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CAMPAIGN TAKEDOWN TROUBLES: HOW MERITLESS COPYRIGHT CLAIMS THREATEN ONLINE POLITICAL SPEECH

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This report documents the extent to which overly aggressive copyright claims under the Digital Millennium Copyright Act have inappropriately stifled political speech on the Internet during recent campaign cycles. Broadcasters, concerned about the reuse of their news and public affairs footage in political advocacy, sometimes turn to the mechanisms created by the DMCA to force the removal of online political ads that contain such footage. Yet the incorporation of brief clips of news footage into campaign ads is highly likely to be fair use and thus non-infringing under copyright law. This report, drawing on publicly reported incidents and private interviews with campaign professionals, examines the problem of broadcasters and other news organizations abusing copyright enforcement tools in ways that impair lawful online speech by political candidates. It is CDT's hope that greater public exposure of and attention to this problem will discourage such abuse in the future.

I. Introduction

At the height of the 2008 Presidential campaign, the John McCain Campaign made headlines when it sent a public letter of complaint to YouTube. The campaign complained that several of its ads had been taken down from the video-sharing site due to improper copyright claims under the Digital Millennium Copyright Act (DMCA). The campaign felt that the targeted videos, which incorporated footage from various television newscasts, were obvious cases of fair use and that the takedowns inhibited McCain's ability to communicate with voters on a vital new platform.

The issue the McCain Campaign raised about the online political reuse of broadcast footage is a serious one. The Internet's role in political campaigns is increasing dramatically with each election cycle, as is the prominence of user-generated content (UGC) and platforms such as blogs, social networks, and video-sharing sites. These UGC sites are transforming the way campaigns communicate and interact with the electorate. Advocacy organizations and individual candidates increasingly rely on UGC platforms to communicate more directly with voters.¹ In addition, such sites have given individuals powerful new platforms for expressing their opinions and participating in the political process. Therefore, if spurious DMCA takedowns targeting such online advocacy are widespread, the impact on political speech – highly protected under the First Amendment – could be significant.

¹ See, e.g., Claire Cain Miller, *How Obama's Internet Campaign Changed Politics*, N.Y. TIMES, Nov. 7, 2008, <http://bits.blogs.nytimes.com/2008/11/07/how-obamas-internet-campaign-changed-politics/>; James Wolcott, *The YouTube Election*, VANITY FAIR, June 2007, at 96, available at <http://www.vanityfair.com/ontheweb/features/2007/06/wolcott200706> (discussing the dawn of YouTube politics).

This report examines the extent to which overly aggressive copyright claims have interfered with the use of these new platforms for campaign advocacy. The information herein is based on a review of public news reports and blogs, as well as private interviews conducted with campaign personnel and counsel.² This research has led to several conclusions, discussed in detail in Part IV:

- First, this issue, far from being limited to the McCain Campaign or to one or two isolated incidents, appears to recur with considerable frequency and is well known to campaign professionals from across the political spectrum. The takedowns, too, have come from a wide variety of news organizations; the incidents we describe in Part III below involve takedown demands from CBS, Fox, MSNBC, National Public Radio (NPR), and the Christian Broadcasting Network (CBN).
- Second, what motivates these takedowns is often not copyright, but issues not within the DMCA's purview, such as concerns over reputation and false endorsement.
- Third, while disputes over the political use of broadcast footage hardly represent a new phenomenon, the online context raises significant new challenges, especially since the DMCA offers a means to precipitate immediate takedowns on a nearly automatic basis.
- Fourth, the DMCA's safeguards against abuse have not been effective in the fast-paced campaign context, where campaigns may not have the time or resources to devote to challenging takedowns.
- Finally, because repeated takedown notices could lead UGC platforms to cut off a campaign's posting privileges, abusive takedowns may have a chilling impact on the kinds of campaign videos that get produced and distributed in the first place.

II. Background: Political Ads, Fair Use, and the DMCA

Political Ads and Fair Use

As any viewer knows, campaign advocacy advertisements and videos frequently incorporate short clips from previously aired news and public affairs broadcasts. They may, for example, include footage of a candidate or candidate's opponent speaking during a televised debate, speech, or interview. Or they may include footage of a news story discussing an issue (crime, taxes, environmental challenges) that a candidate aims to highlight. Such footage can play an important role in communicating and illustrating a video's political message.

While the copyright in such footage is generally held by the broadcaster or news organization that created it, use of short clips in political advertising should in many cases be permitted under copyright's "fair use" exception. Fair use permits the use of a copyrighted work for purposes such as "criticism" or "comment," subject to a four-factor balancing test that is applied on a case-by-case, fact-specific basis.³ The first of these factors is "the purpose and character of the use": The more transformative a use is, i.e. the more it is intended to achieve a different purpose

² In researching DMCA abuse in the political campaign context, CDT spoke to both Republican and Democratic campaign personnel with knowledge of this issue. We agreed to keep these conversations confidential.

³ 17 U.S.C. § 107.

or effect from that of the original work, the more likely it is to be fair.⁴ In addition, non-commercial uses are viewed more favorably than commercial uses. The second factor is “the nature of the copyrighted work”: Highly creative works that more closely serve the central goal of copyright to promote the production of creative works are generally more protected and thus more resistant to fair-use claims.⁵ The third factor is “the amount and substantiality of the portion used in relation to the copyrighted work as a whole”: The smaller the amount of a copyrighted work used, the more likely the use is to be fair.⁶ The fourth factor is “the effect of the use upon the potential market for the copyrighted work”: Uses that supplant or undercut existing markets for copyrighted works are less likely to be found fair.⁷

The case-by-case nature of fair-use analysis makes it impossible to make categorical statements about what kinds of uses are or are not fair. In line with the strong First-Amendment protection afforded political speech, however, courts have suggested that the fair use doctrine has even wider application when the use relates to issues of public concern.⁸ Political advocacy falls squarely into that category.

The DMCA’s “Notice and Takedown” Process

The Internet presents new challenges for copyright holders. On one hand, it has given rise to countless innovative platforms that offer new opportunities to reach audiences. On the other hand, new media platforms offer new opportunities for infringement. The DMCA was intended to balance the need to promote Internet innovation with the need to enforce copyright. The basic bargain makes sense: To combat some types of online infringement, the DMCA provides rightsholders with an expedited “notice and takedown” system, while at the same time shielding Internet innovators from potentially crippling liability. The Act prescribes a procedure by which rightsholders can demand that online service providers such as web hosts and search engines remove content or links to content that the rightsholders identify as infringing.⁹ In exchange for complying with notices and quickly removing allegedly infringing material, these online service providers enjoy “safe harbor” protection from monetary damages for the infringing content. Without such a safe harbor, these intermediaries could face uncertain and potentially massive liability risk, since any finding of liability for infringing material could subject them to substantial statutory damages for each work infringed.¹⁰

The system strikes a reasonable balance, but it is not invulnerable to abuse. Content hosts have a strong incentive to comply promptly with any facially proper takedown notice they receive, because doing otherwise could jeopardize their crucial safe harbor protection. Even when a takedown notice targets non-infringing content, therefore, it is highly likely to result in the removal of that content – and hence the undue muzzling of legitimate speech.

One form of abuse of particular relevance to this report occurs when takedowns are sent to protect non-copyright interests. The DMCA’s notice-and-takedown procedure was quite

⁴ *Id.*; see also *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1164-67 (9th Cir. 2007).

⁵ See *Perfect 10*, 508 F.3d at 1167.

⁶ *Id.* at 1167-68.

⁷ *Id.* at 1168.

⁸ See *Nat’l Rifle Ass’n of America v. Handgun Control Fed’n of Ohio*, 15 F.3d 559, 562 (6th Cir. 1994) (“The scope of the fair use doctrine is wider when the use relates to issues of public concern.”).

