



April 9, 2008

VIA EMAIL AND U.S. MAIL

Equity Management, Inc.

Dear Mr/

I am writing to you on behalf of my client, John MacNeill, in response to Equity Management's ("EMI") demand that TurboSquid remove from its website Mr. MacNeill's three dimensional digital images of several military aircraft. EMI has alleged that Mr. MacNeill's use of aircraft terms infringes various Lockheed Martin trademarks. As a result of that allegation, TurboSquid has removed the images from its site.

EMI's allegations appear to be based on a fundamental misapprehension of the nature of Mr. MacNeill's works. Mr. MacNeill is a respected graphic artist and illustrator whose work has appeared in many national magazines, including *Popular Science* and *Smithsonian*. As part of his work, he accepts commissions to produce images of various types of machines, including a range of vehicles and aircraft. In order to prepare those images, he often first creates digital three-dimensional pictures of the machine in question. When a commission is completed, he will sometimes then post the three-dimensional pictures he produced to a stock images clearinghouse website such as TurboSquid.

Some of the images Mr. MacNeill has posted are of military aircraft such as the B-24, the F-117, the F-104, and the F-22. I understand that your client, Lockheed Martin, has obtained trademarks for use of these terms. Those trademark rights do not, however, preclude my client from using these terms to describe his three dimensional images.

First, my client's use of these terms is primarily descriptive. Mr. MacNeill has used them simply to identify, clearly and succinctly, the airplanes pictured based on their military designations and names. See generally *WCVB-TV v. Boston Athletic Ass'n*, 926 F.2d 42 (1st Cir. 1991) (news program's use of trademarked term "Boston Marathon" in coverage of Boston Marathon was descriptive fair use). Indeed, his TurboSquid description of the B-24 did not even refer to Lockheed, largely because Lockheed did not build the B-24. There is no other way to describe the aircraft precisely and prohibiting use of the terms in this manner would create an impermissible monopoly on all representations, in whatever format, of these aircraft. *AntiMonopoly v. General Mills Fun Group*, 611 F. 2d 296, 300-301 (9th Cir. 1979) ("Trademarks are not properly used as patent substitutes to further or perpetuate product monopolies.").

Second, to the extent that these aircraft are associated with Lockheed, Mr. MacNeill's use of the terms is protected by the doctrine of nominative fair use. *See The New Kids on the Block v. New Am. Publ'g, Inc.*, 971 F.2d 302, 308 (9th Cir. 1992) (defendant's use is a non-infringing nominative fair use if (1) the markholders' product or service is not readily identifiable without use of the trademark; (2) only so much of the mark or marks was used as is reasonably necessary to identify the product or service; and (3) the user did nothing that would, in conjunction with the mark, suggest endorsement by the trademark holder.) In *Cairns v. Franklin Mint*, 292 F. 3d 1139 (9th Cir. 2002), for example, the defendant used plaintiff's marks (Princess Diana's name and likeness) to describe plaintiff's "product" (Princess Diana) in connection with the sale of dolls and memorabilia. The court held the use to be fair because the defendant could not describe its own product without using Princess Diana's name and likeness, did not use any more of the marks than necessary (e.g., it did not use particular lettering or a specific image associated with the plaintiff), and did not suggest that plaintiff authorized or endorsed defendant's products. *Id.* at 1150.

Mr. MacNeill's use is virtually indistinguishable. The aircraft depicted cannot be accurately identified without using the military designation. Mr. MacNeill only uses the minimal descriptive terms necessary to identify the aircraft in question; there is no extraneous reference to Lockheed in his product descriptions, nor any use of Lockheed logos, colors, etc. And, Mr. MacNeill has done nothing to suggest Lockheed endorses his works.

In sum, Mr. MacNeill has not infringed any Lockheed trademark. Moreover, the allegations of infringement have significantly hampered Mr. MacNeill's business interests as well as his freedom of expression. Therefore, please confirm in writing by April 18 that you have withdrawn your objections to Mr. MacNeill's images.

If you have any questions, please feel free to contact me. Otherwise, I look forward to the prompt and amicable resolution of this matter.

Sincerely,

  
Corynne McSherry  
Staff Attorney

cc: