

Dear Mr. Karamian:

This firm represents the San Antonio Spurs, L.L.C., as the owner and manager of all of its intellectual property assets, affiliated organizations, and subsidiaries (collectively, the "Spurs"). The Spurs are the exclusive agent and proprietor for the Spurs' trademark, goodwill, business reputation, and intellectual property rights associated with their trademark to include, but not limited to, rights of origin, affiliation, and sponsorship (collectively, the "Spurs' Marks").

This letter is formal notice of the Spurs' objection to the display of photographs of Spurs' player George Hill on thedirty.com's website. More specifically, thedirty.com has caused or permitted photographs of Mr. Hill in an unclothed state to be posted on its website. Moreover, the website expressly references Mr. Hill's status as a NBA player from San Antonio and contains a hyperlink to a photograph of Mr. Hill in a Spurs' uniform. The website also links to photographs of Mr. Hill in various states of undress and photographs that contain messages meant for a particular private recipient.

The content of this site is clearly aimed at prurient and sexually explicit interests that should not be associated with the Spurs. What is more, it will be our position that the photographs were disseminated illegally and without permission.

Accordingly, the Spurs demand that thedirty.com immediately and permanently remove the photographs and all references to the Spurs and the Spurs' Marks from its website. The Spurs further demand that thedirty.com continue to monitor, identify and block any further unauthorized use of the photographs and the Spurs trademark, goodwill, intellectual property, or Spurs' Marks of any nature.

Mr. Hill's status as a Spurs player and the display of a photograph of Mr. Hill in a Spurs' uniform are being used to generate interest in the thedirty.com's website and revenue for thedirty.com. Accordingly, the Spurs consider thedirty.com's continued use of the photographs and the Spurs' Marks in connection with commerce, advertisements, and promotional activities to be ongoing trademark infringements and unfair competition. It also appears that thedirty.com may be liable for the Texas common law tort of appropriation, which protects against the use of a person's likeness for advertising, endorsement or other commercial use without that person's permission. The Spurs reserve the right to prosecute all claims and causes of action arising out of, or relating to, the unauthorized use or reference to their intellectual property, goodwill, business reputation, and trademark. Moreover, it appears that thedirty.com may be liable under California statutes for receiving a communication between two cellular telephones without the consent of all parties to the communication.

We expect to receive your acknowledgement and response to this letter in writing by the close of business, Monday, February 8, 2010. Your acknowledgement and response should confirm your willingness to immediately remove the photographs and all Spurs' Marks from thedirty.com's website, to continue to monitor and prohibit any future use of the photographs and the Spurs' Marks, to provide all information in your possession regarding the identity of any other offending parties, and to pay all costs and fees associated with the Spurs' enforcement of this matter, which currently total \$5,000.00.

Should you fail to comply with this request, be advised that the Spurs may use all legal avenues available to ensure that the photographs and the Spurs' Marks are removed from the website, and that the Spurs are fairly compensated for any and all past infringement, dilution, consumer confusion, or misappropriation. Nothing contained or omitted from this demand constitutes a waiver of any of the rights or remedies at law or in equity of the Spurs, all of which are hereby expressly reserved.

TMZ

GINGRAS LAW OFFICE, PLLC

PO Box 310, Tempe AZ 85280 • Tel: (480) 668-3623 • Fax: (480) 248-3196

February 5, 2010

Eric Barbosa, Esq.  
Bracewell & Giuliani LLP  
106 S. St. Mary's Street, Suite 800  
San Antonio, TX 78205-3603

Re: George Hill / San Antonio Spurs

Mr. Barbosa,

I represent [www.TheDirty.com](http://www.TheDirty.com) and its founder, Nik Richie. I have received and reviewed your email dated February 4, 2010 which demands the removal of some photos of Spurs player George Hill from my client's site. As I understand it, your demand is based on both legal and policy grounds. My response will address those matters in that order.

▪ **TRADEMARK LAW DOES NOT APPLY TO CRITICISM  
OF CELEBRITIES MAKING FOOLS OF THEMSELVES**

The primary legal claims asserted in your letter seem to be combination of trademark/Lanham Act violations and generic unfair competition under state law. Specifically, you contend that trademark law and related torts prevent the publication of Mr. Hill's name and/or image simply because [www.TheDirty.com](http://www.TheDirty.com) is a hugely successful commercial site:

Mr. Hill's status as a Spurs player and the display of a photograph of Mr. Hill in a Spurs' uniform are being used to generate interest in the thedirty.com's website and revenue for thedirty.com. Accordingly, the Spurs consider thedirty.com's continued use of the photographs and the Spurs' Marks in connection with commerce, advertisements, and promotional activities to be ongoing trademark infringements and unfair competition.