⁹ 17 U.S.C. § 512(b)-(d).

¹⁰ 17 U.S.C. § 504(c).

purposefully crafted only to apply to instances of copyright infringement. The statute makes very clear that the point of a takedown notice is to describe an alleged instance of copyright infringement.¹¹ Accordingly, the law creates penalties for knowingly misrepresenting that material is infringing of a copyright.¹² Moreover, Congress separately addressed online service providers' liability for other legal claims in Section 230 of the Communications Act.¹³ Section 230 states that online service providers cannot be treated as the speaker or publisher of content posted by others, granting online service providers broad immunity from liability. Importantly, that immunity is *not* subject to compliance with a notice-and-takedown procedure. This does not in any way limit parties' ability to sue any party responsible for posting content in the first place, but only for copyright claims did Congress envision the notice-and-takedown system prescribed by the DMCA.

The DMCA features several safeguards to protect content posters against erroneous or abusive takedown notices. First, each takedown notice must include a statement that the complaining party has a good faith belief that the use of the material in question is not authorized by the copyright holder or by law.¹⁴ Second, the law provides for damages against any complaining party who knowingly misrepresents that material or activity is infringing.¹⁵ Third, the DMCA includes a counter-notification process, which enables users to challenge an inappropriate takedown and request that their content be returned to the site.¹⁶ When a counter-notification is filed, the content is reposted after a period of between 10 and 14 business days (i.e. between two and three weeks), unless the copyright owner files an actual lawsuit regarding the alleged infringement.¹⁷

Despite these safeguards, advocates and legal academics have documented many examples of improper takedowns and devoted considerable attention to the resulting impact on free speech.¹⁸ This report draws on that research, but focuses specifically on the issue of improper DMCA takedowns in the political and campaign context.

III. Incidents of Takedown Notices Stifling Political Speech

In the fall of 2008, John McCain's presidential campaign sent a letter to YouTube, asserting that "numerous times during the course of the campaign, our advertisements or web videos have been the subject of DMCA takedown notices regarding uses that are clearly privileged under the

¹¹ See 17 U.S.C. § 512(c)(3)(A) (describing required contents of a "notification of claimed infringement," including "identification of the copyrighted work claimed to have been infringed" and "identification of material that is claimed to be infringing").

¹² See *infra* notes 15, 76 and accompanying text (citing 17 U.S.C. § 512(f)).

¹³ 47 U.S.C. § 230.

¹⁴ 17 U.S.C. § 512(c)(3)(A)(v).

¹⁵ 17 U.S.C. § 512(f).

¹⁶ See *id.* § 512(g).

¹⁷ 17 U.S.C. § 512(g)(2)(B)-(C).

¹⁸ See, e.g., *Takedown Hall of Shame*, ELECTRONIC FRONTIER FOUNDATION, <http://www.eff.org/takedowns>; CHILLING EFFECTS CLEARINGHOUSE, www.chillingeffects.org; Wendy Seltzer, *Free Speech Unmoored in Copyright's Safe Harbor: Chilling Effects on the DMCA on the First Amendment*, 24 HARV. J.L. & TECH. (forthcoming 2010), *author's draft* at http://wendy.seltzer.org/media/seltzer_free_speech_unmoored.pdf; Jennifer M. Urban & Laura Quilter, *Efficient Processes or Chilling Effects? Takedown Notices under Section 512 of the Digital Millennium Copyright Act*, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 612 (2006).

fair use doctrine.”¹⁹ The letter did not provide specific details of individual incidents, although several have been publicly reported and are discussed below. Other campaigns may well have suffered similar incidents without drawing public attention to them, since the fast-paced nature of campaigns may leave little time for dwelling on such matters. Moreover, non-presidential campaigns would not have the high profile of the McCain campaign, making it less likely that any given incident would be reported.

Through publicly available reports and a series of interviews with campaign counsel from both major parties, however, CDT has been able to identify 12 incidents in which DMCA takedowns have been misused to silence political speech. (One particularly useful source was Ben Sheffner’s “Copyrights & Campaigns” blog.²⁰) Parties whose videos were targeted and removed include candidates, commentators, and issue advocacy groups, from both the right and the left sides of the political spectrum. Organizations that issued takedowns are varied, as well, and include Fox News, MSNBC, National Public Radio (NPR), and the Christian Broadcasting Network (CBN).

Based on available information, all the incidents discussed below appear to be straightforward cases of fair use. The uses are generally transformative: the targeted videos use footage from news broadcasts, originally intended to inform, in ads or commentary intended to argue for a specific candidate or position. As to the second factor, the footage at issue often involves factual reporting, which is generally less protected by copyright than highly creative works. With respect to the third factor, the videos typically incorporate only short segments of much longer broadcasts. Finally, it is highly unlikely that the use of the clips has any bearing whatsoever on any market for the original news broadcasts. And of course, all of these incidents involve political speech and hence issues of public concern, which weighs in favor of fair use.

2008 McCain Presidential Campaign – “Lipstick” Ad and CBS News

The McCain campaign used a short clip of CBS News anchor Katie Couric in an infamous 2008 ad based on Barack Obama’s “lipstick on a pig” comment. The ad, criticizing Obama for his remark on the campaign trail, concluded with an approximately seven-second clip of previous comments by Couric about sexism faced by then-Senator Hillary Clinton’s campaign: “One of the greatest lessons of that campaign is the continued and accepted role of sexism in American life.”²¹ The comparison was drawn to suggest that Obama had insulted Sarah Palin, and that the comment was another example of sexism in American politics. CBS News sent a DMCA takedown notice to YouTube alleging copyright infringement and the site removed the ad; the ad remained available on McCain’s website.²²

The four-factor test heavily favors a finding of fair use in this case:

¹⁹ Letter from Trevor Potter, General Counsel, McCain-Palin 2008, to Chad Hurley, CEO, YouTube, et al. (Oct. 13, 2008), available at www.publicknowledge.org/pdf/mccain-letter-20081013.pdf.

²⁰ COPYRIGHTS & CAMPAIGNS, <http://copyrightsandcampaigns.blogspot.com>.

²¹ The “Lipstick” ad can now be seen on the CampaignTVAds YouTube channel here: <http://www.youtube.com/user/campaigntvads#p/search/1/1iCXCO57Cnw>. The Couric clip was taken from the “Notebook” segment of a CBS Evening News broadcast. See Katharine Q. Seelye, *Couric on the Media and Clinton*, N.Y. TIMES, June 11, 2008, <http://thecaucus.blogs.nytimes.com/2008/06/11/couric-on-the-media-and-clinton/>.

²² Ben Smith, *CBS Takes Down McCain Webad, Suggests It’s “Misleading,”* POLITICO, Sept. 10, 2008, http://www.politico.com/blogs/bensmith/0908/CBS_takes_down_McCain_webad_suggests_its_misleading.html.

- On the first factor – the purpose and character of the use – a court would almost certainly find that the McCain campaign ad was non-commercial and transformative. The ad was clearly non-commercial: it was not designed to sell products or services, nor did it propose any kind of commercial transaction.²³ The ad was also a “transformative” use: the ad making use of the short clip of this CBS Evening News broadcast served an entirely different function – political advocacy – than the original work.²⁴
- The second factor – the nature of the copyrighted work – would also favor the McCain campaign. Fact-based works like the news broadcast from which the campaign pulled the clip typically receive a lower level of protection than highly creative works.²⁵
- The third factor – the amount and substantiality of the work used – would strongly weigh in favor of fair use since the seven-second clip could not reasonably be considered a significant portion, or the “heart” of the twenty-two-minute news broadcast in question.²⁶
- On the fourth factor – the effect on the potential market or value of the copyrighted work – the use of seven seconds of footage from a news broadcast, well after airing, certainly had no conceivable effect on the market for that broadcast. The initial screening of the broadcast is the primary commercial market for each day’s CBS Evening News. Use of the clip did not deprive the copyright owner of income or undermine a new or potential market for licensing revenues. Further, the mere use of a short clip as a basis for political advocacy would not diminish the audience or fulfill demand for any re-airing of the original program.

