

EXHIBIT E

CERTIFIED COPY

In the United States District Court
For the Eastern District of Michigan

Deposition

Of

Christopher Schwerzler

Expert Witness

December 6, 2010

The Weather Underground, Inc.

v.

Navigation Catalyst Systems, Inc.

1 Q. Very good.

2 Let's talk a little bit about your schooling,
3 which I know we've got into a little bit before, but let
4 me just refresh my recollection.

5 As I understand, you have a bachelor's degree
6 from the University of Michigan?

7 A. Bachelor's in Engineering.

8 Q. Did that have any kind of --

9 When you say "engineering," was there any kind
10 of specific engineering?

11 A. Computer engineering.

12 Q. And did you have a graduate degree from there
13 as well?

14 A. No.

15 Q. Did you ever get any other degree, like a
16 marketing degree?

17 A. No.

18 Q. Did you ever take any marketing classes?

19 A. No.

20 Q. And you've never gone to law school, right?

21 A. I've never gone to law school.

22 Q. All right. After you graduated from Michigan
23 with your bachelor's degree, where -- what was your
24 first job?

25 A. Technically, I probably worked for The Weather

1 worry about it. I'll rephrase it.

2 Did you ever perform any of the tasks that you
3 did as part of preparing your expert report in this
4 case?

5 A. Which tasks would you be referring to?

6 Q. Well, any of them. Let's just kind of think
7 through some of the things you've done.

8 At some point, you received the NCS database,
9 and that had to be restored, because it was a backup
10 copy, right?

11 A. Yes.

12 Q. Okay. Had you ever done that task before, of
13 restoring a database?

14 A. I had never restored the NCS database before.

15 Q. Did you ever restore any SQL database at all?

16 A. Not a Microsoft SQL database. I've primarily
17 dealt with Linux-based MYSQL, and we do our backups
18 slightly different than what was presented to us.

19 Q. Okay. Any other types of databases that you
20 restored?

21 A. Not that I can recall.

22 Q. Now, have you ever -- had you ever written a
23 string comparison program before?

24 A. Yes, I think I have. I've actually written my
25 own versions of STRCMP, S-T-R-C-M-P, at some point in my

1 education.

2 Q. Do you remember when that was?

3 A. Probably between 1991 and '96.

4 Q. And this was in connection with getting your
5 bachelor's degree?

6 A. Yes.

7 Q. Any other instances?

8 A. I may have, as a -- written some string
9 comparison logic, and probably in my high school years,
10 in regards to writing a Commodore 128 ANSI emulator,
11 which I was picking out strings and comparing them in
12 that time frame, so --

13 Q. Okay. The string comp that you did for -- when
14 you were at the University of Michigan, what would that
15 have been for?

16 A. Probably, in regards to a -- just an algorithms
17 class.

18 Q. Do you specifically remember writing one of
19 those programs, or you just think you probably did in
20 one of those classes?

21 A. I'm pretty sure we did something like that
22 in -- probably at the assembly level, just as an
23 exercise in assembly class.

24 Q. Okay.

25 A. Where you're comparing two registers and

1 walking through it, which is, pretty much, a very simple
2 character-by-character-string comparison.

3 Q. Okay. Had you ever done anything with
4 trademark matching, trademark specifically?

5 A. Probably in the time frame of when we were
6 first registering our trademarks. I think we looked
7 through the USPTO, between me and Jeff, and that would
8 be -- but not -- I'm not in the business of trying to
9 register lots of trademarks and covering our butts.

10 Q. Okay. So, when you say you went through the
11 PTO, was that in some kind of automated fashion, or you
12 just meant you kind of looked through the --

13 A. I thought it was online at that point. Jeff
14 was more involved with the initial registrations of our
15 trademarks, and I'm trying to think. I can't remember
16 how many years ago we were playing around with
17 DomainTools typo registry. But after that point, I
18 would have probably had seen typos, and I -- but that
19 doesn't have any regard to writing a comparison
20 algorithm, so --

21 Q. Have you ever held any kind of marketing jobs?

22 A. Have I held any type of marketing jobs? I've
23 stood at trade shows, handing out umbrellas.

24 Q. Okay. Anything -- well, any other type of
25 marketing responsibility at any of your jobs?

1 A. I would say that as the director of the
2 company, I have a responsibility to protect our
3 trademarks.

4 Q. Anything else?

5 A. Not that I can think of.

6 Q. And have you had any jobs in the legal field,
7 as a paralegal or a legal assistant?

8 A. I've never worked as a paralegal.

9 Q. And certainly not as a lawyer, right?

10 A. I have not worked as a lawyer.

11 Q. All right. Have you ever been accredited by
12 any organization?

13 A. Not that I can recall.

14 Q. Have you ever been licensed by any
15 organization?

16 A. Not that I can recall.

17 Q. Are you a member of any professional
18 associations?

19 A. Not that I can recall.

20 Q. Have you participated in any seminars on, like,
21 coding or software, in general?

22 A. I think in my last deposition, I referred to a
23 phone.com mobile device conference that I had been to,
24 in regards to programming for that device.

25 Q. I'm sorry. It was what .com?

1 A. Phone.

2 Q. Phone.com?

3 A. Yes.

4 Q. Any other ones that you can recall?

5 A. Can you repeat the question.

6 Q. Yeah. Have you participated in any seminars on
7 the topic of software or --

8 A. I've gone to trade shows, such as LinuxWorld,
9 and listened to people speak.

10 Q. Okay. Anything else?

11 A. Probably, a couple of Macworlds, somewhere in
12 there, some of the tech presentations, but I don't
13 recall topics off the top of my head right now.

