Gripe Site Survives ACPA and Trademark Infringement Claims

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By David Beeman, Attorney

Gripe sites, websites that criticize a company or its products or services, present tricky problems for trademark owners due to the protections of the First Amendment. *Career Agents Network, Inc. v. White*, 09-CV-12269-DT, *slip op.* (E.D. Mich. Feb. 26, 2010), illustrates the pitfalls of taking legal action to stop these sites. Career Agents Network ("Career Agents") sued White for using the domain names <careeragentsnetwork.biz> and <careeragentnetwork.biz> in connection with a website to criticize Career Agents' business practices. The gripe site displayed a single page of text:

WARNING
If you are considering investing in
this "opportunity", be aware that it is
highly improbable that you will earn
enough to cover your investment. If
you proceed with this company, you
have been warned by those that
know and have lost $20,000-$150,000
by trusting them and their "plan"

Id. at 4. The website did not contain any links to other websites or advertisements.

At the time White registered the domain names, Career Agents had a limited online presence consisting of a holding page at <careeragentsnetwork.com>. According to White, "the website consisted of only the words 'Career Agents Network' in black type on a white background and contained no links and no information." *Id.* at 5. Career Agents claimed rights in the trademark CAREER AGENTS NETWORK and that White's activities constituted cybersquatting in violation of the Anticybersquatting Consumer Protection Act ("ACPA") and trademark infringement under the Lanham Act. The parties filed cross-motions for summary judgment, agreeing that no facts were in dispute. The District Court for the Eastern District of Michigan denied Career Agents' claims and granted White's motion.

Although the parties did not dispute that White used Career Agents' trademark in the domain names, the court found no evidence that White was using the domain names with "bad faith intent to profit" – an element of the ACPA claim. The court emphasized that White's website was designed to harm Career Agents' business, not to bolster White's. The court found "irrelevant to the bad faith inquiry" that White used search engine optimization companies to raise the ranking of his website in search results so that consumers searching the Internet were more likely to find White's website than Career Agents'. The court also found that, although both parties generally were in the same industry, employment recruiting, they occupied different niches and targeted different customers.

In granting White's motion for summary judgment on Career Agents' trademark infringement claim, the court found that White's website did not constitute a "commercial use" of Career Agents' mark and, therefore, it was not subject to a claim under the Lanham Act. White's website contained only critical commentary and no commercial links (not even links to White's own business). It is tempting to wonder whether White's statement could have been successfully challenged as false or misleading, but that is not how the case was positioned.

The court distinguished prior decisions that ruled for ACPA plaintiffs on the ground that the challenged websites displayed in those cases involved intentionally misleading or deceitful content, commercial links, or content that competed with the plaintiffs' goods and services. The court, as several courts have in similar contexts, found that the consumer inconvenience arising from White's use of the mark in a domain name was outweighed by White's right to express an opinion.

Although potentially subject to appeal, *Career Agents v. White* offers several lessons for businesses seeking to protect their trademarks from cybersquatters and gripe sites. First, a business might preemptively register domain names that are identical to its trademark in the .net, .org, and .biz spaces. Second, defensive registrations could be extended to foreign ccTLD domains or in other manners, such as some "typosquatting" variations, but a business must take care to balance costs and benefits, as it is impossible to preempt all conceivable variations and expensive to try. Third, if the trademark owner is concerned about gripe sites, it might preemptively register a few of the most common gripe site formulations, such as "____sucks.com". Finally, a business should carefully assess whether to pursue legal action against a gripe site, both from a legal and a business standpoint. That is, the business should ask whether legal action (successful or unsuccessful) plays into the hands of the gripers by increasing their visibility. The answer to this and similar questions can guide businesses as they decide how to combat gripers.

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