ISSUE: CORPORATE “HATE SITES”

Just as the Internet is an excellent vehicle for companies to promote their goods and services, it can be an equally effective tool for dissatisfied customers and disgruntled employees to criticize a particular company or product.

This paper examines the legal issues surrounding corporate “hate sites”, otherwise known as “sucks sites” and “gripe sites”.

*What can companies legally do in order to prevent or deal with these sites?*

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Much to the chagrin of trademark owners, “hate sites”, which often include the company name or trademark in the url ([company]sucks.com) are very difficult, if not impossible, to shut down. The First Amendment typically shields the operators of corporate hate sites from liability, unless they are selling products, deriving advertising revenue and/or in some other way engaged in "commercial" speech. If the hate site is strictly non-commercial in nature, the operator's freedom of speech will generally override the trademark owner's interest in controlling the use of its company name or trademark.

This paper examines the laws surrounding corporate hate sites and offers some tips for combating these sites or at least minimizing their negative impact.

**What is a “hate site”?**

Hate sites are typically owned and operated by a “wronged” consumer or disgruntled ex-employee, who obtains a domain name comprised of the company's trademark or trade name combined with sucks, ihatе, stinks, etc., who then posts criticism of the company and provides a forum for others to do the same. The Web site www.webgripesites.com features over a hundred hate sites currently on the Internet which criticize companies anywhere from the insurance industry to retail chains to sports teams.

**Legal Remedies**

Companies have pursued a variety of claims (with varying degrees of success) to combat corporate hate sites, including traditional trademark infringement claims, trademark dilution claims, claims under the Anticybersquatting Consumer Protection Act (“ACPA”), the Uniform Domain Name Dispute Policy (UDRP), as well as false advertising and trade libel claims.

**Trademark Infringement and Dilution Claims**

A company may file a traditional trademark infringement claim where “there is unauthorized use of its trademark in connection with a commercial transaction in which the trademark is…used to confuse potential consumers.”¹ A company may file a claim under the Federal Trademark Dilution Act (FTDA) “against another person’s commercial use in commerce of a mark or trade name if such use begins after the mark has become famous and causes dilution of the distinctive quality of the mark…”²

The key to prevailing on these claims is proving that the hate site operator is engaged in commercial use of a company's trademark or trade name on its hate site. Commercial use of a mark is typically found when the mark is used in connection with the sale or advertising of goods and services.³

¹ Bosely Medical Institute, Inc. v. Kremer, 403 F.3d 672, 676 (9th Cir. 2005)
² TMI, Inc. v. Maxell, 368 F.3d 433,436 (5th Cir. 2004) citing 15 U.S.C. § 1125(c)(1)
³ See Bosely Medical Institute, Inc. v. Kremer, supra, at 676-677.
Where hate site owners use a company’s mark solely to criticize a company, the owner will usually defeat traditional trademark infringement and FTDA claims. Such use is considered noncommercial and is protected free speech under the First Amendment. The view is that “trademark law cannot be used to suppress criticism of a company or products...on the Internet.”

For example, in Bally Total Fitness Holding Corp. v. Faber, the Defendant operated a “Bally Sucks” Web site as a forum for criticizing Bally and its health clubs. Importantly, the operator of this “hate” site included a disclaimer setting forth that the site was “unauthorized” and not a Bally’s official site. Bally’s trademark infringement claim failed because the Court determined that no reasonable consumer would confuse the site as coming from or being affiliated with or sponsored by Bally. Even though the Defendant did not use the Bally’s mark as part of the domain name, “no reasonably prudent Internet user would believe that ‘ballysucks.com’” was the official Bally site or that it was sponsored by Bally. Bally’s dilution claim failed as well because the Defendant’s use of the Bally mark was not commercial.

Similarly, in Bosley Medical Institute v. Kremer, trademark infringement and dilution claims failed because the Defendant did not derive any revenue from its Web site www.BosleyMedical.com where it criticized Bosley’s hair replacement services. The Court stated that “the noncommercial use of a trademark as the domain name of a Web site-the subject of which is consumer commentary about the product and services represented by the mark-does not constitute infringement.”

Where commercial use can be found, a trademark infringement claim may prove successful. For example, in the recent case Sunlight Saunas, Inc. v. Sundance Sauna, Inc., et al., both parties sold saunas via the Internet. The Defendants were ex-employees and direct competitors of the Plaintiff who registered the domain name www.sunlightsaunas-exposed.com and developed a hate site listing five “Sunlight Saunas Lies” which Defendants claimed that Plaintiff made about its saunas to consumers. The Defendants countered each “Lie” with contradictory and disparaging comments about Plaintiff’s saunas. The Web site also provided the e-mail address sunlightsaunas@yahoo.com in the event that consumers had “questions or comments” about the site. The Web site temporarily included a link to a Web site which advertised saunas made or sold by competitors of Plaintiff.

Plaintiff filed suit against Defendants for false advertising claims under the Lanham Act. The Defendants argued that they were entitled to Summary Judgment on these claims because

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5 Bally Total Fitness Holding Corp. v. Faber, 29 F.Supp.2d 1161(C.D.Ca. 1998)
6 Id. at 1163.
7 Bosley Medical Institute, Inc. v. Kremer, 403 F.3d 672 (9th Cir. 2005)
8 Id. at 677.
9 Id. at 674.
their Web site speech was a noncommercial criticism of Plaintiff, a classic hate site, which was protected by the First Amendment.

