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EVERY LITTLE THING I DO (INCURS LEGAL LIABILITY): UNAUTHORIZED USE OF POPULAR MUSIC IN PRESIDENTIAL CAMPAIGNS

I. INTRODUCTION: A COMMON, IF ILLEGAL, PRACTICE

In 1984, Ronald Reagan's re-election campaign used the Bruce Springsteen song, "Born in the U.S.A.,"¹ to convey energy and patriotism to the crowds of Reagan supporters and the ever vigilant media.² Bruce Springsteen himself did not approve of or authorize the use of the song.³ Following the Reagan campaign's example, the practice of a political campaign using popular music without authorization has become a feature taken almost for granted in the contemporary political landscape.⁴

This Comment will argue that the common practice of using popular songs without permission in presidential campaigns is illegal. First, this Comment surveys recent presidential campaigns' use of popular music,⁵ summarizes copyright and publicity law and the practices of the entertainment industry,⁶ and explains the method of analysis used in the Comment.⁷ Next, the merits of copyright,⁸ publicity right,⁹ and moral rights claims,¹⁰ as well as the nature of the remedies sought are explored.¹¹

1. BRUCE SPRINGSTEEN, *Born in the U.S.A.*, on BORN IN THE U.S.A. (Columbia Records 1984).

2. "Hey, Baby - You're Playing My Song." *Life on the Campaign Trail*, MONTREAL GAZETTE, Mar. 15, 1992, at A2.

3. See Chet Flippo, *The 25 Most Intriguing People of 1984: Bruce Springsteen*, PEOPLE, Dec. 24, 1984 / Dec. 31, 1984, at 28. Reagan began his use of Springsteen by mentioning the song and praising Springsteen as a "man so many Americans admire" at a campaign rally in New Jersey.

Bruce [Springsteen] refused to endorse either candidate; he wasn't coy about where he stood on the issue. In Pittsburgh, two days after President's comments, he said of Reagan: "I got to wondering what his favorite album must have been. I don't think he's been listening to this one." And he launched into *Johnny 99*, a bitter plaint on the fate of a laid-off worker

Id. Springsteen's was hardly the reaction one would expect of a Reagan supporter.

4. See *infra* notes 17-61 and accompanying text.

5. See *infra* notes 17-61 and accompanying text.

6. See *infra* notes 62-71 and accompanying text.

7. See *infra* notes 72-73 and accompanying text.

8. See *infra* notes 74-82 and accompanying text.

9. See *infra* notes 83-111 and accompanying text.

10. See *infra* notes 112-132 and accompanying text.

11. See *infra* notes 133-171 and accompanying text.

Possible defenses against such claims are then discussed, including fair use,¹² statutory exceptions to copyright claims,¹³ standing,¹⁴ and the First Amendment.¹⁵ Finally, this Comment concludes by demonstrating that the unauthorized political use of popular music is illegal, and it briefly discusses the possibilities of successful legal and equitable action.¹⁶

II. FACTUAL BACKGROUND

The use of music by political campaigns is literally as old as the Republic itself. Songs and ditties about politicians and political issues can be traced to the election of 1789,¹⁷ and they were used with great wit and sting in later elections.¹⁸ Probably the most famous political song is

12. See *infra* notes 172-186 and accompanying text.

13. See *infra* notes 187-191 and accompanying text.

14. See *infra* notes 192-213 and accompanying text.

15. See *infra* notes 214-228 and accompanying text.

16. See *infra* notes 229-247 and accompanying text.

17. A group of women in Trenton, New Jersey, wrote and sang a song to George Washington during the 1789 election, the first presidential election in the United States:

*Virgins fair, and Matrons grave,
Those thy conquering arms did save,
Build for thee triumphal bowers
Strew, ye fair, his way with flowers --
Strew your Hero's way with flowers.*

The Gazette of the United States, Apr. 29, 1789, reprinted in MARVIN KITMAN, *THE MAKING OF THE PRESIDENT* [sic] 1789: THE UNAUTHORIZED CAMPAIGN BIOGRAPHY 295 (1989).

18. A particularly nasty example comes from the elections of 1796 and 1800. Secretary of State and later Vice President Thomas Jefferson was dogged with rumors that he had fathered children by one of his slaves, Sally Hemmings. One song, penned by Jefferson's Federalist opponents, was sung to the tune of the Revolutionary ditty "Yankee Doodle" (which was itself written by British loyalists before the American Revolution, to poke fun at colonial agitators):

*Of all the damsels on the green
On mountain, or in valley,
A lass so luscious ne'er was seen
As Monticellian Sally.
Yankee Doodle, who's the noodle?
What wife was half so handy?
To breed a flock of slaves for stock
A black amour's the dandy...
When press'd by load of state affairs,
I seek to sport and dally,
The sweetest solace of my cares
Is in the lap of Sally.*

HOPE RIDINGS MILLER, *SCANDALS IN THE HIGHEST OFFICE* 72-73 (1973), reprinted in *ONE-NIGHT STANDS WITH AMERICAN HISTORY* 47-48 (Richard Shenkman & Kurt Reiger, eds. 1982);

"Happy Days Are Here Again,"¹⁹ used by Franklin Roosevelt and Harry Truman in their campaigns, which attempted to associate a message of optimism and enthusiasm with the candidates.²⁰ Debatably the most effective political song was used by supporters of William Henry Harrison to defeat President Martin Van Buren in 1840.²¹ Harrison's and many other early campaign songs were specially written for their elections; later campaigns adopted popular songs as their themes.²²

However, President Reagan's use in 1984 of Bruce Springsteen's "Born in the U.S.A."²³ was an innovation because it was the first non-permissive use of a copyrighted song in a presidential campaign.²⁴ Reagan's re-election campaign also made extensive use of a song by country singer Lee Greenwood, "God Bless the U.S.A.,"²⁵ and played the

see also VARIOUS ARTISTS, *Yankee Doodle*, on 101 FAVORITE CHILDREN'S SONGS, VOL. 3 (Special Music Records).

19. No Artist Given - Piano Rolls, *Happy Days Are Here Again* (Biograph Records).

20. See WILLIAM MILES, *SONGS, ODES, GLEES AND BALLADS: A BIBLIOGRAPHY OF AMERICAN PRESIDENTIAL CAMPAIGN SONGSTERS* at xlv (1990). Roosevelt successfully ran for President in 1932, 1936, 1940, and 1944; Truman ran successfully in 1948. See GEORGE B. TINDALL AND DAVID E. SHI, *AMERICA: A NARRATIVE HISTORY* (brief 2d ed. 1989) 705-708, 723-726, 750-751, 779-780, 803-805.

21. The Harrison song attacked Van Buren's opulent lifestyle and promoted Harrison's war hero and homespun "Log Cabin" images:

*Let Van Buren from his cooler of silver, drink wine,
And lounge on his cushioned settee,
Our man on his buckeye bench can recline;
Content with hard cedar [sic] is he!
Our man lives in a cabin built wholly of logs,
Drinks only his own cedar [sic], too;
He ploughs his own ground, he feeds his own hogs,
This hero of Tippecanoe!*

HENRY L. STODDARD, *IT COSTS TO BE PRESIDENT* 327 (1938). Stoddard claims that "[s]uch verses turned a President out of the White House! To repeat Van Buren's own words, he was 'drunk down, sung down, and lied down.'" *Id.* at 328.

22. Research for this Comment indicates that the first adoption of a song that was popular in its own right as a campaign theme apparently was when Al Smith used "Sidewalks of New York" in 1924. STODDARD, *supra* note 21, at 307; see also CANNONBALL ADDERLEY AND MILT JACKSON, *Sidewalks of New York*, on *THINGS ARE GOING TO GET BETTER* (Original Jazz Classics 1958).

23. See *supra* note 1.

24. Research for this Comment has revealed no earlier non-permissive use of copyrighted material. Senator John F. Kennedy's campaign in 1960 adopted the song "High Hopes" as its theme, but the use appears to have been with the tacit consent of Sammy Cahn, the song's author. *Yesterdays Once More*, HOUSTON CHRONICLE, July 18, 1992, at A2; see also FRANK SINATRA, *High Hopes*, on SINATRA: CAPITOL COLLECTION SERIES (Capitol Records 1989).

25. LEE GREENWOOD, *God Bless the U.S.A.*, on GREENWOOD: GREATEST HITS (MCA Records 1985).

song in an introductory video which ran prior to President Reagan's speech at the 1984 Republican National Convention.²⁶

The trend of adopting popular songs as campaign themes continued in the 1988 and 1992 presidential elections. Pundits derived some amusement during both election cycles by comparing the varying use of theme music by the campaigns.²⁷

In 1988, candidates of both major parties used popular music. Massachusetts Governor Michael Dukakis used Neil Diamond's "America,"²⁸ most notably at the 1988 Democratic National Convention.²⁹ Dukakis also used Creedence Clearwater Revival's "Fortunate Son"³⁰ and Michael Jackson's "Man in the Mirror"³¹ at campaign stops.³² One of Dukakis' opponents in the Democratic primary, Missouri Congressman Richard Gephardt, borrowed one of Ronald Reagan's tactics and used Bruce Springsteen's "Born in the U.S.A."³³ at a campaign event in New Hampshire.³⁴ For the Republicans, Vice President George Bush utilized Lee Greenwood's "God Bless the U.S.A.,"³⁵ as his predecessor, Ronald Reagan, had done four years before.³⁶ Bush also used Bobby McFerrin's "Don't Worry, Be Happy,"³⁷ although McFerrin himself was a Dukakis supporter and did not approve of Bush's use of the song.³⁸

In 1992, all three Republican presidential primary campaigns used theme music. President Bush used the patriotic Lee Greenwood song to

26. William V. Shannon, *Election of 1984*, in HISTORY OF AMERICAN PRESIDENTIAL ELECTIONS, 1789-1984 at 273, 297-298, (Supp. Vol. 1972-1984) (Arthur M. Schlesinger, Jr., et al., eds., 1986).

27. *The Capital Gang* (CNN television broadcast, July 18, 1992).

28. NEIL DIAMOND, *America*, on THE JAZZ SINGER (Capitol Records 1984).

29. SIDNEY BLUMENTHAL, *PLEDGING ALLEGIANCE: THE LAST CAMPAIGN OF THE COLD WAR* 243 (1990).

30. CREEDENCE CLEARWATER REVIVAL, *Fortunate Son*, on CREEDENCE CLEARWATER REVIVAL - 1969 (Fantasy Records 1969).

31. MICHAEL JACKSON, *Man in the Mirror*, on BAD (Epic Records 1987).

32. *Grapevine*, TIME, Oct. 24, 1988, at 30.

33. *See supra* note 1.

34. BLUMENTHAL, *supra* note 29, at 163.

35. *See supra* note 25 and accompanying text.

36. Sidney Blumenthal, *Bush's Early Honeymoon*, WASH. POST, Nov. 4, 1988, at B1.

37. Marci McDonald, *An Uneasy Patriotism*, MACLEAN'S, Nov. 7, 1988, at 28; *see also* BOBBY MCFERRIN, *Don't Worry, Be Happy*, on SIMPLE PLEASURES (EMI Records 1988).

