

Evidentiary Issues

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

THE WEATHER UNDERGROUND, INC.,
a Michigan corporation,

Plaintiff,

vs.

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

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

Defendants.

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BENCH BOOK EVIDENTIARY ISSUES

The parties note the following evidentiary issues:

1. Admissibility of Weather Underground's balance sheets and profit and loss statements. Plaintiff states these are not relevant to any bad faith factor under 15 USC §1125(d)(1)(B), or to the issue of damages as Plaintiff has elected statutory damages in lieu of lost profits or disgorgement of profits. Plaintiff has not analyzed nor offered any proof of actual damages. It is Plaintiff's position that Defendant has produced no discovery to support its 'for trial' summaries of traffic data or revenue from use of infringing domains from which disgorgement of profits and/or loss of profits might have been possible. Balance sheets or P&L statements don't have any relevance to possible loss profits, nor can Defendants show "lack of damages" with any admissible evidence. Defendant states that Plaintiff's lack of damages and harm are relevant to any analysis of statutory damages. It is Defendants' position that its summaries of traffic data and domain name revenue are in themselves admissible under Fed. R. Evid. 806 without regard to Fed. R. Evid. 1006 but that, in any event, Defendants produced the entire database from which these numbers are derived. Plaintiff has performed other queries on the database which they intend to introduce at trial and could just as easily query the database for traffic and profit information.

2. Admissibility of third party trademark registrations as a matter of judicial notice or through Defendants witnesses. Trademark registration information is publicly available from the USPTO, as well as through Defendants' USPTO Trademark Registration matching tool and thus contained in their own trademark database. Prior to that Defendants state they searched the publically available trademark database allegedly in order to avoid trademarks. Trademark matching was, according to Defendants, always part of their domain name registration process.

It is Plaintiff's position that what trademarks were listed as registered and as of what dates compared to Defendants' domain registrations, either through public search of www.uspto.gov, or as part of Defendants purchased databases is relevant and admissible to (a) impeach Defendants testimony that they looked at USPTO trademark registrations prior to registering all domains and as part of a trademark scrub of the entire portfolio in 2008, (b) compare Defendants domain registrations against publically available trademark registration information and (c) as a specific element of bad faith under factor 8, ("the registrant's registration or acquisition of multiple domain names that are identical or confusingly similar to marks of others;").

3. Whether statutory damages will be assessed by the jury or the Court and whether Defendants' profits and Plaintiff's lack of lost profits may be considered by the fact finder.

4. How to accommodate testimony by deposition and the deadline for deposition designations and counter-designations for completeness as well as objections to deposition testimony.

5. Plaintiff's Motions *in limine*:

a. A motion to exclude any evidence/mention of Weather Underground's actual losses/damages or Defendants' actual profits/gains because of Plaintiff's election of statutory damages.

b. A motion to obtain a jury instruction on spoliation of evidence, seeking a presumption or alternatively an inference against Defendants on the basis of the lack of regularly kept business records.

c. Motion in Limine to exclude reference to Plaintiff's settlements with other alleged cybersquatters.

- d. Motion in Limine to Limit the testimony of Defendants' experts Korf and Berryhill on improper legal conclusion regarding ultimate issue in the case, relevance, foundation and Daubert criteria.
 - e. Motion in Limine to Exclude attorney-client privileged emails between Chris Schwerzler and counsel inadvertently produced as part of Schwerzler's expert opinions.
6. Defendants' Motions *in limine*:
- a. A motion to exclude evidence and arguments abating the details of disputes with third parties including (a) cease-and-desist letters from other parties and (b) other lawsuits.
 - b. A motion to exclude evidence of the UDRP proceeding in this case.
 - c. A motion to exclude evidence of the registration of "adult" domain names.
 - d. A motion to exclude argument regarding document destruction, failure to produce documents, or other spoliation of evidence.
 - e. A motion to preclude evidence and argument regarding the existence of other corporate entities including April Sea and Metes.
 - f. A motion to allow the jury to assess Defendants' actual profit and Plaintiff's lack of profits in determining statutory damages.

Respectfully submitted this 28th day of February, 2012.

/s/William A. Delgado

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