Music has always been used by candidates running for political office as a way to advertise themselves to potential voters. Throughout the years, a battle between political candidates and musicians has grown due to problems caused by music licensing. Currently, an issue in law exists between politicians who obtain proper music licenses versus musicians who have a right of publicity, stating they do not want to be associated with certain candidates’ political views. This comment analyzes the recent copyright case against former 2016 presidential candidate Ted Cruz, and the role it could play in this area of law. Additionally, this comment proposes a few solutions that would clear up the issue created by music licensing in the political realm.

Cite as Courtney Willits, Candidates Shouldn’t “Cruz” through Political Campaigns: Why asking for permission to use music is becoming so important on the campaign trail, 16 J. MARSHALL REV. INTELL. PROP. L. 457 (2017).
CANDIDATES SHOULDN’T “CRUZ” THROUGH POLITICAL CAMPAIGNS: WHY ASKING FOR PERMISSION TO USE MUSIC IS BECOMING SO IMPORTANT ON THE CAMPAIGN TRAIL.

COURTNEY WILLITS

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COURTNEY WILLITS

I. INTRODUCTION

The amount of work that goes into running for President of the United States is unfathomable. Creating a logo such as “Make America Great Again” or “TrueTed” is only the beginning to getting started on the campaign trail. It takes time, money, and creativity to successfully run a campaign, so much so that candidates employ speechwriters to create messages that captivate different audiences. Additionally, music plays a crucial role as potential candidates choose certain songs that help motivate and energize their campaigns, but its role in these campaigns can create easily overlooked problems.

* Courtney Willits 2017. J.D. Candidate, May 2017, The John Marshall Law School. B.B.A. Marketing, B.A. Music, emphasis in Vocal Performance, University of Iowa, Iowa City, Iowa. I was inspired to write about music used in political campaigns because I am fascinated by the influence music has over individuals. My two passions of music and politics were able to come together to explore more about this topic. I would like to thank my family, friends and boyfriend for their continued support while I wrote this comment. A special thanks to my mom, who sparked my interest in politics at age six when she was elected to the city council. Also a special thanks to my dad, a musician, who taught my sister and I the impact music can have in a person’s life.

1 Tory Newmyer, This is what it costs to run for president, Fortune, March 28, 2015. http://fortune.com/2015/03/28/campaign-financing/. The article explains that the startup costs alone to run for president of the United States could cost around $10 million. Newmyer explains that to get the whole operation started there might be around $5 million for overhead plus an addition $5 million for the campaigning itself including all the costs associated with raising money from individuals.

2 Donaldtrump.com. Donald Trump is now the Republican Presidential nominee for 2016


Democratic and Republican speechwriters may differ on the content of the speeches, but we agree on the value of the writing. This is why at midnight, in any political office, you find writers adding detail to a paragraph, compressing a sentence and trying to create the runs of antithesis that bring crowds to their feet.

Id.

5 ASCAP, Using Music in Political Campaigns: what you should know. www.ascap.com/about/legislation/advocacy-resources/using-music-in-political-campaign-what-you-should-know.aspx. Guidelines prepared by ASCAP. Music has been used in campaigns since the founding of our country. George Washington used “God Save Great Washington,” a parody of “God Save the King,” Franklin Roosevelt used “Happy Days Are Here Again” written by Milton Ager and Jack Yellen, Dwight D. Eisenhower used “They Like Ike” written by Irving Berlin. And Most recently, Stevie Wonder’s “Signed, Sealed, Delivered I’m Yours” was used by current President Obama during his last presidential campaign.

6 Ben Sisario, In Choreographed Campaigns, Candidates Stumble Over Choice of Music. The New York Times (Oct. 12, 2015) Many politicians risk a public shaming from popular musicians likely because of the wide gap between the two worlds of politics and entertainment. According to Jonathan Lamy, a spokesman for the Recording Industry Association of America, “There are more candidates, more media, and fewer campaign staff who are knowledgeable about these issues.”
Utilizing music as a way to motivate and grasp voters’ attention is not new. The first President of the United States, George Washington, used music to celebrate his inauguration, and then used the same music for his reelection campaign. Fast-forward to the twentieth century, presidential candidates still use music to rally potential voters, but the music transitioned from patriotic folk music to popular songs among younger generations. For example, in 1984 Ronald Reagan’s campaign used the song “Born in the U.S.A.” by Bruce Springsteen and in 1992 Bill Clinton used the song “Don’t Stop” by Fleetwood Mac, which appealed to many voters. However, problems arise when an unpopular candidate wants to use a popular song for their campaign in an attempt to appeal to more voters. This became especially prevalent in President Trump’s 2016 presidential election campaign. Today, many popular artists lean liberal, making it hard for Republican candidates to use certain songs during their campaign.

