



TALES OF THE CYBERGRIPPER

By: Jim Astrachan

Copyright ownership bestows a virtual monopoly over use. Trademark ownership does not. This became very clear recently when I decided how best to protest the terrible service I had received at a local car dealer, Trichum Motors, and alert other, unsuspecting, customers to what might befall them at the hands of Trichum. I wanted the word to get out to the largest possible audience, at the least cost. I went to the PTO's website, TESS, and did a quick trademark search. Amazingly, Trichum had not registered its trademark. Nor could I find a state registration or a registration for a Trichum domain name. The possibilities were intriguing; I felt inspired.

I registered the domain name www.trichum.com in my name and built a very small website. On the home page I described my extreme frustration and displeasure with Trichum's lack of, what I thought was, appropriate service and customer respect. My goal was to alert others who might go on-line to get some information about this dealer. They would access my site when they did. And they would learn about my unsavory experience at Trichum Motors.

The website was an instant hit with all but Trichum Motors. The site soon became a repository for comments from other persons who were similarly mistreated. I was not

surprised, then, when I receive a letter from Trichum's law firm, Dewey, Cheatum & Howe, threatening me with defamation and trademark infringement for violation of the Anticybersquatting Consumer Protection Act. Knowing that Trichum wouldn't challenge whether my publications were true, because they were and Trichum knew it, I wrote the following response to Rufhaus J. Cheatum, Trichum's lawyer:

Dear Mr. Cheatum:

This letter is in response to your recent letter accusing me of violating the Anticybersquatting Consumer Protection Act (ACPA). At the outset, you should be aware that there is no "K" in "scandalous", nor is there any need to spell "outrageous" with uppercase letters each of the eleven times it appears in your letter.

For me to be liable under the ACPA for my registration and use of the Trichum.com domain name a court will need to conclude that my registration and use of this domain name is in "bad faith" pursuant to the criteria set forth in 15 U.S.C. §1125 (d)(1)(A)-(B). Courts consider numerous factors in determining whether a defendant has acted in bad faith. Nine of those factors are set forth in the ACPA.

The first four factors listed in the ACPA are those that would militate against a finding of my bad faith by providing a

reasonable basis for why I might have registered what could have been your client's domain name had it the good sense to do so before I did, which, I might add, it did not. For example, do I have trademark rights or other rights in the Trichum.com domain name I registered? I do not. Does the Trichum.com domain name in any way consist of my legal or common name? It does not; my name is Astrachan-your client's name is Trichum. Do I have a history of using the domain name for offering goods and services? Not that I can recall. I do confess, Mr. Cheatum, that each of these factors weighs in your client's favor. And that is okay. The fourth factor listed in the ACPA, and perhaps the most critical, is whether I have a bona fide non-commercial use of my website and indeed I do. My site is used for non-commercial purposes and only for non-commercial purposes.

Factors five through eight would serve to militate in favor of a finding that I acted in bad faith. For example, did I attempt, through my site, to divert Trichum's customers from its website in a way that would harm goodwill or disparage the mark by creating confusion regarding the sponsorship of the site? No, I have sold several cars over the years, but never from this website. Nor am I a car dealer. Nor is it likely given the severe criticism of your client on my site that anyone will believe your client sponsored or was affiliated with my site. I have never offered to sell the site or

domain name to your client for commercial gain. If I sold my site, how could I tell the world that Trichum Motors is a miserable dealer with which to do business?

Did I provide misleading contact information when I registered the domain name? No to that factor also. Have I been trafficking in domain names? No, I have registered only this one domain name.

In summary, it is likely that a court would decide the first three factors in favor of your client. But the remaining factors would be decided in my favor. And the remaining factors decidedly tip the scale in my favor.

So I ask you, Mr. Cheatum, what motivation would a court ascribe to my registration and use of the Trichum.com domain name? Would it be bad faith? Unlikely.

To the contrary, a court would believe that my sole purpose in registering, and using, the TRICHUM.COM this domain name is to alert consumers to how Trichum Motors conducts its business; that your client performs sub-standard work, is rude and non-responsive to its customers. The intention of the ACPA is not

to prevent honest consumers from alerting potential consumers to the shoddy practices of a merchant.

I am what the courts have referred to as a "genuine cyber-gripper." My actions are not precluded by the ACPA. If you don't believe me, read, *Mayflower Transit, LLC v. Prince*, 314, F. Supp. 2nd 362, 2004 WL859281 (D.N.J. 2004); and *TMI v. Maxwell*, 368 F.3d 433 (5th Cir. 2004).

Very truly yours,

Jim Astrachan

P.S. Your client should register Trichummotorssucks.com before someone else does.

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