

September 20, 2013

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VIA E-MAIL (info@mayfirst.org)

Corynne McSherry
IP Director
Electronic Frontier Foundation
815 Eddy Street
San Francisco, CA 94109

Re: *partywithplayboy.com; playboyco.com*

Dear Ms. McSherry:

We represent Playboy Enterprises International, Inc. (“Playboy”) in intellectual property matters. I am writing to respond to your letter of September 19, 2013, from the Electronic Frontier Foundation (EFF) on behalf of MayFirst/PeopleLink and FORCE (the “Campaign Organizers”) to Antigone Davoulas concerning both *partywithplayboy.com* and *playboyco.com* (the “Infringing Websites”).

Your letter is without legal merit as we explain below, and is an obvious ploy to buy more time to continue infringing Playboy’s intellectual property rights.

Playboy has not requested to shut down the Campaign Organizers’ message and is not unsupportive of political speech. Indeed, we are not demanding that your clients take down any of the messages contained in the Infringing Websites.

We are simply demanding that you remove Playboys’ brand, website landing pages, URL’s, copyrighted materials and trademarks out of the Infringing Websites.

Your legal arguments lack merit for the following reasons:

- The PLAYBOY and RHD Marks are both registered with the USPTO and legally incontestable (the “Playboy Marks”). The Infringing Websites have already caused actual confusion, continue to do so and create a false association with Playboy, one that Playboy has not authorized or endorsed.
- The Campaign Organizer’s claims of nominative fair use and free speech in connection with the unauthorized trademark use ring hollow where, as here, the Infringing Websites are neither a parody nor is Playboy seeking to remove the Campaign Organizer’s message.

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- No parody exists where there is no comedic message or “spoof” existent, and where the use implies sponsorship or endorsement by the trademark holder.
- Relying on *New Kids on the Block v. News America Publ, Inc.* 971 F.2d 302 (9th Cir. 1992) and its progeny does not support your nominative fair use defense because the public has been confused, not educated here. In fact you have stated in your letter that the Campaign Organizer’s message is designed to “raise awareness” about an “important issue”, not spoof Playboy and its brand. We doubt that you would have invited Playboy to join the campaign (as you did only after-the-fact) if the Campaign Organizer’s message aim was to spoof Playboy.
- From a copyright perspective, the fair use doctrine is no defense to a copyright infringement claim where the material was copied identically in an excessive use and non-transformative way that results in actually duping viewers, not educating them. For a fair use defense to fly in the copyright context, parody and transformative use require that the “message” be one that is holding the original up to ridicule.
- The Campaign Organizers have freely admitted that the “message” here is a campaign dealing with the issue of campus rape. You do not need to infringe Playboy’s Marks and copyrights to send this message.
- Again, your invitation to Playboy to join the campaign belies your parody/transformative use claims. Thus, your reliance on the *Acuff-Rose* and *Castle Rock Ent.* cases to support the Campaign Organizer’s fair use defense is pointless and these cases do not provide a legally viable defense against your client’s copyright infringement in this instance.

Playboy therefore renews its demands for your client to remove the Playboy marks, copyrighted material and infringing URL’s from the Campaign Organizer’s message campaign. You must do this to comply with the law and you can easily do this without changing the underlying message. You have had more than enough time and we hereby demand that you comply with these requests by no later than 6 pm ET today.

Regards,

/s/mb

Marcella Ballard

cc: Playboy Enterprises International, Inc.