SINGING THE CAMPAIGN BLUES

Politicians Often Tone Deaf to Songwriters' Rights

By Robert W. Clarida and Andrew P. Sparkler

What do John McCain, Marco Rubio, Charlie Crist, Rand Paul, and Sarah Palin have in common with President Barack Obama and French President Nicolas Sarkozy? There are, no doubt, many amusing answers to that question, but for present purposes consider this one: all have recently been cited for making unauthorized use of copyrighted music in their campaign rallies, YouTube videos, and/or paid advertisements. In some cases, songwriters have been concerned that such uses of their work could be interpreted as an endorsement of campaigns and political positions with which they disagree. In other instances, songwriters may simply be asserting their right under the law to control and profit from performances and reproductions of their work. If the campaigns have to pay for balloons, catering, and candidates' haircuts, why should they expect to use music for free?

The exact nature of these music claims, and the politicians' responses to them, have been varied. Simple public performances, such as playing songs over the PA system at rallies and other campaign events, raise one set of issues. Including songs in videos, websites, and TV ads raises additional issues. Altering the songs with new lyrics to make topical political points raises still another set of issues.

Playing Songs at Rallies

With regard to playing songs at rallies, some campaigns have taken the position that they have paid for blanket public-performance licenses through ASCAP, BMI, and SESAC, and thus there is no legal basis for the songwriters to object. The McCain/Palin campaign, for example, made that argument during the 2008 campaign in response to complaints it

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received from Heart ("Barracuda"), John Mellencamp ("Pink Houses"), Van Halen ("Right Now") and John Hall ("Still the One").[1] If the proper licenses had in fact been secured, there would seem to be little basis for a copyright claim, no matter how objectionable the songwriter may have found the use.

Recently, however, attorneys for the progressive-rock band Rush have advised the Kentucky Senate campaign of Rand Paul that "[t]he public performance of Rush's music is not licensed for political purposes: any public venue which allows such use is in breach of its public performance license and also liable for copyright infringement."[2] And copyright issues aside, even a licensed performance at rallies could potentially be actionable under the Lanham Act if it falsely implied some connection with, or endorsement by, the performer or songwriter.[3]

Background Music in Videos

When a campaign's use involves more than just a public performance of a song, a copyright infringement claim may be harder to avoid. Even if the campaign has purchased the appropriate ASCAP/BMI/SESAC licenses, those licenses do not cover the making of recordings of the songs, such as occurs in the soundtracks of campaign videos and advertisements.

One such video claim resulted in a 2008 litigation, settled last year, between noted liberal singer-songwriter Jackson Browne and Senator John McCain over the use of Browne's hit song "Runnin' on Empty" in a campaign video produced by the Ohio Republican Party. The video used the song as background music while attacking then-candidate Barack Obama's position on energy conservation. The video was posted to YouTube, published on other websites such as huffingtonpost.com, and broadcast on MSNBC. Browne filed a federal complaint in the Central District of California in August 2008 naming the Ohio Republican Party, the Republican National Committee, and John McCain as defendants.[4] Although the video was removed from the Internet shortly after an initial cease-and-desist letter was received, the suit went forward.

Browne claimed the video falsely suggested that he sponsored, endorsed, and was associated with McCain and the Republican National Committee (RNC), in violation of the Lanham Act. The complaint also alleged copyright infringement for unlicensed use of the song in the soundtrack of the video, as well as a state law claim for violation of Browne's common law right of publicity in connection with the unauthorized use of Browne's voice.

The complaint noted previous unauthorized uses of music by the RNC, including songs by Frankie Valli and ABBA. After the defendants' motion to strike one of the claims was denied in early 2009,[5] the case settled on July 21, 2009, for an undisclosed sum.[6] Although both McCain and the RNC disavowed any connection with the Ohio Republican Party's creation and use of the video, the settlement also included an apology from both and a pledge by the GOP not to use any songwriters' work without proper permission in future campaigns.

