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Music In Politics — Copyright And Lanham Act In The Mix

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Since Frank Sinatra helped John F. Kennedy get elected to the presidency in 1960, every president has used popular music to help inspire voters. Sometimes, the musicians are on board: Bill Clinton used Fleetwood Mac's "Don't Stop" throughout his campaign and the band reunited to perform the song at the inaugural ball. Sometimes, the musicians are not: Ann and Nancy Wilson of Heart publicly complained when John McCain's campaign used "Barracuda" as a theme for vice presidential nominee Sarah Palin. With presidential election season already in full swing, more disputes between musicians and politicians are bound to occur. Can a politician use a song without the artist's permission at a campaign rally or in a campaign advertisement or video? The answer is a mixed bag and involves interpretation of both copyright law and the Lanham Act.

Under the Copyright Act, the owner of a copyrighted musical work has the exclusive right to perform the work publicly or to prepare a derivative work, such as a video incorporating the music.[1] Therefore, if a politician wants to use a musical work at a rally or in an advertisement, he or she needs either a license or must demonstrate that the use falls within an exception to the Copyright Act.

If a politician holds a campaign rally at the right place, use of the musical work may already be licensed. Stadiums, arenas, theaters, performing art centers, and restaurants often enter into blanket licenses with performing arts societies, such as BMI and ASCAP. Those licenses, in exchange for an annual fee, give the venue the right to publicly perform any of the many songs in the catalogs of these performing arts societies. Composers join these societies and receive royalties based on formulas used by the given society. Because of these blanket licenses, artists who have sued politicians for copyright infringement based on public performance of a work, usually focus on campaign stops occurring at places that would not traditionally have an ASCAP or BMI license. For example, the publisher of the composition "Eye of The Tiger" sued Newt Gingrich, alleging that Gingrich played the song at campaign appearances at a Moose Lodge, in various public places, and at an event held at an excavation business, deliberately avoiding locations that might have a license with ASCAP or BMI.[2]

There are no blanket licenses, though, for campaign videos and advertisements. To use copyrighted music in those, the politicians must obtain a license directly from the owner of the composition (and, unless they re-record the song, from the owner of the sound recording) and that almost never happens.

So politicians who use popular music in campaign ads have tried to argue that the use is a parody and falls within the "fair use" exception, a statutory exception to the requirement for a license.[3] Politician Charles DeVore tried this approach when he was sued by Don Henley over campaign videos using satirical versions of Henley's songs. In DeVore's videos, "All She Wants To Do Is Dance" became "All She Wants To Do Is Tax" and "The Boys Of Summer" became "The Hope Of November." When Henley sued for copyright infringement, DeVore argued his videos were protected parody. The district court disagreed, granting Henley summary judgment on his copyright claim.

Whether a use of a copyrighted work is a parody protected by the fair use doctrine involves analysis of four factors including whether the use is transformative (that is, "something new, with a further purpose or different character"[4]) and the amount and substantiality of the portion used in relation to the copyright (the less used, the more likely it is a fair use). While fair use is a complicated subject and requires more explanation than can be given in this article, suffice it to say that a parody (which uses a portion of a work in order to hold the work up to ridicule or otherwise comment or shed light on it) is transformative, but satire (when the work is used merely as a vehicle to poke fun at another target) is not. In the Henley case, the district court held that "All She Wants To Do Is Tax" was not a fair use because it was "pure satire which fails to take aim at the original or its author" and not only borrows from the original, but "appropriates the entire melody, rhyme, scheme, syntax and a majority of the lyrics".[5] The district court went on to hold that while it was a closer question as to whether "The Hope Of November" was parody or satire, it too copied too much of the original, going "far beyond what is necessary to conjure up Henley to hold him up to ridicule."[6]

Even if the politician can get past the Copyright Act, there is still the Lanham Act to consider. Musicians have filed alleged claims under the Lanham Act for false endorsement, in essence complaining that the use of their music in the context of a political campaign creates a false endorsement violating the Lanham Act. Courts have gone different directions on such claims.

The district court in the Henley case held that a performer cannot hold a trademark in his or her performance of a musical composition and therefore cannot assert a Lanham Act claim purely based on the use of that performer's songs.[7] However, the Henley court found that a performer can state a Lanham Act claim when another person imitates their performance such that consumers would believe that the musician was actually performing on the advertisement. Because the court found that no reasonable jury would find a likelihood that viewers would be confused as to whether Henley actually performed those DeVore's satirical songs, DeVore was entitled to summary judgment on Henley's Lanham Act claim.[8]

Courts have rejected politicians' assertion of a "First Amendment" defense on Lanham Act claims. Jackson Browne sued Sen. John McCain, R-Ariz., and the Republican National Committee for violation of the Lanham Act based on McCain's use of "Running On Empty" in a campaign video criticizing Barack Obama's energy policy. Browne alleged that video falsely suggested that he sponsored, endorsed, or was associated with Sen. McCain and the Republican party when "nothing could be further from the truth."[9]

The district court noted that the First Amendment can serve as a bar to a Lanham Act claim involving an artistic work unless (1) the trademark has no artistic relevance to the underlying work at all or (2) if it explicitly misleads as to the source and content of the work.[10] But the district court denied McCain's motion to dismiss holding that the advertisement at issue was not an artistic work and therefore the First Amendment did not, as a matter of law, bar the claim.

All in all, politicians should be careful in using artists' work for political campaigns. The copyright laws and Lanham Act do not give them free rein to use musician's work without license and musicians have started to fight back.

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Allen Grodsky focuses his practice on litigation in the fields of business, entertainment, and intellectual property. He has represented actors, singers, composers, writers, directors and producers, as well as companies in varied industries, including fashion, toy, cosmetics, comic book, and health care. His cases cover a variety of issues including copyright and trademark infringement, right of publicity, breach of contract, fraud, unfair competition, false advertising, defamation, wrongful termination, employment discrimination, bad faith, violation of the Talent Agencies Act, and misappropriation of trade secrets. Grodsky & Olecki is based in Santa Monica, California.

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[1] 17 U.S.C. § 106.

[2] Rude Music, Inc. v. Newt 2012, Inc., et al., Case No. 1:12-CV-00640 (N.D. Ill., filed 1/30/12).

[3] 17 U.S.C. § 107.

[4] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).

[5] Henley v. DeVore, 733 F.Supp. 2nd 1144, 1163 (C.D. Cal. 2010).

[6] Id. at 1164.

[7] Id. at 1167-68.

[8] Id. at 1168.

[9] Browne v. McCain, 612 F.Supp. 2d 1125, 1129 (C.D. Cal. 2009).

[10] Id. at 1132.
