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Gingrich faces eye of the copyright tiger

We are in the midst of a presidential campaign season that is providing substantial entertainment value. Which Republican candidate will win the next primary is anyone's guess. The momentum shifts have been dizzying. The excitement prompts me to write about an issue that has arisen in several prior presidential campaigns and is again in the news: the unauthorized use of copyrighted music by politicians.

Songs have played an important role in presidential campaigns since the first presidential election in 1789, when a group of women from New Jersey composed a song in praise of their hero, George Washington: "Virgins fair and Matrons grave, /Those thy conquering arms did save, /Build for thee triumphal bowers/Strew, ye fair, his way with flowers."

A more hard-hitting song helped William Henry Harrison put President Martin Van Buren out of office in the 1840 election by referring to Van Buren's opulent lifestyle: "Let Van Buren from his cooler of silver drink wine, /And lounge on his cushioned settee, /Our man [Harrison] on his buckeye bench can recline; /Content with hard cidar is he!" Mitt Romney, take note.

And if you think negative campaigning is a recent phenomenon, consider this ditty composed by Federalist opponents of Thomas Jefferson, alluding to his relationship with Sally Hemings, a slave with whom he purportedly fathered children: "When pressed by load of state affairs, /I seek to sport and dally, /The sweetest solace of my cares/Is in the lap of Sally." These and many more examples are discussed in "Unauthorized Use of Popular Music in Presidential Campaigns," by Erik Gunderson 14 Loyola L.A. Ent. L.J. 137 (1993).

Music is a powerful way to express a message. The problem in modern presidential campaigns is that politicians are somewhat cavalier about obtaining permission to use copyrighted music. John McClain has been the recipient of numerous cease-and-desist letters from Van Halen, John Mellencamp, the Foo Fighters and others. He was actually sued by Jackson Browne for unauthorized use of Browne's song "Running on Empty" in the 2008 campaign. *Browne v. McCain.* 611 F. Supp. 2d 1062.

INSIDE IP LAW

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The latest victim of a songwriter's wrath is Newt Gingrich, who was recently sued in Chicago by Frank Sullivan, a member of the musical band Survivor, and a co-author of the band's most famous song "Eye of the Tiger." This song is best known as the theme song for the movie "Rocky III." Sullivan, who lives in Palatine, alleges that since 2009 Gingrich has used the song as a theme at campaign rallies. These public performances, Sullivan claims, were "unlicensed and unauthorized," and violate Sullivan's copyright. The suit also alleges that the American Conservative Union, the group that hosts the annual CPAC political action conference, posted videos of McCain rallies that include the song.

Gingrich knew better, the complaint says. As a former elected official and author of about 40 copyrighted works, "Mr. Gingrich is sophisticated and knowledgeable concerning the copyright laws." This, Sullivan argues, makes the infringement willful and subject to enhanced statutory damages.

The copyright in a musical composition provides a variety of different rights to the composer. One of the most important is the right of public performances. Importantly, public performance licenses of a song are issued by performing rights organizations such as the American Society of Composers, Authors and Publishers (ASCAP). If Gingrich's campaign has obtained such a license, it will not be liable for violating Sullivan's public performance right. Even if the Gingrich campaign does not have such a license, it is permitted to play the song publicly if the venue where the song was played, such as the Moose Lodge in Doylestown, Pa., has an ASCAP license. It remains to be seen whether any public performance licenses were in place.

Another exclusive right of the copyright owner also comes into play, namely the right to reproduce the musical composition in an audiovisual format. To do this, the party needs to obtain a synchronization (synch) license. Apparently, the defendants did not obtain a synch license for the use of the song on the website video of Gingrich's rallies.

Like other political copyright defendants who have preceded him, Gingrich will probably assert a fair use defense, claiming the use to be noncommercial, political expression. While the political nature of the use may weigh in Gingrich's favor, that factor alone is not enough; other fair use factors must be also taken into account. Prior attempts to claim fair use in similar cases have not fared well, although no definitive ruling on the topic has been issued. In *Browne v. McCain*, the court rejected McCain's motion for summary judgment on the fair use issue because there were disputed fact issues. In *Henley v. DeVore,* 733 F. Supp. 2d 1144 (2010), the defendant Charles DeVore was running against U.S. Sen. Barbara Boxer in California. He used the Eagles' song "All She Wants To Do Is Dance," co-written by Don Henley, in a commercial, but changed the words to "All She Wants To Do Is Tax." The court found that the commercial was not truly a parody since it was making fun of Boxer, not the Eagles, and failed to meet this and other fair use factors.

These types of cases also raise First Amendment issues because they involve political expression. The Supreme Court, however, has not in the past given the First Amendment a broad scope in copyright cases. It takes the view that with the fair use doctrine and the fundamental principle that copyright does not protect ideas, copyright law contains built-in First Amendment accommodations. The court has also noted that while the First Amendment protects an individual's right to make one's own speech, "it bears less heavily when speakers assert the right to make other people's speeches." *Eldred v. Ashcroft,* 537 U.S. 186 (2003). For politicians, one might add to that "or play other people's music."