



October 20, 2008

Chad Hurley, CEO
Zahavah Levine, Chief Counsel
YouTube, LLC
901 Cherry Ave.
San Bruno, CA 94066

Dear Mr. Hurley and Ms. Levine,

We are writing to YouTube today to follow up on the October 13, 2008 letter sent to you by the McCain-Palin campaign regarding overreaching copyright claims that have resulted in the silencing of constitutionally-protected political expression on YouTube. While we agree with the McCain-Palin campaign about the nature of the problem, we believe that, in the few remaining days before Election Day, a more comprehensive solution is urgently needed.

The McCain-Palin campaign accurately identifies the problem: “overreaching copyright claims have resulted in the removal of non-infringing campaign videos from YouTube, thus silencing political speech.” The blame for this unfortunate turn of events falls, first and foremost, on the news organizations that have been sending these unfounded DMCA takedown notices without regard for the importance of fair use and political speech. Today, we have sent a letter to CBS, NBC, CBN, and Fox urging them to take these considerations into account and give fair uses a wide berth in the future, especially with regard to political speech.

The solution proposed by the McCain-Palin campaign—that YouTube implement special “human review” procedures for political candidates and campaigns when their videos are targeted by DMCA takedowns—is inadequate. We agree with the concerns expressed in your October 14, 2008, letter responding to the McCain-Palin campaign. It is not enough to protect the interests of political candidates and campaigns, while failing to safeguard the First Amendment interests of the millions of other YouTube users that post non-infringing political videos on a daily basis.

Accordingly, the undersigned propose that YouTube implement at least the following measures in order to protect the interests of *all* YouTube creators, including political candidates and campaigns:

1. Human review for all DMCA “counter-notices” sent by YouTube users and immediate restoration for non-infringing videos. Upon receipt of a DMCA counter-notice from a YouTube user, trained YouTube staff should review the video at issue. If this review reveals that the original takedown notice lacked foundation, YouTube should immediately restore the video, rather than waiting the 10-14 day period set out in the DMCA. While we appreciate that YouTube must take its DMCA safe harbor obligations seriously, the McCain-Palin letter correctly explains

that “YouTube has nothing to fear by hosting *non-infringing* videos, let alone by reposting them much sooner than 10 days.” The relatively small number of counter-notices filed by users should make this a manageable task for YouTube personnel.

2. Human review for all subsequent DMCA takedown notices after a counter-notice has been provided. Where a YouTube user has already sent a valid counter-notice, any future DMCA takedown notices targeting any video posted to the same YouTube account should be subject to human review by trained YouTube staff. If those subsequent takedown notices prove to be well-founded, then YouTube can respond pursuant to its usual procedures. If, however, those notices again prove to be obviously lacking in foundation, then YouTube should refuse to remove the video, secure in the knowledge that it has no need of the DMCA safe harbors.

We understand that whether a particular video constitutes a fair use can be a difficult determination to make, and we are not asking YouTube to make difficult decisions in close cases. We also understand that, as pointed out in your October 14, 2008 letter, YouTube sometimes lacks the requisite information to make a fair use determination. Nevertheless, there are clear cases, particularly where short news clips are used in the course of a political video intended as commentary or criticism.¹ In these cases, YouTube should stand firmly behind the interests of its user community and refuse to remove videos in response to these baseless copyright allegations.

We know that YouTube takes these free speech considerations seriously and applaud YouTube’s previous efforts to protect its users and punish those who send frivolous DMCA takedown notices. Adopting the additional measures outlined above will make YouTube an even more vibrant site for the participatory media that will shape the upcoming election, as well as others to come.

Sincerely,

Fred von Lohmann
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On behalf of:

ACLU

ACLU of Northern California

Anthony Falzone, Executive Director, Stanford Fair Use Project

Center for Social Media, School of Communication, American University

Citizen Media Law Project at Harvard’s Berkman Center

¹ Evolving resources such as the [“Code of Best Practices in Fair Use for Online Video”](#) and [“Fair Use Principles for User Generated Video Content”](#) can assist in defining best practices and delineating the boundaries of fair use. As citizens and courts become more familiar with user-generated videos online, it should become easier over time to determine whether a particular video that incorporates pre-existing copyrighted material constitutes a clear fair use or is otherwise clearly noninfringing.

Electronic Frontier Foundation

Program for Information Justice & Intellectual Property, American University Law School

Public Knowledge

cc Trevor Potter, General Counsel, McCain-Palin 2008

Robert Bauer, General Counsel, Obama for America