14 Q. Had you ever conducted any research independent
15 of this litigation?

16 MR. HALL: I'm going to object; vague.

17 THE WITNESS: Yes. That would be a very vague
18 question.

19 MR. DELGADO: Q. Okay. Let's have it
20 narrowed down, then.

21 Have you conducted any research into, like,
22 computer science for string comparison algorithms,
23 independent of the litigation?

24 A. Not that I can recall.

25 Q. Had you ever conducted any research independent

1 A. I would say that the person who's worked the
2 most on that would probably be Matt Kallio.

3 Q. And you had discussions with Mr. Kallio?

4 A. Yes. I speak with Kallio often.

5 Q. So what was your role?

6 A. Sound wall.

7 Q. Which means he bounces ideas off of you?

8 A. Yes. It's how a lot of our development works.

9 Q. Other than being a sound wall for Mr. Kallio,
10 is there anything else?

11 A. That's the only example I can think of right
12 now that would probably be along the lines that you're
13 looking for.

14 Q. Prior to the litigation, had you conducted any
15 research into domain name tasting?

16 A. I was never interested in doing domain name
17 tasting, so no.

18 Q. How about domain name monetization?

19 A. I had never researched domain name
20 monetization, other than what we do with ours.

21 Q. Okay. Have you ever given any lectures
22 anywhere?

23 A. Yes. At the university level, I had done
24 presentations with Perry Sampson there about Blue Skies,
25 and I'd also given one of his presentations in a senior

1 tech com class, so that would be about the closest thing
2 that I could think of to a lecture.

3 Q. This is while you were an undergraduate?

4 A. Yes.

5 Q. And tech com stands for what?

6 A. Technical communications.

7 Q. Anything else you can recall?

8 A. Not offhand.

9 Q. Have you ever been published?

10 A. In what form?

11 Q. Written any kind of books or magazine articles,
12 or anything like that?

13 A. No.

14 Q. Is there in any form, since you asked the
15 question?

16 A. I have had people publish things about our work
17 at The Weather Underground.

18 Q. But nothing that you yourself have written?

19 A. Not that I can recall.

20 Q. And you've never been an expert before,
21 correct?

22 A. I've never been an expert in a trial.

23 Q. Have you been an expert in some other context?

24 A. I am an expert at taking weather data and
25 putting it online and building a business out of it.

1 Q. Okay. Any other context?

2 A. I guess, expert is all relevant to what
3 you're -- what field you're talking about.

4 Q. Is there any other field that you think you're
5 an expert in?

6 A. There's topics I know a lot about.

7 Q. And those would be?

8 A. I know a lot about llamas.

9 Q. That explains the title.

10 A. Yes.

11 Q. Okay. Anything else?

12 A. Olives.

13 Q. I'm sorry?

14 A. Olives, like olive oil. Olives.

15 Q. Got it.

16 Anything else?

17 A. I'm starting to learn a fair amount about
18 guitar building.

19 Q. Okay. How about this, any topics that you drew
20 upon for purposes of preparing the expert report in this
21 case?

22 A. Just my experiences in The Weather Underground,
23 and computer science from that.

24 Q. Okay. Have you ever acted as a consultant for
25 a third party before?

1 A. Yes.

2 Q. Anything else?

3 A. Probably the Java Cool Tools award, circa,
4 probably '97, of Sun Microsystems.

5 Q. What was that for?

6 A. Java Weather.

7 Q. Any other ones you can recall?

8 A. Not offhand.

9 Q. Have you ever served in any organizations in
10 the field of computer science?

11 A. No.

12 Q. Had you ever seen a Fuzzy Matching program like
13 the one used by NCS prior to the litigation?

14 A. A program or the actual algorithm?

15 Q. Well, either one.

16 A. I don't think we have seen the actual algorithm
17 used by the Fuzzy Matching, nor has Navigation Catalyst
18 been able to provide it to us.

19 Q. How about any program that implements the, kind
20 of, Fuzzy Matching algorithm?

21 A. I would say that MYSQL, M-Y-S-Q-L, uses a
22 string matching in the context of the command "like."

23 Q. Is that the only one?

24 A. I don't do a lot with string matching.

25 Q. Just broadly speaking, is there any other

1 experience that you have had which relates to the
2 topics, in your expert report, anything I've left out?

3 MR. HALL: Can you repeat that question?

4 MR. DELGADO: Sure.

5 Q. Is there any other experience that you've had
6 which relates to the topics of your expert report or
7 anything that I may have left out in kind of going
8 through your background?

9 A. Not that I can recall right now.

10 Q. So would it be fair to say that your field of
11 expertise is, essentially, computer science?

12 A. Yes.

13 MR. DELGADO: Let's go through and mark this as
14 Exhibit 203. It sounds like a good place to start.

15 (Whereupon, Defendants' Exhibit No. 203
16 was marked for identification.)

17 MR. DELGADO: Q. Take a moment to look
18 through that, and let me know when you're ready.

19 It looks like my copy was a staple of page 3,
20 in front of page 2, so just don't let that confuse you.
21 Feel free to unstaple it and reorder them, if that
22 helps.

23 A. Okay.

24 Q. I'm going to ask you to look now at the page
25 that's marked page 3 of 8.

1 Q. Okay.

2 A. Qwunderground.com.

3 Q. Okay.

4 A. That would be Q-W-U-N-D-E-R-G-R-O-U-N-D.

5 Probably, I believe, one called

6 tickettoworkfromhome.net, I believe. Probably

7 @watherunderground,

8 W-A-T-H-E-R-U-N-D-E-R-G-R-O-U-N-D.com. Probably,

9 theweatherundergound, spelled

10 T-H-E-W-E-A-T-H-E-R-U-N-D-E-R-G-O-U-N-D, missing the

11 "R." Let's see. Give me enough time, and I can keep
12 going.

