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What to Do when "Everything Sucks"

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For years, domain names were restricted to twenty-two basic generic top-level domains (gTLDs), including the popular ".com," ".net," and ".org." In late 2013, the Internet Corporation for Assigned Names and Numbers (ICANN), the non-profit responsible for maintaining the foundational infrastructure of the internet, broadened the variety of gTLD options - including, as of 2014, the controversial gTLD ".sucks." Since then, many famous brands have had to decide what to do - or not to do - in response to the use of their marks in the domain names of what have become known as "gripe sites." This article discusses the tension between cybersquatting and free speech, including a new wrinkle in that well-tread tapestry involving the Everything.Sucks platform.

Traditional Domain Enforcement Options

A traditionally infringing domain name incorporates a brand owner's mark along with a generic, connotatively neutral gTLD (i.e., brandname.com). It may consist solely of the trademark and the gTLD, or it may combine the trademark with additional terms. As long as these additional terms do not change the average consumer's perception of the domain as tied to the trademark, brand owners have a number of resources at their disposal for combatting the infringement.

The most common, and often most effective, mechanism is to bring a proceeding under the Uniform Dispute Resolution Policy (UDRP), to which all registrars and registrants are bound (citation 1). Initiation of a UDRP results in immediate locking of the domain, and a favorable decision will order transfer of the infringing domain to the brand owner. For classically infringing domains, which often seek to trade off the goodwill of a brand by offering competitive products or profiting from click-through advertising revenue, the UDRP is an excellent tool.

In addition to the UDRP, brand owners faced with traditional domain infringement can initiate a Uniform Rapid Suspension System (URS) proceeding (less expensive than a UDRP, but domains found to be infringing are only suspended rather than transferred); file a lawsuit, including under the Anti-Cybersquatting Consumer Protection Act (ACPA); and, in the event the website content is also infringing, submit "take-down" letters to website facilitators, such as the webhost, payment processors, ad distributors, and e-commerce platforms.

The Difficulty with Traditional Gripe Sites

In order to succeed under a UDRP (or a URS, or the ACPA), a brand owner must establish aprima faciecase that the owner of the disputed domain registered and is using the name in bad faith. The problem with gripe sites is that their very nature suggests good faith criticism and the availability of a potent free speech defense. It also often complicates a showing of likelihood of confusion (one of the ways to make a "bad faith" showing under the UDRP) because an internet user happening across the domain name "brandname.sucks" (or "brandnamesucks.com"), the argument goes, is likely to assume the associated webpage is unaffiliated with, and indeed critical of, the underlying brand name.

Where a gripe site appears to have been created specifically and maliciously to harm the commercial interests of the trademark owner, UDRP Panels have been more sympathetic. For example, slanderous gripe sites the purpose of which is to retributively harm a brand owner's business (rather than express a genuine opinion or offer a neutral forum for reviews) are nearly always transferred to the brand owner, as are domains that resemble legitimate review or complaint sites but which feature commercial products or generate click-through advertising revenue (citation 2).

But, where the disputed domain appears to be used for a legitimate and apparently non-commercial complaint site, the interests of free speech often win out, bad faith cannot be established, and brand owners are unable to wrest the malicious domain from its owner without paying an often-exorbitant fee (citation 3). The line between legitimate and malicious gripe sites can be nebulous, and trademark owners are right to worry about being accused of "reverse hijacking" by these registrants (citation 4).

The Rise of Everything.Sucks

Riding the gripe site wave, the Everything.Sucks infrastructure was first created in 2015 and became more substantively populated in early 2020. Everything.sucks is now home to many "brandname.sucks" domains - such as fisherprice.sucks, famousfootwear.sucks, deloitte.sucks, and invisalign.sucks, just to name a few - all of which resolve to an official-looking website formatted to closely resemble a Wikipedia page dedicated to the associated brand. In June of 2020, there began a spike in sales of ".sucks" domains, with at one point over 2,000 names registered via the registrar Rebel in a span of 24 hours (citation 5). As of this writing, more than 12,000 ".sucks" domains have been registered, representing growth of
about 50% since June, many of which exist on the Everything.sucks platform (citation 6).

While it's not yet known definitively, some industry commentators suspect that these Everything.Sucks pages may have actually been built by scraping the web and only reposting specifically negative content relating to the brand (citation 7).