This caused numerous issues in the past for Republican candidates, including Ronald Reagan, Mitt Romney, Newt Gingrich, George W. Bush, and newly elected President Donald Trump. In the 2014 election, 74% of political donations from people in the entertainment industry went to Democrats, showing the uneven playing field. However, recent Republican Candidate, Ted Cruz, potentially opened up the court

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7 Erica R. Hendry, *From 1786 to 2016: The Evolution of the Presidential Campaign Song*, The Diane Rhem Show Blog. (Sep. 3, 2015, 11:00 AM), http://thedianerehmshow.org/shows/2015-09-03/the-role-of-music-in-political-campaigns. Additionally, music was used to reach potential voters who could not read.

8 Id.

9 Id.

10 Id.

11 Id.


13 Justin Carissimo, *A list of musicians who want Donald Trump to stop playing their music*, The Independent. (Jul 22, 2016) www.independent.co.uk/news/world/americas/us-elections/musicians-who-want-donald-trump-to-stop-playing-their-music-a7151171.html Many artists requested President Trump stop playing their music during his presidential rallies because they did not want to be associated with his viewpoints. The following is a list of artists who publicly requested he stop: Adele, The Rolling Stones, Twisted Sister, Steven Tyler, R.E.M., Elton John, Luciano Pavarotti, Queen, George Harrison.; See also Devon Ivie, All the Musicians Who Have Reportedly Turned Down an Invitation to Perform at Donald Trump’s Presidential Inauguration, Vulture, (Jan 18, 2017). www.vulture.com/2016/12/musicians-who-declined-trumps-inauguration.html

Furthermore, President Trump had a hard time gathering artists to perform at his inauguration celebration. The list of musicians who have declined the opportunity to perform include: Elton John, Celine Dion, Andrea Bocelli, Kiss, Garth Brooks, David Foster, Rebecca Ferguson, Charlotte Church, Jennifer Holliday, and The B Street Band.

14 James C. McKinley Jr., *G.O.P. Candidates Are Told, Don’t Use the Verses, It’s Not Your Song*, NY TIMES (Feb. 3, 2012). Steve Schmidt, a Republican campaign strategist, was the campaign manager for Senator John McCain in 2008 said, “When you think about every iconic song that has emotional resonance for millions and millions of American, in almost every instance, Republican candidates can’t use the song because the artist is not supportive.” Id.


16 Id.
gates, as he is being sued for using unauthorized music in his ads. This former Republican presidential candidate recently received suit for copyright infringement, as he did not obtain permission or the proper music licenses from Audiosocket, a music licensing company, to use certain songs.

Part I of this Comment provides the background, which explains the history of music used in campaigns and relevant law pertaining to these claims. They include: Copyright Infringement, Right of Publicity, the Federal Lanham Act, involving claims about using a person’s “likeness,” as well as False Endorsement. Part II analyzes the Ted Cruz case and how these circumstances are different than previous cases during political campaigns. In his case, specific technology like YouTube and cable television play a role, compared to traditional public performance events. Furthermore, Part II explores the problems with this area of law as it remains unclear what is allowed, due to no court precedent. Part III proposes the outcome the Cruz case should have on this type of issue and other avenues that can be implemented to address the issue including candidates asking permission from artists, Congress changing the federal consent decrees, courts giving guidance, and lobbying to performance rights organization for opt out provisions for political entities in their blanket licenses. Part IV concludes with an overview of the topic and why music remains important on the campaign trail.

II. BACKGROUND

Complying in copyright law is important in campaigns because it helps deter litigation. A politician must obtain a license to use a musical work at a rally or event or they violate the Copyright Act. Even if the politician holds the proper music license, cases usually settle, as litigation is not desired.

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17 Associated Press/Billboard Staff, Audiosocket Sues Ted Cruz Over Campaign Ad Music, BILLBOARD, May 12, 2016. www.billboard.com/articles/business/7370274/audiosocket-sues-ted-cruz-campaign-ad-music. Audiosocket, a music licensing company based in Seattle and also New Orleans, filed the lawsuit in U.S. District Court in Seattle against Cruz for President and the advertising firm Madison McQueen. The agreement between Audiosocket and Madison McQueen expressly barred the use of songs for political purposes. The lawsuit seeks $25,000 for each contract breach – amounting to hundreds of thousands of dollars in damages. Id.; See also; Clyde Hughes, Ted Cruz Sued for $2 Million for Lifting Songs for Campaign Ads, Newsmax (May 12, 2016 10:58 AM) www.newsmax.com/TheWire/audiosocket-sues-ted-cruz/2016/05/12/id/728511/. The lawsuit is seeking $2 million charging $25,000 for each claimed breach of contract plus damages. The Seattle Times reported that one of the ads aired on Fox Business Channel 86 times and another campaign video titled “Best to Come” has been viewed on YouTube 12,000 times.

18 Michelle Casady, Cruz Campaign Sued For Unauthorized Music In Ads, Law 360, May 10, 2016. Texas Senator Ted Cruz, whose presidential campaign is currently suspended, was sued in federal court alleging copyright infringement and breach of contract relating to its use of licensed music in his political ads on Youtube and cable television.

