

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
NO. 5:07-cv-00347-D

LULU ENTERPRISES, INC.,

Plaintiff,

vs.

N-F NEWSITE, LLC,

and

HULU TECH, INC.,

Defendants.

**DECLARATION OF LAUREN L.
SULLINS IN SUPPORT OF DEFENDANT
HULU LLC'S OPPOSITION TO
PRELIMINARY INJUNCTION**

I, Lauren L. Sullins, make the following Declaration:

1. I am an associate at the law firm of Kilpatrick Stockton LLP. I am over the age of twenty-one and am competent to make this Declaration. The facts set forth in this Declaration are based on my personal knowledge.

2. On September 19 and 20, 2007, I conducted an Internet search for website domain names having one letter before the term "ulu.com." I conducted this search by typing in terms alphabetically, starting with aulu.com through zulu.com. My search uncovered that twenty (20) of the sites are active, meaning that somebody owns the domain name and it is sufficiently active that they have at least some content on them. These sites include:

ulu.com

bulu.com

culu.com

dulu.com

eulu.com

julu.com

kulu.com

mulu.com

nulu.com

oulu.com

pulu.com

rule.com

sulu.com

tulu.com

uulu.com

vulu.com

wulu.com

xulu.com

yulu.com; and

zulu.com

Of these twenty (20) sites, at least six (6) are active sites with significant, active content and domain names conforming to this criteria, specifically:

ulu.com

mulu.com

oulu.com

xulu.com

yulu.com; and

zulu.com.

True and correct printouts of the significantly active homepages reached through these domain names, as well as true and correct copies of the database searches for these websites, are attached as **Exhibit A**. The remainder of the websites that I came across in this search were either inactive or being used as portal pages to direct consumers to other sites. My searches were limited to domain names with one letter before the term "ulu.com." I did not try to do searches for additional combinations, but by way of example did try "a_ulu," and discovered active sites coexisting at adulu.com, apulu.com, ayulu.com and azulu.com.

3. I conducted an Internet search for website domain names that consisted of four (4) letters and duplicate pairings of a consonant and vowel, such as "lala" and "haha." I conducted this search by typing in terms that began with the letter "l," such as lala.com, lele.com, lili.com, and lolo.com. I then continued this search alphabetically, resuming with baba.com. True and correct printouts of selected excerpts representing the active homepages reached through these domain names, as well as true and correct copies of excerpts representing the database searches for these websites, are attached as **Exhibit B**. Active pairings included the following:

lala.com, lele.com, lili.com, lolo.com;

haha.com, hoho.com;

baba.com, bebe.com, bubu.com;

dada.com, dodo.com;

fefe.com, fufu.com;

jeje.com, jiji.com, juju.com;

meme.com, mimi.com, momo.com, mumu.com;

nana.com, nono.com, nunu.com;

qiqi.com, qeqe.com;
rere.com, riri.com, roro.com;
sasa.com, soso.com;
tata.com, toto.com, tutu.com;
vava.com, vivi.com;
wawa.com, wewe.com, wowo.com, wuwu.com;
xoxo.com, xuxu.com; and
zaza.com, zozo.com.

4. I reviewed the “Top Sites” according the traffic rankings listed on the website located at www.alex.com. A true and correct copy of the rankings are attached as **Exhibit C**. From these rankings, I chose some of the most popular website names, and conducted a search by typing in domain names that rhymed with the ranked domain names. My search was not exhaustive, but rather a sampling of words. I also did not try to identify phonetically similar marks (but instead used the exact same letters). For example, I found the domain name wahoo.com, which rhymes with the #1 ranked yahoo.com. I conducted a similar search for domain names comprised of common words that rhyme, such as the domain names bars.com and cars.com. True and correct printouts of selected excerpts representing the active homepages reached through these domain names, as well as true and correct copies of excerpts representing the database searches for these websites, are attached as **Exhibit D**. The high ranking domain names, and the domain names that I identified in my searches, included:

