

## Corporate Strategies for Addressing Internet "Complaint" Sites

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## I. INTRODUCTION

This summer, commuters arriving in San Francisco from the Bay Bridge were confronted with placard signs reading: "Had any problems at Starbucks Coffee? You're not alone. [www.starbucked.com](http://www.starbucked.com)." The sign's author, Mr. Dorosin, had taken his anti Starbucks campaign to the streets and the Web using a similar and possibly confusing domain name.

In 1995, Jeremy Dorosin purchased an espresso machine as a wedding gift for a friend in Berkeley California. Apparently the espresso machine was not in good working order and Starbucks neglected to provide Mr. Dorosin with the free coffee that went with each machine. Mr. Dorosin escalated his complaints to Starbucks' corporate office and demanded a top of the line replacement espresso machine under the threat of taking out a full-page ad in the Wall Street Journal. Starbucks offered to send letters of apology, and send a machine of better quality, but not the \$2,500 machine demanded. Mr. Dorosin took out his WSJ ad, and proceeded with his anti Starbucks crusade on the Internet, opening up his "Starbucked.com" site. Mr. Dorosin's story has now appeared on local radio and television stations in Seattle and San Francisco as well as the New York Times.

Sometimes, companies face a difficult battle when attempting to take down "complaint" sites on the Internet where disgruntled customers and employees take their grievances to the public. When the "complaint" site is engaged in commercial activity, Federal trademark infringement, dilution and trade libel laws may protect a company against disparaging use of corporate names and trademarks and confusing domain names. However, when the purpose of the disparagement is solely customer complaint and parody, these laws will provide far less protection.

In addition to possible legal actions, some companies are adopting other strategies as well. Complaint Web pages that appear on third party servers, such as Yahoo!/Geocities, are generally subject to a Web hosting agreement that prohibits trademark infringements and offensive materials. Upon receiving complaints of possible infringement and libel, Web hosting companies will generally remove such pages. Recognizing the low cost of registering anti-domain names, many companies have registered as many variations as possible for their Internet domain names (like chasesucks.com) in order to reduce the opportunities for disgruntled customers and employees to establish complaint websites with similar or confusing domain names. Another strategy followed by some companies is to monitor the "complaint" site and, when appropriate, to send coupons and e-mail to upset customers.

Companies must be vigilant of their domain names, trademarks and other intellectual property and they should develop a comprehensive strategy to address all forms of Internet "complaint" sites.

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## II. INTERNET COMPLAINT SITES

Much to the chagrin and annoyance of company executives, Internet "complaint" websites have become the weapon of choice for frustrated customers, disgruntled employees, political activists and anyone with an ax to grind to air their gripes cheaply and sometimes effectively. Protected by the cloak of anonymity and empowered by a worldwide audience, net-complainers have carried old-fashioned pickets and soapbox tirades into cyberspace. For obvious reasons, the largest companies receive the most complaints. One newspaper reports that "[c]onservatively, more than half of the Fortune 1000 companies have encountered some type of website critical of their business,"<sup>1</sup> from Wal-Mart to Allstate to Toys 'R' Us to Microsoft.<sup>2</sup>

Web sites bashing a company, its products, or its employees most often simply tell stories of bad customer service or a faulty product. There are so many that Yahoo! has created a separate directory for "complaint" sites<sup>3</sup>, catering to everything from hard core consumer activism and anti-corporate backlashing to personal revenge and rumormongering. Not surprisingly, "[f]ew of the sites cater to hard-core consumer activists--plenty are merely the province of Web whiners who have found an easy, often anonymous, way to spout off from their armchairs."<sup>4</sup>

As the Internet grows ever larger, companies need to implement policies for effectively dealing with "complaint" sites directed against them. Regardless of the type of "complaint" site, however, a company serious about its on-line image needs to consider the several categories of "complaint" sites on the Internet and plan its response accordingly. There are many categories of "complaint" sites on the Web.

**Consumer and Employee Complaint Web Sites:** The vast majority of complaint sites fall into the category of consumer complaint sites. These sites typically collect stories of bad customer service or a faulty product. The list of these sites is growing and a sampling of these sites is listed below:

