

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION AT MEMPHIS

THE SERVICEMASTER COMPANY, THE )  
TERMINIX INTERNATIONAL COMPANY, )  
L.P., TRUGREEN LIMITED PARTNERSHIP, )  
AMERICAN HOME SHIELD CORPORATION, )  
AND AMERISPEC, INC., )

Plaintiffs, )

v. )

CARLA VIRGA, )

Defendant. )

Civil Action No. 99-2866-TUV

**AFFIDAVIT OF CHARLENE CUNNIFFE**

STATE OF TENNESSEE )  
COUNTY OF DAVIDSON )

Comes now the affiant, having been duly sworn, and deposes and states as follows:

1. I am over the age of eighteen years old and of sound mind. I have personal knowledge of the matters addressed herein unless otherwise stated. I offer this affidavit in support of defendant's response in opposition to plaintiffs' motion for a preliminary injunction in the above-captioned action.

2. In my first affidavit in this case, I made a number of statements about how meta tags are used, and how they contribute both to the ability of web site owners to bring their sites to the attention of potential readers, and to the ability of web users to find information about subjects in which they are interested. In preparing to do that affidavit, I noted that the plaintiffs had conducted searches on three separate search engines – Excite, HotBot, and AltaVista – to show how high Ms. Virga's site would appear. Among other things, I conducted a search on those three search engines

and five others to determine how close to the top of the search results Ms. Virga's site would come when searching, not just for Terminix, but also for the other trademarked names at issue in this case. I found that, on some of the search engines, Ms. Virga's site was among the top twenty when searching for "Terminix," but that even when searching for "Terminix" her site did not come up among the first 20 results. When searching for each of the other trademarked names, Virga's site did not come up even among the first 20 results.

3. Simon Rakoff suggests that I was wrong not to include Yahoo among the search engines that I was using to test how high Ms. Virga's site would come. Apart from the fact that plaintiffs also did not conduct a search on Yahoo, I believe I had very good reasons for not including Yahoo among the search engines I was testing. Moreover, as I explain later in this affidavit, there is no significant difference between the results found searching Yahoo and the results found searching the eight search engines listed in my affidavit.

4. The fact of the matter is that Mr. Rakoff is wrong when he characterized Yahoo as a search engine. Yahoo does not bill itself as a search engine, but as a directory of subject-specific sites categorized by human beings, not software. True crawler-based search engines such as Infoseek, AltaVista, Webcrawler. etc. operate quite differently. The following statement appears on Yahoo's own web site: "Yahoo! is a subject-based directory that happens to be searchable." (<http://help.yahoo.com/help/ysearch/ysearch-01.html>). Elsewhere in its site, Yahoo confirms this point with the following statement: "The Yahoo! directory is created entirely by humans. Because we visit and evaluate every site added to the directory, we ask that you suggest

your site by browsing through the Yahoo! hierarchy and then submitting the required URL, description, and contact information from the appropriate category.”

5. I understand that the plaintiffs state in their most recent brief that the only trademark violation for which they are currently seeking redress is Ms. Virga’s use of their trademarked names in the meta tags for her web site. This makes Mr. Rakoff’s search of Yahoo particularly irrelevant to this case, because, using humans rather than software to categorize web sites, Yahoo does not pay attention to meta tags in listing web sites.

6. Moreover, the results I obtained searching on Yahoo were quite similar to the results obtained looking at the search engines listed in my first affidavit. For Yahoo, a search for “Terminix” brought up Ms. Virga’s site among the first twenty web sites listed, as well as within the “category” matches, a concept that I describe below. Searching for each of the other trademarked names at issue in this case did not result in Ms. Virga’s web site appearing among the top 20 results.

7. When a web user does a search using Yahoo, the first group of results provided is from a Yahoo feature called “Inside Yahoo.” Then come all the Yahoo categories whose names make specific reference to the search term. After that, the search results provide a list of entire sites that Yahoo deems relevant to the search term; the search results show the category, and then each of the sites contained in the category lists the Yahoo categories that are relevant to the search term. Only then do the search results show the individual web pages that are responsive to the search term.

