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### Running on Empty: The Problem with Politicians and Stealing (Music)

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# RUNNING ON EMPTY: THE PROBLEM WITH POLITICIANS AND STEALING (MUSIC)

*Maral Vahdani\**

This Comment explores the legal issues arising from unauthorized use of musical compositions during political campaigns and rallies. Focusing on John McCain's use of Jackson Browne's song "Running on Empty" during his political campaign, the article examines why such uses are problematic and proposes remedies for preventing future unauthorized use.

## I. INTRODUCTION

Rock and Roll Hall of Fame musician Jackson Browne's website describes him as an artist who has "defined a genre of songwriting charged with honesty, emotion and personal politics."<sup>1</sup> In a section of Browne's website called "Readings," he offers a glimpse of what those personal politics entail: current articles, book reviews, and essays on topics ranging from nuclear reactors to the United States' torture of inmates at Guantanamo Bay.<sup>2</sup>

Given Browne's well known liberal leanings,<sup>3</sup> it seems especially troublesome that Republican John McCain, then in his bid for the presidency,

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1. *Biography of Jackson Browne*, JACKSONBROWNE.COM, <http://jacksonbrowne.com/bio> (last visited Mar. 15, 2012).

2. *Readings*, JACKSONBROWNE.COM, <http://jacksonbrowne.com/readings> (last visited Mar. 15, 2012).

3. See Geoff Boucher, *Jackson Browne Sues John McCain over Song Use*, L.A. TIMES TOP OF THE TICKET (Aug. 14, 2008, 12:40 PM), <http://latimesblogs.latimes.com/washington/2008/08/jackson-browne.html> ("Browne . . . gave Obama \$2,000 shortly after he won his Senate seat in 2004 and another \$2,300 in March. Browne also has given about \$5,500 to MoveOn.org, \$5,266 to Rep. Lois Capps of Santa Barbara. And he's sent \$1,000 to Al Franken, the Democratic Senate candidate in Minnesota, \$500 to Ned Lamont for his 2006 run for Joe Lieberman's Senate seat in Connecticut.")

would use Browne's song "Running on Empty" in a commercial criticizing his opponent Barack Obama.<sup>4</sup> Browne is not only a Democrat, but has also been a public voice of support for Obama.<sup>5</sup> While the unauthorized use of copyrighted music in political campaigns is nothing new,<sup>6</sup> the McCain campaign's use of copyrighted music created considerably more controversy than similar uses have in previous campaigns.<sup>7</sup> In fact, at least ten artists, including Browne, demanded that McCain stop using their music without permission during his 2008 campaign.<sup>8</sup>

On August 14, 2008, Browne sued McCain alleging copyright infringement.<sup>9</sup> The suit centered on McCain's use of Browne's song "Running on Empty" in a Republican Party campaign commercial attacking Obama.<sup>10</sup> During the commercial, the instrumental introduction of Browne's composition begins playing as the screen displays the words "What's that Obama plan again?" and continues to play throughout the duration of the commercial.<sup>11</sup>

In his suit, Browne alleged not only copyright infringement, but also vicarious copyright infringement, violation of the Lanham Act for false

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4. *Browne v. McCain*, 611 F. Supp. 2d 1073, 1076 (C.D. Cal. 2009) ("In anticipation of then-Democratic Presidential candidate Barack Obama's visit to Ohio the week of August 4, 2008, [the Ohio Republican Party], acting as an agent for the [the Republican National Committee] and Senator McCain, created a web video to criticize and comment on Barack Obama's energy policy and his suggestion that the country could conserve gasoline by keeping their automobile tires inflated to the proper pressure (the 'Commercial'). During the Commercial, a sound recording of Browne performing the Composition, 'Running on Empty,' plays in the background.").

5. *Id.* at 1075.