Under very similar facts, the Senate campaign of erstwhile Republican Charlie Crist was recently named in a lawsuit by David Byrne in the Middle District of Florida.[7] The claim arose from the use of Byrne's hit "Road to Nowhere" in a January 2010 campaign video posted to YouTube to promote Crist's candidacy in the Republican primary for the U.S. Senate race in Florida. The complaint, filed on May 24, 2010, alleges copyright infringement as well as a claim for false endorsement under the Lanham Act. The complaint further

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YOUTUBE USER-GENERATED OR USER-POSTED "COMMERCIALS"

It is no secret that the Internet is the medium through which most of us receive news and entertainment. Consequently, for a political campaign to be successful, it will probably need a very strong online presence. While the Internet is a relatively new media outlet that has the ability to reach billions of people, politicians still must respect copyright law when posting content online.

Marco Rubio is running a U.S. Senate campaign in Florida and his main opponent is the current governor of Florida, Charlie Crist. While Governor Crist has spent most of his political career as a registered Republican, he recently left the party and registered as an Independent for fear that Rubio (also a Republican) would defeat him in the primary election. In response, Rubio's campaign produced an ad featuring the song "Take the Money and Run," by The Steve Miller Band. (Crist's Senate campaign reportedly accepted financial support from the Republican party, then refused to return the funding when he became an Independent, hence the pretext for using the Miller song).

When Steve Miller learned of the ad, he asked Rubio to remove it from YouTube. The campaign complied but countered that they did not require Miller's permission because the ad's viewers could easily purchase the song via embedded links from YouTube's website to online music stores. This claim completely lacks any sort of legal foundation but does illustrate the common misconception that a different set of laws applies to copyrighted content once it is posted on the Internet.

Recently, the U.S. District Court for the Southern District of New York issued its widely publicized decision in the case of *Viacom Int'l Inc. v. YouTube, Inc.*,* ruling that YouTube is not necessarily secondarily liable for infringement of copyrighted works posted on its website. However, while this "safe harbor" may protect YouTube, it does not extend to the creator or poster of the infringing material. If a commercial containing a song is made available to the public, the commercial's producer (such as a political campaign) is responsible for obtaining the proper licenses from the song's copyright owners, regardless of whether that song is publicly performed via YouTube or other medium such as broadcast television, cable, or radio.

* 2010 WL 2532404 (S.D.N.Y. 2010)

alleges that "Road to Nowhere," one of Byrne's most famous musical compositions, has never been licensed for use in a commercial advertisement, despite numerous lucrative offers. Byrne also asserts that because of Crist's status as a former attorney general and his membership in the Republican Party, which had recently lost an identical suit, he was well aware of the requirement of obtaining a license and thus acted willfully. Perhaps not coincidentally, Byrne's attorney is Lawrence Iser of Kinsella Weitzman Iser Kump & Aldisert, who also represented Jackson Browne in the McCain matter.

What About Fair Use?

With respect to the copyright claims in the above video cases, a fair use defense would be unlikely to succeed. Fair use, codified at 17 U.S.C. § 107, is an affirmative defense that permits unauthorized use of a copyrighted work for certain purposes such as criticism, commentary, research, and news reporting. The statute provides that

> [i]n determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

Briefly, the first factor looks to whether the use is commercial; if so, the use is less likely to be fair. The second factor asks whether the plaintiff's work is highly creative or primarily factual; fair use is more likely to be found with respect to factual works. The third factor looks to the amount of plaintiff's work that has been borrowed by the defendant. The larger the borrowing, or the more central the borrowed portion is to the plaintiff's work, the less likely it is to be held fair use. The fourth factor, often deemed the most important consideration, focuses on whether conduct like the defendant's would be likely to harm an actual or potential market for the plaintiff's work, including the market for licensed uses.