13 Q. Well, let me ask you this: To the best of your
14 knowledge, have all of those -- have printouts of all
15 these archival whois records been provided to us?

16 A. I would think that would be a better question
17 to ask to my legal.

18 Q. So, sitting here today, you don't know?

19 A. Has every domain I've looked at under
20 DomainTools been printed out and presented to you?

21 Q. The archival of whois records you looked at,
22 right.

23 A. No, I wouldn't think that you have not seen
24 that.

25 Q. Okay. And how was it that you -- so did you

1 print out some and not others?

2 A. I do not believe I printed out any for this
3 particular request.

4 Q. Well -- okay.

5 How about just kind of along the way, as you
6 were doing your research or preparing your report; do
7 you recall printing out any of the archival whois
8 records that you were looking at?

9 A. Yes. The tickettoworkfromhome example was used
10 as an exhibit in the Misino second half deposition, so
11 that would be an example of -- that got printed, but
12 that was not done for this expert report.

13 Q. Did you do that for every single archival whois
14 record that you looked at?

15 A. No, I did not.

16 Q. Okay. Did you have conversations with your
17 attorneys about your expert report?

18 A. Without getting into privileged information, I
19 would say yes, I had conversations in regards to MYS- --
20 the time line on which I was to present them, my expert
21 findings. I had a conversation in which we discussed a
22 rough draft of my findings, and I believe we had a
23 conversation in regards to this particular third Request
24 for Production and the questions and the time line
25 involved with it.

1 somewhere around 18 to 19 percent.

2 Q. And in your role as either a member of the
3 board of directors or shareholder, have you made any
4 decisions related to the litigation?

5 MR. HALL: Well, I'm going to object, to the
6 extent that some of this is getting outside of the scope
7 as an expert.

8 MR. DELGADO: Okay. Well, I don't think so. I
9 mean, in various cases you're allowed to explore a
10 potential bias on the part of the expert. To the extent
11 that he's a salaried employee or might share in the
12 proceeds of any damages award, I'm clearly entitled to
13 know that. So I'll note your objection, but I'm going
14 to keep asking my questions.

15 Q. So the question was, did you play any role in
16 decisions related to the litigation.

17 A. Yes, I believe I played a role at the board
18 level, that we were going to file suit in both this --
19 or both in California and in Michigan.

20 Q. Were you involved in any kind of investigation
21 prior to the decision to filing suit?

22 A. Not that I recall.

23 Q. And in terms of when you made the decision to
24 file suit, did you play any role as to which particular
25 claims you might bring or not bring?

1 trademark," possibly, "deleted." That's all I can think
2 of -- off the top of my head.

3 Q. Did you keep any kind of document that would
4 show all the searches that you ran against?

5 A. No. I have not recorded every search.

6 Q. All right. Go down to the -- go down to the
7 first page of the initial report. Yeah, that one.

8 The general observations there, number one is C
9 Sharp programming language.

10 Had you had previous experience with the
11 programming language C?

12 A. With C, yes, I have.

13 Q. How about C Sharp?

14 A. No, not a lot.

15 Q. How about C++?

16 A. Yes.

17 Q. Do you know the difference between these
18 different languages --

19 A. With C Sharp is a --

20 Q. Hold on. Let me get my question out before the
21 record gets blown.

22 Do you know the difference between any of these
23 languages, if any?

24 A. They are very similar in nature. C Sharp
25 being, I believe, Microsoft's product. And most of my

1 career has been in either Linux or Macintosh
2 development. I'm not super familiar with the Microsoft
3 development toolset.

4 Q. Is either -- are either C or C++ used in Linux
5 or Macintosh?

6 A. Yes.

7 Q. But C Sharp is not?

8 A. Not to my knowledge. I don't know if Microsoft
9 ever published a Macintosh development product that may
10 have been in that flavor, but I've never used it.

11 Q. Look at the second page. There's a paragraph
12 that -- I'm sorry, the next page. The paragraph that
13 says, "The key finding being," and then it gives some
14 code.

15 A. Yes.

16 Q. And then it has a paragraph below that.

17 A. Where it says "To do implement," under -- below
18 that?

19 Q. Correct.

20 A. Yes.

21 Q. The paragraph starts with, "It is my belief,"
22 and then it goes on from there.

23 A. Okay.

24 Q. All right. Is that -- what is stated in that
25 paragraph, having now gotten the database and done some

1 further explorations and seen the program in operation,
2 is there -- is this still your opinion, this paragraph?

3 A. Let me read it.

4 Q. Sure.

5 A. "It is my belief that this function is intended
6 to first load all the known trademarks from the USPTO
7 database and then does nothing (returns NULL or nothing
8 in computer science speak) as a match to anything passed
9 into the function to be checked for trademark
10 violations."

11 The function I list above is what I believe is
12 still in my find- -- or in the discovery materials, and
13 I believe that particular function does nothing after
14 loading the trademarks.

15 Q. Have you found other functions that do in fact
16 load the trademarks and then go -- goes beyond that
17 stuff?

18 A. Yes. After this initial report was filed,
19 there was another spot identified in the code that does
20 actually make use of the same loading of trademarks and
21 then actually does do Fuzzy comparison against
22 trademarks and candidate domains.

23 Q. All right. Go to the page that starts -- or
24 not starts with, but has the title "Conclusions."

25 A. Okay.

1 precludes trademark registrations.

2 Q. And the answer -- or the question was, why, and
3 you gave me one example. So my question is, is there
4 anything else?

5 A. Do you want more examples?

6 Q. Well, I'm trying to get -- I'm trying to figure
7 out if the opinion has changed or has not changed, I
8 should say. So I'm trying to figure out all possible
9 reasons why the opinion has not changed.

