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Fences in Cyberspace

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Recent events in the battle over domain names.

Oh, give me land, lots of land under starry skies above,
Don't fence me in.
Let me ride through the wide open country that I love,
Don't fence me in.
Let me be by myself in the evenin' breeze,
And listen to the murmur of the cottonwood trees,
Send me off forever but I ask you please,
Don't fence me in.
(Cole Porter, 1944)

A melancolic longing for the long-lost, open spaces of the frontier is what could soon be the dominant feeling in cyberspace, at least in those corners where feelings have not been entirely muted by IPO frenzy. Fences are going up everywhere, molding what once seemed infinite space into an overcrowed and tightly controlled strip-mall. The topology of the claims is complex and still emerging, but lawyers are quick in drawing up the fences. A recent law suit and soon-to-be effective Internet legislations highlight this trend in one of the battle grounds: domain names.

On Monday November 8th, 1999, the case of eToys.com vs. etoy.com opened in a United States District Court, Central District of California. The outcome of this battle will be indicative of the balance of power between commercial and non-commercial interests online. In one corner of the ring stands eToys.com, a late-coming online retailer (domain name registration November 3, 1997), in the other corner stands the pioneering, Switzerland-based bad-boy artist collective etoy.com (domain name registration October 13, 1995). Despite of, or maybe because of, their current slogan of choice--leaving reality behind--a nasty reality could soon catch-up with them.

eToys.com is a typical start-up Net company: based in California, about 500 employees, weak sales (30 million in the last fiscal years), an IPO last May and a hugely volatile stock price ever since. For them, and many others struggling start-ups, the big shake-out has just begun and the next year or two will decide their fate. Creating an optimal business environment is crucial and artists with confusing websites is the last thing a family-friendly retailer needs. Particularly if these artists pose as "the first street gang in

the information super highway" (early etoy slogan). eToys.com wants to get rid of them, or at least, move them away into a far-off corner of the Net, that is to a domain name that is entirely unrelated to their's.

One might think that the issues are clear and that eToys.com's case doesn't stand a chance. The artist collective registered their domain name more than two years before the US retailer. Ever since then, the collective--ironically playing a grim corporation while the retailer tries to appear as a "fun!" playground--has been using the domain very busily in a field that is entirely unrelated to toy retailing. "Cybersquatting"--registering a domain name with the intention of reselling at a higher price--is clearly a charge that can not be leveled against etoy.com.

The retailer, however, claims rights to the domain name and is using a carrot and stick approach to get it. One the one hand, it offered $100.000 for the transfer of the domain name. After that offer had been rejected by etoy.com, the company filed a law suit for trade-mark infringement. The artist's defiant reaction to the threat:

"They let us bleed, till we die. But because there is no blood in etoy, we will not bleed."

But the cards are increasingly stacked against them and other independent groups as trademark lawyers are rewriting the laws that govern the administration of the Internet infrastructure. Buried in an otherwise unconspicuous "Satellite Viewers Act" US Senate passed earlier this month regulations against "cybersquatting". The act now moved on to the House where it is expected to pass. According to this legislation, which was lobbied by the Motion Picture Association of America (MPAA), trademark holders will be able to take the alleged "cybersquatters" to court in the country where the domain name was registered. What this means is that all disputes concerning .com, .org, .net can be tried in the US. Furthermore, trademark holders can seek up to $100,000 in damages against people who registered the name with the intent of reselling it, infringing on the trademark or confusing consumers about who is running the Web site. The prospect of having to pay $100,000 in damages makes even the threat of a law suit very powerful and is likely to force small domain name holders into giving in before the law suit even started.

What is startling about this law, besides the fact that it is part of a comprehensive legislation of satellite TV, is the definition of "cybersquatting" as, among others, "confusing consumers about who is running the Web site." This, one must assume deliberately vague, definition is geared against parody, such as RTmark's hilarious gwbush.com site. But it could also be used to fight what

has been called "trademark dilution", the weakening of a brand's identity through confusing messages. The very vagueness of the terms clearly favours major trademark holders and their high-powered legal departments.

A similar initiative is advanced by ICANN, the international organization appointed by the US-government to regulate, amongst others, domain name disputes. On August 26, 1999 ICANN adopted, as one of their first policies, the "Uniform Dispute Resolution Policy". This policy clearly reflects the interests and concerns of major trademark holders, keen to impose their boundaries on the domain name landscape. The disputes to be regulated by this act are:

"(i) your domain name is identical or confusingly similar to a trademark or service mark in which the complainant has rights; and (ii) you have no rights or legitimate interests in respect of the domain name; and (iii) your domain name has been registered and is being used in bad faith."

The very language shows the interest of the policy authors, that is, of latecomers trying to bully their way in. Which is exactly the case in eToys.com vs. etoy.com. However, both regulations are not yet effective, and it is everything but clear how courts will balance the rights of the trademark holders against what one can hope to be more fundamental rights to freedom of speech and freedom of expression. If etoy.com looses this case, it could establish a chilling precedent for an entire class of similar cases. However, the case is far from being lost and the etoy.com is preparing for the next, and very public, round in the toywars. We are going to hear from them very soon.