Politically Incorrect: Music on the Campaign Trail

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With election season in full swing, candidates are increasingly attempting to connect with the public using cultural mediums, such as popular music. However, even with the teams of lawyers protecting them, politicians are repeatedly confronted with cease and desist efforts, and sometimes even litigation, from musicians whose songs are being used during live campaign events without permission. Use of recorded music during a campaign stop can expose a candidate to a myriad of issues, including liability for copyright infringement, trademark infringement or dilution, false endorsement, and/or right of publicity violations.

In this political season alone, the following disputes have arisen: (1) Newt Gingrich was sued by a former member of the band Survivor for Gingrich's use of *Eye of the Tiger* during public campaign events in violation of the band's copyright (the parties settled, Gingrich apologized, and promised never to use the song again); (2) the band The Heavy demanded that Newt Gingrich stop using their song *How You Like Me Now?* on the campaign trail, claiming Gingrich's use of the song violated their copyright and created a false endorsement (Gingrich agreed to stop using the song); (3) the Silversun Pickups demanded that Mitt Romney's campaign stop using their song *Panic Switch* at events and creating a false endorsement (Romney's campaign says that they had the correct license, but agreed not to use the song anymore); (4) Rapper K'Naan demanded that Mitt Romney stop using his song *Wavin' Flag* during speeches, complaining Romney's use tarnished his brand and created a false endorsement of the candidate (Romney's campaign agreed to stop using the song); (5) Tom Petty sent Michele Bachmann a cease and desist letter after she used *American Girl* when announcing her presidential campaign (the Bachmann campaign generally ignored Petty's demands; however, Petty's demands became moot once Bachmann withdrew from the race); (6) Katrina and the Waves demanded that Michele Bachmann stop using their song *Walking On Sunshine*, claiming it created a false endorsement (the demand became moot once Bachmann withdrew); and (7) Dee Snider of Twisted Sister denounced Paul Ryan for using the song *We're Not Gonna Take It* at a campaign event, saying he did not agree with Ryan's politics and Ryan's use of the song falsely implied an endorsement (the Ryan camp agreed to stop using the song).

In order to understand why politicians are consistently faced with these legal claims, and to protect against them, it is helpful to have a general understanding of the various legal doctrines that are implicated by the use of recorded music at live political events.

Copyright:

The most common complaint by artists is that a political campaign is using their music in violation of their copyrights. In very general terms, copyright protects original creative works of authorship that are fixed in a tangible medium of expression. 17 U.S.C. § 102. A copyright grants the author a "bundle" of exclusive rights, including the right to perform the copyrighted work for the public. 17 U.S.C. § 106.

A recorded song implicates two distinct copyrights: (1) a copyright in the underlying musical composition (*i.e.*, the music and lyrics); and (2) a copyright in the sound recording. Often these rights are owned by separate individuals or entities. For instance, there is a copyright in the musical composition *All Along the Watchtower*, which is owned by Bob Dylan, the original author of the music and lyrics. There is also a copyright in each sound recording made of the song by musicians such as Bob Dylan, Jimi Hendrix, U2, and the Indigo Girls, to name just a few. Thus, in order to use a recorded song – *e.g.*, to play the song publicly – one must obtain permission from both the owner of the musical composition copyright, and the owner of the copyright in the sound recording of the version one wishes to use (with some limited exceptions).

Of course, we have all been in restaurants, bars, retail stores, sports arenas, hotel lobbies, and other public venues where music is playing in the background. It would be impractical, if not entirely impossible, for owners of these establishments to procure licenses from each and every copyright owner of the songs they wish to play. Thus, owners of establishments that wish to publicly[1] perform copyrighted music may obtain a "public performance license" from one (or all) of the performance rights organizations (PROs).[2] The PROs grant blanket licenses to public establishments, collect royalties for the use of music in public venues, and pay these royalties to the copyright owners. In other words, with the payment of one license fee, a PRO license allows the licensee the right to publicly perform[3] any of the musical works in that PRO's repertory without having to incur the time, expense, and burden of negotiating with each of the separate copyright owners.

