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

December 2, 2008

VIA EMAIL AND U.S. MAIL

Kenneth A. Richieri
Senior Vice President, General Counsel and Secretary
The New York Times Company
Legal Department
620 8th Avenue
New York, NY 10018

Re: www.nytimes-se.com

Dear Mr. Richieri,

I represent the creators of the above-listed domain name. I have reviewed your letter demanding, in essence, that the site be shut down and the domain name transferred to you. We are frankly disappointed that the New York Times has chosen to take this approach. As your own spokesperson conceded, the physical paper was "obviously a fake." *See* http://cityroom.blogs.nytimes.com/2008/11/12/pranksters-spoof-the-times/. The same holds true for the website. Given the content of the site, and the ample publicity the spoof has generated, it is difficult to imagine that any Internet user would be confused. Moreover, given the New York Times' long history of defending free speech and fair use, we had hoped that your paper would recognize that the spoof site is entirely legal critical speech.

Copyright Issues

With respect to your allegations of unauthorized copying, the site is obviously designed for purposes of criticism and comment and protected by the fair use doctrine. 17 U.S.C. § 107 ("the fair use of a copyrighted work . . . for purposes such as criticism [and] comment . . . is not an infringement of copyright.). Any use my clients may have made of material copyrighted by the New York Times is highly transformative. *See generally Campbell v. Acuff-Rose,* 510 U.S. 569, 579 (1994) ("[Transformative] works . . . lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright . . . parody has an obvious claim to transformative value"); *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.").

Further, my clients copied no more than necessary for purposes of the parody. As the Supreme Court has recognized, parodies must often use substantial portions of an original work to make their point. *Campbell*, 510 U.S. at 588; *see also Mattel, Inc. v. Walking Mountain Prod.,* 353 F.3d 792, 803 n.8 (9th Cir. 2003) (holding that "entire verbatim reproductions are justifiable where the purpose of the work differs from the original."). And while my clients used the Times' style sheet (necessary to create the parody), they

454 Shotwell Street • San Francisco, CA 94110 USA
+1 415 436 9333 +1 415 436 9993 www.eff.org information@eff.org

did not, as you suggest in your letter, engage in "wholesale copying" of the Times' HTML code.

Finally, critical transformative uses rarely if ever supplant markets for the original material. *Campbell,* 510 U.S. at 591-92*; see also Harper & Row v. Nation Enters.*, 471 U.S. 539, 567-69 (1985). In this case, the website is plainly not a substitute for the original, nor does it invade any licensing market for the Times' copyrighted works.

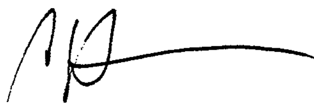
More broadly, the website serves the public interest by advancing political criticism and debate about a variety of pressing social issues, such war in Iraq, global warming, healthcare, and flawed media coverage of these topics. Nimmer on Copyright, § 13.05[B][4] ("the public interest is also a factor that continually informs the fair use analysis."); *see also Sony v. Universal*, 464 U.S. 417, 431-32 (1984) ("courts are more willing to find a secondary use fair when it produces a value that benefits the broader public interest."); *Mattel*, 353 F.3d at 806 ("the public benefit in allowing . . . social criticism to flourish is great.").

<u>Trademark Issues</u>

Similarly, the Times does not have a valid trademark complaint. First, the site is fully protected by the nominative fair use doctrine. *See, e.g. Century 21 Real Estate Corp. v. Lendingtree*, 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,* 353 F.3d at 808 n.14 . Second, the spoof is sheltered by the First Amendment. *See L.L. Bean, Inc. v. Drake Pub., 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. v. Skippy Inc.,* 214 F.3d 456 (4th Cir. 2000); *Mattel, Inc. v. MCA Records*, 296 F.3d 894, 906 (9th Cir. 2002). Third, the site is fully noncommercial; it neither offers for sale nor even links to advertising for any actual goods or services. Therefore, it is beyond the reach of 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). Finally, with respect to any dilution claim you believe you may have, please note that news commentary is also exempted from the dilution statute (in addition to the noncommercial use and fair use exemptions). *See* 15 U.S.C.A. §1125(c)(3).

Accordingly, my clients decline to meet your demands. If you have any further concerns, please do not hesitate to contact me.

Sincerely,



Corynne McSherry, Esq.