8. In my search for “Terminix” on Yahoo, the first result was the Inside Yahoo! matches, which highlights a line: “**Yellow Pages:** Find the **Terminix** nearest you.” A link is provided to the whatever listings of Terminix there are in Yahoo’s yellow pages feature. This first result can in no way be confused with Ms. Virga’s site. The second set of listings provided

by Yahoo shows Yahoo category matches (1-1 of 1). The category in question is Business and Economy > Companies > Agriculture > Pest Control > Terminix Corporation. Again, Ms. Virga's site is not among them.

9. After these two results come a series of three "Site Matches" to the search term. Each site is listed under the appropriate Yahoo category. The first two sites, both of which link to the official Terminix web site, appear under the following two categories: Business and Economy> Companies> Agriculture> Pest Control> Terminix Corporation, and Business and Economy > Companies > Home and Garden > Maintenance > Pest Control. Terminix appears in these site matches as defined by Yahoo. Virga's site is further delineated, not as a company, but as "Consumer Opinion," under the site match Business and Economy > Companies > Home and Garden > Maintenance > Pest Control > Terminix Corporation> Consumer Opinion. This cannot possibly be confused with any official Terminix site. The first three links on the page all lead to Terminix and clearly say either "Terminix" or "Terminix Corporation."

10. Each of the site matches has a legend accompanying the clickable link to the web site in question. I have personally compared the legends for each of these three sites to the meta tags for the sites. These legends are not drawn from the meta tags for the respective web sites. Rather, they are summaries attached by the human editors for Yahoo, describing in their own terms the subject of the sites to which they are linked.

11. In his affidavit, Rakoff asserts that the vast majority of web users will not scroll down past the information that appears on the very first screen. His reason for making this point seems to be to suggest that Ms. Virga's use of meta tags to bring her site close to the top of the search results is particularly harmful to Terminix, but in fact this information leads to the opposite

conclusion. Thus, when I repeated the search for Terminix on Yahoo that Rakoff employed, the link to Virga's site did not appear on the first screenful of information. I attach as Exhibit Z a copy of the first screenful of information, which ends not only before Virga's site, but before the Yahoo category that includes Virga's site.

12. I attach as Exhibit AA the meta tags for the Terminix and Service Master web sites. The meta tags for Terminix's site include the name of the company (as well as several misspellings of the name), but most of the meta tags are related to the subject matter of the company, not its name. For example, the meta tags include "roach," "rat," "pest," and "termite." In placing these terms in its meta tags, Terminix is not representing to web users that its site is placed on the internet by a "pest"; rather, Terminix is reaching out to web users who want information about pests and how to deal with them. This seems to be similar to what Ms. Virga is trying to do – to call her web site to the attention of people who are looking for information about Terminix and how to deal with it.

13. In his affidavit, at paragraph 5, Mr. Rakoff states: "thus, a search engine, which today gives lesser weight to meta tags, may change that strategy tomorrow." Indeed, search engines have evolved their strategy regarding the importance of the meta tag in the algorithm used by the search engine program. However, the tendency has been to give less importance to meta tags as the developers of the search engines noted the abuse of the meta tags by HTML developers to falsely draw users to their sites using multiple repetitions of the tag, and other programming tricks of webmasters to bring their pages higher in the hierarchical rankings of search results. Search engines will penalize the appearance of excess repetition by denying a listing to the offending page, or by demoting the listing in the result rankings, if excess repetitions are detected

in either meta tags or the body of the page. Ms. Virga does not participate in any of the “dirty tricks” described above; instead she simply uses the capability of the meta tags to enhance the ability of searchers to find her home page.

14. If she did not follow the advice of the search engines in using meta tags for her pages, searchers would find only those sites officially owned by a company. This would have a chilling effect on the ability of consumers to find relevant information about a company that is not slanted by that company’s own marketing efforts. Ms. Virga is not aiming to be found instead of or replace “Terminix.” She wants to be found if people do searches for complaints about Terminix. If she cannot use the phrase Terminix in her meta tags, then her relevancy for phrases involving Terminix is decreased at the search engines which recommend using meta tags. In this way, Terminix will succeed in quashing to some degree the ability for a consumer to express opinions about a company or product.

