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Social media changes fights over trademarks

By Laura Petrecca, USA TODAY

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"Eat more kale" sounds like an innocuous, perhaps even healthy, thing to say.

But not to the folks at fast-food chain Chick-fil-A. They've come down on the man printing that motto on T-shirts and bumper stickers, saying he's stepped on their trademark turf.

Chick-fil-A — which has used the ad slogan "Eat Mor Chikin" since 1995 — is against Bo Muller-Moore's trademark application for "Eat More Kale," a catchphrase he's been using since 2001.

By Toby Talbot, AP file

Bo Muller-Moore at his home studio in Montpelier, Vt., in November.

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While the words aren't identical, they are close enough to cause confusion among consumers, says a Chick-fil-A lawyer in a letter to Muller-Moore's attorney. That dispatch also gives examples of litigation against other parties and demands a transfer of the EatMoreKale.com domain name to Chick-fil-A.

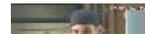
"This is absurd," says Muller-Moore. "If they can produce one customer who has bought one thing from me thinking they were getting a Chick-fil-A product, I'll be a monkey's uncle."

Both sides have dug in for battle. But it won't solely be fought in traditional legal arenas. It's also being waged in the court of public opinion.

Muller-Moore provides the nearly 8,800 Facebook followers who "like" his company updates on the clash and urges them to sign an online petition that asks Chick-fil-A to not block his trademark application. More than 29,000 people have signed, many criticizing Chick-fil-A through remarks such as, "I support the small businessman over a corporate bully any day!"

Before the rise of social media, small firms mainly had two choices when faced with a trademark challenge from a big company: acquiesce immediately or hire high-fee

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lawyers, embark on a prolonged battle, run out of money and likely lose anyway.

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But with increased use of Twitter, Facebook, YouTube and other digital sharing sites, small firms have stronger weapons to use in these battles. Entrepreneurs have used Facebook and Twitter to both spread the word of trademark troubles and to shame the bigger firms going after them. They've also used online petitions to galvanize support and online videos to tell their side of the story.

"Social media has totally changed the dynamics" of how trademark disputes are now handled, says [Eric Goldman](#), an associate professor at Santa Clara University School of Law who specializes in intellectual property. "People who don't have access to mass media can get their message out to larger audiences."

Monster uprising

Matt Nadeau, founder of Morrisville, Vt.-based Rock Art Brewery, spurred on a social-media uprising after [Monster Energy](#) drink-maker Hansen Beverage sent him a cease-and-desist letter in September 2009. Hansen claimed that Rock Arts' Vermonster-themed beer violated its trademark. Nadeau spread word of his plight through e-mail, and soon a Facebook support page was filled with negative comments about Monster. Nadeau also starred in a six-minute online video that gave details of how any legal wranglings could drain him financially.

He emphasized that while he was a small-business owner, Hansen was a "\$1 billion corporation." Nadeau says his lawyer said to him, "This is [Corporate America](#), and they have the coffers and resources to take you down and they will. ... They will drag this on until you can't afford it."

Instead, he decided, "I'm going to stand up to this."

As his story spread, customers boycotted Monster products. Soon, Hansen was ready to negotiate. Nadeau said they hammered out a deal that allowed him to keep the Vermonster brand if he didn't enter the energy-drink genre. He also agreed not to block Hansen if it entered the beer market.

"Our intent in this matter was simply to protect Hansen's trademarks and prevent any likelihood of confusion arising in the future through potential product extensions and was not to prevent Rock Art Brewery from selling their Vermonster beer," Hansen CEO Rodney Sacks said in a statement after the dispute was settled.

Entrepreneur Nick Vaidya turned to the professional networking site LinkedIn for advice after he was hit with a trademark lawsuit from Entrepreneur Media Inc., or EMI.

"*Entrepreneur* magazine is suing me — says I can't ever use the 'e' word again — HELP," was the plea he posted in December.

Vaidya, managing partner at The 8020Strategy Group, published online articles and videos under the name *CEO Entrepreneur Magazine*. He folded to EMI's demands that he remove the word "entrepreneur" from all his business assets, but turned to LinkedIn users for their opinions, as well as advice on how he should proceed from there.

"How can the word 'entrepreneur' be trademarked? How can *Entrepreneur* magazine sue their own audience?" Vaidya asked on the networking site.

Some commentators suggested he use social media to let others know that EMI — which provides small-business advice through its media properties and conferences — is suing an entrepreneur.

Others expressed frustration that EMI could trademark a seemingly generic term such as "entrepreneur." (EMI has had that trademark since 1978 for its print publications and for more than 15 years for online content and its business services.)

