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

THE WEATHER UNDERGROUND, INC.,
a Michigan corporation,

Plaintiff,

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

vs.

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

Defendant.
_____/

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PLAINTIFF'S MOTION IN LIMINE TO EXCLUDE DISCUSSION OF PLAINTIFF'S ACTUAL DAMAGES AND OF DEFENDANTS' MONETARY GAIN AND BRIEF IN SUPPORT

NOW COME Plaintiff, by and through counsel, HOOPER HATHAWAY, P.C. and TRAVERSE LEGAL, PLC and hereby submits its Motion in Limine to Exclude Discussion of Plaintiff's Actual Damages and of Defendants' Monetary Gain and state as follows:

1. As the Court is already well aware from past motion practice, this case is a cybersquatting case of the "typosquatting" variety brought against Defendants in connection with their registration of 274 domains (so far discovered) which were all typographical error variations of Plaintiff's registered trademarks.

2. Discovery has shown that Defendants have registered millions of domain names which are typographical error variations of marks which are owned by others, including some of the most famous marks in the country, all designed to take advantage of typing errors made by consumers who intended to reach the websites of the legitimate mark owners.

3. Plaintiff has sued Defendants under the Anti-Cyberquatting Consumer Protection Act ("ACPA").

4. Plaintiff has elected statutory damages in lieu of actual damages under 15 U.S.C. § 1117(d) of the ACPA.

5. Because of this election of remedies, discussion at trial of Plaintiff's actual damages or of Defendants' actual monetary gain off of the particular marks in question is irrelevant, confusing, prejudicial, and a waste of time. Accordingly, such references should be excluded from trial under FRE 402 and 403.

6. Because Defendants' lead counsel and the undersigned counsel have each been away from their offices on vacation on back-to-back alternating weeks, they were not able to hold a conference with respect to this motion; however, they did confer by e-mail and after the movant explained the nature of the motion and its legal basis, concurrence was denied.

Respectfully submitted this 23rd day of February, 2012.

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BRIEF IN SUPPORT

Concise Statement of Issues Presented

1. Whether the Court should exclude discussion of Plaintiff's actual damages and of Defendants' monetary gain at trial under FRE 402 because these damage items are irrelevant in a case where the plaintiff has elected statutory damages?

   Plaintiff answers: YES

   Defendants answer: NO

2. Alternatively, whether the Court should exclude discussion of Plaintiff's actual damages and of Defendants' monetary gain at trial under FRE 403 because the presentation of such information would be confusing, misleading, prejudicial, and a waste of time?

   Plaintiff answers: YES

   Defendants answer: NO

Controlling or Most Appropriate Authority for the Relief Sought

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I. Factual Background

Since the factual record in this case is already quite extensive through prior briefing, Plaintiff, The Weather Underground, Inc. ("Weather Underground"), will simply remind the Court that this case is about Defendants' unauthorized registration and/or use of what now turns out to be 274 typographical or other derivations of Plaintiff's trademarks. Plaintiff owns and operates a Top 100 website on the Internet. Discovery has shown that Defendants' business model has been to register multiple typographical variations of trademarks and trade names which are owned by others, including many famous trademarks, in order to reap the benefit and cyber-traffic generated by typographical errors which are unwittingly punched into consumers' web browsers. Defendants' domain portfolios have, over the years, included millions of misspelled marks in which Defendants have no legitimate interest, other than to divert traffic away from their lawful trademark owners. (Multiple examples of these "typo-domains" are referenced in ¶ 81 of the First Amended Complaint.)

Defendants make their money on the enormous volume of the Internet, with its millions of users, and millions of typographical errors each day. They do so by "monetizing" the web traffic, receiving a few cents per click on each domain, on which Defendants either host advertising or links to other websites, including the websites of companies which compete with the legitimate trademark owners. For this reason, in conjunction with Defendants' demonstrably shoddy recordkeeping, Defendants are able to claim that they make very little money from the typosquatted domains of any particular trademark owner, such as Plaintiff. Conversely, victims of this typosquatting, like Weather Underground, will necessarily have a difficult time proving substantial damages -- or even anything more than *de mininous* damages -- against cyber-pirates, despite the fact that Defendants are hijacking their intellectual property

