

Confidential - Under Seal

322

12:50:14 1 register domain names for -- for lots of reasons.

12:50:18 2 Is -- is -- are there -- are there people

12:50:21 3 as a subset of, you know, domainers, people

12:50:26 4 wandering the earth, that do that sort of thing?

12:50:29 5 I'm sure there are, yes.

12:50:30 6 BY MR. SCHAEFER:

12:50:31 7 Q And I guess my thought is you're -- you're

12:50:33 8 suggesting that you're sure there are as though

12:50:36 9 it's -- it may be out there.

12:50:37 10 But isn't it true that, in fact, you know

12:50:39 11 there are people who are out there doing that, and

12:50:42 12 you talk about those people sometimes?

12:50:45 13 A Yes, there are -- there are people who have

12:50:47 14 done that, yes.

12:50:55 15 Q Now, what's your view as to whether or not

12:50:56 16 it's good for the domaining community when people go

12:51:04 17 out and target typographical errors of trademarks in

12:51:08 18 order to generate a parking page, advertising

12:51:12 19 traffic, and -- and profits?

12:51:14 20 Is it good for the community, bad for the

12:51:17 21 community? What's your view?

12:51:18 22 MR. DELGADO: Objection; vague and

12:51:19 23 ambiguous.

12:51:19 24 THE WITNESS: Good in -- in some moral

12:51:22 25 sense?

01:13:28 1 It was -- the thing with John Zuccarini is,
01:13:32 2 like I said, he -- it was his behavior in particular
01:13:36 3 which was the model for, you know, subsequent rules
01:13:40 4 and regulations.

01:13:41 5 And my understanding is that, you know, he
01:13:44 6 would -- he would change, you know, and stay one --
01:13:49 7 one step ahead of the -- you know, one step ahead OF
01:13:54 8 the changes to the extent he could.

01:13:55 9 But, you know, he found himself being sued
01:13:59 10 in a lot of jurisdictions where he couldn't
01:14:01 11 adequately represent himself.

01:14:03 12 But you're asking whether he cared?

01:14:03 13 Q Let me ask you this --

01:14:05 14 A I think when they sent him to jail, he
01:14:10 15 cared.

01:14:11 16 Q Electronicsboutique without the "u," was
01:14:14 17 that actually one of the domains that was litigated,
01:14:17 18 to your knowledge, or were you using that as just
01:14:20 19 purely a hypothetical example?

01:14:21 20 A He had -- one of the -- one of the -- one
01:14:24 21 of the -- one of the cases against him was brought
01:14:25 22 by an outfit called Electronics Boutique, which
01:14:29 23 was they -- I don't even know if they exist anymore.
01:14:33 24 You know, these trademarks come and go.

01:14:35 25 But they ran, I think, mall kiosks selling

01:14:38 1 electronic things or something.

01:14:40 2 And my understanding is that he had
01:14:43 3 received a default judgment against him in a case
01:14:47 4 where it appeared he had intentionally registered a
01:14:51 5 number of variations of their name as a domain name
01:14:55 6 and had it going to pornography and a bunch of
01:15:00 7 offensive stuff.

01:15:01 8 Q And that tends -- amongst other things,
01:15:05 9 that tends to make trademark owners a little bit
01:15:08 10 more mad, in your experiences, when you actually
01:15:11 11 send consumers toward pornography?

01:15:14 12 A You know, it actually depends, oddly --
01:15:17 13 oddly enough. I'm -- I'm going to leave it at that
01:15:19 14 because, I mean, these things always get fact
01:15:22 15 specific.

01:15:22 16 But I was involved in a -- in a case where
01:15:25 17 there was a trademark for a piece of medical
01:15:29 18 equipment, and my client was using the domain name
01:15:33 19 for pornography because the -- the words in the --
01:15:38 20 in the -- in the domain name lent themselves one way
01:15:43 21 or the other.

01:15:44 22 And we heard from the medical equipment
01:15:46 23 manufacturer.

01:15:46 24 He said, "Well, you just keep that thing
01:15:48 25 pointed at pornography and don't send it to any

01:15:49 1 competing medical equipment, we'll be fine."
01:15:52 2 So you never know.
01:15:53 3 Q Never know.
01:15:54 4 Now, the section that starts:
01:15:55 5 "The law in the United States
01:15:56 6 is that if you register a domain
01:15:58 7 name that is identical or
01:15:59 8 confusingly similar to a trademark
01:16:01 9 with the specific bad faith
01:16:03 10 intentions to make a profit of
01:16:06 11 misdirected traffic to that
01:16:07 12 trademark, you can be held liable
01:16:09 13 for up to \$100,000 per domain ...
01:16:12 14 absent any other damages."
01:16:14 15 I want to ask you about that particular
01:16:17 16 sentence.
01:16:17 17 A Uh-huh.
01:16:18 18 Q Was that an accurate statement of the law
01:16:21 19 as of 2007?
01:16:27 20 A I -- what -- were you reading from the --
01:16:31 21 were you reading from the statute, or were you
01:16:32 22 reading from the transcript?
01:16:33 23 Q I'm reading from the transcript, the very
01:16:36 24 first page, the bottom paragraph --
01:16:38 25 A Uh-huh.

01:16:39 1 Q -- after you talk about John Zuccarini, you
01:16:43 2 say, "The law in the United States is that" -- and
01:16:45 3 then through the end of that sentence.

01:16:50 4 (Document reviewed by the witness.)

01:16:50 5 THE WITNESS: With the specific -- that
01:16:52 6 was -- you know, that's a -- a fair off-the-cuff
01:16:56 7 summary, sure.

01:16:57 8 BY MR. SCHAEFER:

01:16:57 9 Q Okay. And you're saying here that in order
01:17:02 10 for -- if there -- there could be a problem not only
01:17:06 11 if the domain name is identical to the trademark but
01:17:09 12 also if it's confusingly similar to the trademark.

01:17:13 13 And that's true -- correct? -- under the
01:17:16 14 statute?

01:17:19 15 You could be liable if it's not only
01:17:20 16 identical but confusingly similar?

01:17:27 17 A Yes.

01:17:27 18 Q Okay. What are the factors that you look
01:17:27 19 at in determining whether or not a domain name --
01:17:31 20 and leaving all the other issues that you have to
01:17:33 21 get into -- but just in terms of the "confusingly
01:17:36 22 similar" element, what are the factors that you look
01:17:39 23 at, trying to assess whether or not a domain name is
01:17:42 24 confusingly similar to a trademark?

01:17:46 25 A It can be typographically similar.

01:17:50 1 Q Phonetically similar?

01:17:53 2 A It could be -- it could be phonetically
01:17:55 3 similar.

