



March 7, 2024

VIA EMAIL

Copyright & Trademark Team
SXSW LLC
ip@sxsw.com

Re: Austin for Palestine Coalition Cease & Desist

To Whom It May Concern:

The Electronic Frontier Foundation represents the Austin for Palestine Coalition for purposes of responding to your February 23, 2024 allegations of trademark and copyright infringement. Those allegations are groundless, and we ask that you immediately retract the claims you lodged with Instagram and any you have submitted elsewhere.

The graphics identified in your claims¹ were created by Austin for Palestine as an act of political protest aimed at SXSW—expression that lies at the very heart of the First Amendment.² Austin for Palestine’s political message is conveyed in part through parody of SXSW’s marketing materials, a mode of expression that Congress and the courts have been careful to protect from overzealous copyright and trademark enforcement.

Trademark Claim

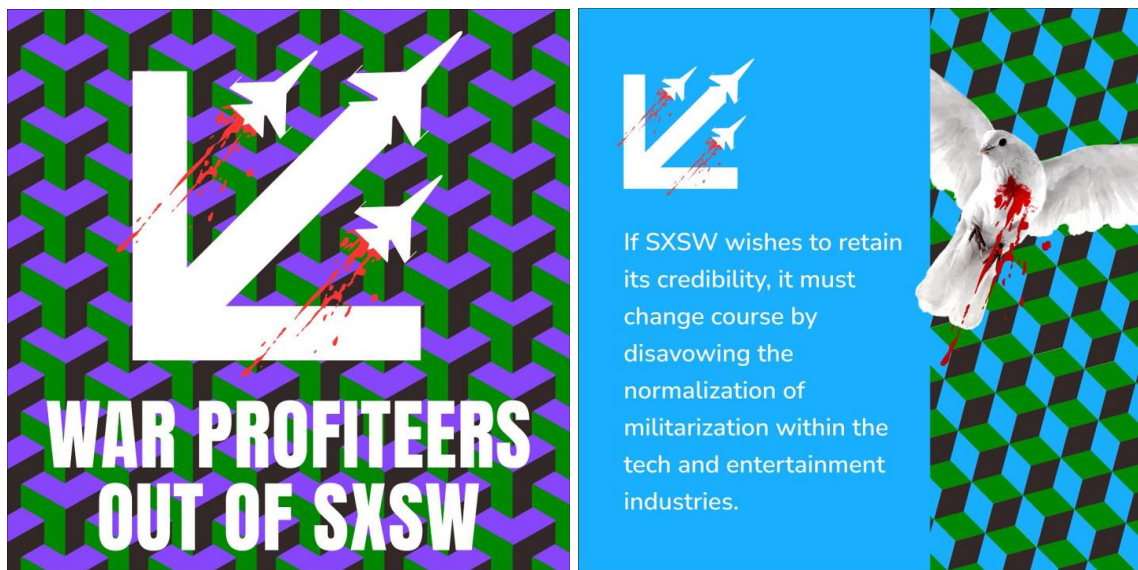
Your trademark claim fails at the threshold because the Lanham Act regulates only commercial speech, not pure political expression.³

¹ See Appendix A.

² *Radiance Found., Inc. v. NAACP*, 786 F.3d 316, 327 (4th Cir. 2015) (“Political discourse is the grist of the mill in the marketplace of ideas.”).

³ 15 U.S.C. §§ 1114, 1125 (requiring “use in commerce”); *see also Seven-Up Co. v. Coca-Cola Co.*, 86 F.3d 1379, 1383 & n.6 (5th Cir. 1996); *Springboards to Educ., Inc. v. Houston Indep. Sch. Dist.*, 285 F. Supp. 3d 989 (S.D. Tex. 2018), *aff’d on other grounds*, 912 F.3d 805 (5th Cir. 2019); *Radiance Found.*, 786 F.3d at 319 (“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.”).

Even if the Lanham Act did apply here, use of a trademark is not infringing unless it is likely to confuse consumers.⁴ Your February 23 email does not explain the basis for your trademark allegations, but we will assume for purposes of this letter that they refer to Austin for Palestine’s parodies of SXSW’s arrow logo, two examples of which are reproduced below.⁵ No reasonable consumer would interpret Austin for Palestine’s renditions of the arrow logo—which add fighter jets and details evoking of blood splatter—as indicating that SXSW produced, sponsored, or endorsed graphics criticizing its own business practices.⁶ Indeed, courts readily recognize that successful parodies carry little risk of consumer confusion.⁷ Without a likelihood of consumer confusion, there is no infringement.



Moreover, the First Amendment protects uses of trademarks in expressive works so long as the use of the mark is relevant to the work and not explicitly misleading.⁸

⁴ *Lyons Partnership v. Giannoulas*, 179 F.3d 384, 387 (5th Cir. 1999).

⁵ While your email also refers to three word marks (SOUTH BY SOUTHWEST, SXSW, and SOUTH BY), we hope you don’t seriously contend that Austin for Palestine’s use of those names to refer to your organization and festival is unlawful.

