Chapter 3: I Go to the Mall. I Get a Suit.

August 3, 2001

The Grand Opening in the Grand Court

By mid-summer, the afternoon temperatures in Dallas were regularly topping off over the 100° mark. But I wasn't concerned about the heat on the morning of the first Friday in August, because I was relaxing in air-conditioned comfort at the Grand Opening ceremonies for The Shops at Willow Bend.

The event was staged in the mall's central atrium, an area that Taubman called "the Grand Court." The obligatory speeches were mercifully short. Robert S. Taubman, CEO of the company that shares his name (and son of the company's founder, A. Alfred Taubman), talked about how pleased his company was to be opening a mall in Plano. State Senator Florence Shapiro, a former Plano mayor, spoke of how pleased she was that The Taubman Company had decided to build their mall in her city. A yellow ribbon was cut, the Imperial Brass[1] struck up an appropriately invigorating tune, everyone applauded, and the mall was open for business.

Even though I was in the midst of a squabble with the mall's owner, I was thrilled that opening day had finally arrived. I'm a big fan of malls, something that I recognize is not especially fashionable these days, as shopping malls regularly take the blame for every negative social phenomenon from rampant consumerism to the decay of urban centers to the corruption of American teenagers. But being a confirmed suburbanite,

[1] MusiciansDFW.org/afm_bands/imperial_brass/imperial_brass.htm

shopping malls give me a place to hang out, walk around, and people-watch. And being a confirmed Dallasite, malls provide a setting for me to do all that without having to risk sunstroke. (You might say that, if it weren't for shopping malls, people would be walking around their neighborhoods with their families and conversing with their neighbors. But if you would say that, you've obviously never lived through a summer in Dallas.)

I took a leisurely stroll around the mall, wandering into a few of The Shops, but mostly window shopping. The mall was airy and its motif was decidedly willowy. Willow-leaf patterns were incorporated into the floor tiles. Willow-branch designs were etched into the glass dividers. A willow sculpture graced the food court. An Ian Fry[2] willow mural arched languidly over the main entrance.

Many of the retailers were names you'd recognize if you'd ever set foot in a shopping mall anywhere in the United States: Foot Locker, Radio Shack, Casual Corner, and so on. But a non-trivial number of The Shops were occupied by retailers who were notably more upscale than your typical mall business: The upper floor of the mall was populated by a number of high-priced boutiques that sported familiar high-fashion names like Armani, St. John, Hugo Boss, and Escada. The bust of the dot-com economy was starting to hit the Dallas area pretty hard; I remember wondering if Taubman hadn't been overly optimistic in launching such a lavish enterprise at such a risky time.

I wandered into Neiman Marcus and strolled over to their menswear department. They were featuring some strikingly attractive suits, but it took only a few minutes for me to realize that they were well out of my price range.

[2] IanFry.com

However, I needn’t have worried, because only a few short days after my delightful introduction to their mall, The Taubman Company was thoughtful enough to send me a suit.

For free.

August 7, 2001

I've Been Served

Unfortunately, the suit that The Taubman Company sent to me was a suit of an entirely different nature than those sold by Neiman Marcus. And it broke my string of more than 50 consecutive years as a non-defendant.

Taubman's lawsuit showed up on my fax machine in the form of a "complaint," preceded by this succinct cover letter:

> Dear Mr. Mishkoff:
>
> Your continued use of our client's mark THE SHOPS AT WILLOW BEND, in WebFeats' domain name and throughout its related website, is a willful infringement of our client's trademark rights, as well as a violation of the federal anti-cybersquatting law.
>
> We have been authorized to take all necessary steps to enforce our client's rights in this mark. To this end, we have prepared and filed the enclosed complaint in federal court against you personally and your company WebFeats.
>
> If you believe an immediate resolution is possible, which must include an agreement to immediately cease all use of the mark THE SHOPS AT WILLOW BEND, or any other confusingly similar mark, as well as a transfer of the domain name registration to our client, you are invited to contact me directly, or my partner, Allen Krass at 248-647-6000 no later than Friday, August 10, 2001. If this matter has not been resolved by that date, we will assume that litigation will proceed.
>
> Very truly yours,
>
> Julie A. Greenberg