The Court found that both the Defendants’ Web site speech and its domain name were commercial speech. While “the speakers on the Web site were anonymous,” they were direct competitors of Plaintiff. Thus, Defendants disparaged Plaintiff’s products with the intent to promote their own products and to divert potential customers from the Plaintiff. Additionally, Defendants’ Web site temporarily included direct links to Plaintiff’s competitors. Thus, “[D]efendants were not motivated solely (or at all) by disinterested, altruistic concern for sauna purchasers.”11

**Anticybersquatting Consumer Protection Act**

Companies may also bring a claim against a hate site owner under the Anticybersquatting Consumer Protection Act (“ACPA”) claiming that the confusingly similar domain name has been registered with the intent to profit from it.

Here too, even though there is no per se rule requiring commercial use, the plaintiff will likely have to establish commercial use in order to prevail. For example, in Mayflower Transit, LLC v. Prince,12 the Web site www.mayflowervanlinebeware.com was operated by a customer whose property was stolen. The Court found that Defendant’s “bona fide noncommercial use of Plaintiff’s mark in connection with critical commentary”13 was not in violation of the ACPA. The Court stated that the Defendant’s motive for registering the disputed domain name was to express his dissatisfaction with the Plaintiff and not for the purpose of selling the domain name to the Plaintiff.

**Uniform Domain Name Dispute Resolution Policy Proceedings**

Companies may also institute Uniform Domain Name Dispute Resolution Policy (“UDRP”) proceedings against hate site owners who have registered domain names which are confusingly similar to a company’s trademark or trade name. The sole remedy in UDRP proceedings is transfer of the domain name to the complaining party. Such proceedings are advantageous because they are typically quicker and less expensive than legal proceedings. If a company prevails, the infringing domain name is either transferred from the hate site owner to the company or the domain name registration is cancelled.

A company must prove the following three (3) elements in order to have the domain name transferred or cancelled:

11 Id., supra, at *19.
12 Id.
13 Id. at 369.
1) The domain name registered by the Respondent is identical or confusingly similar to a trademark or service mark in which the Complainant has rights;
2) The Respondent has no rights or legitimate interests in respect of the domain name; and
3) The domain name has been registered and is being used in bad faith.\textsuperscript{14}

In Dell Inc. v. Innervision Web Solutions,\textsuperscript{15} the domain name www.dellcomputerssuck.com was deemed confusingly similar to the Complainant’s mark DELL and ordered transferred. The Panel held that the word “sucks” constituted “nothing more than the addition of a generic word to the mark.”\textsuperscript{16} The Respondent claimed that he had a legitimate interest in the domain name in using it to express criticism and commentary about Complainant. However, the Panel found that the Respondent had no legitimate interest in the domain name where he used it to direct Internet users to Respondent’s Web site at www.innervisionpc.com where he competed with Complainant. The Panel found that Respondent’s registration and use of the “sucks” domain name, when operated for commercial gain, was registered in bad faith.

**Other Strategies**

All companies and brand owners should make it a point to:

- Monitor the Internet on a regular basis to determine whether a hate site has been established. A company may elect to do this in-house or retain the help of a third-party search company.

- Purchase the www.[company]sucks.com or www.ihate[company].com domain names if they are not already taken. For example, “Ford Motor Company registered the domain name www.FordSucks.com in order to prevent others from registering the domain name to post a gripe site.”\textsuperscript{17}

In addition to the legal remedies discussed above, there are a number of other strategies available for dealing with corporate hate sites. When you find a hate site related to your company or product, you may consider:

- Contacting the person who created the site in an effort to sincerely address his or her gripe.

- Offering the hate site owner money, coupons or gift certificates in an effort to take down the site.\textsuperscript{18}

\textsuperscript{14} Rules for Uniform Domain Name Dispute Resolution Policy, Paragraph 4(a).
\textsuperscript{15} Dell Inc. v. Innervision Web Solutions, FA0503000445601, National Arbitration Forum, (May 23, 2005).
\textsuperscript{16} Id.
\textsuperscript{17} Id.
- Offering to purchase the domain name from the hate site owner.

- Posting a response to a particular complaint on a hate site “or discuss the issue on its own Web site in an effort to tell its side of the story.”

This may comfort the critic especially if they feel that a company has been unresponsive to a complaint or is unapproachable. Companies may even consider starting its own gripe site in order to provide consumers with a forum to post complaints about its products or policies.

- Sending cease and desist letters to the hate site owner which may be effective in getting the owner to shut down his site. The letter should “be respectful because the hater will likely post it. An undiplomatic letter will do little more than anger the griper.”

**Conclusion**

It is important for companies to understand the legal principles regarding Corporate hate sites, as taking action against non-commercial hate sites can do more harm (from a public relations standpoint) than good.

You can find more information on new media issues on the New Media Institute’s Web site: [http://www.newmedia.org](http://www.newmedia.org)

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*The New Media Institute is a research and fact finding organization on issues surrounding the Internet and other forms of new media.*

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