10 A. I would say that also the code hasn't been
11 shown to have been used at all points at registration,
12 so, therefore, it could not have precluded the
13 registration of trademarks prior to its existence.

14 Q. Okay. The second part of that, which I'm going
15 to get to now, it says, "Which appears to be defendant's
16 business model," and I think what that's referring to is
17 the registration of typographical variations of
18 trademarks appear to be defendant's business model.

19 Is that still your opinion today?

20 A. I would say that the defendant has a portfolio
21 that is riddled with near miss trademark registrations.
22 And whether that's your primary business model or a part
23 of -- thereof, cannot be determined by me at this point
24 without proper financial documents, so I will not make a
25 conclusion one way or the other that that is your

1 primary business model. But I do believe that you
2 have profited -- or the defendants have profited through
3 this practice.

4 Q. The next paragraph says, "The coders appear to
5 have intentionally designed the software to allow for
6 the registration of typographical variations of
7 high-traffic websites."

8 Do you see that?

9 A. Yes.

10 Q. Is that your opinion today?

11 A. Is it my opinion that the coders -- from this
12 document, when I wrote this statement, would be that it
13 looked like they had not completed it. The result would
14 be that they were accumulating a large number of near
15 misses. I would think that the coders today implemented
16 a system that they are aware of, was not even being used
17 prior to registration, especially during the tasting
18 periods of 2007 up to mid 2008.

19 So therefore, I would say that the coders were
20 aware that their system was not even being used to
21 preclude registration at that time, and that they were
22 partaking in a system designed to accumulate
23 high-traffic website near miss registrations.

24 Q. But in terms of the language you have here,
25 where it says, "Intentionally designed the software to

1 And then, I believe shortly after that we
2 actually received the stored procedures that I had
3 requested, which made it easier to connect the code to
4 the databases as the stored procedures, or the layer in
5 between there.

6 Q. Okay. Did you keep track in any way as to what
7 you were looking at on a particular day or for a
8 particular task?

9 A. I believe that there -- in my discovery
10 requests there are digital files in there that have
11 notes that I took throughout the course of discovery,
12 queries I ran, results --

13 Q. Okay.

14 A. -- threads of my discovery, thoughts.

15 Q. I think I have some of those, so we'll mark
16 those.

17 Did you capture everything that you did in
18 those notes?

19 A. I don't think you could capture everything and
20 be productive in going through that much discovery.

21 Q. Okay. So the answer is no?

22 A. You're asking me if I captured everything?

23 Q. Correct.

24 A. I think the question is vague.

25 Q. Well, in looking at the database and running

1 these queries that you ran, did you, for example, make a
2 note of each query that you ran or result?

3 A. I did not record every query I ran.

4 Q. Did you keep track of every single table that
5 you looked at?

6 A. I did not record every table that I went
7 through.

8 MR. DELGADO: Okay. I think I can stop here
9 and take a break for lunch, and we'll come back and take
10 a look at the report itself.

11 THE VIDEOGRAPHER: Off the record. The time is
12 12:13 p.m.

13 (Lunch recess from 12:13 to 1:00 p.m.)
14
15
16
17
18
19
20
21
22
23
24
25

1 Q. All right. Let me -- let me address that.

2 It's my understanding that there's a second
3 component, which is the blacklist -- which has been a
4 term that's been used -- and that any candidate domain
5 name that matches against the blacklist is flagged, and
6 then it continues through the review process.

7 Sitting here today, is it your understanding
8 that there's actually, in fact, two different what I
9 will call blacklists: One is this exclusion file and
10 then the other is a blacklist that has terms on it that
11 only flags things as it goes through the candidate
12 process.

13 A. I have not studied any form of an exclusion
14 file in the materials. Whether it exists or not, is
15 possible, but it doesn't seem to have stopped many of
16 the instances that we are alleging.

17 Q. Okay. So that was going to be my next
18 question.

19 Have you seen this exclusion file?

20 A. I may have seen it. I may not have recognized
21 it as what you're calling the exclusion file.

22 Q. How about the blacklist; have you seen the
23 spreadsheet or any kind of document with a bunch of
24 terms that -- it is your understanding that this is what
25 would be the blacklist that the software uses?

1 A. I believe that samples have been presented
2 throughout the course of discovery. I also believe that
3 there is a table in the domain_park set of tables that
4 is -- what you are, probably, referring to as the
5 blacklist of exact matches, that cause a blacklist flag
6 to be acknowledged.

7 Q. Okay. And in your report, is there anywhere
8 where you talk about that blacklist table?

9 A. Not currently in this -- not in this
10 supplemental report. I don't believe so.

11 Q. Okay. Are you considering supplementing your
12 report again to address the blacklist table?

13 A. It's possible.

14 Q. Well, as you sit here today, have you given
15 that thought, or have you put any work towards that end?

16 A. I will probably reflect upon that, and I may
17 supplement my report. But going back to my original
18 statement, it doesn't seem to have precluded the alleged
19 abuses, so --

20 Q. Okay. I guess, what I'm trying to figure out
21 is, right now, have you done any work towards a new
22 report that addresses the blacklist?

23 A. No. I have not done any work towards any
24 report that addresses the blacklist, to this date.

25 Q. Okay. Now, the first sentence here says,

1 "Since my original report, I have found another path in
2 the code provided that appears to actually make some use
3 of the USPTO database."

4 How is it that you came to find this other part
5 of the code?

6 A. I believe I identified this one once I had
7 access to the -- what are referred to as stored
8 procedures. When I had the stored procedures, I was
9 able to actually run larger queries, looking for
10 references to particular tables. In this case, I
11 believe, the table I was searching for was called Search
12 Trademark -- without the -- actually, if you hold on one
13 second, I could probably identify it, if this report is
14 complete.