6. See David C. Johnston, Note, *The Singer Did Not Approve This Message: Analyzing the Unauthorized Use of Copyrighted Music in Political Advertisements in Jackson Browne v. John McCain?*, 27 *CARDOZO ARTS & ENT. L.J.* 687, 688-90 (2010) (demonstrating that in each recent presidential election, at least one campaign has been asked to cease unauthorized public performances of an artist's music, including Bob Dole in 1996 ("Dole Man," modifying the lyrics of "Soul Man" by Isaac Hayes and David Porter); George W. Bush in 2000 ("Brand New Day" by Sting); Bush again in 2004 ("Still the One" by Orleans); and Mike Huckabee in 2008 ("More Than a Feeling" by Boston). With respect to McCain specifically, at least ten artists have requested or demanded that he stop unauthorized public performances of their music, including Browne; Heart ("Barracuda"); John Cougar Mellencamp ("Our Country" and "Pink Houses"); Van Halen ("Right Now"); Foo Fighters ("My Hero"); Frankie Valli ("Can't Take My Eyes Off of You"); ABBA ("Take a Chance on Me"); Bon Jovi ("Who Says You Can't Go Home?"); 28 Survivor ("Eye of the Tiger"); and the owner of the rights to "Gonna Fly Now," the trumpet anthem from the film *Rocky*).

7. *Id.* at 689-90.

8. *Id.* at 689.

9. *Id.* at 687.

10. *Browne*, 611 F. Supp. 2d at 1075.

11. *Id.* at 1076.

association or endorsement, and violation of the right of publicity, which is a cause of action stemming from California common law.<sup>12</sup> The claims survived a motion for summary judgment brought by McCain and the Republican National Committee (“RNC”),<sup>13</sup> the parties later settled outside of court for an undisclosed sum.<sup>14</sup> While Browne’s immediate problem was solved, the larger legal issues of such unauthorized use have yet to be answered definitively by the courts.<sup>15</sup>

Artists like Browne are not without recourse, but their options for preventing unauthorized use are currently problematic. This Comment will address two claims an artist can bring in order to protect his or her rights and the likelihood of success of these claims based on existing case law. Part II discusses copyright and trademark protection, and the potential inadequacies of each. Part III proposes a solution to these problems, resulting in the allowance of greater protection to artists, while still maintaining the intended goals of copyright and trademark law.

## II. THE COPYRIGHT ACT AND TRADEMARK PROTECTION

### A. *The Copyright Act and Fair Use*

Congress enacted the U.S. Copyright Act<sup>16</sup> under its Constitutional authority to protect authors’ writings.<sup>17</sup> Today, copyright protection extends to architectural design, computer software, graphic arts, motion pictures, and sound recordings.<sup>18</sup> Copyright protection of music applies to both the composition itself as well as to the recording of the song.<sup>19</sup> Pursuant to the Copyright Act, a copyright owner has the “exclusive” right to reproduce the work, prepare derivative works, distribute copies, perform the work publicly, and perform the work by means of a digital audio transmission.<sup>20</sup> While a creator’s rights require protection, the Copyright

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12. *Id.* at 1077.

13. *Id.* at 1081.

14. Johnston, *supra* note 6, at 690.

15. *Id.* at 690–91.

16. 17 U.S.C. §§ 101–810 (2006).

17. U.S. CONST. art. I, § 8, cl. 8 (“The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . .”).

18. *See* 17 U.S.C. § 101.

19. 17 U.S.C. § 106.

20. *Id.*

Act also recognizes the public interest in promoting creativity.<sup>21</sup> In order to achieve the Constitution's goal of promoting the "Progress of Science and useful Arts,"<sup>22</sup> the Copyright Act balances the right of an author to benefit from his or her work with the public's need to use that work to create new material.<sup>23</sup>

By applying the "fair use" doctrine, Congress and the Judiciary balance the public interest in using a work with the copyright owner's right to exclusivity in his or her original creative works.<sup>24</sup> In applying the fair use exception, courts developed a test,<sup>25</sup> now incorporated into the statute, designed to ensure the competing interests are weighed properly.<sup>26</sup> The definitive Supreme Court case on the matter is *Campbell v. Acuff-Rose*.<sup>27</sup> Using the balancing test laid out in the case,<sup>28</sup> courts evaluate the following four factors: (1) the purpose of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to work as a whole; and (4) the effect of the use upon the potential market for or value of the work.<sup>29</sup>

#### 1. The First Fair Use Factor: Purpose and Character of Use

The first factor in the fair use analysis is "the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes."<sup>30</sup> In *Campbell*, the respondent, Acuff-Rose Music, Inc., filed suit against petitioners, the members of the rap music group 2 Live Crew and its record company, claiming that 2 Live Crew's

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21. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (quoting *Stewart v. Abend*, 495 U.S. 207, 236 (1990)).

