical
2 situation.

3 Q. That it would be a typosquat situation;
4 true?

5 A. If -- if someone had selected that
6 domain name for registration, I would have serious
7 questions about their motivation, which, as I said,
8 is the first question I ask when someone comes to me
9 is why did you register that domain name.

10 Q. Now, interestingly, in all of the things
11 that you talked about that you would do, you never
12 said that you would check the trademark database;
13 you never said that you would check Google to see
14 if -- what the other results were. Yet I know
15 that's -- must be part of your process; true?

16 A. The process depends upon the
17 circumstances. And when I'm dealing with
18 unsophisticated, naive users, you know, it -- it --
19 it's -- I would trust someone who has had marine
20 basic training to take an M16 apart, reassemble it,
21 take it out on the range and do target practice. If
22 we're talking about random people walking in off the
23 street who want to take an M16 apart and go off and
24 engage in target practice with it, I would say, you
25 know what, I think you better find another hobby

1 because you're going to hurt yourself.

2 And in addressing naive registrants,
3 random members of the public who may have, you know,
4 basic questions, the types of general answers I give
5 them tend to be very -- stay very far away from the
6 line. You know, if -- if you're -- if you're a
7 skier, I can tell pretty quickly whether or not you
8 belong on the green dot slopes, the blue square
9 slopes, you know. There -- there are -- there are
10 degrees of difficulty and degrees of sophistication.
11 And, you know, in -- in pieces that I have written
12 for popular consumption, I don't want people to rely
13 on some fine nuance or -- or distinction. And the
14 types of -- of things that I write in popular --
15 this popular article and on internet forums are, you
16 know, not indicative of legal advice, number one,
17 but general principles to sensitize people I presume
18 not to know much about the subject, to stay very
19 well away from contentious areas.

20 Q. Okay. But the domain that we discussed,
21 the Microsoft derivation --

22 A. Uh-huh.

23 Q. -- I don't care in the potential client
24 is sophisticated --

25 A. Uh-huh.

1 Q. -- or -- or knows nothing about
2 trademarks, your advice would be the same if their
3 intent was to put up a PPC page, correct, which is
4 I'm advising you not to register this domain,
5 correct?

6 A. I -- I -- I -- you know, like I said,
7 there are -- what -- what was the question?

8 Q. I said it doesn't matter if the client
9 was sophisticated or had no knowledge of trademarks
10 in the instance of the Microsoft derivation --

11 A. Uh-huh, yeah.

12 Q. -- we just -- your advice would be the
13 same in both cases of wanting to put up a PPC page,
14 your recommendation would be, do not register this
15 domain name, correct?

16 A. I -- I would not characterize a client
17 as sophisticated who would come to me with a
18 question about that domain name.

19 Q. Okay.

20 A. So your --

21 Q. So -- and I know -- we're going to do a
22 few of these. And hopefully, we'll go -- be able to
23 do it a little bit easier, because I'm not trying to
24 trick you.

25 A. Okay.

1 Q. -- problematic.

2 A. Uh-huh.

3 Q. And really, I want to know what that
4 process is. What do you do, knowing that I'm Enrico
5 Schaefer, I'm taking a look at maybe registering
6 it --

7 A. Uh-huh.

8 Q. -- and I'm worried about trademark
9 issues. John, give me your legal advice on this
10 domain. What is the process that you're going to go
11 through in order to give me legal advice?

12 MR. DELGADO: Objection;
13 incomplete hypothetical.

14 THE WITNESS: What -- what --
15 why did you -- the first thing I'm going to do
16 is I'm going to ask you why did you -- what
17 motivated you to register this domain name?

18 BY MR. SCHAEFER:

19 Q. I saw it on a drop list. And I saw the
20 word fifth and third, and I thought it looked
21 interesting.

22 A. Uh-huh. Okay. What -- what's it being
23 used for?

24 Q. I have no idea.

25 A. Okay. Well, when -- when -- when you

1 can answer my questions, come back.