While Vaidya lost his fight, he is thankful that he was able to get the feedback of his peers through online networking. He posted a "thank you" that said he was "touched" and "empowered" by the array of perspectives.

"I'm extremely angry," says Vaidya. "But I have to move on."

Protecting your mark

Of course, firms have the right to go after those infringing on their trademarks. Without trademark protection, they would lose hard-earned brand equity. Everything from fast-food chains to shampoo brands could sound confusingly alike and store shelves could be filled with similar-looking products.

"You have a responsibility if you are a trademark owner to protect your mark," says U.S. Patent & Trademark Office Trademark Commissioner Deborah Cohn. "Trademarks help the public to distinguish among competing products."

[Ron Young](#), in-house counsel for EMI, says his company is one of many firms that vigorously protect their assets.

"We're not doing anything different than any other small, medium and large business would have to do," he says. "Branding is important, and it needs to be protected."

If EMI doesn't go after those who wrongly use its trademark, then consumers may mistakenly think that other product is affiliated with his company. "If that (product) is not the same quality as ours, that could hurt our reputation," he says.

Without policing, he says, a brand name could eventually be considered a generic term for all to use — such as Jell-O being mistakenly used as a term for all gelatin desserts.

Yet some companies take the protection of their trademarks to an extreme. They send threatening letters and put forth unreasonable demands. Some use legal maneuverings to wage expensive, time-consuming court battles knowing that small businesses don't have the funds to fight back, says law professor Goldman.

And just the harsh wording of many lawsuits and cease-and-desist letters is sometimes enough to cause a small-business owner consternation.

In [Tootsie Roll Industries'](#) lawsuit against start-up Rollashoe's Footzyrolls brand, for instance, the candy maker demands that all products and marketing materials with the Footzyroll name "be delivered to (Tootsie Roll) for destruction."

Tootsie Roll wouldn't comment on the case, which claims the Footzyrolls shoe brand is "confusingly similar" to its Tootsie Roll trademarks.

Rollashoe co-founders Sarah and Jenifer Caplan say they have done nothing wrong and will fight to retain the Footzyroll name. However, with expenses such as \$500-an-hour lawyers, the sisters say that this trademark skirmish has affected their ability to expand their firm.

"We could be using this money to hire new people and grow our business, but instead we're using it for our legal fees," says Sarah.

And it's not just finances that are drained as a small business fights back. Owners who have tussled with bigger companies say they often lose time and money that could have been spent on expanding their firms.

"There are a lot of unseen costs and the stress that goes with it," says Rock Art Brewery's Nadeau. "Already, as a small-business owner, you wear 20 different hats, but then I had to put on more regarding (trademark issues)."

Not an easy subject

For small-business owners trying to defend their brand, it takes time to learn about the intricacies of trademarks — and it's no easy subject.

"Trademarks are intensely complicated," says Goldman. "There's a lot of probabilities and ambiguous conclusions. ... Trademark law is so squishy and so malleable that I refer to it as a plastic doctrine."

Even the case of "Eat More Chikin" vs. "Eat More Kale" gets complicated, because it was in trying to protect "Eat More Kale" that Muller-Moore caught the ire of Chick-fil-A.

The T-shirt artist — who began to print "Eat More Kale" shirts 11 years ago at the suggestion of a farmer friend — says his motto was being ripped off by companies selling T-shirts online.

"I've worked really hard for these three words," he says. "You can print 'eat more cabbage' or 'eat more chocolate,' I won't try to stop you. ... But I'm not so laissez faire to say that you shouldn't protect what is yours."

That trademark application is what ruffled Chick-fil-A.

Executives at the chain wouldn't comment, other than to say that the company didn't sue Muller-Moore, it just wanted him to stop his trademark application.

Yet as word of Muller-Moore's plight got out, Chick-fil-A turned to social media, posting this statement on its Facebook page on Nov. 30: "In 2006, we became aware of the Vermont company using the (Eat More Kale) slogan and chose not to contest the continued sale of T-shirts through the company's website. However, in August 2011, the company submitted its application to trademark the slogan, so it can protect it and use it nationally, ironically like we're trying to protect ours. Because of this new development, we are required to protect 'Eat Mor Chikin,' our own brand and trademark for 16 years."

Muller-Moore did receive a cease-and-desist order in 2006. Among its demands, it asked for him to stop using "Eat More Kale," give up his domain name and to send all "Eat More Kale" T-shirts to the lawyer who wrote the letter.

He says his lawyer wrote back to defend "Eat more Kale" and soon correspondence from Chick-fil-A stopped.