In addition to these four nonexclusive factors, the courts have increasingly emphasized the concept of "transformative use" in determining whether defendant's use qualifies as a fair use. The term originated with a landmark 1990 article in the *Harvard Law Review*,[8] in which Judge Pierre N. Leval of the Second Circuit recognized the essential public policy issue that lies at the heart of fair use, namely, under what circumstances may a second author's use of a copyrighted work provide such a benefit to society that otherwise infringing conduct is justified? Judge Leval's answer centered on "transformative use," which he defined as a use that is "productive and [that employs] the quoted matter in a different manner or for a different purpose from the original."[9]

OF THE LANHAM ACT, RIGHT OF PUBLICITY, AND SOUND-ALIKES

The defendants in *Henley v. DeVore** recorded new lyrics and vocal tracks to a popular Don Henley song and featured the song in a campaign commercial. In addition to his claims of copyright infringement, Henley brought a cause of action under the Lanham Act. A Lanham Act claim is based in trademark law and principles of false advertising. The key inquiry in this type of claim is whether a plaintiff can prove that the people listening to the song at issue are likely to confuse the singer in the new song with the singer in the original song and thus to assume, wrongly, that the plaintiff endorses or has some other affiliation with the subject of the ad. In *Henley*, the court dismissed Henley's Lanham Act claim, holding that "[h]aving listened to [the singer's] less-than-angelic-voice in comparison with Henley's more soothing vocals, the Court finds that a reasonable jury would not find a likelihood of confusion."

It is possible that the court would have held differently if DeVore had used a singer whose voice sounded more like Henley's. In *Midler v. Ford*,** auto manufacturer Ford unsuccessfully attempted to hire singer Bette Midler to record a commercial. When Ford hired a singer whose voice sounded very similar to Midler's and used a (licensed) song strongly associated with Midler, Midler sued. While the suit was not based in the Lanham Act, it did include a California state law claim that Midler's right of publicity had been misappropriated. The court determined that a singer's voice is central to her identity and found that Midler's misappropriation claim was valid, awarding her $400,000.

In a similar case, singer Tom Waits brought a claim against Frito-Lay when the company produced a commercial featuring a song performed by a Tom Waits "sound-alike."*** Waits contended both that his right of publicity had been misappropriated and that there was false advertising under the Lanham Act. He was successful on both claims.

American courts have yet to accept claims under the right of publicity or the Lanham Act by a songwriter against a political campaign when the campaign possesses a performance license from the songwriter's performing rights organization. Such a scenario would present an interesting legal issue, however. Because performing rights organizations grant blanket licenses to venues for public gatherings, it is conceivable that a political campaign's performance of a songwriter's work—in a public forum—is legal from a copyright perspective, at least initially, even when the songwriter objects to the performance of the work in association with a particular campaign. In such an instance, the songwriter's recourse would not be based in copyright infringement but in claims under state tort law and federal trademark law. However, if the particular campaign uses the song in other ways, such as synchronized with an audio-visual program, and then posts it on its own website or YouTube, then the songwriter might also have claims based in copyright.

* No. 09-481, 2010 U.S. Dist. LEXIS 67987 (C.D. Cal. June 10, 2010).
** 849 F.2d 460 (9th Cir. 1988).
*** Waits v. Frito-Lay, 978 F.2d 1093 (9th Cir. 1992).

A transformative use, unlike simple piracy or other "supersedes uses," potentially furthers the underlying policy goal of the Copyright Act to "promote the Progress of Science and useful Arts."[10] For example, a transformative use such as a book review or scholarly essay may contribute to the creation of new works that draw upon portions of earlier works but endow them with "new expression, meaning or message."[11] Therefore, in applying the fair use factors set forth in § 107 of the Copyright Act, the degree to which defendant's use is transformative is a crucial consideration.

Judge Leval's concept of transformative use was immediately adopted by a number of courts facing tough fair use decisions, and, since the Supreme Court's application of the concept in *Campbell v. Acuff-Rose*, a 1994 opinion concerning a rap parody of the Roy Orbison song "Oh Pretty Woman," it seems that no fair use analysis is complete without consideration of the transformative value (or lack thereof) to be found in the defendant's work.[12]