- **Chasebanksucks.com:** According to its creators, the site is dedicated to "all those who hate Chase Manhattan Bank, and also to inform others why they should not bank with Chase," this highly-publicized site features an animated picture of a man repeatedly urinating on the word "Chase." A bulletin board allows customers and ex-employees to gripe about every service Chase provides (as well as an "insider's" prospective on Chase policies). The site also provides links to news stories about how "Chase's 'right relationship' started with the Nazis during W.W.II" and how "corruption is alive and well at Chase."
- **AOLsucks.com:** The creator of this site is upset over apparently overzealous censorship, inconsistent service, prevalence of spam and lack of security. The operator's biggest claim to fame, however, is a series of e-mails sent by AOL employees which threaten legal action at first, and then become very apologetic as AOL begins to realize the public relations fiasco they might create. Nevertheless, AOL has been one of the most outspoken proponents of shutting down anti-AOL sites.<sup>5</sup>
- **Dunkindonuts.org:** David Felton of Hartford, Conn., was outraged that his local Dunkin' Donuts store did not carry 1 percent milk, his favorite coffee lightener. He was also upset that the world's largest doughnut chain did not offer a "decent" low-fat muffin. Felton's site is among the most prominent of Internet consumer complaint sites, featuring "unhappy tales about coffee, crullers and cinnamon buns."<sup>6</sup>
- **Starbucked.com:** The Starbucked website documents the saga of onetime Starbucks customer Jeremy Dorosin and his fight against Starbucks' corporate greed, all stemming from a defective espresso machine Dorosin purchased. Dorosin also plugs his book detailing his struggle against Starbucks in addition to maintaining a "Top Ten" list of other companies who have "starbucked" customers.<sup>7</sup>
- **Untied.com:** A mistype of united.com (for those looking for United Airlines) leads to untied.com, a complaint site created by anti-fans of United Airlines. This site tries to be a clearinghouse for passenger complaints directed at the customer service department at United and publishes all complaint letters (and the few responses from United) for the world to see.
- **Bally Sucks:** Once the target of a federal lawsuit in which the operator was held to be justifiably exercising his free speech rights, this site caters to those bitter customers who find themselves unreasonably bound by Bally Health Clubs' membership contract and policies. This case is now an often-cited example of the clash between corporate image and First Amendment rights on the Web.
- **The Nervous Investor:** In explaining how he "lost his shirt with E\*TRADE Canada," Lubomyr Prytulak crusades as one who has been "defending investor rights since 1 Jan. 1999." This site consists mostly of personal experiences Prytulak has had in using E\*TRADE services and his dissatisfaction with the result. With all the nervousness of on-line investors and the susceptibility of stock prices to rumors on the Internet, attorneys for E\*TRADE recently sent Prytulak a letter alleging harassment and libel and seeking injunctive relief, damages, costs, and account closure.<sup>8</sup>

**Consumer and Ex-employee E-mail:** In addition to the Web, disgruntled consumers and ex-employees may take to e-mail to vent their frustrations and disrupt company operations.

In ways perhaps far more damaging, disgruntled customers have used e-mail to disrupt company operations. In perhaps one of the largest cases of phantom e-mail, during two weeks in July 1997, some six to twenty million Internet users received what appeared to be unsolicited, promotional e-mail from Samsung Electronics. Upset over the apparent "spam," thousands sent back angry responses. This time, they received a nasty cease and desist message, apparently from Samsung's law firm, that said, in part, "Your e-mail name was provided as being suspected of connection to various acts of Internet terrorism. Your acts are illegal." Not surprisingly, Samsung received an even angrier and more voluminous response (as many as 10,000 e-mails a day). Samsung estimated that the damages from the incident reached into the millions of dollars. However, none of the offending messages originated with Samsung or its representatives. They were, apparently, the work of a single dissatisfied customer.<sup>9</sup>

Ex employees have also used e-mail to disrupt company operations. In *Intel Corp. v. Hamidi*<sup>10</sup>, a California judge recently granted Intel summary judgment and a permanent injunction in its trespass suit against a former employee. Intel sued the former employee in 1998, alleging that he illegally accessed the company's e-mail system, sending more than 30,000 messages stating that the company is unfair and abusive to Intel employees. The court noted that "the evidence establishes (without dispute) that Intel has been injured by diminished employee productivity" and in devoting resources to blocking the e-mails.<sup>11</sup>

**Political Web Sites Targeting Companies:** In addition to disgruntled consumers and employees, companies may face websites sponsored by environmental or other activist groups seeking to promote their political causes. There are many examples of these types of websites.

- **Homdepotsucks.com:** Depicting a Home Depot employee with a skull for a head, this site is run by the Action Resource Center and the Rainforest Relief and Living Jungle Alliance. The groups claim that Home Depot is the "largest retailer of old growth rainforest wood in the U.S. As countless forests and indigenous peoples continue to face death and annihilation, Home Depot only responds with PR spins and broken promises." This site also fields general customer complaints that have nothing to do with old growth lumber; many contributors tell unverified stories of managers killing birds trapped in the store, bitterness over getting fired from Home Depot, and anger over Home Depot running smaller stores out of business.<sup>12</sup> Home Depot's director of community affairs and environment programs strongly disagrees, noting that "[i]t's just not true," and that she "respect[s] the right to freedom of speech," but not when it involves false and misleading information.<sup>13</sup> The company has tried to counter the charges through its Web page by highlighting their strong commitment to environmental programs and policies such as recycling, "green" products, and consumer education on the environment.
- **McSpotlight:** With over sixty volunteers in several countries, 21,000 files, and a server in the Netherlands and mirror sites in the U.S., New Zealand and Australia, this fancy website and the organization responsible for this site, McInformation Network, were recently the subject of a lawsuit--nicknamed "McLibel" by the group--by McDonald's in the United Kingdom. McDonald's won \$94,000 in damages for libel, after having spent \$16 million on the case.<sup>14</sup> This site charges McDonald's with: 1) the connection between multinational companies like McDonald's, cash crops and starvation in the third world; 2) the responsibility of corporations such as McDonald's for damage to the environment, including destruction of rainforests; 3) the wasteful and harmful effects of the mountains of packaging used by McDonald's and other companies; 4) McDonald's promotion and sale of food with a low fiber, high fat, saturated fat, sodium and sugar content, and the links between a diet of this type and the major degenerative diseases in western society, including heart disease and cancer.; McDonald's exploitation of children by its use of advertisements and gimmicks to sell unhealthy products; 5) the barbaric way that animals are reared and slaughtered to supply products for McDonald's; and finally, 6) the lousy conditions that workers in the catering industry are forced to work under, and the low wages paid by McDonald's, and McDonald's hostility towards trade unions.

