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Sports & Entertainment Spotlight

Cease & Desist From "Rockin' in the Free World": Copyright and Campaign Songs

Jonathan Malki on 9.10.15 | Posted in Entertainment

Descending into the atrium of the tower bearing his name, Donald Trump prepared to announce his candidacy for president. Blaring above the reporters' din, Neil Young's ferociously populist 1989 "Rockin' in the Free World" ripped through the speakers.

The content of Trump's announcement raised hackles in at least two countries. Among the incensed was Young himself—icon of the anti-war movement and avowed Bernie Sanders supporter—who had not consented to Trump's use of his famous rock anthem.

Every election cycle sees a variation of this familiar story — a candidate adopts a crowd-pleasing hit without the artist's permission; shortly thereafter, the musician disavows that candidate. In 2012 alone, Journey was skeptical of Newt Gingrich's use of "Don't Stop Believin'," Tom Petty thought Michelle Bachman an unworthy "American Girl," and Survivor punched back at Mitt Romney for rocking "Eye of the Tiger."

One artist, however, was not satisfied with a rebuke alone. In 2008, the Republican Party aired a commercial in Ohio supporting John McCain. The ad, attacking then-Senator Obama's energy policies, was scored to the tune of Jackson Browne's classic "Running on Empty." Browne responded by suing McCain and the Republicans for copyright and trademark infringement, as well as violation of Browne's common law right of publicity. (Browne v. McCain, et al., 08 Civ. 05334 (C.D.Cal.) After unsuccessfully seeking to dismiss the lawsuit on the basis that unlicensed use of a song in a political ad is First Amendment-protected fair use, the defendants settled for an undisclosed sum and issued a public apology.

Browne illustrates that candidates invite more than embarrassment when neglecting to secure artists' consent. First, copyright owners have an exclusive right to license the public performance of a protected work; by failing to get permission, the defendants presumptively violated Browne's copyrights. Moreover, because the public so closely associates Browne with his most famous song, the defendants' use of "Running on Empty" could plausibly create the false impression that Browne endorsed McCain and his views, and such unauthorized use could violate his right of publicity. Moreover, while the Republicans' defense may have ultimately prevailed, the fair use inquiry is not only complex and uncertain, but also presumes that infringement has occurred.

Consequently, campaigns are best served seeking artists' permission (and potentially their label's consent, depending on the type of use and the holder of the copyright to the actual sound recording) *before* blasting their hits.

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Tags: Browne v. McCain, copyright infringement, copyright owners, election, First Amendment-protected fair use, Right of Publicity, Trademark Infringement