Since you have not cited any authority for this premise, I assume you could not find any. That's not surprising since as Paris Hilton, Tiger Woods, or Britney Spears could explain to you, this argument is totally without merit. Strangely, many people seem to share this mistaken belief that the Lanham Act prevents all uses of a trademark without the holder's permission. Thankfully for The Dirty, TMZ, etc., this is not the law; it is an urban myth:

The Lanham Act is intended "to protect the ability of consumers to distinguish among competing producers," not to prevent all unauthorized uses. The First and Ninth Circuits have emphasized that trademark rights cannot be used "to quash an unauthorized use of the mark by another who is communicating ideas or expressing points of view."

*Utah Lighthouse Ministry v. Foundation for Apologetic Information & Research*, 527 F.3d 1045, 1052-52 (10<sup>th</sup> Cir. 2008) (emphasis added) (quoting *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768, 112 S.Ct. 2753, 120 L.Ed.2d 615 (1992); *L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26,29 (1<sup>st</sup> Cir. 1987); *Bosley Med. Inst., Inc. v. Kremer*, 403 F.3d 672, 677 (9<sup>th</sup> Cir. 2005)).

In all fairness, a few cases do exist in which celebrities have used trademark laws to state a viable claim of one sort or another. See, e.g., *White v. Samsung Electronics America, Inc.*, 971 F.2d 1395 (9<sup>th</sup> Cir. 1992); *Parks v. LaFace Records*, 329 F.3d 437, 445 (6<sup>th</sup> Cir. 2003). However, the elements these claims are limited to very unique facts:

To prevail in a claim under section 43(a) [of the Lanham Act], the celebrity plaintiff must show that the allegedly infringing use of her name is likely to cause consumers confusion "as to the 'affiliation, connection, or association' between the celebrity and the . . . goods or services, or as to the celebrity's participation in the 'origin, sponsorship, or approval' of the . . . goods or services." The celebrity plaintiff must establish the likelihood that the defendant's designation will be confused with the plaintiff's trademark (her name or identity), such that consumers are, or are likely to be, mistakenly led to believe that the defendant's goods are produced by or sponsored by the plaintiff.

Stephanie Dotson Zimdahl, *A Celebrity Balancing Act: An Analysis of Trademark Protection Under The Lanham Act And The First Amendment Artistic Expression Defense*, 99 Nw. U.L. Rev. 1817, 1824 (2005) (internal footnotes omitted) (citing extensive authority for premise).

Under this rigorous standard, Mr. Hill cannot assert a Lanham Act claim unless he can demonstrate that an average viewer of [www.TheDirty.com](http://www.TheDirty.com) is likely to be misled into thinking that the site is selling a product or service that Mr. Hill has chosen to endorse by "sexting" naked pictures of himself to a third party. Given that most of our readers are extremely savvy consumers of Internet news and gossip, I am confident that none of them would be confused in any way about the nature of The Dirty's use of these images.

I realize that NBA fans in the San Antonio area may not be so sophisticated, particularly if any of them have opted to support Mr. Hill and the Spurs rather than the undeniably-superior Dallas Mavericks (excluding Shawn Marion who hasn't been the same since he left Phoenix). However, insofar as the Lanham Act is concerned, I am confident that even the least sophisticated websurfer in San Antonio would understand that [www.TheDirty.com](http://www.TheDirty.com) is not using Mr. Hill's name or image to falsely imply that he endorses anything about the site.

▪ **COMMON LAW MISAPPROPRIATION DOES NOT APPLY**

Aside from trademark-based claims, your email also suggests, "thedirty.com may be liable for the Texas common law tort of appropriation, which protects against the use of a person's likeness for advertising, endorsement or other commercial use without that person's permission." Again, you cite no authority for this principle, and again, the argument is groundless.

Generic "misappropriation of name/likeness" claims are a subset of the invasion of privacy tort; "The common form of invasion of privacy under the rule here stated is the appropriation and use of the plaintiff's name or likeness to advertise the defendant's business or product, or for some similar commercial purpose." RESTATEMENT (SECOND) OF TORTS § 652C cmt. b (1977). In short, if you take a person's name or image and use it on a commercial product (think: Kobe Bryant-brand condoms), then you are required to obtain the consent of the person before you use their fame to advertise and promote your product.