15. The use of meta tags will not make a site leap to the top of a list of search engine results, and it will not pull searchers to a web site against their will. Ms. Virga is able to define and categorize her page for her users with this method. As a professional librarian with graduate school training in the subject, I equate the process of using meta keyword tags to that of a cataloguer indexing any print or non-print product. To allow the user to find the record, a cataloguer will assign descriptors to it in the catalogued record. Ms. Virga is performing the electronic equivalent of cataloguing her page to make it more user-friendly, much as the librarian tries to make a book, a recording or an electronic file most readily found.

16. Many people obviously guess that a company can be found at an address which is its name + .com, such as at Terminix + .com = terminix.com. This is a commonly known fact and is why, for example, the name business.com recently sold for millions of dollars and why there are lawsuits over “cybersquatting.” It is also why a porn operator obtained the name whitehouse.com: to capture traffic of people trying to actually reach the whitehouse.gov site. This case has no confusion over the domain name. Ms. Virga has made no attempt to own a web name that would be misleading in this way, such as terminics.com. Nothing Virga’s site has done prevents or interferes with users trying to reach Terminix by guessing at the company name and adding a .com.

17. I have no statistical data or scientific studies on which to base my conclusion that the average searcher uses the format [www.companyname.com](http://www.companyname.com) or [www.productname.com](http://www.productname.com) to locate the home page of a company or product. I base these statements on my personal knowledge and experience, as does Mr. Rakoff, and my opinions are the result of my expertise. I have been teaching and training on accessing the Internet for over 8 years. I teach several classes per semester, and have taught several hundred individuals in beginning Internet search methods. I have observed that students who are new to an Internet class still can recognize, perhaps by witnessing advertising in other media such as television, that this standard format is being used by the majority of companies and trademark holders when vying for the attention of consumers on the Internet.

18. Terminix itself provides good evidence that it expects people to look for it on the

Internet by entering its company name in between www. and .com, because it has registered the [www.terminex.com](http://www.terminex.com) domain name (that is, the most common misspelling and mispronunciation of its name) as well as the [www.terminix.com](http://www.terminix.com) domain name.

19. I agree with Mr. Rakoff that variants of company names such as those with hyphens would make it difficult to locate directly the web site of that company. One such example of confusing names might be Mr. Rakoff's own company, whose web site location took me two tries to find, once attempting "dotcomgroup.com" which did not lead me to the right location. The second try, of "thedotcomgroup.com," did get me to his URL without any additional need for a search engine. I would venture to suggest that Mr. Rakoff and his group would benefit from the use of both URLs in marketing their presence as Web experts. Terminix does not have this problem, however, since it has a straightforward company and trade name. The only confusion which might arrive here is in the misspelling of the company name, which I will assume is oft-noted by Terminix, as its own meta tags includes the variations "Terminix, Terminex, terminix, terminex, Terminics, terminics." This is a good example of why meta tags are useful in web pages, as it would look unprofessional on the part of Terminix to include misspelled versions of its name in the text of its home page for the purpose of allowing searchers the ability to find it.

20. Mr. Rakoff might benefit if he followed Terminix' example and used meta tags on his web site. For example, I did a search for the term "usability" and found the web site of Jakob Nielsen, an expert whose opinion Mr. Rakoff cites in his affidavit, among the top results. But Mr. Rakoff's site did not appear among the top search results.

21. Mr. Rakoff's contention that that only ten percent (10%) of searchers are willing to scroll through a web page seems doubtful in my experience, as what is applicable to a common

web page may not be applicable to a search results page, which typically offers a much different type of interaction with the user. Even if this fact were so, and Mr. Rakoff's figure were correct, Terminix should not fear that the user will be misguided into thinking that Ms. Virga's pages are the home pages of the company, as most of the results found by using search engines would force them to scroll through at least one screen before reaching her page.

Further the affiant saith not.

\_\_\_\_\_  
\_\_\_\_\_  
Charlene Cunniffe

STATE OF TENNESSEE )  
COUNTY OF DAVIDSON )

Personally appeared before me, \_\_\_\_\_, the undersigned, a Notary Public in and for said County and State, Charlene Cunniffe, with whom I am personally acquainted, and who upon oath acknowledged that she executed the within instrument for the purposes therein contained.

\_\_\_\_\_

Witness my hand and seal, at office in Nashville, Tennessee, this the \_\_\_ day of February \_\_\_, 2000.

\_\_\_\_\_  
NOTARY PUBLIC

My Commission Expires: \_\_\_\_\_