To say that I was stunned would be a massive understatement. I had never been the target of a lawsuit, not even in small-claims court, and I had what I thought was the reasonable expectation that I might be able to muddle through the rest of my life without being sued. But not only did it seem that I had been overly optimistic, I had skipped completely over small-claims court, local courts, and state courts, and I had reached all the way to the rarefied air of federal court on my first shot!

And I didn’t really even understand *why* I was being sued. I mean, as far as I knew, we were in the midst of a civil give-and-take, we were discussing an issue about which we disagreed, we were both rational and reasonable people – but not only had we not reached anything close to an impasse, we had barely even begun to lay our cards on the table. We had exchanged a grand total of only four notes! Although I know that I can be stubborn (“muley,” Donna has been known to say), I was nonetheless operating on the assumption that Julie and I might be able to resolve the situation amicably, if only she would be willing to spend less time threatening me and more time addressing my concerns. I simply did not understand why she had to go and literally make a federal case out of it instead.

I took a deep breath, tried to steady my nerves, and read the complaint. It was only five pages long (double-spaced) and fairly easy to read, as it contained little of the turgid legalese that I was expecting. It was preceded by a heading that looked something like this:

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

THE TAUBMAN COMPANY LIMITED
PARTNERSHIP, a Delaware limited partnership,
Plaintiff,
v.
WEBFEATS, a Texas company,
and HENRY MISHKOFF, an individual,
Defendants.

A rubber-stamped series of digits indicated that that the complaint had been assigned case number 01-72987. Two other stamps alerted me to the fact that the case had become the responsibility of the Honorable Lawrence P. Zatkoff and Magistrate Judge Komives.

I learned some important details from the heading, including: (1) I was being sued in Michigan, on Taubman's "home turf"; (2) not only was I being sued, WebFeats was being sued as well – even though WebFeats was nothing more than a DBA (a "Doing-Business-As" name) that I used for professional reasons; and (3) both a judge and a "magistrate judge" had been assigned to my case.

Who were these guys?

I couldn't find much on the Web about Judge Komives, but I did learn that magistrate judges are appointed to handle pre-trial matters and to make recommendations to the "real" judges. I got the impression that if judges were dentists, magistrate judges would be their hygienists.

In contrast, a wealth of material was available about the Honorable Lawrence P. Zatkoff – who, it turned out, was actually the *Chief* Judge of the District Court. (I really

had gone straight to the top.) Although I had no standard by which to compare his record, my research seemed to indicate that a lot of Judge Zatkoff's decisions were getting overturned by higher courts – which could mean that he didn't pay much attention to the law, or it could mean that he was a man of principle and didn't care about what other people (even his superior judges) were likely to think.

I was a little concerned when I stumbled across an article in the Detroit Free Press[3] that revealed that Judge Zatkoff was a member of something called the Federalist Society,[4] which the article described as "ultra-conservative" and "the legal vanguard for the extreme right of American politics." It seemed to me that an arch-conservative judge would be likely to favor the interests of businesses over the interests of people who have been dragged into lawsuits by those businesses. But maybe I was just being paranoid – judges should be able to separate their personal political leanings from their application of the law, right?

Once I finally tore myself away from the heading, I saw that the complaint was divided into several sections.

Parties and Jurisdiction

This short section introduced the Plaintiff and the "Defendants" (me and my alter ego WebFeats), and specified the laws that "we" were accused of violating. (Finally!) The most important passages seemed to be the ones that spelled out why it was proper for Taubman to be suing me in federal court all the way up in Michigan. For example:

[3] Freep.com/voices/columnists/qetrev8.htm

[4] Fed-Soc.org

> This Court has jurisdiction under 28 U.S.C. §1331 (1996) and 15 U.S.C. §1121 (1996). Venue is proper under 28 U.S.C. §1391 (1996).
>
> Defendant WebFeats has engaged in actions in Michigan which confer personal jurisdiction over it.