01:17:55 4 Typographic similarity is more important,
01:17:58 5 actually, because, you know, you don't really
01:18:00 6 navigate audibly.

01:18:02 7 So if I take, you know, the -- the famous
01:18:06 8 spelling of the word "fish," which is the "gh" from
01:18:10 9 laugh, the "o" from women, and the "ti" from nation,
01:18:14 10 g-h-o-t-i, then it spells "fish," if I go
01:18:19 11 phonetically. But that's not how it's typed.

01:18:22 12 Q Sure.

01:18:22 13 And "Phish" is also, as you may or may not
01:18:24 14 be aware, a famous band, P-h-i-s-h, and perhaps an
01:18:30 15 ice cream flavor for Ben & Jerry's as well as
01:18:32 16 f-i-s-h swimming in the ocean; true?

01:18:36 17 A It could be a lot of different things.

01:18:38 18 Q Anything else that you look at in
01:18:44 19 determining whether or not a domain name is
01:18:46 20 confusingly similar to a trademark in making an
01:18:49 21 assessment as to whether it might be -- it might
01:18:53 22 meet that element?

01:18:54 23 A Yeah, yeah.

01:18:54 24 Well, you might, if -- if given an domain
01:19:00 25 name and given a trademark, you might also look at,

01:19:03 1 you know, what other marks are in that -- in that
01:19:07 2 field.

01:19:08 3 And I'll give you an example taken from
01:19:10 4 a recently decided case under the UDRP. It
01:19:15 5 involved the domain name seventysevn --
01:19:23 6 s-e-v-e-n-t-y-s-e-v-n.com, all right, written out as
01:19:24 7 the word "seventy-seven."

01:19:26 8 The alleged mark was asserted by the people
01:19:32 9 that run the American Eagle Outfitters. Apparently
01:19:35 10 they -- they were founded in 1977. They stamp a lot
01:19:38 11 of -- they allege that they stamp some of their
01:19:40 12 clothes with the mark "77," the two digits.

01:19:45 13 And you know, so it's an interesting
01:19:48 14 question whether or not, you know, someone's mark 77
01:19:52 15 is similar to the words "seventy-seven" written out.

01:19:57 16 Now, it turns out that you can conduct a
01:19:59 17 search of registered trademarks for clothing and
01:20:02 18 find that, for some reason -- I guess it's because
01:20:06 19 seven is a lucky number -- there are at least 20
01:20:10 20 other federally registered trademarks for clothing
01:20:14 21 that involve seven, s-e-v-e-n, written out; the
01:20:19 22 number 7, the digit 77. There was somebody else
01:20:22 23 that had 1877, because that's when they were found.

01:20:28 24 So in that situation, if one case says,
01:20:31 25 given that 77, the digits, were a mark for clothing,

01:20:35 1 and someone else is using seventy-seven, the words
01:20:39 2 written out, is this confusingly similar to that?

01:20:44 3 You know, the analysis kind of comes down
01:20:46 4 to -- well, you have to bridge that gap; you have to
01:20:49 5 jump over, you know, 20 other registered trademarks
01:20:53 6 in that field.

01:20:54 7 So you know, it depends upon the degree of
01:20:57 8 distinctiveness of the mark itself, you know,
01:21:01 9 whether that mark is used for, you know, other
01:21:05 10 things.

01:21:06 11 For example, I believe in this case the
01:21:09 12 plaintiff is Weather Underground, which is, you
01:21:12 13 know, the name of a -- of a radical organization,
01:21:16 14 you know, from the 1960s.

01:21:19 15 So you know, I think you've got probably
01:21:23 16 tons of Sarah Palin supporters that would never get
01:21:26 17 a -- you know, the temperature in -- in Duluth by
01:21:29 18 going to this website because they'd be, you know,
01:21:32 19 participating in some terrorist act.

01:21:35 20 Q Sure.

01:21:35 21 And so really one of the things that you --
01:21:38 22 you're looking at is what we refer to as the
01:21:41 23 strength of the mark; true?

01:21:42 24 A Yeah.

01:21:43 25 Q And that is to say, the stronger the mark,

01:21:45 1 the more protection it receives under trademark law?

01:21:48 2 A Right.

01:21:48 3 Q Okay. And some of the factors that go into
01:21:50 4 the strength of the mark are how -- you know, how
01:21:55 5 much consumer awareness there really is around the
01:21:58 6 mark.

01:21:58 7 A Uh-huh.

01:21:59 8 Q Okay. How long they've been around, how
01:22:02 9 distinctive the brand is -- that is to say, how
01:22:06 10 unique it is -- these types of factors; correct?

01:22:09 11 A Yeah. There are a number of -- number of
01:22:11 12 ways one can -- can look at distinctiveness. And
01:22:14 13 how distinctive a mark is is a factor in whether or
01:22:20 14 not something other than the mark is confusingly
01:22:22 15 similar to it.

01:22:22 16 Q Okay. And then you go on in this paragraph
01:22:25 17 to talk about, you know, what does it mean -- the
01:22:27 18 intent to profit, what does it mean.

01:22:31 19 And it looks like what you're suggesting
01:22:33 20 here is it doesn't matter if you actually did
01:22:36 21 profit; if your intent in registering the domain or
01:22:40 22 using the domain or trafficking in the domain was to
01:22:42 23 profit, then you may have a problem.

01:22:42 24 A Yeah.

01:22:46 25 The question that Craig asked here was

01:22:49 1 suggesting that -- that people have suggested to him
01:22:52 2 that it's a good idea to specifically go after
01:22:56 3 trademarks and try to profit from them.

01:23:01 4 Q Right.

01:23:02 5 And in those instances, I take it, you
01:23:07 6 would agree that it's a bad idea because it could
01:23:11 7 land you some liability under the Anticybersquatting
01:23:19 8 Consumer Protection Act of up to \$100,000 per domain
01:23:19 9 name?

01:23:19 10 A In the discretion of the court. Yeah,
01:23:21 11 that's why I said someone can bring a suit and ask
01:23:23 12 for that much, and -- and they'll do it.

01:23:25 13 You know, in a jurisdiction where -- and,
01:23:27 14 again, he talked about his audience consisting of,
01:23:30 15 you know, inexperienced people, young people.

01:23:34 16 And I certainly wanted to convey to them
01:23:37 17 that being sued in some state other than the one you
01:23:43 18 do business in is not something that you can blow
01:23:47 19 off.

01:23:47 20 Q Sure.

01:23:48 21 And you and I see this on occasion where --
01:23:52 22 where domainers legitimately don't know it's wrong.
01:23:55 23 They think, "Well, it's available, and hey, Go Daddy
01:23:59 24 said I could register it." And so somehow they --
01:24:01 25 they think that that's -- it's appropriate.