Given this fair use analysis, McCain’s “Lipstick” ad did not infringe the CBS copyright and should not have been targeted by a takedown demand. Indeed, CBS’s own statements regarding the takedown confirm that the network’s motivations had little to do with copyright, and more to do with maintaining an air of objectivity and impartiality: “CBS News does not endorse any candidate in the Presidential race. Any use of CBS personnel in political advertising that suggests the contrary is misleading.”²⁷ As discussed above, however, this is not a concern that copyright law and the DMCA were created to advance.

²³ Courts have rejected the argument that political speech is commercial because of its connection to fundraising. See *American Family Life Ins. Co. v. Hagan*, 266 F. Supp. 2d 682, 697 (N.D. Ohio 2002) (use of trademark in a political campaign ad that included “solicitation of contributions” was “properly classified not as a commercial transaction at all, but completely noncommercial, political speech”); *MasterCard Int’l Inc. v. Nader 2000 Primary Comm., Inc.*, No. 00 Civ. 6068, 2004 U.S. Dist. LEXIS 3644, at *23-24 (S.D.N.Y. Mar. 8, 2004) (even if a candidate’s ad resulted in increased contributions, the ad would still not be “commercial;” “If so . . . all political campaign speech would also be ‘commercial speech’ since all political candidates collect contributions”).

²⁴ See *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1164-66 (9th Cir. 2007) (finding Google’s use of thumbnail images to be highly transformative).

²⁵ See *Feist Publ’ns, Inc. v. Rural Tel. Service Co., Inc.*, 499 U.S. 340, 349 (1991) (copyright protection for fact-based works is thin).

²⁶ See *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 564-66 (1985) (discussing the relevance of the “heart” of the work to fair use analysis). While a political campaign is likely to use footage of what it finds most interesting to them in getting candidate X elected, such a clip does not then necessarily become the “heart” of the original copyrighted work. In a minority of cases it may be possible to persuasively argue that a certain clip used in a campaign ad or video is the “heart” of the copyrighted work, but it is still likely that this third factor would be overcome by the other statutory factors.

²⁷ Ben Smith, *supra* note 22.

McCain Campaign – “Nothing New” Ad and Fox News

Another McCain campaign video subject to a spurious DMCA takedown during the 2008 presidential election was the “Nothing New” ad. The ad included an approximately seven-second audio clip of the voice of Fox News correspondent Major Garrett from a *Special Report* broadcast in which he noted Obama’s refusal to take a stance on the bailout of insurance giant AIG.²⁸ No video image of the footage from the news broadcast was displayed in the ad. Like CBS News, Fox News sent a DMCA takedown notice to YouTube alleging copyright infringement and the site took down the video.²⁹

As in the case of CBS News’s claim, the complaint appears to be based not on any legitimate copyright concern, but on the network’s interest in protecting its reputation and that of its newscaster. This is apparent from a telling cease-and-desist letter that Fox News sent directly to the campaign in response to the same ad. The network argued: “As Mr. Garrett is a non-partisan news correspondent covering the Obama campaign for Fox News, it is highly inappropriate, among other things, of your campaign to use him in your ad.”³⁰ If the DMCA takedown demand sent to YouTube was indeed based on a “good faith belief” that use of the audio clip from the news broadcast was infringing, as is required by statute, then why did the cease-and-desist letter not make the same claim? It appears that Fox was in fact using the DMCA’s expedited takedown procedure to advance unrelated interests.

And again, any claim of copyright infringement in this case was specious at best. The use of the short audio clip from *Special Report* was a paradigmatic example of fair use. All four statutory factors strongly weighed in the McCain campaign’s favor. As in the case of “Lipstick,” the use was non-commercial and transformative. Again the copyrighted news broadcast at issue here was factual, not fictional. Again the seven-second clip was extremely brief, not the “heart” of the work; moreover, the McCain campaign limited its use of the copyrighted work to the audio only. And again, like in “Lipstick,” the use of the clip had no conceivable effect on the market for the original work. Nevertheless, Fox News was unhappy with the use of Garrett’s words in a political ad, and sent a takedown demand to squelch the video.

McCain Campaign – “Folks” Ad and Christian Broadcasting Network

In another example, the McCain campaign’s “Folks” ad included very brief footage from a Christian Broadcasting Network (CBN) broadcast of an interview conducted with Obama. The ad attacked Obama’s response to criticism of his voting record. In the clip, Obama says, “I hate to say that people are lying, but here’s a situation where folks are lying.” Only Obama can be seen in the clip. The ad also included brief footage of a comment (“They’re not telling the truth”)

²⁸ The “Nothing New” ad can now be seen on Political Realm’s YouTube channel here: <http://www.youtube.com/user/PoliticalRealm#p/search/0/4VzrKK1kzpY>.

²⁹ See Jonathan Martin, *McCain Camp Rebuffs Fox Request*, POLITICO, September 19, 2008, http://www.politico.com/blogs/jonathanmartin/0908/McCain_camp_rebuffs_Fox_request.html?showall.

³⁰ *Id.*; see also Michael Calderone, *Fox Demands McCain Camp Remove Garrett from Ad*, POLITICO, September 19, 2008, http://www.politico.com/blogs/michaelcalderone/0908/Fox_demands_McCain_camp_remove_Garrett_from_ad.html?showall (providing a copy of the Fox News cease-and-desist letter). The McCain campaign quickly rejected Fox News’ demand that they remove the voice of Garrett from the ad: “We respectfully disagree with your suggestion that the “Nothing New” ad somehow portrays Mr. Garrett (who is not even identified) as anything other than a nonpartisan news correspondent covering the campaign.”

that Obama had made during an interview with MSNBC's Keith Olbermann, although Olbermann is barely visible in the approximately 4-second clip used.³¹

CBN sent a takedown notice alleging copyright infringement to YouTube, and in this case the McCain campaign responded with a counter-notice. CBN did not then file a lawsuit against the campaign within the 10-14 day DMCA waiting period, so YouTube reposted the video.³² It is unclear what response, if any, MSNBC had to the release of the "Folks" ad. What is clear is that the CBN takedown was improper because it ignored yet another obvious case of fair use. Once again, the campaign used a very short clip of a factual work in a transformative, non-commercial video that had no effect on the market for the original broadcast.

This example is particularly troubling because the cable news broadcast involved footage of a presidential candidate himself, not a news correspondent or an anchor. News networks, concerned about protecting their own credibility, may well prefer to appear above the political fray by avoiding having clips featuring their personnel appear in campaign ads – although as mentioned above, this is not a *copyright* interest within the purview of the DMCA. But for a network to assert a copyright interest solely in the words of a candidate seems especially misguided. The ability to replay a particular candidate's public statements for purposes of reacting to or commenting on them is a crucial part of the political process that is central to First Amendment rights.

McCain Campaign – "ACORN" Video and Fox News

Fox News also sent an improperly motivated DMCA takedown demand to YouTube in response to the McCain campaign's "ACORN" video. This minute-and-a-half web video included approximately six seconds of footage featuring a Fox News graphic depicting the states in which voter fraud connected to the ACORN advocacy organization had allegedly occurred. The goal of the video was to connect Obama to the controversial group. The McCain campaign sent a counter-notice in this case as well and YouTube eventually reposted the video.³³ For reasons similar to those discussed in the cases above, the four statutory fair use factors overwhelmingly weighed in the McCain campaign's favor here.