Was this true? Had WebFeats (my evil twin?) done things in Michigan that had served to make it (and, therefore, me) subject to the jurisdiction of a court that was more than a thousand miles away from my home in Dallas? I had no idea, but I suspected that it would behoove me to find out. (Actually, I assumed that it probably was true. Surely Julie had been a lawyer long enough to know the proper place to file a lawsuit. Right?) I asked a lawyer friend if I could be sued in Michigan, and he rolled his eyes. (I asked him via email, so his eye roll was figurative.) "Look," he said, "they're accusing you of violating their rights on the Internet, right? Well, the Internet reaches all the way to Michigan, doesn't it? So, of *course* they can sue you there!"

"You'd better get yourself a lawyer," he added. In fact, although I got a lot of wildly differing advice from a lot of well-meaning (and some not-so-well-meaning) attorneys, they unanimously agreed on one point: I was nuts if I didn't get a lawyer. Frankly, this advice always struck me as more than a little self-serving. I was a reasonably intelligent guy, I communicated well, I had a fair amount of free time, I knew how to effectively conduct research via the Internet – and as far as I could tell, I hadn't done anything wrong. Why should I have to hire a lawyer just because some big company wanted to take something away from me? It just didn't seem right.

On the other hand, I had no idea what 28 U.S.C. §1331 (1996) was, and without that information I had no way of evaluating Julie's claim that the court in Detroit

had jurisdiction over me. I assumed that these kinds of mysteries of the legal priesthood were revealed to prospective attorneys in law schools (probably in *Intimidation 101),* so I had to admit that, at times, it might be handy to have an attorney around after all.

General Allegations

I had grown accustomed to reading Julie's incredibly general allegations, so I didn't expect to find anything new in this section – and for the most part, I was not disappointed. However, there were a couple of surprises.

> At this site, Defendants promote Plaintiff's shopping mall and purport to disseminate factual information about Plaintiffs shopping mall. In fact, this information is incorrect.

This was a shocker. I'm a careful researcher – and more to the point, nearly all of the information on my site was gleaned from news articles and from Taubman's own press releases. How could any inaccuracies have crept their way into my site? I wished that Julie had been more specific… but this was, after all, the section for *general* allegations…

> Also on this site Defendants include advertising, an indication that the website is being operated for commercial gain. Furthermore, the advertisement featured on the side promotes goods (shirts) in direct competition with goods sold at Plaintiff's mall, in an attempt to divert mall

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customers, with the text "You Don't Have to Go to the Mall...
We'll Come to You...".
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This one’s going to require a bit more explanation.

Many years earlier, Donna had run a thriving business selling custom-made shirts; her business had been flagging in recent years, to the point where it had become more of a hobby than a business. (It was a hobby that I greatly appreciated, as it allowed me to have a closet overflowing with elegant custom-made shirts – all of which I had acquired at cost!) In hopes of helping to resurrect her business, I displayed links to her website from several of mine. Occasionally, I tried to make the text of those links relevant to the sites that contained them, typically in a mildly jocular way. For example, the link to Donna’s site from a restaurant-related site said, “Eat Too Much? Shirt Too Tight?” (Hey, I never claimed to be an advertising copywriter.) And on my BestUS.com site, the link read, “The best custom-made shirts in the United States (or anywhere else).” You get the idea.

