

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.

Enrico Schaefer (P43506)
Brian A. Hall (P70865)
TRAVERSE LEGAL, PLC
810 Cottageview Drive, Unit G-20
Traverse City, MI 49686
231-932-0411
enrico.schaefer@traverselegal.com
brianhall@traverselegal.com
Lead Attorneys for Plaintiff

Anthony P. Patti (P43729)
HOOPER HATHAWAY, PC
126 South Main Street
Ann Arbor, MI 48104
734-662-4426
apatti@hooperhathaway.com
Attorneys for Plaintiff

Nicholas J. Stasevich (P41896)
Benjamin K. Steffans (P69712)
Bruce L. Sendek (P28095)
BUTZEL LONG, PC
150 West Jefferson, Suite 100
Detroit, MI 48226
(313) 225-7000
stasevich@butzel.com
steffans@butzel.com
sendek@butzel.com
Local Counsel for Defendants

William A. Delgado (admitted pro hac vice)
WILLENKEN WILSON LOH & LIEB LLP
707 Wilshire Boulevard, Suite 3850
Los Angeles, CA 90017
(213) 955-9240
williamdelgado@willenken.com
Lead Counsel for Defendants

AFFIDAVIT OF CHRIS SCHWERZLER

Chris Schwerzler, being first duly sworn, deposes and states as follows:

1. I am a member of the Board of Directors and an employee of The Weather Underground Inc.

2. I have been hired to be an expert in the above mentioned matter to look at the materials produced by Defendants containing, for example, the source code of their software, their portfolio of domain names, dates of registration, trademark scoring system, and their database. Because Defendants only produced the database information digitally, there is no way for the jury to see or access the data. I wrote simple queries of the database to pull information to show to the jury what information is contained therein. Separately, I also drew some conclusions about the output of the scripts I wrote about whether Defendants registered domains despite a near exact match using their own trademark scoring system, domains matching well known web site domains such as facebook.com, plentyoffish.com, ultimate-guitar.com, and wunderground.com. I am not a trademark expert, although I am able to run queries matching a list of domains against a database of trademarks.

3. I hold a Computer Engineering B.S.E from the University of Michigan, 1996. I was involved with much of the University of Michigan's development of a software package called BlueSkies, an early internet application used to display weather data primarily for use with K-12 weather education. After graduating, I continued to work on the commercialization of Weather Underground, writing many of the companies early systems. These systems include database intensive projects such as the company's ad serving platform and the website's earliest database of cities,

zipcodes, countries, and weather products. In 1996 I worked for Adobe Systems and a programmer on their product Adobe Acrobat. At Adobe, I was responsible for learning and maintaining a very large existing code base for the product. With the success of Weather Underground's wunderground.com website, I chose to leave Adobe in 1998 to focus on growing the Weather Underground business. For the past 13 years I have worked heavily with the MYSQL database, SQL query language, the computer language C, the language/toolset called PHP, the Apache web server, the Linux operating system, and have been heavily involved with Weather Underground's hardware and datacenter design and scaling.

4. My report dated August 9, 2010, and my supplemental report dated October 10, 2010, and attached as Exhibit M to Plaintiff's Motion for Summary Adjudication, are true and accurate of the factual information discovered and contain my analysis and opinions in this case.

5. In Defendants' Daubert Motion to Strike Report of Christopher Schwerzler and Prohibit His Testimony on Same at Trial, Defendants state that the initial report appears to be "draft". In fact, this was true because of Defendants' repeated failures to provide discovery as ordered by the Magistrate in this case, their failure to make disclosures concerning related companies, and other discovery failures. In fact, the primary piece of evidence comprised of the terabyte drive in this case was not produced until the morning of the 30(b)(6) deposition of Donnie Misino, months after the Court ordered production of the same.

6. The terabyte drive produced by Defendants contained approximately 1.8 terabytes of data for analysis after the decompression of the data from this compressed snapshot.

7. My primary responsibility in this case was to analyze the terra byte drive of data and create queries in order to pull information off of the terabyte drive. By way of example, I wrote simple queries to see data such as, by way of example:

- a. Domain names registered under the name Navigation Catalyst Systems.
- b. The dates of registration of domain names registered by Navigation Catalyst Systems.
- c. Comparison of various trademarks registered with the USPTO for which typographical variations occurred within the NCS domain portfolio.
- d. The dates of registration for domains that were held for five day periods and then deleted for a refund.

8. Defendants argue that my methodology “is deeply flawed and entirely unreliable.” Defendants have proprietary software the more complex queries are shown in my Reports. The simple queries such as “retrieve list of tasted domain names that start with ‘w’ and contain ‘herund’” are as simple as “SELECT * FROM [Domain_Park].[dbo].[dp_tasting_queue_complete_previous_20081103] where domain_name like ‘w%herund%’”. This shows the data in its database. I wrote simple

queries on the database to retrieve the data. The queries, included in my report, which could be performed by any person with basic computer programming abilities.

Defendants do not question the accuracy of the data retrieved as a result of these queries (i.e. the domain names registered by Defendants, the trademark scoring on these domain names, etc). Reliability is clearly seen in the results of the queries. For instance, anyone can see that in fact Defendants have registered scores of domains that are within 2-3 letters variation of the registered trademarks contained in their database. My script simply retrieved sample lists from the terabyte drive for all to see and discuss.

9. All of the more complicated queries I have run on the subject database are incorporated in my reports and opinions are easily verifiable by the Defendants or anyone else with basic computer programming skills and knowledge of SQL (Structured Query Language).

