



Canadian Copyright and Campaigns - Moral Rights Edition

January 28, 2012 by Bob Tarantino

Canadian entertainment lawyers are forced to look on in wonderment (and envy?) at the plethora of entertainment law-related legal disputes which arise in the United States. Now (finally!) one with a Canadian angle - Gingrich ordered to stop using Heavy song

U.S. presidential hopeful Newt Gingrich's campaign is striking a sour note with a Montreal record label.

Third Side Music has sent Gingrich's team a cease and desist order demanding they stop using the song "How You Like Me Now" at campaign events.

The song is by the British band The Heavy, and the Third Side record label holds the rights to it.

In recent years, particularly in the 2008 US presidential campaign, assertions of copyright intended to stop politicians from making use of songs reached such a fever pitch that it was one of the primary topics of discussion on Ben Sheffner's late, lamented blog (from which this post swiped its name) Copyrights & Campaigns, and the US Center for Democracy and Technology published a 2010 report entitled Campaign Takedown Troubles: How Meritless Copyright Claims Threaten Online Political Speech. There are also some great law journal articles on the topic: for example, Erik Gunderson's "Every Little Thing I Do (Incurs Legal Liability): Unauthorized use of Popular Music in Presidential Campaigns" (14 Loy. L.A. Ent. L.J. 137 (1993-1994)) and David Johnston's "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 LJ 687 (2010)).

What is the position under US copyright law regarding the use of songs by political campaigns? First, we need to draw a distinction between using a song at a public event, like a rally, and using a song in an advertisement - the legal restrictions are different in the different circumstances. Tamera Bennett provides a handy summary of the relevant legal implications:

...so long as a campaign secures the necessary public performance license, a song can be played at campaign events without any permission from the artist, songwriter or music publisher. If Mr. Gingrich would like to incorporate the song into a video or advertisement, then his team would need to secure a master use license from the record label and a synchronization license from the music publisher.

Fairly simple: in the US, using a song at a public event requires only the securing of a valid public performance license from a performing rights organization (such as ASCAP, BMI or SESAC) by either the campaign or the venue at which the event is being held. Beyond requiring that a public performance license has been secured, it seems that an artist or record company has no other ability to restrict the use of a composition or recording at a political event. If, however, a political campaign



wants to make use of a song in an ad, then a synchronization license and a master use license would be required.

So, if that's the case, on what basis might The Heavy and Third Side Music be objecting to the Gingrinch campaign's use of "How You Like Me Now"? After all, available news reports indicate that the song was only being played at public events and not being used in ads, and it would be a pretty basic error for either the venue to not have a license or the campaign to not have acquired what is referred to as a "travelling blanket license". What gives?

Here's where the differences between Canadian and US copyright laws come into the picture (Canadian copyright law is relevant because the record label is in Canada and it was evidently a Canadian lawyer who sent the letter to the Gingrinch campaign). In Canada, the Copyright Act (Canada) gives to authors rights referred to as "moral rights". The relevant part of Section 14.1 of the Act reads as follows:

The author of a work has, subject to section 28.2, the right to the integrity of the work...

Section 28.2 of the Act elaborates on what "integrity of the work" means:

The author's right to the integrity of a work is infringed only if the work is, to the prejudice of the honour or reputation of the author,

- (a) distorted, mutilated or otherwise modified; or
- (b) used in association with a product, service, cause or institution.

Thus, under Section 28.2, the use of a composition "in association with a ... cause" which "prejudice[s]" the "honour or reputation of the author" would constitute an infringement of the author's moral rights.

Regrettably, we don't have any Canadian caselaw on point which would help us analyze the circumstances in which a Canadian author might be able to successfully claim an infringement of his or her moral rights if the author's song has been used by a Canadian political campaign. Presumably the use of a song by a politician who does not enjoy the support of the author could constitute the necessary prejudice, since Canadian courts have held that the question of whether prejudice has occurred is a subjective one - essentially meaning that so long as the author thinks their reputation has been prejudiced, and so long as the author's opinion is "reasonably arrived at", then prejudice will have been deemed to occur (see *Snow v. The Eaton Centre Ltd.* (1982) 70 C.P.R. (2d) 105). It doesn't take a very limber imagination to envision an artist who does not want their work used by a politician.



So, does that answer the question? Do The Heavy have a right to stop the Gingrich campaign from using their song? Well, we're not quite there yet. A list of just some of the issues which remain outstanding:

- first, the Gingrich campaign is operating in the US - which does not recognize moral rights for authors (or, properly, only recognizes moral rights for authors of works of visual art, such as painting and sculpture) - so someone could not assert a moral rights claim in the US
- second, the UK (from where The Heavy hail) only recognizes a more limited form of moral rights as compared to Canada - and the UK version of moral rights does not include the "used in association with a cause" branch which is found in the Canadian Copyright Act - The Heavy wouldn't suddenly acquire expanded moral rights simply because their record company was located in Canada
- third, moral rights are held by authors, not by record companies or music publishers - if anyone wanted to complain here, it would have to be The Heavy themselves (assuming they are the authors of the song in question), not their surrogates
- fourth, it would be interesting to inquire whether The Heavy (again, assuming they are the authors of the song in question) had waived their moral rights in any kind of music publishing contract they had signed

In sum, then, can The Heavy prevent the Gingrich campaign from using their song at public events? Not under US law. Could they prevent a Canadian politician from using their song at a public event in Canada? Possibly - though if they wanted to take the dispute to court they would certainly be breaking new ground in Canadian copyright law.

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