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# Unauthorized Televised Debate Footage in Political Campaign Advertising: Fair Use and the DMCA

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# UNAUTHORIZED TELEVISED DEBATE FOOTAGE IN POLITICAL CAMPAIGN ADVERTISING: FAIR USE AND THE DMCA

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## I. INTRODUCTION

In recent years television networks which air political campaign debates have attempted to enforce their copyright protection by denying the use of debate footage in subsequent campaign advertising. Although some campaigns have complied with network demands to omit the footage from campaign ads, others have relied upon a fair use or free speech argument to defy the networks and use the footage without permission. The success of this defense will vary drastically, depending upon the medium. Ads run on television are subject to traditional copyright law that requires the copyright holder to affirmatively assert a claim of copyright infringement. Although several networks have threatened legal action, no court has yet determined whether such ads are indeed a fair use of the copyrighted material. When political campaigns upload ads for viewing on the Internet through sites such as YouTube, the process set forth in the Digital Millennium Copyright Act (DMCA) gives the networks the ability to takedown allegedly infringing content almost immediately, without first showing that the material infringes upon an existing copyright. This use of the DMCA has the effect of chilling important political speech, especially in a rapid campaign cycle. This article analyzes this issue, showing first that the use of campaign debate footage is indeed a fair use, and then reviewing and critiquing various proposals for reform of the DMCA.

Part II of this article presents the factual backdrop upon which this issue must be analyzed. Part III discusses traditional copyright protection and the fair use exception. It also explores the intersection of copyright law and the important free speech issues these cases present. Part IV analyzes the fair use defense as applied to this situation and suggests the likely outcome,

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should such a case ever go to trial.<sup>1</sup> Part V discusses the related topic of the DMCA as it applies to internet service providers (ISPs) such as YouTube and explains how a holding of fair use could have important implications for political speech on the Internet. It suggests that a holding in favor of making debate footage available for all candidates to use in political advertising is essential to ensuring full and fair debate of ideas and issues within the political process. Part VI concludes.

## II. FACTUAL BACKGROUND

Early in the primary season of the 2008 U.S. presidential race, a bipartisan group, which later became known as the Open Debate Coalition,<sup>2</sup> formed to push for the free, public use of televised presidential debate footage. The coalition urged both the Republican and Democratic national committees to require any networks that aired presidential debates to either put the debate footage into the public domain, or at least allow its unrestrained use.<sup>3</sup> Democratic candidates John Edwards and Barack Obama, among various others, supported the movement.<sup>4</sup>

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<sup>1</sup> The plaintiffs in such a case would be the news network organization challenging the use of its copyright. The defendant would be the creator / disseminator of a political ad featuring portions of the debate footage, who may or may not be the candidate.

<sup>2</sup> The Open Debate Coalition described itself as “a coalition of people and organizations across the ideological spectrum” which urged the candidates in the 2008 presidential election to commit to the principles of open debate. Among the members of the Open Debate Coalition were Professor Lawrence Lessig, Stanford Law School Professor and founder of the Center for Internet and Society; Craig Newmark, founder of Craigslist; Jimmy Wales, founder of Wikipedia; David Kralick, Director of Internet Strategy for Newt Gingrich’s American Solutions; Eli Pariser, Executive Director of MoveOn.Org; Arianna Huffington, founder of the Huffington Post; Markos Moulitsas, founder of DailyKos.com; and Robert Greenwald, President of Brave New Films. See Lawrence Lessig, *Free Debates: Round Two*, LESSIG.2.0 BLOG (Sept. 25, 2008), [http://lessig.org/blog/2008/09/free\\_debates\\_round\\_two.html](http://lessig.org/blog/2008/09/free_debates_round_two.html).

<sup>3</sup> *Id.* See also, Lawrence Lessig, *A Call on the RNC and DNC to Eliminate Unnecessary Regulation of Political Speech*, LESSIG.2.0 BLOG (Apr. 25, 2007), [http://lessig.org/blog/2007/04/a\\_call\\_on\\_the\\_rnc\\_dnc\\_to\\_elimi.html](http://lessig.org/blog/2007/04/a_call_on_the_rnc_dnc_to_elimi.html).

<sup>4</sup> Nate Anderson, *No Debate: Obama, Edwards, GOP Bloggers Support Free Access to Footage*, ARSTECHNICA (May 4, 2007), <http://arstechnica.com/old/content/2007/05/no-debate-obama-edwards-gop-bloggers-support-free-access-to-footage.ars>; John Eggerton, *Obama Wants Debate Footage Copyright Waived*, BROADCASTING & CABLE (May 3, 2007); Lawrence Lessig, *Obama on “Open Debates,”* LESSIG.2.0 BLOG (Oct. 4, 2008), [http://www.lessig.org/blog/2008/10/obama\\_on\\_open\\_debates\\_1.html](http://www.lessig.org/blog/2008/10/obama_on_open_debates_1.html); Andrew Noyes, *Internet Portion of Tonight’s Debate To Be Scrutinized*, CONGRESS DAILY (2008 WLNR 19086148, Oct. 7, 2008); Jon Stokes, *Campaign to Make ‘08 Debate Footage “Free as in Speech” Marches On*, ARSTECHNICA (May 7, 2008), <http://arstechnica.com/tech-policy/news/2007/05/campaign-to-make-08-debate-footage-free-as-in-speech-marches-on.ars>.

Most major news network organizations agreed,<sup>5</sup> except for Fox News, which refused and denied permission to at least two candidates, John McCain and Mitt Romney, both of whom had created campaign ads featuring small portions of debates aired on Fox News.<sup>6</sup> Nevertheless, during the primary both Romney and McCain defied Fox News' cease-and-desist requests, at least with regard to their campaign ads run on television.<sup>7</sup>

The Romney campaign relied upon a free speech argument in its letter to Fox explaining its decision to begin running an ad featuring a clip from a televised debate:

[T]he Romney campaign's use of a very short debate clip to deliver a message about Governor Romney is the very essence of political speech protected by the First Amendment. In addition to the First Amendment, statutes and numerous court decisions protect a political campaign's use of this material in this fashion. . . . As for the law, the First Amendment's right of free speech protects the use of relevant information such as this in the public discourse. The

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<sup>5</sup> Hugh D'Andrade, *Let 1,000 YouTube Debate Remixes Bloom!*, ELECTRONIC FRONTIER FOUNDATION (Aug. 10, 2007), <https://www.eff.org/deeplinks/2007/08/let-1-000-youtube-debate-remixes-bloom>. According to D'Andrade, CNN and ABC made their footage available without restriction. NBC agreed to release footage so long as the MSNBC credit was visible, and the footage was used for non-commercial purposes. See also, Nate Anderson, *MSNBC Restricts Internet Redistribution of Debate; Joe Biden Ignores Them*, ARSTECHNICA (Apr. 30, 2007), <http://arstechnica.com/old/content/2007/04/msnbc-supplies-gas-matches-to-bloggers-after-limiting-use-of-debate-footage.ars>.

<sup>6</sup> Lawrence Lessig, *Copyright and Politics Don't Mix*, N.Y. TIMES (Oct. 21, 2008), <http://www.nytimes.com/2008/10/21/opinion/21lessig.html>. See also, Jim Rutenberg, *Fox Orders Halt to McCain Ad*, THE CAUCUS - THE POLITICS AND GOVERNMENT BLOG OF THE N.Y. TIMES (Oct. 25, 2007), <http://thecaucus.blogs.nytimes.com/2007/10/25/fox-orders-halt-to-mccain-ad/>; *Fox Bars Candidates from Using Its Images*, THE CAUCUS - THE POLITICS AND GOVERNMENT BLOG OF THE N.Y. TIMES (Oct. 26, 2007), <http://thecaucus.blogs.nytimes.com/2007/10/26/fox-says-all-candidates-to-stop-using-images-from-news-channel/>.

<sup>7</sup> Lessig, *Copyright and Politics Don't Mix*, *supra* note 6; Greg Sargent, *Romney Defies Fox News' Ban on Use of its Debate Footage*, TALKING POINTS MEMO - ELECTION CENTRAL (Nov. 2, 2007), [http://tpmelectioncentral.talkingpointsmemo.com/2007/11/\\_romney\\_defies\\_fox\\_news\\_ban\\_on\\_use\\_of\\_its\\_debate\\_footage.php](http://tpmelectioncentral.talkingpointsmemo.com/2007/11/_romney_defies_fox_news_ban_on_use_of_its_debate_footage.php). The McCain campaign also ignored a later demand letter from Fox News that the campaign remove the voice of Fox News Correspondent Major Garrett from an ad the campaign began running in September, 2008. See Ben Smith, *McCain Camp Rebuffs Fox Request*, POLITICO (Sept. 19, 2008), [http://www.politico.com/blogs/jonathanmartin/0908/McCain\\_camp\\_rebuffs\\_Fox\\_request.html](http://www.politico.com/blogs/jonathanmartin/0908/McCain_camp_rebuffs_Fox_request.html). The Obama Campaign encountered a similar issue with NBC over its own video posted on YouTube. See John Eggerton, *Obama Campaign's VoteForChange.com Posts YouTube Video Featuring NBC News Anchors Brokaw, Olbermann 'Pronouncing' McCain Election Winner*, BROADCASTING & CABLE (Oct. 1, 2008), [http://www.broadcastingcable.com/article/115679-NBC\\_Obama\\_Campaign\\_Spar\\_Over\\_YouTube\\_Video.php](http://www.broadcastingcable.com/article/115679-NBC_Obama_Campaign_Spar_Over_YouTube_Video.php).

campaign's use of these statements places this very relevant information in the marketplace of ideas that is a protected part of the discussion of the public policy positions of candidates for President of the United States.<sup>8</sup>

In its own letter to Fox News, the McCain campaign argued that McCain's right to free speech, and the fair use defense to copyright infringement, supported the unauthorized use of a clip taken from an October, 2007, presidential debate in Florida:

[T]he Campaign's minimal usage of Senator McCain's own comments in the debate clearly constitutes "fair use" under U.S. Copyright Law. . . . As you are undoubtedly aware, over the course of many decades, U.S. law has continually recognized (both in the early common law and as later codified by statute at 17 USC 107) that such "fair use" of a newsworthy clip by a secondary user – such as the McCain Campaign – is clearly permitted. Indeed, the Fair Use doctrine, recognized in every jurisdiction, unequivocally permits a secondary use of an original copyrighted work where, as here, the length of the material is so very minor as compared to the whole, where the secondary use is absolutely and exclusively non-commercial in nature, where the Campaign's advertisement has materially transformed the original clip, and where the advertisement would have no adverse effect on the potential market for, or value of, the original work. When considering the core First Amendment principles that this doctrine serves to protect, and the value the Courts place on political debate, the Campaign has not removed the FNC debate footage from its advertisement.<sup>9</sup>

However, the McCain campaign quickly learned that cease-and-desist requests are not so easily defied when they take the form of a takedown notice sent to an ISP, such as YouTube, pursuant to the Digital Millennium Copyright Act (DMCA). In the same presidential election, upon learning that McCain's ads containing debate footage were also available for public viewing on YouTube, Fox News sent a take-down notice to YouTube demanding that it pull the ads, which YouTube did immediately upon receipt

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<sup>8</sup> Sargent, *supra* note 7. Apparently this letter was not sent as a reply to an official Fox News cease-and-desist order, but instead was likely sent in anticipation of such a letter, since the McCain campaign had just made headlines regarding the issue and its response to Fox News.

<sup>9</sup> Letter from Trevor Potter, General Counsel for McCain for President Campaign, to Christopher J. Silvestri, Fox News Vice President for Legal and Business Affairs (Oct. 25, 2007), <http://markhalperin.files.wordpress.com/2007/10/mccain-doc.pdf>.

of the notice. The McCain campaign objected to YouTube's acquiescence to the take-down notice, making a fair use argument similar to the one it had made previously to Fox News.<sup>10</sup> McCain also suggested to YouTube that it conduct a more careful review of takedown notices involving content uploaded by political campaigns:

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 a 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.<sup>11</sup>

YouTube rebuffed McCain's suggestion, contending that it was "not a viable solution."<sup>12</sup> YouTube pointed out that a determination of fair use

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<sup>10</sup> Lessig, *Copyright and Politics Don't Mix*, *supra* note 6. See also, Austin Modine, *McCain Begg for YouTube DMCA Takedown Immunity*, THE REGISTER (Oct. 15, 2008), [http://www.theregister.co.uk/2008/10/15/mccain\\_campaign\\_wants\\_youtube\\_dmca\\_special\\_treatment/](http://www.theregister.co.uk/2008/10/15/mccain_campaign_wants_youtube_dmca_special_treatment/); Sarah Lai Stirland, *Stifled by Copyright, McCain Asks YouTube to Consider Fair Use*, WIRED (Oct. 14, 2008), <http://www.wired.com/threatlevel/2008/10/stifled-by-copy/>; *Campaign Takedown Troubles: How Meritless Copyright Claims Threaten Online Political Speech*, REPORT OF THE CENTER FOR DEMOCRACY & TECHNOLOGY (Sept. 2010), <http://www.cdt.org/report/campaign-takedown-troubles-how-meritless-copyright-claims-threaten-online-political-speech>.

<sup>11</sup> Letter from Trevor Potter, General Counsel for McCain for President Campaign, to Chad Hurley, YouTube CEO, Zahavah Levine, YouTube General Counsel, and William Patry, YouTube Senior Copyright Counsel (Oct. 13, 2008), [http://www.wired.com/images\\_blogs/threatlevel/files/mccain\\_youtube\\_copyright\\_letter\\_10.13.08-3.pdf](http://www.wired.com/images_blogs/threatlevel/files/mccain_youtube_copyright_letter_10.13.08-3.pdf). See also, Wendy Seltzer, *McCain's YouTube Takedowns Inspire Fair Use Fervor*, CITIZEN MEDIA LAW PROJECT (Oct. 15, 2008), <http://www.citmedialaw.org/blog/2008/mccains-youtube-takedowns-inspire-fair-use-fervor>.

