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IN FOCUS

October 2, 2024

Copyright and Uses of Music by Political Campaigns

During election seasons, news stories often report of musicians and songwriters objecting to uses of their music by political campaigns. Sometimes, these artists send cease-and-desist letters, threaten or file lawsuits, or otherwise publicly demand that candidates stop using their songs or recordings at political rallies or other events.

The legal basis for these demands is not always clear, but the artists often claim infringement of their copyrights. Some artists have also asserted noncopyright claims such as false endorsement under the Lanham Act or violation of their rights of publicity under various state laws. This In Focus explains the legal principles governing these claims.

Copyright in Music

Copyright law grants the authors of original creative works (e.g., books, movies, or fine art) a set of exclusive rights in their creations. Those rights include the right to prevent others from copying or selling the work, or making derivative works from it, without the copyright holder's permission. For some types of works, copyright includes an exclusive right of public performance as well. For example, even if the owner of a theater has legally purchased a copy of a movie, the owner would also need separate permission before playing the movie to a public audience.

There are two distinct types of copyrights applicable to musical creations. The copyright in a *musical work* covers the work of the music's composers and lyricists (collectively, *songwriters*). The copyright in a *sound recording* covers the work of the musicians, singers, producers, or engineers who perform and record a piece of music (collectively, *performing artists*). Copyright in a musical work initially vests in the songwriter(s) and is often assigned to a music publisher. Copyright in a sound recording initially vests in the performing artist(s) and is often assigned to a record company. For more information, see CRS Report R43984, *Money for Something: Music Licensing in the 21st Century*, by Dana A. Scherer.

For musical works, Congress has long recognized an exclusive right of public performance. Thus, any entity or venue seeking to perform musical works publicly—for example, a symphony orchestra, music club, or radio station—generally needs to seek permission (i.e., a *license*) from the copyright holders, and typically pays the copyright holders a fee (sometimes called a *royalty*) in return.

Copyright in sound recordings has more limited rights under U.S. law. In the 1970s, Congress first granted copyright to sound recordings but declined to provide these works an exclusive right of public performance. (Thus, to play a song over the air, radio stations only need permission to use the musical work and not the sound recording.) In 1995, Congress granted sound recordings an exclusive right of public performance but only for certain "digital audio transmission[s]" (e.g., interactive streaming services).

Performing Rights Organizations

To enforce their copyrights against unauthorized public performances of their musical works, songwriters and music publishers have formed performing rights organizations (PROs) since the early 20th century. The American Society of Composers, Authors, and Publishers (ASCAP), formed in 1914, was the first U.S. PRO. Other PROs include Broadcast Music, Inc. (BMI), SESAC (formerly the Society of European Stage Authors and Composers), and Global Music Rights (GMR).

Songwriters and publishers may license their public performance rights to PROs, which in turn issue licenses to businesses and other users who want to play or perform musical works. PROs generally issue a *blanket license*, allowing licensees to perform publicly any musical work in a PRO's catalog for a flat fee or a percentage of total revenues. After charging administrative fees, PROs split the public performance royalties they collect among their members based on play frequency, among other factors.

PROs thus offer logistical benefits to both copyright holders and users of musical works. The types of licenses offered by PROs are typically based on the nature of the user. For example, ASCAP offers different licenses for radio stations, nightclubs, gyms, orchestras, and concert venues.

Licenses for Uses of Music by Political Campaigns

The permissions needed to use copyrighted music or recordings depends on the particular use that is being made of the works. In political campaigns, copyright issues often arise for two different types of uses: (1) playing music for audiences at in-person events (e.g., campaign rallies); and (2) using music in campaign advertisements or videos.

Uses of Music at Campaign Rallies

For use at campaign rallies—presuming that the campaign purchased a legal copy of the recording (e.g., on physical media or via a subscription service)—the campaign will typically need a public performance license to play the musical work for the audience. Because sound recordings lack a general public-performance right, permission is only needed from the musical-work copyright holders (i.e., the songwriters or their assignees). This license can be obtained directly from the copyright holders, or through a PRO.

In some cases, the venue holding the event (e.g., an arena, hotel, or fairgrounds) may already have a license from one or more PROs. In that case, the performance would be authorized if it falls within the venue's license and the song is in the catalog of the particular PRO. According to

ASCAP and BMI, however, general venue licenses usually *exclude* uses by political campaigns or party conventions. These PROs thus offer separate political campaign licenses that candidates may buy to obtain permission to perform musical works in the PROs' catalogs. Particular songwriters may opt out of those licenses if they do not want political campaigns to use their works.

