

THE NEED FOR SONGWRI

obtaining permission from you or your band, manager, record label, or music publisher.³ As a result, your fans now falsely believe that you and your band support this candidate.

Despite your efforts to stop this unsolicited use, the current state of music licensing prevents you from controlling political uses of your music your intellectual property. In fact, under copyright law, it is legal for all political campaigns to play any of your songs if a blanket license exists.⁴ Countless songwriters, including Jackson Browne and Eddie Van Halen, have experienced the frustration triggered by political candidates using their music without permission.⁵ I

1. See *Foo Fighters Bio*, ROLLING STONE, <http://www.rollingstone.com/music/artists/foo-fighters/biography>

BMI, <http://repertoire.bmi.com/DetailView.aspx?detail=titleid&keyid=3990060&ShowNbr=0&ShowSeqNbr=0&blnWriter=True&blnPublisher=True&blnArtist=True&blnAltTitles=True> (last visited Sept. 30, 2017).

3. Daniel Kreps, *Foo Fighters Slam McCain for Using* , ROLLING STONE (Oct. 6, 2008), <http://www.rollingstone.com/music/news/foo-fighters-slam-mccain-for-using-my-hero-20081008>.

4. See *ASCAP Payment System: Who does ASCAP Collect From?*, ASCAP, <https://www.ascap.com/help/royalties->

political uses of their intellectual property because ASCAP and BMI cannot legally deny any political campaign a public performance license.

This note argues that the consent decrees should be amended to no current licensing norms prohibit the use of U.S. copyright law to protect against unwanted political uses of musical compositions. Part II examines the ineffectiveness of right of publicity and false endorsement challenges in

B. Licensing Norms

Songwriters enter into crucial, profit-generating agreements with ASCAP and BMI for the purpose of having these PROs license their public performance rights on their behalf for a fee.³³ PROs only license out the public performance right attached to musical compositions—not sound recordings.³⁴ Additionally, PROs collect and distribute royalties that accrue

compositions.³⁵ ASCAP and BMI both operate on a not-for-profit basis, paying songwriters approximately eighty-eight cents on each collected dollar, which accounts for operating expenses.³⁶

Most ASCAP and BMI customers—not member songwriters—pay the PROs an annual blanket license fee for the right to publicly perform all musical compositions within the two repertoires.³⁷ BMI licenses almost thirteen million musical compositions owned by more than 800,000 BMI members.³⁸ ASCAP licenses more than one billion compositions owned by more than 625,000 ASCAP members, which equates to over one trillion performances annually.³⁹

Songwriters who fail to register with a PRO must collect their own performance royalties, which is a difficult, labor-intensive undertaking.⁴⁰ BMI explained that monitoring the hundreds of thousands of businesses that publicly perform music would be practically impossible for individual songwriters.⁴¹ Thus, PRO membership is an industry standard.

Political campaigns tend to hold live rallies in venues that customarily host musical performances and, thus, already employ blanket venue licenses that allow campaigns to publicly perform music while at these venues.⁴² Music users who secure blanket licenses are granted permission to use

33. See RIAA, *supra* note 9.

34. *Id.*

35. See *BMI Members FAQ: Royalties*, BMI, <http://www.bmi.com/faq/category/royalties> (last visited Sept. 30, 2017).

36. See *ASCAP Payment System*, ASCAP, <https://www.ascap.com/help/royalties-and-payment/payment/> (last visited

numerous compositions for a single fee.⁴³ ASCAP licenses to over 700,000 ASCAP customers,⁴⁴ including many music venues, sports arenas, and theaters.⁴⁵ These venues secure blanket public performance licenses in the form of venue licenses through ASCAP and BMI.⁴⁶ These blanket licenses are non-exclusive licenses that cover public performances of all musical compositions⁴⁷

While some venue licenses exclude music use during political conventions and campaign events, these narrow licenses are limited to only some convention centers, arenas, and hotels.⁴⁸ Political rallies, however, are not limited to these few locations. Thus, during rallies at venues with general venue licenses that do not exclude political uses, political campaigns are permitted to play compositions without obtaining a license themselves.⁴⁹ When this occurs, political campaigns get the benefit of utilizing music to further their political agendas without paying songwriters for using their intellectual property.

To ensure that their musical composition uses are protected under U.S. copyright law, political campaigns can also obtain blanket public performance licenses in the form of campaign licenses through ASCAP and BMI.⁵⁰ These blanket licenses allow political campaigns to publicly

wherever the campaign trail leads them.⁵¹ There is a disincentive, however, to obtain and pay for these licenses when political campaigns can instead hold their rallies at venues that already employ venue licenses that do not exclude political uses.⁵²

songwriters control because political campaigns can simply obtain campaign licenses to publicly perform music. While campaigns do pay for the licenses, they still do not request permission from songwriters to do so. Therefore, the employment of exclusions for political uses in some venue licenses does not grant songwriters the power to control how their intellectual property is used. These political exclusions also do not remedy candidates that use their music.

C.

copyright Remedy

songwriters with an opt-out ability in connection with uses of their compositions at political rallies is necessary because current licensing norms prohibit the use of U.S. copyright law to protect against these uses.⁵³

licensing, which denies these entities the power to refuse to grant public performance rights to political campaigns.⁵⁴ Instead, ASCAP and BMI must license public performance rights for all musical compositions within their repertoires to any requesting music user willing to pay the applicable rates.⁵⁵

ASCAP to license all of its musical
⁵⁶ This interpretation occurred

⁵⁷ including online music services.⁵⁸

Before this ruling, ASCAP allowed its registered songwriters to withdraw their public performance rights if requesting licensees, such as Pandora, compositions.⁵⁹

53. *See, e.g.*, Civ. 8035(DLC), 2013 WL 5211927, at *1 (S.D.N.Y. Sept. 17, 2013).