<sup>12</sup> Sarah Lai Stirland, *YouTube to McCain: You Made Your DMCA Bed, Lie In It*, WIRED (Oct. 15, 2008), <http://www.wired.com/threatlevel/2008/10/youtube-to-mccal/>. See also, David Ardia, *Copyright, Politics, and McCain's Request for Special Treatment*, CITIZEN MEDIA LAW PROJECT (Oct. 21, 2008), <http://www.citmedialaw.org/blog/2008/copyright->

requires such a subjective balancing that “[n]o 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.”<sup>13</sup> YouTube also claimed to lack the information necessary to determine whether any user-uploaded video was a copyright infringement and therefore had no basis upon which to verify claims. Finally, YouTube acknowledged that while presidential campaigns are certainly “worthy of the highest level of protection,” it also hosts other equally worthy content and must treat “all users fairly, regardless of whether they are an individual, a large corporation or a candidate for public office.”<sup>14</sup> YouTube ended the letter by stating that it looked 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.”<sup>15</sup>

This scenario has not been limited to national politics – it has also been repeated at state-wide and local levels.<sup>16</sup> For instance, on October 5, 2010, Idaho Public Television (IPTV) and the Idaho League of Women Voters hosted a televised political debate between two candidates for Idaho Superintendent of Public Instruction, Republican Tom Luna and Democrat Stan Olson.<sup>17</sup> During the debate, both candidates were asked whether they would be willing to take the Idaho Standards Achievement Test (ISAT), which all Idaho high school seniors must pass to graduate, and have their pay

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politics-and-mccains-request-special-treatment; Wendy Seltzer, *Free Speech Unmoored in Copyright's Safe Harbor: Chilling Effects of the DMCA on the First Amendment*, 24 HARV. J.L. & TECH. 171 (Fall 2010).

<sup>13</sup> Stirland, *YouTube to McCain*, *supra* note 12.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> According to the Center for Democracy and Technology report, *Campaign Takedown Troubles: How Meritless Copyright Claims Threaten Online Political Speech*, *supra* note 10, at 2, DMCA takedowns occur often in political campaigns. “[T]his 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 . . . involve takedown demands from CBS, Fox, MSNBC, National Public Radio (NPR), and the Christian Broadcasting Network (CBN).” See also, Seltzer, *Free Speech Unmoored*, *supra* note 12, at 210, who also describes various instances of “takedowns of allegedly infringing material.”

<sup>17</sup> Ben Botkin, *Luna, Olson Face Off in Education Debate*, TIMES-NEWS MAGICVALLEY (Oct. 6, 2010), [http://www.magicvalley.com/news/local/govt-and-politics/article\\_b7d7880d-0fd2-5a73-ad65-701221550877.html](http://www.magicvalley.com/news/local/govt-and-politics/article_b7d7880d-0fd2-5a73-ad65-701221550877.html).

based upon their test results.<sup>18</sup> Candidate Olson responded that he would not want to take the math portion of the test because he had always struggled at math.<sup>19</sup>

After the debate was televised, Melaleuca, Inc., an Idaho corporation headed by prominent Idaho Republican Frank VanderSloot, created and paid for a 60-second televised ad in support of Luna's campaign which contained that portion of the debate where Olson described his challenges with math.<sup>20</sup> Before running the ad, Melaleuca asked IPTV for permission to use the debate footage, which IPTV denied.<sup>21</sup> Nonetheless, Melaleuca ran the ad on several television stations throughout Idaho.<sup>22</sup> IPTV sent Melaleuca a cease-and-desist letter, asserting its copyright protection and demanding that Melaleuca pull the ads.<sup>23</sup> Melaleuca refused, relying upon a free speech and fair use defense.<sup>24</sup> IPTV threatened legal action, but no further action has been reported, as the case appears to have been quietly shelved.<sup>25</sup> After the controversy over the ad arose, at least one state network news organization refused to air it.<sup>26</sup>

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<sup>18</sup> Betsy Z. Russell, *Idaho Schools Race Draws Independent Spending*, THE SPOKESMAN REVIEW (Oct. 22, 2010), <http://www.spokesman.com/stories/2010/oct/22/idaho-schools-race-draws-independent-spending/>.

<sup>19</sup> *Id.* Russell also suggested that "VanderSloot's ad belittles Olson, the recently retired superintendent of the Boise School District, with a digitally altered clip. . . .". See also, Sven Berg, *Melaleuca Refuses to Pull Ad*, ALLBUSINESS (Oct. 26, 2010).

<sup>20</sup> Jamie Grey, *Ad Watch: Copyright Question in New Luna Support Ad*, KTVB.COM (Oct. 22, 2010), <http://www.ktvb.com/news/Ad-Watch-105582963.html>. Grey's article also explained that some of the footage shown in the ad was altered from the original by changing the speed of the clip, inserting a dated version of the IPTV logo, and adding "ominous" music over Olson's statements. Despite a request to Melaleuca, Inc., I have been unable to obtain a copy of this ad. Therefore, I can only rely upon the descriptions found in the newspaper coverage. In addition to copyright infringement issues, the use of the dated IPTV logo may raise trademark violation issues, which are outside the scope of this article.

<sup>21</sup> Russell, *supra* note 18.

<sup>22</sup> *Id.*

<sup>23</sup> Grey, *supra* note 20. See also, Tammy Harmer, *Melaleuca versus Idaho Public Television*, KIDK.COM (Oct. 22, 2010), <http://www.kidk.com/zcommunities/105572878.html>.

<sup>24</sup> Harmer, *supra* note 23. ("We checked with our legal counsel. Our people have told us we do have a right to do it, that under the fair use doctrine, those ads and material can be used. It is a matter of free speech.") See also, Berg, *supra* note 19 ("Their copyright – if one exists – would not prevent its use the way we're using it.").

<sup>25</sup> Russell, *supra* note 18. ("Peter Morrill, IPTV general manager, said, 'We are not issuing them a license to utilize footage for their campaign purposes and . . . we would ask them to cease and desist.' The network will 'vigorously' defend its copyright, he said, just as do networks across the country that air televised political debates."). I have been unable to determine the current status of this case, and whether IPTV intends to move forward with this case.

<sup>26</sup> Grey, *supra* note 20. ("That ad is not airing on KTVB right now. Here's what the station's general manager Doug Armstrong has to say: 'We have two very different and opposing opinions regarding the legal right to use IPTV video in a commercial. It's our view that the



In 2008, in Schenectady, New York, a Democratic candidate for the New York State Assembly, Mark Blanchfield, released television and radio advertisements which included a brief clip of his opponent, George Amadore, stating in an interview with an Albany paper that, "I don't look at the Assembly position as a job."<sup>27</sup> Both Amadore and the Albany Business Review objected to Blanchfield's ads. Amadore argued that the ads portrayed his comments out of context. The newspaper alleged that the ads infringed upon its copyright protection and demanded that Blanchfield pull the ads off the air.<sup>28</sup> Blanchfield ultimately pulled the ad from the air after a local Fair Campaign Practices Committee agreed with Amadore that the ad was unfair.<sup>29</sup> (It is unclear whether the Albany Business Review's claim of copyright infringement impacted this decision).

Thus, although most network news organizations have chosen to waive whatever rights they may have had in televised debate footage, others, such as Fox News and IPTV, have taken the opposite approach and (at least initially) sought to enforce their copyright protection. Networks may deny permission to use debate footage for varied reasons. Peter Morrill, IPTV general manager, explained that IPTV denied permission to use the debate footage in the Idaho Superintendent race on fairness grounds since IPTV had previously denied other candidates the right to use its debate footage for campaign advertising.<sup>30</sup> Morrill also explained that restricting the use of debate footage was necessary to maintain the integrity of the debate process by insuring the availability of future debates:

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copyright issue should be settled before we air the commercial, and we encourage both parties to seek settlement,' Armstrong said.")

<sup>27</sup> Lessig, *Copyright and Politics Don't Mix*, *supra* note 6.

<sup>28</sup> *Id.* See also, Anthony Falzone, *Albany Business Review Tries to Use Bogus Copyright Claim to Silence NY Assembly Candidate*, THE CENTER FOR INTERNET AND SOCIETY (Oct. 13, 2008), <http://cyberlaw.stanford.edu/node/5885>; Steve Ference, *Political Ad Continues to Create Controversy*, YOUR NEWS NOW (Oct. 10, 2008), [http://capitalregion.ynn.com/content/top\\_stories/125743/political-ad-continues-to-create-controversy/](http://capitalregion.ynn.com/content/top_stories/125743/political-ad-continues-to-create-controversy/).

<sup>29</sup> Lauren Stanforth, *Amedore and Blanchfield – At It Again Update*, TIME UNION (Oct. 20, 2008), <http://blog.timesunion.com/localpolitics/2073/amedore-and-blanchfield-at-it-again/>.

<sup>30</sup> In the same election cycle in Idaho, at least one candidate, Raul Labrador, a candidate for the U.S. House of Representatives, pulled an ad containing IPTV debate footage when asked. See Kevin Richert: *The Melaleuca Rules – A New Election Tradition*, THE IDAHO STATESMAN (Oct. 30, 2010), [http://voices.idahostatesman.com/2010/10/25/krichtert/idaho\\_elections\\_melaleuca\\_rules\\_another\\_questionable\\_lastminute\\_?page=1](http://voices.idahostatesman.com/2010/10/25/krichtert/idaho_elections_melaleuca_rules_another_questionable_lastminute_?page=1). Candidates who agreed to participate in IPTV debates apparently pledged beforehand not to use debate footage in subsequent campaign advertising. However, VanderSloot was not a participant in the debate and therefore was not bound by the pledge Tom Luna presumably made to IPTV. See also, Marty Trillaase, *It's Luna's Choice to Rescue the Idaho Debates*, LEWISTON MORNING TRIB. (Oct. 30, 2010).

Part of the currency, the value of debates, is to create a level playing field. . . . Anytime a candidate feels they're not going to be treated fairly, and this is just one example of candidates not getting a good sense their images will be used appropriately, it will only undermine the debate organizing process. . . . We don't think having third parties excerpt segments of the debates serves the public good well; hence, we will defend our copyright.<sup>31</sup>

Others have suggested that networks deny permission to use debate footage "to avoid controversy or embarrassment,"<sup>32</sup> or even due to "concerns over reputation and false endorsement."<sup>33</sup> The Center for Democracy and Technology, in its report *Campaign Takedown Troubles: How Meritless Copyright Claims Threaten Online Political Speech*, theorized that:

[T]he 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. These are trademark-type interests that may not even be legally cognizable. In any event, enforcing such interests using the DMCA could significantly inhibit legitimate editorial reporting in core political speech.<sup>34</sup>

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<sup>31</sup> Grey, *supra* note 20. Other editorial commentators made a similar argument. For instance, Kevin Richert of the Idaho Statesman argued: "IPTV has been bullied into a bind. The station can roll over to a well-heeled political player and let VanderSloot use the debate footage in an attack ad. This would cheapen the brand of the decades-long 'Idaho Debates' franchise – and gives future candidates reason to be gun-shy about appearing in a debate where anything said can and will be used against a candidate in a smear." See Richert, *supra* note 30.

<sup>32</sup> Lessig, *Copyright and Politics*, *supra* note 6.

<sup>33</sup> *Campaign Takedown Troubles*, *supra* note 10, at 2.

<sup>34</sup> *Id.* at 14. See also, Stokes, *supra* note 4 ("[I]t's not hard to see why the networks are reluctant to set a precedent by caving in to the public's demands that they authorize any of their footage for unrestricted public use. Right now, content owners are in a pitched battle with Internet outlets like YouTube over the fundamentals of copyright in the digital age. And because copyright law operates under an 'enforce it vigorously or lose it' model, content owners are right to fear that they may accidentally give up more than they bargained for. This fear is certainly what's behind the amount of text that CNN's announcement devoted to describing the singular nature of the presidential debate as 'an integral part of our system of government' – the real point being that nobody should expect that any sort of precedent is being set by the network's move. If the other networks follow CNN's lead in releasing their debate footage out into the wild, their announcements will certainly contain similar precedent-

Despite their threats of legal action against campaigns who have disregarded cease-and-desist requests and run ads with campaign footage on television, no network has as yet followed through with a subsequent lawsuit alleging copyright infringement. Indeed, IPTV's current lack of follow-through on its threat of litigation may disappoint Melaleuca CEO VanderSloot, who claimed to welcome a lawsuit challenging his ad because he hopes to set "the precedent that you can use debate material – a candidate's own words – to make public what they said."<sup>35</sup>

While a lawsuit would clearly set a precedent, surprisingly, despite the increasing number of these situations, no court has heard or decided the issue of whether copyright-protected political debate footage may be used in campaign advertising. In fact, there is very little case law regarding the intersection of political speech and copyright law at all.<sup>36</sup> As the court stated in one of the few such cases, *American Family Life Insurance Co. v. Hagan*:

[T]here is at least one aspect to this case that makes it different from virtually any other the Court can find: the alleged infringer is a politician in the midst of a campaign, and he is using the allegedly infringing materials in furtherance of that campaign. Only one other case cited by the parties has any apparent factual similarity, and it is still unresolved; although the court in the case denied a motion for TRO, it has not issued any substantive written opinion. . . . Thus, while the cases cited by the parties are instructive, none is "on all fours with the instant case."<sup>37</sup>

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neutralizing language about the exceptional nature of the presidential debate as an American institution.").

<sup>35</sup> Berg, *supra* note 19.

<sup>36</sup> See, e.g., *Henley v. DeVore*, 733 F.Supp.2d 1144 (2010); *Browne v. McCain*, 611 F.Supp.2d 1073 (2009); *Mastercard v Nader*, 2004 WL 434404 (S.D.N.Y. 2004); *Am. Family Life Ins. Co. v. Hagan*, 266 F.Supp.2d 682 (2002); *Keep Thomson Governor Comm. v. Citizens for Gallen Comm.*, 457 F.Supp. 957 (1978). For various reasons, these cases relating directly to copyright infringement claims by a political campaign are not entirely relevant to this issue. For instance, *Browne v. McCain* and *Keep Thompson Governor* involved the use of songs, which requires a slightly differently analysis. *Browne v. McCain* ultimately settled after the court denied McCain's 12(b)(6) motion seeking to dismiss the case. *Mastercard v. Nader* and *Am. Family Life v. Hagan* provide some guidance (see *infra* Part IV(A)), but they primarily involve parodies of a trademark which is not at issue here. For law review commentary on the cases referred to in this footnote, see David C. Johnston, *The Singer Did Not Approve This Message: Analyzing the Unauthorized Use of Copyrighted Music in Political Advertisements in Jackson Brown v. John McCain*, 27 CARDOZO ARTS & ENT. L.J. 687 (2010); Sarah Schacter, *The Barracuda Lacuna: Music, Political Campaigns, and the First Amendment*, 99 GEO. L.J. 571 (Jan. 2011).