**Competitor Sponsored Sites:** Some "complaint" sites may not be run by disgruntled customers or employees, but by a competing company or its employees. For example, in a federal suit filed in Michigan in 1998, Amway alleged that Procter & Gamble "has been a behind-the-scenes sponsor of a rogue website...that foments hate rhetoric about Amway."<sup>15</sup> In addition to the standard array of negative news clippings and personal testimonials, the site "Amway: The Untold Story"<sup>16</sup> apparently published some sensitive internal documents. Procter & Gamble acknowledged it supplied some material to the creator of the site but says the documents were public and that it acted legally.<sup>17</sup> The veracity of Amway's claims has yet to be tested in court, but the case serves as a reminder that companies must make sure that its own website does not libel or infringe upon the rights of its competitors.

**Personal Revenge Sites Against Employees:** William A. Sheehan III, a Seattle-area man who believed his credit had been unfairly damaged by several rating agencies--including TransUnion, Experian, CBI/Equifax and SCA Credit--retaliated against some of the companies' employees and attorneys by posting family information such as names, birthdates, social security numbers, home addresses and maps to their homes on his website.<sup>18</sup> Fearful the information might get into the hands of a stalker, the companies asked a judge in Seattle to close the site.<sup>19</sup> But even though Sheehan called the employees "scumbags" and worse, he didn't advocate hurting them, so the judge let him keep the site. However, the court later dismissed Sheehan's lawsuits against the credit agencies because of Sheehan's "bad faith and abuse of judicial process" in disparaging the credit agency attorneys on his website, which the court noted was "clearly presented as an invitation for others to harass, threaten, or even attack these people."<sup>20</sup>

**Disgruntled Employee Web Sites:** Many of the "complaint" websites contain forums for disgruntled current and ex-employees. The *walmartsucks.com*, *chasebanksucks.com* and *bestbye.com* sites are three of the more popular among such employees. Most employee complaints seem to revolve around poor treatment of lower-ranking employees by management. While rooted in some element of truth, many complaints are one-sided, exaggerated, and sometimes outright false. Nevertheless, when an anti-company website is setup by existing employees, employers must be aware that taking action against the site could violate labor laws. If a site discusses company policies and invites other employees to comment, then it can be considered "concerted activity" and is protected by the National Labor Relations Act (NLRA).<sup>21</sup> In short, where the company does not sponsor the website or host it on company servers, there is may be little the company can do to shut down employee forums. As discussed infra, however, companies can pursue employees and non-employees who the company believes are revealing confidential information and spreading false rumors.

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### III. BUSINESS IMPACTS FROM CUSTOMER "COMPLAINT" WEB SITES

Consumers often search the Web for opinions and experiences with products and services. Although it is difficult to quantify the impacts from customer "complaint" sites, there are now a few examples of business losses attributable to such sites.

In 1996, EPS Technologies, an \$80-million computer manufacturer in Omaha which sold PCs through its 800 number, blamed significant revenue loss on four "complaint" sites hammering its service. The first site was created by a customer who was frustrated by a month-long delay in receiving a laptop. Though EPS offered him a refund, he insisted on additional compensation for his inconvenience. When the company refused, the customer threatened a negative website. The site went up, but EPS Technologies did not realize the site was built with metatags--special Web-search markers--that brought the negative site up ahead of EPS Technologies' own site on search engines. Cyber-customers who searched the Web to learn more about the company instead read

a scathing indictment of EPS Technologies. "People called up and said they were canceling orders because of it," EPS Technologies president Ed Kieler said. "We have to assume some others simply never called in the first place." All told, EPS lost hundreds of orders, he added. In 1997, EPS Technologies went out of business for reasons unknown.<sup>22</sup>

A large company generally has the resources to fight on-line rumors by hiring a public relations firm. For example, in 1996 rumors spread on the Web that Mrs. Fields Cookies planned to donate cookies to the O.J. Simpson victory party. Threatened with a national boycott, Mrs. Fields Cookies quickly hired an on line firm to fight the rumors, which eventually died down as a result.<sup>23</sup>

While the "complaint" sites or rumors may be only a nuisance or irritant to large corporations, they can be more devastating to smaller companies. In 1998, David Holker hired two website designers to help him develop a web page for his company, Express Success Inc., a multilevel marketing company that sold car products. After a billing dispute, the designers created [expressuccesssucks.com](http://expressuccesssucks.com), a site where they "called Express Success a 'scam,' pictured Holker in prison clothing, and posted an advertisement for one of his biggest competitors."<sup>24</sup> Holker claims the attack drove his revenues down from \$60,000 monthly to nearly zero, since many of his clients came from the Internet. Claiming defamation, among other things, Holker sued the website designers. His efforts to shut it down failed, but he's still seeking money damages.

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#### IV. LEGAL STRATEGIES FOR CUSTOMER "COMPLAINT" SITES

While some companies have tried to silence their cybercritics using legal force, the results have been mixed. In many cases, however, the mere threat of legal action is enough to scare a website operator into submission. By the same token, the company must keep in mind that threats of legal action will generally be highlighted and portrayed poorly on the complaint site.<sup>25</sup>

Website operators argue that they have a constitutionally protected right to preach their message. Unless the content is libelous it is protected by the First Amendment. In addition, trademark infringement and dilution claims may be ineffective if the complaint site is clearly unofficial, non-commercial, and unlikely to confuse consumers.<sup>26</sup> In addition, any legal action that a company threatens may draw more attention to the complaint site. In short, legal action may be more appropriate for extreme cases, i.e., a clear case of libel or trademark infringement or dilution.

