Why Politicians' 'Theme Songs' Often Hit the Wrong Notes

[1]

Why Politicians' 'Theme Songs' Often Hit the Wrong Notes

Published: July 15, 2012 @ 2:54 pm

Election season will soon be upon us. Inevitably a political candidate will enter a large convention center to the blaring tune of some song with a catchy phrase that he or she believes embodies the policies and/or the spirit of the campaign, but which, when listened to from start to finish, likely contains numerous references to drugs or sex, or lyrics which actually support the positions of the other candidate.

Nevertheless, the use of political campaign “theme songs” will no doubt continue, as it is a tradition that dates back to at least the campaign of Andrew Jackson (song: “The Hunters of Kentucky,” sung to the tune of “The Unfortunate Miss Bailey”).

Indeed, one such song, “Tip and Ty,” which used the slogan “Tippecanoe and Tyler Too,” has been said to have sung William Henry Harrison into the presidency in 1840.

Recently, numerous artists have objected to the use of one of their songs as a political theme song by a politician with views that differ from those of the artist. Jackson Browne, for example, famously objected to the use of “Running on Empty” in a John McCain campaign ad. In fact, he sued McCain.

David Byrne objected to Florida Gov. Charlie Crist’s use of “Road to Nowhere” in a Senate campaign ad. And, to show that all objections are not lodged against Republicans, Sam and Dave demanded that Barack Obama stop using the song “Hold On, I’m Coming” during his first Presidential run.

But is the use of these songs (and, in some cases, the original artists' recordings of them) by the candidate, without permission from the copyright owner, unlawful?

The answer is, it depends.

The performance of the song as "theme music" at a campaign rally or event would not constitute a copyright infringement provided the venue has proper public performance licenses (from ASCAP, BMI or SESAC). If the venue does not have the requisite performance license, such license should be obtained by the campaign itself.

The use of music in a campaign commercial or endorsement video is a different issue.

Such a use requires a synchronization license from both the song's composer or his or her music publisher and, if the original or master recording is used (i.e., the campaign does not create a new recording of the song by an artist hired by the campaign), from the record label that owns the recording. This is true whether the commercial or video appears on TV or is posted on the Internet.

Even if the requisite synchronization or performance licenses are in place, an artist who does not want his or her music associated with a political campaign may object -- and may have an arguably valid claim -- on the grounds that the campaign is falsely implying or confusing the public that the artist endorses the candidate. Such a claim would be grounded in the federal Lanham Act.

In the Jackson Browne case, the McCain campaign created a web commercial criticizing Obama's energy policy, in which the Browne song "Running On Empty," played in the background. Browne contended that the commercial falsely suggested that he sponsors, endorses or is associated with McCain and the Republican Party.

McCain moved to dismiss, arguing that Lanham Act false endorsement claims apply only to commercial speech, and cannot be asserted where the context of the speech is political. The court rejected this argument, and further held that McCain had not established that the public could not possibly be confused as to whether Browne endorsed the Republican Party. It therefore denied McCain's motion.

An artist could also argue that such a use violates his or her right of publicity under applicable state law. In order to state a claim under California's common law right of publicity, for example, a plaintiff must show that the defendant used plaintiff's identity, to defendant's advantage (commercially or otherwise) or without consent, causing injury to plaintiff. Browne also asserted such a claim against McCain.

The court held that Browne had shown a possibility of success on the claim sufficient to withstand McCain's motion to strike it. Browne presented evidence that tended to show that his voice is sufficiently distinctive and widely known that, in light of the success of "Running On Empty," its use in the commercial could constitute use of his identity.

There was also evidence that McCain benefited from the use through increased media attention to his candidacy, and that Browne was injured in that the use of the song gave the false impression that he was associated with or endorsed McCain's candidacy, and the campaign did not pay him a licensing fee.

The Browne case subsequently settled (and McCain stopped using the song). However, the lesson is that even if the campaign and its venues have the requisite licenses, that is no guarantee the candidate will not get sued anyway, or at least receive a well-publicized cease and desist letter.

In that case, the candidate's use of the song may have the opposite of its intended effect,

in that the artist with whom the candidate has chosen to associate his or her message has made it widely known that the artist is not on board with that message. If the campaign wants to ensure it won't have an egg-faced candidate, it would be wise to vet the use of the song with the artist or his or her management prior to adopting it as the candidate's theme.

Next month we will discuss another related, time-honored election season tradition: the use of copyrighted music in political satires.

Exclude Thumbnail from River:
Don't Exclude
Published Date:
18 hours 32 min ago

Tags: **campaigns** [2], **Jackson Browne** [3], **John McCain** [4], **music** [5], **Music** [5], **politics** [6], **President Barack Obama** [7]

Source URL: http://www.thewrap.com/music/blog-post/why-politicians-theme-songs-often-hit-wrong-notes-47871

Links:
[1] http://www.thewrap.com/music/blog/frank-scibilia
[2] http://www.thewrap.com/music/articles/campaigns
[3] http://www.thewrap.com/music/articles/jackson%20browne
[4] http://www.thewrap.com/music/articles/john%20mccain
[5] http://www.thewrap.com/music/articles/music

[6] http://www.thewrap.com/music/articles/politics
[7] http://www.thewrap.com/music/articles/president%20barack%20obama