10. It is unclear what "methodology" which would be query language Defendants take issue or what results they believe are unreliable. They have not specifically identified any.

11. In general, Defendants apparently take issue with my opinion that Defendants' software is ineffective "by design", since it does not seem to consistently flag "near-trademarked terms."

12. The basis for my opinions are as follows:
The defendants registered domain names prior to even developing the software that in theory protects against registering third party trademarks. In the case of domain tasting,

the practice of registering a domain for less than 5 days, there was no testing for trademarks prior to registration. In the cases where there was testing, the database includes examples of registrations for domains like: rockymountainchocolatefactory, where the defendants scored it a 98% match to the trademark "Rocky Mountain Chocolate Factory" (USPTO serial 75002116) and yet chose to register the domain on October 8th 2007, and still hold to this date. In another example from Weather Underground's trademarks, qwunderground.com scored a 92% to the "wunderground.com" trademark (USPTO serial 75662098). Please notice the proximity of the Q and the W on a keyboard.

13. Defendants generally take issue with the fact that I did not look at the "blacklist", which Defendants allege they somehow use to filter out DNS error data domains from consideration (Defendants apparently want to look at domains the excluded from consideration from registration via the blacklist, although no information on what domains were excluded by the blacklist or otherwise was produced). Defendants provided no DNS error data for review in this case. Thus, it is unclear what prospective domains they considered prior to registration; however, the supposed "blacklist" which removed certain DNS error generated domains from consideration for registration has little to do with the analysis I performed in this case. Because Defendants produced no information on what DNS error domains they removed from consideration based on the blacklist, there was nothing there for me to analyze. I reviewed the only real data Defendants produced in discovery, which is a partial list of the domain names they actually registered. Defendants argue that the blacklist was a

“integral piece of Connexus’ trademark screening process” which is fine. They are free to talk about that at trial. However, anyone can look at the domains that Connexus did in fact register - which are clear typographical variations of trademarks registered with the USPTO, high traffic websites, and famous companies - to know that their trademark process, either by design, with intent or otherwise, failed to preclude the registration of clear typographical variations of high traffic websites and/or registered trademarks. Also, now having read their expert, Prof. Korf’s, deposition, I am unclear that the “blacklist” process even existed prior to vast majority of the claimed trademark abuses in this case. NCS059208, a stored procedure used to record the blacklist matching results, shows a creation date of 7/9/2008. This is after the first 279 of our 284 claimed trademark registrations, making the blacklist’s function primarily a moot point.

14. My conclusion that Defendants intentionally registered trademarked domains is based on my review of their extremely rudimentary trademark matching algorithm, the fact that even when the trademark algorithm scores a near perfect match to a trademark (for instance, one letter off for a 98% match), Defendants still registered the domain in many instances, such as:

- a. rockymountainchocolatefactory.com (98%)
- b. napaautoparsts.com (98%)
- c. thehistorychannael.com (99%)

15. The PHP scripts I created for the purpose of trademark matching looked at domains with high traffic in order to see if there were matches within Defendants’ domain portfolio. The issue of whether or not a “valid trademark” exists in the USPTO

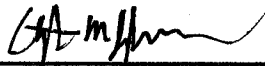
database for such domains as: wickapedia.org, youtue.com, answers.com, craiglest.org, blloger.com, phohotobucket.com, photobucket5.com, huggingtonpost.com, nefftlix.com, jcypenny.com, welsfarfo.com, drudgerteport.com, wungerground.com, thewunderground.com, weatherrbug.com, urbandictioanary.com, ticketmater.com, foodnetworc.com, ancestroty.com, deviantnart.com, accuweaterh.com, babycentter.com, addictcinggames.com, plenityoffish.com, biblegatewaay.com, and wwwmakeawishfoundation.com is for counsel and the Court. At a minimum, Defendants registered many typographical variations of high traffic domains despite the fact that their own trademark tool scored the domains as an extremely high trademark match. It was unnecessary for me to write a script to compare Defendants' portfolio against the USPTO database, as their database already includes USPTO registrations. Interestingly, Defendants failed to identify a single "high traffic domain name" match wherein a trademark does not, in fact, exist, either through registration or common law use.

16. Because Defendants have produced data which is not a format which a jury can see, look at, or access, my testimony is critical in order to show items such as, but not limited to:

- a. What domains are registered by Defendants and for what periods.
- b. How Defendants' own trademark software scores domain names registered by NCS against the USPTO database.

- c. Whether Defendants registered domain names which are typographical variations of high traffic website domain names.
- d. Whether Defendants' trademark scoring tool appears to properly flag domains against the USPTO database. For example, they seem to do a fine job at recognizing that rockymountainchocolatefactory.com is a near match of a known trademark, yet domains like thewunderground.com did not match wunderground.com, but did match "The Underground Rebels" with a 91%.
- e. When the software was written and in use.
- f. The existence of tables such as "temp_weatherunderground_lily_dm" create 2009-04-14 that lists additional domains known by defense and not brought to our attention, such as: wondergroundweather.com, weatheground.com, wundgerground.com, wunderunderground.com, weaatherunderground.com(see my second expert report Appendix A for more)
- g. Records of hand made categorization efforts to take the portfolio domains like "weatgerunderground.com" and tag it as

“online weather”, or for the domain “watherunderground.com” and tag it as “weather underground” in the database. Data that shows active knowledge of the types of domains found in the defendants’ portfolio.



Christopher M. Schwerzler