

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA**
Alexandria Division

Young America's Foundation,

Plaintiff,

v.

Matthew Sitman, *et al.*,

Defendants.

Case No. 1:24-cv-00923-RDA-LRV

**DEFENDANTS' REPLY MEMORANDUM
IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS**

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INTRODUCTION

Know Your Enemy, Inc. and the other Defendants engage in ironic commentary when—on the Know Your Enemy Patreon page for their leftist Know Your Enemy podcast—they label three different subscription tiers by reference to three well-known conservative groups: (1) Young Americans for Freedom, (2) West Coast Straussians, and (3) John Birchers. *See* Complaint, ECF No. 2 (“Compl.”), Ex. C at 1. The Court may look at the Patreon page, acknowledge the obvious joke, and grant Defendants’ motion to dismiss based on the Court’s common sense. *See, e.g., Martin v. Living Essentials, LLC*, 160 F. Supp. 3d 1042, 1051 (N.D. Ill. 2016) (dismissing false advertising claim where ad was “an obvious joke that employs hyperbole and exaggeration for comedic effect”), *aff’d*, 653 F. App’x 482 (7th Cir. 2016); *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687, 692 (7th Cir. 2012) (affirming dismissal where *South Park* episode parodying viral internet music videos was “an obvious case of fair use”). *See also Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (determining plausibility “requires the reviewing court to draw on its judicial experience and common sense”).

Humor aside, Defendants’ reference to Young Americans for Freedom is also political commentary. That commentary is relevant to the “content of the [Know Your Enemy] Podcast as a ‘leftist’s guide to the conservative movement.’” Compl. ¶ 16. Echoing this theme, the Know Your Enemy Patreon page essentially asks, “Who are the ideological enemies of the left?” It then answers by identifying three prominent conservative organizations, including Plaintiff’s Young Americans for Freedom. *See* Ex. C at 1. Such political speech “occupies the core of the protection afforded by the First Amendment.” *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 346 (1995). As the Fourth Circuit had made crystal clear—in a line of cases Plaintiff’s opposition entirely ignores—Congress “did not intend for trademark laws to impinge the First Amendment

rights of critics and commentators.” *Radiance Found., Inc. v. NAACP*, 786 F.3d 316, 321 (4th Cir. 2015) (quoting *Lamparello v. Falwell*, 420 F.3d 309, 313 (4th Cir. 2005)). The First Amendment protects Defendants’ right to identify Plaintiff as an ideological enemy, including in Know Your Enemy’s fundraising appeals. *See, e.g., Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc.*, 406 F. Supp. 3d 1258, 1284 (M.D. Ala. 2019), *aff’d*, 6 F.4th 1247 (11th Cir. 2021).

The ironic or critical use of another’s trademark does not equal consumer confusion. *See Radiance Found.*, 786 F.3d at 329. Plaintiff’s Complaint must therefore be dismissed.

I. ARGUMENT

A. Plaintiff’s trademark claims are barred by the First Amendment.

The *Rogers* test, as embraced by the Fourth Circuit in *Radiance*, affords First Amendment protection to the use of another’s marks in connection with an expressive work—so long as the use has at least minimal expressive relevance to the underlying product and is not affirmatively misleading. *See* Defendants’ Memorandum in Support of Motion to Dismiss, ECF No. 29 (“Mot.”) at 9–11. Where it applies, the *Rogers* test “offers [defendants] an escape from the likelihood-of-confusion inquiry and a shortcut to dismissal.” *Jack Daniel’s Props., Inc. v. VIP Prods. LLC*, 599 U.S. 140, 144 (2023).

The pleadings here establish that: (1) Defendants’ reference to Young Americans for Freedom, a “conservative youth organization,” (Compl., Exs. A and B) is relevant to Know Your Enemy’s “podcast about the American right,” (Compl., Ex. C at 2); and (2) Defendants’ use of the YOUNG AMERICANS FOR FREEDOM and YAF marks is not affirmatively misleading about the source of the podcast, which Defendants prominently identify as coming from Know Your Enemy (Compl., Ex. C). The Know Your Enemy podcast is forthrightly billed as “a leftist’s guide

to the conservative movement.” Compl. ¶ 16.¹ Applying the *Rogers* test’s threshold First Amendment inquiry, dismissal is warranted because “no amount of discovery will tilt the scales in favor of the mark holder at the expense of the public’s right to free expression.” *Louis Vuitton Malletier S.A. v. Warner Bros. Entm’t Inc.*, 868 F. Supp. 2d 172, 184 (S.D.N.Y. 2012) (footnote omitted); *see also Brown v. Elec. Arts, Inc.*, 724 F.3d 1235, 1247–48 (9th Cir. 2013), *abrogated in part on other grounds, Jack Daniel’s*, 599 U.S. at 159–61.