³¹ The "Folks" ad can be seen on John McCain's YouTube channel here: <http://www.youtube.com/user/JohnMcCaindotcom#p/u/38/wBsE8GbLM8U>. Amy Harder, *Armed with National Journal's Ranking, McCain Attacks Obama*, NATIONALJOURNAL.COM, October 8, 2008, <http://adspotlight.nationaljournal.com/2008/10/armed-with-nati.php>. See also Amy Harder, *The Targeted Videos: McCain's 'Lipstick' Video and a Fake Newscast from the Obama Campaign Sparked Claims of Copyright Infringement*, NATIONALJOURNAL.COM, November 12, 2008, http://www.nationaljournal.com/njonline/no_20081112_2601.php.

³² See Ben Sheffner, *Fox Chicago O&O sends takedowns to YouTube over liberal web site's videos; were its uses fair?*, COPYRIGHTS & CAMPAIGNS BLOG, January 7, 2009, <http://copyrightsandcampaigns.blogspot.com/2009/01/fox-chicago-o-sends-takedowns-to.html> (discussing the McCain campaign's "Folks" ad).

³³ *Id.* (discussing the McCain campaign's "Acorn" Web video); see also Amy Harder, *The Targeted Videos: McCain's 'Lipstick' Video and a Fake Newscast from the Obama Campaign Sparked Claims of Copyright Infringement*, NATIONALJOURNAL.COM, November 12, 2008, http://www.nationaljournal.com/njonline/no_20081112_2601.php. The "ACORN" Web video can be seen on John McCain's YouTube channel here: <http://www.youtube.com/user/JohnMcCaindotcom#p/u/34/0dInt9maBJA>.

2008 Obama Presidential Campaign – “Bad News” Ad and NBC News

The 2008 Obama campaign was also the target of at least one publicly documented overreaching copyright claim. The campaign’s “Bad News” web video stitched together footage of NBC News anchors Tom Brokaw and Keith Olbermann into a faux newscast declaring McCain the narrow winner of the presidential race. The ad concluded with a screen flashing, “It doesn’t have to be that way,” and then urged Obama supporters to register to vote and go to the campaign’s VoteForChange.com site.³⁴

NBC sent a DMCA takedown notice to YouTube alleging copyright infringement and the site removed the campaign ad.³⁵ In addition, NBC sent a cease-and-desist letter directly to the Obama campaign demanding it stop using the ad. The campaign refused to back down and instead attached a disclaimer to the version of the ad it hosted itself that read: “NBC and MSNBC did not cooperate in the making of this video.” Nevertheless, NBC continued to voice displeasure over the modified ad.³⁶

Although we have been unable to obtain a copy of NBC’s cease-and-desist letter, the disclaimer added by the Obama campaign seemed to respond to what would have been more properly understood as a Lanham Act consumer confusion or false endorsement issue, not a viable copyright claim. In either case, the use of the DMCA’s takedown procedure to remedy such unrelated issues would be improper. Other legal issues notwithstanding, any *copyright* questions about the ad would be resolved by a fair use analysis.

One potentially complicating factor arises from the fact that the “Bad News” video was almost entirely composed from NBC footage (approximately 35 out of 40 seconds), but this actually is a red herring. In a fair use analysis, what matters is the percentage of the copyright owner’s work that is taken, not the percentage of the allegedly infringing work that consists of borrowed material.³⁷ Thus, the analysis in this case would focus on the fact that the Obama campaign used a total of only 35 seconds from multiple NBC broadcasts that were at least 22 minutes long.

Seattle Blogger – Political Commentary and TVW

There have been a number of incidents involving TVW, a Washington-state public affairs TV network (similar to C-SPAN). In 2008, Seattle blogger David Goldstein embedded a YouTube clip of Congressman Dave Reichert from a TVW-broadcast event in a blog post criticizing Reichert’s stance on Medicare issues. Although the post incorporated just a 37-second clip from a broadcast of over an hour, TVW sent both a DMCA takedown to YouTube and a cease-and-desist letter to Goldstein.³⁸ Ostensibly to prevent its footage from being taken out of

³⁴ The “Nothing New” Web video can now be seen on the barackobama4prez2008 YouTube channel here: <http://www.youtube.com/user/barackobama4prez2008#p/search/0/XhYxt5F4He8>.

³⁵ See Amy Harder, *supra* note 33; Steve McClellan, *YouTube Pulls Obama Spot*, ADWEEK, October 1, 2008, http://www.adweek.com/aw/content_display/news/agency/e3i226441afd9c0206fb4262e8f1dec94f7.

³⁶ *Id.*

³⁷ See 17 U.S.C. § 107(3) (critical question is “the amount and substantiality of the portion used *in relation to the copyrighted work as a whole*”) (emphasis added); Peter Letterese and Asso., Inc. v. World Inst. of Scientology Enter., 533 F.3d 1287, 1314-15 (11th Cir. 2008) (“[T]he amount and substantiality of the portion used is measured with respect to the ‘copyrighted work as a whole,’ not to the putatively infringing work.”).

³⁸ David Goldstein (Goldy), *Will TVW sue HA over fair use?*, HA SEATTLE BLOG, June 7, 2008, <http://horsesass.org/?p=4988>.

context, TVW expressly forbids political reuse in its website's terms of service.³⁹ Goldstein, though, noted that other clips had not been targeted, and ascribed a political motive to the takedown, citing TVW's president's ties to the Republican party.⁴⁰

Goldstein discussed the problem with TVW, and the network developed a potential solution: TVW now offers a tool for people to embed clips in their full original context.⁴¹ The tool embeds the full program, allowing users to see context if desired, but automatically skips to the desired clip.⁴²

While it is encouraging that TVW developed this tool to allow the commentary it had previously thwarted with spurious takedowns, it appears the network has yet to fully warm to fair uses of its content. The network has continued to go after other reuses that do not simply make use of its embedding tool. Goldstein, for example, ran into exactly the same trouble when he included TVW footage in criticism of a local conservative candidate for county executive, Susan Hutchison. This time, he did not use TVW's tool to show an excerpt, but rather incorporated TVW footage into his own video.⁴³ Goldstein describes his use:

"My 2-minute-and-16-second video includes a total of 26 seconds of copyrighted material excerpted from over 1 hour and 40 minutes of TVW streaming video. The clips are used to fact check and contrast Susan Hutchison's claims during a KCTS debate with her statements during a Washington Policy Center annual dinner, a journalistic critique that simply would not be possible without the use of these clips."⁴⁴

It is worth noting in this case that TVW did not just send the takedown notice to YouTube, but to other video hosting sites where Goldstein attempted to re-post his video.⁴⁵ Still, the video appears to be yet another straightforward example of fair use. Goldstein's choice not to use TVW's embedding tool should not significantly undermine his fair use claim, especially since that tool did not give Goldstein a means to incorporate TVW footage into his own video.

2009 Dow Constantine Campaign and TVW

Hutchison's opponent in the same election, Dow Constantine, also had an ad taken down from YouTube for incorporating TVW footage.⁴⁶ The ad used footage of Hutchison praising a Washington Policy Council (WPC) publication at an event sponsored by WPC, pausing to paraphrase what the ad called "extreme" policies included in the book.⁴⁷ TVW again sent both a DMCA takedown notice to YouTube and a cease-and-desist letter to the Constantine campaign.

³⁹ *Copyright and Terms of Use*, TVW – WASHINGTON STATE PUBLIC AFFAIRS TV NETWORK <http://www.tvw.org/about/copyright.cfm?bhcp=1>.

⁴⁰ David Goldstein, *supra* note 38.

⁴¹ David Goldstein (Goldy), *TVW update*, HA SEATTLE BLOG, June 10, 2008, <http://horsesass.org/?p=4999>.

⁴² *See, e.g.*, David Goldstein (Goldy), *Reichert's flip-flops a "common thing"*, HA SEATTLE BLOG, June 30, 2008 <http://horsesass.org/?p=5105>.