38. McDonald, *supra* note 37, at 28. McFerrin appears to have voiced no objection directly to the Bush campaign, although he did desire that Bush not use the song. *See Grapevine*, TIME, *supra* note 32.

forward his successful re-nomination effort during the primaries.³⁹ Former Ku Klux Klansman David Duke⁴⁰ used Bryan Adams' "Every Little Thing I Do (I Do It For You)"⁴¹ during his short-lived presidential campaign.⁴² Finally, political commentator Patrick Buchanan occasionally played Queen's "We Will Rock You"⁴³ at his events.⁴⁴

Several Democratic primary contenders also used theme music on one or more occasions during the 1992 campaign. Arkansas Governor Bill Clinton used Fleetwood Mac's "Don't Stop"⁴⁵ and occasionally Paul Simon's "Graceland"⁴⁶ during the primaries. At one point, Christine

39. Lloyd Grove, *Democrats' Different Drummers: Rap, Reggae or Rock, the Music Carries the Campaign Tune*, WASH. POST, Oct. 25, 1991, at B1.

40. The Republican National Committee in 1991 publicly repudiated any connection with David Duke or his political views during Duke's failed election bid for Governor of Louisiana. "Republican National Committee Chairman Lee Atwater denounced him as a 'pretender, a charlatan and a political opportunist.'" Royal Brightbill, "Former Klansman to run for Governor," UPI Newswire, Jan. 4, 1991, available in LEXIS, Nexis Library, WIRES File. The Republican Party, through its leader, President George Bush, endorsed Edwin Edwards, a *Democrat* running against Duke. Federal News Service, "Special Transcript: The McLaughlin Group," Nov. 8, 1991, available in LEXIS, Nexis Library, ARCHIV file. The Republican Party affirmed its disassociation from Duke during the 1992 presidential primary in no uncertain terms. President Bush publicly denounced Duke as a "racist" and a "bigot" in a press conference: "I'd encourage anything to help David Duke go away . . . [I]f you get the idea here I'm unenthusiastic about the man, why, that's it, because it's bad, it's bad for our country." Federal News Service, "Press Conference with President George Bush," Dec. 5, 1991, available in LEXIS, Nexis Library, WIRES file. Therefore, for purposes of this Comment, Duke should only be considered a 'major' Republican candidate for President because his campaign attracted appreciable national attention, and his use of Bryan Adams' song was noted and commented on by both the artist and the press.

41. BRYAN ADAMS, *Every Little Thing I Do (I Do It For You)*, on WAKING UP THE NEIGHBORS (A&M Records 1991).

42. Patrick Goldstein, *Pop Eye II: And the '91 Pop Follies Awards Go To...*, L.A. TIMES, Dec. 29, 1991, at F58. Duke first used Bryan Adams' song during his bid for Governor of Louisiana, which prompted Adams to "implore the radio stations in the state of Louisiana to pull the song from play lists until their election is over so that none of their listeners are unintentionally influenced to vote for this man." Beth Holland, 'I Do It for You,' *But Not for Duke*, NEWSDAY, Nov. 14, 1991, at 41.

43. QUEEN, *We Will Rock You*, on QUEEN: GREATEST HITS (Hollywood Records 1992).

44. MONTREAL GAZETTE, *supra* note 2.

45. Ronald D. Elving, *Clinton Sets Out to Recast Personal, Party Images*, 50 CONG. Q. WKLY. REP. 2075-76, July 18, 1992. The song is, on occasion, misnamed "Don't Stop Thinking About Tomorrow." The actual name of the song is "Don't Stop." FLEETWOOD MAC, *Don't Stop, on RUMOURS* (Warner Bros. Records 1976).

46. *All Things Considered: Clinton's Team Looking for Theme Song* (National Public Radio broadcast, Apr. 3, 1992); see also PAUL SIMON, *Graceland*, on GRACELAND (Warner Bros. Records 1986).

McVie, the author of "Don't Stop," asked Clinton to stop using her song.⁴⁷ At the Democratic National Convention, another Paul Simon song, "You Can Call Me Al,"⁴⁸ was used after vice-presidential candidate Al Gore's speech.⁴⁹ Nebraska Senator Bob Kerrey used both Bruce Springsteen's "Born to Run"⁵⁰ and John Mellencamp's "Smalltown."⁵¹ Mellencamp later asked Kerrey not to use his song.⁵² Massachusetts Senator Paul Tsongas occasionally used music from *Les Misérables*⁵³ and considered using music by Don Henley⁵⁴ and John Lennon's "Power to the People."⁵⁵ California Governor Jerry Brown announced his candidacy to Jimmy Cliff's "You Can Get It If You Really Want,"⁵⁶ and Iowa Senator Tom Harkin announced his candidacy to Franklin Roosevelt's old standard, "Happy Days Are Here Again."⁵⁷ Of the "major" candidates for president in 1992, only Virginia Governor Douglas Wilder did not use

47. Grove, *supra* note 39. However, McVie is quoted in a later newspaper article as having been unaware of the Clinton campaign's use of the song and claimed to have been ambivalent to its use when she did learn of it. Steve Hochman, *Christine McVie: Hail to the Chief Songwriter*, L.A. TIMES, Jan. 13, 1993, at F1. After having been alerted to McVie's disapproval during the primaries, Clinton campaign workers avoided using the song. *All Things Considered: Clinton's Team Looking for Theme Song*, *supra* note 46. Nevertheless, the song was played three times in succession following Clinton's speech accepting the nomination of his party for President at the Democratic National Convention. DEMOCRATIC NATIONAL CONVENTION, (CNN television broadcast, July 17, 1992).

48. PAUL SIMON, *You Can Call Me Al*, on GRACELAND (Warner Bros. Records 1986).

49. Dave Marsh, *Sock Hop at The Garden*, NEWSDAY, July 21, 1992, at 38. Marsh commented on what he felt to be the inappropriate lyrics of "You Can Call Me Al," portraying Gore as a shallow politician:

*I need a photo-opportunity
I want a shot at redemption
Don't want to end up a cartoon
In a cartoon graveyard.*

PAUL SIMON, *You Can Call Me Al*, on GRACELAND (Warner Bros. Records 1986).

50. BRUCE SPRINGSTEEN, *Born to Run*, on BORN TO RUN (Columbia Records 1975).

51. Grove, *supra* note 39; *see also* JOHN MELLENCAMP, *Smalltown*, on SCARECROW (RIVA Records 1985).

52. Grove, *supra* note 39.

53. MONTREAL GAZETTE, *supra* note 2; *see also* *Les Misérables, The Complete Symphonic Recording* (Relativity Records 1988).

54. Grove, *supra* note 39.

55. *Eye on the '90's*, U.S. NEWS AND WORLD REP., Mar. 23, 1992, at 20; *see also* JOHN LENNON, *Power to the People*, on JOHN LENNON COLLECTION (Capitol Records 1989).

56. Grove, *supra* note 39; *see also* JIMMY CLIFF, *You Can Get It If You Really Want*, on IN CONCERT: BEST OF JIMMY CLIFF (Reprise Records 1976).

57. Grove, *supra* note 39; *see also supra* notes 19-20 and accompanying text.

theme music.⁵⁸ Even independent presidential candidate H. Ross Perot adopted a theme song for his campaign, Patsy Cline's "Crazy."⁵⁹

While most of the songs used in the 1988 and 1992 campaigns were copyrighted, this did not deter campaigns from using them.⁶⁰ The attitude of campaign officials concerning the unauthorized use of songs was exemplified by a short colloquy between Gary Ginsberg, an advance team member for the Clinton campaign, and National Public Radio interviewer Barry Siegel, discussing the campaign's use of a song:

Siegel: Well, does Paul Simon, who did "Graceland" . . . approve of your using that at rallies?

Ginsberg: Haven't heard from Mr. Simon so we assume that it's OK for now. . . .

Siegel: [Y]ou have an interesting policy about releases there. You . . . use it at the rally and find out if they call up to complain.

Ginsberg: Really. We don't really have a policy about . . . that. We probably should.⁶¹

III. LEGAL AND BUSINESS BACKGROUND

A. Applicable Law

Under federal law, the owner of a copyright to a song has the exclusive right to control public performances of the song.⁶² Thus, a

58. Grove, *supra* note 39. "Major" candidates are defined here as those that attract appreciable national media attention.

59. Mike Clancy, "Perot Dances in Last Rally, Predicts Landslide Win," Reuters Newswire, Financial Report, Nov. 2, 1992, available in LEXIS, Nexis Library, WIRES file. See also PATSY CLINE, *Crazy*, on PATSY CLINE STORY (MCA Records 1988).

60. See, e.g., liner notes to BRYAN ADAMS, *WAKING UP THE NEIGHBORS* (A&M Records 1991), BRUCE SPRINGSTEEN, *BORN IN THE U.S.A.* (Columbia Records 1984), PAUL SIMON, *GRACELAND* (EMI Records 1989), and FLEETWOOD MAC, *RUMOURS* (Warner Bros. Records 1976).

61. *All Things Considered: Clinton's Team Looking for Theme Song*, *supra* note 46.

62. "[T]he owner of copyright under this title [17 U.S.C. § 101 *et seq.*] has the exclusive rights to do and to authorize . . . in the case of . . . musical . . . works, to perform the copyrighted work publicly; and . . . to display the copyrighted work publicly." 17 U.S.C. § 106(4)-(5) (1988). "To 'display' a work means to show a copy of it, either directly or by means of a . . . device or process . . ." 17 U.S.C. § 101 (1988). "To 'perform' a work means to recite, render play, dance, or act it, either directly or by means of any device or process." *Id.*

"To perform or display a work 'publicly' means — (1) to perform or display it at a place open to the public or at any place where a substantial number of persons

copyrighted song cannot be played in public without the owner's permission.⁶³ Virtually all songwriters affiliate with a performing rights organization. The two leading performing rights organizations, the American Society of Composers, Authors and Publishers ("ASCAP") and Broadcast Music Inc. ("BMI"), issue licenses to radio stations, television stations, and other interested buyers in exchange for a fee.⁶⁴ There are many purposes for such an arrangement, but the primary reason is to allow a songwriter and music publisher to be paid for performances of the song.⁶⁵ The songwriter retains various interests in the work, including royalties from sales of sound recordings of the song. Without these interests, a songwriter has little economic incentive to write and produce a song.⁶⁶

Once an artist has agreed to allow a performing rights organization to sell the licensing rights, there is little that he can do to prevent the organization from selling the right to use his works to anyone at what may seem a surprisingly low price.⁶⁷ This sale does not exhaust an artist's

outside of a normal circle of a family and its social acquaintances is gathered; or (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process"

Id.

63. 17 U.S.C. § 106 (1988). Playing a sound recording of a song by means of an electronic device, such as a tape player, falls within the 17 U.S.C. § 101 definition of "display" and "performance." See also 17 U.S.C. § 114(c) (1988) (declining to limit "the exclusive right to perform publicly, by means of a phonorecord, any of the works specified by [17 U.S.C.] section 106(4)").