##### A. Common Law Defamation and the First Amendment Defense

When challenged, the vast majority of "complaint" website operators claim their conduct is protected under the First Amendment, which guarantees freedom of speech. Accordingly, many complaint websites on the Internet contain a disclaimer similar to the one on [www.bestbye.com](http://www.bestbye.com) (link to <http://www.bestbye.com/legal.html>), an anti-Best Buy site:

"This site is classified as a non-commercial, non-profit consumer advocacy site, which is permissible via the First Amendment to the US Constitution; specifically, the freedom of speech/expression. It provides a forum for the general populous to voice their opinions and experiences regarding the subject matter at hand. The operator assumes no liability for the actions or statements of the posting party(s)."

Because the standards for a state defamation claim are very high, many "complaint" websites may not constitute libel. A defamation claim generally "requires the plaintiff to demonstrate the existence of a defamatory statement about the plaintiff that is 'published' by the defendant with malice."<sup>27</sup> Nevertheless, operating under the flag of "consumer advocacy" and "public opinion," such sites are very difficult to attack using libel laws for three main reasons:<sup>28</sup>

First, as a general rule, companies cannot sue for libel--called "trade libel" or "product disparagement"--unless they can show actual damages, such as monetary losses resulting from the false statement. In the many cases, however, companies are seeking to shut down "complaint" sites before any damage is done or damages are speculative. While perhaps a prudent strategy, trade libel may not apply.

Second, those individuals<sup>29</sup> within a company who are singled out for criticism are usually considered "pervasive public figures" or "limited-purpose public figures," meaning that by merely "being" a notable figure within a company (i.e. Bill Gates) or at least engaging in the transaction giving rise to the criticism (i.e., setting a corporate policy or selling a certain product), such individuals have invited public scrutiny and exposure.<sup>30</sup> As a result, the standard for libel rises to the level of "actual malice," meaning that the false statement must have been made "with knowledge that it was false or with reckless disregard of whether it was false or not."<sup>31</sup> This "reckless disregard" standard usually makes it extremely difficult to prove actual malice<sup>32</sup> since the Supreme Court has held that a statement need only be "substantially true,"<sup>33</sup> meaning that the overall nature of the statement is true, but not necessarily entirely true.<sup>34</sup> Although the standard for libel drops to a mere negligence if the plaintiff is a private figure, it is difficult to imagine a "complaint" site singling out an individual without also mentioning some act within the corporation to which the individual is linked.

On many website providers like Yahoo!/Geocities or AOL,<sup>35</sup> the website creator can hide behind a cloak of anonymity. This anonymity is often guaranteed in the host's privacy policy, primarily to assure users that their personal information will not be divulged to Internet marketers. Because of the anonymity, however, companies have considered pursuing a libel action against the parties responsible for hosting the site.

After the enactment of the Communications Decency Act (CDA) of 1996, however, ISPs and discussion group hosts no longer have an incentive to monitor the content on its servers for defamatory material. Although much of the CDA was struck down as unconstitutional, 47 U.S.C. § 230(1) remained. It provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."<sup>36</sup> Congress noted as its express purpose in enacting § 230 the intent to allow ISPs to exercise editorial discretion without fear of publisher liability.<sup>37</sup>

The immunity provision faced its first major test in *Zeran v. America Online*.<sup>38</sup> In *Zeran*, an anonymous subscriber repeatedly posted allegedly defamatory statements about Zeran to an AOL bulletin board. In attempting to hold AOL liable, Zeran argued that § 230 did not bar his action because once he notified the service of the first message, it had knowledge of the defamatory statement and had a duty to remove the posting promptly and notify its members of the falsity of the statement. Zeran argued that § 230 only immunized "publishers;" he claimed that AOL was a "distributor" for purposes of defamation law. The court, however, held that § 230 did indeed immunize AOL against liability for defamatory statements of content providers.

Despite § 230, however, as a matter of policy most Web hosts and ISPs will block any defamatory or abusive material of which they are made aware.<sup>39</sup> Furthermore, Web hosts and ISPs will often divulge an anonymous user's identity to companies who threaten legal action. For example, Raytheon, in the libel case discussed infra, "had a relatively easy time"<sup>40</sup> obtaining orders that Yahoo! reveal the identities of the chatters, despite a privacy policy that emphasizes that Yahoo! is "committed to safeguarding your privacy online."<sup>41</sup> Specifically, Yahoo! has included a disclaimer for its Business & Finance discussion boards, noting that "under special circumstances, such as to comply with subpoenas and other legal obligations, Yahoo! may provide personally identifiable information which may include IP addresses."<sup>42</sup> Ultimately, Raytheon dropped the case when four employees implicated in the discussion board resigned,<sup>43</sup> including a Raytheon vice president, Mark Neuhausen, who allegedly posted confidential information under the alias "RSCDeepThroat."<sup>44</sup>

#### B. Trademark infringement, trademark dilution, copyright infringement and unfair competition under Federal law.

Trademark rights are one of the biggest concerns of any company trying to protect its name and trademarks on the Internet from cybercomplainers. Most cybercomplainers use the company name in their domain name or plaster their sites with a company's name and/or logo--often doctoring the logo to spell crude names. In fact, "[m]ore than 80 percent of Fortune 1000 companies are victims of some type of trademark misuse on the Internet" according to Cyveillance, a company that monitors online abuse for corporate clients.<sup>45</sup> However, in pursuing a "complaint" site, a standard trademark infringement claim requires confusion on the part of the consumer, implying that infringement claims only work where the alleged infringer is engaged in commercial conduct.



