



September 13, 2024

VIA EMAIL

[contact info redacted]

Re: wired-magazine.com

Dear [redacted]:

The Electronic Frontier Foundation represents the Yes Men for purposes of responding to your September 11, 2024 missive concerning the wired-magazine.com domain and related website content.

The Yes Men are an activist group with a long history of using parody and culture jamming to advance environmental justice and other social causes, including through spoofs of well-known publications.¹ As our client explained to you via email, the Yes Men created the wired-magazine.com parody web page to shine a spotlight on the greenwashing perpetrated by the liquified natural gas (LNG) industry while incorporating criticism of the WIRED brand.

We are frankly disappointed that WIRED has chosen to take this approach. Given both the content of the site and Cory Doctorow's September 10 tweets revealing the fake article to be a parody²—each of which has already garnered several thousand views—we find it unlikely the site has generated any significant confusion or will going forward. Moreover, given the long journalistic tradition of defending free speech and fair use, we had hoped that your magazine would recognize that the spoof site is entirely legal critical speech.

¹ See, e.g., <https://www.eff.org/deeplinks/2008/11/de-beers-internet-intermediaries>; <https://www.eff.org/deeplinks/2019/01/washington-post-tries-take-down-parody-site-announcing-trumps-resignation-0>.

² See <https://x.com/doctorow/status/1833554668070572329>; <https://x.com/doctorow/status/1833560083902697815>.

Trademark Issues³

Your trademark claim fails at the threshold because the Lanham Act regulates only commercial speech.⁴ The Yes Men’s spoof website is not selling any good or service; it is pure social commentary. It therefore falls beyond the Lanham Act’s reach.

Even if the Lanham Act did apply here, use of a trademark is not infringing unless it is likely to confuse consumers. The idea that Unicode would adopt a complex greenwashing emoji—a total outlier among an otherwise simple and ideologically neutral set of icons—is facially absurd, and we find it highly unlikely that any significant number of consumers would mistake the fake article for anything other than the spoof that it is. Indeed, courts readily recognize that successful parodies carry little risk of consumer confusion.⁵ Without a likelihood of consumer confusion, there is no infringement.

Moreover, the First Amendment requires robust protection for uses of trademarks in expressive works, including parodies.⁶ The infringement analysis must therefore construe the Lanham Act narrowly and give significant weight to the public interest in free expression.⁷ Here, where the Yes Men have used the WIRED mark only to the extent needed to produce a successful parody and achieve their expressive goals, the First Amendment does not allow a finding of infringement.

Copyright Issues

Your email also includes passing reference to use of WIRED’s copyrighted material, without identifying what material you mean. Regardless, the site is obviously designed for purposes of criticism and comment and is protected by the fair use doctrine.⁸

³ Your complaint of “unauthorized misappropriation” of “the names of WIRED contributors,” presumably refers to Cory Doctorow. WIRED has no basis for this complaint; Mr. Doctorow clearly supports the Yes Men’s use of his name in their spoof.

⁴ 15 U.S.C. §§ 1114, 1125 (requiring use in connection with the sale of goods or services); *see also Bosley Med. Inst., Inc. v. Kremer*, 403 F.3d 672, 676–77 (9th Cir. 2005); *Farah v. Esquire Mag.*, 736 F.3d 528, 541 (D.C. Cir. 2013).

⁵ *See, e.g., Louis Vuitton Malletier, S.A. v. My Other Bag, Inc.*, 156 F. Supp. 3d 425, 435 (S.D.N.Y.) (quoting McCarthy on Trademarks and Unfair Competition § 31:153), *aff’d*, 674 Fed. App’x 16 (2d Cir. 2016); *Anheuser-Busch, Inc. v. L. & L. Wings, Inc.*, 962 F.2d 316, 320–21 (4th Cir. 1992).

⁶ *See Radianc Found., Inc. v. N.A.A.C.P.*, 786 F.3d 316, 319 (4th Cir. 2015) (“To find Lanham Act violations under these facts risks a different form of infringement—that of Radianc’s expressive right to comment on social issues under the First Amendment.”).

⁷ *Cliffs Notes, Inc. v. Bantam Doubleday Dell Publ’g Grp., Inc.*, 886 F.2d 490, 494–95 (2d Cir. 1989).

⁸ 17 U.S.C. § 107.

The fair use factors weigh in our client's favor. First, any use our client may have made of material copyrighted by WIRED is noncommercial, highly transformative, and a favored use under Section 107.⁹ At the same time, our client copied no more material than necessary for purposes of the parody. As the Supreme Court has recognized, parodies often must use substantial portions of an original work to make their point.¹⁰ Finally, critical transformative uses rarely if ever supplant markets for the original material.¹¹ In this case, the website is plainly not a substitute for the original, nor does it invade any licensing market for WIRED's copyrighted works.

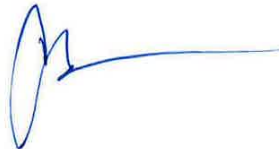
More broadly, the website serves the public interest by advancing criticism and debate on pressing social issues. The public interest is an important consideration in the fair use analysis.¹² And "the public benefit in allowing...social criticism to flourish is great."¹³

* * *

Accordingly, your legal threats are baseless and the Yes Men decline to comply with your demands. In the spirit of compromise, however, the Yes Men have removed all links to wired.com from the wired-magazine.com website.

If you have any further concerns, please contact me directly.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Corynne', with a long horizontal line extending to the right.

Corynne McSherry
Legal Director
Electronic Frontier Foundation

⁹ See generally *Campbell v. Acuff-Rose*, 510 U.S. 569, 579 (1994) (“[Transformative] works...lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright...parody has an obvious claim to transformative value.”).

¹⁰ *Campbell*, 510 U.S. at 588; see also *Mattel, Inc. v. Walking Mountain Prod.*, 353 F.3d 792, 803 n.8 (9th Cir. 2003) (holding that “entire verbatim reproductions are justifiable where the purpose of the work differs from the original”).

¹¹ *Campbell*, 510 U.S. at 591–92.

¹² See *Nimmer on Copyright* § 13.05[B][4]; *Sony v. Universal*, 464 U.S. 417, 431–32 (1984).

¹³ *Mattel*, 353 F.3d at 806.