01:24:02 1 And I take it that you try and help those
01:24:04 2 people understand what the law really is?

01:24:06 3 A Typically, yeah, by some kind of shock
01:24:09 4 treatment, yeah.

01:24:10 5 Q Exactly.

01:24:16 6 In those instances -- in fact, most of the
01:24:19 7 registrars that you're aware of actually make the
01:24:23 8 domain registrant affirm, prior to registering the
01:24:26 9 domain, that they're not infringing anyone's
01:24:29 10 trademark rights; true?

01:24:29 11 A There is boilerplate language that ICANN --
01:24:29 12 the Internet Corporation for Assigned Names and
01:24:33 13 Numbers, I-C-A-N-N -- requires registrars to include
01:24:42 14 in domain registration contracts and -- and
01:24:44 15 includes -- I believe it's incorporated into
01:24:48 16 paragraph 2 of the UDRP, which is longer than people
01:24:53 17 think it is -- where they say that "I'm not aware
01:24:57 18 that there's any unlawful activity contemplated
01:25:04 19 here."

01:25:05 20 Q And then as you continue to talk -- on to
01:25:07 21 the second page of the transcript, you talk about
01:25:10 22 this attitude that, "Well, what do I care if I get
01:25:13 23 hit with a \$100,000? I don't have any money, and
01:25:13 24 they'll never collect it."

01:25:16 25 I take it that that is something you hear

01:25:17 1 on occasion from people who have domain names that
01:25:20 2 are pretty questionable.

01:25:21 3 A I have -- I have heard that on occasion,
01:25:24 4 yeah, yeah. Although usually it's in the context of
01:25:28 5 if someone's received a civil complaint, and they
01:25:31 6 say, "They're suing me for \$100,000."

01:25:33 7 And the first question I always ask them is
01:25:35 8 "Do you have \$100,000?"

01:25:36 9 And they say, "No."

01:25:38 10 And I say, "Well, the good news is you're
01:25:39 11 not going to lose \$100,000."

01:25:41 12 Q Now, who are the companies out there that
01:25:45 13 you're seeing right now that are -- are pretty
01:25:46 14 aggressively pursuing people under the ACPA even
01:25:50 15 when the domain owner says, "Hey, I'll give you back
01:25:55 16 the domain"?

01:25:55 17 A These days very few.

01:25:58 18 I think that Microsoft has developed a --
01:26:05 19 more or less of a formula for settling these out.

01:26:09 20 I know that Dell Computer and Yahoo were --
01:26:17 21 were fairly aggressive, although it seems that the
01:26:21 22 course of their litigation has been more oriented
01:26:24 23 toward entering -- entering into a partnership with
01:26:28 24 the defendant on the -- on the revenue because
01:26:33 25 that's where they've -- they've settled out.

01:26:36 1 You know, there have been -- this
01:26:40 2 discussion was in October of 2007, which was a
01:26:44 3 couple of years ago. And among, you know, what
01:26:51 4 are -- what would have been primary crusaders in
01:26:54 5 these things -- Verizon, Yahoo, Dell Computer, and
01:26:57 6 to a certain extent Microsoft -- it seems they've
01:27:00 7 gone in a -- in a different direction than -- but
01:27:03 8 they were the -- the specific ones that I had in
01:27:05 9 mind when I talked about, you know, they'll --
01:27:09 10 they'll latch on and not let go against all reason.

01:27:12 11 Q Sure.

01:27:13 12 And so even though it is relatively rare
01:27:17 13 for someone to file an ACPA complaint over one of
01:27:20 14 these domain names -- is that -- that's true;
01:27:23 15 correct?

01:27:23 16 A Again, it gets into, you know, what's rare
01:27:27 17 and what's not rare.

01:27:28 18 But yeah, there are 76 million domain names
01:27:32 19 and, you know -- and a handful of ACPA suits. So
01:27:36 20 we'll call it rare.

01:27:36 21 Q And is there a kind of a thought in the
01:27:39 22 community sometimes that domainers feel like, "Well,
01:27:42 23 if I give -- if I give it back, I'll be okay. If
01:27:46 24 someone sends me a letter, I'll just give it back,
01:27:49 25 and I'll be okay"?

01:27:50 1 MR. DELGADO: Objection; calls for
01:27:51 2 speculation.

01:27:51 3 THE WITNESS: There are -- there are people
01:27:52 4 that think that, sure. You know, I -- I have heard
01:27:55 5 that kind of thing before.

01:27:57 6 There are -- there are people that believe
01:27:58 7 that they have to receive a cease and desist letter
01:28:02 8 first.

01:28:02 9 There are people that believe all manner of
01:28:05 10 things because, again, you've got crazy people
01:28:11 11 registering domains all the time. There's people
01:28:14 12 that believe everything.

01:28:15 13 BY MR. SCHAEFER:

01:28:16 14 Q Sure.

01:28:17 15 A It gets -- it gets to be like that question
01:28:19 16 is there life, you know, elsewhere in the universe.

01:28:21 17 Well, you know, there's a lot -- a lot of
01:28:23 18 places to look.

01:28:23 19 Q The domain name market is a little bit
01:28:27 20 unique in that the price for a domain name is
01:28:29 21 relatively low, and it's a global market; correct?

01:28:31 22 So the population of potential domainers is
01:28:35 23 literally the world.

01:28:36 24 A Yes. I have -- I have frequently said
01:28:37 25 that it's one of the only -- only venue in which for

01:28:41 1 \$12 you can piss off a major multinational

01:28:45 2 corporation.

01:28:45 3 Q Right.

01:28:45 4 A And that's -- you know, it -- it -- it's --

01:28:48 5 it's a different dynamic than, you know, what

01:28:51 6 business litigation used to be where you'd have, you

01:28:56 7 know, Spacely Sprockets suing Coswell Cogs for

01:28:58 8 patent infringement.

01:28:59 9 Now you have General Motors going after a

01:29:02 10 12-year-old kid.

01:29:04 11 Q Sure.

01:29:05 12 Now, in this -- in this -- continuing on

01:29:08 13 the second page, in that first paragraph, you talk a

01:29:15 14 little bit about, you know, people sometimes

01:29:15 15 consider themselves to be judgment proof.

01:29:15 16 And you're essentially suggesting to them

01:29:18 17 that, you know, "Even if you can't pay the judgment,

01:29:21 18 it's still no fun to have one against you because

01:29:24 19 it's going to stay there for a long time, and it --

01:29:26 20 it's going to cause certainly some level of

01:29:29 21 annoyance to you over your life even if you never

01:29:32 22 make a dime."