yahoo.com: wahoo.com;
google.com: doogle.com, roogle.com;
myspace.com: nyspace.com, cyspace.com, tyspace.com;

orkut.com: irkut.com, erkut.com;
wikipedia.com: hikipedia.com, tikipedia.com;
facebook.com: racebook.com;
ebay.com: tbay.com, bbay.com;
badoo.com: kadoo.com, sadoo.com;
xanga.com: danga.com, hanga.com, langa.com;
zshare.com: tshare.com;
ask.com: mask.com, bask.com, cask.com; and
xtube.com: utube.com.

Other pairings with one letter differences in the first letter of the domain names include the following:

abc.com, bbc.com, nbc.com;
fox.com, cox.com;
hotels.com, motels.com;
lego.com, bego.com, cego.com, hego.com, jego.com, mego.com, tego.com;
bars.com, cars.com, kars.com, lars.com, mars.com;
sand.com, rand.com, dand.com, gand.com, jand.com, mand.com; and
dice.com, nice.com, mice.com, sice.com, tice.com, wice.com.

5. I reviewed and compiled various articles referring to this lawsuit. These articles come from a number of sources, and true and correct copies are collected and attached as **Exhibit E**. Articles from which excerpts are cited below are further identified as Exhibit E-1 through E-16.

6. Exhibit E-1 is an article from Paul R. La Monica, Lulu Sues Hulu, <http://mediabiz.blogs.cnnmoney.com/2007/09/06/lulu-sues-hulu> (last visited Oct. 1, 2007). The following excerpt appears in that article:

- “I’m not too sure that too many Web users will really confuse Hulu, despite my sarcastic comments, with Lulu. Sure, both are technically online media companies. But there’s a big difference between publishing books and posting online video from NBC and Fox.”

7. Exhibit E-2 is an article from Sahar Sarid, When Corporations Forget What Trademarks Are All About, <http://www.conceptualist.com/?p=437> (last visited Oct. 1, 2007). The following excerpt appears in that article:

- “Trademark infringement is about confusion in the marketplace, not in the mind of corporations and their own perception of reality. I have not heard one person that thought Hulu was remotely related to Lulu This lawsuit sounds to me like a complete abuse of the trademark system.”

8. Exhibit E-3 is an article from Domainnamewire.com, Is Hulu.com Confusingly Similar to Lulu.com, <http://domainnamewire.com/2007/09/07/is-hulucom-confusingly-similar-to-lulucom> (last visited Oct. 1, 2007). The following excerpt appears in that article:

- “My take is that LuLu.com is either:
 - In financial trouble and looking to get cash from a settlement
 - Really proud of itself to think that NBC and News Corp want to play off its ‘good name’ (how many of you have heard of LuLu.com before?)
 - Looking to get some free publicity”

- “Domainers usually side with the little guy going up against Goliath, but in this case the tables are turned. If LuLu.com were to be successful, how would this be applied to a three letter domain? ABC.com could claim NBC.com was ‘confusingly similar.’”

9. Exhibit E-4 is an article from Brooks Barnes, *You Say Hulu. I Say Lulu. Let's Take the Thing to Court*, N.Y. TIMES, Sept. 10, 2007, at C6. The following excerpt appears in that article:

- “Robert Thompson, a professor of media and popular culture at Syracuse University, is not so sure consumers will be confused by the two names.”

10. Exhibit E-5 is an article from Rick Aristotle Munarriz, *Boo-Hoo, Lulu to Sue Hulu*, <http://www.fool.com/investing/general/2007/09/07/boo-hoo-lulu-to-sue-julu.aspx> (last visited Oct. 1, 2007). The following excerpt appears in that article:

- “But where does one draw the line? We’ve had FoolU.com around for ages. Can The Motley Fool get in on that action? Yahoo! (Nasdaq: YHOO) is a phonetic cousin, twice removed, from Hulu. Does the search-engine star get a shot?”