Uses of Music in Political Advertisements

Use of music in a campaign commercial or video involves a different set of rights. Incorporating a piece of music into an audiovisual work (the video) requires making a copy of the sound recording and musical work, and may create a derivative work of both. In this case, the campaign would need to obtain permission from the copyright holders of the musical work (called a "synchronization license" in industry parlance), as well as from the copyright holders of the sound recording used (called a "master use" license). Thus, to clear music for a video commercial, licenses are generally needed from both the songwriters (often via a publisher) and the performing artists (often via a record label).

Digital technology may blur the line between public performance of music at campaign rallies and incorporation of recorded music into a political commercial. For example, campaigns may live stream a rally over the internet or post clips from a rally on social media that include the music played at the rally. Arguably, these scenarios transform a use that required only a performance license for the musical work to one that may require additional permissions. On the other hand, fair use may permit some of these uses of music in an audiovisual work.

Fair Use and First Amendment Considerations

An unlicensed use of music that implicates the exclusive rights of a copyright holder may infringe the copyright and subject the user to legal liability. Copyright holders may sue in federal court to obtain money damages, injunctions, and other legal remedies.

At the same time, copyright is subject to many limitations and exceptions, including fair use. Fair use is an equitable doctrine that allows certain uses of works without infringing the copyright. For example, quoting portions of a copyrighted work in a book review or creating a parody of a work are typically considered by courts to be fair uses.

Fair-use determinations are highly contextual. In determining whether a use is fair, courts consider four nonexclusive statutory factors: (1) the purpose and character of the use (including whether the use is "transformative"), (2) the nature of the original work, (3) the substantiality of what was copied, and (4) any market harm from the use.

The application of the fair use doctrine to uses of music by political campaigns will depend on the specific facts. For example, a prominent use of unedited music in a TV advertisement is, all other things equal, less likely to be fair than a clip of a campaign speech posted online that includes a snippet of incidental background music.

In the context of political campaigns, claims of copyright infringement could interfere with political speech (e.g., by making a candidate change the music used in a political advertisement or stop running the ad), raising concerns under the First Amendment of the U.S. Constitution. In general, the U.S. Supreme Court has held that the restrictions on speech caused by copyright are not subject to heightened judicial scrutiny, so long as traditional copyright limitations such as fair use apply.

Noncopyright Claims

Artists sometimes object to uses of their compositions or recordings on noncopyright grounds. Thus, even if a use is duly licensed, some artists have argued that political campaigns' use of their work violates other legal rights.

First, the Lanham Act prohibits using certain confusing or deceptive uses of symbols in connection with goods and services. Courts have interpreted this law to allow federal claims for "false endorsement," that is, when a person uses distinctive attributes of a celebrity (such as their likeness or voice) without authorization in a way likely to confuse as to source, affiliation, or sponsorship of the goods or services.

Second, most states protect the "right of publicity," which prohibits certain unauthorized commercial uses of another person's name, image, voice, or likeness. The scope of this right varies by state: in some states, the right of publicity may apply only to advertising, for example.

Whether a songwriter or performing artist could claim false endorsement or a violation of the right of publicity for uses of their music by political campaigns may depend on the circumstances. When popular music is used for transitions or background music at a rally, for example, it would appear unlikely in the usual case that attendees would view the music as an endorsement of the candidate by the songwriter or performing artist. (Moreover, if based only on a licensed use of a musical work, state right of publicity claims may be preempted by the Copyright Act.) Repeated and prominent uses of a piece of music as a candidate or campaign's signature song (e.g., repeated use as entrance music) or in advertisements, in ways that could imply that the artist endorsed the candidate, might raise closer issues for these noncopyright claims.

Considerations for Congress

Copyright law is a creation of Congress that lawmakers may alter or amend, consistent with the Constitution. Copyright law contains a number of exceptions for particular uses that Congress has decided should not require permission from the copyright holder. For example, Congress allows musical works to be performed during in-person religious services without a license. Congress could create an analogous exception for uses by political campaigns, if it wished to broadly permit these uses. Alternatively, if Congress wished to restrict these uses, Congress could clarify that fair use does not permit particular uses of musical works and sound recordings by political campaigns.

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