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Joan Claybrook, President

October 16, 2008

Senator John McCain
241 Russell Senate Office Building
Washington DC 20510

Senator Barack Obama
713 Hart Senate Office Building
Washington DC 20510

Re: Misuse of the DMCA to Suppress Free Speech

Dear Senators McCain and Obama:

In recent weeks, each of you has experienced misuse of the Digital Millennium Copyright Act ("DMCA") to force YouTube to remove speech supporting your candidacies just at the moment when that speech was most valuable – during the last few weeks of your presidential campaigns. The major television networks and others have invoked the DMCA's takedown provisions to remove online posting of campaign advertisements that contain fragments of their news reports. These snippets, they say, infringe their copyrights, even though the material used is plainly protected fair use and hence not infringement.

As you learned from these incidents, when an Internet Service Provider ("ISP") like YouTube receives a takedown notice, its immediate reaction is to remove the material to which the complaint is addressed, because it takes too much in the way of legal or other professional resources to make a judgment about whether each takedown notice is well-founded. ISP's run these services on low profit margins, and in the long run they generally decide that it is cheaper simply to go along with the complaint to avoid the risk of being held liable for damages for infringement of intellectual property rights once their statutory immunity has been swept away by the failure to respond to the takedown notice. They keep their statutory immunity **only** if the allegedly infringing speech remains offline for at least ten days. And that means that, in effect, the sender of the takedown notice gets a temporary restraining order that suppresses the speech for this period, often ten days or more, without having to make **any** showing of wrongdoing. As the letter from Senator McCain's campaign to YouTube recognizes, those ten days "can be a lifetime in a political campaign."

Those who want to suppress speech are often quite cynical about the impact that the invocation of the intellectual property laws such as the DMCA on ISP's that might otherwise stand up for their users' rights. Indeed, ISP's often want the First Amendment to govern, but they often conclude that they cannot take the risks, including awards of statutory damages if they lose, not to

speak of paying attorney fees to their own lawyers.

As Fred von Lohmann of the Electronic Frontier Foundation ("EFF") and Zahavah Levine of YouTube have pointed out, there are alternatives that the suppressed speaker can take, such as trying to shame the sender of the takedown notice, or filing a lawsuit for wrongful takedown. But these alternatives are illusory in most cases – most people can't afford lawyers, and even though groups like EFF and Public Citizen sometimes handle such cases pro bono, we don't have nearly the resources to take all of the meritorious cases even for those wronged citizens who find us. Only so many cases will result in enough publicity to shame the senders of takedown notices – apart from the fact that some of them **have** no shame. And the option of filing suit (or making an issue of the takedown) is illusory even for a presidential campaign with substantial legal resources. After all, campaigns have to make choices about where to devote their resources. Getting off-message in the campaign, or devoting lawyer time to lawsuits against major owners of intellectual property instead of issues about balloting and other more directly electoral matters, rarely make a wise choice in the last few weeks of a campaign.

In truth, although the existing laws provide a largely illusory remedy, the larger problem is with the provisions of the DMCA, which like some other intellectual property laws have been amended over the past several years in a way that gives too much power to IP owners, and shifts the balance too far away from free speech. These laws should be changed. For example, IP owners should be required to give notice to the speaker of their claims of infringement **before** any takedown requirement goes into effect, and the automatic ten-day waiting period for the restoration of speech defended by a counter-notice should be eliminated. Instead, the burden should be squarely placed on IP owners to go to court and prove wrongdoing if they think they can get an injunction against free speech. Just as the copyright laws use the imposition of statutory damages as a disincentive to infringement, IP owners who issue takedown notices for material that is ruled noninfringing should have to pay statutory damages to the speakers and the ISP. IP owners should be required to post their takedown notices publicly, through a central database such as the online Chilling Effects Clearinghouse, so that the public can see what they are doing, comment on them, and link to them. In this way, any shaming mechanisms can take root on their own, without requiring the speakers to engage in their own publicity efforts. Similarly, once the DMCA is improved to provide better protections for free speech, the law should be amended to provide that claims of trademark infringement, as well as copyright infringement, are included within ISP immunity.

The fact that both of you have felt the sting of the DMCA shows that this is a bipartisan issue. Next year, one of you will be President of the United States, while one of you will be a reform leader in the Senate. We also believe that the next Congress may be receptive to balancing free speech rights against abusive intellectual property claims. And there is a growing list of organizations, including EFF, Public Knowledge, and the ACLU, as well as major Internet companies such as Google, that along with Public Citizen recognize the need to change the laws to prevent such abuses.

We ask you to make the commitment now to join in the effort to restore free speech rights by paring back the most offensive provisions of the DMCA and other speech-restrictive intellectual property provisions that regulate the Internet.

Sincerely yours,

Joan Claybrook

Paul Alan Levy