



August 31, 2018

Laurraine Pollard  
Office of the Administrative Vice Chancellor  
University of California, Los Angeles  
2214 Murphy Hall  
Box 951405  
Los Angeles, California 90095-1405

*Sent via U.S. Mail and Electronic Mail (Laurrainelpollard@ucla.edu)*

Dear Ms. Pollard:

The Foundation for Individual Rights in Education (FIRE) is a nonpartisan, nonprofit organization dedicated to defending liberty, freedom of speech, due process, academic freedom, legal equality, and freedom of conscience on America's college campuses.

I'm writing with respect to your May 8, 2018, email to Tom Wilde, a former University of California, Los Angeles (UCLA) student, concerning his non-commercial website critical of UCLA, <https://www.ucla-weeding101.info>, and its corresponding Facebook page. Your email indicates that UCLA had received one "inquiry" about the website, though the nature or purpose of that inquiry is not made clear. As a result, your email was sent as a "[f]riendly reminder [that] UCLA is a protected mark and may not be included in any URL address unrelated to the University." Your email further advises that "protected images of iconic buildings," including UCLA's Royce Hall, "are not available for use without a trademark license." Your email invites Wilde to "remedy" these items.

I trust that your email was an inadvertent oversight, as this matter has previously been resolved as to Wilde's website. Enclosed, please find a letter dated August 14, 2009, from FIRE to Chancellor Gene D. Block, together with an August 20 facsimile from Senior Campus Counsel Patricia M. Jasper. FIRE's letter explains that non-commercial "gripe" websites constitute expression protected by the First Amendment. UCLA's response observes that its concerns involved the possibility of "confusion that the webpage represents the University itself," and formally withdrew its demands of Wilde.

While UCLA may have an interest in deterring unauthorized commercial uses of its marks, that interest does not supersede the First Amendment rights of others to make non-commercial uses of its marks in connection with criticizing the mark holder. *See, e.g., Gordon v. Drape Creative, Inc.*, No. 16-56715, 2018 U.S. App. LEXIS 20986, at \*11–12 (9th Cir. July 30, 2018) (where First Amendment interests are at stake, the Lanham Act applies only if there is a valid trademark, the use of the mark “is likely to cause confusion,” and the mark holder can establish that the use is either not relevant or “explicitly misleads consumers as to the source or content of the work.”). *See also Nissan Motor Co. v. Nissan Computer Corp.*, 378 F.3d 1002 (9th Cir. 2004) (reversing, on First Amendment grounds, order enjoining use of Nissan.com to link to disparaging commentary about car company, as the “prohibited use of the mark is a content-based restriction because the purpose behind it is to control the message . . .”).

Visitors to Wilde’s site are unlikely to be left with the impression that UCLA has crafted a “.info” domain name in order to criticize “how UCLA actually operates behind its fundraising & marketing campaigns.”<sup>1</sup> Nor does the site explicitly mislead anyone as to its source or content: it is not passing itself off as offering a service of or product made by UCLA, but rather criticizing the institution.

We appreciate that UCLA is institutionally committed to freedom of expression, as reflected by its crafting of policies that protect its students’ and faculty members’ First Amendment rights. UCLA was recently rated by FIRE as a “green light” institution, meaning its written policies are generally protective of freedom of expression.

Because your May 8 email to Wilde may reasonably be interpreted as an assertion that UCLA is authorized to enforce its marks against Wilde’s website, FIRE asks that UCLA unambiguously clarify that it will not do so here.

We request a response to this letter by September 14, 2018.

Sincerely,



Adam B. Steinbaugh  
Director, Individual Rights Defense Program

Cc: Jerry Kang, Vice Chancellor for Equity, Diversity and Inclusion

Encl.

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<sup>1</sup> *UCLA: Weeding 101: Letters*, <https://www.ucla-weeding101.info/ucla-letters> (last visited Aug. 28, 2018).



1999 - 2009

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August 14, 2009

Chancellor Gene D. Block  
Chancellor's Office  
University of California, Los Angeles  
Box 951405, 2147 Murphy Hall  
Los Angeles, California 90095-1405

**URGENT**

*Sent by U.S. Mail and Facsimile (310-206-6030)*

Dear Chancellor Block:

As you can see from the list of our Directors and Board of Advisors, FIRE unites civil rights and civil liberties leaders, scholars, journalists, and public intellectuals across the political and ideological spectrum on behalf of liberty, legal equality, due process, freedom of association, religious liberty and, as in this case, freedom of speech on America's college campuses. Our website, [www.thefire.org](http://www.thefire.org), will give you a greater sense of our identity and activities.

FIRE is concerned about the threat to freedom of expression posed by University of California, Los Angeles's (UCLA's) demand that a former student take down a non-commercial, personal website that includes the letters "ucla" in its domain name under the threat of legal action.