⁴³ David Goldstein (Goldy), *Suzie hearts Huckabee (and lies about it)*, HA SEATTLE BLOG, October 26, 2009, <http://horsesass.org/?p=21466>.

⁴⁴ David Goldstein (Goldy), *Screw you, TVW*, HA SEATTLE BLOG, October 29, 2009, <http://horsesass.org/?p=21598>. The video is still available through another video hosting service.

⁴⁵ *Id.*

⁴⁶ Erica C. Barnett, *TVW Complains About Constantine's Use of its Footage*, PUBLICOLA, October 30, 2009. <http://www.publicola.net/2009/10/30/tvw-complains-about-constantines-use-of-its-footage/>.

⁴⁷ Dow Constantine for King County, "Book" ad, available at <http://vimeo.com/7333450>.

In addition, the network released a statement condemning the ad and claiming that the use of TVW programming “for political ads both violate[d] [the] public trust and put[] at tremendous risk the public’s access to [public policy] events.”⁴⁸ The campaign pushed back and did not pull the ad from TV stations, but YouTube complied with the takedown notice and the ad was removed from the site.

In each of the cases described above, TVW expressed an interest in maintaining its reputation for objective factual coverage, worrying that clips could be taken out of context to imply some endorsement or criticism on the part of the network. While these seem to be sincere concerns, as evidenced by the network’s development of an embedding tool for online commentators, these are not concerns that copyright is intended to protect, nor do they trump the fair use of copyrighted material.

Stand for Marriage Maine – “Give me a Break” Ad and National Public Radio

The problem of DMCA takedown requests being used to quash political speech also extends to political issue campaigns, such as those for or against voter referendum initiatives. For example, National Public Radio (NPR) targeted a political advocacy ad by the Stand for Marriage Maine group two weeks before the 2009 vote that eventually withdrew Maine’s same-sex marriage law. In its 30-second “Give me a Break” ad, Stand for Marriage Maine used an approximately 20-second audio clip from an *All Things Considered* interview to criticize same-sex marriage and suggest that the legalization of same-sex marriage would result in teaching school children about gay sex.⁴⁹ NPR sent takedown demands to YouTube and other sites, along with a cease-and-desist letter to both Stand for Marriage Maine and the agency that produced the ad.⁵⁰

NPR’s cease-and-desist letter erroneously alleged copyright infringement essentially because the “ad is based almost entirely on NPR’s content.”⁵¹ As noted above, such a claim misrepresents the third statutory fair use factor, which concerns the percentage of the copyrighted work used, not the percentage of the allegedly infringing work that is comprised of the copyrighted work.⁵² Moreover, NPR’s motivation had nothing to do with copyright. The

⁴⁸ Press Release, TVW, Constantine Campaign Violates TVW Policy (October 29, 2009) <http://tvw.org/modules/articles/TVWStatementOnConstantineAd.pdf>.

⁴⁹ Ben Sheffner, *NPR makes copyright claim over anti-same-sex-marriage ad; another political fair use fight*, COPYRIGHTS & CAMPAIGNS BLOG, Oct. 21, 2009, <http://copyrightsandcampaigns.blogspot.com/2009/10/npr-makes-copyright-claim-over-anti.html>. The video in question has been reposted here: <http://www.youtube.com/watch?v=G1YodpFMLU4>.

⁵⁰ See *id.*; Matt Wickenheiser, *NPR Wants Same-Sex Marriage Ad Pulled*, PORTLAND PRESS HERALD, Oct. 20, 2009, <http://updates.pressherald.maintoday.com/updates/npr-wants-same-sex-marriage-ad-pulled>. The DMCA takedown in this case even made the Electric Frontier Foundation’s “Takedown Hall of Shame,” a site recently designed to publicly shame people who abuse the DMCA to squash free speech rights. See, *Takedown Hall of Shame: NPR Forces Takedown of Political Ad Weeks Before Critical Vote*, ELECTRONIC FRONTIER FOUNDATION <http://www.eff.org/takedowns/npr-forces-takedown-political-ad-weeks-critical-vo>

⁵¹ Letter from Denise Leary, Deputy General Counsel for Programming, National Public Radio, to Marc R. Mutty, Chairman Executive Committee, Stand for Marriage Maine (Oct. 20, 2009) <http://www.scribd.com/doc/21448785/NPR-C-D-Letter-Re-SFMM>.

⁵² See Ben Sheffner, *supra* note 49 (“The fact that the NPR content is heard through about 2/3 of the ad is irrelevant to the fair use analysis. What matters is that [Stand for Marriage Maine] used only 20 seconds of an NPR report that was [nearly six minutes and fifty-six seconds long]”). Sheffner’s post also describes Stand For Marriage Maine’s strong case for fair use on the other factors.

letter explicitly cites the network's interest in maintaining its "valuable reputation as a trusted and unbiased source of news," which is not a copyright interest.⁵³ Not surprisingly, Stand for Marriage Maine flatly rejected NPR's copyright claims. The group's attorney, Barry Bostrom, wrote:

No permission was required and no permission was sought from National Public Radio for use of a very short segment of the NPR news story from All Things Considered . . . The PAC's use is not a commercial use, but as an issue advocacy advertisement it is protected by the First Amendment to the U.S. Constitution and the fair use doctrine of the Copyright Act.⁵⁴

Nonetheless, NPR's DMCA notice to YouTube did result in the advertisement's removal from that site, once again silencing lawful political speech.

National Organization for Marriage – "No Offense" Ad and Perez Hilton

The National Organization for Marriage's (NOM) "No Offense" ad, another issue advocacy campaign video, was also the target of an improperly motivated DMCA takedown demand. The ad, designed to highlight efforts of same-sex marriage advocates to silence and discredit opponents, featured celebrity blogger Perez Hilton (Mario Lavandeira) and Miss California Carrie Prejean. The one-minute video incorporated about three seconds from Hilton's video blog in which he insults Prejean for a Miss USA Pageant response in which she expressed opposition to same-sex marriage. The video also incorporated brief footage (approximately fourteen seconds) of Prejean making the statement during the pageant.⁵⁵ Both Hilton and the Miss Universe Organization sent NOM meritless cease-and-desist letters for using the copyrighted clips.⁵⁶ In addition, Hilton sent a DMCA takedown notice to YouTube.⁵⁷

NOM immediately sent a letter back to Hilton's attorneys and a counter-notification to YouTube.⁵⁸ In addition, NOM's attorney's sent a second letter to YouTube, demanding that the

⁵³ Leary letter, *supra* note 51.

⁵⁴ Letter from Barry A. Bostrom, Legal Counsel, Stand for Marriage Maine, to Denise Leary, Deputy General Counsel, National Public Radio (Oct. 20, 2009) <http://www.wmtw.com/download/2009/1021/21360911.pdf>.

⁵⁵ *Takedown Hall of Shame: Blogger and Pageant Operators Try to Block Advocacy Non-Profit Ad*, ELECTRONIC FRONTIER FOUNDATION, <http://www.eff.org/takedowns/blogger-and-pageant-operators-try-block-advocacy-n>. The video is available at: http://www.youtube.com/watch?v=a1DWVTJ_gBo.

⁵⁶ See Ben Sheffner, *National Organization for Marriage claims fair use on Perez Hilton clip; won't cease broadcast of TV ad*, COPYRIGHTS & CAMPAIGNS BLOG, May 3, 2009, <http://copyrightsandcampaigns.blogspot.com/2009/05/national-organization-for-marriage.html> (providing a copy of the letter NOM's attorney sent rejecting the demand in Hilton's cease-and-desist letter); Ben Sheffner, *Miss Universe pageant joins the copyright fun; piles on National Organization for Marriage over ad*, COPYRIGHTS & CAMPAIGNS BLOG, May 5, 2009, <http://copyrightsandcampaigns.blogspot.com/2009/05/miss-universe-pageant-joins-copyright.html> (describing the Miss Universe Organization's bogus copyright claim against NOM).