64. The right to issue public performance licenses are actually given to the organization, and therefore the artist may no longer issue such licenses himself. BMI explains the process as follows:

BMI acquires rights from songwriters and publishers and in turn grants licenses to use its entire repertoire to users of music. BMI collects fees from each user of music we license and distributes to our writers and publishers all the money collected, other than what is needed for operating expenses.

BMI, HANDBOOK FOR WRITERS & PUBLISHERS 2 (1993).

65. 1 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* §1.01 (1993).

66. *Id.*

67. BMI's royalty payment schedule typifies this. For instance, a performance on radio of at least 90 seconds that is the sole sound broadcast at the time of the performance would incur a six or 12 cent royalty, depending on the radio station which broadcast the song. BMI, *BMI PAYMENT SCHEDULE 2* (1988). A political campaign's use of the song would likely be considered "Background Music for Entrances and Exits" as on television background music, and charged at a prorated rate of 42 cents per minute. *Id.*, at 4-6. For instance, the song "Don't Stop" is three minutes and 11 seconds long (FLEETWOOD MAC, *RUMOURS* (Warner Bros. Records 1976)); a complete play-through would incur a royalty of \$1.34 under BMI's schedule.

ability to control the use of his work, however, since he retains an interest in controlling his own public image.⁶⁸ The artist also retains an interest in the integrity and use of his work.⁶⁹ Based upon these interests, the artist can recover damages suffered because of "humiliation, embarrassment, and mental distress."⁷⁰ The artist can also sue for the tort of false endorsement.⁷¹

B. Method of Analysis

An actual lawsuit would be an useful analytical tool for examination of unauthorized use of popular music in political campaigns, but no suit has been filed against a major presidential campaign.⁷² Therefore, this Comment will examine the merits of two hypothetical claims to serve the same purpose. One hypothetical suit is *Christine McVie v. Clinton/Gore 1992 Committee*, and the other is *Bryan Adams v. David Duke for President 1992 Committee*, both concerning the 1992 presidential election.⁷³

The facts of either hypothetical case may be considered identical. First, the artist both wrote and recorded a song, which makes the artist both the songwriter and the performer. Then, a presidential campaign used the song, without seeking permission, at its rallies. The artist objected to this

68. See *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988).

69. See *Gilliam v. American Broadcasting Co., Inc.*, 538 F.2d 14 (2d Cir. 1976).

70. *Motschenbacher v. R. J. Reynolds Tobacco Co.*, 498 F.2d 821, 824 & n.11 (9th Cir. 1974).

71. 15 U.S.C. § 1125(a) (1989), prohibits, *inter alia*, false endorsements in advertising. See *Waits v. Frito-Lay*, 978 F.2d 1093, 1107 (9th Cir. 1992) (reading 1988 amendments to the statute as "codify[ing] case law interpreting [15 U.S.C. § 1125(a)] to encompass false endorsement claims"). See also *Better Business Bureau v. Medical Directors, Inc.*, 681 F.2d 397 (5th Cir. 1982).

72. Research for this Comment included a LEXIS search for cases involving music and presidential campaigns, last updated on October 15, 1993.

73. No such suits have been filed, and the author wishes neither to encourage nor discourage these or other people from filing a lawsuit. These hypothetical "cases" should only be considered as methods of exploring the law by way of illustration. Also, as to infringements during the 1984 and 1988 campaigns discussed *supra* at notes 23-38 and accompanying text, the three-year statute of limitations for copyright infringement would have expired in 1991. 17 U.S.C. § 507 (1988). The hypothetical suits will occasionally be referred to as *McVie v. Clinton/Gore '92* and *Adams v. Duke for President*, respectively. The reader should bear in mind that the defendants in the hypothetical suits are the campaign committees, *not* the candidates that the campaigns are attempting to get elected. Finally, the careful reader looking for such things will notice the use of the masculine gender when referring to a hypothetical plaintiff; this is done merely by convention of the English language, and is not intended to denigrate the legal rights of the hypothetical plaintiff Christine McVie or other females.

use. The campaign, however, continued to use the song despite the objection. The artist then filed a lawsuit seeking to prevent further use of the song and requesting compensation for use of the song in the past.

IV. THE CASE AGAINST THE POLITICIANS

A. Copyright Law

The hypothetical plaintiff would sue for infringement of copyright under 17 U.S.C. § 501.⁷⁴ Three factors must be proven to establish a *prima facie* case of copyright infringement: 1) ownership of a copyright on the sound recording of the song, 2) defendant's access to the song, and 3) defendant's unauthorized public use of the song.⁷⁵

To prove ownership of a copyright, the artist only needs a certificate from the Register of Copyright. Ownership of the song's copyright is not likely to be contested.⁷⁶ The artist may not necessarily have the right to control use of the song, however. A performing rights organization, such

74. 17 U.S.C. § 501 (1988) reads, in part:

(a) Anyone who violates any of the exclusive rights of the copyright owner as provided by [17 U.S.C. §] 106 . . . is an infringer of the copyright.

(b) The legal or beneficial owner of an exclusive right under a copyright is entitled . . . to institute an action for any infringement of that particular right committed while he or she is the owner of it.

75. The elements of copyright infringement can be found in *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*, 562 F.2d 1157 (9th Cir. 1977).

76. It is important to note that the sound recording is not at issue here. No license is necessary for personal use of a sound recording of a song. The copyright at issue in the hypothetical suit is unauthorized use of the *song*, not of the sound recording.

An example of the difference between a song and a sound recording is typified by what is commonly called a "cover." For instance, Bob Dylan wrote and then recorded a song called "Knockin' on Heaven's Door" in 1974. BOB DYLAN, *BEFORE THE FLOOD* (Columbia Records 1974). In 1982, Eric Clapton made a sound recording of Dylan's "Knockin' on Heaven's Door." ERIC CLAPTON, *TIME PIECES: THE BEST OF ERIC CLAPTON* (Polydor Records 1982). In 1991, the musical group Guns 'n' Roses also covered "Knockin' on Heaven's Door." GUNS 'N' ROSES, *USE YOUR ILLUSION I* (Geffen Records 1991).

The words and music in all three renditions of the song were substantially similar, all based on Dylan's songwriting. However, each version used very different instrumentation, styles of performance, and musical arrangements. The song remains the same, though the sound recordings change. Dylan, Clapton, and Guns 'n' Roses all were playing the same *song*, although each version sounded very different from the other. As the songwriter, Bob Dylan owns the copyright to "Knockin' on Heaven's Door." Therefore, he (or his successor in interest in the song) should collect royalties from the use of the song, not the performers who covered it.

as ASCAP or BMI, may have issued a license to use the song.⁷⁷ If this is the case, the artist will not be able to make out a *prima facie* case of copyright infringement. This is not likely to be the case, given the casual attitude political campaigns demonstrate as to usage licensing requirements.⁷⁸

Proving that the defendants had access to a copy of the song is also not likely to be contested. Popular music is massively distributed and extensively marketed in the United States. Anyone who can go into a music store and pay a small amount of money can obtain a copy of the sound recording of the song. No licenses are necessary to play the sound recording, although a license would be required to perform the song itself.

Finally, establishing that the defendant used the song would also be relatively simple. Anyone who was at the political event can assert whether or not the song was used at the event. In addition, many campaign events are broadcasted on television, and recordings of those television broadcasts can be used as evidence. Such use of the song without permission violates the copyright owner's exclusive rights.⁷⁹

Demonstrating that the defendant's use was not authorized would be slightly more difficult. Campaigns tend to operate with the idea of "tacit consent," that the absence of objection is the same as an endorsement.⁸⁰ This casual attitude would not likely hold up in court, especially in light of the ease with which a license is available.⁸¹ If the defendant has not been given the right to use the song but uses it anyway, the copyright has been infringed.⁸² Since the plaintiff's ownership of the work, the defendant's access to the work, and the defendant's use of the work are all easy to prove, the plaintiff should be able to make out a *prima facie* case of copyright infringement.

77. These organizations acquire the right to issue performance licenses from the songwriter and publisher of a song. BMI, HANDBOOK FOR WRITERS & PUBLISHERS 2 (1993).

78. See *All Things Considered: Clinton's Team Looking for Theme Song*, *supra* note 46, and text accompanying *supra* note 61.

79. In this case, the exclusive rights are to perform and display the song publicly. 17 U.S.C. § 106(4)-(5) (1988).

80. See *All Things Considered: Clinton's Team Looking for Theme Song*, *supra* note 46. Not having heard an objection from Paul Simon as to the use of his song, Bill Clinton's presidential campaign acted on the assumption that Simon had in fact given permission to use the song. The burden of preventing unauthorized use would be shifted by adopting this attitude, from the potential copyright infringer to the copyright owner.

81. See *supra* note 67 (one complete play-through of "Don't Stop" would incur fees of \$1.34). Note also that a license would be sold with little, if any, inquiry into the potential for the purchaser to damage the songwriter's or the performer's reputation.

82. 17 U.S.C. § 501 (1988).

B. Publicity Rights and False Endorsement

The plaintiff could assert an alternative claim based on a right of publicity control. A claim based on a publicity rights theory is superior to a claim based on a copyright theory because the artist may sue the defendant regardless of a business decision to allow the licensing rights to be sold by a performing rights organization.⁸³ A publicity rights claim is usually based on either privacy rights⁸⁴ or property rights.⁸⁵ The theory used depends on the law of the state and the law's foundation for recognizing the right of publicity, although the right of publicity is more widely recognized as a property right.⁸⁶

Under either a privacy-based or property-based publicity rights theory, the artist has the ability to control with what and with whom both his work and his name are associated.⁸⁷ In other words, by using a song without permission, a campaign thrusts unwanted publicity on an artist. A publicity right based on privacy adheres to the artist, regardless of who owns the copyright.⁸⁸ Therefore, even if the plaintiff has sold his copyright interest in the use of the song, he still has a cause of action against the defendant.

Alternatively, under a property-based theory of publicity rights, the right to control publicity is in some instances transferrable.⁸⁹ But an artist loses the right to sue under such a theory if the publicity rights are sold. Therefore, assuming that the publicity rights have not been sold, the

83. Hence the superiority of a publicity rights claim — the right of publicity is not one that a performing rights organization normally can assign. Even if a license to use the music was obtained, the artist may still make out a publicity rights claim.

84. William Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960) (characterizing "publicity which places the plaintiff in a false light in the public's eye" as an actionable tort within the scope of privacy rights). See also *id.* at 398-401. Publicity rights based on privacy theory have been recognized in Texas, in *National Bank of Commerce v. Shaklee Corp.*, 503 F. Supp. 533, 540 (W.D. Tex. 1980), and New York, in *Paulsen v. Personality Posters, Inc.*, 299 N.Y.S. 2d 501 (1968). New York cases are guided by a portion of the New York privacy statute, N.Y. Civil Rights Law § 51. *Id.*

85. Pamela Samuelson, *Reviving Zacchini: Analyzing First Amendment Defenses in Right of Publicity and Copyright Cases*, 57 TUL. L. REV. 836, 838 (1983). See also *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977); *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992).