About a month before Julie’s first letter had slithered its way into my mailbox, I decided to surprise Donna by adding a link to her site from my ShopsAtWillowBend.com website. The link consisted of a line drawing of a shirt (scanned from Donna’s business card) and the clever (?) aphorism that Julie had quoted. Despite my repeated requests for specifics, Julie had never mentioned that she had a problem with the link to Donna’s site – but now that she was filling a lawsuit, it turned out that she had a problem with it after all. Since she had no way of knowing that the link was to my girlfriend’s website, Julie had jumped to the seemingly reasonable conclusion that it was paid advertising. And if I were selling advertising, then I was operating a website for commercial gain. And if I

were operating a website for commercial gain with a domain name that was similar to her client's trademark, then Julie had *prima facie* evidence of trademark infringement.

Of course, Julie's logic was based on the misconception that the link was a paid advertisement, and the structure of her of reasoning collapsed when you removed that foundation. But unlike many of her actions that were to follow over the long course of the lawsuit, Julie had obviously made what I would have to characterize as an honest mistake – under the same set of circumstances, if I had been presented with the same visual evidence, I probably would have jumped to the same conclusion myself.

Anyway, I could see that the link to Donna's site was, at best, tacky. And I could also understand why it would be irritating to Julie's client. And so, even though I was more than a little miffed that I had been served with a lawsuit for no good reason, I decided to do the right thing, and I removed the offending link from my site.

Counts I-III

Remember how I kept asking Julie to tell me exactly what sections of what laws she thought I was violating? Well, I guess these parts of the complaint were her whimsical way of finally answering my questions. It seemed that I had committed several violations of trademark laws, unfair competition laws, and anti-cybersquatting laws – and now that she was discussing the situation with a judge (rather than with a potential defendant), Julie had actually been kind enough to cite the exact sections of the exact laws that I had violated.

Unfortunately, I had no idea of what she meant by statements like:

> Defendants' use of Plaintiff's mark constitutes a violation of 15 U.S.C. §1125(a).

Obviously, I was going to have to learn a great deal more about how a layman could conduct legal research.

Request for Relief

In this final section, Julie spelled out exactly how she'd like me to be punished: I should be ordered to (a) stop infringing Taubman's trademark, (b) transfer my domain name to Taubman, (c) pay for the damages I had caused (with an additional fine thrown in because I had been "willful" about it), (d) reimburse Taubman for their attorney fees, and (e) anything else that the Court, in its wisdom, thought that I deserved. Of all of these prospective chastisements, item (d) was the one that most concerned me. I wasn't much worried about having to pay Taubman for the "damages" I had caused them (which I calculated at approximately zero), but having to pay the bill for their high-priced attorneys might be even more painful than having to *deal* with their high-priced attorneys.

After I slogged through all of the unnerving details, the very last sentence of the complaint made me breathe a sigh of relief:

> Plaintiff demands a jury trial on all issues triable by a jury.

So if I could survive the legal onslaught that Julie A. Greenberg and her cohorts were certain to unleash in my direction, the end result would be that I'd be granted the opportunity to tell my story to a jury of my peers. I pictured Julie trying to convince

twelve blue-collar jurors (most of whom, in my reverie, would be gruff, no-nonsense machinists who had just been laid off by General Motors after 25 years of faithful service) that I had harmed her stunningly wealthy clients by creating a website that promoted their shopping mall. After a scant few minutes of deliberation, the foreman of the jury would rise and ask the judge if, instead of levying fines against me, they could instead order Taubman to pay me several million dollars and to apologize (abjectly) for the harassment to which they had subjected me…

OK, I was dreaming. But when I reluctantly returned to reality, I was still thrilled that Taubman had demanded a jury trial. Maybe I was being naïve, but I firmly believed that no amount of legal chicanery and subterfuge could convince twelve solid citizens that I was a lawbreaker.

But Julie had given me a tight deadline to respond to her threats, and so I forced myself to awaken from my Masonesque (that's Perry, not George) slumber and confront the more pressing issue. I had received the complaint on August 7, and Julie had demanded a response by August 10. She had needed six weeks to figure out how to respond to my first letter, but now she expected me to reply to her lawsuit in three days! How could I possibly hope to meet that deadline?

