wiley

NEWSLETTER

Campaigns, Beware of Using Copyrighted Material!

July 2019

As the election cycle heats up, we think this might be a good time to remind everyone that careless use of songs or photographs in campaigns can give rise to copyright infringement challenges that can pose serious risks. Advance planning and careful coordination among those engaged in preparing campaign materials can save considerable pain.

To provide context, we would like to recall an example that occurred during John McCain's 2008 campaign for President against Barack Obama. Anticipating an appearance by Senator Obama in Ohio during early August, the Ohio Republican Party created a pro-McCain television commercial criticizing Obama's suggestion that the country could conserve gasoline by keeping automobile tires properly inflated. A sound recording of Jackson Browne singing his platinum hit song *Running on Empty* played in the background. The commercial was broadcast in Ohio and Pennsylvania, posted on YouTube, and made available on various websites. Mr. Browne, an Obama supporter, objected that the commercial falsely suggested he sponsored, endorsed, or was associated with Senator McCain and the Republican Party. As owner of the song copyrights, he brought suit in Los Angeles federal court on August 14, 2008, naming as defendants John McCain, the Republican National Committee, and the Ohio Republican Party.

Such alleged infringements and suits can prove damaging in several ways. They can trigger adverse publicity in the media. They can interfere with the continued use of the subject piece in the manner its creators intended, even if injunctive relief is not sought. The litigation itself can be both expensive and distracting. Moreover, a copyright infringement suit can involve litigation discovery by hostile political

Authors

Bruce L. McDonald
Senior Counsel
202.719.7014
bmcdonald@wiley.law

Practice Areas

Election Law & Government Ethics

interests that can provide them access to information that can lead to other difficulties.

If the defendant loses, he or she may be liable for any provable actual damages or, in the alternative, as much as $150,000 per infringed work in statutory damages. 17 U.S.C. § 504. In addition, there is the possibility that the court may order the infringer to pay the copyright owner's legal fees. *See, e.g. Long v. Ballantine*, 1998 U.S. Dist. Lexis 7813 (D.N.C. 1998) (awarding fees and costs following jury trial). There is also the possibility of being enjoined from future infringement. 17 U.S.C. §502.

This is not to suggest that all or most such lawsuits ultimately prove to have merit. To the contrary, numerous infringement defenses eventually can be effective in appropriate circumstances, but there is real risk and no silver bullet. Contrary to what many assume, the First Amendment right of free speech, while relevant, does not immunize political ads. "The mere fact that Plaintiff's claim is based on Defendants' use of his copyrighted work in a political campaign does not bar Plaintiff's claim as a matter of law." *Browne v. McCain*, 612 F. Supp. 2d 1125, 1130 (C.D. Cal. 2009).

Many campaign defendants rely on the Copyright Act defense of "fair use," 17 U.S.C. § 107. That defense can succeed, as it did in one recent case in which Wiley Rein represented the defendant. *Peterman v. Republican National Committee*, 2019 U.S. Dist. Lexis 28828 (D. Mt. 2019) (involving copied photograph of candidate).

The fair use defense can have differing success in various circumstances, in part because it involves the court's applying the following somewhat ambiguous and fact-intensive standards provided by Section 107:

- the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- 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.

That framework means that often the fair use defense will not be decided on a threshold motion to dismiss, although there are exceptions. *See, e.g., Galvin v. Ill. Republican Party*, 130 F. Sup. 3d 1187 (N.D. Ill. 2015) (claim based on altered photo of candidate dismissed as fair use). More commonly, however, the court will conclude that before the defense can be fairly assessed, the record needs to be developed beyond mere complaint allegations. That was the position taken by U.S. District Judge R. Gary Klausner (appointed by President George W. Bush) in the *Running on Empty* case. *Browne v. McCain*, 612 F. Supp. 2d 1125, 1131 (C.D. Cal. 2009) (citing "underdeveloped factual record, limited factual allegations in the Complaint, [and the] existence of potentially disputed materials facts"). Such rulings mean that more time may be spent in developing the record through discovery, with the attendant additional costs and risks. Moreover, there is no guarantee that the defense will succeed on summary judgment. *See, e.g., Henley v. Devore*, 2010 U.S. Dist. Lexis 67987 (C.D. Cal. 2010) (politicians failed to carry their burden to establish defense).