⁶ *Cf. Radiance Found.*, 786 F.3d at 328 (use of trademark to convey message critical of trademark owner ensures no lasting consumer confusion).

⁷ *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).

⁸ *Rogers v. Grimaldi*, 875 F.2d 994, 999 (2d Cir. 1989); *Westchester Media v. PRL USA Holdings, Inc.*, 214 F.3d 658, 664–65 (5th Cir. 2000) (endorsing *Rogers* framework and stating liability for expressive works requires “particularly compelling” likelihood of confusion).

That standard is easily met here. Austin for Palestine’s alteration of the arrow logo helps to convey its criticism that SXSW is complicit in “normaliz[ing] militarization within the tech and entertainment industries.” And nothing about the graphics is misleading (explicitly or otherwise) as to SXSW’s involvement in their creation. Quite the opposite—the graphics pointedly criticize SXSW and call on readers to do the same.

Copyright Claim

Your letter does not explain the basis for your allegations of copyright infringement either, offering only vague references to “copyrighted art.” If you are referring again to the arrow logo, you should know that basic symbols (like your arrow) are not copyrightable.⁹ If you are referring to graphic elements that mimic aspects of SXSW’s promotional website, such as the tessellated backgrounds and bands of geometric icons, those raise similar questions of copyrightability.¹⁰

Even if Austin for Palestine’s graphics have used any copyrightable elements of SXSW’s marketing materials, they are non-infringing under the doctrine of fair use.¹¹ First, looking to the purpose and character of the use, the graphics are non-commercial expression on issues of significant public interest. Austin for Palestine has transformed the borrowed design elements by replacing generic geometric icons with symbols of war and destruction, and by juxtaposing the colorful, hip image cultivated in SXSW’s marketing with text criticizing SXSW for hosting “war profiteers.” The end result enhances Austin for Palestine’s critical message and creates an impression on the viewer entirely different from, and with a different purpose than, SXSW’s marketing materials.¹² The second fair use factor (nature of the copyrighted work) is at worst neutral, given the minimal level of creativity embodied in the borrowed elements. The third fair use factor similarly weighs against infringement because the graphics borrow no more than is needed to achieve the intended effect.¹³ Finally, the only conceivable market harm that the graphics could inflict is reputational, which is not a cognizable copyright injury.¹⁴

Conclusion

⁹ U.S. Copyright Office, Compendium of U.S. Copyright Office Practices § 313.4(J) (3d ed. 2021) (specifically identifying arrows as non-copyrightable symbols).

¹⁰ *See id.* at §§ 313.4(J) (common symbols and patterns), 906.1 (common geometric shapes).

¹¹ 17 U.S.C. § 107.

¹² *Cf. Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 583 (1994); *Katz v. Google Inc.*, 802 F.3d 1178, 1182 (11th Cir. 2015) (blogger’s use of photograph for criticism was transformative); *Lyons Partnership v. Giannoulas*, 14 F. Supp. 2d 947, 955 (N.D. Tex. 1998).

¹³ *See Campbell*, 510 U.S. at 588.

¹⁴ *See id.* at 593 (the “fact that a parody may impair the market for derivative uses by the very effectiveness of its critical commentary” has no relevance under copyright).

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In sum, SXSW has no legitimate claim that Austin for Palestine has infringed its trademarks or copyrighted works. Austin for Palestine therefore will not be complying with any of your demands, and we ask you to immediately withdraw any complaints against them that you have submitted to Instagram or any other online platform.

Sincerely,



Cara L. Gagliano
Senior Staff Attorney
Electronic Frontier Foundation

Appendix A



BAE SYSTEMS



Raytheon
Collins Aerospace

Raytheon manufactures missiles, bombs, and other weapon systems for the Israeli military to use against innocent Palestinian civilians and children. **Collins Aerospace** provides crucial components for military aircraft used by the Israeli Defense Forces (IDF), & **BAE Systems** has supplied weapons and equipment used in the illegal occupation of Palestinian territories.



WHAT IS SXSW?

South by Southwest (SXSW), often referred to as South By, is an annual conglomeration of parallel film, media, and music festivals and conferences organized jointly that take place in mid-March in Austin, Texas. SXSW 2024 will occur from March 8-16



[TINYURL.COM/WARMONGERSOUTSXSW](https://tinyurl.com/warmongersoutsxsw)

EMAIL SXSW TO:

- Disinvite Collins Aerospace & BAE Systems from SXSW
- Reevaluate the inclusion of agencies in the Department of Defense in events & discussions hosted by SXSW.
- Use its platform to raise awareness about the ongoing humanitarian crisis in Gaza and advocate for peace, justice, and the protection of human rights.

WHAT IS HAPPENING IN GAZA?

The ICJ (International Court of Justice) at The Hague has ruled that Israel's campaign of mass slaughter plausibly constitutes a genocide, defined as "acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such." Tens of thousands of Palestinians have already been killed, an unprecedented number of them children.



If SXSW wishes to retain its credibility, it must change course by disavowing the normalization of militarization within the tech and entertainment industries.

