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IP FRONTIERS

No Mr. Trump, you can't use our music

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What do Adele, The Rolling Stones, Neil Young, and Twisted Sister have in common? How about R.E.M., Steven Tyler, and Elton John? The common ground is certainly not their musical stylings, which are distinctly different.

However, in this, shall we say "*unusual*," election year, they have all found themselves in a copyright conundrum after their music was prominently featured, reportedly without proper authorization, at rallies for political candidates that they do not support. OK not really political candidates in general, but more specifically one political candidate – Donald Trump.

Many of you may recall watching Donald Trump take the stage at his campaign launch last year as Neil Young's '*Rockin' in the Free World*' blared through the lobby of Trump Tower. Knowing that Young was both a Canadian and an ardent fan of Bernie Sanders, my first thought as a copyright lawyer and a longtime Young fan was, "uh-oh, someone is getting cease and desist letter this afternoon – there is no WAY this was authorized."

Although Trump's campaign manager insisted that, owing to an ASCAP license, Trump had rights to use the song, Young loudly insisted that no permission was given and further clarified that he "makes his music for people, not for candidates."

Not long after, Trump once again stepped in it by playing R.E.M.'s "*It's the End of the World As We Know It (And I Feel Fine)*", prompting the band's frontman Michael Stipe to immediately and quite plainly tweet: "Go f____ yourselves, the lot of you – you sad, attention grabbing, power hungry little men. Don't use our music or my voice for your moronic charade of a campaign." (Stipe has never been accused of mincing words.)

Seemingly unphased, Trump has continued his songjacking ways – tangling with liberal and not-so liberal musicians alike – by using by their songs at campaign events without specific authorization. For example, Dee Snider of Twisted Sister, who appeared on Celebrity Apprentice and calls Trump a "friend," eventually reconsidered his earlier-granted permission for Trump to use the 1984 hit anthem '*We're Not Gonna Take It*' after being concerned by numerous comments made by the presidential hopeful.

Even registered Republican Steven Tyler, of Aerosmith fame, who, it was rumored, attended one of the Republican debates as a guest of Trump, drew the line after the Aerosmith hit '*Dream On*' was used at a Trump rally. Guest of Trump or not, Tyler made it clear "this is business" when his legal team immediately fired off a strong cease and desist letter. Response from the Trump camp: *That's OK, we found a better song to use than 'Dream On', and by the way, Steven Tyler got a lot of free publicity out of this, so good for him.*

So as the Nov. 8 election draws closer, let's explore some questions about copyright, music and permissions.

Aren't These Songs in the Public Domain?

This one doesn't require much discussion, because the answer is very simple: No. Even when music is publicly available (i.e., you can download it from the Internet) that does not mean it is in the public domain. For a song to be in the public domain, it means that the intellectual property rights in the song have expired or are abandoned.

When Does a Copyright Expire?

Copyright terms vary according to numerous factors, but in general, a work that is created (fixed in tangible form for the first time) on or after Jan. 1, 1978 is ordinarily given a term enduring for the author's life, plus an additional 70 years after the author's death. In the case of "a joint work" prepared by two or more authors that was not a "work made for hire," the term lasts for 70 years after the last surviving author's death. For works made for hire, and for anonymous and pseudonymous works (unless the author's identity is revealed in Copyright Office records), the duration of copyright will be 95 years from publication or 120 years from creation, whichever is shorter. So for any popular songs released in the last couple of decades, you should assume that the copyright is in full force and effect.

Isn't This Fair Use?

The doctrine of Fair Use is frequently misunderstood. Codified under section 107 of the U.S. Copyright Act, the Fair Use doctrine makes an exception for certain activities that would otherwise be copyright infringements, including when a work is used for purposes such as criticism, comment, news reporting, teaching, scholarship, or research.

In 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

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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.

Fair Use is always a case-by-case determination. The use of a work is more likely to be considered a fair use if it is transformative – meaning that the original work has been altered with new expression meaning, or message. A work is also more likely to be fair if it is used for non-profit non-commercial purposes rather than for-profit commercial purposes. A very important factor is whether the use of the work hurts or diminishes the market value for the work. A use that has no effect on the commercial exploitation of the original work is more likely to be deemed a fair use.

An analysis of these factors generally leads to the conclusion that, in most cases, use of a copyrighted song at a political rally will not trigger the fair use exception to infringement.

What if the song is licensed through ASCAP or BMI?

Organizations such as the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI) represent songwriters and music creators and rights holders in the licensing of their music through broad blanket licenses. Licensees include restaurant and bar owners, music venues, TV and radio stations, hotels, bowling alleys, amusement parks, etc. – anyplace where copyrighted music is likely to be "publicly performed" – including live music by a band or DJ, or recorded music played off a CD, iPod, online streaming service, or other means.

So if a campaign event is being held in a venue that holds a blanket license to play a certain song, why can't that song be played at a political rally without further permission? The answer is that it depends on how the song is being used. Blanket licenses generally do not convey rights to use music in a "grand" or "dramatic" way. In other words, a license that conveys the right for music to be played in the background of a lobby, elevator, or restaurant does not necessarily convey the right for a Presidential candidate to use the work as a theme song for a campaign, or to play it when a Presidential hopeful grandly takes the stage to announce his candidacy. Depending on the facts, if these uses are considered outside of the scope of the license, then the license would not cover the use.

The bottom line is that an ASCAP or BMI license may or may not authorize use of music at a political event, depending on the specific facts surrounding the use. But in many cases, especially where a song is intended to be used in a dramatic or grand way, including the use of the entire song (not just short snippets) as a prominent "theme" for a candidate, the blanket license is less likely to authorize the performance.

Deception as to Affiliation

Another legal problem arises under the Lanham Act (15 U.S.C. §1125), which prohibits the use of "any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person."

Therefore, in addition to the potential copyright issues, an entirely different legal doctrine may present a snag if the use of a song improperly and falsely suggests an affiliation, endorsement or support of the musician for the candidate.

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