**Figures 1 & 2:** Perversions of a company's logo, such as the example above from <http://www.geocities.com/Area51/Station/9248/sucks/> are common on Internet "complaint" sites.



**Figure 3:** Use of a company's logo in a fake advertisement, such as the example above from

[http://www.oeonline.com/~chevy/nike\\_sucks.htm](http://www.oeonline.com/~chevy/nike_sucks.htm) are common on Internet "complaint" sites.

Many times, "complaint" sites prominently feature an image of a company's trademark logo, usually with the word "sucks" or other derogatory words. The presence of the derogatory comment may clear any potential customer confusion, so a traditional trademark infringement argument may fail. However, the Federal Anti-Dilution Act of 1996 (15 U.S.C. §1125) prohibits use of a name which harms the distinctiveness of "famous" marks, without regard to whether any likelihood of confusion exists, and regardless of the absence of competition. An exemption in the Act, however, §1125(c)(4) permits:

(A) Fair use of a famous mark by another person in comparative commercial advertising or promotion to identify the competing goods or services of the owner of the famous mark.

(B) Noncommercial use of a mark.

(C) All forms of news reporting and commentary.<sup>46</sup>

Most "complaint" sites claim to be out of reach by trademark dilution laws because their activities supposedly constitute non-commercial consumer activism. Depending on the tone and content of the site, however, the "non-commercial" activity of a "complaint" site is quite often debatable. Two cases illustrate both ends of the spectrum, *Bally Total Fitness Holding Corp. v.*

*Faber*<sup>47</sup> and *Jews for Jesus v. Brodsky*.<sup>48</sup>

In *Bally* a California court held that defendant Faber, who had created a website named *Bally Sucks*, which he created "in a simmering rage after a Bally club in California didn't upgrade his membership as promised,"<sup>49</sup> violated neither federal trademark infringement nor trademark dilution statutes because the site was merely a parody designed to voice consumer complaints and not commercially competitive with Bally in any way. The site was so clearly anti-Bally that it could not be construed as the company's handiwork. In *Bally*, the court noted that Faber "does not use Bally in his domain name" and that "even if Faber did use the mark as part of a larger domain name, such as 'ballysucks.com', this would not necessarily be a violation as a matter of law" because "no reasonably prudent Internet user would believe that 'Ballysucks.com' is the official Bally site or is sponsored by Bally. Finally, the court also cited congressional intent to exempt parody and other non-commercial imitation from the Act."<sup>50</sup>

A company considering legal action against a "complaint" site should consider the way in which it is depicted on the site. If the site clearly would not be confused as the company's own site (i.e., prominently visible slogans criticizing the company, obscene pictures) then a court following *Bally* may permit such criticism on the Web, provided that the "complaint" site is not engaged in commercial activity, but is merely criticism, commentary or parody. However, if the "complaint" site could lead a consumer to confuse it with the company's real site (i.e., similar domain names or similarities in overall graphical presentation of the site), then a court might be willing to intervene, as in the *Jews for Jesus* case below.

In *Jews for Jesus*, defendant Brodsky created a website called *jewsforjesus.org* which contained statements critical of an organization called Jews for Jesus. At one point, Brodsky was reported as stating that the "intent behind my bogus 'Jews for Jesus' site ([www.jewsforjesus.org](http://www.jewsforjesus.org)) is to intercept potential converts before they have a chance to see the obscene garbage on the real site."<sup>51</sup> Users who reached Brodsky's site would be "invited to 'click here to learn more about how the Jews for Jesus cult is founded upon deceit and distortion of fact.'"<sup>52</sup> Because of Brodsky's intent to divert users looking for the real Jews for Jesus site to his own by creating a website with a confusingly similar domain name, the court found that "[t]hese statements demonstrate the actions by the Defendant were wilful [sic] and undertaken in bad faith, with full knowledge of and the intent to cause confusion and to infringe on the rights of the Plaintiff Organization."<sup>53</sup> The court held that the plaintiff had demonstrated a likelihood of success on its claim of federal and common law service mark infringement.<sup>54</sup>

The court also found that Brodsky's conduct was "commercial" for the purposes of substantiating plaintiff's trademark dilution claim for two reasons. First, although Brodsky's site did not solicit funds or sell products, it contained a hyperlink to the Outreach Judaism Organization Internet site, which did sell merchandise, making the *jewsforjesus.org* site a "conduit" to commercial activity, despite a disclaimer which disavowed any affiliation with Outreach Judaism.<sup>55</sup> Second, the court considered Brodsky's conduct "commercial" because "it is designed to harm the Plaintiff Organization commercially by disparaging it and preventing the Plaintiff Organization from exploiting the Mark and the Name of the Plaintiff Organization. In addition, the Defendant Internet site has and will continue to inhibit the efforts of Internet users to locate the Plaintiff Organization Internet site."<sup>56</sup>

The court's finding of commercial use in *Jews for Jesus* is important because occasionally, a "complaint" site will plug books<sup>57</sup> sell advertising space,<sup>58</sup> solicit donations,<sup>59</sup> or provide links to other commercial sites. The *Jews for Jesus* case seems to suggest that any commercial benefit derived from a "hate" site, or any commercial harm done to a company, would classify the site as commercial, thereby permitting a trademark dilution claim.

