

## Plaintiff's Additional Proposed Instructions

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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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

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**PLAINTIFF'S PROPOSED JURY INSTRUCTIONS**

**INSTRUCTION NO. 8  
ELECTION OF A FOREPERSON  
EXPLANATION OF VERDICT FORM(S)**

When you go to the jury room, you should first select one of your members to act as your foreperson. The foreperson will preside over your deliberations and will speak for you here in court.

A form of verdict has been prepared for your convenience.

**EXPLAIN VERDICT**

You will take the verdict form to the jury room; when you have reached unanimous agreement, you will have your foreperson fill in the verdict form, date and sign it, and then return to the courtroom.

If you should desire to communicate with me at any time, then please write down your message or question and pass the note to the marshal who will bring it to my attention. I will then respond as promptly as possible, either in writing or by having you returned to the courtroom so that I can address you orally. I caution you, however, with regard to any message or question you might send, that you should not tell me your numerical division at the time.

**INSTRUCTION NO. 9**  
**Vicarious Liability for Corporate Employer**

Employers are vicariously liable for acts of their officers, employees and agents. The employer is liable for both negligent and intentional torts committed by an officer employees, or agent within the scope of his or her employment.

**Authority:**

***Meyer v. Holley*, 537 U.S. 280, 285-86 (2003).**

**INSTRUCTION NO. 10**  
**SPOILIATION/DESTRUCTION OF EVIDENCE**  
**(DEPENDING ON HOW EVIDENCE COMES IN AT TRIAL)**

Plaintiff contends that Defendants at one time possessed [*describe evidence allegedly destroyed*]. Defendants contend that evidence was destroyed consistent with their document retention policy.

Even when an action has not been commenced and there is only a potential for litigation, the litigant is under a duty to preserve the evidence that it knows or reasonably should know is relevant to the action.

You may assume that the such evidence would have been unfavorable to Defendants only if you find by a preponderance of the evidence that:

1. Defendants intentionally destroyed the evidence; and
2. Defendants destroyed the evidence in bad faith.

Authority:

*Chrysler Realty Co., LLC v. design Forum Architects, Inc.*, 2009 U.S. Dist. LEXIS 121411 (E.D. Mich. 2009).

**INSTRUCTION NO. 11**  
**THE PARTIES AND CLAIMS**

I will now explain the claims that the Plaintiff has made against the Defendants. Plaintiff The Weather Underground, Inc. is a Michigan corporation. Plaintiff owns various trademarks including THE WEATHER UNDERGROUND and WUNDERGROUND. It also operates various websites include <weatherunderground.com> and <wunderground.com> on which it provides online weather information. Plaintiff has sued the defendants in this matter claiming that the defendants in this matter have registered, used, or trafficked in Internet domain names that are confusingly similar to its trademarks with the bad faith intent to profit therefrom. It seeks to hold Defendants liable for cybersquatting for the registration, use or trafficking of such domain names. Plaintiff seeks statutory damages between \$1,000 and \$100,000 for each domain that violates the anti-cybersquatting law.

**INSTRUCTION NO. 12**  
**TRADEMARKS IN GENERAL**

The first issue governing Plaintiff's claims concerns Plaintiff's trademarks. It is important that you know something about what a trademark is. For the purposes of these instructions, I will use the terms "trademark" and "mark" interchangeably. The term trademark includes any word, name, symbol, device, or any combination thereof used to identify and distinguish a company's goods from those made or sold by other companies, even if the specific source is unknown. Slogans, designs, and logos can serve as trademarks.

A single product or service can have more than one trademark (including an accompanying slogan such as "FORD" and "TAURUS" for automobiles, "CAPITAL ONE" and "WHAT'S IN YOUR WALLET" for credit cards, and "AOL" and "AMERICA ONLINE" for Internet services). The main function of a trademark is to designate goods as a particular company's product and to protect that company's goodwill. A trademark is also a merchandising shortcut that allows a prospective purchaser to select what he or she wants. Put another way, a trademark identifies a given good as the product of a particular company and allows people to select the particular brand they want to purchase. Trademarks serve a public interest by avoiding public confusion as to the source of products.

When a company has established a trademark right before anyone else, the company's right to use that mark becomes an exclusive right and the mark is the

property of only that company. No other person can use the same or a similar mark in any manner that would be likely to cause confusion, mistake, or deception.