19 Allen Grodsky, Music in Politics – Copyright And Lanham Act In The Mix, Law 360 (June 29, 2015). www.law360.com/ip/articles/671679/music-in-politics-copyright-and-lanham-act-in-the-mix. Under the Copyright Act, the owner of a copyrighted musical work has the exclusive right to perform the work publicly. If a politician wants to use a musical work at a rally, they need to obtain a license or demonstrate the use falls within an exception to the Copyright Act.

20 Id.

A. Copyright Law

The authority of Congress established U.S. Copyright Act of 1976. The Constitution indicates that the purpose of copyright is “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”. Overtime, the “fair use” doctrine was established as a common law defense to copyright infringements and could potentially become a defense here. Fair use is a defense for a copyright infringement action that considers four factors: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion taken; and (4) the effect of the use upon the potential market. Copyright protection and the fair use exception both seek to ensure that copyright law promotes the advancement of art and sciences by restricting and permitting copies as appropriate. Restrictions occur to ensure copyright protection and different licenses are issued for different events regarding music copyright.

Since a copyright owner retains the right to publicly perform songs, a copyright violation occurs if an individual does not seek a license for a musical work or does not obtain the correct license. Candidates must obtain the correct licenses from either the permission of the artist or from a Performing Rights Organization (“PRO”). A Performing Rights Organization helps songwriters and publishers get paid for the usage of their music by collecting performance royalties, which are paid any time the artist’s music is played on radio stations, television, or performed in live venues.

controversy over unauthorized music use has created negative publicity for candidates that want to do the right thing but many times require clarification on the legal obligations relating to music use.”

22 U.S. Const. art. I, § 8, cl 8.
23 Id.
24 H.R. Rep. No. 94-1476, at 65 (1976), as reprinted in 17 U.S.C. § 107 (2006). See also Paul Goldstein, Copyright’s Highway From Gutenberg to the Celestial Jukebox 84 (1994), “Fair use is a judicial safety valve, empowering courts to excuse certain quotations or copies of copyrighted material even though the literal terms of the Copyright Act prohibit them.”
25 4-13 Nimmer on Copyright § 13.05 (2015). It is nearly impossible to dismiss a copyright infringement claim solely on the basis of fair use. A trial or summary judgment is usually required to find out other relevant facts before a decision can be made if the defendant’s use was indeed “fair.” This happened when John McCain used the defense of fair use against Jackson Browne for using the song “Running on Empty” in a political advertisement and the court denied McCain’s motion as premature.
28 17 U.S.C. § 101 (2006). Under the Copyright Act, to perform or display a work “publicly” means “(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances are gathered; or (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (3) or to the public, by means of any device or process.”
B. Performing Rights Organizations (PROs)

The Performing Rights Organizations ("PROs") provide various types of licenses depending on the nature of the use, and anyone who publicly performs a musical work may obtain a license from a PRO. Most commonly, licensees obtain a blanket license, allowing them to publicly perform any of the musical works in the PRO's catalogue of music for either a percentage of total revenues or a flat fee. When a song is broadcasted publicly, PROs are responsible for collecting royalties for songwriters and publishers. Users can also use Audiosocket, a platform where users can obtain a direct or source license directly from music publishers.

C. Moral Rights

Copyright law and contract law intend to protect artists' economic rights. Arguably the author should also receive moral rights to decide who can use their creative work. Instead, the Visual Artists Rights Act of 1990 ("VARA") is the only piece of federal legislation that deals with moral rights in the United States. The Act only pertains to "visual works of art", providing limited protection. Copyright law does not recognize moral rights since copyright law seeks vindication of economic rights rather than personal rights. Mostly recognized in European countries such as France, Germany, and Italy, moral rights protect the author beyond economic interests.


The most notable PROS are The American Society of Composers Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI) and the Society of European Stage Authors & Composers (SESAC).

32 U.S. Copyright Office, Copyright and the Music Marketplace, A Report of the Register of Copyrights, February 2015. Publicly performs includes; "terrestrial, satellite and internet radio stations, broadcast and cable television stations, online services, bars, restaurants, live performance venues, and commercial establishments that play background music."

33 Id. Many users choose to purchase a blanket license because it has broad coverage of the musical works and is simple compared to other types of licenses.

34 Id.

35 Id. A direct license is a license agreement directly negotiated between the user who intends to publicly perform the musical work and the copyright owner, who is either the publisher or the artist.

36 Gilliam v. ABC, 538 F.2d 14, 24 (2d Cir. N.Y. 1976). While personal rights are not recognized, "the economic incentive for artistic and intellectual creation that serves as the foundation for American copyright law cannot be reconciled with the inability of artists to obtain relief for mutilation or misrepresentation of their work to the public on which the artists are financially dependent.


38 The Copyright Act defines a "work of visual art" as: (1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or (2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author."

39 Id.

emphasizing the importance of keeping the artist attached to the work they created. Moral rights, if accepted in the United States, could help this issue, as musicians would be given the choice to decide and preserve the integrity of the works they create, including their reputation and personality. But due to Congress’ limited actions of moral rights in copyright claims, it seems unlikely copyright law will expand to other works. Because the Constitution does not give protection of moral rights, the effects of blanket licensing continue to allow exploitation of artists’ music. On the other hand, if a campaign legally obtains a blanket license, the artist does not have a true copyright violation claim because their economic rights have protection.