<sup>37</sup> *Am. Family Life Ins. Co.*, 266 F.2d 682, 688 (citing *Gosa v. Mayden*, 413 U.S. 66, 687, 93 S.Ct. 2926, 37 L.Ecd.2d 873 (1973)). The other case the *Hagan* court referred to is *Mastercard v. Nader*, *supra* note 36.

Although *Hagan* was published in 2002, this remains true today.

There are a few obvious explanations why no cases are on point. Practically, during each election cycle, the issue quickly becomes moot, given that the debates typically occur right before an election is held. Any subsequent ads containing debate footage usually run a few weeks, at most. Also, and perhaps most importantly, despite the lack of relevant case law or literature, the networks may know a losing argument when they see one. The use of televised political debate footage in subsequent campaign advertising is very likely an unequivocal fair use of the copyrighted material.<sup>38</sup>

While no cases are directly on point regarding the fair use of campaign debate footage, the literature has touched on the topic. A fair number of recent articles have been published regarding the influence of the DMCA take-down notice provision<sup>39</sup> on political speech conveyed via the Internet, an issue the McCain campaign faced in the general election in 2008.<sup>40</sup> Several of these articles describe the events of the 2008 campaign to argue that application of the DMCA, as interpreted in the three hallmark cases *Online Policy Group v. Diebold*,<sup>41</sup> *Rossi v. Motion Picture Ass'n of America*,<sup>42</sup> and *Lenz v. Universal Music Corp.*,<sup>43</sup> has resulted in an unacceptable chilling effect on speech, to the detriment of the political process. However, each of these articles simply (and correctly) assumes that the use of debate footage in political campaign advertising is a fair use without a thorough analysis of the issue.<sup>44</sup> These authors have no doubt

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<sup>38</sup> See *infra* text accompanying notes 65-115. The term *unequivocal fair use* is borrowed from *Lenz v. Universal Music Corp.*, 572 F.Supp.2d 1150 (2008) (“One might imagine a case in which an alleged infringer uses copyrighted material in a manner that unequivocally qualifies as fair use . . .”) and Jordan Koss, Note, *Protecting Free Speech for Unequivocal Fair Users: Rethinking Our Interpretation of the §512(F) Misrepresentation Clause*, 28 CARDOZO ARTS & ENT. L.J. 149, 152-53 (2010) (“An unequivocal fair use means no reasonable copyright holder, in evaluating an alleged infringer’s use prior to issue a DMCA takedown notice, could conclude that the use is anything but fair use under the four-factor test set out in 17 U.S.C. § 107. . . . In this evaluation, if the copyright holder’s consideration of the four factors could only come to one reasonable conclusion – that the use is fair – then this is an unequivocal fair use.”).

<sup>39</sup> Digital Millennium Copyright Act, 17 U.S.C. § 512 (2006).

<sup>40</sup> See e.g., Charles W. Hazelwood, Jr., *Fair Use and the Takedown / Put Back Provisions of the Digital Millennium Copyright Act*, 50 IDEA 307 (2010); Koss, *supra* note 38; Ian Rubenstrunk, Comment, *The Throw Down over Takedowns: An Analysis of the Lenz Interpretation of 17 U.S.C. § 521(F)*, 10 J. MARSHALL REV. INTELL. PROP. L. (Summer 2011); Seltzer, *Free Speech Unmoored in Copyright’s Safe Harbor*, *supra* note 12.

<sup>41</sup> *Online Policy Grp. v. Diebold*, 337 F.Supp.2d 1195 (2004).

<sup>42</sup> *Rossi v. Motion Picture Ass’n of Am.*, 391 F.3d 1000 (2004).

<sup>43</sup> *Lenz v. Universal Music Corp.*, 572 F.Supp.2d 1150 (2008).

<sup>44</sup> For instance, DMCA scholar Wendy Seltzer states in her article, *Free Speech Unmoored in Copyright’s Safe Harbor: Chilling Effects of the DMCA on the First Amendment*, *supra* note 12, at 173, “[i]f there was ever a clear case of non-infringing fair use – speech protected by the First Amendment – this should have been it: a political candidate, seeking to engage in public

made a valuable contribution to the growing body of work which advocates changes to the takedown procedure of the DMCA so that important political and social speech is not so easily removed from the public domain. However, what is missing in the literature thus far is a detailed legal analysis of the fair use argument as it applies to political speech containing debate footage, an argument which must necessarily be made in any case which challenges a network's refusal to allow campaign debate footage to be used in any type of campaign advertising, via the Internet or run on television. This paper fills that gap by providing such an analysis. The intention of this paper is to give litigators and courts guidance and to direct further attention to calls for a revision of the DMCA.

### III. COPYRIGHT PROTECTION AND FAIR USE

The purpose of copyright protection, which is found in Article I, § 8 of the U.S. Constitution, is to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>45</sup> Copyright protection generally gives the holder an exclusive right to use the copyrighted material, but over time courts began to recognize that a “rigid application of copyright law could, in some situations, stifle the very artistic and scientific progress that copyright protection is intended to protect.”<sup>46</sup> Thus, the common law doctrine of fair use evolved as a defense to certain copyright infringement claims.<sup>47</sup> Congress codified fair use in 1976 to provide specific guidance

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multimedia debate, used video snippets from the television programs on which the issues were discussed.” Similarly, Jordan Koss, in his article *Protecting Free Speech for Unequivocal Fair Users*, *supra* note 38, at 153, states: “In the McCain example, the use fits squarely within the four factors of 17 U.S.C. § 107, and since it is political speech, which is a ‘time-sensitive or controversial subject,’ it deserves the highest protection under fair use principles (as described by the Lenz court). This constitutes the epitome of unequivocal fair use.” Even the *Campaign Takedown Troubles* report, issued by the Center for Democracy and Technology, dispenses with the fair use analysis in just one paragraph: “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.” *Supra* note 10, at 5.

<sup>45</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>46</sup> Johnston, *supra* note 36, at 691.

<sup>47</sup> *Id.*

regarding the type of secondary use that might be acceptable.<sup>48</sup> The statute allows for a fair use of copyrighted material “for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.”<sup>49</sup> It is now commonly recognized that “the purpose of copyright protection and that of the fair use exception are one in the same; both seek to ensure that copyright law promotes the advancement of art and science by restricting and permitting copies as appropriate.”<sup>50</sup>

Section 107 of the Copyright Act sets forth the following four factors courts must apply to determine whether a secondary use of copyrighted material is allowable as a fair use:

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.<sup>51</sup>

Fair use must be determined on a case-by-case basis.<sup>52</sup> These four factors must be considered together, in light of the fundamental purpose of copyright law.<sup>53</sup> Part IV below discusses in detail the application of each of these four factors to the unauthorized use of debate footage for purposes of political speech.

Before considering these factors, however, the character of the important expression involved in this case – political speech – necessitates a discussion of whether and how free speech interests matter in copyright infringement cases. This is especially true since the importance of free speech in political campaigns is the frequent justification for the use of debate footage in campaign advertising.<sup>54</sup> After all, as the U.S. Supreme Court recently reiterated in *Citizens United v. Federal Election Commission*, the First Amendment “has its fullest and most urgent application to speech uttered during a campaign for political office.”<sup>55</sup> Political speech is “indispensable to decision making in a democracy.”<sup>56</sup>

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<sup>48</sup> See 17 U.S.C. § 107 (2006).

<sup>49</sup> *Id.*

<sup>50</sup> Johnston, *supra* note 36, at 691.

<sup>51</sup> 17 U.S.C. § 107 (2006).

<sup>52</sup> *Campbell v. Acuff*, 510 U.S. 569, 578, 114 S.Ct. 1164 (1994).

<sup>53</sup> *Id.* at 577.

<sup>54</sup> See *supra* text accompanying notes 8-9 and 24.

<sup>55</sup> *Citizens United v. Fed. Election Comm'n*, 130 S.Ct. 876, 904 (2010).

<sup>56</sup> *Id.*

Despite the national significance of free speech issues, all courts that have considered the matter have held that free speech is not a separate defense in copyright infringement cases. "Multiple circuits have rejected a First Amendment defense separate from the protections afforded by fair use, holding that 'except perhaps in an extraordinary case, the fair use doctrine encompasses all claims of first amendment in the copyright field.'"<sup>57</sup> For example, in *Roy Export v. CBS*,<sup>58</sup> the Roy Export Co., which held the copyrights to various Charlie Chaplin films, sued CBS after the network broadcast a film biography of Chaplin which included clips from some of those films. CBS claimed a First Amendment privilege to use the clips, arguing that it was "meaningless to attempt a full account of his life without making some use of the very things that make life worth remembering."<sup>59</sup> The court disagreed and noted that "[n]o Circuit that has considered the question, however, has ever held that the First Amendment provides a privilege in the copyright field distinct from the accommodation embodied in the 'fair use' doctrine."<sup>60</sup>

The courts' refusal to extend free speech as a defense to a copyright infringement claim is due in large part to the distinction between the right to speak freely about an idea versus the competing right to protect one's exact expression of that idea. This distinction is commonly referred to as the "idea/expression dichotomy," as the U.S. Supreme Court explained in *Eldred v. Ashcroft*:

[C]opyright law contains built-in First Amendment accommodations. . . . First, it distinguishes between ideas and expression and makes only the latter eligible for copyright protection. . . . As we said in *Harper & Row*, this "idea/expression dichotomy strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression." . . . Due to this distinction, every idea, theory, and fact

<sup>57</sup> Johnston, *supra* note 36, at 704 (citing *Twin Peaks Prods., Inc. v. Publ'ns Intern., Ltd.*, 996 F.2d 1366, 1378 (2nd Cir. 1993)). See also, *Hustler Magazine, Inc. v. Moral Majority, Inc.* 606 F.Supp. 1526, 1536 (U.S.D.C. California 1985) ("[T]he first amendment does not provide a defense to copyright infringement.").

<sup>58</sup> *Roy Exp. Co. Establishment of Vaduz, Liechtenstein v. Columbia Broad. Sys., Inc.*, 672 F.2d 1095 (1982).

<sup>59</sup> *Id.* at 1099.

<sup>60</sup> *Id.* The court did note that there might be a First Amendment *privilege* to use copyrighted material in "some 'rare,' 'almost unique' circumstance, such as those surrounding the Zapruder film, in which 'it is at least arguable that the informational value of (the) film cannot be separated from the photographer's expression, . . . thereby indicating that both should be in the public domain.'" However, the court did not recognize such a privilege in this case. *Id.* at 1100.

in a copyrighted work becomes instantly available for public exploitation at the moment of publication.<sup>61</sup>

Over the years, several scholars have argued that free speech should be a defense in certain copyright infringement cases. For instance, in an article analyzing *Mastercard v. Nader*,<sup>62</sup> one of the few cases involving copyright and political speech, Eileen Hintz Rumpfelt argued that:

[W]hen core political speech is implicated . . . courts should analyze claims under First Amendment jurisprudence, which focuses on the content of the message and the type of speech involved. Under that analysis, core political speech garners a high degree of protection from those who seek to silence it.<sup>63</sup>

David S. Olson also advocates for heightened scrutiny in copyright cases involving issue of free speech:

[D]ue to the drastic lock-up of speech from increased copyright coverage, First Amendment scrutiny must be applied to copyright law with renewed vigor, and . . . in a number of areas, accommodations must be made in copyright law to protect First Amendment interests that are no longer adequately protected by copyright law acting alone.<sup>64</sup>

In view of the ease with which copyright holders can have material removed from the Internet pursuant to the DMCA (described more fully in Part V below), these arguments may have more pressing importance than they once did. However, under the current state of the law, courts will not consider free speech as a separate defense, but will simply incorporate free speech

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<sup>61</sup> *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2002) (citations omitted).

<sup>62</sup> *Mastercard v. Nader*, 2004 WL 434404 (S.D.N.Y. 2004).

<sup>63</sup> Eileen Hintz Rumpfelt, Comment, *Political Speech: Priceless – Mastercard v. Nader and the Intersection of Intellectual Property and Free Speech*, 55 EMORY L.J. 389, 391 (2006).

<sup>64</sup> David S. Olson, *First Amendment Interests and Copyright Accommodations*, 50 B.C. L. REV. 1393, 1397 (Nov. 2009). See also, Joseph P. Bauer, *Copyright and the First Amendment: Comrades, Combatants, or Uneasy Allies?* 67 WASH. & LEE L. REV. 831, 837 (Summer 2010) (“The theme of this Article is not only that the First Amendment should play a significant role in demarcating copyright protection, but that the courts and numerous commentators have understated its significance.”); Matthew D. Bunker, *Adventures in the Copyright Zone: The Puzzling Absence of Independent First Amendment Defenses in Contemporary Copyright Disputes*, 14 COMM. L. & POL’Y 273, 292 (Summer 2009) (“Neither the idea/expression dichotomy nor the fair use doctrine is adequate, either together or separately, to protect First Amendment values in the copyright realm. Thus, it may be appropriate to consider a new approach to this contested legal area.”).



considerations into the fair use defense and give them substantial weight, as discussed more thoroughly in the next section.

#### IV. THE FAIR USE DOCTRINE APPLIED TO THE UNAUTHORIZED USE OF CAMPAIGN DEBATE FOOTAGE

##### A. *Factor One: Purpose and Character of the Use*

A fair use analysis begins by looking at the purpose and character of the secondary use of copyrighted material.<sup>65</sup> This determination involves a response to two fundamental questions. First, one must consider whether the secondary use is commercial in nature.<sup>66</sup> Although not always dispositive, a non-commercial use will weigh more favorably toward fair use than if the alleged infringer is using the original work for commercial purposes.<sup>67</sup> The second step requires a determination of whether the secondary use can be characterized as transformative.<sup>68</sup> Applied to the issue of debate footage used in campaign advertising, this question of transformation is the most important element of the entire fair use analysis.