Plaintiff does not meaningfully dispute these legal points. Instead, Plaintiff invokes the U.S. Supreme Court’s decision in *Jack Daniel’s* to sidestep *Rogers* entirely. Opposition to Mot., ECF No. 31 (“Opp.”) at 13–15. However, as Defendants already explained, *Jack Daniel’s* is inapposite because Plaintiff has not plausibly alleged that Defendants use Plaintiff’s marks as source identifiers. Mot. at 6–9, 11–12.

1. *Jack Daniel’s* forecloses application of the *Rogers* test only where defendants use another’s trademark as a source identifier for their own products.

The U.S. Supreme Court’s holding in *Jack Daniel’s* is simple: Courts should not apply a threshold First Amendment inquiry “when the accused infringer has used a trademark to designate the source of its own goods—in other words, has used a trademark as a trademark.” *Jack Daniel’s*, 599 U.S. at 140, 144. Because Defendants there had affirmatively asserted ownership over and used the challenged BAD SPANIELS mark as a source-identifier for their liquor-bottle dog toy, no special test applied. *Id.* at 149, 159–160. Rather, the Supreme Court instructed the parties to

¹ *See* About, Know Your Enemy, <https://www.patreon.com/knowyourenemy/about> (describing the podcast as “[a] leftist’s guide to the conservative movement, one podcast episode at a time, with co-hosts Matthew Sitman and Sam Adler-Bell”); *accord Young America’s Foundation v. Sitman*, No. 1:23-cv-00253 (E.D. Va. 2023), Complaint, ECF No. 1, Ex. D at 2.

proceed straight to the “likelihood of confusion” test, which “does enough work to account for the interest in free expression.” *See id.* at 159.

The Supreme Court in *Jack Daniel’s* repeatedly stated that it was not disturbing preexisting case law applying *Rogers* as a threshold First Amendment test where the allegedly infringing use does *not* serve to identify the source of defendant’s own goods or services. *Id.* at 145, 153, 155.

2. Defendants do not use YOUNG AMERICANS FOR FREEDOM as their own trademark to identify the source of their Know Your Enemy podcast.

Unlike BAD SPANIELS in *Jack Daniel’s*, Plaintiff does not allege that Defendants have ever asserted any ownership interest in YOUNG AMERICANS FOR FREEDOM or YAF as Defendants’ own trademarks. Plaintiff contends that *Jack Daniel’s* nevertheless applies because the Know Your Enemy Patreon page uses the YOUNG AMERICANS FOR FREEDOM and YAF “[t]rademarks as trademarks” to “identify a Podcast membership tier” and “sell memberships.” *Opp.* at 15 (citing *Compl.* at ¶¶ 33–37, 49, 56). But it is irrelevant whether Defendants use Plaintiff’s marks as a title to “identify a Podcast membership tier” and “sell memberships,” because the First Amendment protects the use of a mark for simultaneous expressive and promotional purposes. *See Rogers v. Grimaldi*, 875 F.2d 994, 998 (2d Cir. 1989) (“Titles, like the artistic works they identify, are of a hybrid nature, combining artistic expression and commercial promotion.”); *Radiance Found.*, 786 F.3d at 326, 329 (rejecting infringement claims against expressive title because “Radiance used the NAACP’s marks only in the title and body of an article criticizing the NAACP.”); *Jack Daniel’s*, 599 U.S. at 153–55 (declining to disturb *Rogers* and agreeing that titles are not source identifiers, notwithstanding their promotional function).

The key question under *Jack Daniel’s* is whether Plaintiff plausibly alleges that Defendants are using the YAF marks as *source identifiers* for the Defendants’ *own goods*. 599 U.S. at 157.

