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March 15, 2004

BY FACSIMILE

Nancy Richman, Esq.
Legal Department
The New York Times Company
229 West 43rd Street
New York, NY 10036

Re: TheNationalDebate.com

Dear Ms. Richman:

This firm represents the management of the Internet website TheNationalDebate.com. We write in response to yours of March 9, 2004 to Ms. Danna Thompson of VERIO, Inc. ("VERIO").

Your statement to VERIO that our client's website was "clearly infringing" on the copyright of the New York Times Company (the "Times Company") is clearly wrong.

We note at the outset that the version of your transmission forwarded to our client does not include the parody *New York Times* correction page that your letter claims infringes on the Times Company's copyright. For this reason, your letter has not effected proper notice pursuant under 17 U.S.C. § 512(c)(A)(ii), which requires "identification of the copyrighted work claimed to have been infringed." If in fact the original transmission from the Times Company did include this material, the Times Company is hereby informed, as is VERIO by copy hereof (in addition to oral notice given by our client by telephone on March 12, 2004), that our client has not received it, and the notice purportedly given by your March 9, 2004 letter is not effective.

The Times Company's March 9, 2004 notice is also deficient because the claim of the Times Company that is has a "good faith belief that use of the

material complained of is not authorized by ... the law" cannot possibly be true. It is impossible to credit a claim by the Times Company that it has a good faith belief that our client's web page was not protected by the First Amendment as a parody:

> *Even if higher courts ultimately agree that [a purported work of parody] falls outside the recognized exception for parody under copyright law, the correct remedy is monetary damages, not shutting down presses in advance of publication. . . .*
>
> *A relevant 1994 Supreme Court decision, in the course of overturning a lower court ruling that found plagiarism in a bawdy satire of Roy Orbison's song "Oh, Pretty Woman" by the rap group 2 Live Crew, recognized that parody requires some borrowing from the original. [Other cases are] actually stronger [when the work at issue] is political expression normally accorded the highest level of First Amendment protection.*
>
> *. . . In an era when media conglomerates control the rights to vast amounts of intellectual property, routine elevation of copyright to a right of censorship could easily squelch active debate and criticism of important ideas.*

These words were published by the Times Company, one of the world's most powerful media conglomerates, in the *New York Times* on May 1, 2001. The reference was to the controversy surrounding the publication of *The Wind Done Gone*, a parody of *Gone with the Wind*. This argument was ultimately adopted by the Eleventh Circuit Court of Appeals, whose opinion is found at *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001). As you know, the Times Company submitted a brief as *amicus curiae* in that appeal arguing against the use of copyright as a method of censorship.

Following the reasoning of *Suntrust*, we note that the "columnists corrections page" at TheNationalDebate.com had one *raison d'etre*: to parody the *New York Times*. There is no likelihood that our client's parody would serve as a market substitute for the original. Nor is there a serious argument that our client took "more of the original" than was necessary to make its point. As the Eleventh Circuit wrote in *Suntrust*, "Parody frequently needs to be more than a fleeting evocation of an original in order to make its humorous point.... [E]ven more extensive use [than necessary to conjure up the original] would still be fair use, provided the parody builds upon the original, using the original as a known element of modern culture and contributing something new for humorous effect or commentary." How the Times Company can ignore so stubbornly that our client is doing just that here – and not acknowledge its own bias in doing so – raises serious questions of good faith. It also provides further proof of the

inability of the Times Company to tolerate criticism, which motivated the parody in the first place.

In any event, because the Times Company's copyright claim blindly ignores the fact that the web page at issue was a parody, the suggestion that our client "clearly infring[ed]" on the Times Company's copyright by also "instructing others on how to similarly infringe" must fail as well. A contributory copyright claim cannot be superior to the underlying copyright claimed. Certainly the Times Company cannot claim to own any copyright in the information on basic HTML editing posted by our client.

The Times Company's March 9, 2004 letter to VERIO, despite its obvious deficiencies, caused VERIO to threaten our client with discontinuation of its website without a bona fide legal basis. It appears that the March 9, 2004 letter constitutes a material misrepresentation under17 U.S.C. § 512(f)(1). As a result of that threat, our client was forced to remove the parody page from its own website, causing a substantial diversion of Internet traffic away from the site. Under the DMCA, the Times Company (and VERIO) may be liable for our client's damages, including costs and attorneys' fees arising from this misrepresentation.

The Times Company's heavy-handed action in this matter would be offensive to the First Amendment and a wrongful abuse of the Copyright Act regardless of your client's own field of endeavor. That an institution that has made so much First Amendment law on its own account – and which has argued so eloquently for the extension of the protection of free speech – would so readily abuse its power to silence criticism of itself is, however, truly troubling.

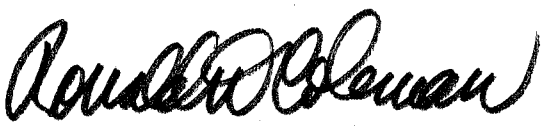
> *What we do know is that the vehicle for this commentary is the American classic [*Gone with the Wind*]. GWTW is an entrenched part of the American psyche. As most literature that is engrained in the collective consciousness of a nation, rigorous and robust debate, parody or criticism about it should be without limitation. Authors, publishers, reporters and editors now are presented with a decision standing for the proposition that iconic works of literature are sacrosanct. Houghton Mifflin asserts that WDG is a parody of GWTW and, in doing so, attempts to debunk the classic's sometimes racist and stereotypical portrayal of African-Americans. Speech that "protest[s] racial discrimination is essential political speech lying at the core of the First Amendment."*

These words written by the Times Company's attorneys in their own brief in the *Suntrust* appeal were about one famous book written in another time. But these words apply tenfold to the iconic power the *New York Times* exercises every day. That our client's work is a parody cannot be seriously gainsaid. No less than speech about racial discrimination, speech that demands the whole truth in news

reporting by the "newspaper of record" is "essential political speech lying at the core of the First Amendment." The DMCA was not meant to silence such speech, but if it were, the Constitution most assuredly could not countenance it – even to protect one of its own sometime guardians from embarrassment.

For the foregoing reasons, we demand an immediate retraction of the allegations in your letter of March 9, 2004 so that our client may republish its parody web page and avoid further damage.

Very truly yours,



Ronald D. Coleman

cc: Ms. Danna Thompson