But then it occurred to me that, even though Julie appeared to have a lot of legal muscle behind her, I didn't have to stand still and be her punching bag. Thanks to the power of the World Wide Web, I could load up and throw a few heavy punches of my own.

August 10, 2001

Are You Threatening Me?

I didn't think it would be a good idea to let Julie's deadline expire without *some* kind of response. So I faxed her back to tell her that I would definitely reply to her complaint, but that it probably take me more than a month (as opposed to less than a week, as she had suggested). If that wasn't good enough, I told her, she would just have to go ahead and sue me:

> If you feel that it's necessary to proceed with litigation rather than waiting a few weeks to see if the problem can be resolved amicably, then I guess you'll do what you feel you have to do.

I thought that she deserved an explanation about the link to Donna's website, so I told her the whole story, informed her that she wouldn't have to worry about it any longer, and promised never to do it again:

> But even though the link you objected to was non-commercial in the sense that it provides me with no revenue, I can understand your objection to it, and I have removed it. I will not place any advertising of any kind on the site in the future, commercial or otherwise…

And finally, my newfound status as a defendant didn't mean that I had to limit myself to playing defense. And so, in line with the football adage that "the best defense is a good offense," I decided that I could be just as offensive as Julie. (Or should that be, "I

could *take* the offensive, just as Julie had"? Hard to tell.) If she could threaten me – well, by God, I could threaten her right back. And that's exactly what I did:

> Earlier today, I took the precaution of registering the domain names WillowBendSucks.com, WillowBendMallSucks.com, ShopsAtWillowBendSucks.com, TheShopsAtWillowBendSucks.com, and – to cover all the bases – TaubmanSucks.com. I will not create websites at those domain names unless you proceed with litigation against me, in which case those websites will contain detailed descriptions of the litigation for the benefit of anyone on the Net who wishes to follow along.

(For better or for worse, some Web records have a pronounced tendency to be permanent. And so if you do a WHOIS search[5] on those domain names, you'll see that they were all created on this very day.)

I was quite proud of myself for coming up with this gambit. I thought I was being *very* clever. (Too clever for my own good? Maybe. Read on.) I suspect that a lot of Big Companies have routinely felt that they could abuse The Little Guy without any fear of negative consequences. Not only didn't we Little Guys have the resources to fight back, we couldn't even really do much of anything to make the Big Companies look bad, not on any scale that would matter to them. Sure, we could tell our stories to our friends, who would shake their heads in dismay and offer us their profound sympathies – but in the overall scheme of things, we just don't have that many friends. And unless we wanted to place ads in newspapers or buy airtime on radio or television (SuperBowl ads?), the Big

[5] One way to this is to go to the Network Solutions website at NetSol.com, where you can select the "WHOIS" link.

Companies could rest easy, secure in the knowledge that, despite The Little Guys' best efforts, only a very small number of people would ever learn that the Big Company and its Evil Lawyers were throwing their weight around like a gang of schoolyard bullies.

Not any more.

As Julie was about to find out, the Web had changed all the rules.

Websites have become so inexpensive that, if you know how to create one (and with the tools available these days, it really isn't that hard), you can build and maintain a website for virtually no money at all. And once your site is online, anyone who has access to the Web can read every word that you have to say. And unlike pamphlets printed on paper, websites don't get yellow with age, and they don't get balled up and thrown away. Once you create a website, it can theoretically stay online forever.

I was making sure that Julie and her client knew that, although they could sue me, they couldn't do it in secret. I couldn't stop them from being abusive, I couldn't stop them from using their considerable power to push me around – but neither could they stop me from exposing their dastardly deeds to the hundreds of millions of people who have access to the World Wide Web.

Of course, if Julie was confident that she was treating me fairly, then she had nothing to fear from the unexpected publicity. But if she was counting on being able to persecute me in private, I had put her on notice that stealth was no longer an option.

Julie had threatened me. I had threatened her right back.

The ball was in her court (tennis, as well as District). And now there was nothing for me to do but to sit back and wonder just how hard she would hit it back.