Plaintiff has not done so. Plaintiff has not alleged any facts supporting its implausible assertion that Defendants are using YOUNG AMERICANS FOR FREEDOM to identify any source or sponsor of the Know Your Enemy podcast. Rather, Plaintiff's Complaint both pleads the Know Your Enemy podcast is a "leftist's guide to the conservative movement," (Compl. at ¶ 16) and attaches the Patreon page with prominent Know Your Enemy branding in the website address, banner, title, about page, and recent post highlights (Compl., Ex. C). *See* Mot. at 8–9. As the Complaint makes plain, Defendants reference three conservative groups to describe three escalating tiers of ideological "enemies": students (Young Americans for Freedom), academics (West Coast Straussians); and emeriti (John Birchers). *See* Compl. at ¶¶ 16, 35–36, Ex. C at 1. These descriptions track a multitude of descriptive three-tier ranking systems that do not indicate source. *E.g.*, small, medium, large; good, better, best; bronze, silver, gold.

Defendants thus use "Young Americans for Freedom" and "YAF" to characterize the lowest subscription tier for Know Your Enemy supporters, but not to identify the source of the Know Your Enemy podcast. That difference means *Jack Daniel's* is no help here. Instead, *Radiance Foundation* requires a threshold First Amendment inquiry. When trademark references double as political speech—as they do here—the First Amendment tolerates some confusion so as to "not transform the Lanham Act into an instrument for chilling or silencing the speech of those who disagree." *Radiance Found.*, 786 F.3d at 327. Because the pleadings establish that Defendants' speech is protected under the First Amendment, the Complaint fails to state a claim and must be dismissed. *See* Mot. § III-A-2.

B. Plaintiff's trademark claims are barred by nominative fair use.

1. The Fourth Circuit recognizes the doctrine of nominative fair use.

Even if the Court were to skip the threshold First Amendment inquiry and jump straight to a likelihood-of-confusion analysis, it should still dismiss Plaintiff's claims. *See Radiance Found.*,

786 F.3d at 328 (holding that “parody or satire or critical opinion generally” undercut the likelihood of confusion). As *Jack Daniel’s* recognized, “various contextual considerations” can make “a plaintiff fail[] to plausibly allege a likelihood of confusion” and thereby require courts to dismiss trademark complaints. *Jack Daniel’s*, 599 U.S. at 157 n.2 (citing 6 McCarthy on Trademarks & Unfair Competition § 32:121.75 (5th ed.)). One of the contexts requiring early dismissal is the doctrine of nominative fair use. See *Radiance Found.*, 786 F.3d at 328–29 (particularly where “domain names and webpage headings . . . clearly denote other organizations,” defendant’s use of NAACP was nominative, critical, and fair).

Plaintiff incorrectly asserts that *Rosetta Stone Ltd. v. Google, Inc.*, 676 F.3d 144, 155 (4th Cir. 2012) prohibits this Court from applying the doctrine of nominative fair use, because “the Fourth Circuit has not recognized nominative fair use as a defense to infringement claims since *Rosetta Stone*.” Opp. at 10. *Radiance* precludes that interpretation. *Radiance Found.*, 786 F.3d at 330 (explaining that the use of a mark “is not actionable” if it is “a nominative or descriptive fair use,” aimed at “identifying and parodying, criticizing, or commenting upon the famous mark owner”). Courts in the Fourth Circuit can and do apply nominative fair use at the pleading stage to grant motions to dismiss. E.g., *Schreiber v. Dunabin*, 938 F. Supp. 2d 587, 600 (E.D. Va. 2013) (dismissing case for failure to state a claim because use of mark served “a purely nominative function”).

The point Plaintiff appears to be making (Opp. at 10) is that the circuits are split as to where and when, procedurally, the doctrine of nominative fair use enters the likelihood of confusion analysis. *Rosetta Stone* recognized that the nominative fair use doctrine exists, but declined to take a position on that procedural split. *Rosetta Stone*, 676 F.3d at 155.

In most of the circuits, nominative fair use is an analytical lens used to adjust courts' balancing of the confusion factors. *See Radiance Found.*, 786 F.3d at 330.² Because plaintiffs always bear the burden of proving likelihood of confusion (*see KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 118 (2004)), nominative fair use is viewed as an ordinary, non-burden-shifting, defense. *See generally, Non-confusing nominative fair use*, 3 McCarthy on Trademarks and Unfair Competition § 23:11 (5th ed.). The nominative fair use analysis is triggered where, as here, Defendants use the accused mark to accurately refer to the Plaintiff.

