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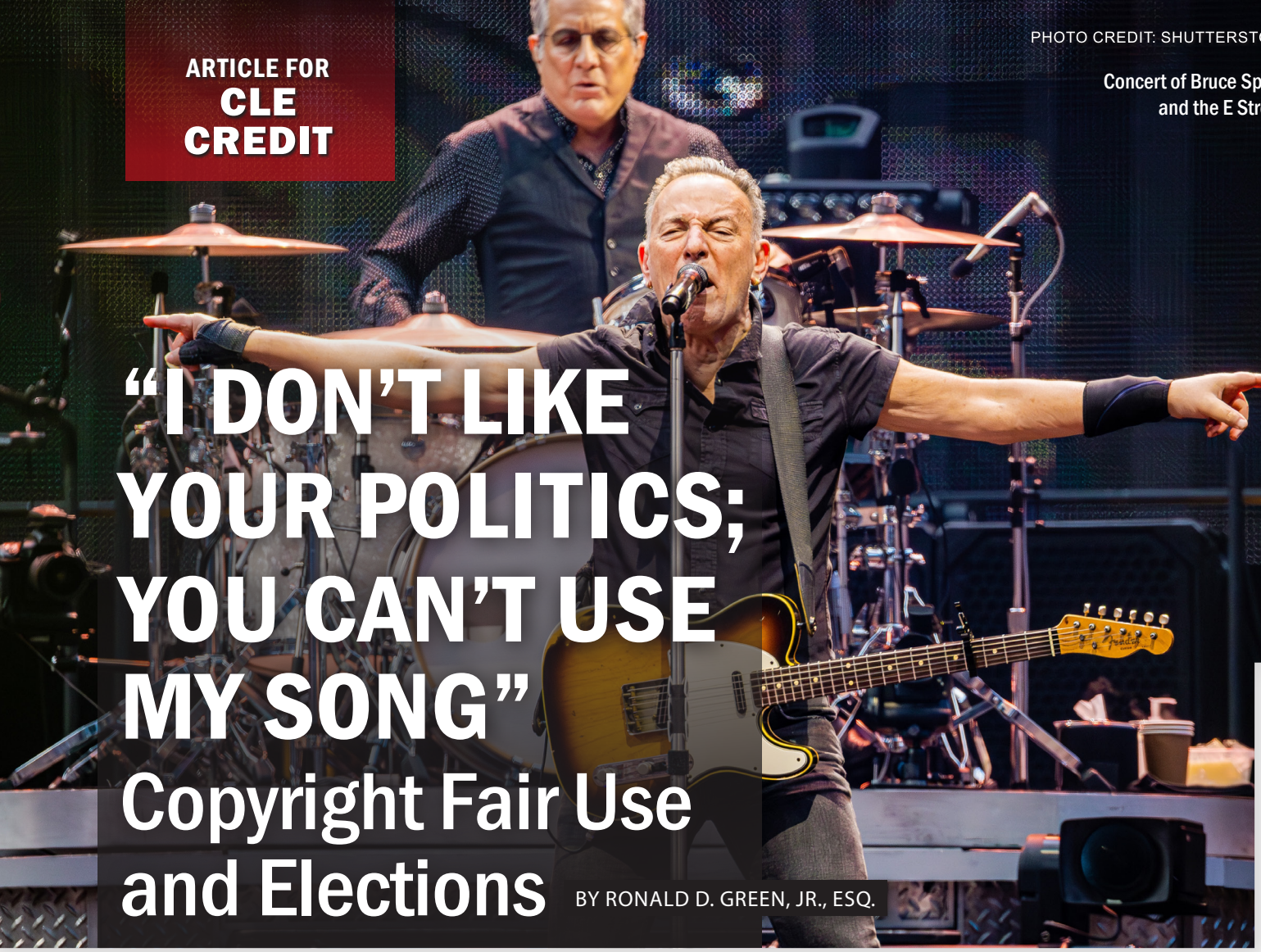

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Concert of Bruce Springsteen and the E Street Band.

