



SMARTENERGY.COM™
Energy that pays you back

Click to
learn more!

the Village VOICE

article search

go

Home
features

- entertainment
- hot spot
- news
- machine age
- opinion
- my minor
- sports

arts

- art
- books
- dance
- film
- music
- theater

classifieds

personals

cards

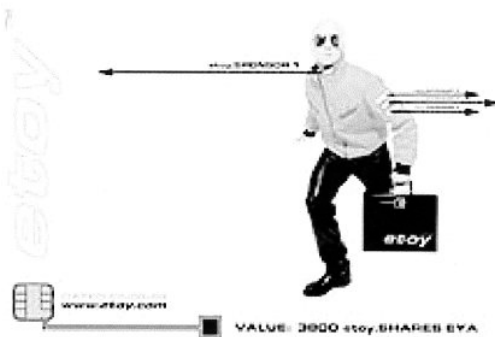
- WLS
- list of nps
- past and top
- advis
- local news
- about us

Work at the
Voice

● ● machine age

Published December 1 - 7, 1999

etoy.SHARE
No. 048201-048000/840000



E-TOY STORY

BY CLAIRE BARIANT

While corporations race to colonize the virtual frontier of the Internet, a recent

case that has surfaced amid the taming of the digital badlands demonstrates what uneasy neighbors art and commerce make. On Monday, the California State Court granted eToys.com, the leading online toy retailer, a preliminary injunction against etoy.com, an international Internet art site. This ruling could lead to an unfortunate precedent, as it clearly favors American corporations and American commercial law when settling disputes stemming from Net conflicts.

etoy created this "share" certificate; eToys cried securities fraud. (illustration: courtesy Rennie Pritikin, San Francisco (value: 3800 etoy shares))

Although etoy.com and eToys.com have been relatively peaceful neighbors for roughly a year, a few months ago a simple event pushed them into legal battle. On August 25, 1999, a consumer fired off this letter to eToys.com: "My grandson was looking for toys for his birthday and brought this to my attention. Are you completely nuts. What an irresponsible thing to show young children. We will never buy from you again." Attached to the letter were two pages printed out not from eToys.com, but etoy.com. Unbeknownst to the innocent grandfather, the Web site he had stumbled onto was the work of etoy, a group of digital artists in Europe. The first page on etoy's site offers visitors the option to "travel the old fashioned way (html only)." The phrase that the customer found so offensive was on the next page, which says, "We do not support the old fashioned way . . . get the fucking flash plugin!" Less than two weeks later, on September 10, 1999, eToys sued etoy for trademark infringement, dilution, and unfair competition.

In the U.S., trademark registration is not the sole determining factor for exclusive rights to a word or logo, although it helps. Though eToys registered its trademark in May 1997, and etoy filed for its U.S. trademark in June 1997, etoy argues that it first used this name in 1994, when its members, who are scattered throughout Europe and describe themselves as "agents," began to work under that name as performance artists for techno events and raves. etoy registered its domain name on October 13, 1995, and eToys registered its own on November 3, 1997. That means that when eToys chose its domain name, it must have been aware that etoy existed. According to agent zai, the public affairs representative of etoy, who lives in Vienna, not only did eToys learn of etoy's existence, the company offered to buy

whole thing is the domain name. Probably the logical response is to get some money rather than lose. But our project was always radical, so for us it is better to risk everything and fight."

The group once posted on another of its Web sites controversial images of the postbombing Oklahoma City federal building, with the caption, "Such work needs a lot of training." zai insists that the images were intentionally provocative, and that they were accompanied by discussion. etoy's online work has always created enemies, but before eToys came along, says zai, "we could always handle it."

This type of case is common enough to have been given a name: reverse domain name hijacking. "Trademark holders are trying to muscle people out of using names that are arguably confusing and arguably belong to them," says David Post, a law professor at Temple University. "A lot of people cave because of the cost of litigating. But the pendulum is swinging. Recent decisions suggest that it may be harder [for trademarked companies to win]." One recent decision involved Hasbro, Inc., another toy maker, versus Clue Computing, Inc., a small Colorado-based computer consultancy. The judge ruled that Hasbro did not have the right to take away the contested url, clue.com, from Clue Computing, despite Hasbro's ownership of the trademark "Clue" for its popular board game. According to the decision, legitimate computing use of the domain name did not represent dilution; the judge wrote that "holders of a famous mark are not automatically entitled to use that mark as their domain name; trademark law does not support such a monopoly."

So far, there is no real governance for domain name disputes, although ICANN (Internet Corporation for Assigned Names and Numbers) is working on filling the void. In the meantime, corporations can't afford confusion. E-commerce sites need brand-name recognition in order to survive in an unbelievably competitive market. eToys's lawyer, Bruce Wessel, points to the fact that etoy is primarily European, claiming that simply because the group has registered with Network Solutions, a U.S.-based domain name company, doesn't mean it has a right to a top-level domain such as .com when its name is confusingly similar to eToys. He acknowledges that etoy had a Web site prior to eToys, but adds that, "If someone has a Web site, the question is whether they have worldwide rights to use the name in all circumstances just because they registered the name first. They were a European-based organization, and we have no problem with them having a European-based site, such as .ch, which is the Switzerland domain."

