

May 26, 2020

Jenny Greenhough
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Re: Removal of Products Bearing Protected Expression

Dear Ms. Greenhough:

As organizations dedicated to the protection of First Amendment rights, especially those afforded cartoonists, journalists, and authors, we are writing to express concern related to the removal of products containing protected expressive content. A May 18 story in the DAILY KOS reported that Redbubble removed products created by political cartoonist Nick Anderson (specifically, his political comic entitled *The Trump Cult*) based on allegations of trademark infringement. See Nick Anderson, *Cartoon: Trump Fans*, DAILY KOS, May 18, 2020 (https://www.dailykos.com/stories/2020/5/18/1945888/-Cartoon-Trump-fans?fbclid=IwAR3dj62g56xIvIXmQNJ_92OLYeuXHjIDqwnUAb4NGnlas50eVvTLf6zEkHw).

According to the report (which contained a copy of your takedown notice), Mr. Anderson's work was removed because a trademark complaint from Donald J. Trump for President, Inc. ("DJT") because the work depicts cartoonish characters wearing "MAGA" hats, referring to the Trump campaign slogan "Make America Great Again." As organizations that exist to protect the rights of our members and their expressive works, we understand the value of protecting intellectual property rights and the challenges faced by Redbubble in balancing competing rights owner interests. However, based on the facts as reported in the DAILY KOS, it is our position that DJT has misused Redbubble's reporting mechanism to suppress protected political expression in the form of parody, critique, and satire.

As has been widely reported, the President and his campaign routinely use baseless cease and desist letters to suppress material perceived as critical. See, e.g., Ryan Bort, *A Brief History of Donald Trump's Ridiculous Cease-and-Desist Letters*, NEWSWEEK, March 23, 2017 (<https://www.newsweek.com/donald-trump-cease-and-desist-letters-572381>); Samantha Schmidt, *Trump's cease-and-desist letter: A 'desperate' attempt to silence Bannon*, WASHINGTON POST, Jan. 4, 2018 (<https://www.washingtonpost.com/news/morning-mix/wp/2018/01/04/trumps-cease-and-desist-letter-a-desperate-attempt-to-silence-bannon/>). The demand to Redbubble from DJT is more of the same.

It is evident on its face that Mr. Anderson's cartoon is a work of political satire. It addresses—in an unmistakably cartoonish way—President Donald Trump's suggestion that injecting disinfectant could help combat coronavirus infection. See, e.g., Katie Rogers, Christine Hauser, Alan Yuhas, and



A non-profit, tax-exempt organization protecting the First Amendment rights of the comics community

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Maggie Haberman, *Trump's Suggestion That Disinfectants Could Be Used to Treat Coronavirus Prompts Aggressive Pushback*, THE NEW YORK TIMES, April 24, 2020

(<https://www.nytimes.com/2020/04/24/us/politics/trump-inject-disinfectant-bleach-coronavirus.html>).



In light of public commentary concerning the President’s statement, Mr. Anderson’s Work conveys a common critique of the administration: President Trump’s scientifically unsound statements could result in severe health consequences for those who follow his advice. In order to identify and lambast those supporters in his comic, Mr. Anderson used the well-known MAGA hat to express his satire and to critique. Ultimately, “[t]he effect is ‘a simple’ message conveyed by ‘juxtaposing the irreverent representation of the trademark with the idealized image created by the mark’s owner,’” which “comments humorously on precisely those elements that [DJT] seeks to enforce here.” *VIP Prod. LLC v. Jack Daniel’s Props., Inc.*, 953 F.3d 1170, 1175 (9th Cir. 2020) (citations omitted).

Such political speech “is central to the meaning and purpose of the First Amendment,” *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 329 (2010), and is ultimately “at the core of what the First Amendment is designed to protect,” *Virginia v. Black*, 538 U.S. 343, 365 (2003). Political cartoons—which have existed since before the American Revolution—play an important role in our nation’s public debate. While often making light of a serious topic to promote discourse through humor, “comic books ‘are no less protected because they provide humorous rather than serious commentary.’” *Winter v. DC Comics*, 30 Cal. 4th 881, 890 (2003) (quoting *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387, 406 (2001)); *Jack Daniel’s*, 953 F.3d at 1175. In this context, Mr. Anderson’s Work is clearly protected from DJT’s infringement claims—which support its erroneous takedown request—under the First Amendment and trademark law.