22. U.S. CONST. art. I, § 8, cl. 8.

23. See *Campbell*, 510 U.S. at 575.

24. See 17 U.S.C. § 107 ("Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.").

25. See *Campbell*, 510 U.S. at 577.

26. See *id.* at 576-77.

27. *Id.* at 569.

28. *Id.* at 577.

29. 17 U.S.C. § 107.

30. *Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc.*, 508 F. Supp. 854, 860 (N.D. Ga. 1981) (holding unfair use where defendants copied protected work solely for their own financial gain when American Heritage Products unlawfully manufactured and sold plastic busts of Dr. Martin Luther King, Jr. and used words from his copyrighted speeches on its advertisements).

song, “Pretty Woman,” infringed upon Acuff-Rose’s copyright in Roy Orbison’s rock ballad, “Oh, Pretty Woman.”<sup>31</sup> The rap group defended on the ground that its version of the song was a parody entitled to fair use protection under the Copyright Act.<sup>32</sup> The District Court granted summary judgment for 2 Live Crew, holding that its song was a parody that made fair use of the original.<sup>33</sup>

The Court of Appeals reversed and remanded, holding that the commercial nature of the parody rendered it presumptively unfair under the first of the four factors relevant under section 107; “that, by taking the heart of the original and making it the heart of a new work, 2 Live Crew had, qualitatively, taken too much” under the third section 107 factor; and that market harm, for purposes of the fourth section 107 factor, had been established by a presumption attaching to commercial uses.<sup>34</sup>

The Supreme Court, however, concluded that the commercial nature of the song did not render a use presumptively unfair.<sup>35</sup> Instead, a parody’s commercial character is only one element that should be weighed in a fair use inquiry.<sup>36</sup> The Court in *Campbell* also analyzed the transformative value of the work in question, holding that parody “can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one.”<sup>37</sup>

Here, McCain’s use of Browne’s music cannot be considered transformative, as he did not do anything new with Browne’s song.<sup>38</sup> Instead, McCain used Browne’s actual composition.<sup>39</sup> Here, McCain’s use was not novel nor did it provide any social benefit, and it may have actually harmed Browne’s artistic integrity.<sup>40</sup> McCain’s use of Browne’s work was not of the type Congress intended to be included in the protection it laid out for new creative works that draw from preexisting ones. Instead, McCain’s conduct is the very type of copyright infringement the Copyright Act seeks to prohibit.

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31. *Campbell*, 510 U.S. at 573.

32. *Id.*

33. *Id.*

34. *Id.* at 574.

35. *Id.* at 594.

36. *Id.* at 572; see also *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109 (2d Cir. 1998) (holding that a photo similar to that of a famed photographer was a parody that did not result in market harm and accordingly fell under fair use).

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

38. See *Browne v. McCain*, 611 F. Supp. 2d 1073, 1076 (C.D. Cal. 2009).

39. See generally *id.* at 1076–77.

40. See *supra* Part I.

While McCain's use of Browne's song and voice is not transformative, this fact alone is not sufficient to defeat McCain's fair use argument. The first factor of the fair use analysis also focuses on the commercial nature of the use.<sup>41</sup> In this portion of the analysis, courts must determine whether a political campaign advertisement is considered commercial.<sup>42</sup> Courts that have addressed this question have unanimously agreed that they are not.<sup>43</sup> Nonetheless, Browne need not prove that McCain's use of his song was "commercial" in order for Browne to prevail. While political speech may be presumptively non-commercial, the *Browne* court specifically stated, "copyright claims based on use of a copyrighted work in a political campaign are not barred, as a matter of law, under the fair use doctrine."<sup>44</sup>

## 2. The Second Fair Use Factor: The Nature of the Copyrighted Work

The nature of the potentially infringing use and whether it serves the public interest affects the level of protection courts will afford the copyrighted work.<sup>45</sup> When analyzing this second factor, courts must determine whether greater access to the work "would serve the public interest in the free dissemination of information."<sup>46</sup> McCain likely used Browne's song because it is well known and its lyrics are relevant to the point he was trying to make about Obama's energy plan. However, using the song to criticize Obama is not the same thing as altering the song itself for the purposes of parody, which the Supreme Court has recognized as a fair use.<sup>47</sup> Again, the song was not altered in any way— instead, a recording of the original musical composition was simply played throughout the commercial.

