



October 27, 2006

Via Facsimile to (415) 788-2019 and U.S. Mail

Amy Briggs
Steeffel, Levitt & Weiss
One Embarcadero Center, 30th Floor
San Francisco, CA 94111

RE: Subpoena to Internet Archive

Dear Ms. Briggs:

I am an attorney with the Electronic Frontier Foundation ("EFF"), a public interest law firm and civil liberties organization. I write in response to the subpoena your client, Landmark Education, LLC ("Landmark") caused to be issued to the Internet Archive ("Archive") on October 19, 2006. The subpoena seeks documents sufficient to allow identification of an individual, "Asatgiaire," who you believe uploaded several videos to the Archive. EFF represents the Archive in connection with this matter.

As you may know, on October 6, 2006, the Internet Archive received a letter from Art Schreiber, General Counsel for Landmark, alleging that the videos infringed Landmark's copyrights and contained libelous material. The letter threatened immediate legal action if the material was not removed from the Archive website. In reliance upon Mr. Schreiber's representations that the material infringed Landmark's copyright, the Archive removed the videos.

On further review of the videos and registration referenced, however, we have determined that the allegation of infringement of Landmark's copyright has no merit. As an initial matter, it is clear that the videos do not contain a copy of a "Landmark forum leaders manual" (TXu-1-120-461) referenced in Landmark's letters. Rather, it is a news documentary critical of the Landmark organization in France. Further, even if Landmark's copyrighted works were visible in the documentary, any such limited and transformative use of a copyrighted work for purpose of criticism, commentary and news reporting is self-evidently fair use and, therefore, noninfringing. *See* 17 U.S.C. § 107; 4 Nimmer on Copyright § 13.05. Indeed, the use is so evidently fair use under the law that it is difficult to see how the declaration claiming infringement accompanying your subpoena could be consistent with Rule 11. In keeping with this determination, we must decline to comply with the October 19 subpoena. Please see the attached Objections. Moreover, and without waiving our Objections, please note that the Internet Archive does not maintain logs of IP addresses used to upload files.


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In addition, we request that your client immediately withdraw the threats of litigation contained in its October 6, 2006, letter. As set forth above, the videos do not infringe any Landmark copyright. Further, 47 U.S.C. § 230 protects Internet service providers such as the Archive from liability for allegedly harmful comments written by others. *See e.g. Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998) (“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”); *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003). Therefore, please confirm in writing, by November 15, 2006, that Landmark does not intend to pursue litigation against the Archive for copyright infringement or defamation.

If Landmark refuses to make this commitment, the Archive will have no choice but to explore its legal options, including, but not limited to, an action for declaratory relief and damages pursuant to 17 U.S.C. § 512(f).

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

Regards,



Corynne McSherry
Staff Attorney

cc: Art Schreiber, Esq.
General Counsel, Landmark Education LLC

**INTERNET ARCHIVE'S RESPONSES TO
LANDMARK EDUCATION LLC'S OCTOBER 19, 2006, SUBPOENA,
CASE NO C06-80303-MISC**

Nonparty Internet Archive hereby answers, objects, and responds to the subpoena that Landmark Education LLC caused to be issued to the Internet Archive on October 19, 2006, seeking "Documents sufficient to allow Landmark Education to identify the infringer 'Asatgiaire' who posted videos labeled 'Introduction' and 'Inside the Landmark Forum' (1 through 6 of 6) as described in the letter of notification in Exhibit A." as follows:

INTRODUCTORY STATEMENT

Internet Archive's investigation into this matter is ongoing and not yet complete. All the Responses contained herein are based only upon such information and documents that are currently available and specifically known to the Internet Archive and his/her attorneys and disclose only those contentions that currently occur to the Internet Archive and its attorneys. Internet Archive anticipates that its continuing discovery, review, research, investigation, and analysis will supply additional facts, add meaning to the known facts, modify Internet Archive's present analysis, and establish entirely new factual conclusions and legal contentions, all of which may lead to substantial additions to, changes in and variations from the contentions herein set forth. Internet Archive reserves the right to change any and all Responses herein as additional facts are ascertained, analyses are made, review of documents is furthered, legal research is continued, and/or contentions are made.

Subject to these qualifications and objections, Internet Archive responds as follows:

OBJECTIONS AND RESPONSES

Internet Archive objects to the subpoena on the ground that it is unduly burdensome and oppressive in that it is invalid. The subpoena was issued based on a letter of notification that asserts that the seven disputed videos contain infringing materials. The use of the materials in question is self-evidently fair use and, therefore, noninfringing.

Internet Archive further objects to the subpoena on the ground that it is unduly burdensome in that it demands a response less than ten (10) days following issuance of the

subpoena.

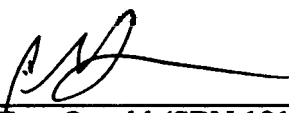
Internet Archives further objects to the subpoena on the ground that it is overbroad in that it seeks information that is neither relevant to the subject matter of any possible litigation nor reasonably calculated to lead to the discovery of admissible evidence.

Internet Archive further objects to the subpoena on the ground that it seeks to obtain the identity of an anonymous speaker without meeting the requirement that a court first evaluate (1) whether Landmark has demonstrated that it has viable claims; (2) the specificity of the discovery request; (3) the existence of alternative means of discovery; (4) the seriousness of Landmark's need for the information; (5) whether Landmark has attempted to notify the individuals whose information is sought of the pending loss of anonymity; and (6) the magnitude of the harms that would be caused to the competing interests. *See Highfields Capital Mgmt. L.P. v. Doe*, 385 F. Supp. 2d 969 (N.D. Cal. 2004); *Doe v. 2theMart.com, Inc.*, 140 F. Supp. 2d 1088, 1092 (W.D. Wash. 2001).

Internet Archive further objects to the subpoena on the ground that it is premised upon a declaration that appears to violate Federal Rule of Civil Procedure 11

Internet Archive further objects to the subpoena on the ground that it is vague.

DATED: October 27, 2006

By 
Kurt Opsahl (SBN 191303)
Corynne McSherry (SBN 221504)
ELECTRONIC FRONTIER FOUNDATION
454 Shotwell Street
San Francisco, CA 94110
Telephone: (415) 436-9333 x122
Facsimile: (415) 436-9993