In some instances, it is possible to escape the litigation early based on lack of personal jurisdiction in the court where suit was brought. *See, e.g., Bigelow v. Garrett*, 299 F. Supp. 3d 34 (D.D.C. 2018) (no personal jurisdiction over Virginia Congressman or his campaign in District of Columbia). Indeed, in the *Browne* case, the Ohio Republican Party was dismissed because Judge Klausner found there was no personal jurisdiction over it in Los Angeles (it had constitutionally insufficient contacts). That ruling left Senator McCain and the Republican National Committee before the court, even though Senator McCain testified by declaration that he was not even aware of the Ohio advertisement until Browne brought suit.

Senator McCain and the Republican National Committee were alleged to be "vicariously liable" for the alleged copyright infringement, which was based on allegations that they had the right and ability to control the Ohio Republican Party and benefited directly from its infringements through media exposure and increased campaign contributions. Judge Klausner refused to dismiss such allegations in the absence of a more developed record. *Browne v. McCain,* 612 F. Supp. 2d 1125, 1131 (C.D. Cal. 2009).

By late July 2009 (long after the election was over), the *Browne* case was still continuing and no dispositive motions were pending. Judge Klausner had set a January 12, 2010 jury trial date. The remaining parties then entered a settlement, the terms of which were not disclosed, but which provided for dismissal of the suit with prejudice and a public apology by the defendants for using the song without permission from Browne.

The risks of such scenarios can be greatly reduced by careful and knowledgeable planning. *First*, it would be prudent for campaigns to place some person in a position of authority and ability to control the use of copyrighted material in campaign materials and events. That can reduce the chances of avoidable and unnecessary legal risks, e.g., by deciding to avoid protected material. *Second*, people involved in developing materials should be made to understand that just because you can find a song or photograph in some online source where it can be copied does not mean that it is lawful to use it. In general, publication of a work does not authorize other uses. Where multiple groups or companies are involved in the production of campaign literature, videos or advertisements, care should be taken to make clear who has the responsibility for securing any needed permissions.

In deciding what approach to take in developing a piece, bear in mind that the Copyright Act provides for the compulsory licensing of musical compositions and certain other works. One can license the words and music and then use one's own artists to record it. In that way, infringement can be avoided if care is taken to follow the specified licensing procedures. Also, rather than copying a picture, you can have your own photographer take a picture of the same subject, avoiding a slavish recreation.

Making your own version of a song – particularly one that obviously is a copy – has other benefits. Some singers claim, as Browne did, that their distinctive voices are a type of trademark, and that using their voice implies their support of a candidate or cause. As with copyright infringement, such claims are subject to many defenses, but they can be an expense and distraction and may lead to unfair adverse publicity.

If you believe you must copy and cannot obtain permission from the copyright owner, then bear in mind that the risks are lower when you copy a little, rather than the whole thing. *See, e.g. Thomson v. Citizens for Gallon Comm.*, 457 F. Supp. 957 (D.N.H. 1978) (copying of a copyrighted song for a few seconds for the purpose of political advertisement amounted to fair use). Also, where the use is "transformative" – using just a part of the protected work with new elements to create a new impression or to serve a new purpose – the fair use defense is significantly strengthened.

The bottom line is that using copyrighted materials can involve substantial risks. Indeed, we wind up handling cases of this type almost every year. For example, we defended an ad using recreated excerpts of a 1950s sci-fi monster, the Blob, to represent the federal deficit; an ad using the popular song "Our House" to mock an eco-candidate's lavish personal lifestyle; and use of "Eye of the Tiger" as an unofficial campaign theme song. Typically, the issues could have been avoided with a little advance legal planning.