ELECTRONIC FRONTIER FOUNDATION
Protecting Rights and Promoting Freedom on the Electronic Frontier

May 12, 2011

VIA EMAIL (ABaum@foley.com)

Andrew Baum, Esq.
Foley & Lardner LLP
90 Park Avenue
New York, NY 10016

Re: www.coalcares.com

Dear Mr. Baum,

The Electronic Frontier Foundation ("EFF") represents Jacques Servin. He has received your letter of May 11, 2011, alleging that the coalcare.com website infringes the trademark rights of your client, Peabody Energy, and demanding the removal of any reference to your client on the coalcares.com site.

Your client's position is without merit.

As you acknowledge, the site is designed to engage in and promote political commentary. It clearly presents a satirical perspective of Peabody's political positions and practices, as well as the coal industry in general. Trademark law does not reach, much less prohibit, this kind of speech regarding a matter of substantial public concern. Particularly given that there is nothing on the site that would lead consumers to purchase goods or services based on a mistaken affiliation, and Coal is Killing Kids obviously does not compete commercially with Peabody Energy, there is no question that the site is sheltered by the First Amendment. *See, e.g., 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. v. Skippy Inc.*, 214 F.3d 456 (4th Cir. 2000); *Mattel, Inc. v. MCA Records*, 296 F.3d 894, 906 (9th Cir. 2002). Simply put, "[t]he Lanham Act regulates only economic, not ideological or political, competition . . . "Competition in the marketplace of ideas" is precisely what the First Amendment is designed to protect." *Koch Ind. v. John Does 1-25,* U.S. District Court for the District of Utah Case No. 2:10-cv-01275, Dkt. 26 (May 9, 2011).

Use of the Peabody name on the site also 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

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

be found in parodies. *Mattel v. Walking Mountain Prods.*, 353 F.3d 792, 80 n.14 (9th Cir. 2003).

Moreover, the site is entirely noncommercial. Therefore, it is statutorily 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).

Any legal action taken by Peabody, sounding in trademark law or another legal doctrine, would be entirely improper. Nonetheless, despite the baselessness of your claims, and without any admission of wrongdoing, certain changes to the site are underway that may resolve Peabody's concerns. These changes will take some time to implement but they are likely to be completed by Friday, May 13.

If you have further concerns, please direct them to my attention.

Sincerely,

Corynne McSherry, Esq.