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VIA EMAIL AND U.S. MAIL
Chad Hurley, CEO
Zahavah Levine, General Counsel
William Patry, Senior Copyright Counsel, Google
YouTube, LLC
901 Cherry Ave.
Second Floor
San Bruno, CA 94066

October 13, 2008

Dear Mr. Hurley, and Ms. Levine, and Mr. Patry:

By providing a platform for political candidates and the American public to post, view, share, discuss, comment on, mash-up, re-mix, and argue over campaign-related videos, YouTube has played a prominent and overwhelmingly positive role in the 2008 election. YouTube is to be congratulated on the groundbreaking contributions it has made to the political discourse, including through the CNN/YouTube primary debates.

We write, however, to alert you to a problem that has already chilled this free and uninhibited discourse, and to propose a solution. First, the problem: overreaching copyright claims have resulted in the removal of non-infringing campaign videos from YouTube, thus silencing political speech. 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 fair use doctrine. The uses at issue have been the inclusion of fewer than ten seconds of footage from news broadcasts in campaign ads or videos, as a basis for commentary on the issues presented in the news reports, or on the reports themselves. These are paradigmatic examples of fair use, in which all four of the statutory factors are strongly in our favor: 1) the uses are non-commercial and transformative; 2) they are factual, not fictional; 3) they are extremely brief; and 4) they have no conceivable effect on the market for the allegedly infringed works. *See* 17 U.S.C. § 107(1)-(4).

Despite the complete lack of merit in these copyright claims, YouTube has removed our videos immediately upon receipt of takedown notices. This is both unfortunate and unnecessary. It is unfortunate because it deprives the public of the ability to freely and easily view and discuss the most popular political videos of the day. And it is wholly unnecessary from a legal standpoint. We recognize that YouTube has said it adheres to the notice-and-takedown procedures established by the DMCA. But nothing in the DMCA requires a host like YouTube to comply automatonically with takedown notices, while blinding itself to their legal merit (or, as here, their lack thereof). The DMCA provides hosts with a safe harbor from liability for

infringement—but there is no need for a safe harbor where, as here, there is no infringement in the first instance. *See id.* § 107 (a fair use "is not an infringement of copyright").

We recognize that the DMCA provides a counternotice procedure (of which we have availed ourselves several times), but this procedure, and the way YouTube has implemented it, provides inadequate protection for political speech, particularly in the context of a fast-paced political campaign. As you know, the DMCA (and YouTube's policies) do not contemplate re-posting of the video until at least 10 and up to 14 days following the receipt of a counternotice—even where the notice is frivolous and the counternotice entirely sound. *See id.* § 512(g)(2)(C). But 10 days can be a lifetime in a political campaign, and there is no justification for depriving the American people of access to important and timely campaign videos during that period. Again, YouTube has nothing to fear by hosting *non-infringing* videos, let alone by re-posting them much sooner than 10 days.[1]

We propose a solution to the problem described above that we believe would serve both to protect the important First Amendment values vital to political discourse, and adequately protect YouTube from copyright liability. We fully understand that YouTube may receive too many videos, and too many takedown notices, to be able to conduct full fair-use review of all such notices. But we believe it would consume few resources—and provide enormous benefit—for YouTube to commit to a full legal review of all takedown notices on videos posted from accounts controlled by (at least) political candidates and campaigns. If YouTube receives a takedown notice for any video posted from such accounts, we propose that it commit to a careful legal review, including fair use analysis, to determine whether the infringement claim has substantial merit. If YouTube is satisfied that the use at issue is fair, or otherwise non-infringing, we propose that it decline to act upon the notice. Surely the protection of core political speech, and the protection of the central role YouTube has come to play in the country's political discourse, is worth the small amount of additional legal work our proposal would require.

While the issues presented by YouTube and other Internet technologies are new, the need to prevent meritless copyright claims from chilling political speech is decidedly not. Thirty years ago, a federal judge confronting a copyright claim over the use of music in a political advertisement correctly recognized the importance of preventing copyright from interfering with political candidates' free and full exercise of their First Amendment right to vigorously debate the issues of the day:

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[1] In our experience, copyright holders often back down upon receipt of a counternotice, primarily because they never had any intention of following through on their takedown notices by filing lawsuits to protect their asserted copyright interests. *See* 17 U.S.C. § 512(g)(2)(C). We believe this is so for two reasons. First, they recognize the weakness of their claims and do not wish to risk a loss on the merits. Second, even if they believe their claims have merit, they do not routinely register their live news broadcasts with the Copyright Office, and cannot obtain registration certificates within 10 days, even through an expedited application. Without such certificates in hand, they have no ability to file infringement actions. *See* 17 U.S.C. § 411(a) ("[N]o action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title."); *see also, e.g., Xoom, Inc. v. Imageline, Inc.*, 323 F.3d 279, 283 (4th Cir. 2003) ("Copyright registration is a jurisdictional prerequisite to bringing an action for infringement under the Copyright Act."); William Patry, "Registration issues," *The Patry Copyright Blog*, Aug. 1, 2005 (available at http://williampatry.blogspot.com/2005/08/registration-issues.html).

> In the context of this case, the Court must be aware that it operates in an area of the most fundamental First Amendment activities. Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people.... [T]here is practically universal agreement that the major purpose of that Amendment was to protect the free discussion of governmental affairs, including discussions of candidates. This is a reflection of our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, because the identities of those who are elected will inevitably shape the course that we follow as a nation.

See Keep Thomson Governor Committee v. Citizens for Gallen Committee, 457 F. Supp. 957, 959-960 (D. N.H. 1978) (citation omitted) (declining to enjoin allegedly infringing political advertisement). Though the judge who wrote those words had never used YouTube, the values he articulated are as true today as they were when he wrote them three decades ago.

We stand ready to work with you and any other campaign or group who may be interested in finding a mutually acceptable means to ensure that YouTube remains a place for vigorous political debate—unchilled by meritless copyright claims. We have copied the Obama campaign as a way of seeing if they would like to join in this effort. Please contact me at (703) 650-5584 or tpotter@mccain08hq.com if you would like to discuss these issues further.

Very truly yours,

Trevor Potter
General Counsel

Robert Bauer, Esq. (General Counsel, Obama for America; via U.S. Mail)