⁵⁷ Ben Sheffner, *Perez Hilton, copyright cop? Blogger issues takedown notice over anti-gay marriage ad*, COPYRIGHTS & CAMPAIGNS BLOG, May 1, 2009, <http://copyrightsandcampaigns.blogspot.com/2009/05/perez-hilton-copyright-cop-blogger.html>; see also Ben Sheffner, *Miss Universe pageant joins the copyright fun; piles on National Organization for Marriage over ad*, COPYRIGHTS & CAMPAIGNS BLOG, May 5, 2009, <http://copyrightsandcampaigns.blogspot.com/2009/05/miss-universe-pageant-joins-copyright.html> ("The Miss Universe organization . . . [or Perez Hilton] may not like its footage to be used for partisan purposes, but the fair use doctrine permits such uses – whether they like it or not.").

⁵⁸ Ben Sheffner, *National Organization for Marriage*, *supra* note 56.

video be reinstated immediately.⁵⁹ In a departure from the pattern seen in the other incidents described in this report, YouTube agreed and reposted the video *without* waiting the two weeks after NOM's counter-notice necessary to maintain its statutory safe harbor, citing the strength of the fair use argument.⁶⁰ While in this case YouTube mitigated the damage of the takedown by reposting the video expeditiously, such initiative is a rare exception to standard DMCA procedures.

Democratic National Committee – “Back Wax” and Fox News

The 2010 Senate primary in Florida brought yet another example. In an interview with Fox News, Republican candidate Charlie Crist made a wisecrack about his opponent Marco Rubio, suggesting that a large spa bill could have been for a “back wax.” The Democratic National Committee used the footage in a web ad criticizing the level of debate in the Republican race.⁶¹ Fox News sent YouTube a takedown notice, and the video was removed.

The DNC responded with a strongly worded letter to Fox, demanding that the network stop issuing similar takedown notices.⁶² The letter stressed that the goal of the video had been to criticize the Republican race, and made a case for fair use. While the fair use argument was once again strong, it seems that the DNC did not submit a counter-notice to YouTube, as the video has not been put back up on the site.⁶³

2010 Carnahan Senate Campaign – “Clean up the House” and Fox News

Most recently, in September 2010, Fox News simultaneously issued a takedown notice to YouTube and filed an infringement lawsuit against the Robin Carnahan Senate campaign.⁶⁴ The Missouri Democrat's campaign created an ad using an edited 25-second clip of Fox anchor Chris Wallace posing a tough question to Carnahan's opponent. The ad was aired on television and uploaded to YouTube. The lawsuit alleges copyright infringement and two claims of infringement on Wallace's personal right of publicity.⁶⁵

Fox News's complaint reveals that the network's and Wallace's intent with this lawsuit – and likely with the accompanying DMCA takedown – is to protect their reputations. The complaint refers to the ad as a “smear ad” that makes “it appear – falsely – that FNC and Christopher Wallace . . . are endorsing Robin Carnahan's campaign,” and goes to great lengths to establish

⁵⁹ Ben Sheffner, *YouTube restores National Organization for Marriage video early, citing fair use*, COPYRIGHTS & CAMPAIGNS BLOG, May 7, 2009, <http://copyrightsandcampaigns.blogspot.com/2009/05/youtube-restores-national-organization.html>.

⁶⁰ *Id.*; see also Nate Anderson, *YouTube Sails Out of Safe Harbor to Reinstate Marriage Video*, ARS TECHNICA, May 14, 2009, <http://arstechnica.com/tech-policy/news/2009/05/youtube-sails-out-of-safe-harbor-to-reinstate-marriage-video.ars>. (According to Sheffner, YouTube wrote: “We have reviewed the content in question and determined that this appears to be an example of fair use under Section 107 of the Copyright Act . . . This content has been restored and your account will not be penalized.”)

⁶¹ The video is still available at http://s3.amazonaws.com/apache.3cdn.net/85b95d150a595e7443_mlbprw9i4.mov.

⁶² Ben Smith, *DNC writes Fox, asserting fair use*, POLITICO, Mar. 12, 2010, http://www.politico.com/blogs/bensmith/0310/DNC_writes_Fox_asserting_fair_use.html

⁶³ The Buzz, *DNC jumps on back wax-gate*, TAMPABAY.COM, Mar. 10, 2010, <http://blogs.tampabay.com/buzz/2010/03/dnc-jumps-on-back-waxgate.html>

⁶⁴ Josh Gerstein, *Fox News sues Carnahan over ad*, POLITICO “UNDER THE RADAR” BLOG, Sept. 16, 2010, http://www.politico.com/blogs/joshgerstein/0910/Fox_News_sues_Carnahan_over_ad.html.

⁶⁵ The complaint is available at: <http://reporter.blogs.com/files/mowd-10903407673.pdf>.

Wallace’s credibility and record as a respected journalist. But as explained above, these are not copyright interests intended to be enforced by the DMCA. Wallace’s reputation notwithstanding, any *copyright* claim in the footage used will likely be overcome by a fair use defense. Fox’s complaint does attempt to tip the fair-use balance in its favor by stressing the proximity of the ad on Carnahan’s website to the “donate today” button, but as seen above, courts have rejected this very argument in relation to political campaigns.⁶⁶

IV. Analysis: Motivations and Impact

The examples discussed above, together with CDT’s interviews with campaign professionals from both major parties, lead to several conclusions.

First, while the McCain Campaign first drew attention to the issue of DMCA takedown notices improperly targeting non-infringing political ads, there is no reason to believe the McCain Campaign’s experience in this area was unique. There are multiple other publicly documented examples, and many campaign personnel we spoke with were aware of the issue and viewed it as a real problem.

Second, the motivations behind news networks’ takedown demands appear to have little to do with the copyrights the DMCA was created to help enforce. The networks, often by their own admission, seem to be taking advantage of the DMCA’s notice-and-takedown system as a blunt tool to restrict use of their works in political contexts. The interests they are seeking to protect appear to concern their integrity, reputation, or false association, rather than exploitation, market substitution or incentive destruction.⁶⁷ These are trademark-type interests that may not even be legally cognizable.⁶⁸ In any event, enforcing such interests using the DMCA could significantly inhibit legitimate editorial reporting in core political speech.

CDT’s interviews with campaign counsel support the conclusion that these types of takedown notices are motivated neither by true copyright concerns nor by political viewpoint or bias. Campaigns believe networks are not singling out certain groups with DMCA takedown demands for partisan purposes, but rather appear to be concerned about being perceived as partisan in ads or videos (i.e., reputation, false endorsement). That is, some broadcasters want to protect their brand as an unbiased source of news, and misuse notice-and-takedown to that end. In other cases, broadcasters may act to protect their anchors and reporters, either on their own initiative or because individual anchors complain. Networks and anchors have a strong interest in appearing unbiased, and worry that damage to their reputation may result in difficulty getting interviews or otherwise reporting the news. One interviewee cited a non-DMCA example in which NBC News had been agreeable about the use of candidate footage, but balked at the idea of including footage in which an anchor appeared.

This apparent motivation reinforces the importance of fair use in this context. If campaigns were to ask permission to use broadcast footage, in many cases they would be turned down. Nor

⁶⁶ See *supra* note 23.

⁶⁷ See Laura Heymann, *The Trademark/Copyright Divide*, 60 SMU L. REV. 55, 57-58 (2007) (discussing how content owners are using copyright to reach beyond its core purpose and, as a result, stifling speech).

