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NEWSLETTER

Copyrights and Campaigns: Five Tips for the Unwary

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Many political campaigns and PACs fall into easily avoidable traps when it comes to copyright protection. Infringement can result in very significant liability: The copyright statute provides that willful infringers may be liable for up to $150,000 in statutory damages per work infringed-with no proof of actual damages required-and even where statutory damages are not available, the law provides that infringers must pay for actual damage caused to the infringer. Loss of that kind of money can seriously damage a campaign, and the reputational fallout and distraction of defending against a claim may be even greater.

The very best advice is not how to win cases against copyright owners, but how to avoid an infringement in the first place. So, here are five traps to avoid:

Play That Funky Music . . . But Not without a License

Campaign songs are almost as old as America itself. Andrew Jackson campaigned to the tune of "Hunters of Kentucky"; Abraham Lincoln used "The Battle Cry of Freedom"; and who can forget Franklin D. Roosevelt's "Happy Days are Here Again"? However, the last few election cycles have witnessed an uptick of complaints by musicians against the use of their songs in campaigns-such as Michele Bachmann's use of Tom Petty's "American Girl" and Katrina & the Waves' "Walking On Sunshine," and John McCain's use of Jackson Browne's "Running on Empty".

Recorded music embodies at least two separate works of authorship, each protected by separate copyrights: the musical composition and any accompanying lyrics (termed the "musical work") and a particular recorded rendition of that music (termed the "sound recording"). This means that, if you play recorded music in an arena, restaurant, parking lot, in a commercial or over a digital medium such as the Internet, you likely will have to pay for at least one license (for the musical work) and possibly two (adding a license for the sound recording in certain cases)-though you should check if a particular location has licenses in place that cover your usage. Finally, if you are incorporating music into an audiovisual work, such as a television commercial, then you also may need to secure special types of licenses called a "synchronization" or "sync" license for use of the musical work and-if you are using prerecorded music-a "master use" license for use of the sound recording.

Materials Found on the Internet Generally Are Not Free to Take

Copyright protection arises automatically when an original work is fixed in a tangible medium of expression from which it can be perceived, reproduced or otherwise communicated, either directly or with the aid of a machine or device. No notice, publication, registration or other action in the Copyright Office is required to secure the copyright, although the ability to bring an infringement suit and the statutory damages mentioned above require timely registration. Therefore, materials such as photos, videos, music, illustrations and logos that are found on the Internet are not necessarily in the public domain; in fact, there is a good chance that you need to obtain an assignment or a license from the copyright owner in order to use them. In some instances, the terms under which material may be used can be found on the website itself. Materials that are produced by the U.S. government are in the public domain. However, this does not mean that everything on a government website is public domain material, because the government can acquire copyright rights from third parties. Doing your homework on the materials you want to use is imperative.

Materials That You Did Not Create Are Not Yours

The law vests ownership of copyrights in the creators of original works unless they are works "made for hire." An organization generally owns the copyright for materials created by its employees within the scope of their employment. An organization does not own the copyright for materials created by independent contractors or other third parties, unless very specific conditions of the work made for hire are met. First, the work must be "specially ordered or commissioned" by the company-it may not be a preexisting work. Second, it must be one of nine narrowly defined types of works. Third, the parties must expressly agree in writing that the work will be considered a work made for hire. If all of these three conditions are not met, then you probably have to obtain a license to use or assignment of the materials from the copyright owner. This includes, for example, your website design, materials published on your website, advertisements, print, radio and television ads. Although a license may be oral or even implicit in the dealings between the parties, it is generally advisable to make it in writing.

There is No "20%" (or "30-second") Fair Use Rule

The concept of fair use, which permits the use of copyrighted works of others under certain conditions, is frequently misunderstood. As recently as a few weeks ago, the campaign of presidential candidate Mitt Romney issued an ad attacking rival Newt Gingrich using a short clip of a 1997 episode of NBC's *Nightly News*, reporting that Gingrich was found guilty of ethics violations. So how much is too much?

There is no bright-line rule defining how much of a work can be taken and still be fair use. The Copyright Act contains a nonexhaustive list of examples of purposes for which a particular use of a work might be considered "fair" and not an infringement-such as criticism, comment, news reporting, teaching, scholarship and research. A proper fair use analysis also must include a balancing of four factors:

- The purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes (this includes an examination of the "transformative" nature of the use);

- The nature of the copyrighted work;
- The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- The effect of the use upon the potential market for or value of the copyrighted work.

The distinction between fair use and infringement is not easily defined and is highly factually dependent.

Even If There's No Copyright Violation, You Still May Have Issues

Even if you have secured licenses or determined that a use is "fair," copyright owners such as recording artists and news outlets have more frequently started to assert objections that the use of their personalities or works in political campaigns implies a false endorsement of the campaign under a right of publicity or federal Lanham Act theory. These arguments also are being used to assert wrongdoing in the case of the anonymous fake attack ads attributed to the campaign of Ron Paul. Any use of materials that features or can be attributed to a public individual or organization that has not approved their use must be approached with extreme caution.

Conclusion

The best defense against claims of infringement is to have done your homework before using materials that may be owned by someone else. The potential fallout from a complaint or a lawsuit is expensive and distracting to a campaign. If you have any doubts about whether a particular use is likely to spurn an objection, consult with counsel skilled in evaluating these issues for political campaigns.