But just like trademark claims, misappropriation claims are narrowly-construed in deference to the First Amendment; "The tort is intended to protect against a person using the identity of another to advertise his business or for other commercial purposes. Thus, an appropriation claim does not arise from incidental uses of a person's identity or likeness." *Barnhart v. Paisano Publications, LLC*, 457 F.Supp.2d 590, 595 (D.Md. 2006). In this context, "incidental" uses include parody, satire, commentary and criticism in magazines and other publications. See *Stanley v. General Media Comm., Inc.*, 149 F.Supp.2d 701 (W.D.Ark. 2001) (consent not required for unauthorized use of photos of two high-school girls in *Penthouse* magazine story); *Fredrickson v. Hustler Magazine*, 607 F.Supp. 1341, 1360 (N.D.Tex. 1985); *Olan Mills, Inc. of Texas v. Dodd*, 234 Ark. 495, 353 S.W.2d 22 (1962); *Zacchini v. Scripps-Howard Broadcasting Co.*, 351 N.E.2d 454, 459 (1976), 433 U.S. 562, 97 S.Ct. 2849, 53 L.Ed.2d 965 (1977); *Ault v. Hustler Magazine, Inc.*, 860 F.2d 877, 883 (9<sup>th</sup> Cir. 1988)).

To be sure, just as Mr. Hill does not play basketball for free, it is true that [www.TheDirty.com](http://www.TheDirty.com) is a for-profit website and it is true Mr. Richie is extremely well-paid for his time and talent. Furthermore, you are 100% correct in stating, "Mr. Hill's status as a Spurs player and the display of a photograph of Mr. Hill in a Spurs' uniform are being used to generate interest in the thedirty.com's website and revenue for thedirty.com." Of course, the same logic applies to any Sports Illustrated article about Mr. Hill, the Spurs, or any other athlete. However, the mere use of celebrity's face, name, and image by someone seeking to earn a profit is NOT a violation of the limited privacy interests protected by the misappropriation tort:

Liability under this legal theory is generally limited to unauthorized use in connection with the promotion or advertisement of a product or service and not, as is the case here, for use in a magazine story. This is true even if the article was arguably motivated by [a] desire for profits or tangentially results in increased income ... . The fact that the defendant is engaged in the business of publication, for example of a newspaper, out of which he makes or seeks to make a profit, is not enough to make the incidental publication a commercial use of the name or likeness.

*Chapman v. Journal Concepts, Inc.*, 528 F.Supp.2d 1081, 1096 (D.Hawai'i 2007) (citing *Daly v. Viacom, Inc.*, 238 F.Supp.2d 1118, 1122-23 (N.D.Cal. 2002)).

▪ **CALIFORNIA'S EAVESDROPPING LAW DOES NOT APPLY**

Your email also suggests that, "thedirty.com may be liable under California statutes for receiving a communication between two cellular telephones without the consent of all parties to the communication." If this claim is based on Cal. Penal Code § 632.5, I am confident that no claim exists. This section imposes liability on anyone who "intercepts, receives, or assists in intercepting or receiving a communication transmitted between cellular radio telephones ..." without the consent of both parties.

As I understand it, your claim appears to be based on the fact that the recipient of Mr. Hill's "sext" messages took a photo of her (or his?) phone to show portions of the messages. Because presumably Mr. Hill knew the person he was sending these messages to, they were never "intercepted" nor were they received without consent. Since nothing in the law prevents an authorized recipient from forwarding or sharing messages *after* they have been lawfully received, there is no basis for any claim under the eavesdropping statute.

Eric Barbosa, Esq.  
February 5, 2010  
Page 4 of 4

Finally, turning to your policy concerns, I recognize and respect your statement that, "The content of this site is clearly aimed at prurient and sexually explicit interests that should not be associated with the Spurs." It goes without saying that many fans see athletes like Mr. Hill as a role model, and I appreciate the desire of the Spurs to keep its image as wholesome as possible.

Be that as it may, if the Spurs organization feels that Mr. Hill's conduct is incompatible with its public image, those concerns should be directed at Mr. Hill, not Mr. Richie. Censoring newsworthy material from the public's view does not somehow change the fact that this conduct occurred. Removing these images from our site will not undo the past, nor will litigation further your client's goals given the clear application of the "Streisand effect" to these types of cases. See [http://en.wikipedia.org/wiki/Streisand\\_effect](http://en.wikipedia.org/wiki/Streisand_effect)

In closing, [www.TheDirty.com](http://www.TheDirty.com) will not agree to remove any reports concerning your client. If you have any questions, please let me know. You are welcome to contact me via email ([David.Gingras@webmail.azbar.org](mailto:David.Gingras@webmail.azbar.org)), fax (480-248-3196) or phone (480-668-3623).

**VERY TRULY YOURS,**



David Gingras

cc: Nik Richie