As applied to the Jackson Browne and David Byrne cases, the fair use analysis would probably not cut in the defendants' favor. In *Browne v. McCain* the court did not address fair use directly, but in denying the defendants' motion to strike the right of publicity claim, it held that the McCain video did not make a transformative use of the Browne composition.[13] The statutory factors would also appear to favor the plaintiff. The video used about 20 seconds of the Browne work, which is a substantial portion, and the song is obviously creative rather than factual. Songs are routinely licensed for use in video soundtracks; thus, there is genuine market harm under the fourth factor. Moreover, the video would probably qualify as "commercial" under the first factor, even assuming *arguendo* the campaign made no money directly from it because "monetary gain is not the sole criterion, particularly in a setting where profit is ill-measured in dollars."[14] Because the McCain and Crist campaigns presumably stood to gain publicity and campaign donations through the circulation of the videos in question, they obtained a benefit from the use of the music without paying the customary price, and their uses would accordingly be deemed commercial.

What About Parody?

Perhaps the closest thing to a bright-line rule in fair use is that parody is given a very high degree of freedom to copy from the work it targets. Post-*Campbell* it is extremely rare, if not impossible, to find a case in which a true parody of the plaintiff's work has not prevailed under the fair use analysis. Is McCain's use of "Runnin' on Empty" parody? Or Crist's use of "Road to Nowhere"? Probably not. Under *Campbell*, courts must first determine whether the defendant's work is a criticism or comment upon the plaintiff's own work, or whether it gratuitously borrows elements from the plaintiff to poke fun at something else, such as an aspect of society in general. The latter type of use is generally termed "satire" rather than "parody" and is accorded far less fair use deference. Courts in fair use parody cases have generally rejected claims of parodic intent where the purported parody did not directly set out to skewer the plaintiff's work. With *Browne* and *Byrne v. Crist*, the target of the critique appears to be the defendants' political adversaries, not the plaintiff's own songs.[15]

The question of parody *vel non* is so important in these cases because the courts have made parody almost a *per se* category of transformative use. And once the defendant convinces the court that the use is truly transformative, the severity of other problems with the defendant's case, such as commercial use and extensive copying, is greatly reduced. That is, under *Campbell*, the more transformative a second work is, "the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use."[16]

Although after *Campbell* the defendant's commercial purpose can no longer be a *per se* bar to a finding of fair use, it does still weigh against the defendant, even in the parody context. Transformative use therefore gives the commercial defendant a counterargument under the first factor.

PERFORMING RIGHTS LICENSES AND POLITICAL CAMPAIGNS

As we all know, political campaigns hold events and rallies in a wide variety of locales. While some of the larger events take place in arenas or stadiums, campaign stops often occur at factories, backyard barbeques, and even wide-open fields. As the lawsuits involving Jackson Browne, David Byrne, and Don Henley indicate, music is often a crucial component of these campaign stops. But how is music licensed to campaigns that publicly perform music in an unconventional setting?

First, let's address the more common licensing scenario—a campaign's music use in a venue that traditionally hosts musical performances (like a theatre or arena). This sort of venue will have a public performance license from ASCAP, BMI, and SESAC, the three U.S. performing rights organizations (PROs). These licenses allow the venue to publicly perform the PROs' entire catalogs. So, if a politician's grand entrance is accompanied by an ASCAP member's song, that performance is already licensed by the venue. Under the standard licenses between the PROs and songwriters, political uses are not subject to any more restrictions than any other uses of music; they are simply considered public performances.

If a campaign stop occurs in a more unusual place (from a music licensing perspective), it is likely that music performances are still licensed uses. This is because campaigns can also purchase public performance licenses from the PROs. Thus, it does not matter where the campaign trail brings a politician: if the campaign has a PRO license, it can play any music from that PRO's repertory. A campaign song can add dramatic flair to a politician's appearance without fear of infringement, regardless of the stump's location. But when the song starts to be repeated to the point of being a "theme" song, and used over the objections of the song's writer, the songwriter may have grounds under state tort law and the Lanham Act (*see* "Of the Lanham Act, Right of Publicity, and Sound-Alikes," on the facing page).

