

## Critical campaigning

Charities and social enterprises planning a campaign that directly criticises a business or its practices need to carefully consider the legal issues that can arise.



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Mat is a chartered Trade Mark attorney and heads up our IP and Trade Marks team. He has more than 15 years' experience of assisting clients with registration and protection of their intellectual property rights. Along with the rest of BWB's Trade Marks team, Mat is ideally placed to assist charities and social enterprises with planning critical campaigning.

### Mathew Healey advises charities and social enterprises how to navigate this area successfully

Critical campaigning can be very effective, but it is high-risk territory. You are potentially picking a fight with a well-resourced and sophisticated opponent, and there are a number of legal pitfalls. Charities and social enterprises can and do campaign successfully in this way, but this should only be once they have understood and weighed up the risks.

First, any claim, statement or insinuation that speaks ill of its target potentially gives rise to a claim for defamation. This shouldn't, in principle, be a problem, provided what you are saying is unequivocally true. Bear in mind, though, that if your target makes a claim of defamation, the onus is not on them to prove that the statement or allegation is false; it is on you, as the defendant, to show that it is true. To be safe here, it may not be enough to feel that you are 'in the right' – you may need to prove what you are saying in court through objective evidence.

Since 2013, defamation claimants need to show that they have suffered 'serious harm' as a result of the alleged defamation; but it could be difficult for a not-for-profit organisation to argue that, in running this kind of campaign, they did not intend to damage their target's reputation.

Another issue is the use of other parties' intellectual property. You'll need to consider whether your campaign infringes your target's registered trade marks. The law perceives a difference between using another party's name to say things about them (including negative things) in the context of an article, for example, and abusing their valuable and hard-won trade mark rights to unfairly damage their image in what looks and smells like a commercial ad campaign. The line between the two is fuzzy – there is a shortage of case law in this area – and legal uncertainty can, of course, help the party with the deeper pockets. The risk here is higher if your target is able to make a case that your campaign is unfair in some respect.

Again, this is very much a 'smell test' and in assessing risk we think you need to consider how the target

of your campaign is likely to perceive it. This could extend beyond the mere truth or falsity of any claims you make.

You may also need to think about whether your campaign infringes copyright owned by the other party. Your target's names as such will not be protected by copyright (that's what trade marks do), but businesses' logos, advertisements and other graphical, audio-visual collateral absolutely are. You don't need to copy materials in their entirety to infringe such rights: simply reproducing or imitating a 'substantial part' of the original work is enough to give rise to a claim. As a rule of thumb, we think that if your campaign clearly brings to mind your subject's graphics, advertising or whatever else, then copyright is likely to be infringed.

There are various 'exemptions' around use of copyright materials, such as for use in education, or for news reporting. But none of these allows you to use others' branding and suchlike to convey a negative message about their owner. The one possible exception is around caricature, parody and pastiche; there is a limited right to ape another's work for humorous effect. We're sometimes asked whether this provides any assistance for this kind of campaign – the answer is usually 'no!' It's not enough for the campaign to be funny, or to send up your target; the exemption only seems to apply where the copyright work itself is parodied. A campaign that artfully pokes fun at a company's logo or advertising may qualify; simply using a company's copyright materials to mock it will not.

It's important to remember the worst-case scenario: a court injunction curtailing your campaign, and an award of compensation and/or legal costs against you. In fact, where your key campaigning tools are websites and social media, it's more likely that the other party will employ the various available takedown procedures (either contacting your internet service provider, using Facebook, YouTube etc. and/or established and easyish-to-use trademark/copyright complaint forms) than drag everyone off to court. But there are no certainties, and the approach your target adopts will be outside your control.

At first blush, this sounds like a reason not to use electronic means to spread your message. But the

availability of a quick and relatively easy resolution (for everyone) if there is a problem can be a positive. Contrast this, for example, with campaigns that use traditional print media: magazine and billboard advertising can give rise to the biggest difficulties if things go wrong. It can be hugely problematic if your target gets wind of a magazine ad the day before it goes to print; and very expensive if you are forced to remove it from hundreds of billboards, bus shelters etc. In fact, some advertising companies will refuse to run critical campaigns (this is sometimes covered in their terms and conditions), which raises the possibility of finding that you have paid for advertising space that you cannot use as you intended.

**‘The biggest risk of things going pear-shaped arises if you allege anything that is not demonstrably fair or true’**

Obviously, there are organisations that have run critical campaigns at different times – running all kinds of legal risks – that have not encountered serious difficulties. Clearly, brand owners recognise that, sometimes, the reputational ill effects (for them) arising from taking action outweigh those of not doing so. There are well-documented cases of big corporates encountering serious social media backlashes from taking heavy-handed action to end campaigns.

From what we've seen, these campaigns will be more likely to evade complaints where the overall approach is constructive and concentrates on encouraging brand owners to make realistic and achievable changes – you've a better chance of receiving a balanced response to asking a coffee chain to use recyclable cups, for example, than if you criticise BP for drilling for oil.

It should be obvious from all this that the biggest risk of things going pear-shaped arises if you allege anything that is not demonstrably fair or true. Not only would that potentially expose you to a claim for defamation, but you may also find that your moral high ground is compromised, and the party in question could take a view that any potential reputational fallout is manageable and/or the lesser of evils.

Finally, charities should remember that any campaigning activity needs to be conducted within the confines of charity law (even if it doesn't involve political campaigning). The Charity Commission's guidance *CC9 Campaigning and political activity guidance for charities* is the key guidance for charities in this area.

In conclusion, campaigns of this kind can be hugely effective and memorable. But it's crucial that they are properly thought through from the outset.

**Find out more**

The Charity Commission's guidance is available at <https://www.gov.uk/government/publications/speaking-out-guidance-on-campaigning-and-political-activity-by-charities-cc9>

Our knowledgeable team of lawyers has extensive experience of advising on critical campaigns. Key contacts are Mathew Healey or Catharina Waller from our Trade Marks team, Rupert Earle from our Defamation team and Simon Steeden from our Political Campaigning team.

BWB Get Legal offers free bespoke guidance for charities on the regulation of their campaigning activities, based on responses to questions about their legal structure, governance and campaign plans. Find out more here <https://getlegal.bwbllp.com/store/products/campaigning-and-elections-guidance>