for commercial gain. With Defendants' business model such as it is, only a large group of plaintiffs banding together, as in a class action, would be able to successfully demonstrate substantial damages on the part of the victims and substantial gains on the part of Defendants. Defendants' business model is predicated on the tendency to quickly transfer typosquatted domain names back to their rightful owners whenever they get caught, in the realistic hope that most trademark owners will not make the effort to assert their rights against Defendants under the ACPA. Weather Underground, like Verizon before it, has chosen to pursue its claim under the ACPA, not satisfied with the notion that thieves should suffer no consequences just because they give back the stolen property when caught. See *Verizon Cal., Inc. v Navigation Catalyst Sys.*, 568 F.Supp.2d 1088 (C.D. Cal. 2008).

Because the ACPA gives victims of cyber-piracy the right to elect statutory damages in lieu of proving their actual damages or Defendants' ill-gotten profits from these particular instances of typosquatting, Plaintiff believes that any discussion of these monetary figures should be excluded from trial, lest they prejudice the Plaintiff, waste the Court's time on matters which are not necessary, confuse or mislead the jury into believing that the statutory damages are somehow dependent upon the actual dollars gained or lost. More to the point: actual damages and the profits gained from these particular marks are irrelevant where statutory damages have been elected.

II. Argument

A. Plaintiff Has Elected to Recover Statutory Damages

1. The ACPA Provides for an Election of Remedies

Defendants' entire business model is based on the notion that it is acceptable to profit off of millions of typographical variations of the trademarks and trade names of others, and

then to count on the legitimate owners of the those marks not asserting their right to demand statutory damages under the ACPA. One way that Defendants do this is by transferring the domains back to their legitimate owners whenever they get caught. At trial, it is predictable that Defendants will continue this theme of "no harm, no foul" by trying to put into evidence or otherwise discuss the relatively small level of harm suffered by Plaintiff and the relatively small monetary gain attributed to the Defendants for the particular domains in question, notwithstanding the fact that we now know of 274 of them. But unfortunately for the Defendants, the ACPA does not lend itself to a "no harm, no foul" defense.

Congress purposefully left it up to the victims of cyber-piracy to determine whether the evidence of monetary losses or of ill-gotten gains would be submitted to the trier of fact or not. Under the Lanham Act, in which the ACPA is now incorporated, a Plaintiff who successfully proves a violation under § 1125(d) is entitled "to recover (1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action." 15 U.S.C. § 1117(a). However, should a plaintiff prefer not to go through the often difficult or impossible exercise of proving the cybersquatter's profits and/or its own damages, it has the option of electing to pursue statutory damages under 15 U.S.C. § 1117(d), which reads:

> In a case involving a violation of § 1125(d)(1) of this title [i.e., the ACPA], the plaintiff may elect, at any time before final judgment is rendered by the trial court, to recover, instead of actual damages and profits, an award of statutory damages in the amount of not less than $1,000 and not more than $100,000 per domain name, as the court considers just.

In the present case, Plaintiff has now elected to receive statutory damages, in lieu of actual damages or profits. The choices are mutually exclusive. *Ford Motor Co. v Catalanotte*, 342 F.3d 543, 546 (6th Cir. 2003) (a plaintiff under the ACPA may seek, "between $1,000 and $100,000 in statutory damages per domain name *in lieu of actual damages*.") (emphasis added).

Statutory damages under § 1117(d) "may be awarded only in cases in which compensatory damages are not awarded for the same violation." *Gabbanelli Accordions & Imports v Ditta Gabbanelli Ubaldo di Elio Gabbanelli*, 575 F.3d 693, 698 (7th Cir. 2009); see also, *Fieldturf v Triexe Management Group*, 69 U.S.P.Q.2d 861 (N.D. IL 2003) ("a plaintiff seeking to recover under § 1125(d) may elect an award of statutory damages for each violation of the cybersquatting statute *instead of* actual damages.) (emphasis added). In other words, choosing to pursue statutory damages constitutes a definitive election of remedies.[1]

