



Avoiding Gripes About Your Gripe (or Parody) Site

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Here's a story we hear a lot at EFF: You think BadCo, Inc. is a bad actor and you've developed a really cool site to tell the world why. Maybe just by **gripping** about them or maybe through a bit of **parody**. Fast forward two weeks: you're basking in the pleasure of calling BadCo out when bam! You find out your site's been shut down. You call your internet service provider to find out what's going on. After way too much time climbing phone trees and sitting on hold you get an answer—Badco has claimed that your site violates its intellectual property rights.

The above scenario is all too common—and, often, could have been avoided (or at least discouraged) by a few simple measures. Below, we'll give you some tips for warding off complaints about your gripe or parody site. But first, some background on common claims and defenses.

Trademark:

Many trademark owners are not happy when they see their marks (e.g., the name of a company [like **McDonald's**], logos [like Nike's **swoosh**] and/or trademarked phrases [like "**Let's Get Ready to Rumble!**"]) on their critics' websites or in a **domain name**. They may argue (to the site owner or webhost) that these uses infringe their trademarks, dilute their trademarks, and/or constitute cybersquatting. *Infringement* means using a mark in such a way as to cause a likelihood of confusion as to the source of goods or services; *dilution* means using a *nationally famous* mark (like Coca-Cola) in a way that tarnishes the mark or blurs the connection in the consumer's mind between the mark and the mark-owner's goods or services; *cybersquatting* means using a domain name with a bad faith intent to profit from the goodwill associated with someone's trademark.

However, several courts have held that U.S. trademark law does not reach entirely noncommercial uses. In addition, your use may be a *nominative fair use* if:

1. It's not easy to identify the product/company without using a mark (e.g., using the term "Chicago Bulls" instead of "the basketball team that plays in Chicago");
2. Only so much is used as is necessary to identify the product/company and accomplish your purpose; *and*
3. You do nothing to suggest the mark-owner has endorsed or sponsored your site.

Finally, your use may be protected by the First Amendment—if use of the mark is part of your message, courts will consider whether the First Amendment interest in free expression outweighs the public interest in preventing consumer confusion.

A trademark claim will normally start with a cease and desist letter sent to you or your service provider. This kind of letter is designed to accomplish the mark-owner's objectives relatively

cheaply, i.e., without the expense of going to court. If you or your service provider refuse to comply, the mark-owner may let the matter go, may sue, or, if it is primarily interested in your domain name, may seek to have the domain name transferred under the **Uniform Domain Name Dispute Resolution Policy (UDRP)**. According to the UDRP, a mark-owner who believes a domain name was registered and is being used in bad faith may demand an arbitrator be assigned to assess the matter. If so, you'll have a chance to explain your position to the arbitrator. If the arbitrator nonetheless orders a transfer (note that UDRP decisions overwhelmingly tend to favor established mark-owners), you can ask a U.S. court to intervene.

Copyright:

Some complaints we've seen are based on alleged copyright violations, i.e., a claim that the website infringes original creative material owned by the complaining party. Usually this will take the form of a **Digital Millennium Copyright Act (DMCA)** notice to you or your service provider. In 1998, Congress granted online service providers (like hosting services) certain protections from copyright infringement liability, so long as they meet certain requirements. One requirement of this "DMCA safe harbor" is that online service providers must implement a "notice-and-takedown" system. Under this system, your provider has strong incentives to take down your site as long as the notice it receives complies with the DMCA. However, if you believe your copying, if any, was a **fair use** (or otherwise noninfringing), you can submit a counter-notice and call the copyright owner's bluff. If the copyright owner does not file suit in federal court within 10-14 business days, your site should go back up.

How do you decide whether your use is fair? In evaluating whether something is a fair use, courts generally consider four factors:

1. The nature of your use (transformative works are more likely to be fair uses, as are noncommercial works);
2. The nature of the copyrighted work (you have more fair use leeway with factual works like news stories than purely creative works);
3. The amount taken from the copyrighted work (this is both a quantitative and qualitative inquiry); and
4. The effect on the market for or value of the work.

No one factor is dispositive, and the cases say that all the issues need to be considered together, rather than simply calculating a win-loss record on the four factors.

Fair use is a big topic. Fortunately, there are excellent resources online that explain it in more detail (e.g., Stanford's **Copyright and Fair Use Center** and **Chilling Effects**). For a comparison of copyright and trademark fair use, and lots of information about protecting speech online, check out Public Citizen's **Legal Perils and Legal Rights of Internet Speakers**. You may also want to explore EFF's own **Blogger's Legal Guide**.

It is not always easy to figure out the exact basis of a complaint—copyright, trademark, or something else. If the complaint went to your service provider, ask them to tell you the exact basis for the complaint and give you a copy of any documents they have received.

Avoiding Trouble in the First Place

Whatever the nature of the complaint, dealing with it can be time-consuming, intimidating and interfere with your ability to accomplish your main purpose: legitimate criticism. Fortunately, there are some simple things you can do in advance to either stave off complaints, or give yourself some tools to nip them in the bud:

1. Be noncommercial—no ads, no links to commercial sites, no affiliate links, no Café Press T-shirt sales, no fundraising if you can help it. Several court rulings have held that noncommercial uses fall entirely outside the reach of federal trademark laws, and lack of commerciality can weigh in your favor under copyright law as well.
2. Don't use the target's name alone in the domain name—adding “sucks” is good, but you can be creative. Point is, www.badco.com is more likely to be perceived by a trademark owner as confusing than www.ihatebadco.com. And remember, if your content is good and people link to it, your site will likely come up in Google searches for your topic, no matter what your domain name is. Often, the domain name isn't worth the trouble.
3. Have a prominent disclaimer that explains that your target is neither affiliated with nor endorses your site.
4. Find a service provider with backbone. All too often, internet service providers will choose to take your site down simply because it's cheaper to do so than to pay a lawyer to evaluate whether your target's claims have merit. Two services that have stood up for their customers' free speech rights in the past are **ComputerTyme**, **MayFirst**, and **Project DoD**. A list of other service providers that reportedly “won't dump you at the first sign of controversy” is available [here](#).
5. If you borrow from the target's own materials, such as text or images from the target's own websites, be selective. Make sure that you have taken no more than necessary to accomplish your purpose. Consider altering them in such a way that no one could possibly be confused about endorsement or sponsorship.
6. If a mark-owner challenges your use of a mark in a domain name, don't offer to sell it to the mark-owner without the assistance of legal counsel. An offer to sell, particularly at an apparently inflated price, could be seen by a UDRP arbitrator (and possibly a U.S. court) as evidence that you are a cybersquatter.

To be clear: You don't need to follow any of these suggestions to have a perfectly legal site. On the flip side, following them won't guarantee you won't get complaints. But it should help minimize your legal risk, so you can focus on the primary task—raising public awareness about the issues that are important to you.

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