



Google's Alleged Licensing of Domain Names as Part of its AdSense Program may Subject it to Liability under the Anticybersquatting Consumer Protection Act

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In a case that tests the limits of contributory liability under the Anticybersquatting Consumer Protection Act (ACPA), Judge Blanche Manning of the Northern District of Illinois denied defendant Google's motion for summary judgment on the plaintiffs' cybersquatting claim that Google should be held liable for servicing the parking pages of registrants' allegedly cybersquatting domain names.¹ *Vulcan Golf, LLC v. Google, Inc.*, No. 1:07-cv-03371, slip op. (N.D. Ill. June 9, 2010) (Memorandum and Order). Specifically, the court held that, where Google's agreement with a third party contains a license permitting Google to use a parked domain name for purposes of placing Google's advertising (sponsored links) on the web site displayed when an Internet user enters the domain name, Google may be held liable under plain language the ACPA as an "authorized licensee" of the registrant if the underlying domain name violates the ACPA. *Vulcan Golf*, slip op. at 8. See 15 U.S.C. § 1125(d)(1)(D).

The ACPA protects trademark owners from cybersquatting. A defendant is liable under the ACPA if he registers, traffics in, or uses a domain name that is identical or confusingly similar to a trademark, and he is the registrant of the domain name or the registrant's authorized licensee. 15 U.S.C. §§ 1125(d)(1)(A), (D).

Google provides advertising services to domain name owners through its AdSense for Domains (AFD) program. Essentially, AFD provides an owner of a domain name that otherwise would have an inactive web site with advertising links relevant to that domain name. Instead of a blank page, these links are displayed when an Internet user types the domain name into his browser. Any

¹ Pattishall McAuliffe represented a former defendant in this case, Internet REIT. All of the counts against Internet REIT previously were dismissed.



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Internet user who has inadvertently misspelled a domain name when typing it into his web browser likely has seen a page of such advertising links, known as a parked page. See, e.g., <http://www.laywers.com/>. When a user clicks on a link on such a parked page, the domain name owner and parking company split a micropayment (usually, a few cents, but it can be more) paid by the advertiser. Numerous companies, including Google, offer such parking services that permit domain name owners to monetize domain names without the effort of building a web site with content.

For many years, cybersquatters, especially of the typosquatter variety, have taken advantage of parking services to generate revenue from infringing domain names. The plaintiffs, including famous former football and baseball player Bo Jackson, sued Google for, among many other claims, violating the ACPA because of its involvement in this practice.

Here, Google moved for summary judgment on the ACPA claim, arguing that Google does not register or use the domain names. Judge Manning found that, to the extent Google's agreements state that it receives a "license to use the domain names" the plain language of the ACPA, 15 U.S.C. § 1125(d)(1)(D), permits Google to be treated as a domain name registrant's authorized licensee and, therefore, be subject to liability.²

Of particular importance to companies that advertise on the Internet is the court's rejection of Google's argument that the purported license was not a license to "use the domain name as a domain name" but was merely incidental to Google's provision of AdSense services to the parking page providers. The court found this to be a "distinction without a difference." *Vulcan Golf*, slip op. at 7. That is, a license to use a domain name is just that: a license subject to the ACPA, regardless of the purpose of the license or how the licensee actually uses the license. Moreover, the court found irrelevant whether Google's agreements contain provisions forbidding its partners from using domain names that infringer another's trademarks.

Many different e-commerce agreements cross-license the parties' domain names to take advantage of marketing opportunities. If the licensor finds itself the target of an ACPA suit, the licensee may also find itself in the hot seat, even if the licensing of the domain name at issue was incidental to another purpose of the agreement. Given the ACPA's statutory damages scheme, permitting awards of up to \$100,000 per domain name, the lawsuits in this area likely are just beginning.

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² Issues of fact remain over whether the agreements Google actually entered into with its AdSense advertising partners included such a term, as the parties disagreed over the permissibility of the underlying documents. The plaintiffs presented portions of agreements, which the court noted were impossible to conclude as having been executed.