2. Statutory Damages are Meant to Punish and Deter: Proof of Actual, Out-of-Pocket Damages is Unnecessary and Often Extremely Difficult

a. Proof of Actual Damages is Unnecessary

The ACPA is designed so that a plaintiff can decide whether the best possible recovery is likely to be achieved by pursuing compensatory damages or by pursuing statutory damages, depending upon the facts of the case. In cases where the plaintiff is easily able to prove that it has sustained substantial damages or that the defendant has made significant profits off of its marks at a magnitude likely to exceed the statutory range, then compensatory damages will likely be chosen. Conversely, when damages or ill-gotten gain are difficult to prove, plaintiff may forgo that exercise and argue for statutory damages between $1,000 and $100,000 per domain name. Plaintiff is given this choice because of the punitive and deterrent nature of the ACPA. Neil L. Martin, *The Anticybersquatting Consumer Protection Act: Empowering Trademark Owners, But Not the Last Word on Domain Name Disputes*, 25 Iowa J. Corp. L. 591, 607 (2000). In essence, "The provision of statutory damages alleviates the plaintiffs'

[1] Similarly, the Copyright Act requires a plaintiff to give up the right to seek actual damages once the plaintiff has elected statutory damages. *L.A. News Serv. V Rueters TV Int'l*, 149 F.3d 987, 995 (9th Cir. 1998) (citations omitted).

burden of proving the amount of damage they suffered at the hands of the cybersquatter." *Id*. As the Eleventh Circuit has observed, the ACPA's statutory damages serve as, "a sanction to deter … wrongful conduct." S*t. Luke's Cataract and Laser Institute v Sanderson*, 573 F.3d 1186, 1204 (2009). Statutory damages under § 1125(d) thus serve "to sanction or punish" the "cyber pirate" for its "bad faith conduct in order to deter future violations of the ACPA …." *Id* at 1205.[2] As the leading treatise on trademarks and unfair competition notes, "an award of statutory damages under the ACPA serves to sanction or punish the bad faith conduct of defendant, while an award of damages for trademark infringement serves to compensate the trademark owner for the injuries." J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition*, § 2078, pp. 25-393-394 (2011). In the Final Pretrial Order, Plaintiff has elected to try its ACPA and declaratory relief counts only, and limits its claim for monetary relief to statutory damages and attorney fees only. Accordingly, there is no need for Weather Underground to prove its actual damages, which are immaterial to these inquiries.

For the same reason, the court in *Microsoft Corporation v Tierra Computer*, 184 F.Supp.2d 1329, 1333 (N.D. GA 2001), rejected defendant's assertion that plaintiff must prove some amount of actual damages before it can recover statutory damages under the Lanham Act. In that case, the court held that where a plaintiff is able to demonstrate evidence of a clear violation of the Lanham Act, plaintiff may elect and recover statutory damages, without proof of actual damages. *Id*. Similarly, in *E&J Gallo Winery v Spider Webs Ltd*, 286 F.3d 270, 278 (5th Cir. 2002), the circuit court affirmed the trial court's award of statutory damages, even though the plaintiff "did not present evidence that it actually lost any business due to Spider Web's actions," since the defendant's behavior put Gallo "'at risk of losing business and of

[2] This is also evident from the legislative history. See 145 Cong. Rec. S10519 (Daily Ed. Aug. 5, 1999) (Statement of Sen. Abraham).

having its business representation tarnished." (internal citation omitted). Since Plaintiff is not required to prove actual losses in order to be awarded statutory damages, there is no reason for the jury to consider them, and a discussion of them at trial runs the risk of misleading the jurors into believing that plaintiff has the burden of showing actual losses or that these actual losses somehow dictate the appropriate statutory damage figure.

b. Proof of Actual Damages is Often Extremely Difficult

Even where willful intent can be established, Congress and the courts have recognized that proving damages is often quite difficult. See S. Rep. No. 106-140, at 7 (1999). In *Electronics Bouquet Holdings v Zuccarini*, 56 U.S.P.Q.2d 1705 (E.D. PA 2000), a case very similar to this one, the court awarded the maximum amount of statutory damages for each of the five domain misspellings at issue, rendering a $500,000 statutory damage verdict despite the fact that the plaintiff's loss of customers and good will was determined to be "incalculable." Like in the instant matter, the defendant in the *Zuccarini* case had no bonafide business purpose for registering the domain misspellings, offered no goods or services relating to the true owners' products, and inexplicably registered (merely) hundreds of domain names which were misspellings of famous brands, company names, etc. The court found that because *Zuccarini* "boldly thumbs his nose at the rulings of this court and laws of our country," the maximum statutory damages were appropriate. The Court here will be asked to do likewise, even in the absence of "calculable," actual damages.

