

MCLE Self-Study Article



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CAMPAIGNS AND COPYRIGHTS: THE USE AND MISUSE OF MUSIC BY POLITICIANS

(**SEE END OF THIS ARTICLE FOR INFORMATION ON RECEIVING 1.0 HOUR MCLE SELF-STUDY CREDIT IN ETHICS.**)

SOMETIMES THE WORLD IS BEYOND SATIRE. Like when the heir to a real estate fortune, who avoided military service because of student deferments and a dubious medical classification,¹ enters a campaign rally to Creedence Clearwater Revival's "Fortunate Son."² But politicians missing the point is not a new story. The interesting question is what happens when musicians see a politician that they oppose, or even detest, using their work. Do politicians have a right to use the music of their choice? Do musicians have any ability to stop them from using their music?

As Usual, Blame Player Pianos

Let's start with the basics.³ A song usually has two separate copyrights: the song itself—the sheet music and words—and the recording of the song. The rights to the actual recording are typically divided even more, into mechanical rights, or the rights to physical copies or streams of the recording; synchronization rights, or the rights to use the recording in other media, like television or film; and performance rights, or the rights to play the recording over the radio or at an event. It's this last right that we're concerned with here.

A copyright holder has the exclusive right, "in the case of... musical... works... to display the copyrighted work publicly;" and "in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission."⁴ So if you want to play a recorded song (that isn't your own) at an event, you either need permission from the rights-holder or a good defense.⁵ For most businesses, and events, this means a license from one of the performing rights societies,⁶ sometimes called copyright collectives.

In response to new technologies,⁷ including the player piano and the burgeoning sheet music industry, early 20th Century industry stakeholders looked for ways to regulate and profit from the transmission of musical copyrights.⁸ In 1914, composers, lyricists, publishers, and attorneys banded together and created the American Society of Composers, Authors, and Publishers ("ASCAP").⁹ ASCAP operates as a repository of copyrights. It holds the public performance rights to works by its members and collects license fees to those works, and sues on behalf of its members for copyright infringement.¹⁰

With the growth of radio in the 1920s and '30s, these licenses became even more important. In the face of increasingly rapacious behavior by ASCAP,¹¹ Broadcast Music, Inc. ("BMI") was founded in 1939 as a competitive alternative to ASCAP.¹² BMI offered lower-cost licenses and made a point of acquiring the catalogues of Black songwriters and musicians, who had often been shut out of ASCAP.¹³

While there's a fascinating (no, seriously!) antitrust history around these two groups,¹⁴ that is beyond the scope of this article. For our purposes, what is important is the current situation. As it stands now, ASCAP, BMI, and a handful of other licensing groups acquire the public performance rights to music recordings, and handle licensing and enforcement of those rights under "blanket licenses."

In the hundred or so years since ASCAP started issuing blanket licenses, this system has generally worked more-or-less as intended, despite some flaws. While the general consensus is that the blanket-license system is economically efficient,¹⁵ artists have often felt that they were not compensated fairly for their work.¹⁶ And this doesn't even begin to address the problems mentioned earlier about ASCAP's historical exclusionary and racist practices. But for the issue of creating a relatively simple way to obtain a license to play recorded music in public, this system has proven itself to be durable and manageable. That said, the regime contains at least one other major blindspot: once artists have licensed their work to a copyright collective, can they maintain any control over who uses that work?

Campaign Soundtracks

Let's say I wanted to use a piece of music at an event. The first thing I would do is look up which licensing group held the public performance right. Once I've identified that, I can apply for a license. BMI even offers a political entities license for just this purpose. Pretty simple so far. But there's an issue lurking here: what if artists find the politician who wants to use the music repugnant? If they do, can they stop the politician from using their works?

The short answer is no. Even if an artist finds the politician repugnant, as long as that politician has secured the proper license, the politician can use the music. Unlike other countries, notably France and Germany,¹⁷ the United States does not have robust protection for moral rights of artists.¹⁸ While some limited moral rights were recognized by the Visual Artists Rights Act of 1990 ("VARA"), 17 U.S.C. § 106(c), VARA only protects a limited class of works of visual art.¹⁹ While it may seem obvious that once a copyright is licensed, the original author gives up some control, uses at campaign rallies seem more problematic. Intuitively, simply licensing work and not knowing if horrible people will listen to it seems a lot less serious than a politician using one's work to advocate for a position or a campaign.

So what can artists do? Well, for a start, they might simply ask the politician to stop using the work. And when that doesn't work, they can see if the politician has actually obtained the correct license. The exact license required isn't always obvious²⁰ and in some cases, musicians have found that campaigns have used dubious claims to licensing and that has given them a way to claim damages or force the politician to stop using the work.²¹ But that does not prevent the campaign from getting the correct license the next time around—unless of course the musician has them agree to not use the music.

Another option for the artist is to negotiate with the copyright collectives. An artist could theoretically work with BMI, ASCAP, or whichever group holds the rights to license the public performance right of their work to restrict who has access to it. The Rolling Stones have tried this with some success.²² But not every group has the clout of The Rolling Stones and many artists depend on the licensure scheme for revenue, so they may not want to or may lack the leverage to negotiate with BMI and ASCAP.²³

Looking Past Copyright

Without copyright claims, artists have limited recourse against unscrupulous politicians. Some people have argued that they could use the federal trademark statute, the Lanham Act, on a theory of false association or endorsement. The claim is essentially that playing one's music at a rally implies association with or endorsement of the politician by the artist. That remains an untested—and frankly dubious—theory²⁴ and may only be available to the upper echelon of recording artists. Even for the most established musicians this theory has some serious obstacles, as trademark law generally guards against consumer confusion.²⁵ And if conventional intellectual property laws are ineffective, what are artists left with?

Leaving aside legal remedies, some groups have found that the combination of more primitive techniques, like public shaming, alongside or helped by newer technologies, like Twitter, can be effective.²⁶ Artists (or the holders of their rights) including the Dropkick Murphy's,²⁷ Tom Petty,²⁸ Jackson Browne,²⁹ and K'Naan³⁰ have used this technique with some success. It can also provide an alternative avenue for groups that may have ideological misgivings about using the copyright laws or the courts; those groups generally have found this method effective.³¹

It's likely that politicians will continue to miss the point of the music they use,³² and neither the law nor the existing licensing schema are, as now used, able to protect artists who would oppose their politics or simply want to stay out of the political arena. Because of that, this form of shaming may be the most efficient way around the problem. 

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Endnotes

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