The few courts which have considered this issue in the context of political speech have consistently held that campaign advertising is not commercial in nature. For instance, in *American Family Life Insurance Co. v. Hagan*,<sup>69</sup> the court considered a trademark violation claim in a case involving a parody of the ubiquitous AFLAC duck, commonly shown in American Family Life Assurance Company of Columbus (AFLAC) television ads, in the 2002 Ohio gubernatorial race. Candidate Timothy Hagan, whose opponent was incumbent Ohio Governor Robert Taft, created campaign ads portraying a “TaftQuack” duck cartoon, which consisted of Governor Taft’s head on the body of a duck similar to the AFLAC duck. AFLAC objected to the ad and filed a trademark violation claim against the Hagan campaign. The *Hagan* court held that political campaign advertising, even if done to solicit donations, is inherently non-commercial. “Hagan’s solicitation of contributions, and the making of those contributions by visitors to the *www.taftquack.com* website, is much more than merely a commercial transaction. Indeed, this exchange is properly classified not as a commercial transaction at all, but completely noncommercial, political speech.”<sup>70</sup>

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<sup>65</sup> Consumers Union of United States, Inc., v. Gen. Signal Corp., 724 F.2d 1044 (1983).

<sup>66</sup> *Id.*

<sup>67</sup> Lennon v. Premise Media Corp., L.P., 556 F.Supp.2d 310, 322 (2008).

<sup>68</sup> *Id.*

<sup>69</sup> Am. Family Life Ins. Co. v. Hagan, 266 F.Supp.2d 682 (2002).

<sup>70</sup> *Id.* at 697.

Similarly, the district court in *Mastercard v. Nader*<sup>71</sup> relied upon *Hagan* to hold that a campaign ad created by 2004 presidential candidate Ralph Nader, which included a parody of the Mastercard “priceless” advertising campaign, was non-commercial even though the ad sought political donations. “This Court finds that Ralph Nader’s use of plaintiff’s trademarks is not commercial, but instead political in nature . . .”<sup>72</sup> In fact, the court noted that any other holding could very well mean that all political speech could be deemed commercial “since all political candidates collect contributions.”<sup>73</sup> Additionally, campaigns are arguably inherently non-profit since federal law prohibits politicians from keeping money not spent on the campaign.<sup>74</sup>

This part of the character and purpose factor weighs strongly in favor of a finding that use of political debate footage in a campaign ad is a fair use. Campaign advertising is clearly non-commercial.<sup>75</sup> *Hagan* and *Mastercard* support this conclusion.

Next, analysis of this first factor requires a look at whether the secondary use is transformative. A second use of copyrighted material might be transformative if it “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”<sup>76</sup> A transformative use might create “new information, new

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<sup>71</sup> *Mastercard v. Nader*, 2004 WL 434404 (S.D.N.Y. 2004).

<sup>72</sup> *Id.* at 11.

<sup>73</sup> *Id.* at 10. See also, *Fed. Election Com’n v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 440 (2001) (“Spending for political ends and contributing to political candidates both fall within the First Amendment’s protection of speech and political association”); *Keep Thomson Governor Comm. v. Citizens for Gallen Comm.*, 457 F.Supp. 957, 961 (1978) (“The use by the defendant of a portion of the plaintiff’s political advertisement is clearly part of a political campaign message, noncommercial in nature, and First Amendment issues of freedom of expression in a political campaign are clearly implicated.”).

<sup>74</sup> Johnston, *supra* note 36, at 694.

<sup>75</sup> The one case which has reached an opposite conclusion appears to be an anomaly. In *Henley v. DeVore*, 733 F.Supp.2d 1144 (2010), the court relied upon *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110 (9th Cir. 2000), to hold that the use of two of musician Don Henley’s songs in campaign advertising was indeed commercial. In *Worldwide Church*, the Ninth Circuit held that monetary gain was not the sole criterion upon which the commercial / non-commercial decision could be made in a fair use analysis. The *Henley* court stated: “Like the church in *Worldwide Church*, which stood to gain parishioners through the unlicensed use of the plaintiff’s copyrighted work, [defendants] DeVore [the candidate] and Hart [the campaign manager] stood to gain publicity and campaign donations from their use of Henley’s music. In fact, the videos contained links directing viewers to the DeVore campaign website, encouraging them to donate. Thus, under the reasoning of *Worldwide Church*, the Defendants ‘profited’ from their use by gaining an advantage without having to pay customer licensing fees to the Plaintiffs. . . . In fact, Hart himself directly profited, as his compensation was tied to the amount of funds he raised.” *Id.* at 1159 (citations omitted).

<sup>76</sup> *Campbell v. Acuff*, 510 U.S. 569, 578 (1994).

aesthetics, new insights and understandings.”<sup>77</sup> Additionally, to determine whether the second use is transformative, one might ask whether it “[m]erely supersede[s] the original work, or does it add something new, with a further purpose or different character, altering the first with new expression, meaning, or message?”<sup>78</sup>

Although First Amendment free speech rights are not a separate defense to copyright law, clearly a secondary use of copyrighted material for purposes of political speech must be given considerable weight, as the U.S. District Court noted in the first iteration of the famous case, *Hustler Magazine v. Moral Majority, Inc.*: “Although the first amendment does not provide a defense to copyright infringement, when an act of copying occurs in the course of a political, social or moral debate, the public interest in free expression is one factor favoring a finding of fair use.”<sup>79</sup> Similarly, in *Keep Thomsen Governor v. Citizens for Gallen*, which involved the use of a copyrighted song in a political advertisement, the court noted that “the use by the defendant of a portion of the plaintiff’s political advertisement is clearly part of a political campaign message, noncommercial in nature, and First Amendment issues of freedom of expression in a political campaign are clearly implicated.”<sup>80</sup>

Looking at other fair use analyses of acceptable transformative uses, such as critical social or cultural commentary,<sup>81</sup> is also helpful. An example of a fair use for critical commentary is found in *Savage v. Council on American-Islamic Relations, Inc.*,<sup>82</sup> the facts of which parallel those

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<sup>77</sup> Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (Mar. 1990).

<sup>78</sup> Campbell, 510 U.S. 569 at 578.

<sup>79</sup> *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 606 F.Supp. 1526, 1536 (U.S.D.C. Cal., 1985). The decision in *Hustler* was affirmed on appeal in *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148 (1986).

<sup>80</sup> *Keep Thomsen Governor Comm. v. Citizens for Gallen Comm.*, 457 F.Supp. 957, 961 (1978). See also, *Eldred v. Ashcroft*, 537 U.S. 186 (2002); *Nat’l Rifle Ass’n v. Handgun Control Federation of Ohio*, 15 F.3d 559, 562 (1994) (“The document was used primarily in exercising HCF’s First Amendment speech rights to comment on public issues. . . . The scope of the fair use doctrine is wider when the use relates to issues of public concern.”); *Consumers Union of United States, Inc. v. Gen. Signal Corp.*, 724 F.2d 1044, 1050 (2nd Cir. 1983) (“The scope of the doctrine [of fair use] is undoubtedly wider when the information conveyed relates to matters of high public concern.”); *Lennon v. Premise Media Corp.*, 556 F.Supp.2d 310 (2008) (“Court are more willing to find a secondary use fair when it produces a value that benefits the broader public interest . . .”).

<sup>81</sup> Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537 (Apr. 2009).

Professor Samuelson’s article is a compelling, comprehensive attempt to organize, or *bundle*, fair uses cases into certain patterns, or *policy clusters*, such as cases which implicate the freedom of speech and expression interests of the authors and the public, which can be further broken down into transformative, productive, and orthogonal uses.

<sup>82</sup> *Savage v. Council on American-Islamic Relations, Inc.*, 2008 WL 2951281 (N.D.Cal. 2008).

described in the introduction more closely than any other case. In *Savage*, the Council on American-Islamic Relations of Santa Clara, Inc., (Council) posted a page on its website, titled *National Radio Host Goes On Anti-Muslim Tirade*, which included a four-minute audio clip taken from *The Savage Nation*, a nationally-syndicated radio program hosted by Michael Savage. The Council appropriated this material to criticize many of Savage's "anti-Muslim" statements, which often equated Muslims with terrorists, and to raise money for its cause. Savage sued the Council for copyright infringement, claiming that its unauthorized use of portions of his show was taken out of context and that the "misportrayals" destroyed the value of his material and led to a loss of advertising revenue."<sup>83</sup>

The court disagreed with Savage. Considering the purpose of the Council's use of Savage's remarks, the court found the use to be fair in part because it provided authenticity. The court held that:

To comment on plaintiff's statements without reference or citation to them would not only render defendants' criticism less reliable, but be unfair to plaintiff. Further, it was not unreasonable for defendants to provide the actual audio excerpts, since they reaffirmed the authenticity of the criticized statements and provided the audience with the tone and manner in which the plaintiff made the statements.<sup>84</sup>

The *Savage* court relied upon the Ninth Circuit case of *Hustler v. Moral Majority*<sup>85</sup> to support its holding that the Council had made a fair use of the *Savage* video. *Hustler* concerned the infamous parody of Jerry Falwell in a Campari ad which ran in an edition of *Hustler Magazine*. Falwell and his organization, the Moral Majority, responded to the ad by mailing a copy of it in a fundraising appeal to its membership, in part because "words were inadequate to illustrate how outrageous the ad was."<sup>86</sup> *Hustler* then sued the Moral Majority, claiming that the organization's use of the ad in its fundraising letter infringed on *Hustler's* copyright. The Moral Majority claimed that the letter was fair use, and the court agreed:

Falwell was not selling the parody, but was instead using the parody to make a statement about pornography and Larry Flynt, the publisher of *Hustler*. Section 107 expressly permits fair use for the purposes of criticism and comment. . . . [A]n individual in rebutting

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<sup>83</sup> *Id.* at 2.

<sup>84</sup> *Id.* at 5.

<sup>85</sup> *Hustler Magazine, Inc., v. Moral Majority, Inc.*, 796 F.2d 1148 (1986).

<sup>86</sup> Samuelson, *supra* note 81, at 11.

a copyrighted work containing derogatory information about himself may copy such parts of the work as are necessary to permit understandable comment. Falwell did not use more than was reasonably necessary to make an understandable comment when he copied the entire parody from the magazine. Therefore, the public interest in allowing an individual to defend himself against such derogatory personal attacks serves to rebut the presumption of unfairness.<sup>87</sup>

An earlier case, *Time, Inc. v. Bernard Geis Associates*,<sup>88</sup> is also relevant. The *Geis* court considered whether Time, Inc., could successfully defend its copyright on the Zapruder film depicting the assassination of President Kennedy against the publisher of a book on the topic. The court ruled against Time, Inc., and held that the use of still photos of the Zapruder film was a fair use, in part because of the national importance of the film's content.

There is a public interest in having the fullest information available on the murder of President Kennedy. Thompson did serious work on the subject and has a theory entitled to public consideration. While doubtless the theory could be explained with sketches of the type used at page 87 of the Book and in the Saturday Evening Post, the explanation actually made in the Book with copies is easier to understand. The Book is not bought because it contained the Zapruder pictures; the Book is bought because of the theory of Thompson and its explanation, supported by Zapruder pictures.<sup>89</sup>

Application of this part of the first factor to campaign ads containing debate footage also weighs in favor of a finding of fair use. First, because these ads contain political speech relating to a matter of high public concern, the use is entitled to a great deal of latitude as a fair use defense.<sup>90</sup> Moreover, the use of debate footage in campaign advertising is inherently

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<sup>87</sup> *Hustler Magazine, Inc.*, 796 F.2d at 1153.

<sup>88</sup> *Time, Inc. v. Bernard Geis Assocs.*, 293 F.Supp. 130 (1968).

<sup>89</sup> *Id.* at 146. The court went on to state: "There seems little, if any, injury to plaintiff, the copyright owner. There is no competition between plaintiff and defendants. Plaintiff does not sell the Zapruder pictures as such and no market for the copyrighted work appears to be affected. Defendants do not publish a magazine. There are projects for use by plaintiff of the film in the future as a motion picture or in books, but the effect of the use of certain frames in the Book on such projects is speculative. It seems more reasonable to speculate that the Book would, if anything, enhance the value of the copyrighted work; it is difficult to see any decrease in its value." *Id.*

<sup>90</sup> *Consumers Union, Inc., v. Gen. Signal Corp.*, 724 F.2d 1044, 1050 (1983). See also, *supra* text accompanying notes 79-80.

transformative because it serves a different purpose than the original work.<sup>91</sup> The point of these ads is political advocacy, while the original work is intended to be informational.<sup>92</sup> As each of these ads is described, the debate footage was inserted into the ad to persuade viewers to vote for a particular candidate by criticizing his opponent and questioning the opponent's qualifications for the position.<sup>93</sup> This indicates that the second use was clearly a transformation of the first, serving a different function. Additionally, as in *Savage*, the use of the IPTV video in the political ad was to "reaffirm the authenticity of the statements" and to provide the audience with the veracity of what was said. Melaleuca CEO VanderSloot stated that the actual debate footage was used in the ad to make clear what Olson had said. "We could have said what he said but then no one would believe it. . . . We thought it was important to put it up there in his own words."<sup>94</sup>

### B. *Factor Two: Nature of the Copyrighted Work*

Here, courts will look at the nature of the original work by considering two separate questions. First, is the original work informational or creative? Fair use is generally more acceptable regarding informational rather than creative works.<sup>95</sup> Second, has the original work been published? A secondary use of

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<sup>91</sup> This is especially true in the Idaho Public Television case in which the debate footage was literally transformed, at least in parts, by the addition of music, a voice-over, and changing the speed of the footage. See Gray, *supra* note 20.

<sup>92</sup> See *Campaign Takedown Troubles*, *supra* note 10, at 5 ("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.")

<sup>93</sup> At one point in the Idaho ad containing the IPTV debate footage, the voice-over states, "Administrators should know and understand what's taught within our schools. . . . That may disqualify Stan Olson." See Russell, *supra* note 18.