This is our understanding of the facts; please inform us if you believe we are in error. On or about July 12, 2009, former UCLA student Tom Wilde launched the website "ucla-weeding101.info." The website is entirely non-commercial and is expressly about personal matters, as the home page makes clear:

On this website, I am offering documents on my expulsion from UCLA's Graduate School of Education. These documents will show how the university terminated me, and thereby help the public to understand how this public university operates in the public's name.

At present, the website also includes this disclaimer, in relevant part:

Disclaimer: This site is not supported, endorsed, or authorized by UCLA or the University of California. The inclusion of "UCLA" in the domain name and site content is solely for the purposes of identifying this public university.



In a letter dated August 6, 2009, however, Patricia M. Jasper, UCLA Senior Campus Counsel, argued that Wilde's website and another domain name, "ucla-weeding101.com" (which appears never to have been used by Wilde) constitute "trademark infringement and dilution, and are illegal." Although the website is entirely non-commercial, Jasper further threatened that "[t]he commercial use of any of the names of the University of California" without the appropriate university permission "not only constitutes an illegal infringement of the trademark rights of The Regents [of the University of California], but is also a criminal offense under California Education Code, section 92000."

Jasper's letter demanded "in writing by fax" that Wilde confirm that he "will immediately cease the use of 'UCLA' or any other name belonging to The Regents in connection with your websites' activities, including, without limitation, promotion of products or services on such sites, no later than August 17, 2009." Jasper noted that the University would "take all necessary steps to protect its trademarks **and reputation**." (Emphasis added.)

Jasper further demanded that Wilde disclaim any right to the domain names now and in the future and "immediately cancel the registrations and take down the web sites." Jasper added that the University "reserves its rights to pursue whatever additional remedies or claims it may have against you, including punitive damages."

As a public institution, UCLA is both legally and morally bound by the United States Constitution. *National Collegiate Athletic Association v. Tarkanian*, 488 U.S. 179, 192 (1988) (holding that "[a] state university without question is a state actor.") We trust that you understand that the First Amendment's guarantee of freedom of expression fully extends to public universities like UCLA.

By misinterpreting the restrictions of the California Education Code in order to ban non-commercial mentions of UCLA's name such as in Wilde's website, and by threatening both criminal and civil action against him, UCLA has abused its power as a state entity and has unconstitutionally threatened his freedom of expression. UCLA may reasonably restrict the commercial use of its name and may reasonably intervene when there is legitimate confusion between an official UCLA website and a private website that speaks *about* UCLA. UCLA may not, however, categorically ban domain names containing the letters "ucla" or "UCLA" simply because they use an abbreviation of the name of the school—and certainly not in order to prevent attacks to the university's "reputation" by disgruntled former students. The vast majority of possible domain names, websites, and e-mail addresses that might use the letters "ucla" or "UCLA" have no commercial purpose and do not tend to confuse or mislead readers into believing that they are officially sanctioned or endorsed by UCLA.

In the case of *Bally Total Fitness Holding Corp. v. Faber*, 29 F. Supp. 2d 1161 (C.D. Cal. 1998), a federal court ruled that Bally Total Fitness (Bally) could not stop a man from operating a website called "Bally Sucks," which included a modified Bally logo on the front page and used the term "ballysucks" in the URL of the website. In that case, Bally, similarly to UCLA, argued (among other things) that allowing a critic to use its mark was likely to cause confusion among those who were searching for its official website. The court found against Bally, ruling that there was no likelihood of consumer confusion and that "[a]pplying Bally's argument would extend



trademark protection to eclipse First Amendment rights. The courts ... have rejected this approach by holding that trademark rights may be limited by First Amendment concerns.” 29 F. Supp. 2d at 1166, *citing L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26 (1st Cir. 1987), *cert denied*, 483 U.S. 1013 (1987).

Courts have also determined that so-called “cybergripping” websites, which are generally dedicated to harsh criticism of a business and which often use the business’s marks, are usually considered constitutionally protected speech. In *Taubman Co. v. Webfeats*, 319 F.3d 770, 775 (6th Cir. 2003), the court determined that “any expression embodying the use of a mark not ‘in connection with the sale ... or advertising of any goods or services,’ and not likely to cause confusion, is ... necessarily protected by the First Amendment.” In that case, the defendant had established not one but *five* different websites, such as *taubmansucks.com* and *willowbendmall sucks.com*, that criticized plaintiff Taubman and his business “The Shops at Willow Bend” with the purpose of hurting his business and reputation. *Id.* at 772.

UCLA may not threaten legal action against protected expression, nor may it seek to silence protected expression by declaring that it is illegal. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963) (holding that “threat of invoking legal sanctions” from state actor may constitute “informal censorship” and thus require injunctive relief). As a state actor, UCLA may not censor by instilling fear in those who seek to engage in protected speech. *Laird v. Tatum*, 408 U.S. 1, 11 (1972) (holding that indirect prohibition on protected speech may give rise to constitutional challenge due to resulting chilling effect on speech).

Jasper’s demands are also a form of unconstitutional prior restraint, chilling and preventing protected expression that might otherwise have come to pass were it not for this ban. *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (“[a]ny prior restraint on expression comes to this Court with a ‘heavy presumption’ against its constitutional validity”).

