



901 Cherry Avenue
San Bruno, California USA 94066
Tel +1 (650) 827 6000
www.youtube.com

VIA EMAIL AND U.S. MAIL

Trevor Potter
General Counsel
McCain-Palin 2008
P.O. Box 16118
Arlington, VA 22215

October 14, 2008

Dear Mr. Potter:

Thank you for your thoughtful letter dated October 13, 2008. We are very happy about the extent to which the McCain-Palin campaign and, indeed, all of the presidential campaigns, are using YouTube as a platform to reach out to Americans in this critical election year.

Your letter raises important issues relating to the Digital Millennium Copyright Act (DMCA) that directly affect the YouTube community. As your letter acknowledges, the DMCA provides a statutory safe harbor for service providers such as YouTube that host content at the direction of users. Without this safe harbor, sites like YouTube could not exist. To strike the proper balance between rights holders and content uploaders, Congress had the foresight to implement a notice-and-takedown regime that allows rights holders to submit takedown notices for uploaded content that the rights holders believe infringes their rights. If service providers remove the content in response to a notice, they maintain their safe harbor and avoid potential copyright infringement liability. If, on the other hand, service providers do not remove the content in response to such notice, they do so at their own risk because they lose their safe harbor.

The DMCA protects content uploaders from erroneous or abusive takedown notices in two distinct ways. First, it allows uploaders to file a counter-notification in response to a takedown notice they believe to have been made in error. Once the uploader files a counter-notification, the statute allows the service provider to reinstate the content after a waiting period of 10 business days without jeopardizing its safe harbor, provided that the

rights owner does not file a copyright infringement lawsuit against the content uploader during that waiting period. Second, Section 512(f) of the DMCA allows parties injured by fraudulent takedowns to sue the claimant for damages.

Despite penalties of perjury, the counter-notification process and the very real possibility of lawsuits for damages, some parties still abuse the DMCA takedown process and seek the removal of content that does not infringe their rights. Because of the DMCA's structure, an abusive takedown notice may result in the restriction of non-infringing speech during the statutory 10-day waiting period. We recognize this potential for abuse, and have a number of measures in place to combat it. Indeed, we have spent numerous hours tracking down abuse, terminating offending accounts and reinstating affected videos. *See, e.g.*, the EFF's blog post at <http://www.eff.org/deeplinks/2008/09/youtube-anti-scientology-takedowns-good-news-bad-n-0> describing one such case. While we have successfully reduced the amount of abuse, we have not eliminated it.

Some have suggested that YouTube mitigate abuse by performing a substantive legal review of every DMCA notice we receive prior to processing a takedown. For a number of reasons, this is not a viable solution. As you recognize in your letter, a detailed substantive review of every DMCA notice is simply not possible due to the scale of YouTube's operations. Any such review would have to include a determination of whether a particular use is a "fair use" under the law, which is a complex and fact-specific test that requires the subjective balancing of four factors. Lawyers and judges constantly disagree about what does and does not constitute fair use. No number of lawyers could possibly determine with a reasonable level of certainty whether all the videos for which we receive disputed takedown notices qualify as fair use.

More importantly, YouTube does not possess the requisite information about the content in user-uploaded videos to make a determination as to whether a particular takedown notice includes a valid claim of infringement. The claimant and the uploader, not YouTube, hold all of the relevant information in this regard, including the actual source of any content used, the ownership rights to that content, and any licensing arrangements in place between the parties. YouTube is a merely an intermediary in this exchange, and does not have direct access to this critical information. When two parties disagree, we are simply not in a position to verify the veracity of either party's claims.

Your suggestion that we limit our reviews and fair use analysis to "political candidates and campaigns" attempts to address our scale issue, but it does not address the information problem mentioned above. The fact remains that we do not know who owns what content included in user uploaded videos, who uploaded those videos or what authorization the uploader may or may not have to use the content. Moreover, while we agree with you that the U.S. Presidential election-related content is invaluable and worthy of the highest level of protection, there is a lot of other content on our global site that our users around the world find to be equally important, including, by way of example only, political campaigns from around the globe at all levels of government, human rights movements, and other important voices. We try to be careful not to favor one category

of content on our site over others, and to treat all of our users fairly, regardless of whether they are an individual, a large corporation or a candidate for public office.

The real problem here is individuals and entities that abuse the DMCA takedown process. You and our other content uploaders can play a critical role in helping us to address this difficult problem of takedown abuse. You are operating from the position of strength, with knowledge of exactly where the content in your videos came from. You can file counter-notifications. You can seek retractions of abusive takedown notices.

You can hold abusive claimants publicly accountable for their actions by publicizing their actions. You can hold claimants legally responsible for their actions by filing a lawsuit under 512(f). We believe that with your vigilance and efforts in these areas, we can go a long way towards minimizing abusive takedown behavior.

On a final note, we hope that as a content uploader you have gained a sense of some of the challenges we face everyday in operating YouTube. We look forward to working with Senator (or President) McCain on ways to combat abuse of the DMCA takedown process on YouTube, including, by way of example, strengthening the fair use doctrine, so that intermediaries like us can rely on this important doctrine with a measure of business certainty.

Thank you again for your thoughtful letter and concern about this important challenge.

Very Truly Yours,



Zahavah Levine
Chief Counsel, YouTube

CC: Robert Bauer, Esq. (General Counsel, Obama for America; via U.S. Mail and e-mail)