One final note on the limitations of a PRO license: even if a campaign obtains a license to publicly perform a song, it may be in its best interest to contact the songwriter to ensure that he or she does not object to the usage. While a performing rights license permits a song to be publicly performed, it will not offer protection against a songwriter's claims of a Lanham Act violation or that a right of publicity has been harmed.

Under the third factor, the courts also rely on the transformative use concept to excuse takings that would ordinarily be too large to qualify as fair use. If the defendant has a legitimate parodic intent, even a very extensive taking can be permissible.

In looking at the final statutory factor, which considers the effect of the second work on the plaintiff's market, the courts often rely on the transformative, parodic character of the defendant's work to find that it is not likely to serve as a market substitute for the original work or cause any other "cognizable" market harm. The courts' reasoning in these cases, borrowed directly from *Campbell*, is that "no protectible derivative market" exists for works of criticism and parody, since authors cannot be expected to cooperate in subjecting their own works to ridicule by issuing licenses to parodists. Accordingly, the author's usual right to control the creation and sale of derivative works must be suspended because authors will not generally exercise it in the best interest of society. There is, no doubt, a "derivative market" for some commercial parodies, but under this reasoning, that market is not protectable. An author whose work is copied for a socially valuable, transformative derivative work of true parody or criticism thus loses the right to capitalize on licensing that derivative work, at least where the court suspects that the author is being deprived of nothing because he or she would not have licensed the use anyway. If the court is correct in this assessment, then the author has no economic stake in the outcome, and the social benefit that flows from the creation of parodic and critical works outweighs the author's sense of moral outrage at seeing his or her work distorted.

The *Don Henley* Case

The above discussion of fair use, parody, and transformative use is all by way of introduction to *Henley v. DeVore*, a June 10, 2010, decision in the Central District of California that offers the most comprehensive picture yet of the clash between songwriters' rights in their work and political campaigns' seemingly insatiable desire to blast their opponents to the tune of hit songs.[17] In *Henley*, a founding member of The Eagles, Don Henley, filed suit against Charles DeVore, a Republican candidate for the U.S. Senate in California, after DeVore posted a video featuring two songs performed or written by Henley, "The Boys of Summer" and "All She Wants to Do Is Dance," with new lyrics by DeVore. The complaint alleged copyright infringement as well as the by-now-familiar false association or endorsement claim under § 43(a) of the Lanham Act.[18] In May 2009, defendants moved to dismiss the Lanham Act claims, asserting that the Act only applies to commercial, not political, speech. The court denied this motion. On April 9, 2010, defendants moved for summary judgment. The court issued a formal ruling on June 10, 2010, granting summary judgment to the plaintiffs on the copyright infringement claim but finding for the defendants under the Lanham Act.

DeVore's version of the song "Boys of Summer," performed by DeVore over a karaoke instrumental track of the song, substitutes new lyrics and a new title ("The Hope of November") for the original, poking fun at President Barack Obama, Representative Nancy Pelosi (D-CA), and others. It was posted to YouTube and other Internet sites in March of 2009. In April 2009, Henley found the video and sent a DMCA take-down notice to YouTube, which complied. DeVore sent a counter-notification claiming the video constituted a parody. DeVore then created a similar video based on the song "All She Wants to Do Is Dance," with new lyrics, entitled "All She Wants to Do Is Tax," ridiculing Senator Barbara Boxer (D-CA) and others. This second video was posted on April 14, 2009, and three days later Henley filed his action.

Defendants' primary fair use argument was that their works constituted parody and were thus noninfringing under § 107. As a threshold matter, the court assumed that a critique of Henley himself, rather than his songs *per se*, could be properly considered a transformative parody under *Campbell*. Even under this assumption, though, it concluded that DeVore's "All She Wants to Do Is Tax" ("Tax") did not target Henley for comment. As for "The

KARAOKE SONGS IN CAMPAIGN COMMERCIALS

In the case of *Henley v. DeVore*,* the defendant used a karaoke version of Mr. Henley's song "All She Wants to Do Is Dance" and recorded new lyrics atop the karaoke track. While the district court in California found that this use did constitute copyright infringement, it is not the only recent case involving a karaoke version of a popular song.