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41. See *Campbell*, 510 U.S. at 578.

42. See 17 U.S.C. § 107 (2006).

43. See *MasterCard Int'l Inc. v. Nader 2000 Primary Comm., Inc.*, No. 00-CV-6068 (GBD), 2004 U.S. Dist. LEXIS 3644, at \*28–29 (S.D.N.Y. Mar. 8, 2004) (holding that defendant's "use of plaintiff's trademarks is not commercial, but instead political in nature and that, therefore, it is exempted from coverage by the Federal Trademark Dilution Act"); *Am. Family Life Ins. Co. v. Hagan*, 266 F. Supp. 2d 682, 697 (N.D. Ohio 2002) ("[I]t is arguable whether [the candidate's] speech proposes a commercial transaction at all."); *Keep Thomson Governor Comm. v. Citizens for Gallen Comm.*, 457 F. Supp. 957, 958 (D.N.H. 1978) (holding that defendant's use "of a portion of the plaintiff's political advertisement is clearly part of a political campaign message [and therefore] noncommercial in nature").

44. *Browne*, 611 F. Supp. 2d at 1078 n.2.

45. See *Rosemont Enters., Inc. v. Random House, Inc.*, 366 F.2d 303, 307 (2d Cir. 1966).

46. See *id.*

47. See *Campbell*, 510 U.S. 569.

### 3. The Third Fair Use Factor: Extent of the Use of the Protected Work

The third factor courts analyze under the fair use doctrine considers the extent to which the work was used.<sup>48</sup> Courts consider “how much of the copyrighted work was taken and whether that portion was an essential element of the plaintiff’s work.”<sup>49</sup> Here, at least twenty seconds of the song “Running on Empty,” including the chorus, were included in a commercial that is approximately one minute and twenty seconds long.<sup>50</sup> While the McCain commercial used a little more than ten percent of Browne’s total composition,<sup>51</sup> the parts of the song used were substantial. Specifically, using the chorus of the song, which also includes the song’s title, is more substantial than using, for example, just an instrumental portion.<sup>52</sup> McCain’s use of Browne’s chorus provides a greater likelihood that the song will be recognized by anyone who is familiar with Browne’s work.<sup>53</sup>

### 4. The Fourth Fair Use Factor: Impact on Potential Value of the Protected Work

The fourth factor in the fair use analysis requires courts to consider not only market harm the alleged infringer has already caused, but also the future harm.<sup>54</sup> This factor weighs most heavily in support of Browne and other artists in similar situations. McCain’s use of “Running on Empty” without permission resulted in a pecuniary loss equivalent to what it would have cost to license the song’s use.<sup>55</sup> While a single instance of copyright infringement in this case would not yield substantial losses, the losses would be significant if this type of infringement were to continue. Furthermore, if Browne’s music is routinely used to spread a political message that is out of line with the artist’s own political beliefs, it is likely his target audience may lose interest in his original works.

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48. See *Hustler Magazine Inc. v. Moral Majority*, 606 F. Supp. 1526, 1537 (C.D. Cal. 1985).

49. *Id.*

50. *Browne*, 611 F. Supp. 2d at 1076.

51. *Id.* at 1075–76 (stating the original song is 296 seconds. Because the song played from the fifty second mark to the end of the commercial, the commercial uses approximately ten percent of Browne’s song.).

52. See *Campbell*, 510 U.S. at 587–88.

53. See *supra* Part I (discussing Browne’s popularity as a political artist).

54. See *Campbell*, 510 U.S. at 590.

55. Johnston, *supra* note 6, at 702.



### B. Trademark Law and the Lanham Act

Found in Title 15 of the U.S. Code, the Lanham Act (“Act”) contains the federal statutes governing trademark law in the United States.<sup>56</sup> The primary purpose of trademark protection is to avoid public confusion “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.”<sup>57</sup> Pursuant to this primary goal, whether a trademark has been infringed depends on whether this sort of consumer confusion is likely.<sup>58</sup> The Act was amended in 1996 to include the Trademark Dilution Act.<sup>59</sup> This addition to the Lanham Act protects against dilution, defined as the use of a trademark by someone other than its owner resulting in impairment of the mark’s distinctiveness.<sup>60</sup> Dilution can be found through “blurring,” the process through which an established trademark is whittled away “through its unauthorized use by others upon dissimilar products”<sup>61</sup> or “tarnishment,” which occurs “when the plaintiff’s trademark is linked to products of shoddy quality, or is portrayed in an unwholesome or unsavory context.”<sup>62</sup>

