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

June 14, 2013

VIA EMAIL: garysoter@gmail.com

Gary Soter, Esq.
LAW OFFICES OF GARY S. SOTER
22287 Mulholland Highway, #169
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Re: cheerupwillsmith.com

Dear Mr. Soter,

I represent the creators of the website **cheerupwillsmith.com**. My clients have received a copy of your complaint letter to GoDaddy.com, which resulted in the temporary disablement of the site. The letter alleges that the site violates copyright, trademark and false impersonation laws. The allegations are utterly false and must be withdrawn immediately to prevent further harm to my clients.

Copyright Allegations

With respect to your allegations of unauthorized copying, the site was obviously designed for purposes of criticism and comment 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 CSI 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, my clients copied no more than necessary for purposes of the parody. As the Supreme Court has recognized, parodies must often use portions of an original work, or even an entire work, to make their 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.").

Finally, critical transformative uses rarely if ever supplant markets for the original material. *Campbell*, 510 U.S. at 591-92; *see also Harper & Row v. Nation Enters.*, 471 U.S. 539, 567-69 (1985). In this case, the website is plainly not a substitute for the original, nor does it invade any licensing market for CSI's copyrighted works. Moreover, your letter makes clear that CSI would never license the works for this purpose.

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More broadly, the website served the public interest by advancing political criticism and debate about CSI. Nimmer on Copyright, § 13.05[B][4] ("the public interest is also a factor that continually informs the fair use analysis."); *see also Sony v. Universal,* 464 U.S. 417, 431-32 (1984) ("courts are more willing to find a secondary use fair when it produces a value that benefits the broader public interest."); *Mattel*, 353 F.3d at 806 ("the public benefit in allowing . . . social criticism to flourish is great.").

Trademark Allegations

Your allegations of trademark infringement are equally spurious. The website uses parody and satire to comment on CSI and its alleged relationship to the film "After Earth." 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).

And, the site was 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).

Simply put, trademark law does not reach, much less prohibit, this kind of speech regarding a matter of substantial public concern. "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*, U.S. District Court for the District of Utah Case No. 2:10-cv-01275, Dkt. 26 (May 9, 2011).

Further, even if CSI did have some colorable infringement claim against my client based on the content of the website—which it does not—GoDaddy 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).

False Impersonation

Your claim that the site violated the California Penal Code is equally absurd. First, my client did not "open an account or profile on a social networking site" in the name of any CSI leader. The site did contain a latter purportedly signed by David Miscavige. However, Section 528.5 applies only to "credible" impersonations. Under the statute, an impersonation is credible only if "another person would reasonably believe, or did reasonably believe, that the defendant was or is the person who was impersonated." Cal. Penal 528.5(b). No viewer would believe the site offered a credible impersonation of Mr. Miscavige.

Accordingly, we demand that CSI immediately withdraw its complaint to GoDaddy and refrain from any further threats against or interference with my clients' political speech and commentary.

If you have any questions, please do not hesitate to contact me.

Regards,

Corynne McSherry, Esq.
Intellectual Property Director

Cc: trademarkclaims@godaddy.com; copyrightclaims@godaddy.com