

Gripe Sites: Sue or Stew

By William G. Pecau

Gripe sites are Web sites whose purpose is to complain, criticize, and revile businesses or other institutions. These sites, also known as “hate sites” and “suck sites,” are generally established by dissatisfied customers or unhappy ex-employees. And, they are proliferating. They have become so common there even are sites for gripe sites like WebGripeSites.com and Cybergripping.com. Forbes has even published lists of the top Corporate Hate Web Sites judged on criteria such as hostility level, number of posts, ease of use, and entertainment value. Charles Wolrich, “Top Corporate Hate Web Sites,” Forbes.com, March 8, 2005.

Of course, gripe sites hold little entertainment value for those that are the subject of their venom. Everyone, almost everyone, likes to be liked. Businesses depend on it. Their advertising, customer relations, employee training, product development, and sales departments are, almost always, fixated on creating satisfied customers and goodwill. Goodwill is the cornerstone of repeat business and without repeat business, and attendant goodwill, there is, for most, no business.

There might be some tangential value to a gripe site. They do tell a business what some customers think, even though their opinions are not necessarily those that the business wants to hear and certainly not those that it would want other customers or potential customers to hear. They could serve as a warning system to companies that their products or services are not being well-received and that they are suffering from bad word of mouth. But, there are, or should be, many other and better ways to obtain this information. Some alternative routes are through a company's own Web

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site and toll-free service numbers. Gripe sites also, theoretically, add to the public good as forums for discussion and creating better informed customers.

However, gripe sites serve as an attraction to what otherwise would be isolated disaffected voices and consolidate them into a focused area of unhappiness and criticism. The overall effect can be an echo chamber that amplifies and encourages disaffection. This can create a very distorted view of the company and its products or services by someone who comes upon the site. For example, one review of these sites dismissed most as “one

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man's personal vendetta against a company,” but concluded that some “paint an accurate reflection” of a company stating: “I know now that it would be quite foolish to ever shop at Best Buy.” Scott Kessman, Gripe Sites When Something Sucks. Post Your Rant on These Sites, Associated Content, Sept. 20, 2006, www.associatedcontent.com/article/60685/gripe_sites_when_something_sucks_post.html?cat=7. To draw any conclusion from a site dedicated to criticism seems foolish, but the reviewer's conclusion reflects the power and effect of bad word of mouth even upon the supposedly dispassionate.

Gripe sites can be more than forums for criticism. Because some are run by or receive contributions from former employees or anonymous current dissatisfied employees, some gripe sites have access to and post non-public information about a company or its employees. Some of this information is false, some of it might be embarrassing, and some of it might be very harmful to a company.

One gripe site www.royaldutchshellplc.com, run by a former employee of Shell,

credits itself with costing Shell billions of dollars. It claims to have disclosed environmental violations by a joint venture in Russia's Sakhalin Islands that allowed Vladimir Putin's government significant concessions from the Shell joint venture.

Accordingly, the aversion of businesses and others to gripe sites has very powerful, practical, and emotional bases. The immediate reaction of most businesses that have been the target of a gripe site naturally is to seek legal means to have the site taken down. But, shutting down a gripe site generally is not easy, often cannot be done, and often is counterproductive.

LEGAL HURDLES

A gripe site frequently uses its target's trademark or a variation in its domain name as the name of the site and actively seeks to harm the goodwill of its target. Accordingly, the target/trademark owner typically bases its objection on trademark infringement and related federal and state law claims designed to protect trade identity and reputation, such as dilution, unfair competition, anti-cybersquatting, deceptive trade practices, defamation, and the like. However, there are significant difficulties with these claims. For the trademark infringement, unfair competition, and other claims that require a showing of likely confusion, there is the obvious problem that in most cases people are not likely to believe that the trademark owner has sponsored or approved a site that is devoted to disparaging the trademark owner, its brand, and its products or services — particularly when the site contains disparaging qualifiers such as “hate,” “bad,” or “sucks.” In other words, there is no confusion. Also, the gripe site's use of the target's brand is almost always nominative and a fair use. The gripe site wants its readers to know its targets; it does not desire any confusion or mistake as to whom it is disparaging. This clarity of victim and purpose also makes it very difficult for any dilution claim to succeed — at least

a claim of dilution of the distinctiveness of the mark.

A dilution by tarnishment claim, in addition to its inherently problematic nature, runs into a number of problems. One issue, which is also applicable to other trademark identity claims, is whether the use of the target's mark is use in commerce. If there is no commercial component to the site, and there usually is not, then there might not be the commercial use necessary to bring an action under the Lanham Act or to bring a UDRP proceeding. A dilution by tarnishment claim also will face significant hurdles with fair use and First Amendment defenses. The First Amendment additionally will block most claims for defamation, product disparagement, and similar state law claims.

Further, the content on these Web sites is usually provided by anonymous individuals — customers, and current and former employees. The gripe site itself is immunized from claims perhaps stemming from information from those third parties under the Communications Decency Act under most circumstances. *Universal Communication Systems, Inc. v. Lycos, Inc.*, 478 F.3d 413 (1st Cir. 2007); *Global Royalties, Ltd. v. Xcentric Ventures, LLC*, 544 F.Supp.2d 929 (D.Ariz. 2008). Action might be taken against the individuals if their postings violate defamation, trade secrets, or other laws and if their identities can be ascertained.