2 Q. But I'm hiring you, John, to -- to look
3 into this --

4 A. Right.

5 Q. -- and figure out what -- whether or not
6 there might be problems.

7 A. Right. But if I ask you questions to
8 diagnose your situation, you know, I need answers to
9 that. You -- you can't walk into the doctor's
10 office and say, it hurts. Well, what hurts. Well,
11 I'm not going to tell you, you know.

12 Q. I already told you. Mr. Berryhill,
13 isn't it true that the very first thing you would do
14 or one of the very first things you would do --

15 A. Uh-huh.

16 Q. -- if I were your client is you would do
17 a trademark search on the USPTO database to see if
18 there are any trademarks out there that were
19 similar --

20 A. Yeah.

21 Q. -- to this word.

22 A. The -- I had given you a list. And --
23 and did we mark that actually? You had taken a list
24 of -- of questions that I ask every time in order
25 when someone comes to me with a domain name.

1 Q. And my data tells me if I do register it
2 and I put up an ad page there --

3 A. Uh-huh.

4 Q. -- PPC page, I'm going to make some
5 money on that domain.

6 A. Okay. Well, it's good to know, first,
7 that you are not doing this out of an intent to rip
8 off someone's trademark that's known to you.
9 However, it often occurs that regardless of the --
10 the purity and innocence of one's intent that one
11 can get into a situation that, regardless of the
12 purity of your heart, is -- is not going to be one
13 that -- that others will find, you know, credible.

14 And I frequently end up telling
15 prospective clients that, you know, the truth of the
16 matter is that -- that you are not ill-motivated.
17 The practicality of the matter is that the truth
18 does not always win, simply because we can only make
19 post hoc determinations of your intent based on, you
20 know, inferences about your behavior. But --

21 Q. But my intent is --

22 A. Uh-huh.

23 Q. -- that I feel an obligation to figure
24 out if there's a trademark issue here.

25 A. Uh-huh.

1 Q. So I haven't -- I don't have any intent
2 yet. I haven't registered yet. I'm not at the
3 moment of registration. I'm asking you to give me
4 the information I need to know whether or not I
5 should register this in view of -- I know there are
6 lots of trademarks out there.

7 A. Uh-huh.

8 Q. I'm worried that maybe there might be
9 one out there that -- that is -- is the same or
10 similar to this one.

11 A. Uh-huh.

12 Q. What is it you're going to do in order
13 to help me understand whether I should actually push
14 the button and register the domain?

15 A. Uh-huh.

16 MR. DELGADO: Objection;
17 incomplete hypothetical, and it's now a new
18 hypothetical.

19 THE WITNESS: Okay. You know, I
20 mean at -- at some point in time, I would --
21 you know, I -- I would suggest that, you know,
22 perhaps we -- we -- we do a search, you know.
23 But I have to --

24 BY MR. SCHAEFER:

25 Q. Well, let's do it.

1 improve it.

2 BY MR. SCHAEFER:

3 Q. Well, let's do this --

4 A. I mean, it's a meaningless number.

5 Q. By the way, not only did my scoring
6 system note that it was almost identical to a
7 registered trademark, but -- but by the way, here's
8 the registered trademark, I'll do that work for you.

9 A. Uh-huh.

10 Q. And it's Fifth Third, spelled identical
11 to what you see there, except for the addition of
12 the letter F --

13 A. Uh-huh.

14 Q. -- to the front.

15 A. Right.

16 Q. Now what should I do?

17 MR. DELGADO: Same objection;
18 incomplete hypothetical.

19 THE WITNESS: I would like to
20 know if this has some musical significance. I
21 mean, you know, the -- the trademark is for
22 some particular kind of services. We -- we
23 could certainly spend a lot of time analyzing
24 this -- this situation. And, you know, part of
25 that will be driven by what is the prospective

1 buying misspellings of big companies, for example --

2 A. Uh-huh.

3 Q. -- gopgle.com --

4 A. Uh-huh.

5 Q. -- or yehoo.com, Y-E-H-O-O dot-com?

6 A. Uh-huh.

7 Q. I'm thinking of buying misspells of the
8 established sites --

9 A. Established sites.

10 Q. -- and putting up adsense pages.

11 A. Right.

12 Q. Okay.

13 A. Right. He has stated an intention to
14 register these domain names because they are --
15 because he states that they are misspells of
16 established sites, presumably Google and Yahoo. And
17 he has stated that this is his intention in
18 selecting these domain names. Because they are
19 misspells of established sites.