In January of 2010, Joe Walsh, a Republican congressional candidate, recorded a karaoke version of the song "Walk Away," by the musician Joe Walsh (to avoid confusion, the two parties will be referred to herein as "the politician" and "the musician"). The politician changed the lyrics of the original song to poke fun at his opponents and the Democratic Party and then posted the commercial on YouTube. When the musician asked the politician to remove the video from YouTube, citing copyright infringement, the politician responded via an open letter to the *Daily Herald*, a Chicago-region newspaper. The letter claimed that the song did not infringe the musician's copyrights and was a parody of the original. Both of these claims are incorrect as a matter of law.

First, the politician asserted that, because he used a karaoke version of the song and not the original, he did not infringe the musician's copyrights. But there is ample case law demonstrating that permission from the copyright owner is required to set a karaoke version of a song to video.**

Second, the politician takes the position that his song is a parody and, thus, protected under the affirmative defense of "fair use." This claim is also erroneous because the lyrics of his song did not mock the original composition of "Walk Away" but, rather, lampooned other politicians in a style closer to satire than parody. Satire is not relevant to a fair use analysis (*see* "What About Parody?", page 9 of the main article). It is highly unlikely that the politician would have been successful in defending his recording—with revised lyrics—using these legal theories.

* No. 09-481, 2010 U.S. Dist. LEXIS 67987 (C.D. Cal. June 10, 2010).
** *See* Leadsinger v. BMG, 512 F.3d 522 (9th Cir. 2008); ABKCO Music v. Stellar Records, 96 F.3d 60 (2d Cir. 1996).

Hope of November," it implicitly targeted Henley but took too much from the original ("Boys of Summer") in relation to the jab at Henley and risked harming the market for Henley's song. The court further determined that DeVore's purpose was commercial. The defendants asserted that campaign ads are not-for-profit, but the court followed a Ninth Circuit decision, *Worldwide Church v. Philadelphia Church of God*, to hold that a use can be "commercial" under § 107 even where the defendant earns no revenue directly from it.[19]

The second factor, the nature of the copyrighted work, did not weigh heavily with regard to the "November" track. However, with regard to "Tax," since there was no legitimate claim to parody, the fact that the original work was highly expressive weighed against the defendants. Under the third factor, the amount and substantiality of the portion used, it was undisputed that both "November" and "Tax" borrowed heavily from the originals. In addition to the karaoke instrumental tracks and the vocal melodies, 65 percent of the "Boys of Summer" lyrics and 74.7 percent of the "Dance" lyrics were directly copied. The court determined that since "Tax" was almost entirely satirical, rather than true parody, it could not justify such excessive copying. "November" was a closer question, due to the song's implied parodic critique of Henley, but the court decided that the amount copied was more than anything courts had previously found to be fair use and that such extensive use of Henley's music to make political points was not justified.

Under the fourth factor, the effect of the use on the potential market, the court determined that DeVore's taking of the entire musical composition with minimal lyrical change would adversely affect the market for the original. The defendants also failed to offer any evidence to show that their songs did not usurp the potential licensing market for the Henley songs, should he choose to license them for similar purposes.

Overall, the court concluded that "Tax" was clearly not fair use. "November," while a closer call because of its arguably parodic nature, still did not meet the defendant's burden of establishing the affirmative defense of fair use, and plaintiff was entitled to summary judgment as to liability for copyright infringement.

As for the Lanham Act claim for false endorsement, however, the court found in defendants' favor. The court determined that the plaintiff could not maintain a Lanham Act claim based merely on the use of *songs* that Henley performed, noting that there is no precedent to support the proposition that a performer holds a trademark on the performance of a particular song. The court determined that since the public could not reasonably think that Henley himself *actually performed* the DeVore campaign video songs, defendants were entitled to summary judgment on the Lanham Act claim.