This holistic view of the relation between the author and his work is reflected, for example, in the French law under which the author’s right includes attributes of an intellectual and moral nature and also attributes of an economic nature, and in the General law according to which the author is protected in his intellectual and personal relationship with his work and also in respect of the utilization of his work.

Id. Russell J. DaSilva, Droit Moral and the Amoral Copyright: A Comparison of Artists’ Rights in France and the United States, 28 Bull. Copyright Soc’y U.S.A. 1, 3 (1980). "While the United States copyright seeks to protect primarily the author’s pecuniary and exploitative interests, French law purports to protect the author’s intellectual and moral interests, as well."

Id. at 3. Moral rights are essentially divided into four categories: (1) The Right of Disclosure, which gives the author the right to determine publication or non-publication of his work; (2) The Right of Withdrawal or Repentance, which gives the author the right to withdraw or modify a work which already has been made public; (3) The Right of Attribution, which gives the author the right to be acknowledged as the creator of the work or to disclaim works falsely attributed to them; and (4) The Right of Integrity, which allows the author to preserve his work from alteration, mutilation or even excessive criticism.

Study on the Moral Rights of Attribution and Integrity, U.S. Copyright Office, Library of Congress Federal Register, Volume 82, Number 13 (Jan. 23, 2017). Currently, the United States Copyright Office is undertaking a public study to assess the current U.S. laws recognizing and protecting moral rights. In this study, the office will review existing law on moral rights as well as any additional protection that is recommended in this area. During the late 1950s, the Copyright Office and Congress reviewed the issue of moral rights to decide whether revision was needed regarding moral rights. Specifically, Congress considered whether the current law was sufficient, or if additional laws were needed to satisfy Bern article 6bis’s. Furthermore, the majority of Congressman argued against changes to current U.S. laws "concerning an artist’s right to control attribution or any alteration to his creation, stating current U.S. law was sufficient." Referencing H.R. Rep. No. 100-609, at 33 (1988).

Lauren M. Bilasz, Note: Copyrights, Campaigns, and the Collective Administration of Performance Rights: A Call to End Blanket Licensing of Political Events, 32 CARDOZO L. REV. 305. “Without the blanket license, public performance licenses would have to be obtained directly from the copyright owner, who could grant or deny them at will.” Furthermore, blanket licenses are “easily obtained from PROs, without the copyright owner being consulted as to the context of the particular uses for which the licenses are sought” allowing for the “repeated exploitation of authors’ moral rights.” Id.

H.R. Rep. No. 60-2222, 2d Sess., at 7 (1909):

The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings . . . but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writings.
D. The Lanham Act and False Endorsement

If an artist does not want his music to be associated with a campaign, they may be able to take legal action, even if the campaign has obtained the appropriate copyright licenses in the form of right of publicity or under the Lanham Act for false endorsement.\textsuperscript{46} Under the Lanham Act, trademark infringement can occur if the use of a song by a politician is likely to create confusion in the market place that the musician endorses the politician.\textsuperscript{47} The artist may also have a claim if the use causes harm to their reputation.\textsuperscript{48} The Lanham Act is used for musicians to bring a claim of false endorsement.\textsuperscript{49} The Ninth Circuit has created an eight-factor test to determine whether a likelihood of confusion exists.\textsuperscript{50} These factors are: (1) the strength of the mark; (2) the proximity or relatedness of the goods; (3) the similarity of the marks; (4) any evidence of actual confusion; (5) the marketing channels used; (6) the degree of care customers are likely to exercise in purchasing the goods; (7) the defendant’s intent in selecting the mark; and (8) the likelihood of expansion into other markets.\textsuperscript{51}

Courts have recognized that the Lanham Act applies to noncommercial use, including political and commercial speech.\textsuperscript{52} The purpose of reducing consumer confusion supports the application of the Act regarding political speech, where confusion could in fact lead to dire consequences.\textsuperscript{53} A candidate or campaign may be able to assert a First Amendment defense against a violation for the Lanham Act, but they must meet a certain test.\textsuperscript{54} Under the Roger’s Artistic Relevance Test, the Second Circuit developed a test to address the competing interests of the First Amendment’s protection of artistic works and trademark protection.\textsuperscript{55} Under this test, “an artistic work’s use of trademark that otherwise would violate the Lanham Act is not actionable unless (1) the use of the mark has no artistic relevance to the underlying work whatsoever, or (2) if it does have some artistic relevance, unless it explicitly misleads

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\textsuperscript{46} 15 U.S. C. § 1125 (Section 43(a) of the Lanham Act.)
\textsuperscript{47} The Legal Artist, \textit{When Politicians Use Music Without Permission It’s Not a Copyright Issue, It’s a Trademark Issue (But It Doesn’t Matter Anyway)}, September 15, 2015.
\textsuperscript{48} Id.
\textsuperscript{49} Browne v. McCain, 611 F.Supp 2d. 1062, 1067 (C.D. Cal. 2009). In this case Browne argued McCain’s commercial falsely suggested he endorsed the candidate and the Republican Party “when nothing could be further from the truth.” Browne sued Defendants asserting claims for (1) Copyright Infringement, (2) Vicarious Copyright Infringement, (3) Violation of the Lanham Act (False Association or Endorsement), and (4) Violation of California’s Common Law Right of Publicity.
\textsuperscript{50} AMF, Inc. v. Sleekcraft Boats, 559 F.2d 341 (9th Cir. Cal. 1979).
\textsuperscript{51} Id.
\textsuperscript{52} Browne v. McCain, 612 F. Supp. 2d at 1131.
\textsuperscript{53} Id.
\textsuperscript{54} Id.
\textsuperscript{55} Id.
as to the source or content of the work.” The artist will not have a claim if the advertisement is an expressive work because it is barred under the First Amendment.

E. Right of Publicity

Although federal law may provide limited relief, musicians can find additional protections in state court. The right of publicity is a state law claim that provides a cause of action for misappropriation of identity for commercial exploitation. For example, in Washington, where the Cruz case is filed, the Washington Personality Rights Act states “every individual has a property right in the use of his or her name, voice, signature, photograph, or likeness.” Artists use this claim because it recognizes the right to control the commercial value of one’s name and likeness and prevents others from exploiting that value without their permission. The problem is that Congress believes the right of publicity claim is an adequate substitute for moral rights because it encompasses the protection from exploitation of one’s voice.

F. Background of Cruz Case

Due to advanced technology, the lawsuit against Ted Cruz is unique compared to other cases where artists have objected to their music used in political campaigns. Audiosocket is a music licensing company that gives visual media creators a way to quickly discover and license original music. The company’s website has made licensing easy, as they have assembled a roster of bands and composers in every style

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56 Id.; see E.S.S. Entm’t 2000, Inc. v. Rock Star Videos, Inc., 547 F.3d 1095, 1099 (9th Cir. 2008).
57 Id. See Mattel, Inc. v. MCA Records, Inc., 296 F.3d 894, 902 (9th Cir. 2002).
58 Hart v. Elec. Arts, Inc., 717 F.3d 141, 149 (3d Cir. 2013) “While it is true that the right of publicity is a creature of state law and precedent, its intersection with the First Amendment presents a federal issue.”
59 77 C.J.S. Right of Privacy and Publicity § 51 (2010); See Hart. Furthermore, “To resolve the tension between the First Amendment and the right of publicity, we must balance the interests underlying the right to free expression against the interests in protecting the right of publicity.”
62 Lauren M. Bilasz, Note: Copyrights, Campaigns, and the Collective Administration of Performance Rights: A Call to End Blanket Licensing of Political Events, 32 Cardozo L.Rev.305. “The right is part of the ‘patchwork’ protection that Congress claimed provided a sufficient substitute for moral rights.”
63 Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988). See Part I of Lauren M. Bilasz comment A call to end blanket licensing of political events, 32 Cardozo L.Rev. 305.
64 Michelle Casady, Cruz Campaign Sued for Unauthorized Music In Ads, Law 360 (May 10, 2016), available at www.law360.com/articles/794415/cruz-campaign-sued-for-unauthorized-music-in-ads. Through the use of “LicenseID” technology, the software confirmed that its watermarked version of the songs were the ones Cruz used on his ads on YouTube and Fox Business News. Essentially the technology scans the internet for watermarked files within video content and when a file is located an alert is sent to LicenseID monitors.
and genre that can be licensed with a simple click of a button.\textsuperscript{66} The advanced technology Audiosocket uses is called LicenseID, which is a program that can scan the internet and confirm if a specific, licensed track is being used for a permitted purpose.\textsuperscript{67} This could make the case against Ted Cruz an outlier, compared to previous cases where artists have complained\textsuperscript{68}, because the exact song that was downloaded by his campaign is traceable.\textsuperscript{69}

The complaint against Cruz alleges copyright infringement for two songs and details when Madison McQueen (the advertising agency used by Cruz) downloaded each track.\textsuperscript{70} Additionally, it alleges the campaign violated the license agreements by using both songs in political ads with both ads ending in text reaffirming “Paid for by Cruz for President.”\textsuperscript{71} Audiosocket CEO, Brent McCrossen, said that the intellectual property and copyright violation is “rampant” from information obtained from LicenseID, which caught Cruz red-handed.\textsuperscript{72} On September 17, 2015, an employee of the advertising company, Madison McQueen, downloaded an Audiosocket-licensed music track called “Lens” by Sarah Schachner\textsuperscript{73} On December 23, 2015, Defendant McQueen entered into Audiosocket’s standard Small Business License Agreement to use the song.\textsuperscript{74}

