

PUBLIC CITIZEN LITIGATION GROUP

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

(202) 588-1000

BY EMAIL ONLY: ryaloz@elc-paris.com

September 19, 2019

Randy Yaloz, Esquire
Euro Legal Counsel Group
8 Rue de l'Université
75007 Paris
FRANCE

Dear Mr. Yaloz:

I write on behalf of Liberty Maniacs in response to your demand, made on behalf of Diaz Lopez, the daughter of Alberto Diaz Gutierrez, a/k/a/ Korda, as well as a French company, Legende Global, that Liberty Maniacs stop offering parody Tshirts that play on Korda's iconic photograph of Che Guevara. Your letter mentions both copyright and "moral rights." It also mentions a French statute, but Liberty Maniacs is located in the United States and has no obligation to comply with French law. Liberty Maniacs rejects your claims and invokes its First Amendment rights in opposition to those claims; it does not intend to stop distributing its parodies.

Liberty Maniacs sells Tshirts and other paraphernalia with political content. In this case, its images (which your letter calls "Litigious Products") comment on Korda's cult photograph of Che Guevara by comparing it with two of today's cult heroes: one on the populist right, Donald Trump, <https://libertymaniacs.com/products/trump-che-t-shirt>, and one on the populist left, Alexandria Ocasio-Cortez, <https://libertymaniacs.com/products/she-guevara-alexandria-ocasio-cortez-comrade-t-shirts>. Your letter asserts both "moral rights" on behalf of Korda's daughter and copyright on behalf of the company. Neither claim is valid.

First, American law does not recognize the general concept of "moral rights. The concept is broadly inconsistent with the First Amendment (whose protection Liberty Maniacs is pleased to claim, as it has done in the past when, for example, the National Security Agency and Transportation Security Administration tried to suppress some of its parodies). Congress recognized a limited form of moral rights in the Visual Artists' Rights Act of 1990, 17 U.S.C. § 106A, but you do not advance any claim under that statute, which does not apply because the artist is deceased and, in any event, the alteration was not made to a work that exists only in a single copy or a limited edition of 200 or fewer and signed and consecutively numbered by Korda. Moreover, any claim of moral rights under VARA would be subject to the fair use defense that precludes a copyright claim. In addition, your complaint that Korda's name has not been mentioned on the web pages promoting these parodies, while at the same time complaining that Korda's reputation is sullied by the association of his



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famous work with these parodies, is bizarre. In 2019, viewers of the parodies either would not know who Korda was, or, knowing who he was, would understand that he had nothing to do with taking photographs of Donald Trump or Alexandria Ocasio-Cortez.

Turning to your copyright claim on behalf of Legende Global, we reserve the question whether Korda's copyright in his photograph was subject to restoration under the Uruguay Round, and whether your client took the proper steps to perfect its rights. Even assuming a valid copyright registration, Liberty Maniac's images are protected as fair use. Given how iconic the Korda photo has become in popular culture, it has been an inevitable subject of parody, and it has often **been** parodied. The parodies here borrow only so much of the Korda photograph as is needed to "conjure up" the original, *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 588 (1994), and hence to make viewers understand the reference to the photo's cult character, which has grown over the past fifty years, in the course of commenting on the similarities between the cult of Che Guevara and cult status that Donald Trump and Alexandria Ocasio-Cortez each enjoy among their respective bases. Nor is there any reason to believe that the dissemination of the parodies will have any discernible impact on the market for Korda's original. And I would question whether such a market remains given the widespread nonparodic use of the original photo on a variety of products which, I assume, has been made without paying any license fee to your client. https://www.google.com/search?sxsrfr=CyBGNRddg-VCdVB3WvAK_UeiDEyWEoOOQ:1568823828203&q=che+guevara+shirt&tbm=isch&source=hp&sa=X&ved=2ahUKEwj11fqX5NrKAhXGneAKHachAdUQ4216BAgAECM&biw=1680&bih=917#imgcr=sWhfapMQUxAvAM.

In sum, Liberty Maniacs is entirely within its rights under the doctrine of fair use as well as the First Amendment. It is not going to stop disseminating its parodies, it is not going to produce any documents to you, and it is not going to pay money to your clients. Nor does it agree with your characterization of its products as "litigious" – should you file suit as you are threatening to do, it would be your clients who are properly called "litigious." If you file suit in France, we will not appear to defend, but we will oppose any attempt to enforce any resulting judgment here in the United States. If you do file suit in the United States, we anticipate seeking an award of attorney fees for the bringing of frivolous infringement claims.

Sincerely yours,


Paul Alan Levy