86. See Christopher Menjou, Comment, "Waits v. Frito-Lay: The Ninth Circuit Rides the Right of Publicity Down a Slippery Slope," 14 LOY. L.A. ENT. L.J. 173, 179, n. 44 (only five of 14 states with publicity rights statutes recognize publicity rights under the rubric of privacy rights) (1993), and Samuelson, *supra* note 85, at 838.

87. Samuelson, *supra* note 85, at 839.

88. *Zacchini*, 433 U.S. at 573.

89. Samuelson, *supra* note 85, at 843.

campaign would be engaging in an activity analogous to conversion.⁹⁰

The rights in question are articulated in *Midler v. Ford Motor Co.*⁹¹ Ford wanted to use a Bette Midler song in one of its advertisements for the 1985 Lincoln Mercury, but Midler had refused to sing the song in the commercial.⁹² Ford then used a "sound-alike" singer who had formerly been a backup singer for Midler.⁹³ In ruling that Midler had a cause of action, the court stated that "[a] voice is as distinctive and personal as a face. . . . To impersonate [Midler's] voice is to pirate her identity."⁹⁴ The court then held that "when a distinctive voice of a professional singer is widely known and is deliberately imitated in order to sell a product, the sellers have appropriated what is not theirs and have committed a tort in California."⁹⁵

The common law right of publicity was affirmed in late 1992 in *Waits v. Frito-Lay, Inc.*⁹⁶ The facts in *Waits* are very similar to those in *Midler*. Singer Tom Waits was considered for an endorsement of SalsaRio Doritos, but the advertisers did not contact him because Waits had previously refused on principle to endorse any product.⁹⁷ The defendants then hired a different singer, whose act consisted in part of imitating Waits' vocal style, to deliberately imitate Waits' voice for the SalsaRio Doritos commercial. Frito-Lay then broadcasted the advertisement without informing Waits, who learned of the commercial by hearing it on the radio.⁹⁸ Waits was awarded compensatory damages for voice misappropriation,⁹⁹ which included the fair market value of his services,¹⁰⁰ loss of goodwill and future publicity value,¹⁰¹ and "injury to [his] peace, happiness and feelings."¹⁰² Waits was also awarded punitive damages for

90. Samuelson, *supra* note 85, at 843.

91. 849 F.2d 460 (9th Cir. 1988).

92. *Id.* at 461.

93. *Id.* at 461-62.

94. *Id.* at 463.

95. *Midler*, 849 F.2d at 463.

96. 978 F.2d 1093 (9th Cir. 1992).

97. *Id.* at 1097-98. Waits' objection came, in part, from his regretting an endorsement of a dog food, after which Waits felt that he had "betrayed himself." See Menjou, *supra* note 86, at 189 & n. 120.

98. *Id.* at 1098.

99. *Id.* The court characterized this tort as "a species of violation of the 'right of publicity . . .'" *Id.*

100. *Waits*, 978 F.2d at 1102-3.

101. *Id.* at 1103-4.

102. *Id.* at 1103, quoting *Motschenbacher v. R. J. Reynolds Tobacco Co.*, 498 F.2d 821, recognizing compensability of a celebrity's "humiliation, embarrassment, and mental distress."

Frito-Lay's willful violation of his right of publicity.¹⁰³

Furthermore, the tort of false endorsement is recognized in the Lanham Act.¹⁰⁴ Although the Lanham Act was originally intended to protect against trademark infringements, its scope has been extended.¹⁰⁵ The tort of false endorsement applies where a defendant has appropriated a distinctive attribute of a celebrity, giving the impression that the celebrity endorsed the defendant in some manner.¹⁰⁶ In *Waits*, because the Salsa-Rio Doritos commercial could create the impression that Waits endorsed that brand of corn chips when in fact he did not, the damages given to Waits were found valid.¹⁰⁷

In a hypothetical case, the plaintiff could assert that the use of his song by a political campaign would give the false impression that he had endorsed the candidate. He would claim that this impression damaged the future value of his services, his goodwill and professional standing, and his peace, happiness, and feelings.¹⁰⁸ By analogy, this claim would also establish a claim for false endorsement of the candidate and his platform. The plaintiff could make a colorable claim that the tort of false endorsement reaches beyond endorsements of consumer products, especially in light of the fact that presidential candidates are "marketed," perhaps like detergent.¹⁰⁹ An artist could clearly recover for false endorsement of

103. *Waits*, 978 F.2d at 1104-6.

104. The applicable provision of the Lanham Act reads:

Any person who, on or in connection with any goods or services . . . uses in commerce any . . . false or misleading description [or] representation of fact, which — (A) 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 . . . shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1125(a) (1988).

105. *Gilliam v. ABC*, 538 F.2d 14, 24 (2d Cir. 1976), recognized that the Lanham Act "has been invoked to prevent misrepresentations that may injure plaintiff's business or personal reputation, even where no registered trademark is concerned." (citation omitted).

106. *E.g.*, *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200 (2d Cir. 1979) (recognizing validity of false endorsement claim when uniform of X-rated movie star bore striking resemblance to plaintiff's well-known uniforms).

107. *Waits*, 978 F.2d at 1106-11. Waits' Lanham Act damages were reversed on other grounds, although he was awarded attorney's fees on that cause of action. *Id.* at 1111-12.

108. These are the same injuries asserted by Tom Waits. *See Waits*, 978 F.2d at 1103.

109. *See Roger Simon, Happiness is Something Called George*, L.A. TIMES, Oct. 28, 1988, at E5. The article describes an advertisement not run in the 1988 presidential election, mocking Bush's use of the Bobby McFerrin song, "Don't Worry, Be Happy" in Bush's campaign. *See supra* note 37 and accompanying text. The producers of the ad, confronted with the accusation that advertising agencies "sell politicians like [they] sell detergent," pointed to the substantive

detergent.¹¹⁰ His damages would arise from the publicity generated by detergent advertisements. For publicity purposes, a candidate is no different than detergent. Both are presented to the public primarily through advertising on television and radio. Since commercial and political advertisements provide similar exposure to the artist falsely endorsing the product, the damages he suffers in both cases would be substantially similar.

The plaintiff in *Adams v. Duke for President* would have a high probability of prevailing on such a claim. While Bryan Adams would have to analogize commercial endorsements in case law to the political endorsement in his case, the tort is driven by the damage to Adams' reputation and emotions, rather than the Duke campaign's intent. It is thus not a difficult analogy to make.¹¹¹ David Duke is likely to provoke stronger emotions than corn chips, for both Bryan Adams and the general public. It is even more likely that Adams, after the false endorsement of Duke, would suffer damages to his emotions and reputation due to the political, rather than commercial, nature of the false endorsement.

C. Moral Rights of the Artists

The doctrine of moral right is an European legal concept that grants an artist certain rights of control over a work that he has created.¹¹² Although "American copyright law, as presently written, does not recognize

content of a detergent ad: "[P]eople have to say: 'Boy, that's right! We should be buying that soap!'" *Id.* So too with political advertisements: there must be some reason in a political ad to motivate a voter to pick a candidate. It is for this reason that a hypothetical plaintiff such as Bryan Adams could be harmed by false endorsement, especially if the political content of an advertisement is obnoxious to the plaintiff (if not to most people).

110. Artists have recovered for false endorsement of a variety of products. See *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992) (corn chips); *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992), *reh'g en banc denied*, 989 F.2d 1512 (9th Cir. 1993), *cert. denied*, 113 S. Ct. 2443 (1993) (television sets); *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988) (cars).

111. The defendant's intent is only relevant for the issue of punitive damages, see *Waits*, 978 F.2d at 1104-6, and attorney's fees, see *id.* at 1111-12.

112. The doctrine of moral right is a broad concept, embracing many different aspects of how an artist may control his work. One definition of this concept is as follows:

The basic rights sought to be protected under this concept comprise: the right to create; the right to disclose or publish; the right to withdraw from publication; *the right to be identified with the work*; and, the right to integrity with respect to the work, including the right to object to the mutilation or distortion of the work.

BLACK'S LAW DICTIONARY (6th ed. 1990) 497 (emphasis added).

moral rights or provide a cause of action for their violation,"¹¹³ the policy justifications for copyright seem to support a basis for artists to prevent "mutilation or misrepresentation of their work to the public on which the artists are financially dependent."¹¹⁴ An artist should be able to "prevent the presentation of his work to the public in a distorted form,"¹¹⁵ which would include use by a political campaign that might express views the artist believes are contrary to both the artist himself and the spirit of the work. Bryan Adams made such a moral claim when his song was used without permission, stating, "[e]verything I am about and everything I stand for is diametrically opposed to David Duke."¹¹⁶ Morally, then, it seems that an artist should be able to exert some control over a work based on the political views expressed through its use.

An example of such a claim is found in *Shostakovich v. Twentieth Century-Fox Film Corp.*,¹¹⁷ where authors of music in the public domain attempted to prevent its use in a film which they felt to be contradictory to their own political philosophy.¹¹⁸ Their theory was that use of the music would identify the composer with a certain point of view.¹¹⁹ The court could reconcile this concept only with a theory based on moral rights.¹²⁰ However, the court stated that "[i]n the present state of our law the very existence of the right is not clear," and it required "a clear showing of the infliction of a wilful injury or of any invasion of a moral right."¹²¹ Not finding such, the *Shostakovich* court denied the plaintiffs' motion for an injunction against showing the film or restricting its soundtrack.¹²²

*Gilliam v. American Broadcasting Co.*¹²³ discussed the extent of an artist's moral rights in the United States. When the BBC sold its broadcast rights for the comedy series "Monty Python's Flying Circus" to ABC, Terry Gilliam and other members of the comedy troupe Monty Python were "'appalled' at the discontinuity and 'mutilation' that had resulted from the editing" of their work.¹²⁴ Monty Python sued to prevent ABC from

113. *Gilliam v. ABC, Inc.*, 538 F.2d 14, 24. (2d Cir. 1976).

114. *Id.* (finding policy justification in *Goldstein v. California*, 412 U.S. 546 (1973), and *Mazer v. Stein*, 347 U.S. 201 (1954)).

115. *Gilliam*, 538 F.2d 14, 24.

116. *Holland*, *supra* note 42, at 41.

117. 80 N.Y.S.2d 575 (1948), *aff'd*, 275 A.D.2d 692 (1949).

118. *Id.* at 578.

119. *Id.* The *Shostakovich* court found that the association did not libel the plaintiffs. *Id.*

120. *Id.* at 577-9.

121. *Shostakovich*, 80 N.Y.S.2d at 579.

122. *Id.*

123. 538 F.2d 14 (2d Cir. 1976).

124. *Id.* at 18.

broadcasting the edited specials.¹²⁵ Finding that an "injury to [Monty Python's] theatrical reputation would imperil their ability to attract [an] audience" that could not be "measured in monetary terms or recompensed by other relief,"¹²⁶ a panel of the Second Circuit granted the injunction.¹²⁷ *Gilliam* implies that moral rights might be recognized in the United States, to a limited degree, under the rubric of property rights.¹²⁸ Read in this fashion, *Gilliam* extended moral rights to protect against the mutilation of a work.¹²⁹

The plaintiff might argue that a court should accept *Gilliam's* invitation to extend property rights to prevent misrepresentation of the work as endorsing or associating the song and the artist with a political campaign. It is possible, in spite of the holding of the *Shostakovich* court, to recognize some moral rights of an artist under a property rights theory.