\textsuperscript{66} Id.
\textsuperscript{67} Michelle Casady, Cruz Campaign Sued for Unauthorized Music In Ads, Law 360 (May 10, 2016), available at www.law360.com/articles/794415/cruz-campaign-sued-for-unauthorized-music-in-ads. Stephen Vanderhoef who represents Audiosocket, the plaintiff, believes LicenseID will make this case unique because of its specific capabilities of trolling. He stated “we’ve helped this company [Audiosocket] for at least a year, and it’s not uncommon for there to be unpermitted uses and we’ve followed up and helped them enforce their rights.”
\textsuperscript{69} Id.
\textsuperscript{70} Id. Compl. ¶ 20-21 at 1.
\textsuperscript{71} Id. Compl. ¶ 3-9 at 6, 3-8 at 8.
\textsuperscript{72} Kurt Schlosser, Music-licensing startup Audiosocket sues Ted Cruz campaign over use of music in two political ads, GEEKWIRE, (May 11, 2016 11:31AM), available at www.geekwire.com/2016/audiosocket-sues-ted-cruz-campaign/. CEO Brent McCrossen also expanded on the LicenseID technology stating “There’s not really any effective technology that can track individual license and unlicensed usage and help rights holders recapture that.” Id. Further, “while big brands and corporations have settled over violations, the suit against Cruz is a first for Audiosocket because “it was so egregious.” He stated that Audiosocket had to sue because the facts were so shocking. “They got the wrong license, they put it on TV, they realized they shouldn’t have put it on TV, they called asking for permission, we said no, they didn’t come clean at that time and they kept broadcasting.” Id.
\textsuperscript{73} Id. Compl. ¶ 2-4 at 5.
\textsuperscript{74} Id. Compl. ¶ 6-8 at 5.
The music agreement between Madison McQueen and Cruz with Audiosocket expressly listed permitted uses and restrictions of the compositions and sound recordings. Specifically, the songs could not be used for political purposes or on TV - both policies that Cruz violated. On February 24, 2016, after the “Lens” ad already went live, but before its broadcast on cable television, Madison McQueen admitted it had no right to use the song on cable television. The “Victories” video contained Lens, which is now offline, but received 78,000 views on YouTube. Even after the campaign received notification of the unauthorized use, it broadcast the video at least 86 times on Fox Business News.

On September 17, 2015, Madison McQueen downloaded an Audiosocket-licensed song called “Fear of Complacency” by Brad Couture. On January 25, 2016, Madison McQueen entered into another Small Business Licensing Agreement with Audiosocket for the use of “Fear of Complacency.” Audiosocket confirmed that on January 24, 2016, Cruz and Madison McQueen began broadcasting a new Ted Cruz ad using Mr. Couture’s song. The song “Fear of Complacency” played in Ted Cruz’s ad “Best to Come” video, which received 12,000 views on YouTube. The ad, “Best to Come,” features the song as Ted Cruz is shown traveling across the country, meeting with individuals. The ad ends with a saying “America won’t accept defeat” and “America needs a trusted leader.” Audiosocket confirmed that this new ad by Ted Cruz used Audiosocket’s unique watermarked version of the song, proving it was the licensed version that was downloaded by a Madison McQueen employee.

The Defendants Cruz and McQueen moved to dismiss the complaint, but all of their defense arguments received rejection, including: (1) Plaintiff’s did not have copyright ownership; (2) Plaintiff’s cannot support their claim for liquidated copyright ownership;

75 Compl ¶ 13-26 at 5. The agreement stated Madison McQueen was allowed to use the songs for “educational, entertainment or advertising videos distributed online, through public performance,” Additionally, it prohibited them from using the songs “in any broadcast, cable, web television, video games, mobile applications or radio; and political purposes.”
76 Compl ¶ 19-26 at 6; 1-4 at 7.
77 Id.
78 Compl ¶ 17-18 at 6.
79 Compl ¶ 1-4 at 7.
80 Compl ¶ 7-11 at 7.
81 Compl ¶ 12-15 at 7.
82 Compl ¶ 3-7 at 8.
83 Compl ¶ 9-12 at 8.
84 YouTube, Best to Come, www.youtube.com/watch?v=uvX9jWK_Cqu.
85 Id.
86 Webopedia definition for watermarked:

A pattern of bits inserted into a digital image, audio or visual file that identifies the file’s copyright information. The purpose is to provide copyright protection for intellectual property that’s in a digital format. The digital watermark is scattered throughout the file in such a way that they cannot be identified or manipulated and are designed to be completely invisible.

