Electronic Frontier Foundation
Protecting Rights and Promoting Freedom on the Electronic Frontier

November 25, 2008

VIA EMAIL AND U.S. MAIL

Brian R. McGinley
Sonnenschein, Nath & Rosenthal LLP
4520 Main Street, Suite 1100
Kansas City, MO 64111-7700

Re: www.nytimes-se.com

Dear Mr. McGinley,

I represent Harold Schweppes, the pseudonymous owner of the above-listed domain name. Mr. Schweppes has learned that your client, De Beers, is demanding that Joker.com disable Mr. Schweppes' domain name based on De Beers' alleged belief that the web site associated with that domain name contains materials that infringe De Beers' trademarks. These threats are improper and baseless and we demand that you withdraw them immediately.

First and foremost, there is no trademark infringement here. The spoof advertisement to which De Beers objects is just that—a clearly parodic ad on a clearly parodic website. It 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). The spoof 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). Moreover, the site is fully noncommercial; it neither offers for sale nor even links to advertising for any actual goods or services. 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).

Second, even if De Beers did have some colorable infringement claim against my client based on the content of the website associated with www.nytimes-se.com—which it does not—Joker.com cannot be held directly or indirectly liable for such alleged infringement. *See, e.g., Lockheed Martin v. Network Solutions, Inc.*, 194 F.3d 980 (9th Cir. 1999); *Bird v. Parsons*, 289 F.3d 865 (6th Cir. 2002); *Lockheed Martin Corp. v. Network Solutions, Inc.*, 985 F.Supp. 949, 951-53 (C.D.Cal.1997); *Tiffany (NJ) Inc. v. eBay, Inc.*, --- F.Supp.2d ----, 2008 WL 2755787.

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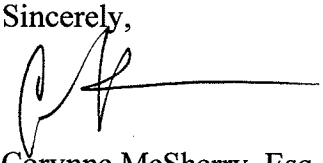
Third, in light of your references to "disparagement" in your communications with Joker.com, I remind you that Section 230 of the Communications Decency Act grants absolute immunity to providers and users of interactive computer services (such as Joker.com) from liability for content provided by third parties (such as my client). 47 U.S.C. § 230; *see also Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998)).

Finally, any concerns you may have regarding the domain name should be addressed to a WIPO arbitrator pursuant to the Uniform Domain Name Dispute Resolution Policy ("UDRP"). *See* UDRP ¶ 3, http://www.icann.org/en/udrp/udrp-policy-24oct99.htm. However, I hasten to point out that De Beers has no standing to raise any claims under the UDRP, because the domain name bears no connection to any De Beers mark.

Your threats have put my client's domain name at risk, and must immediately be rescinded to prevent further harm. We look forward to your immediate response. If you have any questions, please do not hesitate to contact me.

Sincerely,



Corynne McSherry, Esq.

cc: Mersedeh Mehraban, Joker.com (via email)