For example, in *Planned Parenthood*, the court held that defendant's use of a similar domain name was commercial conduct because:

(1) defendant is engaged in the promotion of a book, (2) defendant is, in essence, a non-profit political activist who solicits funds for his activities, and (3) defendant's actions are designed to, and do, harm plaintiff commercially.<sup>60</sup>

The court concluded that "[t]he conduct of the Defendant also constitutes a commercial use of the mark and the Name of the Plaintiff Organization because it is designed to harm the Plaintiff Organization commercially by disparaging it and preventing the

Plaintiff Organization from exploiting the Mark and the Name of the Plaintiff Organization."<sup>61</sup>

Any copyright claim will be subject to the defense of "fair use" under 17 U.S.C. section 107. Federal law accepts the "fair use" of copyrighted material without prior consent of the copyright owner for "criticism, comment, news reporting, teaching, scholarship, or research."<sup>62</sup> Most "complaint" sites can probably be classified as some form of criticism, comment or parody, all of which would most likely fall under the fair use exception.

Lastly, a company considering legal action against a cybercomplainer must consider the jurisdiction in which they bring suit. For example, in March of 1998, U-Haul brought suit in Arizona against John Osborne of Georgia for trademark infringement and libel. Osborne ran the "U-Hell" website which published visitors' U-Haul "horror" stories. Arizona is U-Haul's home base, but the defendant filed a motion to dismiss the case, arguing the defendant and witnesses are in Georgia, not Arizona. The case was summarily dismissed,<sup>63</sup> with U-Haul vowing to refile in Georgia.

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## V. NON LITIGATION STRATEGIES FOR ADDRESSING COMPLAINT SITES

In order to stem the proliferation of confusing "complaint" driven domain names, many large companies (or their marketing/advertising firms) are registering or buying domain names critical of the company mark.<sup>64</sup> Many companies will register the following variations on complaint sites: [name]sucks.com, [name]stinks.com, [name]blows.com, ihate[name].com, screw[name].com, and boycott[name].com.<sup>65</sup>

In addition, a whole market has popped up for companies that monitor the Internet for abuses of a company's trademark or copyrighted material.<sup>66</sup> A large list of such companies is available on [Yahoo!](#).

The price for such monitoring, however, is not cheap. Approximately 600 companies pay about \$13,000 to one company that prowls websites and helps with damage control when criticism hits the Internet.<sup>67</sup> Less expensive techniques involve software that monitors who links to a company's website.<sup>68</sup>

Finally some companies regularly monitor complaint website and take a proactive approach to such complaint sites and customer complaints.

For example, the most captive audience at dunkindonuts.org are the executives of Dunkin' Donuts, who fastidiously monitor the site and "occasionally send coupons and mollifying e-mail to disgruntled consumers."<sup>69</sup> Nike Inc. has taken to a peaceful counteroffensive. In response to several sites urging consumers to boycott Nike for underpaying Third World workers, the sports clothing manufacturer has created [a site separate from the company's main Web page](#). It features photos of a humble but clean-looking shoe manufacturing plant in China and describes benefits offered to overseas workers.<sup>70</sup> Other companies, including many computer vendors, provide at least an e-mail link (or even a Web-based forum monitored by a customer service representative who answers questions in real-time) so that frustrated customers will hopefully blow their steam directly at the company instead of complaining to the whole world.<sup>71</sup>

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## VI. CONCLUSION

When a company is confronted with a customer or employee "complaint site," there are a number of legal strategies it may follow. Whether the company pursues legal action or sets up an alternative website, the company will need to follow a carefully thought out strategy in order to minimize any disruption to the business or any harm to the company trade name or trade marks.

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## VII. ENDNOTES

<sup>1</sup> Robert Trigaux, *Gripe.com*, ST. PETERSBURG (Florida) TIMES, January 31, 1999 at 1H.

<sup>2</sup> See Mike France & Joann Muller, *A Site for Soreheads*, BUS. WK. ONLINE, Apr. 12, 1999 at [http://www.businessweek.com/1999/99\\_15/b3624104.htm](http://www.businessweek.com/1999/99_15/b3624104.htm).

<sup>3</sup> [http://dir.yahoo.com/Business\\_and\\_Economy/Companies/Corporate\\_Services/Public\\_Relations/Clipping\\_and\\_Monitoring\\_Services/](http://dir.yahoo.com/Business_and_Economy/Companies/Corporate_Services/Public_Relations/Clipping_and_Monitoring_Services/).

<sup>4</sup> David Segal and Caroline E. Mayer, *Site for Sore Consumers: Complaints About Companies Multiply on the Web*, THE WASH. POST, Mar. 28, 1999 at A1.

<sup>5</sup> Janelle Brown, *Can AOL Silence its Critics?*, SALON.COM, July 1, 1999 at [http://www.salon.com/tech/log/1999/07/01/inside\\_aol](http://www.salon.com/tech/log/1999/07/01/inside_aol).

<sup>6</sup> Segal & Mayer, *supra* note 6.

<sup>7</sup> See Victoria Colliver, *Anti-corporate Crusader; Pinole Resident Has Made Starbucks-Bashing His Life's Work*, THE S.F. EXAMINER, June 11, 1999, at D1.

<sup>8</sup> <http://www.nervousinvestor.com/020299cs.shtml>.

<sup>9</sup> Patrick McKenna, *Samsung Stung For \$Millions By Internet Fraud*, NEWSBYTES, August 11, 1997; See also, Martyn Williams, *Samsung Issues Statement Regarding Spam*, NEWSBYTES, August 15, 1997; Minda Zetlin, *Disinformation: What Do You Do When You Get Dissed*, MGMT. REV., July 17, 1998, at 33.

<sup>10</sup> Cal. Super. Ct., No. 98AS05067, Apr. 27, 1999.

<sup>11</sup> Simon J. Nadel, *Anti-Company Web Sites Often Legal, More Than a Minor Nuisance to Employers*, 4 ELECTRONIC COM. & LAW (BNA) No. 26, at 579 (June 30, 1999).

<sup>12</sup> See Trigaux, *supra* note 3.

<sup>13</sup> Segal & Mayer, *supra* note 6.

<sup>14</sup> Zetlin, *supra* note 19, at 87.

<sup>15</sup> France & Muller, *supra* note 4; Colliver, *supra*, note 14.

<sup>16</sup> The website is apparently now off-line, so no URL is available.

<sup>17</sup> France & Muller, *supra* note 4.

<sup>18</sup> The website was at <http://www.billsheehan.com> but no longer seems to be active. With respect to the company attorneys, Sheehan announced on his website that "both these guys are very unprofessional. They take things personal [sic] and tend to anger easily. Could somebody PLEASE medicate these guys?" 1998 U.S. Dist. LEXIS 16862 at \*3 (W.D. Wash. 1998).

<sup>19</sup> France & Muller, *supra* note 4.

<sup>20</sup> 1998 U.S. Dist LEXIS 16862 at \*5.

<sup>21</sup> Nadel, *supra* note 21.

<sup>22</sup> Zetlin, *supra* note 18; Shane McLaughlin, *Barbed Wires, INC.*, Nov. 1998 at 24.

<sup>23</sup> See Jerome & Taylor, *Liar, Liar: Unscrupulous Web Pages*, PC/COMPUTING, Dec. 1, 1998 at 89.

<sup>24</sup> Now, however, the site merely contains a few quotes about how Holker's case has no merit, along with a link to a page featuring statistics on how often the [expressuccesssucks.com](http://www.expressuccesssucks.com) website is visited.

<sup>25</sup> Companies need to consider the ramifications when they threaten legal action against "complaint" site operators. See Phillip M. Perry, *Don't Bad-Mouth Your Competition*, CHEMTECH, January, 1997 at <http://pubs.acs.org/hotartcl/chemtech/97/jan/bad.html>. <http://www.aolsucks.com>. <http://www.aolsucks.org/webcens/webmaster1.html>. <http://www.aolsucks.org/webcens/chitow.html>. As an example of such attempts at public relations gone sour, the webmaster of America Online emailed the publisher of the AOL-Sucks webpage threatening legal action for the "offensive and disturbing" comments. When the "complaint" site creator began to demand justification for the legal action, a vice-president at AOL quickly apologized and retracted all threats.

<sup>26</sup> See Segal & Mayer, *supra* note 6.

<sup>27</sup> George B. Delta & Jeffrey H. Matsuura, LAW OF THE INTERNET § 7.02 (1998) [*hereinafter* LAW OF THE INTERNET]. See also, RESTATEMENT (SECOND) OF TORTS § 558 (1997) which defines the elements of defamation as:

- (a) a false and defamatory statement concerning another;
- (b) an unprivileged publication to a third party;
- (c) fault amounting to at least negligence on the part of the publisher; and
- (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.

<sup>28</sup> See, *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984) (holding that in Consumer Reports' criticism of Bose products in its product evaluation, Bose is a public figure and therefore must prove by clear and convincing evidence that Consumer Reports published its comments with actual knowledge of falsity or reckless disregard of the truth in order to bring a libel action).

<sup>29</sup> Although a large group of people cannot be defamed (i.e., "all employees of X Corp. are liars"), a smaller group--of not more than twenty-five--has been held to have standing to bring a defamation case where a reasonable reader can understand the comment as applying to the plaintiff. See LAW OF THE INTERNET, at § 7.02[A][2].

30 See LAW OF THE INTERNET §7.02[C][3] (discussing, generally, the definition of "public figure" and "limited-purpose public figure.").

31 LAW OF THE INTERNET §7.02[C][1], *citing* New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964).

32 See LAW OF THE INTERNET §7.02[C][2].

33 Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 516-17 (1991).

34 See LAW OF THE INTERNET §7.02[B][1].

35 For example, *Yahoo!/Geocities* and *AOL* host a wide-range of discussion groups. Furthermore, sites like *grumbling.com* and *gripenet.com* provide web-based bulletin boards for a variety of consumer complaints and workplace grievances, but the operators of these sites post no material themselves.

36 47 U.S.C.A. § 230 (West, 1996).

37 H. R. Rep. No. 104-458, at 1130 (1996).

38 129 F.3d 327 (4th Cir. 1997).