In this case, Plaintiff claims it owns trademark rights in the following marks:

WUNDER

THE WEATHER UNDERGROUND

WUNDERGROUND.COM

WUNDERSEARCH WUNDERMAP

WUNDERRADIO

WUNDERPHOTOS

WUNDERBLOG

WUNDERGROUND

WEATHER UNDERGROUND



**INSTRUCTION NO. 13**  
**REGISTERED TRADEMARKS**

If a mark is registered, then the registration constitutes “prima facie” evidence of the validity of the mark, the registrant's ownership of the mark, and the registrant's exclusive right to use the mark throughout the United States. Registration of a mark entitles the owner to sue for infringement and bestows upon the mark a presumption of validity in that suit. Trademark registration with the US Trademark Office puts all would be users of the mark on constructive notice of the mark under 15 U.S.C. § 1072.

The following trademarks owned by Plaintiff are registered with the United States Patent and Trademark office:

- THE WEATHER UNDERGROUND (Reg. No. 2,297,683)  
(First Use in Commerce 3-16-1995)
- WUNDERGROUND.COM (Reg. No. 2,324,272)  
(First Use in Commerce 3-16-1995)
- WUNDERSEARCH (Reg. No. 3,647,301)  
(First Use in Commerce 2-0-1999)
- WUNDERPHOTOS (Reg. No. 3,739,351)  
(First Use in Commerce 8-12-2002)
- WUNDERBLOG (Reg. No. 3,742,092)  
(First Use in Commerce 6-7-2005)
- WUNDERMAP (Reg. No. 3,527,030)

(First Use in Commerce 2-21-2008)

- WUNDERRADIO (Reg. No. 3,647,301)

(First Use in Commerce 9/25/2008)

Authority:

15 USC §§1114; *Fuji Kogyo Co., Ltd. v. Pacific Bay Intern., Inc.*, 461 F.3d 675, 682-83 (6<sup>th</sup> Cir. 2006).

15 U.S.C. § 1072; *Champions Golf Club, Inc. v. The Champions Golf Club, Inc.*, 78 F.3d 1111, 1123 (6th Cir. 1996) (citing *Thrifty Rent-A-Car Sys., Inc. v. Thrift Cars, Inc.*, 831 F.2d 1177, 1181 (1st Cir. 1987)).

**INSTRUCTION NO. 16**  
**ANTI-CYBERSQUATTING CONSUMER PROTECTION ACT**  
**INTRODUCTORY INSTRUCTION AND DEFINITIONS**

Plaintiff seeks damages from defendant for violation of the federal law known as the Anti-Cybersquatting Consumer Protection Act, which will be referred to as the “ACPA.” The purpose of the ACPA is to protect marks against certain confusing uses of those marks in Internet domain names. A “domain name” is an alphanumeric designation that forms at least part of an address on the Internet, such as [www.cnn.com](http://www.cnn.com) (“cnn” for the CNN television network), that has been registered with or assigned by any domain-name authority. The term “mark,” for purposes of the ACPA, means any trademark, service mark, collective mark, or certification mark, whether registered or unregistered, as well as a personal name that may be protected as a mark.

Plaintiff has the burden to prove by a preponderance of the evidence that Defendants violated the Anticybersquatting Consumer Protection Act (ACPA), 15 U.S.C. 1125(d). To prove its claim, Plaintiff must prove that each of the following essential elements is more probably true than not true:

- (a) Plaintiff has a valid trademark or trademarks entitled to protection. In this case Plaintiff’s trademarks are not contested by Defendant.
- (b) Plaintiff’s trademarks are distinctive or famous. In this case, Defendants do not contest that Plaintiff’s trademarks are distinctive.
- (c) One or more of defendants’ domain names listed on Exhibit \_\_\_\_ were identical or confusingly similar to that trademark;

(d) Defendant registered, used or trafficked in one or more of the domain names listed on Exhibit \_\_\_\_\_. Defendants do not contest that they registered and used the domain names listed on Exhibit A.

(e) Defendant did so with a bad faith intent to profit.

In this case, Plaintiff's registered trademarks are distinctive as a matter of law.

Authority:

15 USC §1125(d)(1)(A); see *also* House Judiciary Committee Report on HR 3028, HR Rep. Ho. 106-412 at 15 (October 15, 1999); Senate Section-by-Section Analysis, Cong. Rec., at S14715 (Nov. 17, 1999).

**INSTRUCTION NO. 17**

Defendants' Instruction No. 17 is unnecessary because Plaintiff's marks are distinctive as a matter of law.

**INSTRUCTION NO. 18**  
**“REGISTERS,” “TRAFFICS IN” OR “USES”**

The terms “registers” means taking the action to register a domain name through a Registrar, such as Basic Fusion or GoDaddy, to become the registrant or owner of the domain name.