11. Exhibit E-6 is the article *Away With Words: Big Hulu and Little Hulu*, http://nancyfriedman.typepad.com/away_with_words/2007/09/hulu-and-little.html (last visited Oct. 1, 2007). The following excerpt appears in that article:

- “I say: Hulu, Lulu, Gulu, Mulu, Sulu, Vulu, Xulu, Yulu, Zulu – can’t we all just get along?”

12. Exhibit E-7 is the article Lulu Gets Pissed About Hulu, Files Lawsuit, http://www.mediabistro.com/galleycat/web_tech/lulu_gets_pissed_about_hulu_files_lawsuit_66458.asp (last visited Oct. 1, 2007). The following excerpt appears in that article:

- “If it was, say, Looloo or Lula, or Lu-lu, maybe I could buy the argument. But that the name rhymes? Nope.”

13. Exhibit E-8 is an article from Stefanie Olsen, Battle of the ulu.com’s, http://www.news.com/8301-10784_3-9772407-7.html (last visited Oct. 1, 2007). The following excerpt appears in that article:

- “This case should surely elicit some giggles from the rhyme police.”

The article also contained the following user comment:

- “Now on the hulu vs. lulu debate. It seems rather silly to me. I don’t see how similar they are. One is for self publishing books, and the other is for watching TV over the internet. Now if NBC named it loost I could see people getting confused. This “brand confusion” stunt by lulu is nothing more than an attempt to draw attention to their site.”

14. Exhibit E-9 is an article from Dan Farber, Lulu Wants to Meet Hulu in Sulu Court, <http://blogs.zdnet.com/BTL/wp-mobile.php?p=6140> (last visited Oct. 1, 2007). The following excerpt appears in that article:

- “Here are the two sites. Are you confused? Hulu, Lulu, Zulu, Culu, Vulu and of course Sulu.”

15. Exhibit E-10 is an article from Joseph Laszlo, Lulu Dislikes Hulu, http://weblogs.jupiterresearch.com/analysts/laszlo/archives/2007/09/lulu_dislikes_h.html (last visited Oct. 1, 2007). The following excerpt appears in that article:

- “Actually, if anyone’s going to sue Hulu it should be Mr. Sulu. There’s not, after all, that much difference between the ability to navigate to the stars of online video and the ability to navigate among the stars on video.”

16. Exhibit E-11 is an article from Keith Hahn, UFC: 76: Lulu v. Hulu, NEWSTEX WEBLOGS, Sept. 7, 2007, *available at* http://www.dealbreaker.com/2007/09/ufc_76_lulu_vs_hulu.php. The following excerpt appears in that article:

- “Do the Zulu’s have enough lawyers on hand to enter the fray? We hear creator god Nkulunkulu is especially pissed, but is not really an interventionist when it comes to human affairs.”

17. Exhibit E-12 is an article from Mihaela Lica, Lulu vs. Hulu, <http://www.pamil-visions.blogspot.com/2007/09/lulu-vs-hulu.html> (last visited Oct. 4, 2007). The following excerpt appears in that article:

- “I am a convinced Lulu fan, but public relations news like this that follows, make me really wonder whether people at Lulu don’t have enough work to do Yes, the spellings are quite similar, but common, would you sue someone for any rhyme? It’s not Lulu, it is not Lulu o[r] Lolu Lulo . . . Lilu Luli. It’s Hulu. You cannot misspell that. You cannot say Lulu and hear Hulu.”
- “I am a Lulu user and I will not leave a self publishing service for a video sharing service. Two different industries. Two different purposes.”

18. Exhibit E-13 is an article from Jonathan Handel, Lulu Ululates Over Hulu, <http://digitalmedialaw.blogspot.com/2007/09/lulu-ululates-over-hulu.html> (last visited Oct. 4, 2007). The following excerpt appears in that article:

- “The names certainly are similar, but the business models seem different: Lulu.com is a self-publishing service (print, publish, and sell your own book), whereas Hulu.com is a recently-announced digital video company jointly owned by NBC Universal and News Corp.”