15 Q. Okay.

16 A. Yes, I believe it's referred to as
17 dbo.search_trademark, containing some 1.3 million in
18 change entries.

19 Q. Okay. Now, earlier I asked you about some of
20 the searches you ran with respect to when you first got
21 the discovery documents in connection with preparing
22 your very first report. I think you said, "Blacklist,
23 trademark, Fuzzy, deleted," as some of the potential
24 searches you may have run. Do you remember that?

25 A. I remember your -- yes, the recollection of --

1 recklation of -- or recalling of the record.

2 Q. Okay. Look at the code itself where it says,
3 "Checks a domain name against trademark database, and
4 inserts into search_algo_client_data_trademarks if
5 there's a potential trademark concern."

6 A. Correct.

7 Q. Did this portion of the code not come up when
8 you ran your search for "trademark" on the PDF files?

9 A. It's possible.

10 Q. It's possible that it did or did not come up?

11 A. It's possible it did not. It's possible that
12 it did.

13 Q. Do you recall whether it came up or not?

14 A. I do not recall.

15 Q. Okay. Let's go to the next page. The first
16 full paragraph says, "This appears to be where the Algo
17 tool does 'Fuzzy Matching,'" end quotes, "and records
18 the match results to the, open quote,
19 'search_algo_client_data_trademarks,'" closed quote,
20 "table."

21 Is it your opinion that it is the Algo tool
22 that does the Fuzzy Matching?

23 A. I do not think that is the only place that
24 Fuzzy Matching is done, seeing that some of the results
25 seem to indicate, I believe, Source. I may be mistaken

1 Q. What would happen if you increased 85 percent
2 to 90 percent?

3 A. I would believe that the examples would be
4 fewer but, probably, there would be less possible false
5 positives.

6 Q. What is a false positive?

7 A. In shorter domains such as the one everyone
8 loves to use, Time, a single edit distance can sometimes
9 change the word in a way that it is another word, and
10 that would be something many people would take objection
11 to. Larger domains, not so much the case.

12 Q. So how does your PHP script, kind of, take into
13 account that with shorter domain names, a single edit
14 could change the objectionableness of the domain names?

15 A. It doesn't. It treats them the same, but I
16 would expect that 85 percent is going to rule out some
17 of the shorter ones, based on -- let's take, for
18 example, if you had a four-letter domain, one letter
19 being different, it's going to cause a 75 percent match,
20 and it's going to fall out. That may have been why I
21 picked 85, being greater than 80, and that 80 could
22 actually catch a four-out-of-five-letter variation.

23 Q. Okay. Now, this PHP script that you created,
24 that was specifically for purposes of this litigation?

25 A. Yes.

1 Q. Had you ever created a PHP script like this
2 before?

3 A. I've created many PHP scripts, not like this
4 one.

5 Q. Not like this one?

6 A. Not for the purpose of doing trademark
7 matching.

8 Q. Okay. Has anybody else ever used your PHP
9 script, Mr. Kallio, for example?

10 A. I believe I'm the only one that's run and
11 modified the script.

12 Q. To the best of your knowledge, did --
13 Mr. Kallio see the -- why don't we call it the finished
14 version of this script, the one that appears in the
15 Appendix to the report.

16 A. I don't believe Mr. Kallio has reviewed my
17 expert report, no.

18 Q. Okay.

19 A. Oh, wait. I will amend that. He did do a
20 proofing of the text, not so much the examples in the
21 appendixes, as far as typos and misspellings, for the
22 final version.

23 Q. Okay.

24 A. So, I want to be accurate.

25 Q. Could you use the PHP script to compare the

1 portfolio to the PTO database?

2 A. Could I use PHP to compare your portfolio to
3 the US trademark database?

4 Q. Yes. Well, the one that appears in Appendix B.

5 A. Yes, I could do that.

6 Q. Okay. I may have asked you this before. I'm
7 sorry if I did. I can't remember.

8 For purposes of determining edit distance, did
9 you consider an alternative to Levenshtein distance?

10 A. No. Levenshtein seemed to meet my needs.

11 Q. Okay. And what were those needs?

12 A. A decent text comparison algorithm.

13 Q. Well, did you consider any other ones at all?

14 A. Oh, I think we considered using `similar_text`,
15 and we ended up using both. I think we could have used
16 either one, stand-alone. But I think that by using
17 multiple techniques, it would be even better. And I
18 think that if I wanted to spend even more time doing a
19 job that the defendants should have done more properly,
20 I could have developed further algorithms, such as what
21 I was talking about before, with analyzing the QWERTY
22 distance and traversal of the keyboard to determine
23 whether two strings were similar.

24 Q. Okay. Let me see if I understand, kind of,
25 your earlier testimony.

1 MR. DELGADO: I think he's given me other
2 answers. It's not really -- haven't been answers to the
3 question.

4 MR. HALL: Can you repeat your question.

5 MR. DELGADO: Sure.

6 Q. The question was, if underground.com was in
7 fact peddling pornography, or not weather-related, would
8 plaintiffs still be claiming rights to underground.com?

9 MR. HALL: I'll object as being compound.

10 THE WITNESS: I don't think that we would take
11 legal action against underground.com, nor have we.

12 MR. DELGADO: Q. Okay. Let's go to the next
13 page where it starts with "Analysis of the time line."

14 A. Okay.

15 Q. All right. Go down to the second to last
16 paragraph. It says, "My opinion is that the defendants
17 intended to start dealing in riskier registration
18 practices and saw the opportunity to obscure their
19 identity and add a lawyer of corporate legal protection
20 to their actions."