Additionally, a case such as *Adams v. Duke for President* can be distinguished from *Shostakovich* in one important respect: the music used without permission by the defendants in *Shostakovich* was in the public domain, while "Every Little Thing I Do (I Do It For You)"¹³⁰ is copyrighted. Use of copyrighted music is controlled,¹³¹ while anyone in the world may use a work that is in the public domain.¹³² Therefore, Adams would have a stronger case for establishing a moral rights claim, since he has taken legal steps to prevent unauthorized use of his work.

D. Remedy Sought

1. Legal Remedies

The standard legal remedy for unauthorized use of copyrighted material is to require the infringer to pay actual damages and profits

125. *Id.* at 17.

126. *Id.* at 19.

127. *Id.* at 26.

128. "Although such decisions are clothed in terms of proprietary right in one's creation, they also properly vindicate the author's personal right to prevent the presentation of his work to the public in a distorted form." *Gilliam*, 538 F.2d at 24.

129. *Id.* at 24-25 (alterations made to plaintiff's television program prior to broadcast by defendant); see n.12 (describing the distortion to the content of the program).

130. See *supra* note 41.

131. 17 U.S.C. § 106(4)-(5) (1988).

132. "When a work is 'in' or has 'fallen into' the public domain it means it is available for unrestricted use by anyone. Permission and/or payment are not required for use." BMI, A GUIDE TO MUSIC PUBLISHING TERMINOLOGY 9 (1992).

accruing from the use.¹³³ However, no profits or revenues are realized by a campaign as a result of using a song.¹³⁴ The campaign hopes to “rouse a crowd . . . [and to] enthuse the candidate” by use of the song.¹³⁵ The campaign hopes to transform this enthusiasm into volunteer efforts and eventually into votes for its candidate. Therefore, none of the “profits” resulting from the use of a song in a presidential campaign are quantifiable.

Even assuming that it were possible to determine the increased number of votes that a candidate received from the use of a song, those votes could not be transferred as damages to a copyright owner. Votes are not transferrable like poker chips from one person to another. A voter casts his ballot for a politician, not an artist, and the artist would very likely not be a presidential candidate in the first place. Furthermore, the plaintiff would be constitutionally ineligible to receive those votes for President, since he is not a native-born American citizen.¹³⁶

However, damages resulting from unauthorized use of the work may be more easily quantifiable than profits. Here, the reasoning resembles that of a publicity rights theory — the campaign is associating itself with the artist to the artist’s detriment, and the artist is entitled to protect his public image. One possible measure of this damage would be to examine the rise and fall in the sales of a plaintiff’s recordings as a result of this association with the campaign.¹³⁷ Such damage would likely be found to be *de minimis*. Sales of an artist’s albums are not likely to be impacted significantly simply because a politician is using the song, and thus any

133. 17 U.S.C. § 504(b) (1988); *Dorchester Music Corp. v. NBC*, 171 F. Supp. 580, 588 (S.D. Cal. 1959).

134. See *All Things Considered: Clinton’s Team Looking for Theme Song*, *supra* note 46, as to the benefits a campaign realizes from using a song at an event such as a rally.

135. *Id.*

136. U.S. CONST. art. II, § 1, cl. 5, states that “[n]o person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President.” Neither hypothetical plaintiff is an American citizen: Christine McVie is English, see Robert Hilburn, *Big Mac is Back; Together Again for an Album, But For How Long?*, L.A. TIMES, June 14, 1987, at F60, and Bryan Adams Canadian, see Holland, *supra* note 42, at 39.

137. This, however, is a difficult proposition. Either hypothetical case defies easy examination. In *McVie v. Clinton/Gore ‘92*, the Fleetwood Mac song is sufficiently old to have a nearly constant “sales curve” and in *Adams v. Duke for President* the Bryan Adams song was sufficiently recent to be within the standard sales curve of a new release. At the time of the Duke campaign’s use of the song, sales were likely tapering off in spite of the minimal association between artist and campaign. A court would be hard-pressed to determine to what extent the drop in popularity of the song was caused by association with Duke and what portion of the drop in popularity would have occurred anyway. The absence of a boycott of the artists also suggests that the reason for a decline in sales is not association of the artist with the campaign.

damages awarded for loss of sales would be nominal.

Alternatively, once a *prima facie* case of copyright infringement has been made, there is a presumption of irreparable damage.¹³⁸ Therefore, the plaintiff might request statutory damages in the absence of quantifiable monetary damage. Two sections of copyright law are applicable. A plaintiff may pursue "statutory damages for all infringements involved in the action, with respect to any one work . . . in a sum of not less than \$500 or more than \$20,000."¹³⁹ Also, the damages are increased "where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, [to] not more than \$100,000."¹⁴⁰ In the hypothetical case of *McVie v. Clinton/Gore '92*, proving that the Clinton campaign willfully used "Don't Stop" would be easy. Statutory damages would probably be the most acceptable legal remedy for *McVie* to pursue, since this remedy would yield the largest potential recovery. The exact amount of the award is set by the judge.¹⁴¹

A significant problem exists with legal remedies of any kind, due to the nature of the defendants as political campaigns. Commonly, "presidential campaigns . . . leave various creditors with empty hands."¹⁴² For instance, Colorado Senator Gary Hart's 1984 presidential bid ran up debts of \$1.4 million, most of which have been paid off, and Ohio Senator John Glenn's 1984 presidential campaign was still three million dollars in debt eight years later.¹⁴³ Additionally, campaign committees are almost always in debt continuously through the end of the election season.¹⁴⁴ Good election strategy in modern presidential elections usually mandates heavy spending very early in the process, specifically during the Iowa caucus,

138. *Wainwright Secs. Inc. v. Wall St. Transcript Corp.*, 558 F.2d 91 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1977).

139. 17 U.S.C. § 504(c)(1) (1988).

140. 17 U.S.C. § 504(c)(2) (1988).

141. 17 U.S.C. § 504(c) (1988).

142. Marianne Lavelle, *Can Hart Take From '88 to Pay '84?*, NAT'L. L.J., February 8, 1988, at 3 (quoting Warren S. Rosenfeld, representing a creditor to Colorado Senator Gary Hart's 1984 presidential campaign seeking to collect \$11,000).

143. Neil A. Lewis, *The 1992 Campaign: Campaign Finances; For Democratic Candidates, Deficits Are the Rule*, N.Y. TIMES, April 10, 1992, at A27. Senator Glenn himself described his 1984 bid for the Presidency: "I humiliated my family, gained 16 pounds and went over \$2.5 million in debt. Other than that, it was a great experience." RICHARD F. FENNO, JR., *THE PRESIDENTIAL ODYSSEY OF JOHN GLENN* 293 (1990) (emphasis added).

144. Lewis, *supra* note 143, at A27. "[F]or most [presidential candidates], running their campaigns on a deficit has been a way of life." *Id.*

New Hampshire primary, and "Super Tuesday."¹⁴⁵ The remainder of the campaign season is often financed by borrowing funds from creditors against projected future fundraising and accompanying federal matching funds.¹⁴⁶

Given the amount of time required to conduct litigation, it is highly probable that by the time the plaintiff wins his suit, the defendant would be completely judgment-proof. "Debt reduction is the toughest kind of fund raising imaginable," according to one political fundraiser,¹⁴⁷ and it is possible that the odium of a legal judgment against the campaign would only make that task more difficult. The plaintiff would have to "get in line" with all of the other unsecured claimants against the defunct campaign committee and wait years before seeing a penny, even were the defendant eventually able to produce any money.¹⁴⁸

One possible source of compensatory damages suggests itself: funds raised for the candidate's next campaign. A successful candidate will often run for re-election; certainly in the hypothetical case of *McVie v. Clinton/Gore '92*, it is highly likely that Bill Clinton, the ultimately successful candidate, will seek re-election in 1996. McVie might seek to attach President Clinton's re-election campaign funds for 1996. However, such an attachment would run afoul of a Federal Elections Commission (FEC) decision relating to former Colorado Senator Gary Hart's bids for the Presidency in 1984 and 1988, where the FEC ruled that debts cannot be transferred from one campaign to another.¹⁴⁹ Therefore, the plaintiff

145. For an interesting discussion of this and related topics, see generally *CAMPAIGN FOR PRESIDENT: THE MANAGERS LOOK AT '88* (David R. Runkel, ed. 1989), especially at 175-179 for the financial pressures imposed on presidential campaigns by the existence of twenty simultaneous primary elections on "Super Tuesday" in 1988. Notable is a quote from Larry Eichel, a reporter from the *Philadelphia Enquirer*: "[O]ur understanding of primary politics is that with few exceptions most candidates are in a situation where they have to be spending money very quickly as it comes in . . ." *Id.* at 179. See also Lewis, *supra* note 143, at A27 ("running [presidential] campaigns on a deficit has been a way of life"). In other words, at least during the primary stage of a presidential campaign, money is spent as fast as it comes in, if not faster.

146. See Runkel, *supra* note 145. The discussion dealt directly with Congressman Richard Gephardt's presidential campaign in 1988. See also Lewis, *supra* note 143 ("There is a general guideline that campaigns should try not to borrow much more than could be anticipated in Federal matching funds.")

147. Lewis, *supra* note 143 (quoting Nicholas Rizzo, campaign finance chairman for former Sen. Paul Tsongas' 1992 presidential campaign).

148. A successful plaintiff in the hypothetical cases would almost certainly be in the same position as a creditor to a past campaign, described in Lavelle, *supra* note 142 ("There is no legal way, I believe, for [creditors] to collect those debts," says David M. Ifshin, a Democratic election lawyer . . . who served as 1984 presidential candidate Walter F. Mondale's campaign counsel.")

149. *Id.*

would have to extract funds from the *defunct* campaign, while the candidate himself would be able to run for re-election without this financial burden. The probability of a plaintiff's securing these funds, as noted above, would be quite low.

2. Equitable Remedy

Because of the problems with pursuing monetary damages, the relief sought would most likely be equitable in nature. When considering the probability that a lawsuit would last longer than the election, an artist seeking to prevent the unauthorized use of his song would be well-advised to seek a preliminary injunction against a campaign's use of his song, ostensibly pending final litigation. As demonstrated above, the artist would probably have to content himself with the injunction and no legal damages.