20 Q. Okay. And so if we look at page 2 of
21 6 --

22 A. Uh-huh.

23 Q. -- I think you've got a comment at the
24 bottom.

25 A. Right.

1 Q. And you indicate, yes, it would be a
2 problem that can result in civil penalties as much
3 as \$100,000 per domain name.

4 A. Uh-huh.

5 Q. I take it this would be a -- pretty much
6 a gimmie from your point of view if he registered
7 these domain names?

8 A. Here someone has -- well, not if he
9 registered these domain names. Again, I don't -- I
10 don't, you know, necessarily know what -- what the
11 situation is. But the really important part is what
12 he says, I am thinking of doing this for this
13 purpose. That is a direct statement of intent. And
14 that's actually, you know, where I had premised, you
15 know, my response to that hypothetical, including
16 the fact where he includes a statement of intent.

17 Q. And the intent is to put up adsense
18 pages?

19 A. No. The intent is buying misspells of
20 established sites, and he gives two examples.

21 Q. Got it.

22 A. If you intend to buy a misspell of
23 Google for the purpose of capitalizing on the known
24 established status of that as a mark, you are
25 hitting the -- definitely hitting the bag, rounding

1 Q. Page 14, the trademark, the fourth one,
2 blink.

3 A. The word blink is a dictionary word.

4 Q. And it's listed as a trademark in this
5 Pleading, correct?

6 A. It is listed as a -- a trademark
7 registered to Blink.com, Inc. for goods and services
8 which are not identified.

9 Q. Okay. And I guess my point here is you
10 certainly acknowledge that dictionary words can, in
11 fact, be trademarks just as in the --

12 A. Uh-huh.

13 Q. -- apple or tide examples we talked
14 about earlier?

15 A. Yep. It all depends on what's going on.

16 Q. Okay. Now, you indicated that you had
17 had an interesting discussion with the attorney
18 in -- in this case. Was it Michael King?

19 A. No. It was -- you know, I believe I may
20 have tangentially had some discussion with -- with
21 Brett Lewis.

22 Q. Okay. And it appears from the Pleading
23 here that this case was May of 2008, at least the
24 Pleading that we're looking at here as Exhibit 130
25 was May 2008, correct?

1 A. It looks that way, yeah.

2 Q. Okay. And do you remember commenting on
3 this case of Verizon versus Navigation Catalyst
4 Systems on the internet?

5 A. I don't remember that. I very well may
6 have. I probably did.

7 Q. Do you remember indicating about NCS and
8 Verizon that, quote, These suits are simply jousting
9 matches between two different gangs of pirates,
10 period, end quote?

11 A. That is likely not the entirety of
12 something I posted there. But I -- that's what I
13 referred to earlier in that if one can demonstrate
14 a -- a -- you know, an equitable bar to relief by
15 the plaintiff, then that is, you know, a -- a
16 strategy that is quite often taken.

17 Q. Okay. I move to strike.

18 I -- I think question is, do you
19 recall referring to Navigation Catalyst System, who
20 has hired you in this case --

21 A. Uh-huh.

22 Q. -- okay, and Verizon, in relation to
23 this Exhibit 130 --

24 A. Uh-huh.

25 Q. -- this lawsuit between the two of them,

1 as that -- that the case involved dispute between --
2 let me get it again.