<sup>94</sup> *Id.* VanderSloot also stated, "We'd like people to just watch the whole debate, but of course you can't show the whole debate in a 60 second spot, so we wanted to bring some of the attention on that race, and we thought that those comments that we show are quite important for people to know." Grey, *supra* note 20. See also, *Campaign Takedown Troubles*, *supra* note 10, at 10 ("The clips are used to fact check and contrast [the candidate's] claims during a . . . 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.") (quoting from David Goldstein, *Suzie Hearts Huckabee (and Lies About It)*, HA SEATTLE BLOG, (Oct. 29, 2009), <http://horsesass.org/?p=21598>).

<sup>95</sup> *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 563, 105 S.Ct. 2218, 2232 (1985) ("The law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy.") See also, *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1153-54 (9th Cir. 1986) ("The scope of fair use is greater when 'informational' as opposed to more 'creative' works are involved.")

work that has been published is more likely to be considered a fair use than if the work is not yet available to the public.<sup>96</sup>

This factor needs little analysis as it weighs so clearly in favor of fair use.<sup>97</sup> The nature of the copyrighted work itself, a political debate, is clearly informational. This may be especially true regarding non-profit networks such as IPTV. The IPTV website states, in part, that its mission is “to meet the needs and reflect the interests of our various audiences by . . . [p]roviding learning opportunities and fostering participation and collaboration in education and civic activities.”<sup>98</sup> Likewise, a spokesperson for the League of Women Voters of Idaho who helped organize the IPTV debate stated, “[w]e do these [debates] as part of our voter-education effort . . . ”<sup>99</sup> Secondly, it almost goes without saying that the original work (the debate) will be televised before the campaign ad is released (indeed that is the source of the clip included in the ad). Thus, the question of publication is not relevant.

### C. Factor Three: Amount and Substantiality of the Work Used

This factor requires both a quantitative analysis, which examines how much of the original expression is used in the secondary work, and a qualitative analysis, which looks at the significance of the borrowed portion of the original work.<sup>100</sup> According to *Savage*, “[t]his factor looks to the quantity and significance of the material used to determine whether the use is reasonably necessary to accomplish the purpose of the defendant’s work and whether it supersedes or constitutes the heart of the original work.”<sup>101</sup> However, “[t]here is no clear standard to this test, and courts have rejected absolute rules regarding what proportion is too much to possibly be considered fair use, and what proportion is so insignificant that it must be fair use.”<sup>102</sup>

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<sup>96</sup> See *Harper & Row*, 471 U.S. at 564 (“[T]he author’s right to control the first public appearance of his expression weighs against such use of the work before its release. The right of first publication encompasses not only the choice whether to publish at all, but also the choices of when, where, and in what form first to publish a work.”).

<sup>97</sup> Indeed, at least one law review article on this topic omitted this factor completely from its discussion because the original work under analysis had been published. See Johnston, *supra* note 36, at 693 (“The analysis omits the second consideration, the nature of the copyrighted work, because it exists to protect unpublished materials and is irrelevant here.”).

<sup>98</sup> Idaho Public Television Mission, <http://idahoptv.org/about/> (last visited Mar. 6, 2012).

<sup>99</sup> Russell, *supra* note 18.

<sup>100</sup> Johnston, *supra* note 36.

<sup>101</sup> *Savage v. Council on American-Islamic Relations, Inc.*, 2008 WL 2951281 at 5 (N.D.Cal. 2008). See also, *Campbell v. Acuff*, 510 U.S. 569, 578 (1994); *Elvis Presley Enters., Inc. v. Passport Video*, 349 F.3d 622 (2003); *Sofa Entm’t, Inc. v. Dodger Prods., Inc.*, 2010 WL 4228343 (D.C.Cal. 2010).

<sup>102</sup> Johnston, *supra* note 36, at 696.

Application of this factor also supports a fair use ruling. In *Savage*, the video published on the Council's website involved four minutes of a two-hour talk show, which the court considered to be insubstantial:

As discussed in the Court's analysis of the first fair use factor, defendants used the audio excerpts to comment on and rebut derogatory statements regarding their organization and their religious affiliations, and the amount used in reference to plaintiff's statements was reasonably necessary to convey the extent of plaintiff's comments. As a result, regardless of whether the entire October 29, 2007, program or segments of that program constitute the entire original work for analysis under this factor, the extent of defendants' copying of the audio excerpts falls within the fair use doctrine.<sup>103</sup>

While the national campaign ads described in this article's introduction are not available for viewing, various sources describe them as using a very small portion of the debates from which they are taken. For instance, Romney's ad uses only a "snippet of the 90 minute coverage of the debate between the candidates."<sup>104</sup> A similar McCain ad used just 19 seconds of a 90 minute debate aired on Fox News.<sup>105</sup> In the IPTV case, while the 60-second Melaleuca ad consisted of 45 seconds of campaign debate footage, the debate itself was an hour long. Moreover, the portion of the footage used compared to the entire debate itself, while not miniscule, is certainly not the crux of the debate. Indeed, no portion of a political debate is arguably of any greater importance than any other. Consequently, the amount and importance of the original work used in these political campaign ads weighs against the networks and in favor of a finding of fair use.

#### D. Factor Four: Effect on the Market for the Original Work

The fourth factor, the effect of the second use on the market for the original work, is typically considered to be the most important in fair uses cases.<sup>106</sup> Many courts rejecting a fair use defense do so because of the

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<sup>103</sup> *Savage*, 2008 WL 2951281 at 6.

<sup>104</sup> See Sargent, *supra* note 7; *New Romney Ad Uses Fox Debate Video*, THE CAUCUS - THE POLITICS AND GOVERNMENT BLOG OF THE N.Y. TIMES (Nov. 2, 1007), <http://thecaucus.blogs.nytimes.com/2007/11/02/new-romney-ad-uses-fox-debate-video/>.

<sup>105</sup> Jim Rutenberg, *Fox Orders Halt to McCain Ad*, THE CAUCUS - THE POLITICS AND GOVERNMENT BLOG OF THE N.Y. TIMES (Oct. 25, 2007), <http://thecaucus.blogs.nytimes.com/2007/10/25/fox-orders-halt-to-mccain-ad/>.

<sup>106</sup> *Consumers Union, Inc., v. Gen. Signal Corp.*, 724 F.2d 1044, 1050 (1983) ("This factor is 'widely accepted to be the most important.'") (citation omitted); Johnston, *supra* note 36, at



adverse impact of the second use on the market for the original work. Although arguably the first factor is the most persuasive in this particular fair use analysis, as explained previously in section IV(A), this fourth factor is significant. Indeed, it too weighs in favor of a fair use conclusion because the impact on the market for the original work is minimal, at best.

Under this fourth factor, courts look at the extent to which the secondary use tends to diminish potential sales of the original work or interferes with the marketability of the original work by fulfilling demand for it.<sup>107</sup> Generally, courts will compare the:

[B]enefit the public will derive if the use is permitted [against] the personal gain the copyright owner will receive if the use is denied. . . . The less adverse effect that an alleged infringing use has on the copyright owner's expectation of gain, the less public benefit need be shown to justify the use.<sup>108</sup>

Courts will find against fair use if the secondary use is found to compete directly with the copyrighted work, as was the case in *Harper & Row*.<sup>109</sup> In that case, publishing company Harper & Row, which held the copyright to President Ford's memoirs, sued the publisher of *The Nation* magazine after it published portions of the memoirs without permission. Harper had previously contracted with *Time Magazine* to run a series excerpting the memoirs. After *The Nation's* article ran, *Time* canceled its piece and its payment to Harper. In *Harper*, as is typical, this fourth factor was significant. The court held that *The Nation's* subsequent use of the material competed directly with the proposed articles *Time* was to have run and thus reduced its market, which in turn damaged Harper, the copyright holder. In fact, the court noted that "[r]arely will a case of copyright infringement present such clear-cut evidence of actual damage."<sup>110</sup>

Conversely, "courts weigh this consideration in favor of fair use when the use would have zero impact or a positive impact on the market for the copyrighted work."<sup>111</sup> This was the case in *Savage*, where the court noted that:

There is no suggestion that plaintiff currently has, or ever had, any kind of market for the copyrighted work at issue outside its airing

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698 ("The Supreme Court has called this 'undoubtedly the single most important element of fair use' and the 'most important, and indeed, central fair use factor.'").

<sup>107</sup> *Lennon v. Premise Media Corp., L.P.*, 556 F.Supp.2d 310, 327 (2008).

<sup>108</sup> *MCA, Inc., v. Wilson*, 677 F.2d 180, 183 (1981).

<sup>109</sup> *Harper & Row*, 471 U.S. 539, 105 S.Ct. 2218 (1985).

<sup>110</sup> *Id.* at 567.

<sup>111</sup> *Johnston*, *supra* note 36, at 699.

on the ... radio show. Further, he does not allege any attempts or plans to sell or license the material or derivatives thereof. Plaintiff instead alleges that defendants caused him financial loss in advertising revenue. Assuming the truth of this allegation, it relates only to the economic impact on future shows, and has no impact on the market for the original, copyrighted show. . . . Because this factor limits the evaluation of market impact to the *original* work at issue, not other works by the creator, the loss of advertising revenue for future shows, unrelated to the original work, does not give rise to a legal cognizable infringement claim.<sup>112</sup>

Similarly, in *Hustler*, the court noted that the magazine which contained the excerpts used in the Moral Majority's mailing was no longer on the newsstands and available for purchase. Thus, the court held that the effect of the secondary use on the marketability of back issues was minimal, which supported a conclusion that the use was legitimate.<sup>113</sup>

Although there are no statements from the networks regarding the actual financial impact of campaign ads containing debate footage, it is hard to imagine that there would be significant monetary consequences.<sup>114</sup> As in *Savage*, there is no indication of a market for these televised debates outside of their original airing. As The Center for Democracy and Technology (CDT) points out in the brief fair use discussion in its *Campaign Takedown Troubles* report:

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

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<sup>112</sup> *Savage*, 2008 WL 2951281 at 6-7.

<sup>113</sup> *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148 (9th Cir. 1986). *See also*, *Mastercard v Nader*, 2004 WL 434404 at 16 (S.D.N.Y. 2004) (“The Ralph Nader Political Ad may serve a general overlapping market, the viewing public. However, it serves an entirely different purpose than the Priceless Advertisements, a political non-commercial purpose. For this reason, the fourth factor also weighs heavily in the defendant's favor for a finding of fair use.”); *Nat'l Rifle Ass'n of Am. v. Handgun Control Fed'n of Ohio*, 15 F.3d 559 (1994).

<sup>114</sup> Indeed, this may be especially true in the Idaho case, given that IPTV is not a for-profit news organization, which is different than the major television networks such as Fox News.

political advocacy would not diminish the audience or fulfill demand for any re-airing of the original program.<sup>115</sup>

Thus, while this is often the most important factor in those cases in which courts find against a secondary use being fair, in this case it weighs heavily in favor of a fair use. There is no market for campaign debate footage after the debate has aired.

### E. Fair Use Summary

In conclusion, the secondary use of televised campaign debate footage in political advertising does not infringe upon the networks' copyright protection. Such use is allowable under the fair use doctrine and serves an important public purpose. It is both non-commercial and transformative in nature. The amount of debate material used in a campaign ad is likely to be minor compared to the length of the televised debate. Finally, the use of the debate footage is unlikely to have any adverse impact on the potential market for the original work, if indeed one exists.

A fair use holding would likely resolve any dispute regarding campaign ads run on national television; it would almost certainly resolve the Idaho case. This is due in large part to the burden placed on copyright holders to enforce their rights in court when their protected material is aired on television. "[T]o get an allegedly infringing work removed in non-digital copyright cases, a copyright holder has to seek an injunction in court,"<sup>116</sup> which no network appears to have done (or may be likely to do). However, campaign advertising has also transitioned to the digital milieu, where the legal landscape is vastly different. The DMCA shifts the balance of power regarding copyright enforcement to the copyright holders by giving them the right to issue take-down notices to any ISP who is host to allegedly infringing material.<sup>117</sup> This event has occurred numerous times in recent years to candidates who have used debate footage in ads posted on the Internet.<sup>118</sup> Thus, the DMCA must be addressed as well.

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<sup>115</sup> See, *Campaign Takedown Troubles*, *supra* note 10, at 6.

<sup>116</sup> Hazelwood, *supra* note 40, at 307 ("The copyright holder is free to send a takedown notice for cases of questionable infringement, de minimis infringement, or in clear cases of fair use. This is in sharp contrast to the incentive in non-digital copyright cases. In order to get an allegedly infringing work removed in non-digital copyright cases, a copyright holder has to seek an injunction in court. This procedure necessarily involves legal expenses. These expenses act as an economic disincentive on copyright holders to pursue cases of de minimis infringement or cases where there is an arguable fair use right.")

<sup>117</sup> *Id.*

<sup>118</sup> See *supra* text accompanying note 16.

## V. FAIR USE AND THE DIGITAL MILLENNIUM COPYRIGHT ACT (DMCA)

A holding that the use of political debate footage in campaign advertising is a fair use of that copyrighted material will have especially important relevance in cases involving the DMCA.<sup>119</sup> In stark contrast to the networks' reluctance to enforce their copyrights when these ads are run on television, some networks, especially Fox News, have vigorously enforced their copyright protection regarding material posted on the Internet because their right to do so under the DMCA is dramatically different than it is in non-digital cases. The Center for Democracy and Technology states:

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. . . . 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.<sup>120</sup>

Other scholars who have analyzed the relevant DMCA cases have concluded they have resulted in an unacceptable chilling of important political speech.<sup>121</sup>

### A. *The DMCA and Relevant Case Law*

In the 1990s, as the digital transmission of copyrighted material grew widespread on the Internet, Congress recognized the necessity of limiting liability for copyright infringement for Internet service providers (ISPs) who provided an Internet site through which others could post content.<sup>122</sup> Congress enacted the DMCA in 2006 in part to “protect[] internet service providers from copyright infringement claims and copyright owners against

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<sup>119</sup> 17 U.S.C. § 512 (2006).

<sup>120</sup> See *Campaign Takedown Troubles*, *supra* note 10, at 15.

<sup>121</sup> See *infra* text accompanying notes 190-92.