A suit for injunctive relief would greatly resemble *Keep Thomson Governor Committee v. Citizens for Gallen Committee*.¹⁵⁰ In *Thomson*, the plaintiff, a campaign to re-elect the incumbent Governor of New Hampshire, had commissioned a song entitled "Live Free or Die."¹⁵¹ The campaign purchased the copyright from the artists and sold sound recordings of the song, apparently both as a political promotion and as a means of raising funds.¹⁵² The defendant campaign committee used a portion of the song in its political commercials.¹⁵³ The rival campaign's commercial played a short segment of "Live Free or Die" and criticized the incumbent's platform.¹⁵⁴ The Thomson campaign invoked its exclusive rights to use the sound recording under 17 U.S.C. § 101 *et seq.* and sued to enjoin the Gallen campaign from playing the commercial that used a portion of "Live Free or Die."¹⁵⁵ The court considered four factors in denying the injunction: "(1) The significance of the threat of irreparable harm if the injunction is not granted; (2) the balance between this harm and the injury that granting an injunction would inflict on the defendant; (3) the probability that plaintiff will succeed on the merits; and (4) the public interest."¹⁵⁶

The court in *Thomson* presumed irreparable harm after the *prima facie*

150. 457 F. Supp. 957 (D.N.H. 1978).

151. *Id.* at 958.

152. *Id.*

153. *Id.* at 959.

154. *Thomson*, 457 F. Supp. at 959.

155. *Id.*

156. *Id.*

showing of copyright infringement, and found that the plaintiff had met the first of the four factors.¹⁵⁷ However, the court then found that the defendant's inability to express its political views during a campaign would greatly harm both the defendant and the public, invoking significant First Amendment concerns of protecting free political speech.¹⁵⁸ Additionally, the *Thomson* court believed it unlikely that the plaintiff would succeed on the merits, since the court anticipated a successful fair use defense.¹⁵⁹ The *Thomson* court therefore denied the plaintiff's motion for a preliminary injunction.¹⁶⁰

Thomson provides a good framework for dealing with political campaigns and copyright issues, but the outcome in the hypothetical cases would be very different from *Thomson*. First, the court would probably accede to the presumption of irreparable harm, disposing of the first factor in favor of the plaintiff.¹⁶¹ Second, the harm caused to the defendant by granting the injunction would be slight. One campaign strategist notes that "that kind of music doesn't really reach the community of politically active people."¹⁶² Since the harm to the defendant would be minimal, the second factor would be decided for the plaintiff as well. The third factor would favor granting the injunction, because the plaintiff would have a very strong case on the merits.¹⁶³ Finally, the court would weigh the public interest of allowing this kind of unauthorized use of copyrighted material to continue in the face of the copyright owner's objections. Consider *McVie v. Clinton/Gore '92*. The public had an interest in the ability of the electorate to make an informed choice about candidate Bill Clinton, because of the tremendous effect that Clinton would have had on national policy if elected to the office of President.¹⁶⁴ But, given the facts that the song existed sixteen years before the campaign found a vehicle for its message

157. *Id.* (following *Wainwright Sec., Inc. v. Wall St. Transcript Corp.*, 558 F.2d 91 (2d Cir. 1977)).

158. *Thomson*, 457 F. Supp. at 959-60.

159. *Id.* at 960. The fair use defense is discussed in detail *infra* at notes 172-186 and accompanying text.

160. *Thomson*, 457 F. Supp. at 961. After the plaintiffs raised a cause of action for unfair competition, the court found that the relevant statutes were inapposite to the facts of the case. *Id.*

161. *Wainwright*, 558 F.2d 91 (presumption of irreparable harm in copyright infringement).

162. *Grove*, *supra* note 39 (quoting Republican National Committee Chief of Staff Mary Matalin).

163. *See supra* notes 74-132 and accompanying text.

164. *See Buckley v. Valeo*, 424 U.S. 1, 42-45 (1976). *Buckley* paints the public interest in broader terms, covering candidates for public office generally; obviously this would include candidates for President of the United States.

in the song¹⁶⁵ and that the lyrical content is not explicitly political,¹⁶⁶ the public's interest in robust political debate would not have been paid a disservice by excluding the song from the political forum.

Under a *Thomson* analysis, McVie would therefore likely prevail on the merits, and the result would be that the preliminary injunction would be granted. Consider what would have happened had McVie sued the Clinton campaign in the early stages of the 1992 primaries: the campaign could no longer have used "Don't Stop" at campaign events¹⁶⁷ until the claims were litigated, resulting in an effective victory for McVie. Even assuming an ultimate victory for the Clinton campaign at trial, in all probability the election would have long since passed and McVie would no longer be interested in the litigation. Once a court issued the preliminary injunction, the Clinton campaign would likely have found that the costs of using the song far outweighed the benefits. Also, the campaign might well have been embarrassed by the controversy and negative publicity surrounding litigation and feared bad press more than any fines it would have had to pay.¹⁶⁸

An additional advantage to seeking injunctive relief is that under the copyright laws, a preliminary injunction is enforceable nationwide.¹⁶⁹ Because copyright is under exclusive federal jurisdiction¹⁷⁰ and because of a desire to prevent separate suits in all fifty states and the District of Columbia, the provision allows for adequate national enforcement of copyright laws. A preliminary injunction granted in any state will prevent the hypothetical defendant from using a song at all campaign events throughout

165. "Don't Stop" was copyrighted in 1976 by Gentoo Music and was "a hit in 1977, the last time a Democrat was inaugurated President," Elving, *supra* note 45, at 2076.

166. The substantive content of "Live Free or Die" was described as "approximately 60 seconds of narration relative to the tradition and spirit of New Hampshire" and does not elaborate on the exact lyrical content of the song. *Thomson*, 457 F. Supp. at 959.

Debatably, the emotional content and lyrical message of "Don't Stop" convey a spirit of optimism, energy, and hope. The Clinton campaign would understandably want to associate those emotions with its candidate, but that message is not explicitly political.

167. *See supra* note 46.

168. This appears to be the reason that, when an artist makes a request to a campaign to stop using his songs, campaigns typically have complied. Indeed, to continue the example described in the text, Christine McVie at one point asked the Clinton campaign to stop using "Don't Stop" at campaign events, and the Clinton campaign took pains not to use the song. *See All Things Considered, Clinton's Team Looking for Theme Song, supra* note 46; *but cf. supra* note 47.

169. An injunction received pursuant to copyright law (17 U.S.C. 101 *et seq.*) "shall be enforceable, by proceedings in contempt or otherwise, by any United States court having jurisdiction of that person." 17 U.S.C. § 502(b) (1988).

170. 28 U.S.C. § 1338(a) (1988).

the entire country.¹⁷¹ Therefore, a preliminary injunction would be the most favored remedy for the plaintiff.

V. DEFENSES: "I DIDN'T INHALE AND I DIDN'T LISTEN EITHER!"

The hypothetical defendant campaign would have several strong arguments to assert in defense of its actions. The campaign could concede some of the plaintiff's factual propositions with no harm to their defense. Specifically, the defendant campaign could admit using the plaintiff's song at events and concede ownership of the song's copyright to the plaintiff. Moreover, the defense strategy would likely be aimed at postponing the preliminary injunction for as long as possible. Attorneys defending the campaigns might employ dilatory litigation tactics, seeking to delay an inevitable loss. More effective, however, would be presenting a four-tiered defense. First, the defendant would assert fair use. Second, the defendant would claim that the campaign's use of the song should be considered within certain exceptions of copyright law. Third, the defendant would challenge the plaintiff's standing. Finally, the defendant campaign would argue that it is protected by the First Amendment, which would afford the defendant campaign great protection by virtue of its status as a political campaign.

A. *Fair Use*

The law provides for a limitation on the exclusive rights of a copyright holder if the unauthorized use is "fair."¹⁷² Fair use will likely be the hypothetical defendant's first line of defense against a copyright claim. The statute lists four factors for consideration which the defendant would address in raising a fair use defense. The cautious scholar will note that the statute is only meant to codify an existing common law doctrine, making judicial inquiry into specific claims of fair use potentially broader

171. Such a suit could theoretically be brought in any Federal District Court in the country. For convenience of jurisdiction and enforcement, the suit might be brought in a state such as Iowa or New Hampshire, due to their early placement in the Presidential primary season, or whichever state the campaign announced that its next event would be in. California law, however, is favorable to a publicity rights claim, discussed *supra* at notes 83-111 and accompanying text. California may also be a geographically convenient forum for the plaintiff, since it is a state where a great many musicians and songwriters reside.

172. "[T]he fair use of a copyrighted work, including . . . phonorecords . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright." 17 U.S.C. § 107 (1988).

than the four factors outlined in 17 U.S.C. § 107.¹⁷³ Nevertheless, these factors are usually sufficient for finding whether an unauthorized use is fair or not.¹⁷⁴ An analysis of the *Adams v. Duke for President* hypothetical case thus need not look beyond the statute's listed factors.

"The purpose and character of the use, including whether such is of a commercial nature or for nonprofit educational purposes" is the first factor considered in determining whether there has been a fair use.¹⁷⁵ Neither an educational nor a commercial use would exist in *Adams v. Duke for President*, unless playing the song was an integral part of a Duke fundraising event. However, fundraising would not appear to be the Duke campaign's purpose for using "Every Little Thing I Do (I Do It For You)," given the objectives described by campaign workers.¹⁷⁶ Since the purpose and character of the use is neither commercial nor educational, this factor would not favor either party.

Second, "the nature of the copyrighted work" is considered.¹⁷⁷ "Every Little Thing I Do (I Do It For You)" was written for profit.¹⁷⁸ Adams presumably hoped to sell sound recordings of the song and thus support himself through royalty payments. He also hoped that the publicity surrounding one song will help build his public image, enabling him to later sell additional songs. Like all artists, Adams realized that individuals will use these sound recordings privately and licensed them to do so by releasing the song for public purchase.¹⁷⁹ Because the song was created for profit, its unpaid appropriation by the Duke campaign contradicts its reason for existence. This factor would thus favor Adams.

The third factor considered is "the amount and substantiality of the

173. 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, § 13.05, at 13-86 (1993).

174. *Id.* at 13-87.

175. 17 U.S.C. § 107(1) (1988).

176. See *All Things Considered, Clinton's Campaign Team Looking for Theme Song*, *supra* note 46 (describing the Clinton campaign's purposes in using songs to "rouse" and "enthuse"). It is safe to presume that the Duke campaign's use was for similar purposes.

177. 17 U.S.C. § 107(2) (1988).

178. See *supra* note 41 (song appears on a commercially-released album).

179. Increasingly, artists seek to advance political statements coincidental to releasing a song for profit. Obviously, not all artists do this and even the "political" songs are still expected to turn a profit for the artist. There is considerable debate as to whether certain political messages, inserted into the song, improve its profitability, and whether including political messages in songs is responsible behavior. To the extent that an artist's political message and a campaign's political message coincide, it would appear that an artist has no complaint about being associated with a campaign. But, given this argument, an artist has a stronger incentive to distinguish his political message from a campaign's once his song has become associated with it, if the campaign does not accurately reflect his views.

portion used in relation to the copyrighted work as a whole."¹⁸⁰ If only a short excerpt from the song were used, this factor would favor the defendant. However, the usual campaign event includes a complete or nearly complete use of the song. If a substantial portion of the work were used, which was qualitatively recognizable as representing the entire work, then this factor would favor the plaintiff.¹⁸¹ If the court finds that the quantity of the work used is insubstantial, then this factor will weigh in favor of the defendant. In both hypothetical cases, however, the songs were played all the way through; in the *McVie v. Clinton/Gore '92* case, "Don't Stop" was played three times in succession at one event.¹⁸² It is therefore probable that this factor would also weigh in favor of the plaintiff.

