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

February 15, 2007

VIA FAX AND MAIL

Anthony V. Lupo
Arent Fox PLLC
1050 Connecticut Ave., N.W.
Washington, D.C. 20036-5339

Re: Spankmymarketer.com

Dear Mr. Lupo:

I am writing to you on behalf of my client, Jonathan Rubinstien, in response to Discovery Communications' demand that Mr. Rubinstien take down the "SpankMaker" template. The demand alleges that the template infringes Discovery Communications' copyrights and is being used as a vehicle for libel and harassment.

We appreciate that your client recognizes that the use of online forums, such as the Spankmymarketer.com website, to engage in social commentary is legally protected speech. However, your claim that he has overstepped those legal protections is incorrect.

Nothing on my client's website infringes any of Discovery Communications' copyrights. Assuming *arguendo* that Discovery Communications owns any copyrights in the photographs in question, the use of those photographs in the template is a self-evident fair use. The entire purpose of the "SpankMaker" template is to permit comment about ethical marketing practices—precisely the type of objective the fair use provision was intended to foster. 17 U.S.C. § 107 ("the fair use of a copyrighted work … for purposes such as criticism [or] comment … is not an infringement of copyright.") Accordingly, the use of the photographs in the template is both noncommercial and transformative. *Nat'l Rifle Ass'n of America v. Handgun Control Fed. of Ohio*, 15 F.3d 559 (6th Cir. 1994) (non-commercial uses are more likely fair); *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."). Indeed, numerous courts have found the use of copyrighted works to comment on the social implications of the copyright owners' business practices to be especially transformative. *See, e.g., Mattel Inc. v. Walking Mountain Prods*., 353 F.3d 792, 803 (9th Cir. 2003). And while the photographs are minimally creative, where, as here, the use is transformative, the nature of the work is "not . . . terribly significant in the overall fair use balancing." *Id*. at 803. Similarly, though the template uses entire photographs, such "reproductions are justifiable where the purpose of the work differs from the original." *Id*. Finally, the template does not affect on any actual or potential licensing market for the photograph. Indeed, because the use in question is parodic, "[t]he economic effect [at issue]. . . is not its potential to destroy or diminish the market for the original . . . but whether it fulfills

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the demand for the original." *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986). In sum, the template fits squarely within the rubric of no infringing parodic fair use.

Furthermore, Discovery Communications has no cause of action for defamation or other state law torts. As you know, Spankmymarketer.com is a platform upon which others – including concerned members of the public – may speak. My client provides this forum for public discussion and debate consistent with the Supreme Court's holding that "this country has a 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open.'" *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (citation omitted).

Recognizing the importance of online forums like the Spankmymarketer service, Congress passed Section 230 of the Communications Decency Act ("Section 230"), which provides that online service providers are neither responsible nor liable for the speech of third parties on their sites. Section 230 of the CDA provides:

> TREATMENT OF PUBLISHER OR SPEAKER. No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider. 47 U.S.C. § 230 (emphasis added).

Simply put, this section means Mr. Rubinstien cannot be held liable for third party statements such as those about which your client complains, even if Mr. Rubinstien has notice of the disputed statements. "By its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service." *Zeran v. America Online, Inc*., 129 F.3d 327, 330 (4th Cir. 1997). Courts across the country have upheld Section 230 immunity and its policy of regulatory forbearance in a variety of factual contexts. *See e.g. Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003) (website operator immune for distributing email sent to listserv); *Carafano v. Metrosplash.com, Inc*., 339 F.3d 1119 (9th Cir. 2003) (Internet dating service provider was entitled to Section 230 immunity from liability stemming from third party's submission of false profile); *Ben Ezra, Weinstein & Co. v. America Online*, 206 F.3d 980, 984-985 (10th Cir. 2000), *cert. denied*, 531 U.S. 824 (2000) (no liability for posting of incorrect stock information).

Courts also agree that Section 230 immunity applies to persons that provide the canvas upon which a third party places material. *Gentry*, 99 Cal.App.4th at 833-34 (eBay not liable despite highly structured Feedback Forum); *see also Carafano*, 339 F.3d at 1124-25 (Internet dating service immune even though it "contributes much more structure and content than eBay by asking 62 detailed questions and providing a menu of 'pre-prepared responses.'"); *Prickett v. InfoUSA, Inc*. 2006 WL 887431 (E.D.Tex. 2006) (immunity even though system prompts uses "to select subcategories ... The fact that some of the content was formulated in response to the Defendant's prompts does not alter the Defendant's status."). Thus, even if the statements you have identified were libelous, Discovery Communications would have no viable cause of action against my client.

That said, the statements you have identified are *not* libelous. Rather, they are hyperbolic opinions that no reader could reasonably take to be statements of fact. *See e.g. Hustler Magazine v. Falwell*, 485 U.S. 46 57 (1988) (parody implying minister involved in incest could not "reasonably be understood as describing actual facts about [minister] or actual events in which [he] participated"); *Partington v. Buliosi*, 56 F.3d 1147, 1158, (9th Cir. 1995) (subjective, ambiguous terms such as "false," "phony," "hefty mark-up" are "unprovable, since those adjective admit of numerous interpretations …. [They are] too subjective … to be verifiable" and therefore are not actionable."); *Letter Carriers v. Austin*, 418 U.S. 264, 285-86 (1974) (accusing plaintiffs of "rotten principles" not actionable). This is especially true given the medium for the message—a parodic online template that may be filled in anonymously. *See Global Telemedia Int'l Inc. v. Doe*, 132 F. Supp. 2d 1261 (C.D. Cal. 2001) (finding statements "full of hyperbole, invective, short-hand phrases and language not generally found in fact-based documents," posted to bulletin board about publicly traded company, not actionable as business libel); *Rocker Mgmt. v. John Does*, 2003 U.S. Dist. Lexis 16277, 2003 WL 22149380 (N.D. Cal. 2003) (readers were unlikely to view anonymously posted messages on an online message board as assertions of fact); *SPX Corp. v. Doe*, 253 F. Supp. 2d 974, 981-82 (N.D. Ohio 2003).

I presume that the foregoing explanation of the facts and the law resolves this matter. If you wish to discuss further, please feel free to contact me directly.

Sincerely,

Corynne McSherry
Staff Attorney