Realizing the complexity of bringing a successful UDRP or other

enforcement action against these ".sucks" domain names, some mark owners may look to see if the domain is available to purchase, which it often is. However, at least one industry commentator has proposed that by purchasing back these domain names, trademark owners may be unwittingly supporting a nefarious .sucks "marketplace."

As of this writing, only a handful of UDRPs involving Everything.Sucks gripe sites have been decided by arbitration panels, and the decisions have been split. Some panels have taken the websites at face value as valid gripe sites; others have found them to be part of a broader nefarious scheme to hold trademark owners hostage by creating automated micro-sites designed to resemble exercises of free speech (but which really exist only to prevent transfer of the domain via UDRP) (citation 8). More cases involving Everything.Sucks domains are pending, and the coming months should hopefully bring some clarity as to how these cases will resolve. For now, however, many brands will likely want to avoid the expense (and potentially negative published decision) associated with a UDRP, given the uncertain outcome.

What To Do When All Traditional Options "Suck"?

When a brand owner is in the middle of a triangle, the sides of which are cybersquatting, free speech, and potentially a new and not-yet-universally-recognized scam, what is the best move? The answer might be watch and wait (citation 9).

Until (or unless) ICANN closes the loophole, Everything.Sucks (and similar potentially "fake" gripe sites) appear to be exploiting, brand owners may find themselves feeling hamstrung. However, the content on these sites often remains static, which is likely to tip off internet users regarding the validity of the sites and result in minimal web traffic, making the sites more of an annoyance than a true enforcement priority. Aggressive enforcers may consider hunting down the original creators of any scraped text appearing on the site and encouraging these content owners to submit their own DMCA takedown requests objecting to the reproduction of their original content. And of course, any demonstrably false statements or use of logos may be separately actionable. But absent such elements, given the legal quagmire on one side and distasteful possibility of inadvertently buying into a bad faith commercial scheme on the other, the best strategy may just be to de-prioritize enforcement of these sites and watch and wait for the law to catch up.

Citation 1 - Click here to view page.

Citation 2 - See, e.g., HBT Investments, LLCd/b/a Valley Goldmine v. Christopher D. Bussing, Case No. D2010-1326 (WIPO Sept. 24, 2010) (transferring the disputed domain because "Panels have long held the view that the right to express one's views is not the same as the right to use another's trademark as the platform for expression. . . . Although cloaked in the mantle of a gripe site, Respondent's website is quite clearly a platform for Respondent to cast aspersions on the reliability of a report that portrayed his company in a negative light and his competitor in a positive light, and to otherwise sling mud.");Diet Center Worldwide, Inc. v. Jason

Akatiff, D2012-1609 (WIPO Oct. 5, 2012) (refusing to find the disputed domain name to be a "legitimate gripe site" "[s]ince the website includes links to various profit-making enterprises, and presumably Respondent earns some revenue from or through those links").

Citation 3 - Of course, if a registrant does offer to sell for an exorbitant fee, this behavior can be put forward by the trademark owner as suggestive of bad faith.

Citation 4 - A trademark owner seeking to capture a desired domain through the UDRP process without a good faith belief the registrant acquired the domain maliciously may be subject to a finding of "reverse domain name hijacking." Although there are no monetary or other penalties directly associated with a finding of reverse hijacking, respondents may use such a finding to bolster, for example, unfair competition claims in subsequent litigation.

Citation 5 - Click here to view page.

Citation 6 - Click here to view page.

Citation 7 - See, e.g., click here to view page.

Citation 8 - See, e.g., NAOSv. Honey Salt Ltd., CAC 103142, August 26, 2020 (transferring <bioderma.sucks> after characterizing site's criticism as not genuine because "Respondent's entire endeavor seems to the Panel to be a pretext for commercial activity"); Boehringer Ingelheim Pharma GmbH & Co. KG v. Honey Salt Ltd., cAC103141, September 1, 2020 (denying claim for <miraplex.sucks> after finding evidence failed to show intent to use site for criticism was disingenuous).

Citation 9 - Some brand owners have previously argued Everything.Sucks' placement of banner advertisements constitutes commercial activity suggestive of bad faith; however, Everything.Sucks appears to have removed banner advertisements from its sites, obviating this argument going forward. Of course, if there is demonstrable commercial activity, a trademark owner has a good argument that the site was created in bad faith.

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