3 A. Uh-huh.

4 Q. These suits are simply jousting matches
5 between two different gangs of pirates.

6 A. Yes. The -- the -- you're -- you're --
7 you're reading that -- I know how you're reading
8 that.

9 Q. Okay. So let me ask you --

10 A. There are accusations. There are cross
11 accusations. Both of them are accusing the other
12 of -- of -- you know, of bad behavior.

13 Q. Okay.

14 A. That's what claims and counterclaim are
15 about.

16 Q. I understand that.

17 A. Uh-huh.

18 Q. But let me ask you -- so you indicate
19 that when -- when -- when the plaintiff sues a
20 defendant and the defendant countersues --

21 A. Uh-huh.

22 Q. -- those are called cross claims under
23 the law, correct?

24 A. Counterclaims.

25 Q. Counterclaims under the law, correct?

1 A. Yes.

2 Q. Okay. But you refer to Navigation
3 Catalyst System in relation to this suit and Verizon
4 as two different gangs of pirates. Do you recall
5 that?

6 A. Verizon accuses Navigation of
7 wrongdoing. Navigation accuses Verizon of
8 wrongdoing. We have allegations on both sides.
9 They're -- they're -- they're both jousting and
10 calling each other pirates.

11 Q. No, they're not. They didn't call each
12 other pirates, sir. You called Navigation Catalyst
13 System and Verizon pirates based on their claims and
14 cross claims of violations of the ACPA --

15 A. You're --

16 Q. -- did you not?

17 A. You're -- no. You're -- you're
18 reading -- you're -- you're trying to take my
19 characterization of the case with these accusations
20 going back and forth.

21 Q. Is it --

22 A. They're -- they're -- they're at sea
23 firing cannons at each other.

24 Q. So it's --

25 A. It's, you know, like a pirate ship

1 battle.

2 Q. So it's your sworn testimony that when
3 you refer to parties who are claiming and cross
4 claiming against you, that somehow that makes them
5 pirates?

6 A. In each other's eyes, yeah. The case
7 is -- is -- you've got two people in a room, firing
8 away at each other, over claims of piracy, yes.

9 Q. Let me show you exactly what you said.

10 A. Yeah.

11 Q. Because it seems to me that you're
12 suggesting that Navigation Catalyst System is bad
13 and that Verizon is bad, and the connotation, as
14 anyone would have, of the word pirate is someone who
15 steels from someone else.

16 A. That's the type of picture that one
17 attempts to portray when one is dealing in an
18 equitable situation where, you know, you say I did
19 something bad, I say you did something bad. We go
20 in front of the court and we both make each other
21 look bad. And the judge says, you know, a pox on
22 both your houses. That's -- that's a standard sort
23 of situation that -- that these things can -- can go
24 to.

25 Q. So when people file Complaints in

1 court -- or when you file Complaints in court on
2 behalf of your clients --

3 A. Uh-huh?

4 Q. -- you're a pirate in that instance, or
5 is it only when people countersue that all of a
6 sudden they go from plaintiff and defendant to,
7 quote, unquote, pirates?

8 (Whereupon, there was a brief
9 interruption.)

10 THE WITNESS: The -- I can take
11 you down the hall to the table where I spent
12 many hours in this firm being mentored to show
13 you a picture of a sailing ship firing abroad
14 side, which is over the -- the table of the
15 president of this firm, and which I spent many
16 long hours staring at while -- while learning
17 some of the practice of law.

18 But yeah, they're calling each
19 other pirates. They made accusations -- mutual
20 accusations of piracy.

21 BY MR. SCHAEFER:

22 Q. Sir, they did not. You said, These
23 suits are simply jousting matches between two
24 different gangs of pirates --

25 A. Right.

1 Q. -- period, end quote. That is your
2 quote.

3 A. Uh-huh.

4 Q. You are referring to them --

5 A. Right.

6 Q. -- as two different gangs of pirates,
7 correct?

8 A. I think -- I think -- you know, we -- we
9 can do this all night long. You have an
10 interpretation of what I meant in a -- a casual
11 comment written on a blog. I have an interpretation
12 of what I meant. If you would like your
13 interpretation of my intent in using those words to
14 be controlling, you know, that's fine. But I --
15 I -- I don't read it that way.