<sup>122</sup> Rubenstrunk, *supra* note 40, at 796 (“In passing the DMCA, Congress recognized that the law struggled to keep up with the fast-paced development of new technology and recognized that the law needed to adapt to new changes. The DMCA was designed to create an environment where electronic commerce and digital technology could advance and flourish globally. Congress hoped to make digital networks safe places to disseminate and make use of copyrighted materials and make available to the public ‘the fruit of American genius.’ In creating this piece of legislation, Congress conducted extensive research and sought a broad spectrum of viewpoints to ensure that they could protect the interests of all internet users and copyright holders.”).

piracy by providing means for copyright owners to have infringing material immediately removed from the Internet.”<sup>123</sup> Section 512(c), commonly referred to as the safe harbor provision of the DMCA,<sup>124</sup> grants immunity from a possible copyright infringement claim to an ISP that passively stores or hosts material posted by others, if it is unaware that infringing material has been posted and “acts expeditiously to disable access to [infringing] material upon notice of the alleged infringement by the copyright owner.”<sup>125</sup>

Section 512(c) also places certain requirements on copyright holders who issue takedown notices to ISPs. The notice must include “[a] statement that the complaining party has a good faith belief that the use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.”<sup>126</sup> Once the ISP removes material pursuant to a copyright holder’s take-down notice, the user who posted the allegedly infringing material is given an opportunity to defend the use by providing a counter-notice to the ISP that the secondary use was made in good faith and that the original take-down notice was the result of a “mistake or misidentification.”<sup>127</sup> The ISP is then obligated to notify the copyright holder of the user’s counter-notice and replace the material within ten to fourteen days of receipt of the counter-notice, unless the copyright holder files an infringement lawsuit within that time frame.<sup>128</sup> Section 512(f) provides a cause of action to parties who suffer damages as a result of a copyright holder’s violation of § 512(c), i.e. who knowingly misrepresent a claim of copyright infringement in a takedown notice.<sup>129</sup> “The purpose of Section 512(f) is to prevent the abuse of takedown notices.”<sup>130</sup>

<sup>123</sup> Hazelwood, *supra* note 40, at 309.

<sup>124</sup> Online Policy Grp. v. Diebold, Inc., 337 F.Supp.2d 1195, 1200-01 (N.D.Cal. 2004) (“[The] DMCA contains various nonexclusive safe harbors designed to limit the liability of ISPs for incidental acts of copyright infringements.”).

<sup>125</sup> See 17 U.S.C. § 512(a)–(d). Those circumstances include providing Internet access, system caching or temporary storage of material, passive storage or hosting of material posted by others, and providing location tools.

<sup>126</sup> *Id.* at § 512(c)(3)(A)(v) (“To be effective under this subsection, a notification of claimed infringement must be a written communication provided to the designated agent of a service provider that includes substantially the following: . . . (v) A statement that the complaining party has 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.”) (emphasis added).

<sup>127</sup> *Id.* at § 512(g)(3)(c) (“To be effective under this subsection, a counter notification must be a written communication provided to the service provider’s designated agent that includes substantially the following: . . . A statement under penalty of perjury that the subscriber has a good faith belief that the material was removed or disabled as a result of *mistake or misidentification* of the material to be removed or disabled.”) (emphasis added).

<sup>128</sup> *Id.* at § 512(g)(2)(c).

<sup>129</sup> *Id.* at § 512(f) (“Any person who knowingly materially misrepresents under this section . . . (1) that material or activity is infringing, or (2) that material or activity was removed or disabled by mistake or misidentification, shall be liable for any damages, including costs and

Since the DMCA was enacted, copyright owners have issued thousands of take-down notices pursuant to § 512(c).<sup>131</sup> However, to date, very few cases on the relevant provisions of the DMCA have been published. Three of these cases are relevant to this issue and have been widely discussed: *Online Policy Group v. Diebold*,<sup>132</sup> *Rossi v. Motion Picture Ass'n of America, Inc.*,<sup>133</sup> and *Lenz v. Universal Music Corp.*<sup>134</sup>

*Diebold* was the first case in which a court applied the language of § 512(f) of the DMCA which assigns liability to copyright holders who *knowingly misrepresent* a copyright infringement in a take-down notice. Diebold, Inc., manufactures electronic voting machines which were the subject of much criticism after the 2004 elections. Two students at Swarthmore College obtained an archive of Diebold employee emails which allegedly contained evidence that Diebold was aware of problems with its machines before the election. These students posted the information on various websites through an ISP provided by Swarthmore. Diebold subsequently sent the students, Swarthmore, and the ISP a takedown notice demanding the removal of the archive. The students took the material down and subsequently filed a lawsuit against Diebold, alleging that “Diebold’s claim of copyright infringement was based on knowing material misrepresentation” in violation of § 512(f) of the DMCA. The basis of their claim was that posting the email archive was a lawful use of the material under the fair use defense to copyright infringement.<sup>135</sup>

The court first considered whether the plaintiffs’ use of the email archive was a fair use of the material.

The purpose, character, nature of the use, and the effect of the use upon the potential market for or value of the copyrighted work all indicate that at least part of the email archive is not protected by copyright law. The email archive was posted or hyperlinked to for the purpose of informing the public about the problems associated with Diebold’s electronic voting machines. It is hard to imagine a subject the discussion of which could be more in the public interest.

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attorneys' fees, incurred by the alleged infringer, by any copyright owner or copyright owner's authorized licensee, or by a service provider, who is injured by such misrepresentation, as the result of the service provider relying upon such misrepresentation in removing or disabling access to the material or activity claimed to be infringing, or in replacing the removed material or ceasing to disable access to it.”) (emphasis added).

<sup>130</sup> *Lenz v. Universal*, 572 F.Supp.2d 1150, 1156 (N.D.Cal. 2008).

<sup>131</sup> *Hazelwood*, *supra* note 40, at 325.

<sup>132</sup> *Online Policy Grp. v. Diebold*, 337 F.Supp.2d 1195 (N.D.Cal. 2004).

<sup>133</sup> *Rossi v. Motion Picture Ass'n of Am., Inc.*, 391 F.3d 1000 (9th Cir. 2004).

<sup>134</sup> *Lenz v. Universal Music Corp.*, 572 F.Supp.2d 1150, 1156 (N.D.Cal. 2008).

<sup>135</sup> *Diebold*, 337 F.Supp.2d at 1198.

If Diebold's machines in fact do tabulate voters' preferences incorrectly, the very legitimacy of elections would be suspect. Moreover, Diebold has identified no specific commercial purpose or interest affected by publication of the email archive, and there is no evidence that such publication actually had or may have any affect on the putative market value, if any, of Diebold's allegedly copyrighted material. Even if it is true that portions of the email archive have commercial value, there is no evidence that plaintiffs have attempted or intended to sell copies of the email archive for profit. . . . Finally, Plaintiffs' and [the ISP's] use was transformative; they used the email archive to support criticism that is in the public interest, not to develop electronic voting technology. Accordingly, there is no genuine issue of material fact that Diebold, through its use of the DMCA, sought to and did in fact suppress publication of content that is not subject to copyright protection.<sup>136</sup>

Finding that the use was lawful, the court then considered whether Diebold knowingly and materially misrepresented that the use violated its copyright. At issue was the parties' disagreement about the meaning of the requirement of § 512(f) that the allegation of copyright infringement be "knowingly materially misrepresented."<sup>137</sup> Regarding the appropriate definition, the court stated:

A requirement that a party have an objectively measured "likelihood of success on the merits" in order to assert claims of copyright infringement would impermissibly chill the rights of copyright owners. . . . A party is liable if it "knowingly" and "materially" misrepresents that copyright infringement has occurred. "Knowingly" means that a party actually knew, should have known if it acted with reasonable care or diligence, or would have had no substantial doubt had it been acting in good faith, that it was making misrepresentations.<sup>138</sup>

Based upon its analysis that the plaintiffs clearly made a fair use which did not infringe upon Diebold's copyright protection, the court held that Diebold's claim of copyright infringement in its take-down notice was a knowing misrepresentation of the DMCA.

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<sup>136</sup> *Id.* at 1203.

<sup>137</sup> *Id.* at 1204. See also, *supra* text accompanying notes 129-130.

<sup>138</sup> *Id.* at 1204. See *infra* note 149 for discussion about the relationship between Diebold and Rossi.

Applying this standard and in light of the evidence in the record, the court concludes as a matter of law that Diebold knowingly materially misrepresented that Plaintiffs infringed Diebold's copyright interest, at least with respect to the portions of the email archive clearly subject to the fair use exceptions. No reasonable copyright holder could have believed that the portions of the email archive discussing possible technical problems with Diebold's voting machines were protected by copyright, and there is no genuine issue of fact that Diebold knew – and indeed that it specifically intended – that its letters to OPG and Swarthmore would result in prevention of publication of that content. The misrepresentations were material in that they resulted in removal of the content from websites and the initiation of the present lawsuit. The fact that Diebold never actually brought suit against any alleged infringer suggests strongly that Diebold sought to use the DMCA's safe harbor provisions – which were designed to protect ISPs, not copyright holders – as a sword to suppress publication of embarrassing content rather than as a shield to protect its intellectual property.<sup>139</sup>

Although the *Diebold* court suggested that the applicable standard for determining whether a misrepresentation was made knowingly might be objective (“[k]nowingly means that a party ... should have known if it acted with reasonable care . . .”), the court in *Rossi v. Motion Picture Ass'n of America* held affirmatively that it was not. Plaintiff Michael Rossi maintained a website (“internetmovies.com”) which he described as an “online magazine” intended to provide users with a directory through which they could find online movies.<sup>140</sup> Although Rossi claimed that movies could not actually be downloaded through his site, various links found on the site indicated that movies were “downloadable” by clicking on the link.<sup>141</sup> The Motion Picture Association of America (MPAA), a trade association comprised of movie studios organized to protect and enforce its members' copyrights, viewed the website and subsequently served both Rossi and his website's ISP with a take-down notice pursuant to § 512(c)(3) of the DMCA.<sup>142</sup> The MPAA did not ascertain whether movies were available for download by actually clicking on the site's links.<sup>143</sup> Although Rossi subsequently found a new ISP to host his site, he filed suit against the MPAA

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<sup>139</sup> *Id.* at 1204-05.

<sup>140</sup> *Rossi*, 391 F.3d at 1002.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*



alleging, among other claims, that the MPAA violated § 512(c) of the DMCA by issuing its take-down notice without a good faith belief that Rossi had actually infringed upon any of the copyrights held by MPAA members.<sup>144</sup> The district court granted the MPAA's motion for summary judgment.<sup>145</sup>

On appeal, the issue before Ninth Circuit was whether the good faith belief requirement of § 512(c)(3)(A) of the DMCA should be evaluated upon an objective or subjective standard. The court referred to the language in § 512(c) ("good faith belief"), § 512(f) ("knowingly materially represents"), and similar language found in other federal statutes to conclude that the DMCA contemplated a subjective standard requiring the copyright holder's actual knowledge that the secondary use does not infringe:

Juxtaposing the "good faith" proviso of the DMCA with the "knowing misrepresentation" provision of that same statute reveals an apparent statutory structure that predicated the imposition of liability upon copyright owners only for knowing misrepresentations regarding allegedly infringing websites. Measuring compliance with a lesser "objective reasonableness" standard would be inconsistent with Congress's apparent intent that the statute protect potential violators from *subjectively* improper actions by copyright owners.<sup>146</sup>

The court rejected outright an interpretation which would hold copyright owners liable for even unreasonable mistakes regarding claims of infringement. "A copyright owner cannot be liable simply because an unknowing mistake is made, even if the copyright owner acted unreasonably in making the mistake."<sup>147</sup> Applying this subjective standard to the MPAA's take-down notice, the court held it did not violate the DMCA. Given the website's "unequivocal language" that movies were available for download, the court determined that that the MPAA had concluded "in good faith that motion pictures owned by MPAA members were available for immediate downloading from the website. The unequivocal language used by Rossi not only suggests that conclusion, but virtually compels it."<sup>148</sup> The court upheld

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<sup>144</sup> *Id.* at 1004.

<sup>145</sup> *Id.* at 1003.

<sup>146</sup> *Id.* at 1005 (emphasis in original).

<sup>147</sup> *Id.* at 1005.

<sup>148</sup> *Id.* at 1006-07 ("After one of the MPAA's member companies notified the MPAA's anti-piracy department of possible infringements on internetmovies.com, an MPAA employee reviewed the website. The website contained statements that included 'Join to download full length movies online now! New movies every month'; 'Full Length Downloadable Movies'; and 'NOW DOWNLOADABLE.' These representations on the website led the MPAA

the district court's decision to grant the MPAA's motion for summary judgment.<sup>149</sup>

*Lenz v. Universal Music Corp* followed *Rossi* approximately four years later and considered the fair use defense to interpretation of the DMCA. The facts of *Lenz* have been widely-discussed.<sup>150</sup> In February, 2007, plaintiff Stephanie Lenz videotaped her young child dancing to the Prince song *Let's Go Crazy* and uploaded the 29-second video on YouTube to share with her family and friends. The video was of apparent low quality, and only approximately 20 seconds of it contained audible portions of the song.<sup>151</sup> Nonetheless, Universal Music Corporation, which holds the copyright to the song, sent YouTube a take-down notice pursuant to the DMCA in June, 2007, approximately five months after Lenz uploaded it.<sup>152</sup> YouTube immediately removed the video and notified Lenz that it had done so. Lenz

employee to conclude in good faith that motion pictures owned by MPAA members were available for immediate downloading from the website. The unequivocal language used by Rossi not only suggests that conclusion, but virtually compels it. As the district court noted, "[t]here is little question that these statements strongly suggest, if not expressly state, that movies were available for downloading from the site." ... In fact, Rossi even admitted that his own customers often believed that actual movies were available for downloading on his website.") (footnotes and citations omitted).