Because of the common, recognized difficulty of proving actual losses in intellectual property cases, District courts are given very broad discretion in assessing statutory damages. See *Douglas v Cunningham*, 294 U.S. 207, 210, 79 L.Ed. 862, 55 S. Ct. 365 (1935) (within statutory limits, determination of statutory damages is committed solely to the discretion of the

trial court). As this Court has acknowledged, "a successful plaintiff in a trademark infringement case is entitled to recover enhanced statutory damages even where its actual damages are nominal or non-existent." *Ford Motor Company v Cross*, 441 F.Supp.2d 837, 852 (E.D. Mich. 2006) (citing *Peer Int'l Corp. v Pausa Records*, 909 F.2d 1332, 1336-1337 (9th Cir. 1990)). This Court has also recognized that the proper objective of statutory damages in an ACPA case is to have a deterrent effect. *Id.* (citing *Fitzgerald Publishing Co. v Baylor Publishing Co.*, 807 F.2d 1110, 1117 (2nd Cir. 1986)). A trademark owner may elect to recover statutory damages for cyber-piracy, and in such cases, "a court has wide discretion in determining the amount of statutory damages to be awarded, within the specified limits established by Congress." *Id* (citing *Peer*, *supra*.).

3. The ACPA Does Not Require a Plaintiff to Prove that the Cybersquatter Actually Profited from Its Unlawful Activities

The ACPA states that:

> A person shall be liable in a civil action by the owner of a mark, including a personal name which is protected as a mark under this section, if, without regard to the goods or services of the parties, that person --
>
> (i) has a bad faith *intent to profit* from that mark, including a personal name which is protected as a mark under this section; and
>
> (ii) registers, traffics in or uses a domain name that –
>
> (I) in the case of a mark that is distinctive at the time of the registration of the domain name, is identical or confusingly similar to that mark;
>
> (II) in the case of a famous mark that is famous at the time of registration of the domain name, is identical or confusingly similar to or dilutive of that mark; or

(III) is a trademark, word, or name protected by reason of § 706 of Title 18 or § 220506 of Title 36.

15 U.S.C. § 1125(d)(1)(A) (emphasis added).

The plain language of the statute makes it clear that a plaintiff need only prove a defendant's bad faith intent to profit, not that the cybersquatter *actually* profited or the *amount* of that profit. Immediately following the above-cited statutory language, Congress set out a list of nine non-exclusive factors which a court may consider "[i]n determining whether a person has a bad faith intent …." 15 U.S.C. § 1125(d)(1)(B)(i). None of the Sixth Circuit case law discussing the elements or proofs necessary to prevail in an ACPA claim suggest that it is necessary to make a showing of a defendant's *actual* gains or profits. See, e.g., *DaimlerChrysler v Net, Inc.*, 388 F.3d 201, 204ff (6th Cir. 2004) (the fifth element of an ACPA claim is "a bad faith intent to profit."). Thus, it is clear under the ACPA that intent to profit is the standard, not actual profits or the extent of profits. Moreover, the elements of the ACPA provide no mitigation based on the extent of the defendant's profits; to the contrary, the clear wording of the statute and the lack of any language about the extent of defendant's profits in the list of bad faith factors or in the election of remedies provision indicate that defendant's actual profits are immaterial and irrelevant. See § 1125(d)(1)(B) and § 1117(d).

B. Actual Damages and Lost Profit Figures Should be Excluded from the Trial

1. They are Irrelevant Under FRE 401 and 402

The amount of actual damages sustained by Plaintiff or actual profits gained by Defendants should be excluded from the trial as irrelevant under FRE 402. This is so because the actual amounts of Plaintiff's losses or Defendants' gains do not "make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FRE 401. Since Plaintiff is not required to prove its

