

Make Your Laws PAC, Inc. (FEC ID # C00529743)
% Nick Staddon, Secretary
122 Pinecrest Rd.
Durham, NC 27705

Federal Election Commission
Office of General Counsel
999 E Street, N.W.
Washington, DC 20463

Re: MYL PAC Advisory Opinion Request re. Foreign National Intellectual Property contributions

March 2, 2015

Dear Commissioners:

Thank you for the opportunity to discuss AOR 2014-20 with you. I would like to elaborate on and clarify some of the issues we discussed during your meeting of February 12, 2015.¹

1. Policy *per se* of foreign national contributions

To reiterate, MYL PAC expresses no opinion as to what extent foreign nationals should be permitted to participate in the US political process.

We believe that current law, supported by decades of Commission precedent, does allow foreign nationals to contribute their services without restriction — *if* those services are provided on a purely volunteer basis, and if any significant costs directly incurred in providing that volunteer service (e.g. consumable materials, travel costs, etc) are paid for by the recipient committee (or may be regarded as a permissible in-kind contribution to the committee by a non-foreign national donor).

Nearly all volunteer service has some cost that is not particular to the service — e.g. the use of a personal computer to write code, the use of a personal car to drive to do canvassing, etc. — but the volunteer who incurs such costs is not considered to have made an in-kind contribution.

2. Applicability to non-federal and/or non-online election activity, and intrinsic necessity of IP rights to be able to use provided services

As discussed in our clarifying comments and during the February 12 meeting, MYL PAC intends to

¹ These comments were mainly drafted before the second draft B was released today. The second draft B appears to be substantially identical to the first, except that it addresses application to state and local activity, as we requested. Our position, expressed in part 2 here, agrees with the new language in the second draft B.

engage in the whole range of activities that any other PAC may do. We expect to be primarily working online, and concentrating on federal elections, but intend to expand to state and local level activity, and to use our intellectual property ("IP") outside of the Internet as well (e.g. in mailings, TV, etc).

In order to do so — and to accept volunteer services from foreign nationals that might affect our IP — we would need to have complete confidence (i.e. explicit assurance in an Advisory Opinion) that we will be permitted to use it as we wish. Though we use non-commercial, open source IP (see below), we need to use it just as other committees that use IP obtained from paid sources. For the same practical reasons that MYL PAC needs to own its IP, we need to know that we will be able to freely use the IP that the PAC owns, regardless of who contributed to its creation.

Without such confidence, we would be forced to refuse volunteer contributions of IP-related services out of concern that they might 'taint' our codebase, branding, etc. in ways that would make the resulting IP practically unusable. These include potential exposure of MYL PAC to FEC enforcement action or effectively rendering us unable to enforce our IP rights.

We are aware of no substantive reason to treat IP created by volunteer foreign nationals differently than IP created by volunteer U.S. nationals with respect to how and where a PAC may use it. However, we would be happy to address any concerns or questions the Commission may have in that regard.

We ask that the Commission's Advisory Opinion in this matter clearly address the use of IP resulting from volunteer services that may affect state and local activity, as well as federal activity, and that the Commission address in its opinion both online and offline use of IP created in this manner.

Furthermore, because it is possible that state laws may vary on this issue, we ask that the Commission's opinion address the issue of federal preemption (and decide in favor of preemption), so that we will not have to seek an opinion from any state campaign finance agency in order to accept services that will affect our core IP.

3. Open source

The Commission had some questions regarding the meaning of the terms "open source" and "open source licensing". We believe that question relates to a unique aspect of MYL PAC's operations that may be substantively significant to the Commission's decision. We hope that the Commission's approval of this AOR will encourage other committees to adopt open source as well.

"Open source" in this context means that anybody can view the programming source code that we use. Our code may be viewed at <https://github.com/MakeYourLaws> — that is the code that runs on our server and powers our website.

"Open source licensing" means that, in addition to being able to view the source code, anybody — without having to ask permission, pay, or make any other arrangements — may reuse covered source code *provided that they comply with the terms of the license*. There are several popular open sources licenses. We currently use the *Affero GNU Public License* (for our core code) and the *MIT License* (for libraries). These licenses require that any new works derived from licensed works must be shared with the public under the same terms. Anyone is welcomed and encouraged to use and improve our code, and in return, the author of any code based our code must share their improvements with us and with the public.

We still own all of our code, and those who may improve our code will own their improvements, to the extent that the improved code may be a derivative work². Under the terms of our open source licenses, all derivatives of the open source licensed work must be made freely available, which encourages innovation by expanding the amount of code available to everyone.

It is important to underscore the culture of the open source community (i.e. those who write and benefit from open source code) as well as its practical operation. Our membership in this open source community motivated our request for AOR 2014-20, as we wish to accept volunteer services from others. This is in keeping with the tradition of the open source culture, and we believe it is consistent with federal law and FEC Advisory Opinions.

Our software itself uses many open source, open licensed software products developed and owned by others — Unix, Ruby, Rails, Redis, Puma, Resque, etc. — and we too have helped in some small part, by making improvements to that open source software which benefit everyone who uses it.