01:29:33 23 A Yes.

01:29:33 24 Q Okay. And then in -- in some instances

01:29:36 25 you've seen of -- of cybersquatters whose business

01:29:43 1 is, in fact, cybersquatting, they try to make
01:29:46 2 themselves judgment proof by forming companies
01:29:49 3 overseas sometimes; is that true?

01:29:52 4 MR. DELGADO: Objection; calls for
01:29:52 5 speculation.

01:29:53 6 THE WITNESS: I don't -- you know, I don't
01:29:54 7 know do business organizations.

01:29:57 8 There are people that -- that consult with
01:29:58 9 me on business organization strategies. You know, I
01:30:03 10 don't -- I don't do that, and I don't do tax.

01:30:07 11 I know that accusation is often made
01:30:10 12 because I happen to have a client who resides in the
01:30:13 13 Cayman Islands. And you know, they have this --
01:30:18 14 this feeling that, oh, well, he's using the Cayman
01:30:21 15 Islands as some sort of tax dodge, you know.

01:30:23 16 But, you know, that's -- that's actually
01:30:26 17 where he's located and where his business is.

01:30:28 18 I did another -- another case for a resort
01:30:34 19 owner who owns a property in Turks and Caicos, which
01:30:38 20 is another one of those funny jurisdictions.

01:30:40 21 And the reason why I don't have my normal
01:30:45 22 northeastern spring whiteness is because I just got
01:30:49 23 back from a week in Turks and Caicos where they are.

01:30:52 24 But, you know, people -- people do a
01:30:55 25 variety of things to structure their -- their tax

01:30:59 1 liability and so forth.

01:31:02 2 I'm not aware of anyone specifically who
01:31:04 3 has structured their business organization to avoid
01:31:08 4 liability for cybersquatting, no.

01:31:11 5 BY MR. SCHAEFER:

01:31:11 6 Q Okay. Have you seen instances where
01:31:15 7 companies have been formed as essentially shell
01:31:20 8 companies with no assets in order to register and
01:31:24 9 hold domain names so that if they do get hit,
01:31:28 10 there's nothing there in the company to collect on?

01:31:31 11 A I have not seen that, no.

01:31:32 12 Q If a company did do that, would you
01:31:35 13 consider that to be one of the many potential
01:31:38 14 factors to look at on the issue of bad faith?

01:31:43 15 MR. DELGADO: Objection; calls for a legal
01:31:44 16 conclusion, calls for speculation, and lacks
01:31:48 17 foundation.

01:31:55 18 THE WITNESS: No, I don't -- I don't see
01:31:56 19 why it should.

01:31:57 20 I carry a liability policy on my -- on my
01:32:02 21 automobile to protect me from, you know, financial
01:32:07 22 liability for claims in case I run someone over with
01:32:10 23 my car.

01:32:12 24 That doesn't -- if I hit a pedestrian, I --
01:32:15 25 I wouldn't expect him to come in waving, you know,

01:32:18 1 "But he had an insurance policy for this purpose."

01:32:21 2 I mean, people -- people do -- the entire

01:32:24 3 point of corporate structures is to manage

01:32:26 4 liability.

01:32:27 5 BY MR. SCHAEFER:

01:32:27 6 Q Okay. If a company was set up with

01:32:33 7 literally no assets and no employees --

01:32:35 8 A Uh-huh.

01:32:35 9 Q -- to act as the -- the name of the

01:32:40 10 registrant of domains which clearly infringe

01:32:45 11 third-party trademarks, would you consider that to

01:32:48 12 be a factor -- a bad faith factor under the ACPA?

01:32:53 13 MR. DELGADO: Objection; calls for

01:32:54 14 speculation.

01:32:54 15 THE WITNESS: I don't see why it would be.

01:32:55 16 MR. DELGADO: Hold on, John.

01:32:56 17 THE WITNESS: Okay.

01:32:56 18 BY MR. SCHAEFER:

01:32:57 19 Q Well, let me suggest to you if they --

01:32:58 20 MR. DELGADO: Hold on. Hold on. Let me

01:33:00 21 interpose my objections.

01:33:00 22 MR. SCHAEFER: Sure. Go ahead.

01:33:01 23 MR. DELGADO: Calls for speculation,

01:33:02 24 incomplete hypothetical, lacks foundation.

01:33:04 25 Now I'll let John give you the answer, and

01:33:04 1 you can ask your next question.

01:33:07 2 MR. SCHAEFER: I think he said he didn't

01:33:09 3 think it was.

01:33:10 4 MR. DELGADO: Go ahead.

01:33:10 5 THE WITNESS: I don't -- I don't see why --

01:33:12 6 why it would -- would make the intent to profit from

01:33:16 7 a trademark any more or less evident.

01:33:20 8 You know, like I said, there are people

01:33:21 9 that incorporate, you know, in various ways.

01:33:25 10 I'm not a business attorney. I'm not a tax

01:33:28 11 attorney. You know, I don't -- I do get a lot of

01:33:32 12 inquiries on "How should I, you know, structure

01:33:35 13 various aspects of my business" from people.

01:33:39 14 It's not an area I have any expertise in.

01:33:42 15 BY MR. SCHAEFER:

01:33:44 16 Q With regards to this bottom paragraph on

01:33:48 17 page 2, starting about halfway down where it says

01:33:52 18 "Berryhill" --

01:33:53 19 A Uh-huh.

01:33:53 20 Q -- you note in that -- in that third line

01:33:58 21 down sentence:

01:33:58 22 "Now, I should back up a moment

01:34:00 23 and say that, you know, prevention

01:34:02 24 is certainly better than the cure."

01:34:03 25 A Uh-huh.

01:34:04 1 Q I take it what you mean by that is it's
01:34:09 2 better to not register typographical errors of
01:34:13 3 famous brands than it is to try and get yourself out
01:34:16 4 of the problem once it becomes a problem; is that
01:34:20 5 fair?

01:34:22 6 A I think that if someone had been
01:34:26 7 unreflectively doing this, then they should, yeah,
01:34:30 8 definitely try to find a way to weed out the domains
01:34:35 9 that they may have that might be problematic.

01:34:44 10 I mean, clearly, you know, if one could --
01:34:46 11 I could say, "Well, don't register any domain
01:34:49 12 names." But that wasn't the context in which I'm
01:34:52 13 being asked here about, you know, where people want
01:34:54 14 to get involved in -- in making money in the domain
01:34:57 15 market.

01:35:00 16 The best answer -- I mean, like any lawyer,
01:35:02 17 you know, don't get out of bed in the morning,
01:35:04 18 and -- and then no one will sue you for anything.