16 Q. Okay. Were you meaning to demean
17 Verizon at all -- leaving the issues of Navigation
18 Catalyst System aside, were you meaning to suggest
19 by the use of the word pirates some negative
20 connotation with regards to Verizon in that suit?

21 A. It's -- it's a mud slinging contest.
22 You know, it's -- it's the old adage you don't
23 wrestle with a pig, the pig -- the pig only likes it
24 and you get muddy.

25 Q. Because your comment doesn't suggest

1 anything having to do with the fact that they're
2 suing each other. You pull a quote --

3 A. Yeah.

4 Q. -- that you're commenting on. And the
5 quote that you pulled from is -- somebody posted a
6 blog, domain tasting is the result of the
7 individual, comma, gains access to this data versus
8 those who have network infrastructure methods for --

9 A. What exhibit --

10 Q. Hold it -- for monitoring such data.

11 A. Uh-huh.

12 Q. Okay. That's the quote. I'm going to
13 show it to you in a second, because I just have it
14 on the computer screen.

15 A. Are we going to mark?

16 Q. We will mark it at a later date.

17 A. Because we're -- we're apparently --
18 okay. So apparently you have ripped one sentence
19 from a -- a -- a -- is this some sort of an ongoing
20 discussion of something.

21 Q. It is your -- what I'm telling you, sir,
22 is you pulled the quote --

23 A. Uh-huh.

24 Q. -- about domain tasting.

25 A. I pulled a quote?

1 Q. From above, you pulled a quote.

2 A. Above --

3 Q. Above your comment. And you'll see it
4 in a second, but this is the deal. You pulled a
5 quote saying, domain tasting is the result of
6 individual, gains access to this data versus those
7 who have network infrastructure methods for
8 monitoring such data, referencing domain tasting.
9 And then you say, dot, dot, dot, and then getting
10 sued by a company which is in the business of
11 monetizing error traffic at the ISP level, these
12 suits are simply jousting matches between two
13 different gangs of pirates.

14 A. Uh-huh.

15 Q. So let's go ahead and I'll have you take
16 a look. And then we'll capture that on video and
17 see if that refreshes your recollection about your
18 comments.

19 A. Let's see. It looks like we're down to
20 comment No. 26 in a thread. And, you know,
21 they're -- they're -- you know, they're exchanging
22 accusations. They're exchanging volleys, accusing
23 each other of being pirates, while both of them are
24 essentially looking to profit from domain traffic to
25 nonexistent -- hitherto nonexistent domains. And in

12:46:34 1 in evidence.

12:46:34 2 THE WITNESS: I don't know.

12:46:35 3 BY MR. SCHAEFER:

12:46:35 4 Q You don't know?

12:46:36 5 A No, I don't know.

12:46:40 6 Q Have you ever reviewed raw DNS error data
12:46:42 7 and taken a look at like, for instance, a snapshot
12:46:45 8 of what comes back there?

12:46:47 9 A No, I haven't.

12:46:48 10 That's -- that's why I say I -- I can't say
12:46:50 11 what the numbers are.

12:46:50 12 If -- if people are navigating to site very
12:46:54 13 frequently, they may have it bookmarked. It may be
12:46:57 14 in the auto complete memory of -- of their browser.

12:47:00 15 I don't know really whether, you know, one
12:47:02 16 thing is more likely -- one class of names is more
12:47:09 17 or less likely to be misspelled than any other.

12:47:09 18 It's a good question.

12:47:09 19 Q Well, it is a good question.

12:47:11 20 So I'm wondering why -- and you're familiar
12:47:12 21 with the domainer community, but you're certainly
12:47:16 22 aware that there are domainers out there who
12:47:20 23 actually register typographical variations of famous
12:47:23 24 trademarks -- correct? -- in hopes of diverting
12:47:23 25 traffic?

