



**ELECTRONIC FRONTIER FOUNDATION**  
Protecting Rights and Promoting Freedom on the Electronic Frontier

September 19, 2013

VIA EMAIL: [REDACTED]@playboy.com

[REDACTED]  
Playboy Enterprises, Inc.  
9346 Civic Center Drive, Suite 200  
Beverly Hills, CA 90210

**Re: partywithplayboy.com**

Dear [REDACTED],

The Electronic Frontier Foundation represents MayFirst/PeopleLink and FORCE in connection with your complaints regarding the above-listed website. Specifically, we understand that Playboy, Inc. contends that the website infringes its rights under trademark and copyright law.

As an initial matter, we are frankly disappointed that Playboy has chosen to take a heavy-handed approach. As a news publication that has been involved in its share of controversy, we would expect Playboy to do its best to support political speech, rather than seeking to shut it down. In addition, this political spoof is obviously designed to raise awareness about an important problem, one that we would hope Playboy would want to highlight as well. It is for this reason, in fact, that FORCE reached out to Playboy yesterday to invite it to participate in the campaign, as have several other entities such as Brobible.com.

As for your legal threats, your client's position is without merit.

#### Trademark issues

As should be abundantly clear, the site is designed to engage in and promote political commentary. Trademark law does not reach, much less prohibit, this kind of speech regarding a matter of substantial public concern. Simply put, "The Lanham Act regulates only economic, not ideological or political, competition . . . "Competition in the marketplace of ideas" is precisely what the First Amendment is designed to protect." *Koch Ind. v. John Does 1-25*, 2011 WL 1775765, D.Utah (May 9, 2011).

The legal analysis is supported by a wealth of case law. Use of the Playboy name and logo on the site is fully protected by the nominative fair use doctrine. *See, e.g. Century 21 Real Estate Corp. v. Lendingtree*, 425 F.3d 211, 218-221 (3d Cir. 2005); *New Kids on the Block v. New America Pub.*, 971 F.2d 302, 308 (9th Cir.1992). Indeed, courts have noted that nominative fair uses are particularly likely to be found in parodies. *Mattel v. Walking Mountain Prods.*, 353 F.3d 792, 80 n.14 (9th Cir. 2003).

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Moreover, as a practical matter, given the content of the site, and the ample publicity the spoof has generated, all of which recognized it for the satire and parody that it is, it is difficult to imagine that any Internet user would be confused.

The site is also sheltered by the First Amendment, *see L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26, 29 (1st Cir. 1987); *Cliff Notes v. Bantam Doubleday Dell Publ'g Group*, 886 F.2d 490, 495 (2d Cir. 1989); *CPC Int'l, Inc. v. Skippy Inc.*, 214 F.3d 456 (4th Cir. 2000); *Mattel, Inc. v. MCA Records*, 296 F.3d 894, 906 (9th Cir. 2002). Again, there is nothing on the site that would lead consumers to purchase goods or services based on a mistaken affiliation.


Further, my client's action is entirely noncommercial. Therefore, it is statutorily exempt from the Lanham Act. See 15 U.S.C. §§ 1127, 1125; *Bosley Med. Inst. v. Kremer*, 403 F.3d 672, 677 (9th Cir. 2005); *Taubman v. WebFeats*, 319 F.3d 770, 774 (6th Cir. 2003); *CPC Int'l v. Skippy*, 214 F.3d 456, 461 (4th Cir. 2000).

#### Copyright Issues

With respect to your allegations of unauthorized copying, the site is obviously designed for purposes of criticism and comment and protected by the fair use doctrine. 17 U.S.C. § 107 ("the fair use of a copyrighted work . . . for purposes such as criticism [and] comment . . . is not an infringement of copyright."). Any use my clients may have made of material copyrighted by Playboy is highly transformative. *See generally Campbell v. Acuff-Rose*, 510 U.S. 569, 579 (1994) ("[Transformative] works . . . lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright . . . parody has an obvious claim to transformative value"); *Castle Rock Ent. v. Carol Pub. Group, Inc.*, 150 F.3d 132, 141 (2d Cir. 1998) (A transformative work "is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.").

Further, the site reproduces no more than necessary for purposes of the political commentary. As the Supreme Court has recognized, it is sometimes necessary to use substantial portions of an original work to make the point. *Campbell*, 510 U.S. at 588; *see also Mattel, Inc. v. Walking Mountain Prod.*, 353 F.3d 792, 803 n.8 (9th Cir. 2003) (holding that "entire verbatim reproductions are justifiable where the purpose of the work differs from the original.").

Therefore, we urge you to withdraw your demand. We are also open to discussing ways to resolve this issue amicably. In particular, FORCE would like nothing more than to work with Playboy to raise awareness about the problem of rape on college campuses.

  
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If you have further concerns, please direct them to my attention. I have to be out of the office this afternoon and tomorrow, but will do my best to respond to email expeditiously.

Best regards,

*Corynne McSherry (ss)*

Corynne McSherry  
IP Director

cc: Cynthia Blake Sanders