01:35:07 19 Q And it's even better if you're going to get
01:35:11 20 out of bed in the morning, not to take the
01:35:14 21 neighbor's car without permission on the way to
01:35:17 22 work --

01:35:17 23 A No, no, no, no, no --

01:35:17 24 Q -- because you're increasing your risk by
01:35:23 25 doing so.

01:35:23 1 A No. I'll back up and say prevention is
01:35:23 2 better than the cure.

01:35:23 3 I think that if you have been intentionally
01:35:25 4 registering variations of famous marks, you don't
01:35:28 5 need to wait until you're notified by Microsoft that
01:35:32 6 they have trademark rights in these things.

01:35:37 7 What -- what I was talking about -- he's
01:35:41 8 taking about the receipt of claims. All right.

01:35:43 9 Q Uh-huh.

01:35:44 10 A It could be difficult for someone to tell
01:35:46 11 if there's a valid claim or not.

01:35:48 12 If you've been intentionally doing this and
01:35:50 13 what I'm saying is news to you, then you may want to
01:35:54 14 go take a look at the domain names that you've
01:35:56 15 registered and pull out ones that you know, you
01:36:00 16 know, on whatever basis you know are, you know,
01:36:05 17 famous trademarks.

01:36:07 18 Q I understand now.

01:36:09 19 And so --

01:36:10 20 A Prevention. Preventing -- yeah, we're
01:36:14 21 talking about preventing registering domain names.

01:36:17 22 I say if you've been doing this and this is
01:36:19 23 news to you, don't wait around to find out. Find
01:36:23 24 some way to filter them out.

01:36:25 25 Q I can't resist asking this question.

01:36:27 1 What is modding -- what is a modding chip?

01:36:30 2 A Modding chip. Oh, basically the -- it's
01:36:36 3 like jail breaking your iPhone.

01:36:39 4 The Xbox can -- the system software can be
01:36:43 5 modified in certain ways to do things that Microsoft
01:36:46 6 didn't want done with Xboxes, which are really, you
01:36:50 7 know, multipurpose computers.

01:36:51 8 And there are firmware chips that can be
01:36:57 9 used on them, but these firmware chips typically are
01:37:03 10 modifications of the Microsoft software which
01:37:07 11 involves copyright infringement to sell the mod
01:37:11 12 chips which allows people to cheat with games, and
01:37:14 13 get free Xbox accounts, and other nasty stuff.

01:37:18 14 Q Okay. In this particular section, you --
01:37:22 15 it appears that you're trying to make the point that
01:37:27 16 just because other people may be engaged in
01:37:30 17 cybersquatting and you know that they are is not an
01:37:34 18 excuse for you to do the same thing?

01:37:38 19 A Yes.

01:37:41 20 Q That is to say, you know, if you end up in
01:37:44 21 court, it's not going to help you to say, "Well, Joe
01:37:48 22 down the road is doing it too"?

01:37:51 23 A Well, right, yeah.

01:37:53 24 It's -- it's not even really a matter of --
01:37:56 25 of ending up in court.

01:37:58 1 It's, you know, still talking about in the
01:38:01 2 context of, you know, "If this is news to you" -- a
01:38:06 3 frequent objection that you get is "Well, but lots
01:38:09 4 of people do this."

01:38:10 5 Well, lots of people do lots of things.

01:38:13 6 Q I take it that's something that you hear on
01:38:15 7 occasion from -- from people that you talk to on
01:38:19 8 bulletin boards or by phone, that, you know, "Well,
01:38:24 9 other people are doing it"?

01:38:25 10 A Uh-huh.

01:38:26 11 Q That's -- I don't want to say a common
01:38:30 12 response, but at least it's a response that
01:38:32 13 sometimes you do hear; correct?

01:38:34 14 A It is a common refrain.

01:38:35 15 I'm surprised you don't have one in your
01:38:38 16 stack ready to go.

01:38:39 17 Q I'm sure I do.

01:38:41 18 And what do you tell people who tell you,
01:38:44 19 "Hey, but other people are doing it"?

01:38:46 20 If you see a clear cybersquatting situation
01:38:48 21 and they show you the domain, doesn't take you very
01:38:52 22 long to figure out that this is a problematic
01:38:54 23 domain --

01:38:55 24 A Uh-huh.

01:38:55 25 Q -- and they -- and they say to you,

01:38:58 1 "Mr. Berryhill, other people are registering other
01:39:00 2 variations of this trademark"?

01:39:03 3 A That's -- that's the kind of -- that's the
01:39:05 4 type of thing that I say, that, you know, "You're
01:39:08 5 the guy that got pulled over speeding on the highway
01:39:13 6 when everybody else was speeding."

01:39:14 7 Q Now, there's a sentence here that says:

01:39:16 8 "So, first, you know, if one
01:39:18 9 knows that one's traffic is coming
01:39:21 10 primarily from trademark typos, you
01:39:23 11 need to get rid of those."

01:39:27 12 Do you think -- you know, we've talked
01:39:29 13 numerous times throughout this deposition about
01:39:32 14 sometimes there's a word that you register as a
01:39:35 15 domain such as "apple," which has legitimate
01:39:42 16 non-trademark uses --

01:39:43 17 A Uh-huh.

01:39:43 18 Q -- and -- but if you use it in a particular
01:39:46 19 way, you may end up having a trademark problem;
01:39:49 20 correct?

01:39:49 21 A Uh-huh. Yeah.

01:39:51 22 And I go back to the -- to the premise of
01:39:53 23 this, is, you know, this guy Craig from Domains Into
01:40:00 24 Dollars apparently had the impression that people
01:40:04 25 that view his program and read his web page are

01:40:09 1 intentionally registering misspellings of popular
01:40:13 2 brands.

01:40:13 3 So, you know, again, that's what I'm
01:40:15 4 addressing.

01:40:16 5 If you're intentionally registering
01:40:18 6 typographic variations of famous marks, you know,
01:40:20 7 you know that that's what you're doing, you know,
01:40:23 8 because who I quite often -- you know, you hear from
01:40:26 9 people who had no idea that there's either anything
01:40:34 10 wrong with it or had no idea that, you know, a
01:40:39 11 particular term may or may not have been subject to
01:40:42 12 a trademark claim and may have registered the domain
01:40:47 13 name, you know, in total ignorance.

01:40:49 14 And you know, I explain it to them.

01:40:51 15 And they say, "Well, you know, but I didn't
01:40:53 16 do that."

01:40:53 17 And I said, you know, "And I understand
01:40:56 18 that. But you're -- you're not in a position to --
01:41:00 19 you know, to fight it."