12:47:24 1 A There are people that do that, yes. That's
12:47:27 2 why there are laws against it.

12:47:29 3 Q Right. And you sometimes speak about those
12:47:31 4 issues --

12:47:31 5 A Uh-huh.

12:47:31 6 Q -- and the hazards of it; correct?

12:47:33 7 A Yes. But I -- I thought your question was
12:47:35 8 in the context of domain tasting, which was, you
12:47:39 9 know, not what I would consider to have been a
12:47:41 10 widespread -- widespread phenomenon.

12:47:45 11 Q Right. No, I'm not really not interested
12:47:48 12 in domain tasting today unless I indicate.

12:47:51 13 So I'm just talking about --

12:47:51 14 A Okay.

12:47:52 15 Q -- you know, the use of -- of DNS error
12:47:55 16 data in order to, you know -- in order to identify
12:48:01 17 domains that aren't registered that might have a lot
12:48:04 18 of traffic.

12:48:05 19 So you know, that -- that's really the
12:48:09 20 thrust of my prior question concerning DNS error
12:48:12 21 data.

12:48:12 22 A Okay.

12:48:12 23 Q But with regards to domainers in general,
12:48:16 24 why is it that domainers are sometimes drawn to try
12:48:22 25 and register typographical variations of famous

12:48:27 1 trademarks?

12:48:28 2 MR. DELGADO: Objection; calls for
12:48:29 3 speculation, lacks foundation.

12:48:30 4 THE WITNESS: That's -- so -- so we're not
12:48:33 5 talking about DNS error data.

12:48:33 6 BY MR. SCHAEFER:

12:48:33 7 Q Not --

12:48:34 8 A We're talking about people who
12:48:36 9 intentionally go out and look for this kind of
12:48:38 10 thing.

12:48:38 11 Q Sure.

12:48:39 12 A Probably because they think they can
12:48:44 13 capture, you know, some -- some traffic.

12:48:48 14 If you own the last gas station before
12:48:52 15 Disney World, you probably get more business than
12:48:56 16 someone who's out in a swamp in Florida.

12:48:59 17 Q You have a website johnberryhill.net.com?

12:49:05 18 A I -- I have -- I don't -- I have the domain
12:49:08 19 name johnberryhill.com. I have a -- a placeholder
12:49:11 20 web page there where I provide my contact
12:49:16 21 information.

12:49:16 22 But I don't -- I -- I think you and I have
12:49:22 23 discussed our -- our divergent views on attorney
12:49:25 24 advertising.

12:49:25 25 Q With regards to your website, you don't

12:49:28 1 probably do a whole lot of traffic, do you?

12:49:30 2 A I wouldn't have the foggiest notion.

12:49:34 3 Q Now, isn't it true that the reason why
12:49:37 4 people sometimes target typographical variations of
12:49:43 5 famous trademarks is because they believe that on a
12:49:47 6 percentage basis enough people will make that
12:49:51 7 typographical error to where they'll make money if
12:49:54 8 they show ads on that page?

12:49:56 9 MR. DELGADO: Objection; calls for
12:49:57 10 speculation.

12:49:57 11 THE WITNESS: That-- that may be true,
12:49:58 12 yeah.

12:49:58 13 BY MR. SCHAEFER:

12:49:58 14 Q Well, you certainly know for a fact that
12:50:00 15 it -- it is true, do you not?

12:50:01 16 A Do I know --

12:50:01 17 MR. DELGADO: Same objection.

12:50:03 18 Hold on, John.

12:50:03 19 THE WITNESS: Okay.

12:50:04 20 MR. DELGADO: Same objection, and it's
12:50:04 21 argumentative.

12:50:06 22 Go ahead.

12:50:07 23 THE WITNESS: There are people who try to
12:50:09 24 sell them to the trademark owners.

12:50:11 25 I mean, you know, there are people who