Post, who co-edits icannwatch.org, hopes that ICANN will succeed in creating several different top-level domains like .com, so this type of conflict happens less frequently. If etoy.com were etoy.art, for example, it would have been difficult for eToys to have raised a claim of confusion. But, for now, .com is where most people register. According to Post, "the whole landscape changes for the better if more top-level domain names open up." He fears that trademark interests will oppose this alternative, but hopes ICANN won't be swayed. "ICANN should not be an organ for trademark owners."

In the meantime, etoy argues that the .com domain is part of its brand name. And .com is not a bad platform for a group of artists whose socially relevant work targets corporations and systems of hierarchy on the World Wide Web. In 1996, etoy successfully completed a project it called a "digital hijack." First researching the software behind search engines such as Infoseek and Altavista, the group determined the method by which one url is deemed more important and given a higher ranking than another. In a coup that demonstrated how such information is sifted—and how easily trusting people can be shepherded—etoy created thousands of pages that announced to innocent surfers who typed keywords such as David Bowie, Porsche, and Penthouse that they had been "hijacked," then proceeded to explain how.

According to etoy agent kubli, who is located in Switzerland, etoy "hijacked" approximately one and a half million people during the three months the group conducted the project. The CIA sent officers to Austria to investigate, in collaboration with the Austrian police. However, the CIA could find nothing incriminating in etoy's activities. zai laughs as he recalls their Keystone Cops tactics: "They were using typewriters [instead of computers], and they kept asking us if what we were doing was bad. We had a good attorney who explained why they should stop, and we never heard from them again." Now the pages, which are still floating around on the Internet, are being used by eToys against etoy, as evidence of "unlawful conduct."

Until now, etoy's digital hijack has been regarded with the utmost respect. etoy was recognized by some

George Soros Foundation. In fact, when Andrea Szekeres, the assistant director of c3, heard that etoy was being sued, she admits that she originally thought it was one of etoy's art projects. "All of their work is about corporate identity. It would be in their scope of activity to be involved in a lawsuit and to see how it would evolve."

etoy took its corporate shtick to another level when it began offering etoy "shares" for sale. zai insists that the etoy shares compel people to think about the elusive and amorphous nature of Internet art. One of the many controversies about Net art is that there is no original copy; an artist can't exactly "sell" a home page to a collector. The "shares" play with the idea of ownership and the Net, as well as spoof absurdly overvalued Net stock. Each "share certificate" is unique, a two-foot-by-two-foot, slickly designed poster. Mounted on aluminum, each contains a java chip bearing the shareholder's information and symbolizing electronic transaction. (The chancellor of Austria, Viktor Klima, was the first to buy a share.)

Clearly, the share certificates are not stock. eToys, however, missed the irony, and now accuses etoy of committing securities fraud. This allegation infuriates zai. In an e-mail, he writes that this "shows how dangerous it is to take today's perverted financial markets as a topic for an art project . . . as an artist you have to deal with 'personal/private' problems . . . and not to jump on things like the stock market etc. . . . you are tolerated as long as you don't disturb!"

William Linn, the director of the blasthaus gallery in San Francisco, which represents etoy on the West Coast, maintains that the shares are "playing around with people's perceived values and associations." He views the suit as "one of the tragedies of American consumerism BS." Megan Gray, a lawyer with the Los Angeles office of Baker & Hostetler who specializes in Internet law and intellectual property and is watching the case, says that this suit would not pass a "giggle test," i.e., an unofficial gauge of the likelihood the plaintiff will appear totally ridiculous in court.

** Money, rather than fear for the corruption of innocent children, seems to be the driving factor behind the suit. Gray suggests that eToys just wants to hurt etoy. "A violation of securities law is very serious. If they lose on trademark infringement, they'll try to win on something else." She adds that the suit is basically a dispute over a similar name, and continues, "This is an attempt to outspend them." In fact, etoy has already spent roughly \$20,000 on American lawyers. This would be mere pennies to eToys, whose market capitalization is worth \$8.41 billion. Peter Wild of Metz and Partners, the trademark law firm representing eToy in Switzerland, says that the etoy.SHARE project does not cross the border of legality. Agent gramazio, who is located in Italy, adds that the "etoy.SHARE is carefully developed with attorneys" and compares the virtual value of stocks traded on NASDAQ with products traded in the art market.

The main question seems to be whether it is fair for U.S. commercial law to govern the Internet. According to Joichi Ito, an executive in Japan who was named one of the "cyber elite" by *Time* magazine in 1997, has feet in both the artistic and the corporate communities online, and is also an etoy "shareholder," it should not. "Internet domains go beyond national borders," he maintains. "It's pompous to think [corporations] can push them out of their name." He also believes that governance on the Internet cannot follow traditional policies. And artists realized that before the judicial system. Ito likes etoy because the group questions boundaries and stands up to corporations, using the Internet as the medium. "Basically, the Internet is not about capitalism and money," Ito says. "It's about people doing what they want to do." In that respect, etoy truly represents the spirit of the Internet—or, maybe, the old Internet. "When etoy set up their domain name, there were no specific rules," he continues. It might not have mattered anyway. Says Ito, "They are the kind of media artists who push back on stuff like this."

etoy has created a "crisis" site, www.toywar.com, about the lawsuit.

Tell us what you think. editor@villagevoice.com

[E-mail](#) this story to a friend.