<sup>149</sup> The relationship between the *Diebold* and *Rossi* decisions remains in question. In an earlier decision in the *Lenz v. Universal* case, which is discussed in the next paragraph, Judge Fogel made the following statement: "While *Diebold* was decided prior to *Rossi*, the cases are not necessarily in conflict. *Diebold* is distinguishable based on its facts; although it included a takedown of hundreds of emails, the defendant failed to identify any specific emails containing copyrighted content, and it appeared to acknowledge that at least some of the emails were subject to the fair use doctrine. Here, it is undisputed that the song 'Let's Go Crazy' is copyrighted, and Universal does not concede that the posting is a fair use. Under *Rossi*, there must be a showing of a knowing misrepresentation on the part of the copyright owner." See, *Lenz v. Universal Music Corp.*, 2008 WL 962102 at 3 (N.D.Cal. 2008). Additionally, Matthew Schonauer suggests that other courts have followed *Rossi*, but he also goes on to state that, "[t]he case law history regarding the application of § 512(f) by end users seeking protection from abusive, erroneous, or disruptive DMCA notices therefore demonstrates that the issue is far from settled in most circuits, having only appeared at issue before the judiciary in the Second, Seventh, Ninth, and Tenth Circuits. It also suggests that the precise requirements for a finding of liability under § 512(f) may have a shaky foundation." See Matthew Schonauer, Note, *Let the Babies Dance: Strengthening Fair Use and Stifling Abuse in DMCA Notice and Takedown Procedures*, 7 I/S: J.L. & POL'Y FOR INFO. SOC'Y 135, 151 (Winter 2011).

<sup>150</sup> See, e.g., Maresa M. Fortunato, Note, *Let's Not Go Crazy: Why Lenz v. Universal Music Corp. Undermines the Notice and Takedown Process of the Digital Millennium Copyright Act*, 17 J. INTELL. PROP. L. 147 (Fall 2009); Joseph M. Miller, Note, *Fair Use Through the Lenz of § 512(C) of the DMCA: A Preemptive Defense to a Premature Remedy?*, 95 IOWA L. REV. 1697 (July 2010); Schonauer, *supra* note 149; Benjamin Wilson, Comment, *Notice, Takedown, and the Good-Faith Standard: How to Protect Internet Users from Bad-faith Removal of Web Content*, 29 ST. LOUIS U. PUB. L. REV. 613, 629 (2010).

<sup>151</sup> *Lenz*, 572 F.Supp.2d at 1152.

<sup>152</sup> *Id.*

filed a counter-notice, asserting that her video was a fair use of the song. YouTube reposted the video approximately six weeks after receiving her counter-notice.<sup>153</sup> Lenz subsequently filed suit against Universal, claiming that its takedown notice violated the DMCA. Her complaint alleged that Universal could not have had a good faith belief that her video was a copyright infringement because she had made a legitimate fair use of the song.<sup>154</sup>

The precise issue the *Lenz* court considered was whether § 512(c) “requires a copyright owner to consider the fair use doctrine in formulating a good faith belief” that a secondary use of the copyrighted material was unlawful.<sup>155</sup> Noting that the Copyright Act specifically provides that “the fair use of a copyrighted work ... is not an infringement of copyright” and is therefore a lawful use of the protected material, the *Lenz* court held that:

[T]he fact remains that fair use is a lawful use of a copyright. Accordingly, in order for a copyright owner to proceed under the DMCA with “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,” the owner must evaluate whether the material makes fair use of the copyright.<sup>156</sup>

In support of its ruling, the *Lenz* court made several statements which are relevant to the scenario presented in this article regarding political speech. The court noted, “the unnecessary removal of non-infringing material causes significant injury to the public where time-sensitive or controversial subjects are involved and the counter-notification remedy does not sufficiently address these harms.”<sup>157</sup> The *Lenz* court also contemplated cases in which an alleged infringement was such an obvious fair use that one could only conclude that the copyright holder was relying upon the DMCA inappropriately:

One might imagine a case in which an alleged infringer uses copyrighted material in a manner that unequivocally qualifies as fair use, and in addition there is evidence that the copyright owner deliberately has invoked the DMCA not to protect its copyright but to prevent such use. *See, e.g., Online Policy Group v. Diebold, Inc.*, 337 F.Supp.2d 1195, 1204-05 (N.D.Cal.2004) (suggesting that

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<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 1153.

<sup>155</sup> *Id.* at 1154.

<sup>156</sup> *Id.* (footnotes and citations omitted).

<sup>157</sup> *Id.* at 1156.

the copyright owner sought to use the DMCA “as a sword to suppress publication of embarrassing content rather than as a shield to protect its intellectual property.”<sup>158</sup>

The situation described in this article clearly fits within the type of case the *Lenz* court imagined. This article has already made the case that the use of political debate footage for campaign speech purposes is an unequivocal fair use. If the use of small portions of copyrighted material for which there is no secondary market, for purposes of political campaign speech, does not meet the criteria of fair use, it is hard to imagine what type of use would.<sup>159</sup> The fact that the networks who deny permission to use debate footage have not once followed up with a subsequent copyright infringement lawsuit strongly suggests that they are inappropriately relying upon the DMCA to suppress content rather than protect their copyrights.

Nonetheless, despite the unequivocal fair use of the debate footage, most commentators who have analyzed *Rossi* and *Lenz* conclude that copyright holders still have broad discretion to issue take-down notices because of the subjective status of the good faith requirement. For instance, Hazelwood writes:

As the case law interpreting section 512(f) now stands, there is virtually no penalty for copyright owners issuing broad and questionable takedown notices. As long as the copyright holder has a subjective belief of infringement, no liability will attach to the copyright holder for the removal of noninfringing material. The copyright owner must consider fair use only in the “rare case” where fair use is obvious. Unfortunately, the courts by adopting

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<sup>158</sup> *Id.* at 1155 n.5.

<sup>159</sup> As Professor Seltzer stated in her article *Free Speech Unmoored in Copyright's Safe Harbor: Chilling Effects of the DMCA on the First Amendment*, *supra* note 12, at 355-56, “[i]f there was ever a clear case of non-infringing fair use – speech protected by the First amendment – this should have been it: a political candidate, seeking to engage in public multimedia debate, used video snippets from the television programs on which the issues were discussed.” See also, Jordan Sundell, Note, *Tempting the Sword of Damocles: Reimagining the Copyright / DMCA Framework in a UGC World*, 12 MINN. J. L. SCI. & TECH. 335, 355-56 (Winter 2011) (“[C]opyright holders often issue takedowns for non-infringing works (i.e., speech) which websites as a matter of course will take down until and unless the UGC uploader successfully challenges the request. In other contexts, such as newspapers and books, courts would strike down such a scheme as a violation of the First Amendment. Similarly, here, because of the almost non-existent burden required of copyright holders before they demand allegedly infringing content taken down, copyright holders can effectively restrain First Amendment rights without judicial oversight. And while copyright law is generally carved out of First Amendment jurisprudence, the sheer volume of inappropriate takedown requests suggests that the DMCA does a disservice to free speech by letting copyright holders trample on the First Amendment in the name of copyright.”).

the subjective standard of knowledge of Rossi, instead of an objective standard of knowledge as set forth in Online Policy Group, have made the provisions of section 512(f) virtually worthless in terms of preventing abuse of the takedown provisions of the DMCA. In fact, although the DMCA has been in existence for approximately ten years and there have been thousands of takedown notices, the decision in Online Policy Group appears to be the only court decision finding a violation of section 512(f) against a copyright holder for a knowing material misrepresentation.<sup>160</sup>

Indeed, even the *Lenz* court expressed doubt that Stephanie Lenz could show the requisite lack of subjective good faith upon remand.<sup>161</sup> Thus, the need for reform is widely recognized - and justified.

### B. DMCA Reform

In addition to the issues regarding political speech discussed in this paper, DMCA take-down abuse is reportedly widespread.<sup>162</sup> As an extreme example, in 2007, Viacom relied upon the DMCA to demand that YouTube remove over 10,000 unauthorized video clips, some of which Viacom had uploaded itself.<sup>163</sup> More recently, in 2009, Google (which owns YouTube) acknowledged that more than half of the takedown notices it received under the DMCA were sent by businesses targeting a competitor, and thirty seven percent of all notices it received were invalid claims of copyright

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<sup>160</sup> Hazelwood, Jr., *supra* note 40, at 325. See also, Rubenstrunk, *supra* note 40, at 810 (“Given the new challenges posed by the [Lenz] decision, it is unlikely that internet users will be able to protect themselves against the abuses of overbearing copyright owners and savvy web surfers.”); Wilson, *supra* note 150, at 628 (“The scarcity of judgments in favor of Internet users showed that proving copyright owners’ subjective bad faith is extremely challenging.”).

<sup>161</sup> *Lenz*, 572 F.Supp.2d at 1156 (“Although the Court has considerable doubt that Lenz will be able to prove that Universal acted with the subjective bad faith required by *Rossi*, and following discovery her claims well may be appropriate for summary judgment, Lenz’s allegations are sufficient at the pleading stage.”).

<sup>162</sup> See, e.g., Fred Von Lohman, *Unintended Consequences: Twelve Years Under the DMCA*, ELECTRONIC FRONTIER FOUNDATION (Feb. 2010), <https://www.eff.org/wp/unintended-consequences-under-dmca>.

<sup>163</sup> Sundell, *supra* note 159, at 346. Sundell also relates that one association, the Science Fiction Writers of America, sent takedown notices for the removal of material over which it had no copyright protection. In another example, the Recording Industry of America sent a takedown notice to a University of Pennsylvania faculty member named Peter Usher who had uploaded a video showing him singing an *original* a capella song about gamma rays, simply because his name resembled that of the more famous singer who goes by the one word name Usher. *Id.* at 346-47.

infringement.<sup>164</sup> Abuses such as this, and the case law which allows it, have prompted many legal scholars and others to call for change.

Preliminarily, regarding the narrow context of the facts presented in this article, an affirmative holding that the use of debate footage for political campaign advocacy is a fair use would negate the possibility that a network could have even a subjective belief that the use is a copyright infringement.<sup>165</sup> Such a holding may also give pause to copyright holders in other contexts and would work toward creating a presumption of fair use, at least in certain circumstances.<sup>166</sup> However, broader reform to the DMCA remains necessary to curb abuses such as those described above.<sup>167</sup>

The suggestions for reform vary, but three proposals stand out as strongest because they add to the obligation of copyright holders and help to level the current playing field in which copyright holders have the ability to remove content with virtually no obligation to first prove infringement. The first proposal would change the standard required from a subjective to objective one. The second is to amend the notice-and-takedown procedure in § 512(c) in two significant ways. A final approach would create an exception for secondary uses that raise important speech issues and which do not economically benefit the user. These suggested reforms shift some of the burden onto the copyright holder to make at least some preliminary showing of infringement before the material is removed, and thus align the DMCA more closely with the common law in important respects.

The most common call for reform would amend the DMCA to overturn *Rossi* and provide specifically that § 512(c) and § 512(f) require an objective rather than subjective good faith that the secondary use is a copyright

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<sup>164</sup> Ted Gibbons, *Google Submission Hammers Section 92A*, NEW ZEALAND PC WORLD MAGAZINE, (Mar. 16, 2009), <http://pcworld.co.nz/pcworld/pcw.nsf/feature/google-submission-hammers-section-92a>. Google provided this information in a submission made to the New Zealand Telecommunications Carriers Forum regarding a proposed draft code of practice for ISPs in New Zealand. *Id.*

<sup>165</sup> Campaigns have standing to sue for invalid takedown notices and “[l]awsuits might help.” See Fred Von Lohmann, *McCain Campaign Feels DMCA Sting*, ELECTRONIC FRONTIER FOUNDATION, (Oct. 14, 2008), <https://www.eff.org/deeplinks/2008/10/mccain-campaign-feels-dmca-sting>. On the other hand, in light of the timing of ads such as these, a campaign may not be likely to file a lawsuit. See Paul Alan Levy, *Abusive Copyright Takedowns Aimed at McCain and Obama Show the Need to Amend the DMCA*, CL&P BLOG (Oct. 16, 2008), <http://pubcit.typepad.com/clpblog/2008/10/abusive-copyright.html> (“[L]awsuits are a needless distraction to political campaigns that have more immediate tasks . . .”).

<sup>166</sup> Sundell argues that in situations such as that in *Lenz*, when the secondary user borrows only a small amount of the copyrighted material, there should be a presumption of fair use which the copyright holder must overcome to support an infringement claim. See Sundell, *supra* note 159, at 353-57.

<sup>167</sup> See *supra* text accompanying notes 160-61.

infringement.<sup>168</sup> This change would require copyright holders to do a more in-depth analysis of whether the secondary use is lawful because they must consider the reasonableness of such a conclusion. A move to an objective good faith standard would undoubtedly solve the issue described in this article regarding the networks' inappropriate reliance upon the DMCA because a claim that this type of use is a copyright infringement is simply unreasonable. It would also have important broader impact as well – for instance, the outcome in *Lenz* would undoubtedly result in favor of the use in that case.

Significant revisions of the notice and takedown procedure of § 512(c) are also warranted. First, as the DMCA is currently written, the copyright holder is not required to contact the party who posted the allegedly infringing content before issuing a takedown notice.<sup>169</sup> Imposing an obligation that the sender of the takedown notice should first give notice of the complaint to the user, if possible, before the takedown occurs, would give the user an immediate opportunity to respond with an effective counter-notice that may prevent the takedown from happening.<sup>170</sup> Some countries within the European Union, such as France, provide for a similar process through which the copyright holder first notifies the secondary user of the claim of copyright infringement and includes such correspondence in its notification to the ISP.<sup>171</sup> In addition to the benefit of resolving some issues quickly and

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<sup>168</sup> See, e.g., Hazelwood, *supra* note 40, at 325 (“Legislative change to amend section 512 is the proper course . . .”); Sundell, *supra* note 159, at 350 (“To remedy the inadequacies of the system, Congress should amend the DMCA . . . [to] put some teeth into the requirement that copyright holders must show a good faith basis for issuing a takedown request”); Miller, *supra* note 150, at 1724 (“As the law develops in this area, Congress and the courts should consider adopting an objective standard of good faith instead of a subjective one, as well as importing existing copyright and intellectual property remedies to give ‘teeth’ to *Lenz*’s deterrent efforts.”); Schonauer, *supra* note 149, at 161 (“My proposal envisions a twofold improvement of the DMCA: (1) courts should construe the knowing misrepresentation language as a ‘known or should have known’ standard in § 512(f) actions, similar to the standard adopted in *Diebold* . . .”).

<sup>169</sup> Levy, *supra* note 165.