There are certain circumstances under which the gripe site itself will not be immunized under the Communications Decency Act. For example, action may be permitted to proceed against the gripe site if it can be proven that the site solicited the improper posts. *Fair Housing Council of San Fernando Valley v. Roommates.com*, 521 F.3d 1157 (9th Cir. 2008). In *Roommates.com*, the Ninth Circuit held that the gripe site was not entitled to immunity where the site induced illegal posts by third parties through its Web site registration process that required subscribers to complete a questionnaire made up of questions and answers created by the site.

The legal hurdles are daunting. In recent years, virtually all attempts to close non-commercial gripe sites that have gone to a decision have been unsuccessful. And, there have been scores of such cases. For example, Bally Total Fitness was unable to close the gripe site www.compupix.com/ballysucks. *Bally Total Fitness Holding Corp. v. Faber*, 29 F.Supp.2d 1161 (C.D. Cal. 1998). Multiple attempts to close www.ripoffreport.com, a site where consumers are invited to post complaints about companies, have similarly failed. *MCW, Inc. v. Badbusinessbureau.com, LLC*, 2004 WL 833595 (N.D. Tex. 2004); *Global Royalties, Ltd. v. Xcentric Ventures, LLC*, 2007 WL 2949002 (D. Ariz. 2007). Even

the attempt to evoke a claim against gripe sites is fraught with possible difficulties. Sites like WebGripeSites.com and Cybergripping.com contain advice to the operators of gripe sites on defenses to various kinds of actions that might be brought. Gripe sites also have regularly received help and representation from public interest groups, such as Public Citizen Litigation Group — sometimes even bringing actions for declaratory judgment. *Riley v. Dozier*, Civ. No. 3:08-CV-0642 (E.D. Va. filed Oct. 2, 2008). The meager success of lawsuits brought against gripe sites and the free and easily accessible information available to gripe site owners make it less likely that the operator of a gripe site will feel intimidated by a threatening protest letter or will be persuaded to cease efforts to publicize his or her perceived hurt and the complaints of others against the site's target. Accordingly, a protest letter to a gripe site could result in an unwelcome lawsuit that might be expensive and unsuccessful.

Most often, the site posts the target company's cease and desist letter and the site's response as exhibits A and B of the target's overbearing manner and fear of the truth, the site operator's victimization by the target, and the nobility of the site operator's efforts to expose the perceived deficiencies of the target. In addition, the protest letter often aids the site operator's attempts to further publicize with the press its site and its dissatisfaction with the target by providing a David and Goliath story.

A cease and desist letter might have the further unintended consequence of encouraging the operator to continue the operation of its gripe site. The folks who run these sites, in this author's opinion, tend to be self-righteous narcissists with time on their hands. A cease and desist letter might play right into the operator's desire for attention and perception that the site's activities are causing the target pain — which, after all, is a principal purpose of the site.

The best course to deal with a gripe site often is to do nothing at all. The site itself actually might have a little impact on a company's business and the ferocity of its venom might obscure the reality that it is only one of millions of sites that has little traffic and that is visited only by the disaffected, whose business is ultimately lost anyway. Also, if the target pays no overt attention to the site, its operator may lose interest in this particular cause and direct his or her ire to more recent, emotionally appealing, or reactive targets. Non-action can be the most difficult course to take where there is a demand that something must be done.

WHAT TO DO

So, what to do. If a cease and desist letter is sent out, it should be written with the

expectation that it will be posted. The tone of the letter should be carefully considered in light of its likely larger audience. It should balance the need of the letter's primary purpose-to-object to all or part of the site's activities on the basis of appropriate legal theories and to indicate a firm resolve to obtain redress if the identified activities continue with the need to honor a customer's rightful expectation to be treated fairly. Also, it should be written in a manner that minimizes the risk of creating a justiciable controversy — unless the target desires a lawsuit in a forum of the site owner's choosing.

If the gripe site's domain name uses the trademark of the target, an administrative proceeding under the Uniform Dispute Resolution is a possible course of action. A UDRP proceeding obviously is a more cost effective solution than a lawsuit. Its resolution is much faster and leaves the alternative of a court proceeding if unsuccessful.

There are also alternatives to legal action. Some companies prophylactically purchase various combinations of their names or principal marks along with pejoratives like "sucks" that are generally used with gripe sites. This may eliminate the most obvious names for gripe sites. But it does not remove the problem as a determined griper can easily come up with a combination or term not obtained by the target corporation to the same effect.

From time to time, targets just buy themselves out of the problem by purchasing the domain from the gripe site owner. The purchase agreement usually has a prohibition against creating other sites having the target or its brands, products, or services as a subject of the site and a confidentiality provision. However, a payment could encourage other gripe sites if others learn or conclude that there was a pay-off.

Finally, the target might seek to engage the operator of the gripe site to find out just what his/her problem is and see if it can be rectified. This would be the cleanest, easiest, and cheapest solution. It might not work, but it has little downside risk and might, if not immediately successful, attenuate the ferocity of the attacks and might in the long run hasten the end of the site, by causing its operator's interest to wane.

