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

January 11, 2010

VIA EMAIL

Paul Fleischut
Senniger Powers, LLP
100 North Broadway, 17th Floor
St. Louis, MO 63102

Re: Parody website located at http://cleancoalwustl.org and http://www.cleancoalwustl.com

Dear Mr. Fleischut,

This letter is in response to your letter of January 6, 2010, as well as your subsequent phone conversations with my colleague Matt Zimmerman. Having reviewed Peabody Energy Corporation's claims regarding the site, I write to respond to Peabody's allegations in detail, and in particular your demand that Mr. DeSmet make various alterations to the site. Simply put, we believe your legal threats to be entirely baseless.

First, as currently configured, the site does not use any Peabody trademarks.[1] The only logo on the site is a facsimile of the logo for the Consortium for Clean Coal Utilization ("CCCU"). Even if CCCU had a colorable trademark claim – which it does not, as explained below – Peabody does not have standing to advance it. Contrary to your suggestion, Peabody's donation of money to the Consortium does not suffice to establish such standing.

Second, there is in any event no trademark infringement, dilution, or other Lanham Act violation here. The spoof site to which Peabody objects is just that — a clearly parodic website that uses the target's trademark as a necessary part of the parody. As such, the site is fully protected by the nominative fair use doctrine. *See, e.g., Century 21 Real Estate Corp. v. Lendingtree, Inc.*, 425 F.3d 211, 218-221 (3d Cir. 2005); *New Kids on the Block v. New America Pub.*, 971 F.2d 302, 308 (9th Cir.1992). Indeed, courts have noted that nominative fair uses are particularly likely to be found in parodies. *Mattel v. Walking Mountain Prods.*, 353 F.3d 792, 808 n.14 (9th Cir. 2003); *see also Mattel, Inc. v. Walking Mountain Prods.*, No. CV99-8543RSWL(RZX), 2004 WL 1454100, at *1-4 (C.D. Cal. June 21, 2004). The spoof is also sheltered by the First Amendment. *See L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26, 29 (1st Cir. 1987); *Cliff Notes v. Bantam Doubleday Dell Publ'g Group*, 886 F.2d 490, 495 (2d Cir. 1989); *CPC Int'l, Inc.*

[1] To be clear, in light of your January 7, 2010, e-mail to Mr. DeSmet, Mr. DeSmet was under no obligation to remove Peabody's logo or add a disclaimer and in no way concedes otherwise. He did so solely in order to attempt to resolve this dispute amicably. It is disappointing that Peabody responded to this attempt by making additional demands.

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v. Skippy Inc., 214 F.3d 456 (4th Cir. 2000); *Nike, Inc. v. "Just Did It" Enter.*, 6 F.3d 1225, 1226-27 (7th Cir. 1993); *Mattel, Inc. v. MCA Records*, 296 F.3d 894, 906 (9th Cir. 2002). Moreover, the site is fully noncommercial; it neither offers for sale nor even links to advertising for any actual goods or services. Therefore, it is categorically exempt from the Lanham Act. *See* 15 U.S.C. §§ 1127, 1125; *Bosley Med. Inst. v. Kremer*, 403 F.3d 672, 677 (9th Cir. 2005); *Taubman v. WebFeats*, 319 F.3d 770, 774 (6th Cir. 2003); *CPC Int'l v. Skippy*, 214 F.3d 456, 461 (4th Cir. 2000).

Your state law allegations are also without merit. First, you fail to specify a single defamatory statement, let alone justify the charge in your letter that Peabody employees and former employees were defamed "by name in the Site." If your client truly believes a statement on the site to be defamatory, please identify the statement, as you must as a matter of law as part of any forthcoming complaint. *See generally Missouri Church of Scientology v. Adams*, 543 S.W.2d 776, 777 (Mo. 1976). Based on our review, it is beyond cavil that most of the statements concerning Peabody and the CCCU are sarcastic, hyperbolic and/or opinion; *i.e.*, not defamatory. Those statements that appear to be factual are based on legitimate sources to which the site links. Thus, Mr. DeSmet is merely republishing publicly available information and, even if there were some inaccuracy in the information, Mr. DeSmet has hardly acted with actual malice, a heightened standard required of all public figure defamation plaintiffs. *Glover v. Herald Co.*, 549 S.W.2d 858, 862 (Mo. 1977).

As for the tortious interference allegation, no breach of contract has occurred, much less one induced by my client's alleged interference. That said, we are aware of no case holding that public criticism of a business relationship that results in the severance of that relationship could possible be the basis of such a claim. To the contrary, the First Amendment specifically shelters such criticism. *See, e.g., NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *Beverly Hills Foodland, Inc. v. United Food and Commercial Workers Union*, 39 F.3d 191 (8th Cir. 1994).

We have asked that you provide legal authority to support the arguments raised in your letter, but you have not done so. Unless and until you can provide such authority, my client declines to make the changes you demand. If you review his site, however, you will see that he has made certain other changes that should resolve any remaining concerns your client may have. If you have any questions, please do not hesitate to contact me or Mr. Zimmerman.

Sincerely,

Corynne McSherry, Esq.