<sup>170</sup> *Id.* See also, Letter from Paul Alan Levy and Joan Claybrook on behalf of Citizen.org to Senator John McCain and Senator Barack Obama (Oct. 16, 2008), <http://www.citizen.org/documents/DMCALetter.pdf>.

<sup>171</sup> Thibault Verbiest, Gerald Spindler, Giovanni Maria Riccio, and Aurelie Van de Perre, *Study on the Liability of Internet Intermediaries* (Nov. 12, 2007), at 46, [http://ec.europa.eu/internal\\_market/e-commerce/docs/study/liability/final\\_report\\_en.pdf](http://ec.europa.eu/internal_market/e-commerce/docs/study/liability/final_report_en.pdf). Although the procedure in France is optional, it is still worth examining. If the copyright holder follows the suggested process, the ISP is then presumed to know that a violation exists and, presumably, has no further obligation to review the claim itself. The notification is to include “a copy of the correspondence addressed to the author or producer of the disputed information or activities requesting them to be stopped, removed or amended, or proof that the author or producer could not be contacted.” *Id.* Interestingly, some EU member-states place even more formal notification requirements upon the copyright holders before the ISP is

privately, a statement of its attempt to contact the user would also help a copyright holder justify its required good faith belief that the material actually infringes upon the copyright.

Second, the ten to fourteen day waiting period currently imposed upon ISPs before they are obligated to return the content should be removed.<sup>172</sup> If the ISP notifies the user that the copyright holder believes the use infringes, and the copyright holder is informed of such notice, then the burden should be upon the copyright holder to enforce its copyright protection if the user fails to comply by taking the material down. This approach aligns the DMCA more closely with the process for copyright protection in non-digital circumstances.

A third revision would expand the requirements of the takedown notice provision to require copyright holders not only to state that they have a good faith belief that the secondary use is infringing, but also to affirmatively justify this belief by providing the steps taken to reach it.

The copyright owner should be required to describe the steps it took and persuade the court of its good faith by a preponderance of the evidence. This is not a proposal for a reasonable investigation, only that the copyright owner need come forward with evidence sufficient to form a good-faith belief. For legitimate complaints and honest mistakes, this will be easy to do and will not chill the rights of copyright owners; they should already have such information from their initial review of the website, as the DMCA requires.<sup>173</sup>

Some countries within the European Union have taken this approach. For instance, the French notification procedure requires the copyright holder to include, among other relevant material, “the reasons for which the content must be removed, including an indication of the legal provisions and justification of the facts.”<sup>174</sup>

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presumed to know of the allegedly infringing content. According to the Study, some ISPs have refused to respond to an “unofficial” takedown notice. For instance, Spanish law “establishes that the service provider shall be understood to be genuinely aware when ‘a competent body has declared the data to be illegal, has ordered its removal or that access to the data be blocked’ . . . .” The “‘competent body’ can be a court or an administrative authority. . . .” *Id* at 42. Similarly, Italian law “requires providers to act expeditiously (to remove or to disable access to the information) *only* upon notice from the relevant authorities.” *Id.* at 44.

<sup>172</sup> See Letter from Levy and Claybrook, *supra* note 170; Levy, *Abusive Copyright Takedowns*, *supra* note 165.

<sup>173</sup> Wilson, *supra* note 150, at 632.

<sup>174</sup> Verbiest, Spindler et al., *supra* note 171, at 45-46. In addition to changing the language of § 512(c), many scholars advocate for the increased availability of attorneys fees in cases in which copyright holders have violated § 512. See, e.g., Levy, *supra* note 165 (“Statutory



Finally, in addition to amending § 512(c) in significant ways, an alternative approach would take into account the importance of the speech in question. Certainly regarding matters of national significance such as political speech, a strong argument can be made that the DMCA take-down provisions simply should not apply, especially when the material is not used for commercial gain.<sup>175</sup> A related option would be to amend the DMCA to provide for expedited review procedures in situations in which important speech is involved.<sup>176</sup> For instance, the statute could be revised to provide for immediate hearing and/or counter-notice provisions when speech of national importance is at issue. As suggested previously, such a review would still give the copyright holder the opportunity to immediately file for a preliminary injunction in the event that the material truly infringes.

Many commentators have suggested that resolving the issue of DMCA take-down abuses could be done, at least in part, by increasing the obligation of ISPs to monitor more closely their platforms for material that infringes upon copyright protection.<sup>177</sup> For instance, Sundell maintains:

While copyright law and the DMCA treat individual users too harshly, they fail to treat OSPs strongly enough. The DMCA exemplifies the phrase “ignorance is bliss” since OSPs need not act unless they know of a violation. If the OSP does not investigate, it will not discover any violations and, therefore, will not have to take action. Additionally, a plaintiff’s burden of proof for showing an

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damage should be available whenever a takedown notice is determined to have been applied to noninfringing material. . . . [T]he degree of good faith of the sender of the takedown notice should affect the amount of the statutory damages, but not their availability.”); Miller, *supra* note 150, at 1728; Schonauer, *supra* note 149, at 161 (“a statutorily imposed mandatory attorney’s fees and costs provision should make available financial assistance to those who vindicate fair use rights.”); In a similar vein, others have asked for a form of “public shaming” by requiring the senders of takedown notices to post their notices on a public database. See Letter from Levy and Claybrook, *supra* note 170; Levy, *Abusive Copyright Takedowns*, *supra* note 165.

<sup>175</sup> Sundell, *supra* note 159, at 350-51. Sundell suggests granting immunity “to users who copy an entire work that is an important cultural moment or interaction and reproduce it with no attempt to profit or reduce the value of the work.” Similarly, Hazelwood suggests that § 512 “should be changed so that the automatic right of takedown only applies to instances where all or substantially all of the copyrighted material is being used *and* the alleged infringing use competes with the original. The right of takedown without court approval is an extraordinary right and it should only be granted for the extraordinary circumstances, such as digital privacy.” Hazelwood, *supra* note 40, at 331-32 (emphasis added).

<sup>176</sup> For instance, Hungarian law allows the user to file a counter-notice within eight days of receiving a takedown notice, after which the ISP must expeditiously replace the material. See Verbiest, Spindler et al., *supra* note 171, at 107-08.

<sup>177</sup> The DMCA changes suggested above, which require additional information to be included in takedown notices, will necessarily place additional burdens on the ISP to be sure the takedown notice complies with the new requirements.

OSP's knowledge is significant. In concert, a copyright holder's high burden of proof and OSPs' studious ignorance effectively insulate OSPs from liability.<sup>178</sup>

While an interesting and seemingly logical approach, decreasing ISP immunity is likely to result in *more* instances in which content is removed rather than less and thus have a continued chilling effect on speech. ISPs have immunity now and yet abuses prevail.<sup>179</sup> Increasing ISP liability is not likely to change that. Indeed, the recent controversy over the Stop Online Piracy Act (SOPA) reveals the inherent challenges associated with changing the balance of ISP immunity.<sup>180</sup> Moreover, it is not the ISPs who initiate invalid takedowns; it is copyright holders who do so. As such, the appropriate place for reform to begin is with them.<sup>181</sup>

Finally, it is important to point out that many observers believe that ISPs such as YouTube should engage in more self-policing of their sites.<sup>182</sup> ISP

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<sup>178</sup> Sundell, *supra* note 159, at 360-61. *See also*, Doug Lichtman and Eric Posner, *Holding Internet Service Providers Accountable*, John M. Olin Law & Economics Working Paper No. 217, 5, University of Chicago Law School, July, 2004 ("Our point is simply that, faced with the growing problem of cyber-insecurity, ISPs should be called into the service of the law. . . . Service providers control the gateway through which Internet pests enter and reenter the system. As such, service providers can help to stop these pests before they spread and to identify the individuals who originate them in the first place. ISPs should be required by law to engage in these precautions."); Ryan Radia, *Why SOPA Threatens the DMCA Safe Harbor*, TECHLIBERATION.COM (Nov. 18, 2011), <http://techliberation.com/2011/11/18/why-sopa-threatens-the-dmca-safe-harbor/> ("Critics . . . allege that the safe harbor has been construed so broadly that it shields service providers that are deliverably indifferent to their users' infringing activities, however rampant they may be.").

<sup>179</sup> *See supra* text accompanying notes 162-64.

<sup>180</sup> Certain sections of SOPA are subject to interpretation and, according to Radia, "enormously troubling." Radia, *supra* note 178. For instance, the language which defines a "foreign infringing website" does not contain any requirement that the operator have any knowledge of possibly infringing content to face possible criminal liability for its existence. The proposed Act allows for civil forfeiture in some circumstances "simply because the outlet has been used in some unlawful manner" presumably by others. *Id.* Also, SOPA provides for a different type of notice-and-takedown provision in which copyright holders who believe infringing content has been posted on a particular ISP are allowed "to attach entire websites by cutting off their access to payment and ad networks." *Id.* Because of the possibilities of being cut-off from payment due to application of other portions of SOPA, the fear is that "website operators will likely do everything they can to avoid falling under SOPA's definitions – even if that means going above and beyond the requirements of the DMCA safe harbor." *Id.* In other words, more content comes down so that YouTube can avoid the possibility of liability.

<sup>181</sup> *See* Von Lohmann, *supra* note 165 ("Let's start by identifying the real villains here: the major news media outlets. They are the ones censoring these political ads, based on the use of a few seconds of their footage. . . . So let's start by shaming the bad guys here.").

<sup>182</sup> *See supra* text accompanying note 11. Self-policing is also one approach taken in several EU countries. Many European nations belong to associations which adhere to particular self-

self-policing is not without precedent. In at least one circumstance, YouTube voluntarily completed a fair use analysis and reposted the content before the counter notice expiration date.<sup>183</sup> The Electronic Frontier Foundation urges this approach (as well as others), suggesting that ISPs have “no need to follow the DMCA safe harbor procedures if the disputed content is a clear fair use and, as a result, there’s no risk of liability.”<sup>184</sup> Also, given Google’s statement in New Zealand,<sup>185</sup> YouTube obviously does indeed closely monitor *and assess* the material on its site, which indicates that a review of at least some important content is plausible, contrary to its assertions elsewhere that legal review in certain circumstances “is not a viable option.”<sup>186</sup> Nonetheless, incidents of self-policing are clearly the exception rather than the rule. YouTube specifically declined to conduct a fair use analysis when requested to do so by the McCain campaign. One instance since then does not indicate a change of heart.<sup>187</sup>

## VI. CONCLUSION

The use of political debate footage in campaign advertising is unequivocally a fair use. A judicial holding to that effect would help encourage important political speech in at least two ways. First, it would establish a solid precedent upon which campaigns and network news organizations can rely in future election cycles. Second, it would help to effect a necessary change in application of the DMCA. The law as it is currently interpreted unnecessarily assumes copyright infringement, despite the implications on political speech. Rather than erring on the side of allowing important speech, the law restricts it without a valid showing of proof that the speech is entitled to be restricted.

IPTV general manager Peter Morrill suggested that restricting the use of debate footage is in the “public good” to avoid a possible chilling effect on participation in future debates.<sup>188</sup> This may be true to some degree (although

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regulatory codes of conduct which “a provider uses in order to handle complaints about illicit content or access to illicit websites.” See Verbiest, Spindler et al., *supra* note 171, at 110-13.

<sup>183</sup> 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>.

<sup>184</sup> Tim Jones, *YouTube Restores a Fair Use*, ELECTRONIC FRONTIER FOUNDATION (May 7, 2009), <https://www.eff.org/deeplinks/2009/05/youtube-restores>.

<sup>185</sup> See Gibbons, *supra* note 164.

<sup>186</sup> See Stirland, *supra* note 12.

<sup>187</sup> An affirmative holding that the use of debate footage for political campaign advocacy is a fair use would certainly give ISPs such as YouTube a stronger basis upon which to ignore takedown notices, despite their current reluctance to do so.

<sup>188</sup> See Grey, *supra* note 20.

not all agree).<sup>189</sup> Some candidates, especially at the local level, may refuse to participate in a public debate to protect and control their public images, which could impact on the public's right to hear the candidates speak and inhibit the use of this particular avenue for political speech. However, even assuming that some candidates will opt out of publicly televised debates, a ruling *against* fair use could have a far more dire outcome – a chilling effect on political speech itself. As the Open Debate Coalition argued, the networks' attempt to exercise "control over political speech is *inconsistent with our democracy*."<sup>190</sup> First Amendment scholar Wendy Seltzer makes a strong argument regarding the DMCA's chilling effect on speech:

Writing for the Court in *Citizens United*, Justice Kennedy concluded that the election laws – which restricted the financing of speech, and thus the opportunity to speak – functioned 'as the equivalent of prior restraint' on speech.

The same reasoning should apply to the barriers that copyright secondary liability and the DMCA pose to speakers. These barriers function as a prior restraint by inducing the necessary service provider to take down speech before, and often in the absence of, a judicial determination of its infringing nature.<sup>191</sup>

The Center for Democracy and Technology also suggests that this chilling effect may be deeper than the simple removal of content.

[I]nappropriate 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.' Many sites meet this requirement by canceling user accounts after a specified number of DMCA takedown notices are received regarding that account. Such policies are of particular concern for campaigns because they are 'serial fair users' whose videos regularly include short footage from news broadcasts.

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<sup>189</sup> Then-Senator Obama wrote in a letter to Democratic National Committee Chair Howard Dean in support of the Open Debate Coalition's movement: "We have incentive enough to debate." Lessig, *Obama on "Open Debates," supra* note 4. See also, Lessig, *A Call on the RNC, supra* note 3.

<sup>190</sup> Lessig, *Free Debates, supra* note 2 (emphasis added).

<sup>191</sup> Seltzer, *supra* note 12, at 175 ("In the wake of *Citizens United*, why can copyright law remove political videos from public reach when campaign finance law must not?" (referring to *Citizens United v. Fed. Election Comm'n*, 130 S.Ct. 876 (2010)).

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. 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.<sup>192</sup>

In the heated last weeks of an election, this chilling effect may be even more pronounced because the damage is irreparable.<sup>193</sup> Thus, the law should be changed to uphold the fundamental principal that political speech is necessary to the proper operation of democracy.

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<sup>192</sup> *Campaign Takedown Troubles*, *supra* note 10, at 17.

<sup>193</sup> *Id.* at 16 (“[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.”).

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