Finally, "the effect of the use upon the potential market for or value of the copyrighted work" is considered.¹⁸³ This factor would likely be decided in favor of the defendant because it is interpreted as the difference . . . between the benefit the public will derive if the use is permitted and the personal gain the copyright owner will receive if the use is denied. The less adverse effect that an alleged infringing use has on the copyright owner's expectation of gain, the less public benefit need be shown to justify the use.¹⁸⁴

Returning to the *Adams v. Duke for President* hypothetical, Adams' expectation of gain or loss has little to do with the infringing use. Sales of "Every Little Thing I Do (I Do It For You)" would not likely have been affected by the Duke campaign's use of the song, if the general public is able to distinguish between a musician and a politician.¹⁸⁵ Therefore, this factor would weigh in favor of the defendant.

The nature and use of the work by the defendant's use of the plaintiff's song should not be found to be a fair use. Fair uses are typically

180. 17 U.S.C. § 107(3) (1988).

181. *Roy Export Co. Establishment v. CBS*, 503 F. Supp. 1137 (S.D.N.Y. 1980), *aff'd*, 672 F.2d 1095 (2d Cir. 1982) (copying 75 seconds of a 72 minute movie is a substantial use, in qualitative terms). *But cf. Thomson*, 457 F. Supp. at 961 (15 seconds of three-minute recording for purposes of political criticism is sufficiently insubstantial as to allow a fair use defense).

182. DEMOCRATIC NATIONAL CONVENTION (CNN television broadcast, July 17, 1992). The convention played "Don't Stop" three times in a row after Arkansas Governor Bill Clinton gave his speech accepting the Democratic Party's nomination for President, accompanied by a festive drop of rainbow-colored balloons and general revelry in Madison Square Garden. *Id.*

183. 17 U.S.C. § 107(4) (1988).

184. *MCA, Inc. v. Wilson*, 677 F.2d 180, 183 (2d Cir. 1981) (citations omitted).

185. *See supra* note 136 and accompanying text. While cynics might suggest that this is not a foregone conclusion, the focus of any campaign is the candidate, *see Runkel, supra* note 145, not accompanying "window dressing" serving a subsidiary purpose. *See also All Things Considered: Clinton's Team Looking for Theme Song, supra* note 46.

educational or charitable in nature,¹⁸⁶ and the Duke campaign did not use the work for either purpose. The public benefit accrued from allowing the use of Bryan Adams' song by David Duke's political campaigns is minimal, at best. While there would be little market effect from use of the song at a political event, other fair use factors should outweigh this consideration. Consequently, the Duke campaign would likely fail to raise a successful fair use defense.

B. Statutory Exceptions to Copyright Infringement

17 U.S.C. § 110 provides specific exceptions to copyright infringement for certain actions. The defendant might assert that its use of the plaintiff's song falls into one of these exceptions. While political campaigns are not specifically mentioned in § 110, the defendant might nevertheless attempt to invoke the exceptions.

One exception provides that "communication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes" is not an infringement of a copyright.¹⁸⁷ This provision, however, does not apply to the use of the song. For example, in the *McVie v. Clinton/Gore '92* hypothetical case, the song "Don't Stop" was played at the Democratic National Convention at Madison Square Garden.¹⁸⁸ The receiving apparatus within Madison Square Garden would not be of the type commonly found in private homes,¹⁸⁹ so it would not be covered by the exception, unlike the common radio and television units to which the exception applies.¹⁹⁰

Political rallies might fall under another exception, which states that

186. 17 U.S.C. § 107 (1988) lists specific uses "such as criticism, comment, news reporting, teaching . . . scholarship, or research" as within the fair use exception. It is not meant to be an exhaustive list, however; see *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 562 (1985). Nevertheless, political rallies seem to fall outside the flavor of the enumerated fair uses.

187. 17 U.S.C. § 110(5) (1988).

188. See *supra* notes 45 and 182 and accompanying text.

189. Telephone Interview with Madison Square Garden Facilities Management, New York, N.Y. (Nov. 29, 1992).

190. Interestingly, then, the copyright was not violated as to the millions of people who watched the convention on TV, but it was violated as to the thousands of people who were at the convention itself. This seems counter-intuitive in that a nonpermissive use of a sound recording with a select (if large) group of people appears to do less harm to an artist's exclusive control over his work than nonpermissive broadcast of that work to a national, indeed a global, audience.

a copyright is not infringed by a "performance of a . . . musical work . . . without any purpose of direct or indirect commercial advantage and without payment of any fee or other compensation for the performance to any of its performers, promoters, or organizers, if . . . there is no direct or indirect admission charge."¹⁹¹

Arguably, this exception applies to the hypothetical cases. A recording of a musical work is played by means of an electronic device. The campaign presumably seeks no commercial advantage, assuming that no fee is charged nor money solicited from participants at a campaign event and the song is not used at fundraising events. Thus, political rallies seem to fall within the exception. However, if any fee was charged to delegates at the convention, this could be seen as a monetary gain for the defendants.

The defendants could also have had an indirect intent to gain money. By playing the song at rallies, enthusiasm for the candidate is increased, and higher levels of political participation will result. In addition to more phone bank volunteers and precinct walkers, the number of campaign donations would increase as a result of heightened enthusiasm. Therefore, an indirect financial gain probably does accrue to the defendant by its use of the song. Should the plaintiff make this argument, it would have a strong chance of defeating the assertion of this exception.

C. Standing

1. Copyright Claim

Another line of defense for the defendant is to assert that the plaintiff lacks standing to sue, based on the theory that he has not sustained an injury in fact.¹⁹² Both *Thomson* and *Shostakovich* illustrate that an unharmed plaintiff lacks standing.¹⁹³ The defendant would allege that the plaintiff must prove that he had suffered a loss of sales, or that his public

191. 17 U.S.C. § 110(4) (1988).

192. *E.g.*, *Allen v. Wright*, 468 U.S. 737, 751 (1984) ("A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief").

193. *Thomson*, 457 F. Supp. at 961, (finding that "the effect of the use upon the potential market or value of the copyrighted work is nil. The recordings have sold and are continuing to sell without substantial commercial loss to the plaintiff"). *Cf. Shostakovich*, 80 N.Y.S.2d 575, 578, (finding that "[t]here is no ground for any contention that plaintiffs have . . . given their approval or endorsement [to a motion picture contrary to their political beliefs]"). The *Shostakovich* court relied, however, on the fact that the works used in the motion picture were within the public domain, while the works in question in the hypothetical cases are copyrighted.

image had suffered a negative impact as a result of his association with the campaign or the candidate. The defendant campaign would argue that the plaintiff's damage can only be measured in terms of a decline in sales. An examination of sales charts would very likely demonstrate that the plaintiff's albums continued to sell as they had prior to the defendant's use of the music.

In *Shostakovich*, the plaintiffs' music was used in a movie which expressed opinions contrary to their political views.¹⁹⁴ The *Shostakovich* court rejected the argument that "[t]he use of plaintiffs' music . . . indicates their 'approval,' 'endorsement' and 'participation'" in the defendant's film.¹⁹⁵ The court found "no ground" for this assumption and said that approval was not "necessarily implic[d]."¹⁹⁶ Therefore, the plaintiffs did not have standing to sue because they had sustained no injury.

Although the plaintiff's claims are similar to those in *Shostakovich*, two factual differences suggest that a court may reach a contrary result. First, the works in *Shostakovich* were "in the public domain and [enjoyed] no copyright protection whatever."¹⁹⁷ Since no copyright had been claimed over the works, anyone could have used them without seeking the permission of the artist.¹⁹⁸ In the hypothetical cases, the works have been copyrighted, and the artists have sought to maintain control over when and how their works are presented. Their purpose in ensuring payment of royalties is not relevant; what matters is that they retain control. Second, a presumption of irreparable harm to the plaintiff once a copyright has been infringed was created in *Wainwright*, a presumption which did not exist at the time of *Shostakovich*.¹⁹⁹ *Wainwright* postdates *Shostakovich* by twenty-nine years, and the hypothetical cases postdate *Shostakovich* by at least forty-four years. The defendant may attempt to rebut this presumption by noting that sales of the plaintiff's album have not appreciably declined, disproving the negative association with the candidate or the campaign. Plaintiff's injuries could be characterized as similar to those suffered by the plaintiffs in *Warth v. Seldin*,²⁰⁰ who sought to enjoin the application of a municipal zoning ordinance prohibiting low-cost housing in Penfield, New York.²⁰¹ The Court distinguished between the availability of low-

194. *Shostakovich*, 80 N.Y.S.2d 575.

195. *Id.* at 578.

196. *Id.*

197. *Id.* at 577.

198. *See id.*

199. *Wainwright*, 558 F.2d 91.

200. *Warth v. Seldin*, 422 U.S. 490 (1975).

201. *Id.*

cost housing in Penfield and the zoning ordinance and determined that there was no injury in fact.²⁰² The Court stated that the plaintiffs' "inability to reside in Penfield is the consequence of the economics of the area housing market, rather than of respondents' assertedly illegal acts."²⁰³

In the *Adams v. Duke for President* hypothetical, the Duke campaign would argue that the injury asserted by Adams (loss of sales) was not caused by Adams' alleged association with David Duke, but rather by normal market processes. However, the presumption of irreparable harm would likely be controlling. Normal market fluctuations were not a factor considered by the court in *Wainwright*.²⁰⁴ Therefore, if Adams can prove ownership of the copyright, he will likely be found to have standing to sue. Again, the distinction between the song and the sound recording becomes significant²⁰⁵ — the sound recording is likely to be copyrighted by a record company, not Adams himself. If Adams sues on the copyright for the sound recording of a song, he would not have standing because he does not own the copyright. However, since the suit is for copyright violation of the song itself, the standing defense will likely fail, allowing Adams to proceed with his suit.

2. False Endorsement and Publicity Rights Claims

*Waits v. Frito-Lay*²⁰⁶ provides strong precedent for establishing standing in a publicity rights or false endorsement claim. When Frito-Lay used a "sound-alike" of Tom Waits to endorse its product, Waits had standing to sue both for false endorsement and voice misappropriation.²⁰⁷ The controlling factor was that the plaintiff had "a commercial interest in the misused mark."²⁰⁸

The defendant in *Adams v. Duke for President* could argue, as Frito-Lay did in *Waits*, that the false endorsement claim is invalid under the Lanham Act, since it only applies to competitors in an unfair competition

202. *Id.* at 505-6.

203. *Id.* at 506. *But see* *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977) (implying that a substantial probability that a causal relationship between discriminatory zoning practice and plaintiffs' inability to purchase a home could exist, but denying relief because plaintiffs failed to prove that the defendants were motivated by racial discrimination).

204. The *Wainwright* court concerned itself with "a probability of success on the merits, or a fair ground for litigation and a balance of the hardships in his favor." *Id.* at 94.

205. *See supra* note 76.

206. 978 F.2d 1093 (9th Cir. 1992).

