

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

THE WEATHER UNDERGROUND, INC.,
a Michigan corporation,

Plaintiff,

vs.

Case No. 2:09-CV-10756
Hon. Marianne O. Battani

NAVIGATION CATALYST SYSTEMS, INC.,
a Delaware corporation; CONNEXUS CORP.,
a Delaware corporation; FIRSTLOOK, INC.,
a Delaware corporation; and EPIC MEDIA
GROUP, INC., a Delaware corporation,

Defendants.

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**DECLARATION OF JOHN BERRYHILL IN OPPOSITION TO
PLAINTIFF'S MOTION FOR SUMMARY ADJUDICATION**

I, John Berryhill, declare as follows:

1. I am over the age of eighteen and am a retained expert for Defendants in this matter. I have personal knowledge of the facts stated herein except where stated on information and belief, and, as to those matters, I believe them to be true.

2. Attached as Exhibit A is a true and correct copy of my curriculum vitae.

3. Prior to the mid-1990's the internet was largely an academic and research endeavor, originally managed under the auspices of the Defense Advanced Research Project Agency. When the potential commercial importance of the internet was appreciated, management of certain technical coordination functions, including domain name registration, was transferred by Congress to the Department of Commerce. The Department of Commerce, in turn, contracted with the Internet Corporation for Assigned Names and Numbers ("ICANN") to establish policies and practices for the commercial registration of internet domain names.

4. Concurrent with developments in the 1990's, persons anticipating use of the internet by famous brand owners sought to register famous trademarks as domain names and then hold these domain names for ransom. Famous brand owners would later find that domain names corresponding to their trade or service marks had already been registered. In response, famous brand owners would attempt to apply the 1996 Federal Anti-Dilution Act (15 U.S.C. 1125) to address this practice. The classic case of this sort is *Panavision Int'l, L.P. v. Toepfen*, 141 F.3d 1316 (9th Cir. 1998).

5. While the *Panavision* case was successful, the intellectual property legal community was concerned that the Anti-Dilution Act was not an appropriately targeted statute under which to address cybersquatting, and, in response, the Anticybersquatting Consumer Protection Act ("ACPA") was enacted to address situations in which a domain name registrant intentionally sought to profit from exploitation of a famous trade or service mark. The ACPA has been successfully employed against persons who have intentionally registered trade or service marks for the purpose of holding them for ransom or profiting by diverting visitor to pornography. See, e.g. *Electronics Boutique Holdings Corp. v. Zuccarini*, 56 U.S.P.Q.2d 1705 (E.D. Pa. 2000).

6. Distinct from the practice of cybersquatting, other persons recognized that domain names could hold inherent value, apart from their association with trade or service marks. When domain name registration became generally available on a commercial basis, such persons sought to speculate in their value by registering and holding domain names for sale. *See, e.g. Cello Holdings v. Lawrence-Dahl Cos*, 89 F. Supp. 2d 464 (S.D.N.Y. 2000); 2002 U.S. Dist. LEXIS 1029 (S.D.N.Y. Jan. 24, 2002), *vacated on other grounds*, 347 F.3d 370 (2d Cir. 2003) (“A reasonable factfinder could conclude that Storey was not trying to extort a particular (or any) trademark holder. This was not, for example, a situation where a cybersquatter registered ‘applecomputer.com’ and then tried to extort Apple Computer into paying him money to release the domain name. Rather, the instant case is more akin to the situation where a person registers ‘apple.com’ and then offers it to a number of parties that might be interested in the domain name.”)

7. As domain speculators accumulated portfolios of domain names for potential sale, they sought ways to earn income from their domain names which remained unsold. Concurrently, as the commercial internet expanded, methods of searching the internet for relevant information became one of the primary activities conducted by internet users. Internet “search engines,” such as Yahoo! and Google, partially filled this need and also sought means to profit from the conduct of internet searches.

8. Aside from using internet search engines, however, another manner in which internet users find information is by what is called “Direct Navigation.” In Direct Navigation, internet users type search queries directly into the “address bar” of web-browsing software (such as Internet Explorer or Mozilla Firefox). Typically internet users may add “.com” to the end of a search term, but the frequency with which the “address bar” is used as a search bar led to browser software developers to cause the software to automatically add “.com” to the end of searches conducted via the address bar.

9. Internet search engine companies such as Yahoo! and Google determined that search could be made profitable by selling “search advertising.” Search advertising operates by inviting advertisers to submit bids for their advertisements to be displayed in response to searches conducted by internet search engine users. For example, the search term “automobiles,”

entered into a search engine such as Google or Yahoo! will cause the display of “sponsored links” or a similar indication, along with a listing of prominently displayed links to advertisers who have bid to pay a “click-through” fee to the search engine operator for each user which clicks on a sponsored advertisement to reach the advertiser’s site through the search engine. This type of revenue model is referred to as “pay-per click” or PPC.