01:41:01 20 Q All right. Now, if -- and this, I'm sure,
01:41:06 21 happens all the time -- but if there is a person
01:41:09 22 that comes to you and they've got a domain name that
01:41:12 23 they think is really unique. Okay. They had never
01:41:17 24 looked but never heard of the company before that's
01:41:21 25 now sent them a threat letter.

01:41:28 1 But you look at the trademark database, you
01:41:29 2 see that it is either identical or almost identical
01:41:29 3 to a registered trademark.

01:41:30 4 A Uh-huh.

01:41:31 5 Q Okay. What do you tell them in terms of
01:41:34 6 whether or not the fact that they didn't, in fact,
01:41:37 7 know that was a trademark -- is the -- is the -- is
01:41:40 8 the notion that "Hey, I didn't know that it was a
01:41:43 9 registered trademark" going to help them under the
01:41:46 10 UDRP or ACPA --

01:41:48 11 MR. DELGADO: Objection; calls for
01:41:49 12 speculation.

01:41:49 13 BY MR. SCHAEFER:

01:41:49 14 Q -- if it's registered on the USPTO database
01:41:52 15 and it's valid, and you don't see any problems with
01:41:55 16 the trademark?

01:41:55 17 MR. DELGADO: Calls for speculation,
01:41:57 18 incomplete hypothetical.

01:41:57 19 THE WITNESS: Okay. I'm sure criminal
01:42:01 20 defense attorneys have the experience of their
01:42:06 21 client being found in a room with a dead guy with a
01:42:11 22 gun in their hand, freshly smoking, who has a really
01:42:17 23 fascinating story about why he didn't shoot the dead
01:42:21 24 guy on the floor; and I'm sure those attorneys
01:42:24 25 advise their clients, "You better plea bargain your

01:42:28 1 way out of this."

01:42:29 2 Because what I frankly tell people a lot of
01:42:32 3 times is that the truth doesn't always win.

01:42:34 4 And absent a mechanism for, you know,
01:42:37 5 determining what's in someone's, you know, mind and
01:42:41 6 heart, than the bare-bone facts -- facts that you
01:42:46 7 stated, if there's nothing suggesting that they were
01:42:49 8 trying to avoid a problem, you know, they're not
01:42:52 9 going to have much to play with in -- in terms of
01:42:55 10 credibility of a defense.

01:42:56 11 BY MR. SCHAEFER:

01:42:57 12 Q And if it is a registered trademark and
01:42:59 13 it's valid, there are no problems with the
01:43:01 14 registration, are you aware of the presumption -- a
01:43:06 15 constructive notice of presumption under U.S.
01:43:09 16 trademark law?

01:43:09 17 A Oh, I deal with people from a lot of places
01:43:12 18 other than -- other than the U.S. And I think we've
01:43:15 19 talked about constructive notice in our -- in our
01:43:18 20 previous session.

01:43:20 21 And it is -- it is -- it is not some, you
01:43:25 22 know, open-ended thing.

01:43:26 23 But what I -- you know, again, in that
01:43:29 24 kind of a situation, you know, we're -- we're just
01:43:32 25 talking about they registered a domain name, what

01:43:35 1 is it being used for, I usually cut off the twists
01:43:39 2 and turns in the discussion very early on when
01:43:42 3 someone tells me they registered a domain name and
01:43:44 4 tells me what the domain name is, I usually ask them
01:43:46 5 up-front, "Why did you register the domain name?"
01:43:51 6 because that's -- that's what we're talking about
01:43:54 7 when we're talking about specific bad faith intent.

01:43:57 8 And they might be -- they might not be
01:44:01 9 telling me the truth.

01:44:02 10 But a truthful answer to that question is
01:44:04 11 what determines whether or not someone is engaged in
01:44:07 12 cybersquatting or not.

01:44:08 13 Q Sure.

01:44:09 14 But one of the -- one of the additional
01:44:11 15 hurdles that they're -- they're going to face if
01:44:13 16 it's a valid registered trademark is the -- the
01:44:18 17 constructive notice issue --

01:44:18 18 A It's the part -- this --

01:44:29 19 Q -- of U.S. trademark law.

01:44:33 20 A For the purpose of trademark infringement
01:44:37 21 claims, if someone is using something as a mark
01:44:41 22 in the relevant competitive market, yes, there's a
01:44:44 23 duty of constructive notice.

01:44:46 24 But we've -- we've talked about this notion
01:44:47 25 of some open-ended duty, you know, on the part of

01:44:49 1 every citizen marching around.

01:44:53 2 What we're talking about under the ACPA is

01:44:56 3 specific bad faith intent. We're talking about

01:44:59 4 willfulness. We're talking about intention.

01:45:02 5 That's not a trademark infringement action,

01:45:05 6 for which purpose, yeah, we do have a -- you know,

01:45:10 7 you do have constructive notice.

01:45:11 8 Q Now, in this sentence we were talking where

01:45:15 9 you talked about:

01:45:15 10 "So, you know, if one knows

01:45:17 11 that one's traffic is coming

01:45:18 12 primarily from trademark typos..."

01:45:20 13 I want to talk about that notion because

01:45:22 14 we've kind of shifted from just looking at the

01:45:24 15 domain name itself, and now we're looking apparently

01:45:27 16 at the traffic that's coming to your website on that

01:45:30 17 domain name.

01:45:30 18 A We're drilling -- we're drilling down

01:45:34 19 into a situation that was set up by your

01:45:40 20 intentionally registering typographic variations.

01:45:43 21 Q Sure.

01:45:44 22 So how does one know --

01:45:44 23 A So if you know that's where -- because you

01:45:46 24 were intentionally doing it.

01:45:47 25 Q Okay. Does it -- so is one of the ways

01:45:51 1 that someone knows that one's traffic is coming
01:45:54 2 primarily from trademark typos the fact that they --
01:45:58 3 that's what they intended to do in the first
01:46:00 4 instance, was divert traffic from a --

01:46:03 5 A Yeah.

01:46:03 6 Q -- from a famous trademark?

01:46:05 7 A That's what I'm talking about.

01:46:06 8 Q Okay. What are some other ways that

01:46:10 9 someone might know that one's traffic is coming

01:46:13 10 primarily from trademark typos?

01:46:14 11 If they have a parking page up, for

01:46:20 12 instance?

01:46:20 13 MR. DELGADO: Objection; calls for

01:46:24 14 speculation.

01:46:24 15 THE WITNESS: I'm -- I'm -- I'm confused by

01:46:27 16 that.

01:46:27 17 BY MR. SCHAEFER:

01:46:27 18 Q Sure.