⁶⁸ *Id.* at 58-59 (“a right of attribution (or, relatedly, a right to a disclaimer of nonattribution) has never had more than a toehold in U.S. intellectual property law. And whatever such rights federal courts had been willing to find in the Lanham Act have now largely been eviscerated following the United States Supreme Court’s 2003 decision in *Dastar Corp. v. Twentieth Century Fox Film Corp.*”).

could they resolve the issue by agreeing to pay a modest license fee; the networks' objections have nothing to do with wanting to exploit their copyrights for additional revenues. So campaigns looking to engage in speech that uses news and public affairs footage *need* to rely on fair use.

Third, there is nothing novel about news networks objecting to the use of their footage in political ads – but the new online context offers a unique ability to secure immediate removal on demand and with little, if any, resistance. In traditional media, it is common for news organizations to complain when their footage is used. For example, in 2006, TVW, the Washington-state public affairs network discussed above, demanded that the Democratic Congressional Campaign Committee (DCCC) stop airing a TV ad that used a very short clip of Congressman Dave Reichert at a TVW-broadcast event. Reichert had discussed his relationship to Republican leadership, and the DCCC used the clip to criticize his association with an unpopular administration, calling him “just another vote for Bush’s agenda.”⁶⁹ As it would do again in the 2008 examples discussed above, TVW argued that using clips for political advocacy violated the terms under which the network sold tapes of its programs, stressing its public service role and the importance of its objectivity.⁷⁰

In another more recent example, Fox News similarly complained to Republican candidates in the 2008 Presidential primary for using footage from a Fox-sponsored debate in their own web ads (but did not, it seems, send DMCA notices). It is unknown whether the demands centered on copyright or another legal issue (some suggest that the candidates had previously agreed not to use the footage). Regardless of the reasoning, the Mitt Romney campaign publicly refused to comply, citing the important political purpose of the use and the shortness of the clip used – points that echo typical fair use arguments.⁷¹

There is a key difference between incidents like these and the DMCA examples described in the previous section. When a campaign receives a cease-and-desist letter, it can evaluate the strength of its legal position and determine whether it should pull the ad. The Romney campaign, like some of the campaigns in the earlier examples, chose to stand its ground. By contrast, when a takedown demand is issued against an online user-generated content platform like YouTube, the ad comes down promptly and virtually automatically, for a minimum of two weeks. Online ads can be taken down virtually at will because the DMCA provides intermediaries strong incentives not to second-guess takedown requests.⁷²

⁶⁹ David Postman, *New Demo ad against Reichert needs to come down, says TVW*, *Seattle Times*, POSTMAN ON POLITICS BLOG, Oct. 18, 2006, http://blog.seattletimes.nwsourc.com/davidpostman/2006/10/new_demo_ad_against_reichert_needs_to_come_down_says_tvw.html.

⁷⁰ TVW, *supra* note 39.

⁷¹ Greg Sargent, *Romney Defies Fox News' Ban On Use Of Its Debate Footage*, TPM ELECTION CENTRAL BLOG, Nov. 2, 2007, http://tpmelectioncentral.talkingpointsmemo.com/2007/11/romney_defies_fox_news_ban_on_use_of_its_debate_footage.php. We have been unable to obtain a copy of either letter.

⁷² This is true for a wide variety of online intermediaries, not just video hosting services like YouTube. While the examples discussed here primarily center around YouTube (likely due to the high profile of the site), the DMCA's notice-and-takedown procedure applies to all content hosts wishing to avail themselves of the safe harbor, including social networks, blogs, and general-purpose webhosts that provide connectivity and storage space for stand-alone websites. It is equally possible for a spurious takedown notice to target a candidate's Facebook page, for example, or the company that hosts a candidate's own website.

This incentive is evident in the McCain Campaign's 2008 exchange of letters with YouTube. The campaign's initial letter urged the site to carefully review takedown notices aimed at videos posted by political campaigns and candidates and to reject notices that ignore obvious cases of fair use. YouTube's response acknowledged the importance of mitigating abuse of the DMCA takedown process, but argued that a site like 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" and, as a result, cannot afford to ignore the takedown requests and risk jeopardizing its safe harbor status.⁷³

It is possible, as in the incident involving the National Organization for Marriage, for a content host to forgo the safe harbor and immediately repost material it deems to be non-infringing. More courage on the part of content hosts to resist spurious takedowns would mitigate the impact of unwarranted takedown notices on non-infringing speech. Indeed, the Electronic Frontier Foundation called on YouTube to stand up to unwarranted DMCA notices in response to the incidents involving the 2008 McCain campaign.⁷⁴ Still, given the large statutory damages available under copyright law and the difficulty of stating with certainty what constitutes fair use, it is not surprising that corporate general counsels would be reluctant to risk their eligibility for the DMCA safe harbor by making independent fair-use judgments about the videos targeted by takedown notices. Moreover, it is not clear how evaluating content for valid claims of infringement would scale. An important feature of the DMCA is that it enables UGC sites and other content hosts to offer their services without the need to exercise editorial discretion, which takes time and would dramatically reduce the rate at which new content could be hosted and the total volume of material hosted.⁷⁵

In short, while overaggressive copyright claims have long been made directly against campaigns and broadcast media in the form of traditional cease-and-desist letters, the DMCA takedown process results in immediate removal, no questions asked. Content hosts have little incentive to consider the merits of any takedown request; their principal interest is in complying with the notice to keep their safe harbor. Campaigns cannot simply reject inappropriate takedown demands in the same way they can ignore or contest cease-and-desist demands.

Fourth, the DMCA's safeguards against inappropriate takedown demands have not proven effective in the campaign context. The counter-notification process does enable posters to challenge an inappropriate takedown demand, but political campaigns are often unwilling or unable to redirect limited resources toward pushing back against takedown demands. The process simply demands time and money that are better spent on actually campaigning. Moreover, a 10-business-day wait to get a video put back online makes filing a counter-notice even less worth the effort given the fast pace of political campaigns. In a political campaign, 10 business days can be a lifetime, and the removal of important and timely non-infringing campaign videos for such a period can reduce their effectiveness and potentially impact an election. In other words, the damage is often done by the time a video can be put back online.

⁷³ Letter from Zahavah Levine, Chief Counsel, YouTube, to Trevor Potter, General Counsel, McCain-Palin 2008 (Oct. 14, 2008), <http://www.eff.org/files/08-10-14YouTube%20Response%20to%20Sen.%20McCain.pdf>. Under 17 U.S.C. § 512(c), content hosts can be subject to liability if they fail to respond to properly formed takedown notices.

⁷⁴ See Letter from Fred von Lohmann, Senior Intellectual Property Attorney, Electronic Frontier Foundation, et. al. to Chad Hurley, CEO, YouTube (Oct. 20, 2008), http://www.eff.org/files/filenode/ip_freespeech/letter-to+YouTube.pdf.

⁷⁵ Recent estimates suggest that users of the site upload a total of 24 hours of video *every minute*. See *YouTube Fact Sheet*, YOUTUBE, http://www.youtube.com/t/fact_sheet.

The DMCA's penalties for knowingly misrepresenting that material is infringing appear to have only limited impact as well.⁷⁶ At least one court has held that rightsholders must at least consider the possibility of fair use for a takedown notice to be in good faith.⁷⁷ Nonetheless, the subjectivity of the fair use analysis suggests that the bar is quite high, even in cases that would seem straightforward, to demonstrate that a rightsholder engaged in knowing misrepresentation and lacked a good-faith belief that a particular use was infringing.⁷⁸ The theoretical availability of penalties for misrepresentation certainly did not discourage the takedown demands reviewed in Part III of this report.