"I DON'T LIKE YOUR POLITICS; YOU CAN'T USE MY SONG"

Copyright Fair Use and Elections

BY RONALD D. GREEN, JR., ESQ.

The concept of intellectual property is so integral to the American identity that our founding fathers enshrined it in the Constitution – "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."[1] The incentive to innovate is maximized by the possibility of legal security safeguarding an individual's or business' creative product, thus fueling both creativity and industry.

However, intellectual property rights are not absolute, but limited to help ensure that they do not hinder creativity. The owners of intellectual property cannot prohibit every unauthorized use. A prominent and recurring example of the rights of creators colliding with the desire of a third party to use someone else's creation without permission is the use of music in American elections.

Political campaigns move quickly and are constantly evolving. They spend a great deal of time and money getting their messages to the public and attempt to do so in a way that will resonate with voters. Often, this means getting voters to associate a politician with something that they already enjoy, such as an existing song. Typically, campaigns do not request permission prior to using a song, and just as commonly the owner of the song's copyright objects to the use because they do not want to be associated with the candidate (or with politics, period).

"At rallies, conventions, and other live campaign events, campaigns get around the need for a license by booking venues that already have a license to play copyrighted music."

American political candidates have long borrowed music to attempt to win over voters. In early American elections, campaigns borrowed classic folk songs. These included Franklin D. Roosevelt using "Happy Days Are Here Again!" in 1932 to signal the end of the Great Depression and Prohibition and Harry Truman campaigning to the tune of "I'm Just Wild About Harry" in 1948.[2]

In the 1980s and 1990s, candidates continued using popular music to engage their supporters. Examples include Ronald Reagan using Bruce Springsteen's "Born in the U.S.A.," Bill Clinton using Fleetwood Mac's "Don't Stop,"

and John McCain using ABBA's "Take a Chance on Me." Artists' reactions to political candidates using their songs have ranged from enthusiastic (Hillary Clinton using Katy Perry's "Roar") to horrified (Vivek Ramaswamy's use of Eminem's "Lose Yourself").

Is the candidate allowed to use an artist's work without permission regardless of the artist's reaction? As with so many questions, the answer is "it depends." At rallies, conventions, and other live campaign events, campaigns get around the need for a license by booking venues that already have a license to play copyrighted music. In advertisements, it often depends upon whether the campaign's use meets the definition of fair use, which permits unlicensed use of copyrighted works under certain conditions.

Singer Katy Perry appeared on behalf of Hillary Clinton in Philadelphia's Mann Center.

PHOTO CREDIT: SHUTTERSTOCK.COM

While the U.S. Supreme Court has typically considered fair use as an affirmative defense, the Ninth Circuit has treated fair use as an express right since 2015.[3] Given that the four-factor fair use test is codified by statute and that the statute specifies that fair use "is not an infringement of copyright," the Ninth Circuit's rationale is likely correct.[4]

For a political campaign's use of a copyrighted song to be considered fair use, four factors need to be weighed:

- **Purpose and Character of the Use***:* Much of the time, the principal inquiry for this factor is whether the use is commercial or not-for-profit. However, when dealing with use of music by campaigns, the most common inquiry is whether the work has been "transformed" by the candidate's use. Courts will look at how the campaign used the copyrighted song. Simply soundtracking an advertisement to a popular song is not transformative. A transformative use is one that parodies the song or imbues it with a new meaning or message.

- **Nature of the Copyrighted Work:** This factor often looks at whether a work is factual or fictional/more creative and whether it is published or unpublished. Given that writing and recording music are inherently creative endeavors, this factor usually weighs against fair use when a campaign uses a song.

- **Portion of the Work Used:** There is no categorical rule regarding the amount of a work that may be used for its unauthorized use to be considered fair. Courts often examine whether the unauthorized use contains the "heart" of the work. A political candidate is likely to feature the most recognizable portion of the work, which weighs against fair use.

- **Effect of the Use on the Value of the Work:** If the campaign used the song without permission, the artist did not receive the licensing fees they would have received if the campaign sought permission first. However, if the use was otherwise fair, then the artist would not have been entitled to licensing fees anyway. Regarding the unauthorized use's effect on the market for the work, courts do not examine whether it would damage the market but whether it would usurp it by offering a viable substitute. This often favors the campaign unless the artist can show that the campaign's use of their song threatens their ability to license it.