21 A. That's one of the typos, I believe, that was
22 edited in the later version.

23 Q. So I assume "add a layer."

24 A. I almost left it as lawyer, because it seemed
25 appropriate, but I think it was meant to be layer.

1 Q. Okay. What is the basis for that opinion?

2 A. I believe that had your defendants chosen to
3 operate a legitimate domaining practice, they probably
4 would have used the parent company as the registrant,
5 rather than creating this shell of a company called
6 Navigation Catalyst Systems, registered late in 2003,
7 prior to what I believe is the first real abusive
8 behavior, it would seem, in their registration
9 activities.

10 Q. Any other basis for that opinion?

11 A. I think that speaks for itself.

12 Q. All right. Let's go to the next page.

13 Go down to one, two, three, four -- the fifth
14 paragraph, "The use of 'DNS error data'"; do you see
15 that?

16 A. Yes, I do.

17 Q. The last sentence says, "Those targets will
18 often and likely represent the brands and trademarks of
19 legitimate companies."

20 Do you see that?

21 A. I see that.

22 Q. Okay. And that opinion is based on what?

23 A. Would you read the full paragraph.

24 Q. Sure. "The use of 'DNS error data' is to
25 intentionally target the actual intent of the user. It

1 is effectively using humans as QWERTY typo generators.
2 By doing so, you will end up with large amounts of typos
3 of the users' intended targets. Those targets will
4 often and likely represent the brands and trademarks of
5 legitimate companies."

6 And my question is, what do you base that on?

7 A. The fact that you -- the defendants heavily
8 registered similar domains to top trafficked websites.
9 I also based it upon Professor Korf's findings in the
10 end of his report, where he says that Firstlook is in
11 the business of registering high trafficked domain
12 names. I think the two are not exclusive.

13 Q. Okay. But that belief, what do you base that
14 on, that they're not exclusive?

15 A. That the high trafficked websites yield a
16 potential to make cache, and I believe that is what is
17 being exploited here by registering confusingly similar
18 domains.

19 Q. The next paragraph says, "These brands and
20 trademarks often represent the hard efforts and the many
21 man-years of work it takes to make a successful
22 business."

23 Do you see that?

24 A. Yes.

25 Q. What do you base that on?

1 A. My personal experience in building a successful
2 online business.

3 Q. Have you ever testified on anything like brand
4 value?

5 A. Not that I can recall. I don't think I've
6 testified -- in a legal context, are you asking?

7 Q. Right.

8 A. No, I don't believe so.

9 Q. It goes on to say, "In the on-line space, the
10 domain name is the identity and one of the primary
11 assets of one successful business, not something that
12 you register millions of."

13 What is that based on?

14 A. Probably, most of the top 2,000 websites on the
15 Internet, most of them register only a handful of
16 domains. Some of them, like Microsoft, might be
17 exceptions to that model, where they've registered all
18 sorts of crazy domains.

19 But that -- I think that, for the most part,
20 you only need one domain to be a successful online
21 website. And I'm not going to say that all domaining
22 and speculative domaining is a product of evil, and I
23 think some people have been very successful in
24 registering non-offending or infringing trade -- or
25 domains, and have sold them for good money and made very

1 percentage of the current portfolio is a near miss of a
2 higher-ranking Quantcast top million domain."

3 For purposes of this statement, when you say
4 "near miss," if I were to quantify that, that would mean
5 it would be what we saw before, in terms of it being an
6 85 percent match and an edit distance of two or less?

7 A. Yes, I believe that my exhibit was created with
8 85 and two or less.

9 Q. Okay. Does this tell us what percentage of the
10 portfolio is a near miss, as that term is defined, to
11 trademarks in the PTO database?

12 A. I have not analyzed the domain portfolio versus
13 the USPTO on a complete basis.

14 Q. Have you done it on an incomplete basis?

15 A. I don't think that you can generate a
16 percentage on an incomplete subset.

17 Q. But what did you mean when you said, "I haven't
18 done it on a complete basis"?

19 A. That I haven't gone through the exercise of
20 taking your entire portfolio and matching it against the
21 one point however many million USPTO trademarks there
22 are. That may be something to do before the end of
23 discovery.

24 Q. Do you have any understanding as to when the
25 Fuzzy Match system that Mr. Misino wrote was first

1 Q. You weren't there for that?

2 A. I believe that was shortly after I left.

3 Q. Okay. Have you read any of that testimony?

4 A. I've read a very, very rough transcript.

5 Q. Do you have any opinion, based on that
6 testimony, as to whether Mr. Misino's explanation is
7 valid or not valid?

8 A. I am not going to state opinion on an
9 incomplete and noncertified version of the transcript.

10 Q. Okay. What do you recall reading as far as a
11 position for why "the" and ".com" are not compared?

12 A. I don't recall actually seeing his explanation
13 of that.

14 Q. Okay. All right. Let's go to point number 11.
15 It says, "The defense is intentionally using DNS error
16 data to come up with a list of candidates to register.
17 This practice will yield a large number of near
18 trademarked terms."

19 That conclusion that it would yield a large
20 number of near trademarked terms is based on what?

21 A. The output of my tests, as included as
22 exhibits.

23 Q. The PHP scripts that compare domain names to
24 domain names?

25 A. Domain names to top trafficked websites.

1 Q. And did you do any kind of analysis as to
2 whether or not these top trafficked websites actually
3 had a trademark?

4 A. I would say that even if they weren't in the
5 USPTO, they are probably common law trademarks through
6 use.

7 Q. And that understanding is based on?

8 A. A conversation with counsel.

9 Q. "This is what the defendants want, as the
10 actual content sites have traffic that they can monetize
11 the misspellings of."

12 How did you determine defendants' intent for
13 the purposes of that conclusion?

14 A. I believe heavily, based on Professor Korf's
15 statement and his findings as well, that Firstlook is in
16 the business of registering highly traffic websites, and
17 highly trafficked websites yield advertisement
18 potential, and that is what I believe the defendants'
19 business is about.