This culture of freely sharing is consistent with the volunteer activity exemption that the Commission has repeatedly upheld, especially for volunteer activity conducted online.

4. Analogies to other activity

As we discussed during the Commission's meeting, though not squarely presented by our request, some analogies may be helpful to the Commission's consideration of how its ruling may affect other

² We ask contributors to assign copyright to us, with license back to the contributor, so that we can effectively enforce the terms of the license. There is also some IP that is *not* open source licensed, over which we must have *exclusive* ownership to have any ability to use it, such as any IP that is part of our trademarks or trade dress.

activity and whether to overturn previous advisory opinions.

a. Tangible goods

Volunteers routinely create tangible products for committees in the course of providing services — for instance, they may hand-paint banners (where the materials are paid for by the committee), help cook or serve food (whose ingredients etc. are paid for by the committee), and so forth. This is completely unremarkable, as is the committee's right to post that banner on their campaign headquarters, sell tickets to an event where the food is served, etc.

Supposing that Elton John were a performance painter rather than a pianist, his services to the Hillary Clinton campaign³ would have resulted in a painting whose materials were paid for by the committee. The Commission has already decided that the campaign was entitled to sell tickets to watch the performance.

It follows from the Commission's earlier treatment of volunteer services that, if the service of painting *per se* is permissible, then the campaign would also be entitled to sell the resulting painting, or reproductions thereof.

As applied to our request, if the service of designing our logo is permitted, it must follow that we would be permitted to own the resulting logo — and surely nobody would contest that a committee may, for example, sell clothing bearing its logo.

b. Intangible goods

As the Commission pointed out, there are many intangible goods that are of value. However, not all create an in-kind contribution.

For example, Bitcoin is a commodity treated as an in-kind contribution, as discussed at length in our comments on AOR 2014-02 and AOR 2013-15. Despite being intangible, it is absolutely illegal for foreign nationals to contribute Bitcoin to a political committee, whether directly or indirectly.

However, one cannot *create* Bitcoin without spending money on electricity, or own a share of stock without paying for it. Those intangible goods do not come into existence simply by performing a service or speech act.

Pure intellectual property, such as copyright or trademark rights, is an intrinsically different kind of "thing". Acts of speech — writing code, performing a song, drawing an artistic work, creating a slogan

³ See MURs 5987, 5996, and 6015.

or advertising copy — create intellectual property, if recorded, with only *de minimis* expense.

In this sense, we understand the FECA volunteer services exemption as including a blanket exemption for *any* speech act with only *de minimis* costs, and any intellectual property resulting from it or necessary to make use of it.⁴

The Commission could distinguish between intellectual property used to run our website (e.g. our code, which is open source and open license) and IP which is in principle separable (e.g. our logo, which isn't open license). Coding would come under the Internet exemption for "maintaining" a website. Logo design comes more squarely under the volunteer services exemption, as it is not limited to use online.

We would of course prefer to be able to accept *both* kinds of services without restriction, and we *cannot* accept the service if it is encumbered by a restriction on our use of its result.

5. Inapplicability to paid work

As we discussed during the meeting, and during the hearing on REG 2014-01, we submit that the volunteer exemption is exactly that: an exemption for *volunteer* work that has no more than *de minimis* out-of-pocket costs, and therefore is not an in-kind contribution.

The Commission should continue to uphold this exemption, and protect the ability of people around the world to provide occasional volunteer services within the U.S. political process when money is not involved. The core of the Commission's purview is to control and disclose the flow of money (or valuable goods) — not of mere expression or volunteer activities.

However, if activities are *not* made purely on a volunteer basis, or the volunteer or some third party incurs significant costs in providing or enabling the services, this exemption does not apply. Instead, such conduct would constitute an in-kind contribution (or perhaps an independent expenditure, in other contexts).

If a third party were to pay a programmer to provide us with services, that would likewise be an in-kind contribution from that third party, which we could only accept if the in-kind contribution was itself permissible.

⁴ We note that the question of what activity is permissible by foreign nationals goes directly to issues discussed in the REG 2014-01 ANPRM hearing re. what Internet activity is regulated by the FECA. Our position is simple, and we hope the Commission will agree: If there are only *de minimis* costs, like use of a volunteer's existing computer equipment which is mainly used for other purposes, the activity is *not* regulated at all. If significant cost *is* involved (people paid, equipment bought, etc), then the flow of that money *is* regulated.

I again thank the Commission for the opportunity to appear, both during the rulemaking hearing and regarding this AOR. I request the Commission's permission to appear at any further hearing on this matter.

If you have any questions or comments, or any issues under consideration that would benefit from our feedback, please do not hesitate to contact me. If possible, we would appreciate earlier release of drafts, so that there may be some time to comment before the Commission meets to reach a final decision on them.

We have had very productive discussions so far, and I look forward to the same in the future. I hope that MYL PAC can play some small part in helping the Commission reach common ground on the scope of the volunteer services and Internet exemptions.

Sincerely,
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