10. To capture potential visitor traffic from direct navigation, internet search engine companies such as Yahoo! and Google also distribute PPC advertisements via syndication to domain name registrants. For example, the registrant of a domain name such as DatingForBusyProfessionals.com, whether the domain name was registered for resale or future development, contract directly or indirectly to allow the domain name to be used to display PPC ads. In such an arrangement, when an internet user visits the web page corresponding to the domain name, the web page is automatically populated by PPC advertisements provided by the search engine company. A share of the revenue from such PPC advertisements is paid by the search engine company to the domain name registrant, in exchange for providing the domain name as a platform for displaying such advertisements. Search engine companies typically refer to this method of distributing advertisements as the “domain channel” in contrast to the “search channel” wherein sponsored advertisements are displayed directly at the search engine site.

11. In a typical PPC advertising arrangement, the domain name is utilized as a publishing platform by the search engine company which populates the web page with sponsored PPC links as if the domain name itself were entered into the search engine as a search term. While the domain name registrant does not typically control the selection and arrangement of the advertisements, the search engine company, in turn, also has limited control over what search terms the advertisers select to have their advertisements displayed.

12. The distribution of PPC advertising by search companies through the domain channel has advanced to the point where domain names are often registered purely for their traffic potential, instead of for resale. The ability to sell domain traffic resulting from direct navigation has led to a number of techniques for accumulating domain names which have the potential to generate traffic per se.

13. In the year 2000, ICANN instituted a standard policy under which a domain name, once registered, could be deleted within five days of its initial registration without incurring a fee for registration of the domain name. This period was known as the “five day grace period” or “add grace period.”

14. The search for direct navigation traffic for domain names, combined with the five day grace period led to a practice known as “domain tasting.” In domain tasting, a domain name would be registered and then monitored during the five day grace period to determine whether its projected annual traffic value exceeded the registration fee. This process could be conducted on a large-scale automated basis comparable to panning for gold or sifting mining fines to extract ore. Thousands of domain names could be registered at a time and then kept or discarded on the basis of whether the domain names generated a suitable threshold value of PPC revenue.

15. The practice of domain tasting was conducted by a number of domain name registration companies using a variety of sources for character strings to be used to generate candidate domain names. It is believed that such companies had access to search data from search engine companies themselves, as well as “error data” from internet service providers and domain name registries, which provided character strings having potential value, as such character strings corresponded to entries by internet users into search engines or into the address bars of browsers for otherwise non-existent domain names.

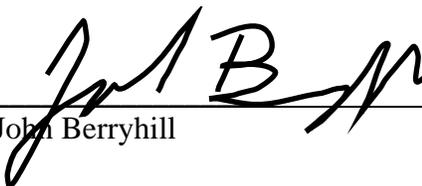
16. One hazard of large-scale bulk domain registration is that some of the domain names may incidentally correspond to trade or service marks. While a character string such as “Tide” may refer to the lunar gravitational effect on large bodies of water, it may also correspond to a brand of laundry detergent. Since a domain name registrant does not typically control what advertisements are displayed on a webpage used to publish advertisements generated by a search company, there is no completely effective way for the domain name registrant to know whether a domain name containing the string “tide” will cause the display of surfing information or laundry information. Furthermore, the advertising results generated by any particular keywords are determined by the collective action of those advertisers who bid on keyword placement with the search engine company, with whom the domain name registrant has no connection or contact.

17. As a result, responsible bulk domain registrants address the problems of incidental trademark correspondence in several ways. First, while there is no completely reliable method of filtering large numbers of strings against any particular database of trademarks, bulk domain registrants have continued to develop and deploy filtering systems on their own and in cooperation with brand owners. Second, responsible bulk domain registrants typically maintain staff and counsel for reviewing communications which may be sent by brand owners relating to brand-relevant domain names which may have escaped capture by the filtering methods employed by the bulk domain registrant. Where a domain name contains an inappropriate character string, or may have been targeted inappropriately by the search engine company supplying the advertising feed, responsible bulk domain registrants typically work with the brand owner to transfer or delete such domain names at no charge, and typically at a loss, to the brand owner, and further to update the filtering method to include variations of the asserted mark.

18. Notably, the absence of bulk domain registrants would not eliminate the use of otherwise nonexistent domain names for PPC advertising purposes. For example, the reason why the second most popular internet browser, Mozilla Firefox, is distributed for “free” is that in a default installation of that browser, traffic to “non-existent” domain names is fed to Google Search, under an arrangement by which Google shares a portion of the resulting revenue to Mozilla. Based on press articles, in 2007, this arrangement yielded an income of US \$70 million to the Mozilla Foundation.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on this ___3rd day of August 2011 at __San Rafael_, _California__.



John Berryhill

CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2011, I electronically filed the foregoing paper with the Court using the ECF system which will send notification of such filing to the following:

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