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## Chords of Discord -- Rock Stars Sue Politicians for Using Songs Without Permission

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In recent years, a number of highly publicized lawsuits have focused America's attention on the fact that musical works are protected by copyright law. Therefore, it would seem that everyone, especially politicians, should know that permission is required to use a copyrighted song. Well, apparently, that is not always the case.

While Republican voters used the mid-term elections to rock the ballot boxes and roll new politicians into office, a few of the Republican candidates stepped on some rock 'n' roll copyright shoes during the dance. More specifically, a few Republican candidates allegedly used, without permission, classic rock 'n' roll songs in their campaigns that led up to the mid-term elections.

If politicians have not yet figured out that copyright law protects musical works, then they better learn quickly, because the times they are a changin'. Rock stars today are less likely to sit back and permit a politician to pirate a song for a political campaign commercial or otherwise. In fact, any politician considering such a move would be wise to consider the lyrics to Bob Dylan's song "The Times They Are A Changin'" - an anthem of change for the moment whose lyrics still ring true 47 years after Dylan penned them:

Come senators, congressmen  
Please heed the call  
Don't stand in the doorway  
Don't block up the hall  
For he that gets hurt  
Will be he who has stalled  
There's a battle outside  
And it is ragin'  
It'll soon shake your windows  
And rattle your walls  
For the times they are a-changin'

## ***Running on Empty***

In 2008 and 2009, Jackson Browne set the stage for this year's rock star versus politician battles over copyrights. Browne has been recording politically charged songs since the 1960s, and he has long aligned himself with Democratic candidates, including President Barack Obama.

In 1977, Browne released an album titled "Running on Empty," which contains a composition of the same name. The album became Browne's best, reaching platinum status seven times over.

During Republican Sen. John McCain's recent run for president, he allegedly released a commercial in which he mocked Obama's energy policy and suggestion that the country could conserve gas by maintaining proper air pressure in automobile tires. Browne's "Running on Empty" played in the background.

On August 14, 2008, Browne sued McCain, the Republican National Committee (RNC) and the Ohio Republican Party (ORP) for copyright infringement, vicarious copyright infringement, false association or endorsement under Lanham Act §1125(a), and violation of California's Common Law Right of Publicity. Browne filed suit in the U.S. District Court for the Central District of California.

In his complaint, Browne alleged that the defendants broadcast the commercial on television and cable networks in Ohio and Pennsylvania without first obtaining either a license or Browne's permission. Browne further alleged that the defendants placed the commercial on Internet websites, including YouTube.com, to reach an international audience without cost.

On November 17, 2008, the RNC moved the court to dismiss Browne's complaint. Specifically, the RNC argued that the fair use doctrine barred the copyright claims. The court, however, refused to engage in fair use analysis because the facts alleged in the complaint were not sufficient to conduct a thorough analysis.

The RNC also argued that the court should dismiss Browne's Lanham Act claims because the Act only applies to commercial speech, the First Amendment and the artistic relevance test bar such claims, and Browne could not establish likelihood of confusion because the commercial clearly identified the ORP as its source. Again, the court disagreed.

In denying the motion to dismiss the Lanham Act claims, the court noted that the Act also applies to non-commercial (i.e., political) speech and that the RNC had not established that the commercial was an artistic work. Moreover, it noted that courts applying the Act to political speech had implicitly rejected the theory that claims based on such speech are barred, as a matter of law, by the First Amendment and the artistic relevance test. Finally, the court found that the RNC had not established that Browne could not prove likelihood of confusion.

On March 10, 2009, the RNC filed notice of its intent to appeal the court's denial of its motion to strike. However, while the appeal was pending, the parties stipulated to dismiss the appeal and underlying action.

As part of the settlement in 2009, McCain, the RNC, and the ORP issued a widely disseminated public apology and pledge that provided in pertinent part:

We apologize that a portion of the Jackson Browne song 'Running on Empty' was used without permission. ... The ORP, RNC and Senator McCain pledge in future election campaigns

to respect and uphold the rights of artists and to obtain permissions and/or licenses for copyrighted works where appropriate.

### ***The Road to Nowhere***

Like Jackson Browne, David Byrne is a well-known musician. He founded the Talking Heads, a critically acclaimed group that was inducted into the Rock and Roll Hall of Fame in 2002.

In 1985, the Talking Heads released an album titled "Little Creatures," which contained the song "Road to Nowhere." It became one of the Talking Heads' most popular songs.

In January 2010, just months after the RNC's public promise to obtain permission and licenses for copyrighted works, Charlie Crist allegedly used the "Road to Nowhere," without either permission or a license, in a commercial attacking political opponent Marco Rubio. At that time, Rubio and Crist, who is currently Florida's governor and who had served as Florida's attorney general under Gov. Jeb Bush, were running against one another to become the Republican candidate for one of Florida's seats in the U.S. Senate.

Shortly thereafter, on April 30, 2010, Crist left the Republican Party to run as an Independent Party candidate for Florida's U.S. Senate seat. He was allegedly far behind Rubio in the polls at that time.

On May 24, 2010, Byrne sued Crist and his campaign entity for copyright infringement, vicarious copyright infringement, and false association or endorsement under Lanham Act §1125(a). Byrne filed suit in the U.S. District Court for the Middle District of Florida, Tampa Division.

In his complaint, Byrne alleged that Crist broadcast the commercial on his campaign website and YouTube.com. He also alleged that the defendants knowingly placed the commercial on the Internet for national distribution and viewing.

The *Byrne et al. v. Crist et al.* lawsuit is ongoing, so it is not yet clear how it will shake out. At this point in time, the only thing that is settled is the fact that Rubio beat Crist in the mid-term Florida Senate race on November 2, 2010. One day before the elections, Byrne filed a first amended complaint naming the Stevens & Schriefer Group - the advertising agency that allegedly created the commercial. Byrne seeks more than \$1,000,000 in damages.

### ***Take the Money and Run***

In the interests of fairness, it should be noted that Rubio reportedly used the Steve Miller Band's 1976 hit "Take the Money and Run" for his own YouTube.com commercial attacking Crist. The video reportedly criticized Crist for not returning campaign donations when he left the Republican party to run as an Independent candidate.

In response to Rubio's commercial, Steve Miller reportedly issued the following statement:

The Steve Miller Band and Steve Miller do not endorse Marco Rubio's campaign or any political candidates and respectfully request that Mr. Rubio learn more about publishing law and intellectual property rights. I also ask that in the future he extends me the courtesy of asking permission before using my songs.

Following Miller's response, Rubio reportedly stopped using the commercial. A spokeswoman for Miller has also reportedly stated that the matter has been settled to Miller's satisfaction.

***Conclusion***

There can be no doubt that the times they are a changin'. With Americans now focused on the fact that musical works are protected by copyright laws, and rock stars more likely to enforce their copyrights against those who ignore them, politicians and their agents who create audiovisual commercials must obtain the necessary licenses and permissions to use copyrighted materials. Of course, the question of whether rock stars and politicians, both of whom are notorious for rocking established rule, can peacefully coexist in these changin' times remains to be answered.