First, DJT’s takedown request is baseless as a threshold matter, as it has no viable claims for trademark infringement, brand dilution, or any other alleged harms based on the Work. In reality, “the Lanham Act is intended to protect the ability of consumers to distinguish among competing producers, not to prevent all unauthorized uses” of a mark. See *Utah Lighthouse Ministry v. Foundation for Apologetic Info.*, 527 F.3d 1045, 1052 (10th Cir. 2008). As a result, use of others’ trademarks is not restricted where the presentation does not deceive the public as to a product’s affiliation. See *Fleischer Studios, Inc. v. A.V.E.L.A., Inc.*, 925 F. Supp. 2d 1067, 1077 (C.D. Cal. 2012) (dismissing trademark claim because “[d]efendants’ use does not indicate a source or origin of the products, and is therefore not a trademark use”); *Gottlieb Dev. LLC v. Paramount Pictures Corp.*, 590 F. Supp. 2d 625, 635 (S.D.N.Y. 2008) (pinball machine manufacturer’s “assertion that the appearance of its trademark in the Film would confuse ordinarily prudent consumers as to the sponsorship or affiliation of its pinball machines is simply not plausible”).

The court in *Caterpillar v. Walt Disney Co.*, for example, denied the bulldozer manufacturer’s motion to enjoin the release of the children’s film *George of the Jungle 2*, which featured villains “driving Caterpillar bulldozers . . . bearing the Caterpillar and Cat trademarks on them with no apparent alterations,” along with the

narrator’s description of the trademarked goods as “deleterious dozers” and “maniacal machinery.” 287 F. Supp. 2d 913, 917 (C.D. Ill. 2003). Like DJT, Caterpillar alleged that Disney’s use of its marks constituted trademark infringement, as well as unfair competition, dilution, and deceptive trade practices. *Id.* at 919. The court disagreed, noting that “the appearance of products bearing well known trademarks in cinema and television is a common phenomenon.” *Id.* at 919–20. Finding it “unlikely . . . that any consumer would be more likely to buy or watch *George 2* because of any mistaken belief that Caterpillar sponsored this movie,” the court dismissed Caterpillar’s claims. *Id.* at 920.

Here, Redbubble should consider Mr. Anderson’s products bearing the Work a non-trademark use. The Work neither advertises MAGA apparel, nor does it deceptively imply that DJT or President Trump are the source or sponsor of the Work. To the contrary, Mr. Anderson’s Work clearly disassociates itself with DJT and its products through mockery of MAGA apparel and its regular customers—*i.e.* the Trump supporters in the comic. Accordingly, no reasonable customer of MAGA apparel would confuse Mr. Anderson’s Work or his products with the official political campaign of President Trump. See *Wham-O v. Paramount Pictures*, 286 F. Supp. 2d 1254, 1262 (N.D. Cal. 2003) (holding that Paramount’s use of the plaintiff’s marks in a motion picture would not “create[] a likelihood that the consuming public will be confused as to who makes what product”; “[c]onsumers and viewers will not mistake plaintiff for a movie production house, and consumers and viewers will not mistake defendants for a purveyor of toys”).

Second, Mr. Anderson’s Work is protected by the First Amendment; independently defeating any claims regarding infringement of DJT’s trademark. In evaluating Lanham Act claims like this, courts have found that the traditional likelihood-of-confusion test “fails to account for the full weight of the public’s interest in free expression.” *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 902 (9th Cir. 2002). “[A]pply[ing] a test developed by the Second Circuit in *Rogers v. Grimaldi*,” *Twentieth Century Fox Television v. Empire Distribution, Inc.*, 875 F.3d 1192, 1196 (9th Cir. 2017), courts must dismiss any Lanham Act claim unless the expressive work (1) “has no artistic relevance to the underlying work whatsoever,” or (2) “explicitly misleads as to the source or the content of the work,” *Rogers v. Grimaldi*, 875 F.2d 994, 999 (2d Cir. 1989).

