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## Toy story

Between "eToys" and "etoy" lies more than a letter's difference.

*By Mark Gimein*

Poor Goliath.

The guy got hit in the head with a rock, and has anyone ever felt a trace of sympathy for him? No. The big guy looked like an idiot just getting into the ring with a pipsqueak like David. And let's face it: David had the Lord of Hosts on his side. The fight was rigged.

The story of David and Goliath comes to mind, as it often does, in looking at a domain-name fight between a big guy and a little guy. In this case, the big guy is eToys, an online toy-selling star. The little guy is a group of German pranksters who work under the name "etoy."

What exactly etoy does is, as eToys admits, "difficult to categorize." One site run by the group calls it "the first streetgang on the information superhighway." It has taken responsibility for one high-profile Net prank, and may be associated with a larger umbrella organization of Net artists and rabble-rousers called RTMark. And, more generally, the group's members are dedicated to making fun of corporate mores. I once saw them in San Francisco, at a particularly raucous New Year's party, where they were decked out Devo-like in orange jumpsuits and selling shares of stock in their "art corporation."

Now etoy is being sued by eToys, an online toy store, which charges that etoy creates consumer confusion, injures eToys' reputation and dilutes its trademark rights.

Sounds like etoy has struck a nerve. Etoy, after all, once sponsored an effort to confuse popular search engines by redirecting people who searched for common trademarks like "Porsche" and "Playboy" to an etoy site. So, one suspects that the thought of confusing eToys' customers doesn't bother the etoy band all that much.

EToys says in a press statement describing its suit that "the primary purpose of the lawsuit is to protect eToys' customers and the children who seek to visit the eToys site." EToys claims that etoy has posted porn on its site, as well as a picture and caption that appeared to support the Oklahoma City bombing. To top it off, eToys accuses etoy of "securities fraud" -- selling bogus shares of stock.

Etoy and its chief spokesman, Martin Kubli, could not be reached for comment, but to anyone who has ever run into the etoy pranksters, the contention that they are engaged in securities fraud, at least, is patently absurd. Etoy does sell shares in its "corporation," but I'll bet eToys has been hard-pressed to find a purchaser who was not aware that buying the shares was just a cute way of donating to etoy's guerrilla art projects.

Underneath the bluster, eToys has what appears to be a weak case. It's true that, as eToys trumpets in its press statement, "eToys" is a registered trademark. But etoy has been carrying on its activities, however difficult to categorize they might be, since at least early 1996. That means it predates even the creation of the online toy store. In general, a company can get a trademark on a name that someone else is already using -- but that doesn't mean it has exclusive right to the name. (A classic example used in explaining trademark law is that while a national chain can get a trademark on "Broadway Pizza" and the right to use it nationally, a local pizza place on Broadway in New York can keep on using the name it has used for years.)

All this takes us right back to the story of David and Goliath. In this case Goliath -- eToys -- has a genuine problem. After all, it's not exactly fair that all the money that eToys has shelled out on publicity should wind up sending typo-prone kids who got online with a plan to max out their parents' credit cards to a site full of confusing and vaguely anti-commercial slogans. Then again, eToys could probably have avoided the problem by choosing a different name in the first place.

But what's fair is ultimately beside the point. The fight is rigged, and David -- etoy -- has in some sense already won. Regardless of who prevails in the suit, eToys has managed to make exactly the kind of tone-deaf, ham-handed display that turns it into a classic corporate villain -- and makes etoy's anti-corporate points a lot more effectively and wittily than etoy could ever have done without Goliath's help.