01:46:28 19 So let's say you have a parking page up

01:46:31 20 on --

01:46:31 21 A You're taking one phrase out of a sentence

01:46:33 22 that was in a particular context.

01:46:35 23 Q Sure.

01:46:37 24 A You know, if you're -- if you're out, you

01:46:41 25 know, beating your brother Ed, you should stop doing

01:46:44 1 that.

01:46:44 2 And you're saying, you know, "Well, how
01:46:45 3 else would you know if you're beating your brother
01:46:48 4 Ed?"

01:46:48 5 Because you were out beating your brother
01:46:51 6 Ed.

01:46:51 7 Q Well, let's get -- let's get out of this
01:46:53 8 context because I'm really more interested in the
01:46:55 9 concept of, you know, how does someone -- how might
01:47:01 10 someone know that their traffic is coming from -- is
01:47:07 11 trademark traffic essentially?

01:47:08 12 So let's just get out of this situation
01:47:14 13 where someone intentionally targeted a trademark
01:47:14 14 because that's not the only situation covered under
01:47:16 15 the ACPA, is it?

01:47:18 16 MR. DELGADO: Objection; calls for
01:47:19 17 speculation.

01:47:19 18 BY MR. SCHAEFER:

01:47:20 19 Q People can be found liable under the ACPA
01:47:23 20 if, in fact, they registered a trademark or they
01:47:27 21 registered a domain name --

01:47:28 22 A Uh-huh.

01:47:28 23 Q -- they say they didn't know about the
01:47:31 24 trademark, but it's registered, and they've been
01:47:34 25 monetizing that domain off of the trademarked

01:47:40 1 traffic; is that true?

01:47:41 2 MR. DELGADO: Objection; calls for a legal
01:47:44 3 conclusion.

01:47:44 4 THE WITNESS: The ACPA requires an element
01:47:46 5 of intent.

01:47:47 6 BY MR. SCHAEFER:

01:47:47 7 Q So if someone comes to you and they say,
01:47:52 8 "Mr. Berryhill, I registered this variation of a
01:47:59 9 domain name that includes the word 'Microsoft' and
01:48:02 10 adds a word. But I had no idea that Microsoft was a
01:48:08 11 trademark," would you tell them that they have no
01:48:11 12 problem and move on because they cannot be found
01:48:13 13 liable under the ACPA --

01:48:15 14 A No.

01:48:15 15 Q -- because they didn't have the intent?

01:48:16 16 A No, I would not tell them that.

01:48:18 17 Q Why not?

01:48:18 18 A Because I -- their claim is not going to be
01:48:22 19 found to be credible. That's why. There's no other
01:48:26 20 factors.

01:48:26 21 You know, when we talked about bad faith
01:48:29 22 intent previously, I said you've got to look at the
01:48:32 23 totality of circumstances.

01:48:34 24 The statute sets up a particular situation.

01:48:38 25 You know, it applies to those situations

01:48:42 1 that they were contemplated back in 2000, but -- or
01:48:47 2 1999.

01:48:48 3 But whether or not someone is -- is setting
01:48:51 4 out to do something bad, you know, is something that
01:48:57 5 we -- we look at a bunch of -- we look at a bunch of
01:48:59 6 stuff.

01:49:00 7 Q Okay.

01:49:00 8 A Were they trying to avoid it? Did I have
01:49:02 9 the safety on my gun? Was I -- did I -- did I load
01:49:04 10 my gun with blanks? Did I think I loaded my gun
01:49:07 11 with blanks?

01:49:08 12 Q Did I fire into a crowd?

01:49:10 13 A Right.

01:49:11 14 Q Okay. So I'm just wondering -- you would
01:49:14 15 agree that ignorance of the law is no defense in
01:49:19 16 this particular instance of analyzing bad faith.

01:49:23 17 Someone can't just say, "Hey, I don't know
01:49:25 18 anything about trademarks or trademark law. I never
01:49:28 19 went to law school. I can't be found" --

01:49:28 20 A That's not the -- that's not the point.

01:49:30 21 Ignorance of the law is not the point.

01:49:34 22 You know, the point is am I trying to -- am
01:49:39 23 I trying to reap value based on something that's
01:49:44 24 known to me to be yours.

01:49:48 25 Q Okay. Fair enough.

01:49:50 1 A And you don't need to know trademark law to

01:49:53 2 know that.

01:49:53 3 And it's like you raised a good example.

01:49:56 4 You know, shooting into a crowd and killing

01:49:58 5 someone would not be first-degree murder in most

01:50:03 6 states because, you know, first-degree murder is --

01:50:06 7 is the intentional premeditated, you know, killing

01:50:10 8 of that person and does not normally -- you know,

01:50:12 9 we're talking about some form of recklessness that

01:50:16 10 raises it up toward, you know, some other degree.

01:50:19 11 But...

01:50:20 12 Q But it would probably be second-degree

01:50:22 13 murder, and it would still --

01:50:24 14 A Right.

01:50:24 15 Q -- intent?

01:50:25 16 A Did I have -- did I have -- did I have the

01:50:28 17 safety on? Was I trying not to shoot someone in the

01:50:31 18 crowd?

01:50:32 19 Are there some other factors present?

01:50:34 20 Q Sure.

01:50:35 21 But intent is still an element of

01:50:37 22 second-degree murder; that is to say, you can't say,

01:50:39 23 "Well, I didn't know the person -- any of those

01:50:41 24 people in the crowd. I didn't intend to shoot Bob,"

01:50:44 25 who turns out to be Bob Smith.

01:50:45 1 A Right.

01:50:46 2 Q It -- you expect -- you can be found guilty
01:50:51 3 of the natural consequences of your act and be found
01:50:55 4 to have had intent under that circumstance; correct?

01:50:58 5 A If you were the -- the difference is you're
01:51:02 6 shooting into a crowd, you know, you're looking to
01:51:09 7 shoot someone.

01:51:12 8 I mean, there are people that, you know --
01:51:15 9 there are people that get killed from falling
01:51:17 10 bullets.

01:51:17 11 I understand that -- that they have to do
01:51:19 12 this around New Year's out here in Los Angeles; they
01:51:22 13 have to warn people about falling bullets.

01:51:25 14 MR. DELGADO: Yeah, Miami too.

01:51:28 15 BY MR. SCHAEFER:

01:51:28 16 Q Because a bullet coming down --
01:51:28 17 (Speaking simultaneously.)

01:51:30 18 THE WITNESS: Because people shoot up in
01:51:31 19 the air, you know.

01:51:32 20 MR. DELGADO: It comes down as fast as it
01:51:33 21 goes up.

01:51:34 22 THE WITNESS: Right.