39 For example, *Yahoo!/Geocities*, like most free-web hosts, prohibits the following, among other things, in its Terms of Service (TOS) and reserves the right to terminate its service "if Yahoo believes that you have violated or acted inconsistently with the letter or spirit of the TOS:

(5)(a) upload, post or otherwise transmit any Content that is unlawful, harmful, threatening, abusive, harassing, tortious, defamatory, vulgar, obscene, libelous, invasive of another's privacy, hateful, or racially, ethnically or otherwise objectionable;

(5)(f) upload, post or otherwise transmit any Content that infringes any patent, trademark, trade secret, copyright or other proprietary rights of any party." In addition, *Yahoo!/Geocities* provides a Content Violation Reporting Form at [http://geocities.yahoo.com/main/contact/alert\\_form.html](http://geocities.yahoo.com/main/contact/alert_form.html).

40 *Raytheon Co. Won't Sue 21 Who Put Secrets on Internet*, THE BOSTON HERALD, May 21, 1999 at 14.

41 See, *Yahoo! Privacy Policy* <http://docs.yahoo.com/info/privacy/>.

42 *About the Business & Finance Message Boards* <http://messages.yahoo.com/reminder.html>.

43 *Short Take: Raytheon Drops Suit Against Yahoo Users*, CNET NEWS.COM, May 21, 1999 at <http://www.news.com/News/Item/Textonly/0,25,36919,00.html>.

44 Todd Wallack, *Message Nets VP an Exit*, THE BOSTON HERALD, Mar. 31, 1999 at 35.

45 Trigaux, *supra* note 3.

46 15 U.S.C.A. § 1125(c)(4)(A)-(C) (West, 1996).

47 29 F. Supp. 2d 1161 (D. C. Cal. 1998). See also, *Planned parenthood Federation of America, Inc. v. Bucci*, 1997 U.S. Dist LEXIS 3338 (S.D. N.Y. 1997) (holding that defendant's use of the domain name *www.plannedparenthood.com* was unfairly competing with plaintiff's website at *www.ppfa.org*).

48 993 F. Supp. 282 (D. N.J. 1998).

49 Segal & Mayer, *supra* note 6.

50 Bally, 29 F. Supp. 2d at 1166-67.

51 *Jews for Jesus*, 993 F. Supp. at 291.

52 *Id.* at 291 n.15.

53 993 F. Supp. 304. By extension, it may also be possible to apply *Jews for Jesus* to situations where the graphic elements of a "complaint" site are designed to look similar to the company's real website and perhaps even to "complaint" sites which are likely to fall under *Bally* but which are loaded with metatags to encourage Internet search engines to place the "complaint" site above the company's real site. The metatag issue with EPS Technologies, discussed *supra*, would be a good case to test this theory.

54 *Id.* at 305.

55 *Id.* at 308.

56 *Id.*

57 See, *Starbucked.com* <http://www.starbucked.com>, where Jeremy Dorosin criticizes Starbucks Coffee and also sells his book, *Balance at Middlefork*, an autobiographical account of Dorosin's view of "philosophical compatibility between Eastern and Western

values," and leads up to his highly-publicized Starbucks incident. Not surprisingly, one of Dorosin's demands to Starbucks was to make his book available for sale in the popular coffee stores.

58 Both *starbucked.com* and *chasebanksucks.com* provide links for potential advertisers to link advertisement banners on their sites. Furthermore, *bestbye.com* already has advertisements in place linking to, among other things, a company called i-Level.com.

59 The *untied.com* site (anti-United Airlines) seeks "token" contributions of \$5 (or more) at <http://www.untied.com>.

60 *Planned Parenthood*, 1997 U.S. Dist. at \*16.

61 *Jews for Jesus*, 993 F. Supp. at 308.

62 17 U.S.C.A. § 107 (West, 1996).

63 See Andrew Marlatt, *Companies Take Complaint Sites to Court*, INTERNET WORLD, Nov. 16, 1998; David Segal & Caroline E. Mayer, *Sites for Sore Consumers: Complaints About Companies Multiply on the Web*, THE WASH. POST, Mar. 28, 1999 at A1.

64 See Andrew Marlatt, *Who's Owner of Chasesucks.com And Chasestinks? Three Guesses*, INTERNET WORLD, June 15, 1998, at <http://www.iw.com/print/1998/06/15/industry/06/15-antidomains.html>.

65 Companies registering anti-domain names include, Chase Manhattan Bank, Charles Schwab & Co., GE, Hyatt Resorts, and CIT Group.

66 See, e.g., *cyveillance.com*, *ewatch.com*, *ir-watch.com*, *investorfacts.com*, *cycheck.com*, *cyberalert.com*, *webclipping.com*, *utilittech.com*, and *wavephore.com*.

67 Segal & Mayer, *supra* note 6.

68 For \$20 a month, LinkAlarm, <http://www.linkalarm.com>, provides the services of software robot that monitors who has linked to a given site.

69 *Id.*

70 France & Muller, *supra* note 4.

71 Dell WebForum is a web-based bulletin board for Dell customers to ask questions and blow steam about various problems with Dell Computers. See <http://support.dell.com/support/delltalk.htm>. Dunkin' Donuts provides product and nutritional information, as well as an e-mail link for comments and complaints. See <http://www.dunkindonuts.com>.

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