87 Compl ¶ 3-12 at 8.
88 Leopona, Inc. v. Cruz for President, 2016 U.S. Dist. LEXIS 89706 at 8 (W.D. Wash. 2016). The court rejected Defendant’s first defense regarding the copyright claims, holding there is a reasonable inference from the Copyright Office that the artists did in fact hold the copyright to their
damages;\(^90\) (3) Plaintiff’s contract claims are preempted by the Copyright Act;\(^90\) and (4) Plaintiff’s request for injunctive relief is moot.\(^91\) Because of the denial of Defendants’ motion to dismiss, the parties will likely revisit settlement as no politician wants to litigate in court.\(^92\) Should the case move forward, a fair use defense would be probable by Cruz as previous candidates in the same position argued the use of the song in an advertisement remains fair and is transformative in nature.\(^93\)

Currently, the parties’ biggest argument is about how many breaches occurred under the license agreement, which set out a penalty of $25,000 for a breach.\(^94\) In settlement, if Audiosocket accepts $25,000 per song, it should take $50,000 or less to buy them out.\(^95\) But, if it is computed for the usage amount the song, and the fact Madison McQueen openly acknowledged they did not have the rights to use the song, the compromise could be higher.\(^96\) Due to the history of this topic with artists and political candidates, the case will likely settle.\(^97\)

compositions as a copyright application may only be filled out with the Copyright Office, and filing with the Copyright Office is the only way one can complete the application process.

\(^90\) Id. at 9. Second, the court reasoned that the Plaintiffs at this time did not need to plead an actual amount of damages as “all that is necessary is that Plaintiffs have pleaded a plausible claim and they have done so.”

\(^91\) Id. at 10. The court reasoned with the Ninth Circuit which found the “contractual rights at issue to be qualitatively different and not the equivalent of a copyright infringement claim; thus the Copyright Act did not preempt such state law claims.” Therefore, in this case, “Audiosocket seeks to hold Defendants liable for alleged breaches of their Licensing Agreements, specifically the use of the musical compositions for political purposes and cable television ads, both of which were prohibited by the Agreements.” Id. at 17. And for that reason the claims were not preempted by the Copyright Act.

\(^92\) Id. at 17. Lastly, the court rejected Defendants argument that Plaintiff’s claim for injunctive relief is moot because the Cruz campaign is over. The court held “the fact that Senator Cruz has suspended his Presidential campaign does not change Plaintiffs’ allegation that Defendants are responsible for the continued use of the musical compositions in ads that remain accessible to the public.”

\(^93\) Browne v. McCain, 611 F. Supp. 2d 1062, 1072-1073 (C.D.Cal. 2009). Under the “transformative use” test, “the First Amendment bars a right of publicity claim if the claim is based on a work that contains significant transformative elements.” See Comedy III Productions, Inc. v. Gary Saderup, Inc., 25 Cal. 4th 387, 405-6 (2001). Under this test, a transformative use contemplates actual transformation of a celebrity’s likeness so it becomes the defendant’s own expression. It is unlikely the court would find the ads for Cruz transformative as he did not alter the songs or change them significantly.

\(^94\) Compl. ¶ 23 at 8.

\(^95\) Erica Portillo, Cruz settles lawsuit with New Orleans-based licensing firm, Louisiana Record (Dec, 4 2016 11:40am). In December 2016, Ted Cruz agreed to pay $55,000 to Audiosocket for alleged copyright infringement and breach of a licensing agreement. Additionally, the Cruz campaign and Madison McQueen were required to issue a public apology that stated: “Madison McQueen and Cruz
G. How Cruz Could Have Avoided This Issue

Ted Cruz would have needed special licenses to use the songs on cable television, which he was never given. Generally if a campaign wants to use a song in a commercial or advertisement, they need to obtain a synchronization license and a master use license. If a campaign wants to play music at a campaign event, a public performance license will be needed. The issue, however, is that artists can object to a song’s use in a campaign regardless of whether the candidate has secured the proper license.

III. Analysis

Historically, Republican candidates legally obtain the correct music licenses to play popular songs, but artists object, claiming they do not want to be associated with

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98 Leopona, Inc. v. Cruz for President at 4 (2016).
99 ASCAP, Using Music in Political Campaigns: What You Should Know, Guidelines prepared by ASCAP. Available at www.ascap.com/~media/files/pdf/advocacy-legislation/political_campaign/pdf. A commercial usually involves a synchronization of music with video and the possible use of the master sound recording. If a campaign wants to use a song in this way they need to “contact the song’s publisher and possibly the artist’s record label to negotiate the appropriate licenses with them.” Id. This license is also needed for campaign videos that are posted on the Internet.
100 Id. ASCAP recommends that for campaigns with different venues it is easier for the campaign to “obtain a public performance license from ASCAP (and possibly one or both of the other two U.S. performing rights organizations if the music is licensed through one of them.) This would guarantee no matter where you have a campaign stop you would be in compliance with copyright law.”
101 Id. As a general rule, “A campaign should be aware that, in most cases, the more closely a song is tied to the ‘image’ or message of the campaign, the more likely it is that the recording artist or songwriter of the song could object to the song’s usage in the campaign.”
certain candidates and their beliefs. This also occurs outside of the political realm, including commercials, TV shows, and movies.

Part A of this section will explain a similar case in 2009 regarding presidential candidate John McCain, and a copyright infringement action filed against him. Part B will focus on why settlement between the parties strips the courts of the ability to decide precedent, leaving the issue of music in campaign events an anomaly. Part C explores the issues of why artists still remain unhappy with the candidate even if they have legally obtained a music license. Part D explains the problems both artists and candidates have with “Right of Publicity” Claims. Finally, Part E describes why the Ted Cruz case could be different than previous cases, and why it would help future disputes.