actual damages -- and in fact is prohibited from doing so where it has elected statutory damages -- the amount of those damages is of no consequence to the determination. Likewise, since Plaintiff is precluded from seeking Defendants' profits where it has elected to receive statutory damages, and since Plaintiff is only required to prove Defendants' "bad faith intent to profit," the amount of those profits is of no consequence to the determination of the action. In other words, these monetary figures lack materiality.[3] Since Plaintiff here is not required to prove the amount of its actual damages or the amount of Defendants' profits in order to be awarded statutory damages, those figures are not "of consequence" and are thus irrelevant. They should, accordingly, be excluded. See *Columbia Pictures Television v Krypton Broadcasting of Birmingham*, 259 F.3d 1186, 1194 (9th Cir. 2001) ("a plaintiff may elect statutory damages "'regardless of the adequacy of the evidence offered as to its actual damages or the amount of the defendant's profits.'") (citation omitted). There is no need for such evidence, because where statutory damages are elected, "'the court has wide discretion in determining the amount of statutory damages to be awarded, constrained only by the specified maxima and minima.'" *Id* (quoting *Peer, supra*, 909 F.2d at 1336).

2. Alternatively, They Should be Excluded Under FRE 403

Alternatively, even if the Court were to find that the actual amount of Plaintiff's damages and/or the actual amount of Defendants' profits are relevant, they should nevertheless be excluded under FRE 403, because the probative value of those figures "is substantially

[3] "There are two components to relevant evidence: materiality and probative value. Materiality concerns the fit between the evidence and the case. It looks to the relation between the propositions that the evidence is offered to prove and issues in the case. If the evidence is offered to help prove a proposition that is not a matter in issue, the evidence is immaterial. *** Thus, in a suit for workers' compensation, evidence of contributory negligence would be immaterial, whether pleaded or not, since a worker's negligence does not affect the right to compensation." *McCormick on Evidence* (6th Ed.) § 185. FRE 401 incorporates "these twin concepts of materiality and probative value." *Id*.

outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, [and] waste of time …." FRE 403. As recognized in many of the cases cited above, the very nature of cyber-piracy is likely to involve egregious conduct for which actual damages are either difficult to prove or *de minimus*, with relatively small profits realized by the defendant against any particular trademark owner whose marks are included in the Defendants' extensive portfolio. Because the intent of the statute is to deter this type of behavior through punishment, the purpose of the law would be thwarted if Defendants were allowed to confuse the issues and prejudice or mislead the jury into believing that statutory damages should merely be reflective of or related to actual damages or profits. Worse yet, Plaintiff would be unfairly prejudiced and the jury misled if a discussion of Plaintiff's actual damages or of Defendants' actual profits were to give the jurors the impression that Plaintiff has the burden of proving these figures in order to obtain a verdict on liability. Moreover, the Court's valuable time would be wasted by the presentation of figures which are not required in order for the Plaintiff to prevail on liability and obtain statutory damages.

3. They Should Be Excluded Because Defendant was not Forthcoming with the Information Necessary to Prove or Disprove these Figures

Finally, it would be patently unfair for monetary figures regarding gained or lost profits to be submitted to the jury because defendant failed to provide complete revenue data, and instead just produced a summary, which was prepared for this litigation and not in the ordinary course of business.[4] Moreover, Defendants only provided revenue data with respect to the first 35 domain names known to Plaintiff at the time the lawsuit was filed, not with respect to the subsequently discovered list of 239 additional domains, of which Plaintiff is now aware.

[4] The inadequacy of Defendants' overall disclosures are addressed more comprehensively in Plaintiff's simultaneously filed Motion in Limine Requesting a Jury Instruction on Spoliation.

Weather Underground would necessarily be significantly prejudiced by having to respond to such information if it were for the first time produced now or at trial.

III. Conclusion

The Court should exclude discussion of Plaintiff's actual damages and of Defendants' actual profits because Plaintiff has elected to recover statutory damages under the ACPA--the purpose of which is to punish or deter, not compensate--and further because proof of actual damages and profits is often difficult or impossible and is simply not required. Because they are of no consequence to the claim under the elements of the ACPA, they are immaterial and irrelevant and should be excluded. Alternatively, they should be excluded because they risk confusing or misleading the jury and wasting time. Finally, they should be excluded because they prejudice the Plaintiff by making it appear as if it had to prove these in order to establish liability or statutory damages, and because Defendant has not provided enough information to do so.

WHEREFORE, for all of the above-stated reasons, this Honorable Court is respectfully asked to grant Plaintiff's Motion in Limine to Exclude Discussion of Plaintiff's Actual Damages and of Defendants' Monetary Gain.

Respectfully submitted this 23rd day of February, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of February, 2012, 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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