It is important to note, though, that a PRO license does not cover all uses of all music publicly performed at a venue. For example, a sporting arena may have PRO licenses that cover *all* events that occur at that location. More likely, however, venues will procure more limited (read: less expensive) licenses, covering only specific events. For example, the Oracle Arena in Oakland may have PRO licenses to perform recorded music during Warriors, A's, and Raiders games. However, those licenses may not allow recorded music to play during the numerous other events held at the Arena. For those "other" events, in order to play recorded music, the promoters or organizers are responsible for procuring their own separate PRO licenses.

Also, significantly, as a general rule, blanket public performance licenses for convention centers, arenas, and hotels specifically *exclude* music use during conventions, expositions, and campaign events. Thus, in order for a political candidate to use recorded music during a campaign stop, it would be the responsibility of the campaign organizers to obtain performance licenses from all of the PROs prior to any such live campaign event. Based on the numerous artist complaints, it appears this requirement is often overlooked.

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[1] A performance is considered "public" if it occurs either in a public place, or at any place where people, other than a small circle of a family or social acquaintances, gather; this could include a private home.

[2] In the U.S., the three major PROs are the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and the Society of European Stage Authors & Composers (SESAC).

[3] Note that if one wanted to use a song in a political campaign advertisement to be seen on television or the Internet, for example, a PRO license would not cover that type of use. PRO licenses are only for public (to a live audience) performances of recorded music. A license from the owner of the musical composition, and a synchronization license from the master sound recording copyright owner would be required in order to create an audio-visual advertisement.

Trademark and False Endorsement:

Many campaigns take the position that if they buy a PRO license they are allowed to play any song they want without seeking approval from the artist. However, despite holding a PRO license, a candidate may be liable for trademark infringement, dilution, and/or false endorsement where use of an artist's work at a campaign rally implies that the artist supports or endorses that particular candidate.

The Lanham Act protects against consumer confusion caused by a mark's unauthorized use. 15 U.S.C. § 1114. The Act also protects against the dilution of famous trademarks, such as band or artist names, caused by the famous mark's unauthorized use. 15 U.S.C. § 1125. Musicians often argue that if fans hear their song played at a particular political event it could hurt their brand, causing trademark infringement or dilution. For instance, the rapper K'Naan argued that Mitt Romney's use of his song would confuse his fans into thinking that he endorsed Mr. Romney, which endorsement would hurt his brand because he supports President Obama.

Additionally, the Lanham Act protects against false endorsement, which occurs when a person's identity is connected with a product or service in such a way that consumers are likely to be misled about that person's sponsorship or approval of the product or service. 15 U.S.C. § 1125. Other than allegations of copyright violations, this is by far the most common artist complaint about politicians' unauthorized use of their music. For example, the band Silversun Pickups demanded that Mitt Romney's campaign stop using their song *Panic Switch* at events, alleging that Romney's use falsely implied an endorsement of the candidate by the band. The front man of the band made a public statement denouncing Romney's politics and the campaign's use of their song without permission, and saying: "We're nice, approachable people. We won't bite. Unless you're Mitt Romney!"

Rights of Publicity:

If a political campaign adopts a particular song, and plays it so much that it becomes associated with the candidate, the performers of that song may also have a claim for violation of their right of publicity.

In California, one's right of publicity is governed by Civil Code § 3344. In very general terms, the right of publicity statute dictates that any person who uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling goods or services, without that person's consent, is liable for damages.

Thus, when a campaign adopts a song as its "theme song," musical artists usually assert violations of their right of publicity, claiming that their image is being used to endorse a candidate, *i.e.*, a product. For instance, when Michele Bachmann adopted Tom Petty's song *American Girl* as the theme song for her Presidential campaign, Tom Petty arguably had a valid claim for violation of his publicity rights.

In every election, large and small, politicians are faced with the same complaints from musicians who were not consulted prior to the unauthorized use of their music during live campaign events. Remember, the foregoing laws regarding the use of recorded music in political campaigns are not just applicable in national, or even state, elections. If you are running for political office, or if you are representing a client who is, even if it is a local town or city office, you must always be cognizant of artists' rights when using recorded music in a public setting.

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