



Electronic Frontier Foundation  
815 Eddy Street  
San Francisco, CA 94109 USA  
415.436.9333  
eff.org

January 11, 2019

**BY EMAIL**

Linda Kwak  
Senior Corporate Counsel  
Bird Rides, Inc.  
406 Broadway #369  
Santa Monica, CA 90401

**Re: Notice of Claimed Infringement by Cory Doctorow:  
<https://boingboing.net/2018/12/08/flipping-a-bird.html>**

Dear Ms. Kwak:

I write in response to Bird's letter of December 20, 2018, regarding an article on the website BoingBoing.net, owned and operated by Happy Mutants, LLC. In your letter, you requested that Happy Mutants take down an article in which Boing Boing writer Cory Doctorow reports on conversion kits that replace parts in Bird scooters so they can be used without the Bird app. The Electronic Frontier Foundation is counsel for Happy Mutants in this matter. Our client has no obligation to, and will not, comply with your request to remove the article.

Bird may not be pleased that the technology exists to modify the scooters that it deploys, but it should not make baseless legal threats to silence reporting on that technology.

Boing Boing is an online publication created and written by five people to report on "mostly wonderful things." For three decades, Boing Boing has reported on social, educational, political, scientific, and artistic developments in popular culture, becoming one of the Internet's leading sources of news and commentary. Mr. Doctorow is a regular contributor and co-owner of Happy Mutants, LLC.

Mr. Doctorow – and many others – have reported on the short-term scooter rental phenomenon, including the fact that large numbers of scooters wind up abandoned or improperly parked and are impounded by city governments to be sold at auction. As Mr. Doctorow describes in his article, a person can lawfully acquire an impounded scooter at one of these auctions. Thanks to "conversion kits," purchasers can turn these scooters into usable devices rather than trash or spare parts.

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Although you styled your letter as a “Notice of Infringement by Cory Doctorow,” it does not appear that he, or anyone else, is infringing any of Bird’s asserted rights in connection with these conversion kits.

First of all, Mr. Doctorow is well within his First-Amendment-protected rights to report on the existence of these conversion kits and their use. Mr. Doctorow’s article does not encourage any form of illegal conduct, but even if it did, the First Amendment does not permit liability based solely on encouraging others to break the law. Even in cases where a person advocates *violent crimes*, the First Amendment only permits that advocacy to be punished when it is intended to and likely to imminently cause the lawless act. *E.g.*, *Brandenburg v. Ohio*, 89 S.Ct. 1827 (1969). The Boing Boing article falls far short of meeting any legal test that would allow a court to impose liability on its author, nor have you identified any basis for doing so. Mr. Doctorow would have had every right to advocate for Bird scooters to be destroyed or stolen; instead he simply reported that they could lawfully be acquired at auction and lawfully modified to function as personal scooters.

Second, you cite the anti-trafficking provisions of 17 USC 1201, alleging that the scooter conversion kits are circumvention devices that violate Section 1201, but that does not appear to be true. Again, Happy Mutants would have every right to report on unlawful conduct or even to encourage it, but here the conduct being described seems entirely within the law.

“Conversion kits” are apparently just replacement motherboards, such as the stock motherboard for the Xiaomi Mijia m365 scooter. Installing the “kit” involves opening the scooter, removing the motherboard containing Bird software, and replacing it with a part that does not contain Bird software. As you note in your letter, the kit “allows the user to replace the Bird code so that users may ride the Bird scooters without using its app.”

It is not an act of circumvention to *unplug and discard* a motherboard containing unwanted code. Likewise, a part that is used to replace the unwanted board is not a circumvention device -- it *substitutes* for the part containing proprietary code rather than *circumventing* technological protection measures that restrict access to the code or prevent infringement. Use of a conversion kit does not appear to involve any access, reproduction, or modification of any Bird code. We are likewise puzzled by your assertion that your copyright in the Bird *app* provides a basis for a Section 1201 claim against the conversion kits, since they do not appear to interact with the app at all.

You have not claimed that the Boing Boing article itself constitutes trafficking, nor could you. It does not offer to sell or traffic in anything but rather reports true, newsworthy facts. Attempting to expand Section 1201 to bar such reporting would fatally exacerbate the First Amendment flaws already inherent in the statute. (Happy Mutants would also be

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fully within its rights to link to a site such as eBay where the kits can be purchased, but, contrary to your assertion, the article does not contain such a link.)

An assertion of Section 1201 is on especially shaky ground when it seeks to suppress activity that does not infringe copyright, such as fair uses. The Librarian of Congress, overseeing the Copyright Office, has repeatedly exempted from Section 1201's circumvention ban the noninfringing repair and modification of motorized land vehicles (such as electric scooters), because barring those repairs and modifications would be unjustified and harmful to the public. Those repairs and modifications actually do involve circumventing access controls in order to inspect and modify copyrighted code, unlike the conversion kits at issue here, and they nonetheless are noninfringing, fair uses.

We hope that you will re-evaluate your decision to send a "Notice of Infringement" regarding speech that does not in fact impinge on any of Bird's rights. Journalists will continue to cover developments concerning Bird scooters, and Bird should not attempt to suppress coverage that it dislikes through meritless legal claims. Likewise, since the conversion kits do not appear to violate Section 1201, we hope that you will not seek to suppress the lawful distribution, use, or discussion of that technology.

If you disagree with the factual or legal conclusions above, we invite you to explain the theory behind your "Notice of Infringement by Cory Doctorow." Otherwise, we will consider the matter closed.

Very truly yours,



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Kit Walsh  
Senior Staff Attorney  
Electronic Frontier Foundation  
kit@eff.org