54. *See id.*

55. 2001 WL 1589999, at *4 (S.D.N.Y. June 11, 2001).

56. *Pandora*, 2013 WL 5211927, at *1.

57. *Id.*

58. Brabec, *supra* note 17, at 18.

59. *Pandora*, 2013 WL 5211927, at *2.

the Copyright Act, which grants copyright owners the exclusive right to publicly perform their dramatic works.⁷²

According to BMI , , for decades, performing rights.⁷³ standard agreement with music publishers.⁷⁴ In addition, Provis

protection to political speech,⁸⁴ protects their uses of songwriters likenesses compositions in connection with an issue of public concern constitute protected communicative news.⁸⁵ The U.S. Supreme Court stated in *Buckley v. Valeo* that the Fi

86

free discussion of governmental affairs, including discussions of

87

uninhibited, robust, and wide-⁸⁸ Therefore, the First Amendment of public issues.⁸⁹

In response, songwriters can shed light on the significant distinction that exists between political speech and the music utilized in conjunction

90

connection with public issues constitute protected political speech.⁹¹ Although a political campaign strategically chooses music that corresponds

⁹² the words that make up the musical

⁹³ Even when a political candidate speaks simultaneously with the playing of a purposefully

message.⁹⁴

objectives.¹¹⁵ The Copyright Act of 1976 expressly prohibits states from enacting copyright laws.¹¹⁶ Section 301 provides that all rights equivalent

section 106 . . .

¹¹⁷ For federal copyright law to preempt state right of publicity law, two requirements must be met: first, the subject of the right of publicity claim must be a work that comes within the scope of copyright protection, and second, the right of publicity asserted under applicable state law must be equivalent to those rights encompassed in section 106.¹¹⁸ As explained in Part I, Section A, original, fixed musical compositions come within the subject matter of copyright protection; thus, the first requirement is clearly satisfied.

claims will likely be preempted by federal copyright law because political campaigns merely perform the compositions at issue. According to the California Court of Appeal in *Fleet v. CBS, Inc.*

rights within the exclusive province of copyright when it is infringed by the mere act of reproducing, performing, distributing, or displaying the work at

¹¹⁹ Thus, when songwriters assert their rights of publicity against political campaigns for performing their compositions, this right of publicity will likely be held equivalent to those rights within section 106, including the exclusive right to publicly perform.¹²⁰

For the multiplicity of issues involved, right of publicity actions are an ineffective means for songwriters to assert control over political uses of their musical compositions at rallies. If federal copyright law does not

composition at a rally does not satisfy the elements required for a right of publicity challenge. A songwriter would also have to overcome the

the First Amendment offers broad protection for this political speech.¹²¹

C. False Endorsement as an Ineffective Remedy

False endorsement actions are also not a viable remedy for songwriters to assert control over unwanted, political uses of their musical compositions because they are largely untested and require political campaigns to repeatedly use a particular song, adopting it as the cam

political rally believed that the songwriter sponsored or otherwise approved

have found that distinctive voices merit protection as trademarks. *11. Political Trademark*

face, including proving trademark ownership and likelihood of confusion, likely remove false endorsement as a viable remedy.

endorsement challenges to political uses of their musical compositions are bound to fail due to their inability to satisfy the necessary elements of the claims and overcome the current state of First Amendment defenses. The fact that courts have yet to accept either claim by a songwriter against a political campaign that possesses a public performance license from the

ineffective and not worth litigating. Thus, with songwriters currently lacking a remedy from copyright law, right of publicity challenges, and false endorsement claims, the licensing structure for musical compositions

political uses. Part III explores how this protection can be created through

III. AMENDING THE CONSENT DECREES TO NOT REQUIRE LL OR NOTHING LICENSING

could then allow songwriters to opt out of uses of their musical compositions at political rallies. Section A explains how ASCAP and BMI could incorporate an opt

adopted as a limited opt-out provision for political uses.¹⁴⁸

PROs could simply designate within their repertoires whether particular songwriters have opted out of political uses of their musical works or not. This would make it simple for political campaigns to look up whether or not they can utilize certain compositions.

Even if a certain songwriter has opted out of political uses, a political campaign that really wants to use a composition can reach out to that songwriter for permission. As explained later in Section C, PROs are legally restricted from preventing songwriters from directly licensing out their public performance rights.¹⁵¹ Thus, even when a comprehensive opt-out provision is utilized, songwriters can still grant permission to use their compositions to approved political candidates. This gives songwriters the ability to direct who can adopt their intellectual property for political reasons.

B. Requiring Campaign Licenses

If an opt-out provision is implemented, allowing songwriters to opt out of political uses of their registered musical compositions, its language can also be incorporated into specific campaign licenses to reinforce the effect that opting out carries. For this to be effective, however, political campaigns must first be obligated to secure campaign licenses.

ASCAP and BMI should require political campaigns to obtain campaign licenses, preventing them from blindly relying on venue licenses

campaigns should be required to pay for campaign licenses and should not be allowed to freely rely on venue licenses without contributing monetarily. Campaigns pay for all other rally necessities, including insignificant elements like balloons and banners, so it does not follow that they should not have to pay for music

¹⁵² At a campaign rally, specifically, a

to real property owners. A campaign cannot hold a campaign rally on
hout permission and fair compensation,¹⁵⁵ so the
property without permission and fair compensation.

CONCLUSION

The U.S. Department of Justice must provide songwriters with the ability to opt out of political uses of their musical compositions because the