01:51:35 23 Now, you know, my local fire department
01:51:36 24 on July 4th put on a fireworks display and fired a
01:51:41 25 rocket into a crowd, you know, and hurt people.

01:54:31 1 someone in that review process who understands at
01:54:34 2 some level trademark law and what would or would not
01:54:37 3 constitute infringement; true?

01:54:40 4 A Well, again, we're not talking about, you
01:54:43 5 know, infringement.

01:54:46 6 But, you know, I'd be interested to know
01:54:50 7 what they were doing. But it's -- it's like any
01:54:52 8 kind of quality control process. You know, how
01:54:57 9 many -- how many are you, you know, catching in the
01:54:59 10 nets?

01:54:59 11 I mean, obviously if you're on a tuna ship
01:55:02 12 and pulling in the net, you want people that can
01:55:05 13 tell the difference between tuna and dolphins.

01:55:07 14 It doesn't mean you're going to end up with
01:55:11 15 no dolphins, you know, ending up on the deck of the
01:55:12 16 ship.

01:55:12 17 Q But if you put a bunch of blind people on
01:55:16 18 deck, you're right back to that willful blindness
01:55:16 19 concept --

01:55:16 20 A Right.

01:55:17 21 Q -- that we talked about at the last
01:55:18 22 deposition.

01:55:18 23 A Right. Yes. Like -- like Nelsonian
01:55:22 24 blindness.

01:55:22 25 THE REPORTER: Nelson?

01:55:22 1 THE WITNESS: Nelsonian, N-e-l-s-o-n-i-a-n.

01:55:28 2 And I believe I defined that last time.

01:55:28 3 BY MR. SCHAEFER:

01:55:30 4 Q I think so as well.

01:55:34 5 A All right.

01:55:34 6 Q A little further down you talk a little bit

01:55:38 7 about how to do a search, and you talk about the

01:55:41 8 USPTO trade -- trademark database being online.

01:55:43 9 But then you say:

01:55:44 10 "The best trademark ... system

01:55:45 11 is Google."

01:55:46 12 And you give an example of just plugging

01:55:48 13 in, you know, words into Google and seeing what

01:55:51 14 comes back.

01:55:52 15 A Uh-huh.

01:55:53 16 Q And if it happens to be a single company

01:55:57 17 that's coming back a lot, then, you know, you may

01:56:00 18 have a trademark issue.

01:56:01 19 Is that generally the approach?

01:56:02 20 A As an -- as an -- as an indicator.

01:56:06 21 One of the things I try to get across to,

01:56:09 22 again, an audience that has been specifically

01:56:12 23 identified to me as naive is this notion that --

01:56:18 24 that is very widespread, that a trademark is

01:56:22 25 something that the government hands out in the form

01:56:25 1 of registration certificates.

01:56:28 2 So I really try to get people away from
01:56:30 3 that, that sort of notion because they will, you
01:56:36 4 know, look something up in the USPTO database and
01:56:39 5 say, you know, "Well, it wasn't there. So it's not
01:56:42 6 a trademark," you know. No.

01:56:45 7 Does that mean -- and you know, maybe I'm
01:56:48 8 in danger of being misinterpreted when I -- when I
01:56:51 9 say that.

01:56:51 10 Should you look in the USPTO database?

01:56:53 11 Sure. But there's lots of things there.

01:56:55 12 And I see people -- you know, they see a
01:56:58 13 refused and abandoned, you know, crap.

01:57:01 14 You know, I can scrawl an Enrico Schaefer
01:57:03 15 or the back of this card and file it with the --
01:57:05 16 with the USPTO as a trademark application. I mean,
01:57:08 17 you know, it's full of stuff. It has a value.

01:57:14 18 And you know --

01:57:14 19 Q Well, there's a lot --

01:57:18 20 A -- registered -- in the United States,
01:57:19 21 federally registered trademarks are kind of gold
01:57:22 22 standard, you know, if one is able to identify what
01:57:25 23 they are in that database of -- you know, of
01:57:29 24 trademarks. It's a good first cut.

01:57:31 25 But I'm addressing the people that say,

01:57:34 1 "Oh, well, it wasn't there. So it's not a
01:57:36 2 trademark."

01:57:36 3 And I say, "Well, you might want to look at
01:57:39 4 Google."

01:57:39 5 And I've had that comment misinterpreted
01:57:41 6 too because people come back say, "Well, if I type
01:57:44 7 dog food into Google, you know, I get a billion
01:57:47 8 hits."

01:57:47 9 But the point is, depending upon the search
01:57:49 10 engine optimization, you know, you don't -- you
01:57:51 11 don't see 20 pages of hits all to Purina.

01:57:54 12 Q Right.

01:57:55 13 Now, but one of the other points is that
01:57:59 14 just because it's not in the USPTO database doesn't
01:58:01 15 mean it's not a trademark because it could be a
01:58:04 16 common law trademark, meaning that someone's
01:58:06 17 actually operating under that brand, they're doing
01:58:10 18 business or offering services, and they've got a
01:58:13 19 website which clearly shows they're operating under
01:58:16 20 that brand.

01:58:16 21 And that would be returned potentially on
01:58:20 22 Google even though it's not registered at the USPTO.

01:58:23 23 A That kind of thing can show up at Google,
01:58:25 24 right. And then you've got to look at, you know,
01:58:27 25 well, how big are they? What are they using the

01:58:30 1 mark for?

01:58:30 2 You know, because hitting on some, you

01:58:35 3 know, obscure word and it's used in, you know, some

01:58:37 4 small town in Texas for the local diner -- "I'm

01:58:43 5 registering a domain name, and I want to sell

01:58:46 6 stocks," you know, it's -- it's not a problem.

01:58:49 7 But given ten minutes between conference

01:58:52 8 sessions to address a guy with what he claims to be

01:58:56 9 an audience of very naive domain registrants who

01:59:01 10 think that intentionally registering trademarks is a

01:59:03 11 good idea, you know, I suggested that -- that that's

01:59:07 12 one of the most popular misconceptions I like to --

01:59:10 13 to hit.

01:59:10 14 Q Sure.

01:59:11 15 I see Will looking at me anxiously and

01:59:15 16 packing up his bag.

01:59:16 17 So I assume that we've expired our seven

01:59:19 18 hours. And I assume -- Mr. Berryhill, I could sit

01:59:20 19 and talk to you all day.

01:59:21 20 A I would love to just go on, frankly, you

01:59:24 21 know, having -- I mean, the ridiculousness --

01:59:24 22 (Speaking simultaneously.)

01:59:27 23 MR. DELGADO: You can do that -- actually

01:59:27 24 this is on his dime.

01:59:29 25 THE WITNESS: -- of spending ten hours on a