On August 5, 2010, it was announced that Henley and DeVore reached a confidential settlement in this case. As part of the settlement terms, DeVore issued a statement apologizing to Don Henley and his fellow songwriters for using their song "without respect for their rights under copyright law." In an interview discussing the settlement, Henley insisted that the lawsuit was not filed to make a political statement, but rather was "simply a matter of my copyrights being violated by music being used in a way it was never intended to be used."[20]

Conclusion

The continuing series of disputes between songwriters[21] and political campaigns shows no signs of abating. Quite the contrary. Former McCain campaign IP attorney Ben Sheffner has begun a blog covering the topic, and as he noted in a May 24, 2010, post about the David Byrne case, "It won't surprise me if we see a dozen more lawsuits exactly like this one before November."[22] As Alanis Morissette might tell him, "you oughta know."[23] ■

Endnotes

1. Suz Redfearn, *GOP Gets No Love from Musicians*, Politico, Sept. 16, 2008, http://www.politico.com/news/stories/0908/13477.html.

2. Letter from Robert A. Farmer, Director of Legal Affairs, Anthem Entertainment Group, to Rand Paul for U.S. Senate (May 25, 2010), *available at* http://www.scribd.com/doc/32872744/Letter-to-Rand-Paul-re-use-of-Rush-Music.

3. *See, e.g.*, 15 U.S.C. § 1125(a); Waits v. Frito-Lay, Inc., 978 F.2d 1093 (9th Cir. 1992) (finding Lanham Act violation for implied endorsement where singer's voice was imitated in television commercial).

4. Complaint, Browne v. McCain, 612 F. Supp. 2d 1125 (C.D. Cal. 2009) (No. 08 Civ 05334).

5. Browne v. McCain, 612 F. Supp. 2d 1125 (C.D. Cal. 2009).

6. *Jackson Browne Settles with GOP over Song Use*, TODAYshow.com, July 21, 2009, http://today.msnbc.msn.com/id/32027353.

7. Complaint, Byrne v. Crist (M.D. Fla. May 24, 2010) (No. 08 Civ 1187-T26), *available at* http://www.scribd.com/doc/32059750/David-Byrne-v-Charlie-Crist-Complaint [hereinafter Byrne Complaint].

8. Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105 (1990).

9. *Id.* at 1111 (citing Cary v. Kearsley, 107 Eng. Rep. 679, 681–82 (1802); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 480 (1980) (Blackmun, J., dissenting)).

10. U.S. Const. art. I, § 8, cl. 8.

11. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) (citing Leval, *supra* note 8, at 1111).

12. *Id*. at 569.

13. 611 F. Supp. 2d 1062, 1072–73 (C.D. Cal. 2009).

14. Worldwide Church of God v. Phila. Church of God, 227 F.3d 1110, 1117 (9th Cir. 2000) (quoting Weissmann v. Freeman, 868 F.2d 1313, 1324 (2d Cir. 1989)).

15. Byrne Complaint, *supra* note 7.

16. *Campbell*, 510 U.S. at 579.

17. Henley v. DeVore, No. 09-481, 2010 U.S. Dist. LEXIS 67987 (C.D. Cal. June 10, 2010).

18. 15 U.S.C. § 1125.

19. *Worldwide Church of God*, 227 F.3d 1110.

20. Ben Sheffner, *Henley, DeVore Settle Lawsuit . . .* , Copyrights & Campaigns, Aug. 5, 2010, http://copyrightsandcampaigns.blogspot.com/2010/08/henley-devore-settle-lawsuit-henley.html.

21. Throughout the article, reference is made to "songwriters." While it is true that some songwriters are also performers (like Joe Walsh and Don Henley), many successful songwriters do not perform their songs. When a songwriter does not have the added income streams that come with being a well-known performer (touring, merchandising, etc.), their primary source of income is often from the licensing of their works.

22. Ben Sheffner, *David Byrne Sues Charlie Crist over Use of "Road to Nowhere" in Campaign Video*, Copyrights & Campaigns, May 24, 2010, http://copyrightsandcampaigns.blogspot.com/2010/05/david-byrne-sues-charlie-crist-over-use.html.

23. Alanis Morissette, *You Oughta Know*, *on* Jagged Little Pill (Maverick Records 1995).