20 Q. All right. I think we're done with this
21 exhibit.

22 Before you began doing any work as an expert
23 witness in this case, did you have any kind of an
24 opinion about the business model of registering domain
25 names in bulk?

1 A. I guess, I was unaware that companies would
2 register domains in the quantities that the defendants
3 have. I knew there was speculative domainers out there
4 that had fairly impressive-sized portfolios. I was
5 thinking probably tens, 20s, maybe 1,000, early domains.
6 But I was unaware that there were businesses out there
7 that registered tens of thousands, hundreds of
8 thousands, or in the case of tasting, millions of
9 domains.

10 Q. And when was it that you first learned that?

11 A. Throughout the course of this lawsuit.

12 Q. Before doing any work as an expert, did you
13 have any notion as to what you might find in the NCS
14 software?

15 A. I believe we had our suspicions, and that's why
16 I think you will see in our original claim of the
17 lawsuit -- I don't think that my opinion has changed
18 drastically, other than now I'm aware that there are
19 more parties than what were originally aware of involved
20 in how this business works.

21 Q. What were those suspicions?

22 A. That the defendants register large volumes of
23 trademark infringing domains.

24 Q. Do you have any -- did you have any opinions,
25 though, as the software component of their business and

1 how that operated?

2 A. I believe early in the case, it was represented
3 to us that it was a completely automated system. And
4 since then, I believe the depositions have shown
5 otherwise. I believe that there's an automated portion
6 of scoring of domains, but I believe there's also a
7 human aspect. And I also was unaware of when we first
8 filed a lawsuit that NCS had no employees. I think that
9 came out very shortly in to the case.

10 Q. Did you have any opinions about the
11 effectiveness of the software to screen out trademarks?

12 A. I would probably have to say I didn't think it
13 was very effective, in that our trademarks or near
14 misspellings of them were registered.

15 Q. What about any opinions on how one could
16 effectively design a program to screen for trademarks?

17 A. I don't believe that a company has the right to
18 bulk register domains if they cannot come up with a
19 system that does not infringe on other parties'
20 trademarks.

21 Q. And -- okay. So, with respect to that, would
22 that system have to be 100 percent effective, in your
23 opinion?

24 A. I would hope it would be, or else you're likely
25 going to be dealing with lots of litigation.

1 Q. And did any of these opinions change over time
2 after you -- where you reviewed some discovery and did
3 some work for this case as an expert?

4 A. I don't think my opinions have changed
5 substantially.

6 MR. DELGADO: Okay. 214?

7 THE REPORTER: Yes.

8 MR. DELGADO: Okay.

9 (Whereupon, Defendants' Exhibit No. 214
10 was marked for identification.)

11 THE WITNESS: Okay.

12 MR. DELGADO: Q. Can you tell me what this
13 document is.

14 A. This appears to be a signed version of my
15 expert report continuation.

16 Q. And did you provide this to your counsel back
17 in October -- on October 10th, 2010?

18 A. Yes, I believe so.

19 Q. All the content that's in this report would
20 have been there as of October 10th, 2010?

21 A. I believe, with the exception of -- I believe
22 the NCS on the first page, the reference to 058791 was
23 still in the form of NCSXXXX, because I didn't know the
24 number off the top of my head. I prepared that prior to
25 printing this, and I also added my signature to it.

1 Q. When did you do that?

2 A. That would have probably been once I realized
3 that you guys were operating under the wrong copy. And
4 prior to my third responses, I wanted to get an accurate
5 version of this out to you.

6 Q. In terms of a date, do you remember when that
7 was; sometime in the last month?

8 A. I would have to guess someplace around --
9 probably around November 20th, or so.

10 Q. Were those the only two changes that were made?

11 A. That I recall.

12 Q. All right.

13 A. I will state that this version, I believe,
14 should have a section that was not in the last one,
15 referred to as "Categorization Tool Records," on page
16 14.

17 Q. Right.

18 A. That was added just after the original draft
19 that we were working with here.

20 Q. Okay.

21 A. And just prior to the -- I think, your
22 receiving of that copy -- or where the miscommunication
23 happened, I am unaware.

24 Q. Page 3, I'm just going to go through some of
25 the changes that appear in the draft here.

1 Point number two, the word "registration" is
2 inserted between "domain" and "activity."

3 Why was that change made?

4 A. This is probably the product of the last,
5 probably, proofreading of the grammatical mistakes, that
6 were after this version. Because I believe this version
7 was one of the earliest -- or the only rough draft that
8 I presented to counsel. And then, I believe, the edits
9 were made, and then it sat for -- until we realized that
10 you were working with the wrong copy.

11 Q. When you said "the edits were made," who -- did
12 you make those edits?

13 A. Yes. And I also believe that I specified that
14 Mr. Kallio proofed this. And I believe Mr. Ferguson
15 also was in San Francisco that day, and he did a quick
16 pass of it as well.

17 Q. And, approximately, when do you think that was?

18 A. Probably, right around October, early -- the
19 first week of October, I would guess.

20 Q. Now, getting back to the question of the
21 addition of the word "registration," do you know why
22 that particular word was added in there?

23 A. May I take a second to see what it was before?

24 Q. Yeah, go ahead.

25 A. Because I think it's more accurate in that

1 there was actually registration activity that happened
2 involved with this tasting, not that I -- or could I
3 think of another example of where you could taste
4 something without registering it, but --

5 Q. You could or could not think of it?

6 A. I can not think of how you -- one would taste a
7 domain without registering it.

8 Q. On page 7 -- go ahead and go to page 7.

9 A. Okay.

10 Q. In the middle, there's a -- kind of a -- just a
11 random line that says, "Expert Report of John
12 Berryhill." What does that mean?