He considered it "silent capitulation" and went on with his business.

And now that Chick-fil-A has re-emerged, Muller-Moore says that he will continue to fight for his business, as well as to spread the word that one man can take on a big corporation.

In late February, he launched a campaign on the money-raising site Kickstarter.com — which pulls together backers for creative projects — to get funding for a documentary on the trademark battle. So far, more than 632 supporters have pledged close to \$29,000. Muller-Moore's goal is to raise \$75,000 by March 25.

"I would rather them shut me down and me fight the good fight and shine some light on this — rather than just go silently into the night," he says.

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11 comments

[Add a comment](#)**Bo Muller-Moore** · Montpelier, Vermont

thanks Laura and thanks USA TODAY for shining a light on Corp. trademark bullies. There is plenty of room for both of us. Bo from Vermont

[Reply](#) · [13](#) · [Like](#) · March 12 at 6:37pm

**Jennifer Myers** · Top Commenter

I've never heard of this restaurant until Bo and I'll never eat at one either, first because they're bullying a small businessman from VT. Secondly, CFA buys battery raised chickens who are fed growth hormones and are abused. Kale is grown in a garden and is a vegetable. All of us that EAT MORE KALE are very, very clear that kale and chicken are two very different foods and never find ourselves in front of a restaurant thinking how confused they are because they meant to go buy kale not chicken.

[Reply](#) · [4](#) · [Like](#) · March 13 at 11:23am

**Paul Hafner** · Top Commenter · Penfield, New York

In 1958, Greyton and Walter Taylor established a place called Bully Hill Farms. It was founded upon property previously owned by the Taylor Wine Company. Walter was the fourth generation of winemakers and grape growers that started up in 1883. He then started to convert the American grapes growing there to a French-American hybrid grape becoming the first to do so in New York State. Walter continued to also work for the Taylor Wine Company until 1970, when he was fired from the company. Walter Taylor then did what he did best, formed the Bully Hill Winery and started to sell the Bully Hill wines.

In 1977, the Taylor Wine Company was sold to Coca-Cola, which promptly filed a lawsuit to stop Walter from using his last name on the labels of his wine bottles. Walter lost the suit but gained in recognition because of it. He then eit...[See More](#)

[Reply](#) · [2](#) · [Like](#) · March 13 at 3:54am

**Gregg Welpé** · Top Commenter · Owner & Manager at APB Travel of Rockwall

Susan G. Komen's Race for the Cure has been litigating anyone using the phrase, "Race for...", these corporate bullies are stretching the trademark issue to include everyday common phrases!

[Reply](#) · [1](#) · [Like](#) · March 13 at 2:57pm

**Gene Seach** · Youngstown, Ohio

My guess is that as long as no one files a lawsuit against you, your trademark name is good to go! Perhaps the author should do a future article on how the trademark "Life is Good" was issued. This company was featured on a recent TV show. It showed them doing very well. Millions of people every day use the "Life is Good" phrase... so go figure!

[Reply](#) · [Like](#) · March 12 at 11:20pm

**James Lantz**

Thank you, Laura, for mentioning the documentary project about Bo and Chick-fil-a on Kickstarter.com. Here's a link: <http://tinyurl.com/7e36nvu>

[Reply](#) · [Like](#) · March 13 at 8:52am

**Gene Seach** · Youngstown, Ohio

Perhaps we could start a Chick-fil-A boycott and have the America Now do an update on their TV show?

[Reply](#) · [Like](#) · March 12 at 7:31pm

**Rick Mosher** · Wells Fargo

I've been boycotting Chick-fil-A for months over this and other issues I have with the company. I urge everyone to join Bo in the fight against corporate bullying.

[Reply](#) · [5](#) · [Like](#) · March 13 at 5:04am

**Timothy Paul** · Top Commenter

Muller-Moore - You GO Big Guy!

[Reply](#) · [Like](#) · March 13 at 9:00am

**Jennifer Sprafke** · Prison Rape Elimination Act Director at Vermont Department of Corrections

way to go Bo!!!

[Reply](#) · [Like](#) · March 14 at 5:11pm

**Kent G Anderson** · Bismarck State College · 290 subscribers

I am an individual , spent 14 Years of my life ideas applying for The Brand FUTURE in USA,UK,Europe To see Global people and countries work together and to share /Own FUTURE for there own ideas . Way to Give people a Global FUTURE voice in there countries . need investors, Partners ,see Believe in all people all countries ideas FUTURE . people ideas are the product used with FUTURE .My web sight is .www.futurevisionaries.com

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