The *Rogers* test is highly protective of expression of all types, including political and social comics. Assessing the topic and medium, courts are admonished that “only the use of a trademark with ***no artistic relevance to the underlying work whatsoever*** does not merit First Amendment protection.” *E.S.S. Entertainment 2000 v. Rock Star Videos*, 547 F.3d 1095, 1100 (9th Cir. 2008) (emphasis added). “A work need not be the ‘expressive equal of *Anna Karenina* or *Citizen Kane*’ to satisfy this requirement.” *Brown v. Elec. Arts, Inc.*, 724 F.3d 1235, 1241 (9th Cir. 2013). Witty and publically accessible comics like Mr. Anderson’s “communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music).” See *Brown v. Entm’ Merchants Ass’n*, 564 U.S. 786, 789 (2011). Furthermore, where parody of a trademarked brand are involved, recognition of First Amendment protections and artistic relevance are even more important. See *Jack Daniel’s*, 953 F.3d at 1175; *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC*, 507 F.3d 252 (4th Cir. 2007).

“A parody must convey two simultaneous—and contradictory—messages: that it is the original, but also that it is not the original and is instead a parody.” *Louis Vuitton Malletier, S.A. v. My Other Bag, Inc.*, 674 F. App’x 16, 18 (2d Cir. 2016) (citing *Hormel Foods Corp. v. Jim Henson Prods., Inc.*, 73 F.3d 497, 503 (2d Cir. 1996)). Consequently, “it is often virtually impossible to refer to a particular product for purposes of comparison, criticism, point of reference or any other such purpose without using the mark.” *New Kids on the Block v. News Am. Pub., Inc.*, 971 F.2d 302, 306 (9th Cir. 1992). So in addition to *Rogers* test, “the [nominative fair use] doctrine protects those who deliberately use another’s trademark or trade dress ‘for the ‘purposes of comparison, criticism[,] or point of reference.’” *E.S.S. Entm’t*, 547 F.3d at 1098–99 (quoting *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 809 (9th Cir. 2003)).

Either under the nominative fair use of *Rogers* test, the Work’s use of DJT’s mark “produces a ‘new expression [and] message’ that constitutes transformative use” protected under the First Amendment. *My Other Bag, Inc.*, 674 F. App’x at 19 (citation omitted). “To the extent the drawings of the [MAGA apparel] resemble [DJT’s mark] at all, they are distorted for purposes of lampoon, parody, or caricature.” *DC Comics*, 30 Cal. 4th at 890. And “[h]owever one may feel about [Mr. Anderson’s] message—whether he is wrong or right, whether

his methods are powerful or banal—his [comics] parody [the MAGA mark] and everything [DJT’s product] has come to signify. Undoubtedly, one could make similar statements through other means ... [b]ut [MAGA], and all the associations [it] has acquired through [DJT’s] impressive marketing success, conveys these messages in a particular way that is ripe for social comment.” *Walking Mountain*, 353 F.3d at 802.

Satire, critique, and parody of President Trump, MAGA, and their supporters are undeniably contained in the Work. As a result, the First Amendment precludes any primary or secondary liability for infringing DJT’s mark. Additionally, the Work’s expressive fair use of the MAGA mark precludes Redbubble’s liability for Mr. Anderson’s products sold on its platforms. Because DJT “cannot use ‘trademark laws to ... censor all parodies or satires which use [its] name’ or dress,” *id.* at 812 (quoting *New Kids on the Block*, 971 F.2d at 309), we respectfully request that Redbubble reinstate Mr. Anderson’s product listings to affirm its commitment to its sellers’—and its own—First Amendment rights.

Sincerely,



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cc: Robert Corn-Revere, CBLDF Counsel
Nick Anderson