13 A. I did spot that at the end, after I had cleaned
14 this up. Yep, I -- it's probably a copy and paste error
15 that went through all versions.

16 Does it appear in this version as well?

17 Q. I don't think so. It doesn't appear in the
18 prior version.

19 Was there ever any part of any of the drafts of
20 this report where you talked about the expert report of
21 John Berryhill and then wound up taking it out?

22 A. I might have left it as a place marker. This
23 may have actually came out of one of my rough text files
24 that I included in the discovery or Request for
25 Production number three. It's possible that it got

1 copied as a line out of there into here. It could have
2 been a memo.

3 Q. Okay.

4 A. I don't think I was trying to make any exact
5 statement about the expert report of John Berryhill in
6 conjunction with that, and --

7 Q. Okay. Let's go to page -- let's go to page 14
8 and 15. I think you indicated that this section didn't
9 appear in the previous draft. Correct?

10 A. Yes, "Characterization Tool Records" were added
11 late.

12 Q. All right. Tell me what this section is about.

13 A. This is data I found within, what I believe, is
14 the characterization history. It would be, what I
15 believe, are terms that were added by human beings doing
16 their characterization work, to take the candidate
17 domain and typing it, likely, into Google and finding
18 the real domain and then recording key words under the
19 seed_keyword one, seed_keyword two, for the sake of
20 optimizing the advertising.

21 Q. Prior to this lawsuit, had you ever heard of a
22 company that produces a program called "Keyword
23 Country"?

24 A. No.

25 Q. Having read the deposition of Mavi Llamas, are

1 you now familiar with "Keyword Country," the existence
2 of it?

3 A. I'm aware of it now that you're claiming that
4 it's in the Llamas deposition, or Llamas, I believe. I
5 have not done any research on that.

6 Q. Okay. Let's go to page 16. In the second
7 paragraph it says, "From reviewing the history of the
8 defendants' registration, it shows that for the most
9 part from 1993 to 2003 they were in the business of
10 registering non trademarked domains. Names like
11 jackpotloterry.com, iwinbig.com, and seekingcredit.com."

12 The domain name videopokers0.com was deleted;
13 why was that?

14 A. That may have been in regards to a conversation
15 I had with counsel. I think Enrico said that that might
16 be on the edge of a trademark, so I didn't think it made
17 a good example, but -- I will also say that, looking at
18 the earlier registrations, I have not run them through
19 any thorough trademark analysis. I just personally did
20 not recognize any of the domains being registered prior
21 to the end of 2003, other than Navigation Catalyst being
22 registered, as being something I recognized.

23 Q. Go to page 17, the second to last paragraph.
24 There was language in the old report that said, "They
25 have tried to hide that through the use of a proxy

1 service created by their former chief counsel Chris
2 Pirrone. They have no intent of stopping this
3 practice."

4 That does not appear in this draft. Can you
5 tell me why that change was made?

6 A. Probably, through my notes -- I'm not sure if
7 I -- did I actually physically write that or -- I don't
8 know. I may have been editing on the fly there with
9 counsel, in that they said that that sounded a bit
10 hostile, but --

11 Q. When you were editing this, how is it that you
12 received input from counsel?

13 A. I produced the rough draft. We walked through
14 it. They -- mostly so they understood what I was
15 saying, and they gave me only a very limited list of
16 suggestions.

17 Q. And, to the best of your recollection, one of
18 the suggestions was to eliminate that particular
19 language that we just discussed?

20 A. I believe so.

21 Q. There's also language in the previous draft at
22 the end of that paragraph that said, "I believe that the
23 ACPA was created exactly for this reason and that
24 Professor Korf's employers and some of their partners,
25 like Sinclair Vabalon, BHG, represent the worst

1 intentional abusers of trademarks in modern history."

2 Is that another paragraph --

3 A. I think I --

4 Q. Hold on. Let me -- let me just finish this.

5 A. Okay.

6 Q. I'll just ask you, why did that get deleted?

7 A. Why were they deleted?

8 Q. Why did that phrase or that sentence get
9 deleted?

10 A. I believe I removed that reference to Sinclair
11 Vabalon because I was curious to see what the record
12 would bring forth.

13 Q. Did counsel give you any suggestions as to
14 removing this sentence, or did the --

15 A. I do not recall that that was the case.

16 Q. Okay. So that was entirely your option or your
17 decision to delete that sentence?

18 A. Yes.

19 Q. Page 18, point number eight, the language has
20 changed, from the earlier draft, saying, "No
21 precautions" to "It does not appear that any significant
22 precautions."

23 Why was that change made?

24 A. I'm unsure. I might have just chosen to reword
25 it after my final read.

1 STATE OF CALIFORNIA,)
2 COUNTY OF SAN FRANCISCO) ss.
3)

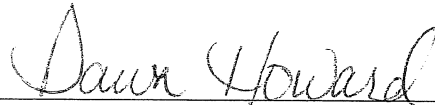
4 CERTIFICATE OF REPORTER

5 I, DAWN HOWARD, a Certified Shorthand
6 Reporter, hereby certify that the witness in the
7 foregoing deposition was by me duly sworn to tell
8 the truth, the whole truth, and nothing but the
9 truth in the within-entitled cause;

10 That said deposition was taken in shorthand by
11 me, a disinterested person, at the time and place
12 therein stated, and that the testimony of the said
13 witness was thereafter reduced to typewriting, by
14 computer, under my direction and supervision;

15 I further certify that I am not of counsel or
16 attorney for either or any of the parties to the
17 said deposition, nor in any way interested in the
18 event of this cause, and that I am not related to
19 any of the parties thereto.

20 DATED: December 16, 2010.

21
22
23 

24 DAWN HOWARD, CSR 13201
25