#### 1. Is It “Commercial”?

The Lanham Act, both in section 43(a) and in section 43(c), requires a use “in commerce.”<sup>63</sup> Thus, establishing that a political use is commercial is essential to showing that an artist can recover on a trademark claim. In his trademark infringement defense, McCain argued that his use of Browne’s song was political, and thus not commercial.<sup>64</sup> Addressing McCain’s argument that the Lanham Act does not apply to political speech, the District Court pointed out case law to the contrary stating, “the Lanham Act applies to noncommercial (i.e., political) *and* commercial speech.”<sup>65</sup> In support of this proposition, the court cited the cases *United We Stand*

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56. 15 U.S.C. §§ 1051–1129 (2010).

57. 15 U.S.C. § 1125.

58. *Id.*

59. *Id.*

60. *Id.*

61. *See Mead Data Cent., Inc. v. Toyota Motor Sales, Inc.*, 875 F.2d 1026, 1031 (2d Cir. 1989).

62. *Deere & Co. v. MTD Prods., Inc.*, 41 F.3d 39, 43 (2d Cir. 1994).

63. 15 U.S.C. § 1125.

64. *Browne*, 611 F. Supp. 2d at 1079.

65. *Id.* (emphasis in original).

*America, Inc. v. United We Stand, America New York, Inc.*<sup>66</sup> and *MGM-Pathe Communications Co. v. Pink Panther Patrol*.<sup>67</sup>

## 2. Is It “In Commerce”?

The court next addressed McCain’s contention that the statute’s use of the phrase “in commerce” required that “the defendant actually used the mark in commerce.”<sup>68</sup> Citing *United We Stand*, the court explained, “the Act’s reference to use ‘in commerce’ actually ‘reflects Congress’s intent to legislate to the limits of its authority under the Commerce Clause’ to regulate interstate commerce.”<sup>69</sup> The court’s logic is that diminishing the plaintiff’s ability to use the mark is sufficient to establish an effect on interstate commerce, and could accordingly satisfy the “in commerce” requirement.<sup>70</sup> The scope of the commerce requirement, the court explained, is broad.<sup>71</sup>

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66. *United We Stand Am., Inc. v. United We Stand, Am. N.Y., Inc.*, 128 F.3d 86, 92–93 (2d Cir. 1997). Here, the mark at issue was “United We Stand America,” a service mark initially used by Ross Perot’s 1992 presidential campaign committee. *Id.* at 88. Perot’s committee established the United Corporation and assigned its right to the words “United We Stand America” to the plaintiff, the current owner of the mark, in 1992. *Id.* The trademark became effective in 1994. *Id.* Defendant, who had previously worked with the campaign, used the mark for his own political activities once he left the campaign. *Id.* The Court held defendant’s political activities were “services” “in commerce.” *Id.* at 89–93.

67. *MGM-Pathe Commc’ns Co. v. Pink Panther Patrol*, 774 F. Supp. 869, 876 (S.D.N.Y. 1991) (issuing an injunction against the defendant-gay activist organization, finding that the plaintiff-film company demonstrated a likelihood of confusion where its trademarked name—“the Pink Panther”—was strong and distinctive, that there was a high degree of similarity between the marks, and that a lack of consumer sophistication existed. Notably, the Court looked to the non-political nature of the work in question to decide that the use by a political group made the infringement more detrimental to the trademark owner. The Court explained, “[plaintiff] MGM has developed this mark to suggest ‘carefree, comedic, non-political fun.’” Accordingly, the defendant’s “use of this very distinctive and famous name will raise questions in the minds of the public, as to whether the promoters of the comic Pink Panther are engaged in sponsoring the Patrol’s cause and efforts.” This type of confusion, the court held, is what “trademark laws are designed to avoid.”).

68. *Browne*, 611 F. Supp. 2d at 1079.

69. *Id.* (quoting *United We Stand Am., Inc.*, 128 F.3d 86 at 92); U.S. CONST. art. 1, § 8, cl. 3 (“The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”).