One recent instructive case is *Grant v. Trump*,[5] which was filed in the Southern District of New York during the 2020 presidential election. Donald Trump posted a video to Twitter depicting his campaign running like a high-speed train, while his opponent Joe Biden putters along the same track in a slow-moving handcar. About 75 percent of the ad's 55-second runtime is soundtracked to the 1980s Eddy Grant hit "Electric Avenue."

Trump's campaign did not obtain a license or permission to use the song, and the day after the video was published, Grant's attorneys sent a cease-and-desist letter. When the Trump campaign did not comply, Grant filed suit. Trump's campaign filed a motion to dismiss for failure to state a claim, arguing fair use and violation of its First Amendment rights.

Ultimately, the motion was denied. First, regarding the nature of the copyrighted work, the court held that it was clearly a creative published work, which the Copyright Act was intended to protect. However, while that factor weighed in Grant's favor, the court also stated that it gave this factor "limited weight."[6]

Regarding the portion of the work used, the court stated that this factor clearly favored Grant. The song was audible for the vast majority of the advertisement, and Trump's campaign used the intro of the song, which was "immediately recognizable," and repeated the chorus six times in the advertisement, which the court pointed out was the central focal point of the song.[7]

The effect of the Trump campaign's use on the value of "Electric Avenue" ultimately favored Grant. While the court agreed with the Trump campaign that its advertisement was not a substitute for Grant's song, it also found that the campaign's use of the song without permission could encourage other infringing uses. The Trump campaign attempted a First Amendment defense, arguing that political satire is a rich part of First Amendment tradition. The court agreed that political satire was a constitutional right but ultimately held that prohibiting the Trump campaign's use would not chill political satire, as candidates could obtain a license or make the use transformative to comply with the fair use statute.[8]

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The heart of the court's ruling looked at the first factor of the fair use test, whether Trump's use of "Electric Avenue" was transformative. Trump argued that it was because the video is satirical and had a different message than the song. The court disagreed, holding that the campaign did not modify the song or comment upon the song or its author. The campaign ad did not edit the song's vocals or instrumental tracks. Finally, while the underlying advertisement was satirical, the satire did not poke fun at the song or Grant.[9]

The Trump case is an illustrative example of how political campaigns should not use an artist's song without the artist's permission. Given that the song was already being used in a satirical video, changing the lyrics could have greatly assisted the Trump campaign in meeting the fair use burden. It could have obtained a license (if Grant would have provided one). It could have taken many steps to render its use a fair one. For fair use to apply, the user should be as creative as the original author. Protecting creative works is ultimately the very purpose of intellectual property law.

ENDNOTES:

1. U.S. Const. art. I, § 8.
2. Hall, Nate, "'I Won't Back Down': A brief history of American campaign music," *The Tufts Daily* (Nov. 7, 2023), located at <tuftsdaily.com/article/2023/11/i-wont-back-down-a-brief-history-of-american-campaign-music>.
3. *See Lenz v. Universal Music Corp.*, 801 F.3d 1126, 1133 (9th Cir. 2015).
4. *See* 17 U.S.C. § 107.
5. 563 F. Supp. 2d 278 (S.D. N.Y. 2021).
6. 563 F. Supp. 2d at 287-88.
7. 563 F. Supp. 2d at 288.
8. 563 F. Supp. 2d at 289.
9. 563 F. Supp. 2d at 284-87.

RONALD GREEN attended law school at the University of Pittsburgh. After relocating to Las Vegas, he accepted a position with Greenberg Traurig, one of the nation's premier intellectual property firms, where he practiced for eight years and headed its Las Vegas office's Internet litigation group. He now serves as an attorney for the Randazza Law Group. His enforcement efforts have included traditional trademark, copyright, and patent litigation, domain name arbitration and litigation, and seizures of infringing goods coordinated with U.S. Marshals. He has additionally protected the likenesses and rights of numerous world-famous actors, musicians, and athletes.