Fifth, inappropriate takedown notices can chill campaign speech in ways that go beyond the removal of a particular video. The DMCA contains a prerequisite to the safe harbor that requires content hosts to have "adopted and reasonably implemented . . . a policy that provides for the termination in appropriate circumstances of . . . repeat infringers."⁷⁹ Many sites meet this requirement by cancelling user accounts after a specified number of DMCA takedown notices are received regarding that account.⁸⁰ Such policies are of particular concern for campaigns because they are 'serial fair users' whose videos regularly include short footage from news broadcasts. Several of the campaign staff we interviewed for this report expressed this as the nightmare scenario: a campaign gets three spurious takedowns for videos on its YouTube account, causing the entire account to be shut down.⁸¹ This could be devastating to any campaign that had invested considerable resources in developing an online presence.

This fear, several of the campaign professionals told us, can have a chilling effect on the creation of ads that incorporate broadcast footage. Particularly if a campaign has already been targeted by a takedown notice – however unwarranted – it may shy away from making additional ads that could elicit additional notices. In short, takedown demands that ignore fair use can have an impact not just on the specific ads the notices target, but on the content of a campaign's future ads as well.

⁷⁶ 17 U.S.C. § 512(f).

⁷⁷ See *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150 (N.D. Cal. 2008) (ruling that "17 U.S.C. § 512(c)(3)(A)(v) requires a copyright owner to consider the fair use doctrine in formulating a good faith belief that 'use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.'").

⁷⁸ In the same case, the judge noted that "there are likely to be few [cases] in which a copyright owner's determination that a particular use is not fair use will meet the requisite standard of subjective bad faith required to prevail in an action for misrepresentation under 17 U.S.C. § 512(f)."

⁷⁹ 17 U.S.C. § 512(i).

⁸⁰ YouTube, for example, terminates accounts after 3 strikes. See *Terms of Service*, YOUTUBE, <http://www.youtube.com/t/terms> ("YouTube will terminate a User's access to its Website if, under appropriate circumstances, they are determined to be a repeat infringer."); see also Nate Anderson, *What fair use? Three strikes and you're out... of YouTube*, ARS TECHNICA, Jan. 15, 2009, <http://arstechnica.com/tech-policy/news/2009/01/what-fair-use-three-strikes-and-youre-out-of-youtube.ars>; *A Guide to YouTube Removals*, ELECTRONIC FRONTIER FOUNDATION, <http://www.eff.org/issues/intellectual-property/guide-to-youtube-removals> (detailing how YouTube puts a "strike" on a user's account when it receives a formal DMCA takedown notice and ultimately cancels accounts that accumulate three "strikes").

⁸¹ Precisely this scenario has occurred in a related context. In early 2009, the advocacy group Progressive Illinois, had its YouTube account suspended following three questionable takedown notices from the Chicago Fox affiliate. The group submitted a counter-notice, and the account was restored. See *Fox Television WFLD-TV v. Progress Illinois*, CITIZEN MEDIA LAW PROJECT, <http://www.citmedialaw.org/threats/fox-television-wfld-tv-v-progress-illinois>. While this incident is similar to the examples catalogued in part III of this report, we have not included it there because the blog posts at issue contained general advocacy and commentary not related to any one election campaign.

V. Outlook

There is no question about the importance of political speech; it is central to the meaning and purpose of the First Amendment and has historically received the highest level of protection.⁸² As the Supreme Court recently reaffirmed in *Citizens United v. Federal Election Commission*, “Political speech is ‘indispensable to decisionmaking in a democracy.’”⁸³ The court further held that the “First Amendment ‘has its fullest and most urgent application to speech uttered during a campaign for political office.’”⁸⁴

There is also no question that online platforms are of increasing importance as forums for political speech. As campaigns rely more and more on digital outlets to reach voters, all signs indicate that the problems and impact associated with improper takedown demands have the potential to increase significantly.

Containing the problem will likely require broadcasters and news organizations – either on their own, or due to public exposure and pressure – to refrain from abusing the DMCA process to address non-copyright concerns and chill lawful fair use in political ads. Refraining from DMCA takedowns in this context would not necessarily require a news organization to abandon entirely its claims and concerns regarding the reuse of its footage. As has long been the case in the traditional media context, an organization could express its objections directly to the campaigns in question, issuing cease-and-desist letters and brandishing the threat of possible legal action where appropriate. It is not hard to see why it also would be tempting for such an organization to serve takedown notices on third party intermediaries who have little incentive to contest them – but doing so in inappropriate cases constitutes an abuse of the DMCA process and should be resisted.

There is at least one positive example for broadcasters and news organizations to follow. Several of those CDT interviewed were encouraged that C-SPAN, the public affairs cable network, liberalized its copyright policy in 2007 for current, future, and past coverage of any official events sponsored by Congress or any federal agency. The network now allows for non-commercial copying, sharing, and posting of C-SPAN video on the Internet with attribution.⁸⁵ This change does not affect its copyright policy for original programming, video coverage of privately sponsored events, and video coverage of other events not sponsored by the federal government. But the network rightly acknowledges that not permitting unlicensed commercial use of this video programming does not affect any person’s right to make a fair use of such programming.⁸⁶

C-SPAN’s decision has already shown positive effects. In a May 2009 ad dubbed “Just Visiting,” the Conservative Party of Canada included an approximately nine-second clip of Liberal Party leader Michael Ignatieff from an interview on C-SPAN’s original program

⁸² See *Morse v. Frederick*, 551 U.S. 393, 403 (2007) (“Political speech, of course, is ‘at the core of what the First Amendment is designed to protect.’” (quoting *Virginia v. Black*, 538 U.S. 343, 365 (2003))); see also *Citizens United v. F.E.C.*, 130 S. Ct. 876, 882 (2010) (“Laws that burden political speech are subject to strict scrutiny”).

⁸³ *Citizens United*, 130 S. Ct. at 904 (quoting *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978)).

⁸⁴ *Id.* (quoting *Eu v. San Francisco Cnty Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989)).

⁸⁵ Press Release, C-SPAN, C-SPAN Takes Lead in Making Video of Congressional Hearings, White House and Other Federal Events More Widely Available to the Online Community, (Mar. 7, 2007) available at <http://www.c-span.org/about/press/release.asp?code=video>. C-SPAN deliberately borrowed from the “Creative Commons” approach to copyright here. See CREATIVE COMMONS, <http://creativecommons.org>.

⁸⁶ *Id.*

Washington Journal.⁸⁷ Canada's Liberal Party called to alert C-SPAN to the use of its copyrighted footage in the Conservative attack ad. While not necessarily pleased to see its material used in the political ad, C-SPAN did not take the bait. The network appropriately decided not to pursue what would have been a meritless copyright infringement claim and did not issue a DMCA takedown notice to YouTube for the use of its content without permission. Use of the short clip was fair use and the ad embodied "the highest form of speech – political speech," said C-SPAN's corporate vice president and general counsel, Bruce Collins.⁸⁸

C-SPAN's approach should serve as a positive example to other media companies. Meanwhile, it will be important for campaigns and the media to call more public attention to the problem of overly aggressive DMCA claims stifling lawful political speech. The give and take in campaigns is a vital part of the American political system so central to the First Amendment. As more and more of the process moves online, it is critical that broadcasters and news organizations take a more careful and nuanced approach to the DMCA and campaign-related speech.

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⁸⁷ The "Just Visiting" ad can be seen on the Conservative Party of Canada's YouTube channel here: <http://www.youtube.com/user/cpcpcc#p/u/1/2BVoT-1B3Os>.

⁸⁸ Glen McGregor, *C-SPAN won't sue Tories over Ignatieff footage*, OTTAWA CITIZEN, May 28, 2009, <http://www.ottawacitizen.com/news/SPAN+Tories+over+Ignatieff+footage/1639909/story.html>; see also Ben Sheffner, *C-SPAN: use of clip in political ad OK*, COPYRIGHTS & CAMPAIGNS BLOG, May 29, 2009, <http://copyrightsandcampaigns.blogspot.com/2009/05/c-span-use-of-clip-in-political-ad-ok.html>.