70. *Browne*, 611 F. Supp. 2d at 1079.

71. *Id.* (relying on the Supreme Court’s decision in *Steel v. Bulova Watch Co. Inc.*, 344 U.S. 280, 286–287 (1952), in which the Court explained, “[i]n the light of the broad jurisdictional grant in the Lanham Act, we deem its scope to encompass petitioner’s activities here. His operations and their effects were not confined within the territorial limits of a foreign nation. He bought component parts of his wares in the United States, and spurious ‘Bulovas’ filtered through the Mexican border into this country; his competing goods could well reflect adversely on Bulova Watch Company’s trade reputation in markets cultivated by advertising here as well as abroad. Under similar factual circumstances, courts of the United States have awarded relief

### 3. The Federal Trademark Dilution Act

As discussed, under federal law, dilution can be found through “blurring,”<sup>72</sup> or “tarnishment.”<sup>73</sup> Artists like Browne, who are commonly associated with a certain viewpoint, can raise a strong argument for tarnishment under the Dilution Act. Again, the use must be “commercial” and “in commerce.”<sup>74</sup> As referenced, Browne is an artist who has taken a specific political stance, in support of Obama, and for that reason sought association with Obama’s campaign.<sup>75</sup> Accordingly, McCain’s commercial “tarnished” Browne’s image as a Democrat and Obama-supporter in a way that was likely to cause dilution to Browne’s name.

The risk to Browne’s image is clear. The general public who saw Browne performing one week at an Obama rally and next heard Browne’s music in a television commercial aired by Obama’s opponent may have easily believed Browne was willing to lend his voice, and lyrics, to whomever would pay him. This perception may not matter for an artist who freely endorses a wide variety of products and services. For example, Grammy winning pop artist Beyoncé is well known for her endorsement deals ranging from bottled water to video game consoles.<sup>76</sup> If a consumer sees an artist such as Beyoncé drinking Coca-Cola in an advertisement one week and two weeks later promoting Pepsi, they will simply assume her new endorsement contract is with Pepsi. These conflicting endorsements may harm the product, in this case Coca-Cola, but it does not necessarily harm Beyoncé personally.<sup>77</sup> The problem is greater for an artist like Browne, however, who, though well known, is not associated with various

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to registered trademark owners, even prior to the advent of the broadened commerce provisions of the Lanham Act.”).

72. See *Mead Data Cent., Inc.*, 875 F.2d at 1031.

73. See *id.*

74. 15 U.S.C. § 1125.

75. See *Barack Obama for President*, JACKSONBROWNE.COM, <http://www.jacksonbrowne.com/readings/barack-obama-president> (last visited Mar. 15, 2012).

76. See Lacy Rose, *The Best Paid Celebs Under Thirty*, FORBES.COM (July 6, 2009), <http://www.forbes.com/2009/07/02/beyonce-knowles-earnings-business-entertainment-young-stars.html> (“The 27-year-old songstress turned actress turned global brand found time to release a double album (*I Am . . . Sasha Fierce*), star in two films (*Cadillac Records* and *Obsessed*), perform at both the Academy Awards and a presidential inaugural ball and embark on a 110-date international tour. She also added Crystal Geyser and Nintendo DSi to a lengthy list of endorsement deals that already included American Express.”).

77. See *Weil, S.A. v. Theron*, 585 F. Supp. 2d 473 (S.D.N.Y. 2008).

commercial products.<sup>78</sup> Browne's name is infrequently associated with endorsements,<sup>79</sup> and when it is, such as in the context of the McCain commercial, the public is more likely to assume he supports that endorsement. Beyond the possibility of viewing Browne as someone willing to sell his work to the highest bidder, the public is also likely to infer, to Browne's detriment, that he has now shifted sides and no longer supports Obama. Both possibilities tarnish Browne's image.