The Third Circuit has diverged from other circuits by treating nominative fair use as an *affirmative* (i.e. burden-shifting) defense. *See Century 21 Real Estate Corp. v. Lendingtree, Inc.*, 425 F.3d 211, 228 (3d Cir. 2005). Plaintiff thus appears to be arguing that because the Fourth Circuit has never recognized nominative fair use as an *affirmative* defense, *see Rosetta Stone*, 676 F.3d at 155, the ordinary defense does not exist. *Opp.* at 10. This is wrong: Defendants' motion to dismiss is not weaker because they correctly held Young America's Foundation to its burden of pleading a likelihood of confusion against Defendants' clear nominative use.

2. Defendants use YOUNG AMERICANS FOR FREEDOM nominatively as an accurate, critical reference to Plaintiff's conservative youth organization.

Ultimately, whether nominative fair use is an ordinary or affirmative defense makes no difference here. Know Your Enemy's Patreon page identifies Young Americans for Freedom as an "enemy" conservative organization. *See Compl.*, Ex. C. That ironic and critical reference is apparent from the face of the Know Your Enemy Patreon page, and thus requires the Court to

² *Accord, e.g., Swarovski Aktiengesellschaft v. Building No. 19, Inc.*, 704 F.3d 44, 50 (1st Cir. 2013); *International Information Systems Sec. Certification Consortium, Inc. v. Security University, LLC*, 823 F.3d 153, 168 (2d Cir. 2016); *Board of Supervisors for Louisiana State University Agricultural and Mechanical College v. Smack Apparel Co.*, 550 F.3d 465, 489 (5th Cir. 2008); *New Kids on the Block v. News America Pub., Inc.*, 971 F.2d 302 (9th Cir. 1992); *University of Florida v. KPB, Inc.*, 89 F.3d 773, 777 (11th Cir. 1996).

dismiss. *See, e.g., Brownmark Films*, 682 F.3d at 692 (affirming dismissal of allegedly infringing parody video based on the affirmative defense of copyright fair use).

Plaintiff argues its trademark claims are strengthened by its conservative “competition” with Know Your Enemy as a leftist podcast in the field of politics. Opp. at 1. But the opposite is true. Competitive references are “the standard case of nominative fair use.” *Cairns v. Franklin Mint Co.*, 292 F.3d 1139, 1151 (9th Cir. 2002). Applying the doctrine is “appropriate where a defendant has used the plaintiff’s mark to describe the plaintiff’s product, *even if the defendant’s ultimate goal is to describe his own product.*” *Id.* (emphasis original); *see also* 3 McCarthy on Trademarks and Unfair Competition § 23:11 (5th ed.) (“a company is permitted to mention a competitor’s trademark on one’s own website in order to compare and criticize”). Know Your Enemy’s political competition with Young Americans Freedom means the podcast’s accurate and critical references to Plaintiff’s marks are fair. As *Radiance* concluded, in such critical and nominative circumstances, “[i]t may be that the only—but also the best—remedy available to a trademark holder is to engage in responsive speech.” *Radiance Found.*, 786 F.3d at 327.

C. Plaintiff’s allegations of confusion are conclusory.

Plaintiff does not dispute that courts in the Fourth Circuit routinely dismiss trademark infringement claims at the pleading stage. *See* Mot. at 8. Early dismissal is appropriate here because Plaintiff’s allegations about confusion are entirely conclusory. *Compare* Compl. at ¶¶ 51, 58 *with* 15 U.S.C. § 1125(a). Plaintiff pleads no instances of actual confusion³ and fails to allege any facts to support an inference of likely confusion. *See* Mot. at 18–19; *see also, e.g., Ahmed v. GEO USA LLC*, No. 14-cv-7486, 2015 WL 1408895, at *3 (S.D.N.Y. Mar. 27, 2015) (dismissing

³ Plaintiff’s failure to allege actual confusion requires dismissal of Plaintiff’s false advertising claim (Count 6). *See* Mot. at 18–19; *In re GNC Corp.*, 789 F.3d 505, 514 (4th Cir. 2015).

trademark infringement claim as “plainly insufficient as a matter of law” where confusion allegations were “conclusory” and “broad statements[] devoid of any factual detail”). Even without applying the First Amendment or recognizing Know Your Enemy’s nominative fair use, the Court should dismiss the Complaint because Plaintiff fails to allege any specific, plausible facts in support of a likelihood of confusion.