The term “traffics in” means to engage in a transaction including but not limited to sales, purchases, loans, pledges, licenses, exchanges of currency, and any other transfer for consideration or receipt in exchange for consideration. The term “uses” means operates a website on that domain name such as a “parking” page or “landing” page.

In this case, Defendants do not contest that they registered and used the domain names listed on Exhibit \*\*.

Authority:

15 USC §§1125(d)(1)(D), 1125(d)(1)(E); *Ford Motor Co. v. Catalonotte*, 342 F.3d 543 (6<sup>th</sup> Cir. 2003).

**INSTRUCTION NO. 19**  
**“CONFUSINGLY SIMILAR”**

To determine whether the domain names at issue are confusingly similar to Plaintiff’s trademarks you should consider whether the domain names are similar to Plaintiff’s trademarks in spelling, characters, sight, sound, or meaning such that that the domain name and trademark being compared could be confused. Unless words or letters added to the Plaintiff’s marks within the domain names clearly distinguish them from the Plaintiff’s usage, allegations that a domain name incorporates a protected mark generally will suffice to satisfy the “identical or confusingly similar to” requirement. The addition of descriptive or generic terms to a domain name, such as the addition of the descriptive term “search” does not affect confusing similarity.

Authority:

15 USC §1125(d)(1)(A); *For Motor Co. v. Greatdomains.com, Inc.*, 177 F. Supp. 2d 635 n.3 (E.D. Mich. 2001). See *Coca-Cola v. Purdy*, 382 F.3d 774, 784 (8th Cir. 2004); see also *In re Chatam Int’l, Inc.*, 380 F.3d 1340, 1343 (Fed. Cir. 2004) (“With respect to GOLD, the Board determined that the term denotes a premium quality, a descriptive term offering little to alter the commercial impression of the mark.”).



## INSTRUCTION NO. 20 TYPOSQUATTING

Typosquatting is the registration of typographical variations of trademarks hoping to capitalize on the poor spelling or typographical skills of consumers who proceed directly to the web browser address bar to type in a domain. The Anticybersquatting Consumer Protection Act also prohibits “typosquatting,” “that is, registering intentional misspellings of trademarks. For the purposes of this trial, “cybersquatting” and “typosquatting” are used to mean the same thing.

In the context of typosquatting, confusing similarity is judged not just by appearances, but by the likelihood that a particular domain name might be typed in accidentally by someone trying to type in one of Plaintiff’s marks or domain names.

*Verizon California, Inc. v. Navigation Catalyst Sys., Inc.*, 568 F. Supp. 2d 1088, 1094 - 1095 (C.D. Cal. 2008) (citing *Shields v. Zuccarini*, 254 F.3d 476, 484 (3<sup>rd</sup> Cir. 2001)).

Legislative History, S. Rep. No. 106-140 (1999)(For example, the Committee was informed of a parent whose child mistakenly typed in the domain name for “dosney.com,” expecting to access the family-oriented content of the Walt Disney home page, only to end up staring at a screen of hard core pornography because a cybersquatter had registered that domain name in anticipation that consumers would make that exact mistake.

**INSTRUCTION NO. 21**  
**BAD FAITH INTENT TO PROFIT**

To help you decide whether defendant had a bad faith intent to profit from Plaintiff's trademarks, you may consider the following factors. These factors are given as a guide, not as a substitute for careful thinking about the ultimate issue in a cybersquatting claim: whether the conduct at issue is motivated by a bad faith intent to profit. You may decide that not every factor applies to this case, and you are not limited to only those factors.

1. The trademark or other intellectual property rights of the Defendants, if any, in the domain names..
2. The extent to which the domain names listed on Exhibit \_\_\_\_\_ reflect defendants' legal name or a name that is commonly used to identify defendant.
3. The extent of defendant's *prior* use of the domain names listed on Exhibit \_\_\_\_\_ in connection with good faith offering of goods or services.
4. Whether defendant intended to divert consumers from plaintiff's own website to a website under the domain names at issue that could harm the goodwill represented by Plaintiff's trademarks either for commercial gain or with the intent to tarnish or disparage the mark, by creating a likelihood of confusion as to the source, sponsorship, affiliation or endorsement of the site.
5. Defendants offer to transfer, sell, or otherwise assign the domain names listed on Exhibit \_\_\_\_\_ to plaintiff or any other person for financial gain without having used, or having an intent to use, the domain names listed on Exhibit \_\_\_\_\_ in

connection with a good faith offering of goods or services; or whether defendant has exhibited a pattern of such conduct in the past.

