



Electronic Frontier Foundation

Protecting Rights and Promoting Freedom on the Electronic Frontier

October 22, 2009

Michael Kelly
Kenyon and Kenyon LLP
One Broadway
New York, NY 10004-1007
Fax: 212-425-5288

VIA FAX AND U.S. MAIL

Re: DMCA takedown notice for www.chamber-of-commerce.us

Dear Mr. Kelly,

The Electronic Frontier Foundation (“EFF”) represents the creator of the site currently located at www.chamber-of-commerce.us (“the Parodic Site”). I have reviewed your DMCA takedown letter (“DMCA Takedown”) of October 20, 2009, to ISP Hurricane Electric Internet Services (“Hurricane Electric”) demanding that the site be shut down immediately. While our investigation is ongoing, it appears that your letter is without merit. Accordingly, in order to prevent unnecessary down time for the site, I request that you immediately withdraw your takedown notice to Hurricane Electric.

The Parodic 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 client may have made of material copyrighted by the Chamber of Commerce 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, to the extent that it utilizes copyrightable materials of the Chamber, the Parodic Site uses 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.”).

Finally, critical transformative uses rarely if ever supplant markets for the original material. In this case, the Parodic Site is plainly not a substitute for the original, nor does it invade any licensing market for any of the Chamber’s copyrighted works. *See, e.g., Campbell*, 510 U.S. at 591-92 (“[T]here is no protectible derivative market for criticism.”).

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More broadly, the Parodic Site serves the public interest by advancing political criticism and debate about the Chamber's position on global warming legislation, obviously of public concern as the Chamber purports to "represent[] 3 million business of all sizes, sectors, and regions." DMCA Takedown at p. 1. *See also* 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.").

We are frankly disappointed that the Chamber of Commerce has chosen to take this approach, particularly in light of the Chamber's well-documented history of support for free speech. *See* <http://www.uschamber.com/nclc/caselist/issues/freespeech.htm>. In order to prevent any further harm to our client, we request that you immediately withdraw your letter. Please be aware that if Hurricane Electric takes down the Parodic Site in response to your DMCA takedown notice, or "cancel[s] the accounts of those users that have posted" the Parodic Site as demanded, your client may be subject to liability under not only 17 U.S.C. § 512(f) (misrepresentation of infringement under the Digital Millennium Copyright Act) but also the relevant tortious interference statute. DMCA Takedown at p. 2.

If you would like to discuss this matter further, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink that reads "Matt Zimmerman". The signature is written in a cursive, flowing style.

Matthew Zimmerman, Esq.

cc: Benny Ng, Hurricane Electric
Jamie McClelland, May First