

PUBLIC CITIZEN LITIGATION GROUP

1600 20TH STREET, N.W.
WASHINGTON, D.C. 20009-1001

(202) 588-1000

April 15, 2016

BY EMAIL: chawkins@gsblaw.com

Claire Hawkins, Esquire
Garvey Schubert Baker
1191 Second Avenue, 18th floor
Seattle, Washington 98101-2939

Re: “Notice of Copyright Infringement” sent to Daniel McCall

Dear Ms. Hawkins:

Bernie Sanders should be ashamed of your trademark bullying on his behalf.

I write on behalf of Daniel McCall in respond to the demand letter that you sent him by email on April 14, 2016 (although it is dated January 7, 2016), claiming that a parody image that his company, Liberty Maniacs, has made available for sale on Tshirts, hoodies, and mugs infringes the copyright and trademark of Sanders’ presidential campaign in one of the logos that the committee is using to promote Sanders’ candidacy. Specifically, you complain about the following image,



which places one of the campaign’s logos against a red background above the words “is my comrade” and below a montage of faces that runs from Karl Marx through, Friedrich Engels, V.I. Lenin, Joseph Stalin, Mao Tse Tung, and finally Bernie Sanders. It is your contention, apparently, that an ordinary and reasonably prudent consumer would tend to be confused about whether it is the Sanders campaign that is promoting Sanders’ candidacy by associating him with the 19th Century theoreticians of the communist movement as well as with three ruthless Communist Party dictators.

Claire Hawkins, Esquire

April 15, 2016

page 2

That contention is absurd. You cannot use trademark theories to silence members of the American public who disagree with your client's views and oppose his candidacy. They can hardly express their views in that respect without identifying the candidacy about which they wish to speak; and it is precisely because the logo is so recognizable that it is an excellent way of specifying **which** "Bernie" is the subject of commentary. Moreover, it is very common for people to express their views about presidential candidacies, completely independent of the campaign; such expression is so common that it defies belief that a reasonably careful consumer would believe that a shirt or bumper sticker associating your client with Communists necessarily came from the campaign itself.

Apart from the lack of likely confusion, the use of the logo is plainly fair use, protected by the doctrine of nominative fair use that is well recognized in courts throughout the country.

Beyond that, any lawsuit asking a court to impose remedies for the use of this political speech would run four-square into the First Amendment. Because speech about a candidate for president is protected by the First Amendment, any effort to use trademark law to quash such uses is highly suspect. Although Liberty Maniacs' products are sold, their contents are noncommercial speech, which qualifies for full First Amendment protection. *Ayres v. Chicago*, 125 F.3d 1010, 1014 (7th Cir. 1997); *see also Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 812 (9th Cir. 2003); *Smith v. Wal-Mart Stores*, 537 F. Supp.2d 1302, 1340-1341 (N.D. Ga. 2008). The First Amendment protection for non-commercial speech extends to bar trademark claims. *Entertainment 2000 v. Rock Star Videos*, 547 F.3d 1095, 1099-1101 (9th Cir. 2008); *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 968-976 (10th Cir. 2003); *CPC Intern. v. Skippy Inc.*, 214 F.3d 456, 462-463 (4th Cir. 2000); *L.L. Bean v. Drake Publishers*, 811 F.2d 26, 33 (1st Cir. 1987).

Your letter also refers in passing to your client's ownership of the copyright in the logos; the PDF of the letter was labeled "Notice of Copyright Infringement," and that characterization was in the subject line of the email by which you transmitted the letter. However, you do not say that the copyright has been registered. Not only would you need to register the copyright before you can file suit for its infringement, but any such suit would run directly into the **copyright** fair use defense, which is heightened in the case of an obvious parody like this one. *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994). Because you refer to a copyright claim only in passing, I will not bother to walk you through the application of section 107's fair use factors to this case. In addition, the invocation of the copyright laws to suppress expression that your client dislikes is copyright misuse, which constitutes an additional defense that the Second Circuit (where your client, Bernie 2016, Inc., has its headquarters) as well as the Ninth Circuit (where you are located) have both recognized. *Practice Management Information Corp. v. American Medical Association*, 121 F.3d 516, 521 (9th Cir. 1997); *Rosemont Enterprises v. Random House*, 366 F.2d 303, 311 (2d Cir. 1966). I note as well that, because you are making a claim over political speech, it would be our contention that the First Amendment provides additional protection against your misuse of the copyright laws, just as it protects against misuse of the trademark laws. *Rosemont, id.* (the "spirit of the First Amendment applies to the copyright laws. . . [C]ourts should not tolerate any attempted interference with the

Claire Hawkins, Esquire
April 15, 2016
page 3

public's right to be informed regarding matters of general interest when anyone seeks to use the copyright statute which was designed to protect interests of quite a different nature.”)

Finally, your letter refers in passing to “campaign laws and regulations . . . that apply to the use of the Official Logos.” Are you assuming here that an independent committee supporting your client might run afoul of the ban on coordination if it were to using the official campaign committee's intellectual property? But that analysis, even assuming that it is sound, certainly would not bar an opposing group from making fair use of the intellectual property to say it opposed your client.

For all of these reasons, McCall will not remove the images about which you complain from his web sites, nor will he refrain from continuing to offer printed images on shirts, hoodies and mugs for sale. Should you fail to revoke your claim of infringement, we reserve the right to file an action for a declaratory judgment of non-infringement in a court of appropriate jurisdiction.

If you have any questions or comments about this matter, you are welcome to contact me.

Sincerely yours,



Paul Alan Levy