### III. PROPOSAL

Escaping the restrictions imposed by copyright and trademark law by claiming non-commercial use provides political figures with too much leeway to use the compositions of any musician or artist of their choosing. While use of a creative work without permission may be troublesome in any context, it is particularly problematic in the political context, where an artist profits not only from his or her musical compositions, but also from the image he or she creates.<sup>80</sup> When an artist's music is associated in a way that contradicts his or her image, the artist is harmed not only financially, but also in an intangible sense.<sup>81</sup> The solution is to prevent political figures from using an artist's work by taking the commercial definition of the Trademark Act and applying it to copyright law. It is also essential to recognize that First Amendment protection is for political speech—not speech made by politicians.<sup>82</sup>

#### A. Copyright Law

To ensure that copyright law adequately protects the works of artists who fear their integrity may be compromised, the first proposal concerns the fair use defense. Under the first fair use factor, the purpose and character of use, courts currently consider both whether the work is transformative and whether it is commercial.<sup>83</sup> Transformative works undoubtedly deserve the highest protection, as they embody the very sort of creativity Congress sought to encourage in recognizing the fair use defense.<sup>84</sup> However, regard-

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78. Brian Baxter, *Election 2008: Jackson Browne is No Fan of John McCain*, THE AM LAW DAILY (Oct. 7, 2008, 5:40 PM), <http://amlawdaily.typepad.com/amlawdaily/2008/10/jackson-browne.html>.

79. *See id.*

80. *See generally* Parks v. LaFace Records, 329 F.3d 437 (6th Cir. 2003).

81. *See generally id.*

82. U.S. CONST. amend. I.

83. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578–79 (1994).

84. *See id.* at 579.

less of the purpose and character of the use, whether the use is commercial deserves more attention and, accordingly, should be more clearly defined by the courts. Based on existing law, political speech is currently deemed non-commercial for copyright purposes, yet not all political speech is actually non-commercial.<sup>85</sup> When a politician uses popular copyrighted music in an advertisement intended to raise money, surely he is soliciting the public and engaging in commerce.<sup>86</sup> The *Browne* court specifically stated, “copyright claims based on use of a copyrighted work in a political campaign are not barred, as a matter of law, under the fair use doctrine.”<sup>87</sup> This judicial stance is important, but carries little weight when discussed only at the summary judgment stage of a case that never went to trial.<sup>88</sup> By defining what qualifies as “commercial” within the statute, further confusion can be avoided and future political, commercial uses prevented.

### B. Trademark Law

In addressing McCain’s claim that his speech was political and thus not commercial, the court agreed that political speech is non-commercial but acknowledged that non-commercial speech can fall under the Lanham Act.<sup>89</sup> This stance, although problematic, can be easily remedied. The Lanham Act explicitly states that it applies only to commercial uses in commerce.<sup>90</sup> Instead of avoiding that requirement, case law must recognize that while all non-commercial use can escape the Lanham Act, some types of political speech are commercial. As discussed above, when a politician, or any other individual, uses the channels of commerce to advertise and solicit donations, he or she is entering into the stream of commerce in order to derive commercial benefit.<sup>91</sup> McCain may be a politician, but his commercial was about raising money, rather than just about expressing his political ideas.

## IV. CONCLUSION

Unauthorized use of an artist’s work is always problematic, especially when it can affect not only record sales, but also an artist’s credibility and

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85. *See* Cal. Med. Ass’n v. Fed. Elec. Comm’n, 453 U.S. 182, 194 (1981) (discussing *Buckley v. Valeo*, 424 U.S. 1 (1976)).

86. *See supra* Part III.

87. *Browne v. McCain*, 611 F. Supp. 2d 1073, 1078 n.2 (C.D. Cal. 2009).

88. *See id.*

89. *Id.* at 1079.

90. 15 U.S.C. § 1125 (2010).

91. *See supra* Part III.

integrity. The Jackson Browne case is only one recent example of the legal issues raised when politicians use music without permission.<sup>92</sup> While Browne's case did not make it far in litigation before a settlement was reached, it is only a matter of time before a court will have to address these issues once again.

By more clearly defining the terms of the fair use exception to the Copyright Act and the scope of the Lanham Act, courts can clarify the responsibilities of parties on both sides and help deter further infringement. Specifically, artists can gain greater protection by legal recognition that political speech can be commercial, and that such commercial uses are against the Constitution's original goals of balancing the artists' rights against the rights of the public.

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92. See Johnston, *supra* note 6, at 688; see also David Itzkoff, *Politician Apologized to Don Henley for Song Parodies*, N.Y. TIMES ARTS BEAT BLOG (Aug. 5, 2010, 11:45 AM) <http://artsbeat.blogs.nytimes.com/2010/08/05/politician-apologizes-to-don-henley-for-song-parodies/>.