19. Exhibit E-14 is an article from Leah Messinger, No Love for Rhymes, <http://www.redherring.com/Home/22742> (last visited Oct. 4, 2007). The following excerpt appears in that article:

- “Despite the fact that the two sites appear to offer vastly different services . . .”

20. Exhibit E-15 is an article from Ben Ashton, Lulu Sues Hulu or How Desperate Online Marketers Fight for the Top of the Web, <http://www.seoltd.co.uk/internet-marketing/lulu-and-hulu/> (last visited Oct. 4, 2007). The following excerpt appears in that article:

- “Public relations trick (as some bloggers insinuate) or a real copyright infringement? Lulu is in no danger whatsoever because of Hulu. Hulu doesn’t target the same market.”
- “[I] cannot help but wonder: what is next? Will Google sue a company called Ogle? Or “a “go ogle”? Let’s have some common sense and instead of wast[ing] time and money on irrelevant trials, let’s bring even more value for the users . . .”

21. Exhibit E-16 is the article Lulu’s Hulubulu, <http://gwhiz.wordpress.com>, (last visited Oct. 8, 2007). The following excerpt appears in that article:

- Lessee, can you sue a company over phonetics? I suppose you can sue anybody for anything. But, can you PREVAIL in a lawsuit over the phonetic similarity of a company’s name? Coke - Koch? McDonald’s - Macdonald’s? Frye’s - Frey’s?

- Lulu's about as close to the online video business as my great grammy's website. I can SAY I'm going to get into the online video business with a gazillion different DBA's... doesn't mean jack.
- I suppose they'll sue little old Xulu.com next because they intended to get into interdimensional entertainment too. Nitwits!

22. I reviewed the traffic details for the Lulu.com and Lulu.tv websites, which are available on the website www.alexa.com ("Alexa"). True and correct copies of the traffic details for these sites are attached as **Exhibit F**. The information on Alexa shows that Lulu.com has a traffic rank of 3,036 and only 36.1% of its users are from the United States. Lulu.tv has a traffic rank of 64,761 and 27.8% of its users are from the United States.

23. The traffic details provided by Alexa include traffic trend graphs. A true and correct copy of the webpage explaining the Alexa traffic rankings is attached as **Exhibit G**. The following excerpt appears on that webpage and explains how the trend graphs are calculated:

- "The Trend graph shows you a three-day moving average of the site's daily traffic rank, charted over time. The daily traffic rank reflects the traffic to the site based on data for a single day. In contrast, the main traffic rank shown in the Alexa Toolbar and elsewhere in the service is calculated from three months of aggregate traffic data."
- "Daily traffic rankings will sometimes benefit sites with sporadically high traffic, while the three-month traffic ranking benefits sites with consistent traffic over time. Since we feel that consistent traffic is a better indication of a site's value, we've chosen to use the three-month traffic rank to represent the site's overall popularity. We use the daily traffic rank in the

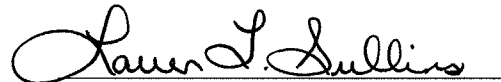
Trend graphs because it allows you to see short-term fluctuations in traffic much more clearly.”

24. I used the Internet archiving website Wayback Machine, located at <http://www.archive.org/web/web.php>, to locate a Lulu.com webpage from 2006. A true and correct copy of the archived Lulu.com website is attached as **Exhibit H**. The following excerpt appears on that webpage:

- “What’s In a Name? For goodness sake, what is a *lulu*? Well it’s not your grandmother’s kitty, that’s for sure. Ever hear the phrase, ‘Boy, that’s a real lulu’? Well, even if you haven’t, we think of the word lulu as an old-fashioned term for a remarkable person, object, or idea. And quite frankly, that’s exactly what Lulu, the company, is.”

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 9 day of October, 2007.


Lauren L. Sullins