

CENTER FOR INTERNET AND SOCIETY CYBERLAW CLINIC

Crown Quadrangle • 559 Nathan Abbott Way • Stanford, CA 94305-8610
Tel: 650/723-5674 • Fax: 650/723-4426 • Web: cyberlaw.stanford.edu

August 9, 2005

VIA FACSIMILE (901-434-9256)

Mr. Les Bishop
Mr. William J. Brown
FedEx Legal Corporation
3620 Hacks Cross Road
Building B, 3rd Floor
Memphis, TN 38125

**Re: DMCA-Based Notice of Copyright Infringement Sent by FedEx re:
FedExFurniture.com**

Dear Gentlemen:

I have received your letter dated August 3, 2005.

Please be assured that Mr. Avila is not selling t-shirts displaying the FedEx mark, or a mark that is substantially similar. Any FedEx Furniture t-shirts that Mr. Avila currently owns are for purely personal, non-commercial purposes and not for sale or distribution to the general public.

Despite your claims, it's apparent that no customer looking for FedEx would mistakenly type in Mr. Avila's URL. Thus, there is zero chance of initial interest confusion or other customer confusion between fedex.com and fedexfurniture.com. Nor is Mr. Avila required to use .net for his non-commercial site. Indeed, I use .com for my website even though it, too, is wholly non-commercial.

While FedEx might retain some copyright rights in the appearance of its packaging, those rights do not prevent the public from making sculptures or furniture from the physical boxes or envelopes, or from otherwise using them for purposes other than shipping. Mr. Avila's activities are protected by the first sale doctrine. Moreover, in *Mattel v. Walking Mountain Productions*, 353 F.3d 792 (9th Cir. 2003), the Ninth Circuit affirmed a grant of summary judgment in favor of an artist who made sculptures and took photographs of Barbie dolls in suggestive positions. The Ninth Circuit rejected Mattel's copyright and trademark claims in no uncertain terms, and granted the defendant substantial attorneys' fees. The *Mattel* case is virtually indistinguishable from this one, except in that case, the artist was selling his works and here, Mr. Avila is not. This fair use case is at least as strong, if not stronger. The "DMCA-based" notice your office sent was groundless.

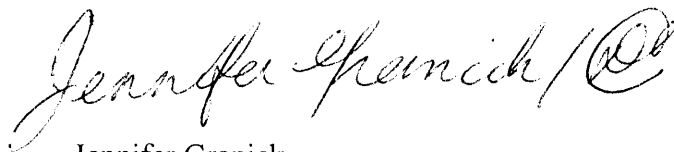
Mr. Les Bishop
Mr. William J. Brown
Page Two
August 9, 2005

I also draw your attention to the Ninth Circuit's discussion and adoption of *Rogers v. Grimaldi*, 875 F.2d 994, 999 (2d Cir. 1989), which requires courts to construe the Lanham Act "to apply to artistic works *only* where the public interest in avoiding consumer confusion *outweighs* the public interest in free expression." *Rogers*, 875 F.2d at 999 (emphasis added).

Finally, should he be legally bound by the fedex.com website terms of use, Mr. Avila is in full compliance with those terms and conditions. He used the website to interact with FedEx, exactly as indicated. While FedEx may hope that its shipping boxes are used only for shipping, nothing in the terms of service requires Mr. Avila to do so.

In conclusion, my client has no grudge against FedEx or its employees. However, your client's intellectual property attorneys are improperly flexing their muscles in an effort to censor Mr. Avila. Your overreaching now includes the affront of a demand to control the content posted on the Stanford Center for Internet and Society's website. Neither Mr. Avila nor I see any reason to alter our websites. Please let me know promptly whether you have any intention of taking legal action against either Mr. Avila or the Stanford Law School Center for Internet and Society.

Sincerely,

A handwritten signature in cursive script that reads "Jennifer Granick" followed by a stylized symbol resembling a copyright symbol or a similar flourish.

Jennifer Granick
Executive Director