D. Plaintiff’s counterfeiting claims do not identify any knock-off goods or services.

Plaintiff concedes that “collective marks are unique.” Opp. at 20. As Defendants previously explained, collective marks are unique because they are the “only registrable symbols that are not used by the sellers of anything.” Mot. at 20. Plaintiff’s concession is why Plaintiff’s counterfeiting claims fail. Counterfeiting is designed to protect the public from the sale of imitation goods that misrepresent their source, like fake Gucci bags or Rolex watches. *See, e.g., Gen. Elec. Co. v. Speicher*, 877 F.2d 531, 534 (7th Cir. 1989) (“[T]he purpose of trademark law is not to guarantee genuine trademarks but to guarantee that every item sold under a trademark is the genuine trademarked product, and not a substitute.”). Because collective membership marks are by definition not used by their holders to sell goods or services, they cannot as a matter of law be the subject of counterfeiting claims. *See* Mot. at 19–20.

Plaintiff incorrectly contests this point by focusing on YOUNG AMERICANS FOR FREEDOM and YAF’s status as registered trademarks, not the scope of what those registrations cover. *See* Opp. at 20–22. Defendants do not dispute that collective marks are registered marks. Rather, Defendants’ point is that the scope of Plaintiff’s registrations, i.e. “membership in ... a conservative youth organization,” (Compl., Exs. A–B), is not a good or service. Plaintiff’s collective membership marks therefore cannot meet Section 1114’s limitation of counterfeiting

claims for use “in connection with the sale, offering for sale, distribution or advertising of any *goods or services*.” 15 U.S.C. § 1114 (emphasis added).

Even if YAF membership were to qualify as a good or service, Plaintiffs still have not plausibly alleged the required elements of their counterfeiting claims. Mot. at 19. As Plaintiff recognizes, subscriptions to a leftist podcast are not the same as memberships in a “conservative youth organization.” Opp. at 20. Plaintiff nevertheless argues its counterfeit claims should survive because the parties’ political motivations in using YOUNG AMERICANS FOR FREEDOM have the “same purpose.” Opp. at 20–21. Plaintiff cites no authority for this novel proposition. Nor could they, because sharing broad political or industry purposes is not an element of a counterfeiting claim.

Counterfeiting claims are not likelihood-of-confusion trademark infringement claims under a different name. *Montres Rolex, S.A. v. Snyder*, 718 F.2d 524, 528 (2d Cir. 1983) (distinguishing counterfeit and infringement claims). Rather, counterfeiting claims impose a heightened standard in order to target spurious marks engaged in misrepresentation and fraud; these claims require infringement as to *the same* goods or services covered by Plaintiff’s registrations. *See Playboy Enterprises, Inc. v. Universal Tel-A-Talk, Inc.*, 48 U.S.P.Q.2d 1779 n.8 (E.D. Pa. 1998); *Ford Motor Co. v. O.E. Wheel Distribs., LLC*, 868 F. Supp. 2d 1350, 1371 (M.D. Fla. 2012) (no valid claim of counterfeiting where defendant’s use of the mark was on a different product than that for which plaintiff registered the mark). This “sameness” requirement aims at the core of counterfeiting, namely, passing off fake goods as authentic ones. *See, e.g., Antetokounmpo v. Paled Prods. LLC*, No. 20-cv-6224, 2021 WL 4864537, *4 (S.D.N.Y. 2021) (“counterfeit mark must be used on the same goods for which the authentic mark is registered”).

And this “sameness” requirement is what justifies counterfeiting’s heightened remedies. *See* 15 U.S.C. § 1117(b)-(c).

Subscriptions to a leftist podcast (*see* Compl., Ex. C) and “membership in . . . a conservative youth organization” (*see* Compl., Exs. A–B) are not the same. The Court should dismiss Counts 3 and 4.

E. Plaintiff’s state law claims are subject to the Virginia Anti-SLAPP law and therefore must be dismissed with the federal claims.

The parties agree that Plaintiff’s federal law and state law claims are coextensive. *Compare* Mot. at 21–23 *with* Opp. at 22. The parties also agree that the applicability of Virginia’s anti-SLAPP law, Va. Code § 8.01-223.2, turns on whether Plaintiff’s trademark claims survive. *Id.* Because Plaintiff’s federal claims fail, Plaintiff’s state law claims fail in turn—and thereby entitle Defendants to reasonable costs and attorneys fees. Va. Code § 8.01-223.2(c); *see* Mot. at 21–23.

II. CONCLUSION

Defendants respectfully request that the Court grant their Motion to Dismiss.

Dated: August 26, 2024

Respectfully submitted,

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