In addition, several provisions in California Education Code section 92000, if interpreted as Jasper seems to interpret them, would be facially unconstitutional in themselves. I refer in particular to sections (a)(1) through (a)(3):

92000. (a) The name “University of California” is the property of the state. No person shall, without the permission of the Regents of the University of California, use this name, or any abbreviation of it or any name of which these words are a part, in any of the following ways:

(1) To designate any business, social, political, religious, or other organization, including, but not limited to, any corporation, firm, partnership, association, group, activity, or enterprise.

(2) To imply, indicate or otherwise suggest that any such organization, or any product or service of such organization is connected or affiliated with, or is endorsed, favored, or supported by, or is opposed by the University of California.

(3) To display, advertise, or announce this name publicly at, or in connection with, any meeting, assembly, or demonstration, or any propaganda, advertising, or promotional activity of any kind which has for its purpose or any part of its purpose the support, endorsement, advancement, opposition, or defeat of any



strike, lockout, or boycott or of any political, religious, sociological, or economic movement, activity, or program.

For example, naming an organization "UCLA Should Change Its Policies Today!" (apparently banned under section 1) or "UCLA Has Opposed Our Organization!" (banned under section 2) is core political speech protected by the First Amendment and thus may not be banned. Facebook.com "groups," for instance, frequently use such language, and such names may not be banned.

Worse, section 3 even prohibits "announc[ing]" the name of UCLA at public meetings and prohibits display of the name of UCLA in "any kind" of "propaganda" regarding "any political, religious, sociological, or economic movement, activity or program." To ban the mere mention or display of UCLA's name in such political contexts is a severe violation of the First Amendment, banning precisely the kind of political speech at the heart of the First Amendment's protection.

Please know that while you are not responsible for the existence of the California Education Code, you and other agents of UCLA *may not* enforce it unconstitutionally. While FIRE does not directly engage in litigation, we believe you should be aware that any public university policy prohibiting constitutionally protected expression is an unlawful deprivation of constitutional rights under 42 U.S.C. § 1983 for which university administrators can be sued in their individual capacities. State officials and employees are offered only *qualified* immunity "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Davis v. Scherer*, 468 U.S. 183 (1984). This means that administrators may be held personally liable for actions that violate First Amendment rights. Having been warned about unconstitutional provisions and uses of the Code, in the future you might not be able to claim qualified immunity from personal legal liability for the kinds of First Amendment violations described in this letter.

Finally, I should note that in 2005, after the University of California–Santa Barbara similarly tried to force the independently hosted website "www.thedarksideofucsb.com" to remove the letters "ucsb" from its website URL—alleging that the website owner was "guilty of a misdemeanor" for using the letters—FIRE successfully intervened to protect the owner's rights.

We urge you to immediately withdraw UCLA's unconstitutional demands. FIRE hopes to resolve this situation amicably and swiftly; we are, however, prepared to use all of our resources to see this situation through to a just and moral conclusion. Since the stated deadline for Wilde's action is Monday, August 17, 2009, we request that you immediately notify Wilde of your response and that you also respond to FIRE by 5:00 p.m. Pacific Time on August 17, 2009.

Sincerely,



Adam Kissel  
Director, Individual Rights Defense Program

cc:

Patricia M. Jasper, Senior Campus Counsel

Kevin S. Reed, Vice Chancellor-Legal Affairs and Associate General Counsel

Charles F. Robinson, General Counsel and Vice President for Legal Affairs

Cynthia Holmes, Director, UCLA Trademarks & Licensing

## UNIVERSITY OF CALIFORNIA, LOS ANGELES

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OFFICE OF THE CHANCELLOR  
BOX 951405  
LOS ANGELES, CALIFORNIA 90095-1405

## VIA FAX &amp; US MAIL

August 20, 2009

Mr. Adam Kissel  
Director, Individual Rights Defense Program  
FIRE  
601 Walnut Street, Suite 510  
Philadelphia, Pennsylvania 19106

Re: [www.ucla-weeding101.info](http://www.ucla-weeding101.info)

Dear Mr. Kissel:

This is in further response to your August 14, 2009, letter addressed to UCLA Chancellor Gene Block.

Your letter notes that Mr. Tom Wilde has now included a disclaimer on the first page of his website, [www.ucla-weeding101.info](http://www.ucla-weeding101.info). This inclusion is helpful in addressing the University's concerns. It would also be helpful if the prominent banner phrase, appearing at the very top of the website, – "The University Offers A Lesson On How It Weeds Out Students" – was amended to avoid creating any confusion that the webpage represents the University itself describing its student retention practices.

In any event, the University hereby withdraws the demands made upon Mr. Wilde in our letter to him of August 6, 2009, and by copy of this letter to him, is so informing him.

Sincerely,

A handwritten signature in black ink, appearing to read "Patricia M. Jasper".

Patricia M. Jasper  
Senior Campus Counsel

cc: Chancellor Block  
Vice Chancellor Reed  
Mr. Wilde