

eToy(s) are Us, and We'll Sue

BY XENI JARDIN

On Sept. 10, 1999, Santa Monica-based retailer eToys Inc. sued etoy, a European digital art collective, who see themselves as secret agents operating within the metaphorical catacombs of the Internet. eToys Inc. described the group as "a Swiss-based organization of computer hackers" distributing "profane, pornographic images," and alleges that the toy store's customers complained about "obscene" material on the group's site when they mistakenly omitted the "s" at the end of the URL. But supporters argued the award-winning art group isn't responsible for shopper typos. After all, etoy.com was launched in 1995, two years before the online store.

Two weeks before the first court date, eToys Inc. received a final rejection of their trademark request—a blow to a case built partly on the charge of "trademark dilution." Despite etoy's longer operating history and eToy Inc.'s failure to win a trademark, on Nov. 29, 1999, an L.A. Superior Court judge issued an injunction shutting down etoy.com. The decision sparked boycotts from free-speech advocates, while self-described "hacktivists" proclaimed virtual war against eToys Inc., a sentence they tried to execute by flooding the retailer with millions of pings. eToys Inc. claimed any hardship imposed on etoy by being evicted from their domain name "pales in comparison to harm to the public" caused by any potential "loss of business to eToys Inc. during the holiday season."

The conflict played out in the poorly governed arena of international domain name regulation. eToys Inc. attorneys argued European businesses don't have an inherent right to dot-com domains registered through U.S. organizations. But etoy said this reasoning amounts to manifest destiny version 2.0, making the Internet just another frontier for Americans to conquer and colonize. "They still believe 'dot-com' belongs to America," said an etoy representative, identified only as agent zai, "but NSI no longer has a monopoly."

eToys Inc. tried to buy the etoy domain from the collective, but were turned down. etoy's allies supported its decision to refuse a reported six-figure buyout offer from the toy giant. Author Douglas Rushkoff, whose etoy advisory board colleagues included EFF's John Perry Barlow and Joichi Ito of Infoseek, agreed, adding "Would anyone have asked Warhol to sell the right to use his own name on his work?"

etoy doesn't condone hacking or virus attacks against eToys, Inc., says zai—at least not in the common sense of the word. "We're media virus producers in the abstract sense of Rushkoff. We create stories that travel the world because people talk and e-mail each other—we create ideas that adapt and travel by themselves." Zai adds that the legal battle has been all-absorbing, so etoy is approaching the fight as an extension of the group's creative process. Says zai, "The only way we'll survive is by transforming the lawsuit into art through media virus."

By Dec. 29, it appeared zai had. Following a dramatic drop in eToys stock and unfavorable media coverage, the toy company announced they were dropping the suit. In response, etoy voiced suspicions that the gesture was misleading rhetoric and hinted that they were preparing for a large-scale counter suit. Had eToys caught the etoy virus? Is zai correct—does eToys, Inc. personify digital imperialism and manifest destiny? If so, then it could be that this dirty little war is being conducted against the persistent, self-replicating virus of personal freedom and individual rights.

eToys vs etoy: Timeline

10.94

Seven European artists found "etoy," begin performances at European raves and art events

10.95

etoy purchases etoy.com domain and launches website

03.96

etoy's "Digital Hijack" project causes search engines to give an etoy page precedence over the pages requested

11.96

Toys.com incorporated In Delaware

05.97-06.97

Toys.com changes name to eToys.com and then to eToys, Inc. eToys, Inc files trademark application with date of first use 1997

06.97

etoy files trademark registration application, still pending at press time, date of first use in commerce: 1994

10.97

eToys, Inc. first online store launches at <http://www.etoys.com>

01.98

etoy holds a mock "IPO" in Vienna, with a press conference at offices of Austrian Chancellor Viktor Klima

09.98

eToys, Inc. trademark is approved demonstrating use from 10.97

12.98

eToys, Inc. applies for trademark on rights purchased from Etna Products Co., Inc. of NYC, which would give the company claim to prior use in 1990

05.99

eToys, Inc. IPOs at \$20 per share (Nasdaq:ETYS)

09.99

eToys, Inc. files lawsuit against etoy in a California court, asks for immediate relief to ensure URL "confusion" doesn't divert potential customers during peak holiday shopping season

10.99

eToys, Inc. launches its first European online store: etoys.co.uk

11.99

eToys, Inc. offers etoy cash and stock settlement in exchange for etoy.com domain. The offer is refused

US Trademark Office refuses eToys, Inc. application for trademark purchased from Etna Products, which would have given it seniority in use of eToys mark

LA. Superior Court Judge John P Shook grants eToys, Inc. request for injunction, shutting down the etoy.com website, prohibiting etoy from promoting the domain name, and banning sale of etoy "art-shares" in the U.S. NSI shuts down etoy's e-mail service, an action not mandated by the injunction

12.99

Media coverage of the dispute widens. etoy supporter sites proliferate. Free speech advocates in the U.S. and Europe organize eToys boycotts. "Digital civil disobedience" actions include U.S. group RTMark's "Virtual Sit-In," a widely publicized online "sabotage project" intended "to damage (or destroy)" eToys, Inc. by flooding its Web servers with millions of simultaneous hits