6. Whether defendant: (a) provided material and misleading false information regarding his contact information when applying for the registration of the domain names at issue; (b) intentionally failed to maintain accurate contact information; or (c) has established a pattern of such conduct in the past. This factor should not weigh against defendant if you find that defendant had some legitimate reason to hide his identity.

7. Whether defendant has registered or otherwise acquired multiple domain names in addition to the domain names at issue that defendants know are identical to, confusingly similar to, marks of other third parties that are distinctive at the time of registration of such domain names, or dilutive of famous marks of others that are famous at the time of registration of such domain names, without regard to the goods or services of the parties; and.

8. The extent to which Plaintiff's trademarks are, or are not, distinctive or famous.

In this case, Plaintiff's registered trademarks are distinctive as a matter of law.

Authority:

15 USC §1125(d)(1)(B)(i); *Ford Motor Co. v. Catalonette*, 342 F.3d 543 (6<sup>th</sup> Cir. 2003); *Interstellar Starship Servs. Ltd. v. Epix, Inc.*, 304 F.3d 936 (9<sup>th</sup> Cir. 2002); *E. & J. Gallo Winery v. Spider Webs, Ltd.*, 286 F.3d 270 (5<sup>th</sup> Cir. 2002); *N. Light Tech., Inc., v. N. Lights Club*, 236 F.3d 57 (1<sup>st</sup> Cir. 2001); *Shields v. Zuccarini*, 254 F.3d 476 (3d Cir. 2001); *Virtual Works, Inc. v. Volkswagen of Am., Inc.*, 238 F.3d 264 (4<sup>th</sup> Cir. 2001); *Sporty's Farm LLC v. Sportsman's Mkt., Inc.*, 202 F.3d 489 (2d Cir. 2000); *Flow Control Indus., Inc. v. AMHI, Inc.*, 278 F. Supp. 2d 1183 (W.D. Wash. 2003); *Nissan Motor Co. v. Nissan Computer corp.*, 61 U.S.P.Q.2d 1839 (C.D. Cal. 2002); *Hartog & co. AS v. SWIX.com*, 136 F. Supp. 2d 531 (E.D. Va. 2001); *Advance Magazine Publishers, Inc. v. Vogue Int'l*, 123 F. Supp. 2d 790 (D.N.J. 2000); *Virtual Works, Inc. v. Network Solutions, Inc.*, 106 F. Supp. 2d 845 (E.D. Va. 2000); *Morrison & Forrester, LLP v. Wick*, 94 F. Supp. 2d 1125 (D. Colo. 2000); *Dolby v. Robertson*, 654 F. supp. 815 (N.D. Cal. 1986); J. THOMAS MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION § 25:78 (4<sup>th</sup> ed. 2005); see also Senate Section-by-Section Analysis, CONG. REC., at S14715 (Nov. 17, 1999); House Judiciary Committee Report on H.R. 3028, H.R. Rep. No. 106-412, at 10-11, 13, 15 (Oct. 25, 1999).; *Lucas Nursery & Landscaping, Inc. v. Grosse*, 359 F.3d 806, 811 (6<sup>th</sup> Cir. 2004).

**INSTRUCTION NO. 22**  
**ANTICYBERSQUATTING CONSUMER PROTECTION ACT DAMAGES**

**[SUBJECT TO THE PARTIES STIPULATING, RULING OR AN AGREEMENT AS TO  
WHETHER STATUTORY DAMAGES ARE AWARDED BY THE JURY OR JUDGE]**

If you find Defendants liable under the ACPA, then you should award Plaintiff damages under that law as well. Plaintiff has elected statutory damages as its monetary remedy. You may award not less than \$1,000 and not more than \$100,000 for each of the domain names registered, trafficked in and/or used by Defendants with a bad faith intent to profit that you find are confusingly similar to any of Plaintiff's trade name or trademarks. Those domain names are listed on Exhibit \_\_\_.

You should decide the just amount to award Plaintiff, keeping in mind that the purpose of the ACPA is to both deter wrongful conduct and provide adequate remedies for trademark owners who seek to enforce their rights in court.

Statutory damages are provided as an alternative to actual damages under the ACPA, and Plaintiff need not show actual damages to establish cybersquatting or to recover statutory damages.

*Source: FieldTurf, Inc. v. Triexe Mgmt. Group, Inc., 69 USPQ 2d 1861, 1863 (N.D. Ill. 2003)*