207. *Id.* at 1107-10.

208. *Id.* at 1109. In this case, the plaintiff's mark is his identity.

claim.²⁰⁹ However, this argument was rejected in *Waits* and would likely be rejected in Adams' case as well. False endorsement, by its very nature, almost always involves a noncompetitor.²¹⁰ "Standing, therefore, does not require 'actual competition' in the traditional sense; it extends to a purported endorser who has an economic interest akin to that of a trademark holder in controlling the commercial exploitation of his or her identity."²¹¹ Since actual competition with David Duke in the political arena is unnecessary and since Bryan Adams as a professional entertainer has a clear economic interest in his identity,²¹² he would almost certainly be found to have standing for these causes of action.²¹³

D. First Amendment

Finally, the defendant may invoke the First Amendment in defense of its actions.²¹⁴ Virtually all scholars and jurists agree that the First Amendment protects speech that is political in nature, since free political discourse is the very core of the First Amendment's *raison d'etre*.²¹⁵ Because the defendant campaign is engaged in forwarding the political process (indeed, it is in many ways the *focus* of the political process), extraordinary First Amendment protection should apply to it. Courts have traditionally been quite deferential to speech by political candidates and campaigns as political expression.²¹⁶ One court has noted that:

[n]o activity is more basic to the maintenance of a democratic society than that which develops the knowledge, debate, and information necessary to enable our citizens to best exercise their electoral franchise, and thereby facilitate the election of

209. *Id.* at 1107.

210. *Id.* at 1107-10.

211. *Waits*, 978 F.2d at 1110.

212. *See, e.g.,* *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992), *reh'g en banc denied*, 989 F.2d 1512 (9th Cir. 1993), *cert. denied*, 113 S. Ct. 2443 (1993); *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988).

213. This is clearly the case given California law, *see supra* notes 91-107 and accompanying text. A suit in a state other than California would rely on that state's law for a publicity right claim. *See Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

214. U.S. CONST. amend. I reads in applicable part, "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble."

215. *E.g., Meyer v. Grant*, 486 U.S. 414, 425 (1988); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. REV. 1 (1971); and LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 785-787 (2d ed. 1988).

216. *See e.g., Dukas v. D.H. Sawyer & Associates*, 520 N.Y.S.2d 306 (1987).

leaders who will guide and shape the policies and programs of our institutions.²¹⁷

Where exclusive rights under copyright law have been invoked counter to a political expression claim, courts have favored the First Amendment.²¹⁸ However, prior First Amendment claims invoked by defendants are distinguishable from either hypothetical case.

In *Dukas v. D.H. Sawyer & Associates*, the plaintiff, a New York disc jockey, was paid to record a narration for a television commercial used in a 1985 campaign to re-elect the Governor of New Jersey.²¹⁹ A four-second excerpt of the plaintiff's voice was used by the opposing campaign in its own commercial, criticizing the incumbent's record.²²⁰ The plaintiff had sold all interest in the recording of his voice to the Governor's re-election campaign, but the court found that any "minimal property right that Dukas may have had in the four-second, ten-word segment is far outweighed by the public's right to free and unfettered political debate."²²¹ Because the use in *Dukas* was for criticism of the incumbent's political record, as advertised in the commercial in which the plaintiff's voice appeared, the *Dukas* Court did not reach the fair use issue because it was so moved by the First Amendment concerns protecting political speech.²²²

In *Thomson*, as previously noted, a fifteen-second excerpt from plaintiff's song was used in defendant's political commercial.²²³ The *Thomson* court found that the "First Amendment issues of freedom of expression in a political campaign"²²⁴ resolved the question of fair use in favor of the defendant.

However, the uses in *Dukas* and *Thomson* were quite minor in comparison to the use in *McVie v. Clinton/Gore '92*. Also, the uses in *Dukas* and *Thomson* were directly related to criticism of political opponents. In fact, the defendants in both cases had taken material directly from their rival campaigns' political material (from a promotional record in *Thomson* and a radio commercial in *Dukas*) and used them for the purpose

217. *Davis v. Duryea*, 417 N.Y.S.2d 624, 627 (1979).

218. See *Thomson*, 457 F. Supp. 957, and *Dukas*, 520 N.Y.S.2d 306.

219. *Dukas*, 520 N.Y.S.2d at 307.

220. *Id.*

221. *Id.* at 308.

222. *Id.* "Property rights must be balanced against the public's interest in the 'free discussion of governmental affairs.'" *Id.* (quoting *Thomson*, 457 F. Supp. at 960).

223. *Thomson*, 457 F. Supp. at 959.

224. *Id.* at 961.

of criticism.²²⁵ The Clinton campaign used "Don't Stop" for a purpose that did not forward substantive debate on political issues. The campaign's use of "Don't Stop" was not educational. "Don't Stop" makes no political statements. Its use at campaign events was intended to produce an emotional reaction in participants of the political process, not to advance "the free discussion of governmental affairs."²²⁶ There was no political message in the song as it was used by the Clinton campaign, and as such is not political speech.²²⁷

The First Amendment clearly protects political speech, including the right of the Clinton campaign to have a political rally. However, it does not protect the rights of a campaign to do whatever it wishes at such a rally.²²⁸ Therefore, the First Amendment would likely fail to protect the Clinton campaign from a lawsuit.

VI. CONCLUSION

The practice of playing popular songs at political rallies has grown to be a common feature of contemporary political campaigns.²²⁹ For most, it is an insignificant detail; for others, the subject of some amusement. For the artists whose work is appropriated, however, this may be serious business indeed.²³⁰ Every detail of a presidential campaign is scrutinized

225. In *Thomson*, the defendant copied 15 seconds of plaintiff's song and then criticized the plaintiff's political program. *Id.* at 959. In *Dukas*, an even shorter excerpt from a competing political commercial was used prior to similar criticism of the incumbent's political program. *Dukas*, 520 N.Y.S.2d 306. Also in *Dukas*, the plaintiff did not own the copyright to the copied commercial. *Id.* at 307.

226. *Thomson*, 457 F. Supp. at 960.

227. The campaigns themselves might suggest that the enthusiasm, energy, and other emotional content of the songs *are* a part of the message that the campaigns wish to take to the people; by playing these songs, campaigns suggest to voters that it is desirable to become excited and enthused about their candidate. This is somewhat incestuous reasoning. One of the very purposes of any political campaign is to create excitement and enthusiasm for a candidate. Nothing new is contributed to the discussion about a candidate by the use of a song.

A song containing a more explicit political message would seem to convey additional protection on its user, by virtue of the fact that it makes a political statement. The "Live Free or Die" song in *Thomson* illustrates this point — "Live Free or Die" was commissioned and used by a political campaign and contained statements that one candidate wished to throw into the public debate during the election by its use. The candidate can have little complaint when his opponent took him up on this challenge by use of the same song.

228. See generally LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1097-1121 and 1129-1132 (2d ed. 1988).

229. See *supra* notes 17-61 and accompanying text.

230. See *supra* note 27 and accompanying text.

by the press, political pundits, and analysts. A campaign such as David Duke's brings with it a tremendous amount of negative publicity,²³¹ causing artists such as Bryan Adams to rightly fear association with such negative exposure.²³² An artist should be able to dissociate himself from such a candidate.

The legal system should not differentiate between David Duke and a more "mainstream" candidate such as Bill Clinton or George Bush. Therefore, similar claims by artists like Christine McVie or Bobby McFerrin are as viable as those of Bryan Adams. Of course, an artist should not immediately rush to the courthouse and sue. Rather, he should first contact the offending campaign and request that it discontinue its use of the song.²³³ If offended by the political use of his work, an artist should also make a public statement disassociating himself from the campaign or its views.²³⁴ It is not likely, especially if the artist acts prudently and quickly in this fashion, that he will become negatively associated with a campaign. Nevertheless, in spite of the probability that an artist will not be associated with a candidate or his views, the artist should have a legal right to control this kind of use of his work.

As demonstrated by the hypothetical cases, the artist would have a strong claim of infringement of copyright,²³⁵ invasion of publicity right,²³⁶ and false endorsement,²³⁷ should matters result in litigation. There is no right without a remedy, and the artist stands an excellent chance of prevailing on the merits and obtaining some form of relief. A legal remedy may prove unsatisfactory and may not even make up the costs of bringing the litigation.²³⁸ The actual pecuniary harm suffered by the artist will likely be quite small.²³⁹ The general public is able to readily distinguish between a rock star singing a song and a politician staging a rally.²⁴⁰ A campaign's use of a song will probably not affect the sales of the song in the market at large and may in some cases help it. Therefore, the damages suffered by an artist will most likely be *de minimis*, making a legal remedy a poor economic choice for the plaintiff. The availability

231. See *supra* note 40.

232. See *supra* note 116 and accompanying text.

233. See *supra* notes 47 and 61 and accompanying text.

234. See *supra* note 116 and accompanying text.

235. See *supra* notes 74-82 and accompanying text.

236. See *supra* notes 83-111 and accompanying text.

237. See *supra* notes 83-111 and accompanying text.

238. See *supra* notes 133-149 and accompanying text.

239. See *supra* note 137 and accompanying text.

240. See *supra* note 185 and accompanying text.

of statutory damages of up to \$100,000 for copyright infringement²⁴¹ mitigates this factor somewhat, but the fact that a campaign would likely be bankrupt and that subsequent campaigns cannot pay the debts of defunct campaigns means that money would probably never be seen by the plaintiff.²⁴²

A more appropriate and effective remedy is to seek a preliminary injunction prohibiting the defendant campaign from using the song. Should matters progress to this stage, an artist would have an excellent chance of success.²⁴³ While a defendant campaign could invoke a long string of defenses, including fair use,²⁴⁴ statutory exceptions to copyright infringement,²⁴⁵ standing,²⁴⁶ and the First Amendment,²⁴⁷ the plaintiff would likely prevail. A preliminary injunction would prevent the further use of the songs by the campaign and would likely be in place for the remainder of the campaign. It would quickly, effectively, and inexpensively distinguish both the song and the artist from the political candidate with whom the artist does not want to become associated. It also provides the artist with an opportunity to appear in court and demonstrate that he does not endorse the candidate in any fashion.

The negative publicity associated with such a lawsuit, regardless of which party ultimately prevails, takes away the very coin a political campaign exists to obtain: a good public image. If an artist asks that his work not be used by a campaign, he should only need to threaten to sue. No campaign, certainly at the presidential level, would want to allow this kind of bad publicity to surround itself and taint its carefully-sculpted public image of the candidate. A lawsuit also feeds a campaign's opponents with ammunition to use against them in negative advertising. The politically wise choice, given an artist who does not want a campaign using his song, is to honor his wishes.

*Erik Gunderson**

241. See *supra* notes 139-141 and accompanying text.

242. See *supra* notes 142-149 and accompanying text.

243. See *supra* notes 150-171 and accompanying text.

244. See *supra* notes 172-186 and accompanying text.

245. See *supra* notes 187-192 and accompanying text.

246. See *supra* notes 192-213 and accompanying text.

247. See *supra* notes 214-228 and accompanying text.

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