



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

July 17, 2015

Kat Johnston
Facebook, Inc.
1 Hacker Way
Menlo Park, CA 94025

RE: Case #435073

BY EMAIL: katj@fb.com

Dear Kat:

I write in response to Facebook's message of June 22, 2015 regarding the website <http://whatsherface-book.com/>. The Electronic Frontier Foundation represents Bay Gross, who registered the domain and co-created the website. In your message, you demand that our client stop using this domain and disable the site at that address. Please be advised that our client will not comply, and has no obligation to do so. Your demands are not supported by law and plainly seek to interfere with protected speech.

Mr. Gross created and launched <http://whatsherface-book.com/> in 2011 as part of his coursework for a computer science class at Yale University. The site provides a wry critique of Facebook and of users who 'friend' distant acquaintances. When it was launched, the site allowed visitors to play an interactive game where they viewed randomly selected photographs of their own Facebook friends and then attempted to name these people from memory.¹ The site was created to help people evaluate whether, given the personal information available on sites like Facebook, users have been too willing to 'friend' minor acquaintances or strangers. In addition to the quiz, the website includes aggregate data and analysis. The site recommends that, to preserve privacy, users 'unfriend' people that they do not know.

Although it was created as an undergraduate class project, Mr. Gross's site received widespread attention and favorable coverage in the media. Kashmir Hill of Forbes wrote:

Students in a technology class at Yale have created a nifty little quiz, called What's Her Face-book, to help Facebook users figure out how well they know the people they're connected to on the site. ... The quiz purveyors suggest that I "get unfriending," noting that people I apparently don't know have the right to share my information with third party apps.

Kashmir Hill, Forbes.com, *As Facebook Timeline Rolls Out, Find Out How Well You*

¹ Due to recent changes in Facebook's API, this interactive game no longer functions for most visitors to the site. The site's aggregate data and commentary remains available.

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Know Your Friends, December 15, 2011.² Other commentators similarly praised the site for prodding visitors to evaluate whether they have opened up their online life to too many distant acquaintances. See Carolyn Jabs, *Facebook's Timeline: When Life's an Open Book*, New Jersey Family, January 26, 2012³ (“A quiz called What’s Her Facebook (whatsherface-book.com) helps users get real about who’s actually a friend.”).

The news articles discussing <http://whatsherface-book.com/> illustrate that its purpose was clear and that it was not confusing. The site states that it was created as a class project and includes commentary on Facebook and social media generally. Quite simply, no rational visitor would ever think that such a website was affiliated with or endorsed by Facebook. See also *Lamparello v. Falwell*, 420 F.3d 309, 314-15 (4th Cir. 2005) (no likelihood of confusion where website criticized mark owner); *Bally Total Fitness Holding Corp. v. Faber*, 29 F. Supp. 2d 1161, 1163-66 (C.D. Cal. 1998). Indeed, far from causing confusion, Mr. Gross’s site has creatively helped visitors reflect upon their use of Facebook.

Mr. Gross’s website uses Facebook’s trademarks solely to refer to and comment on Facebook. This is a classic example of fair use. See *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 114 (2004); *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 920-21 (6th Cir. 2003); *New Kids on the Block v. News Am. Publ'g, Inc.*, 971 F.2d 302, 306 (9th Cir. 1992) (nominative fair use protects use of marks for the “purposes of comparison, criticism [or] point of reference”). While Mr. Gross’s commentary and criticism of Facebook may be more measured than the criticism found on some other gripe sites, it is no less deserving of protection. It is well-settled that the First Amendment fully protects the use of trademarked terms and logos in non-commercial websites that criticize and comment upon corporations and products. See, e.g., *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 806-08 (9th Cir. 2003); *Koch Indus., Inc. v. Does*, No. 2:10CV1275DAK, 2011 WL 1775765 (D. Utah May 9, 2011). Our client’s site is a clear example such protected expression.

The website’s domain name is similarly an example of nominative fair use. See *Toyota Motor Sales, U.S.A., Inc. v. Tabari*, 610 F.3d 1171, 1178 (9th Cir. 2010) (noting that websites often “make nominative use of trademarks in their domains but are not sponsored or endorsed by the trademark holder”). The website’s domain name is, of course, a reference to the colloquial idiom “What’s her face?” which is “a way of talking about someone whose name you have forgotten.”⁴ In the site’s URL, this idiomatic

² Available at: <http://www.forbes.com/sites/kashmirhill/2011/12/15/as-facebook-timeline-rolls-out-find-out-how-well-you-know-your-friends/>

³ Available at: <http://www.njfamily.com/NJ-Family/February-2012/Facebooks-Timeline-When-Lifes-an-Open-Book/>

⁴ Definition of “what’s his/her face” (informal), The Free Dictionary, available at <http://idioms.thefreedictionary.com/what%27s+his+face>. This expression also appears as the website’s title text displayed in the browser tab.

expression is followed by a hyphen and the word “book.” The domain name satirically evokes the Facebook mark in connection with the idiomatic phrase. It thereby illustrates central message of the site: too many people have elected to become ‘friends’ with strangers on Facebook. As the media coverage demonstrates, the site’s domain name did not confuse any visitors as to whether it was endorsed by or affiliated with Facebook.

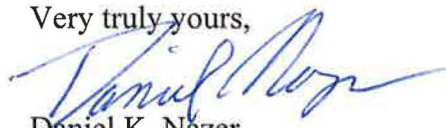
In your message, you suggested that Mr. Gross’s use of the Facebook trademark might “dilute” the mark. But, as you are surely aware, the Lanham Act expressly limits dilution claims to *commercial* uses. 15 U.S.C. § 1125(c)(3) (providing that “noncommercial use” of a mark “shall not be actionable . . . under this subsection”). Mr. Gross’s site is not commercial. *See Bosley Med. Inst., Inc. v. Kremer*, 403 F.3d 672, 676-80 (9th Cir. 2005) (site that merely comments on the trademark owner is not commercial). It contains no advertisements and offers no products or services for sale. Instead, it provides a measured criticism of Facebook and asks users to reflect upon their connections and privacy settings.

Although no changes were required, Mr. Gross has revised his website to include a disclaimer noting the already obvious fact that <http://whatsherface-book.com/> is neither affiliated with nor approved by Facebook, Inc. These changes include a disclaimer that appears on every page of the website, an additional disclaimer in the description of the site on the About page, as well as language noting that hyperlinks to the Facebook.com domain are external links. To be clear, none of these steps was required by law and Mr. Gross makes them only in a spirit of compromise. *See Toyota Motor Sales*, 610 F.3d at 1177 (“Speakers are under no obligation to provide a disclaimer as a condition for engaging in truthful, non-misleading speech.”).

Finally, we note that your message contained no discussion of the content of Mr. Gross’s website. Similarly, you do not appear to have considered whether or not Mr. Gross’s site was commercial. We strongly urge you to review the content of targeted websites and to consider nominative use and fair use before sending cease and desist letters in the future. If you had carefully reviewed the website, you would have seen that it was clearly protected by these fundamental legal principles.

We trust that Facebook will respect our client’s right to free speech and will not trouble a court of law with this matter. If you wish to discuss Mr. Gross’s website further, you may contact me.

Very truly yours,



Daniel K. Nazer
Staff Attorney