

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 THE WEATHER UNDERGROUND, INC.'S EVIDENTIARY
OBJECTIONS AND RESPONSES TO DEFENDANTS' MOTION IN LIMINE NO. 6**

**I. The Seventh Amendment Does Not Guarantee a Right to a Jury Trial Under These
Circumstances**

As Defendants note in their motion, the Seventh Amendment right to a jury trial applies only to suits “at common law.” The Anti-Cybersquatting Consumer Protection Act (“ACPA”) obviously does not involve a common law right. Although Defendants are correct in noting that courts will look to see whether the modern statutory right in question is analogous to a common law action that existed in the Eighteen Century, they are incorrect in lumping together cyber-piracy with trademark law. Cyber-piracy, which obviously was not known at common law in Eighteen Century, may or may not involve trademark infringement. Domain names do not necessary have to be recognized trademarks, although they may be. Although the Defendants’ citation to the *GoPets* case is interesting, it does not answer the question, since the court itself in that case stated that it “need not decide that question”, as it had already awarded summary judgment and the only issue to be tried was damages, where only minimal statutory damages were awarded.¹ Thus, the issue of the Seventh Amendment right to a jury trial under the ACPA is an issue of first impression. While the Court may wish to impanel an advisory jury, it need not necessarily do so.

II. Evidence of Plaintiff’s Financial Condition and Actual Damages Should Be Excluded

In response to this portion of the Defendants’ motion, Plaintiff primarily relies upon its pending Motion in Limine to Exclude Discussion of Plaintiff’s Actual Damages and of Defendants’ Monetary Gain, which is hereby incorporated by this reference in its entirety. Additionally, Plaintiff notes that -- contrary to Defendants’ assertion -- judicial scrutiny of a cyber-piracy victim’s damages is *not required* in order to pass constitutional muster. Defendants cite no binding precedent which would require this Court to admit evidence of

¹ Likewise, in the only other case to discuss the right to a jury trial under the ACPA, the court in *Verizon California Inc. v OnlineNIC, Inc.*, 2009 U.S. Dist. LEXIS 894235 (N.D. Cal. 2009), the court also failed to decide the issue, since the case involved a default judgment.

Plaintiff's actual damages in order to assess statutory damages. The ACPA is an entirely unique statute, in that it does not allow for statutory damages unless bad faith is proven, and then provides a list of factors which may be considered in determining whether bad faith exists. 15 U.S.C. § 1125(d)(1)(B). In other words, the statute itself focuses upon *the Defendants' conduct* and provides within the language of the statute itself a scrutiny which would justify the imposition of statutory damages. Noticeably absent from these factors is any mention of a victim's actual damages. Unlike the Copyright Act, which seems to have been at issue in most of the cases Defendants cited, the ACPA protects against a violation of due process rights in the awarding of statutory damages because of its requirement that a court find bad faith in order to do so. *St. Luke's Cataract and Laser Institute v Sanderson*, 573 F.3d 1186, 1204 (11th Cir. 2011) ("an ACPA-Cyber-Piracy claim, unlike a service mark infringement claim, requires a showing of a 'bad faith intent to profit' from a protected domain name."). The Copyright Act contains no such requirement, but simply gives the copyright owner the ability to collect statutory damages over actual damages and profits. In contrast, under the ACPA, a plaintiff cannot make that election unless it has proven a violation of 15 U.S.C. § 1125(d)(1), which, in turn, requires proof of bad faith. See § 1117(d). Thus, by the time a court gets to the point of awarding statutory damages under the ACPA, it has already considered various factors relating to the cybersquatter's behavior, and in doing so has assured him of due process.²

Defendants suggest that the Supreme Court's opinion in *St. Louis Iron Mountain & Southern Railway Co. v Williams*, 251 U.S. 63, 66 (1919) mandates a scrutiny of actual damages in order to award statutory damages. The *Williams* case contains no such holding.

² Not surprisingly, the cases relied upon by the Defendants, most of which are unreported, do not relate to the ACPA, e.g., *Charter Communications*, decided under 47 U.S.C. § 553, the unauthorized reception of cable service statute; *Bosch*, a copyright case; *Andrade*, a fair credit reporting case; and *Zomba*, another copyright case.

That case considered the constitutionality of the statute itself, and upheld the constitutionality of statutory damages. Its scrutiny about the severity and oppressiveness of the punishment did not relate to the specific facts of the case, but rather, to the fact that the statute in question contained a maximum and minimum statutory damage range, as does the ACPA. The court's finding in that regard is instructive:

True, the penalty goes to the aggrieved passenger [under the civil statutory damages provision of a statute regulating the transportation of railway passengers] and not the State, and is to be enforced by a private and not a public suit. But this is not contrary to due process of law. *** Nor does giving the penalty to the aggrieved passenger require that it is to be confined or proportioned to his loss or damages; for, as it is imposed as a punishment for the violation of a public law, the legislature may adjust its amount to the public wrong rather than the private injury, just as if it were going to the State.

Under the ACPA, a defendant's right to due process is protected by the requirement that bad faith be proven in order to recover under the statute and by the fact that defendant's wrongful behavior is scrutinized for its severity before making such an award. This award need not be "confined or proportioned to [a plaintiff's] loss or damages"; rather, the statutory damages may be imposed as a deterrent or as punishment for the public wrong committed, so long as that public wrong has been proven and appropriately scrutinized by the court in a manner which assures the defendant of due process, as is the case under the ACPA. Plaintiff's actual damages and lost profits are not a required element for due process, and are in fact irrelevant and immaterial to this inquiry. For the reasons stated in Plaintiff's pending motion, they should be excluded under FRE 402 and 403.

Respectfully submitted this 27th day of February, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on the 27th 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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