TotalEnergies SE
c/o CERT-XMCO
takedown@xmco.fr

September 30, 2024

Re: repaer.org and repaer.earth

To Whom It May Concern:

The Electronic Frontier Foundation represents Modest Proposals LLC for purposes of responding to your September 19, 2024 cease-and-desist demand concerning the use of TotalEnergies trademarks on a parody website hosted at repaer.org and repaer.earth. Your allegations of trademark infringement are baseless. No reasonable consumer would ever mistake TotalEnergies for the source or sponsor of the Repaer parody website, and the parody falls firmly within the First Amendment's protections for expressive works. You should retract your allegations immediately, including any takedown demands you may have submitted to Netlify or other third parties involved in hosting the parody website.

Modest Proposals is an activist collective that uses parody and culture jamming to advance environmental justice and other social causes. Modest Proposals created the Repaer parody website as part of a campaign shining a spotlight on the environmental damage and human toll caused by the liquified natural gas (LNG) industry.[1] Modest Proposals is based in the United States and not subject to French jurisdiction. This letter therefore addresses only U.S. trademark law.

Your trademark claim fails at the threshold because the Lanham Act regulates only commercial speech.[2] Modest Proposals' parody 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 content of the website is facially and intentionally absurd: It purports to offer companies in the energy industry the opportunity to purchase "life offsets" that balance the human deaths their activities cause by extending the lives of individuals deemed economically valuable. The website also advertises a fake "Plasma Pals" program that encourages parents to donate their child's plasma to wealthy recipients. We find it extremely unlikely that any significant number of consumers would

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[1] *See* https://www.themodestproposals.org/life-offsets.html; https://thelensnola.org/2024/09/10/humorous-yet-dead-serious/.

[2] 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).

mistake the fake website for anything other than the spoof that it is or believe that TotalEnergies, one of the targets of the parody, approved it. Indeed, courts readily recognize that successful parodies carry little risk of consumer confusion.[3] 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.[4] The infringement analysis must therefore construe the Lanham Act narrowly and give significant weight to the public interest in free expression.[5] Specifically, the First Amendment protects the use of trademarks in expressive works so long as the use of the mark is relevant to the work and not explicitly misleading.[6] Here, where Modest Proposals has used TotalEnergies' trademark on the Repaer website 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.

In short, your allegations of trademark infringement lack merit. Modest Proposals will not be complying with any of your demands, and you should withdraw them immediately—including any takedown demands you may have submitted to third parties.

Sincerely,

Cara L. Gagliano
Senior Staff Attorney
Electronic Frontier Foundation

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[3] *See, e.g.*, *Radiance Found., Inc. v. NAACP*, 786 F.3d 316, 328 (4th Cir. 2015); *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).
[4] *See Radiance 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 Radiance's expressive right to comment on social issues under the First Amendment.").
[5] *Cliffs Notes, Inc. v. Bantam Doubleday Dell Publ'g Grp., Inc.*, 886 F.2d 490, 494–95 (2d Cir. 1989).
[6] *Rogers v. Grimaldi*, 875 F.2d 994, 999 (2d Cir. 1989); *E.S.S. Entm't 2000, Inc. v. Rock Star Videos, Inc.*, 547 F.3d 1095, 1099 (9th Cir. 2008).