



Wired News - 1999-12-30

<http://www.wired.com>

Article URL:

<http://www.wired.com/news/politics/0,1283,33338,00.html>

---

## **Etoy: 'The Fight Isn't Over'**

by Steve Kettmann

Online toy retailer eToys might be willing to back off from its domain-name struggle with the Zurich-based Internet artists of etoy, but that doesn't mean this fight is necessarily over.

Chris Truax, a San Diego-based attorney representing the etoy artists, did receive a fax from eToys' attorneys on Wednesday morning, but he said the proposal was unacceptable to etoy.

"All I have is this fax that makes an offer basically asking us to cede control over the etoy art project, and in return they'll try to stop beating us up," Truax told Wired News. "That's not acceptable."

"EToys is willing to drop the lawsuit if etoy corporation allows eToys some control over the content of the etoy site. It appears eToys wants etoy to move anything they might consider offensive to some other Web site," Truax said. "In other words, they want some control over what the etoy art media group does, and that's unacceptable. These are artists. I don't think eToys would want to let etoy control the toys they sell on their Web site."

But Ken Ross, eToys' vice president of communications, vehemently denied that there was any kind of conditional demand that etoy move potentially disturbing material to a separate Web site.

"The request to move some of the material to alternate sites is just that, a request," he said. "This is a simple, straightforward, good-faith effort on our part to resolve this matter. We are asking that they make good-faith efforts to put some of the material that kids and parents might find offensive on another part of the site."

Ross said eToys would like to see the situation return to where it stood before eToys sued etoy for "trademark infringement, trademark dilution and unfair competition" and won a preliminary injunction in Los Angeles Superior Court on 29 November.

"We'll take all necessary steps to allow etoy to re-establish the etoy.com site," he said. "We're contacting [Truax] with a proposal that both parties drop their claims against each other. That would result in the dismissal against the preliminary injunction that was issued a few weeks ago."

"Over the last few weeks, we've received many emails and letters from members of the arts community [and] members of the Internet community, and they have overwhelmingly urged us to find a way to co-exist with the etoy group. We've listened very carefully to these opinions, and we're doing our part by initiating an end to the legal action."

Zai, the main spokesman for the etoy group in Zurich, said he and the other etoy "agents" had heard press reports about eToys' offer, but that Truax had urged him not to comment until the matter had been cleared up.

Asked if Zai and the others were popping champagne corks over what sounded like good news for etoy, Truax said: "Not until I tell them to."

"Their reaction in Zurich is they are puzzled. They've been getting contradictory reports as well. I try to never attribute to malice what can be attributed to ignorance. Maybe eToys is learning something. Maybe they are becoming aware of some cultural issues that they didn't understand before," Truax said.

"To me, it really gets back to the issue of respect. EToys needs to respect what etoy is doing even if they don't get it. Etoy is creating good, socially relevant art. Suing etoy and trying to take away their brand is like suing Leonardo da Vinci and trying to take away the Mona Lisa."

It may take weeks to clear up the legal mess. Truax just took over the case a week ago, which led to the continuance of a hearing set for last Monday.

"I'm getting conflicting symbols," he said. "If eToys is willing to just drop the lawsuit without any preconditions, then that would be an important step toward resolving this lawsuit."

But Truax dropped several hints that more legal action might be taken - this time, with the toy giant being sued by the artists.

Etoy, he said, would "absolutely" not rule out further legal action, and he confirmed that etoy was already suing eToys, though he referred to it as essentially a defensive action.

"Etoy is countersuing eToys, but the two things they are saying are their trademark isn't any good and we were here first. It asks for the trademark registration to be cancelled and it asks for fees and costs, which could be construed as legal fees, and it asks for a declaration that 'etoy has a superior right to use its [trade]mark in the United States.' "

Etoy, which used its etoy.com Web site two years before eToys.com used its site, has long been well known in Internet art circles, and won the prestigious Golden Nica at Ars Electronica in Linz, Austria, in 1996.

The group has evolved over the years from a wilder style, signified by the orange outfits they used to wear to big events, to a more deadpan gloss on the increasingly corporate character of the Internet.

The temporary injunction helped unleash a spate of publicity about what struck many as a unique domain-name fight.

John Perry Barlow, co-founder of the Electronic Frontier Foundation, joined etoy's crisis advisory board and spoke out against eToys' lawsuit, comparing the fight to the Battle of Bull Run. He called on the entire Internet community to support etoy in its fight against the big company, and yesterday hailed eToys' apparent peace offering as an important triumph.

"I really think that when the water clears, it will be what I regard it as, meaning a victory for our side, and by that I mean not only etoy, but the noncommercial entities on the Internet, that is, practically everyone," he said.

Barlow also offered a view on eToys' step back from legal struggle that many are likely to echo; namely, that the company felt it had no choice but to talk peace, given the dramatic drop in its stock. It fell from near 70 in late November when the temporary injunction was issued down to just 26-3/4 on the Nasdaq as of closing time Wednesday.

"My first reaction was that they had seen what was happening to their stock, and realized there might be some connection," he said. "I think there was. I'm actually surprised the market would respond in this way, but it did. It shows you that the people doing Internet analysis realized there might be some need to take into account the Internet community, and if that's the case, then the Internet community has more influence than I thought we did.

"If we can band together against predatory practices and drive eToys' stock down, then we have a considerable tool. I feel very strongly that there is a culture in cyberspace despite the boom that we've experienced, and after people have been online for awhile they realize there is more at a stake than being able to shop from your home."

As for what will happen next, Barlow said he thinks that etoy must keep alive the threat of a lawsuit against eToys "as a cudgel," and etoy clearly is doing that, making sure to get eToys' attention.

"They have every reason to be nervous," said Truax, the etoy attorney. "We have been fairly passive so far. If we are not able to settle this, we're going to have to take a much, much more aggressive posture."