103 Mike Masnick, Beastie Boys Say They Don’t Want Music in Ads, but Fair Use Doesn’t Care, techdirt podcast. (Nov, 25, 2015, 10:55 AM), available at www.techdirt.com/articles/20131125/10182325360/beastie-boys-say-they-dont-want-their-music-ads-fair-use-doesnt-care.shtml. The Beastie Boys are known for not allowing their music to be used in any sort of advertisement regardless of whether they support the cause or product or not. For example, a toy commercial in 2013 used the Beastie Boys Song “Girls” to empower young women to get involved in engineering and technology by breaking gender stereotypes. However, the Beastie Boys sent an open letter to the company stating:

Like many of the millions of people who have seen your toy commercial...we were very impressed by the creativity and message behind your ad. We strongly support empowering young girls to break down gender stereotypes. As creative as it is... your video is an advertisement that is designed to sell a product, and long ago, we made a conscious decision not to permit our music to be used in product ads.

While it may seem admirable to not use music for advertisements, it does not matter under the law. Under the exception for “fair use” it can be used and a person does not need permission or the need to obtain a license. Fair Use is to enable people to use music without their permission in situations that an individual can create a completely different kind of work where the copyright holder most likely would not grant permission.

The Supreme Court held in Campbell v. Acuff-Rose Music, Inc. that a commercial can be fair use and if commercial use made things automatic infringement, it would destroy the idea of fair use.

104 Louisa Mellor, 17 Movies and TV Shows That Were Refused Rights to Songs, DEN OF GEEK (July 1, 2016, 10:19 AM), available at www.denofgeek.com/us/movies/soundtracks/256710/17-movies-and-tv-shows-that-were-refused-rights-to-songs. A few examples include: Frank Sinatra would not let his music be used in the popular movie Goodfellas because he did not want to be associated with the Mafia; Kings of Leon refused to let any of their songs appear in Fox’s high school musical show Glee; The band Queen did not allow their song “Another One Bites the Dust” to be used in the movie Rocky III because producers could not get publishing rights for it, and instead the famous song “Eye of the Tiger” was written for the movie instead by Survivor; UK film director Nigel Cole was refused the rights to use the song “Purple Haze” by Jimi Hendrix in the movie Saving Grace because Hendrix’s estate said they didn’t want Jimi Hendrix’s music associated with drugs and the movie was about a widow who turns her horticultural skills to growing marijuana plants in order to pay off her debts.
A. McCain Campaign Problems

In 2009, Jackson Browne sued John McCain for copyright infringement due to improper use of the songwriter’s song “Running on Empty.”\textsuperscript{105} Jackson Browne also brought a right of publicity claim against McCain, resulting in injury of misappropriation of identity for unauthorized use of his voice.\textsuperscript{106} The pertinent fact was Browne was closely associated with liberal causes and he publicly supported Democratic nominee, and eventually, President Barack Obama,\textsuperscript{107} by performing at his political rallies.\textsuperscript{108} John McCain, a Senator from Arizona, ran as the Republican Presidential candidate in the 2008 Presidential election.\textsuperscript{109} The issue remained that neither McCain, the Ohio Republican Party, nor the Republican National Committee obtained a proper license or Browne’s permission to use the sound recording “Running on Empty” in a commercial for McCain.\textsuperscript{110} The presidential party posted the commercial to YouTube.com and also emailed as a link to citizens in Ohio interested in state politics.\textsuperscript{111} The commercial aired on television and cable networks in Ohio and Pennsylvania and appeared on numerous websites.\textsuperscript{112} Discussions also occurred by national news media including MSNBC before being removed.\textsuperscript{113}

Browne began to receive numerous inquiries expressing concern about his composition in the commercial, leading him to claim that the commercial itself “falsely suggests he sponsors, endorses or is associated with Senator McCain as well as the Republican Party.”\textsuperscript{114} During the court proceeding, Browne indicated that injury resulted under the right of publicity claim and that the commercial gave a false

\textsuperscript{105}Browne v. McCain, 611 F. Supp. 2d at 1065. Plaintiff songwriter sued defendant presidential candidate, the national committee of a political party, and an Ohio political party for copyright infringement, and other related claims arising out of the defendant’s alleged improper use of the songwriter’s song in a campaign commercial for the candidate.

\textsuperscript{106}Id., Under California law, unauthorized use of a singer’s famous voice can constitute misappropriation of identity under California law.

\textsuperscript{107}Barack Obama, History.com (2009), available at http://www.history.com/topics/us-presidents/barack-obama. President Barack Obama was elected president of the United States on November 4, 2008 and became the 44\textsuperscript{th} president, who was also the first African American to be elected to that office. Additionally, he was reelected to a second term in 2012.

\textsuperscript{108}Browne v. McCain, 611 F. Supp. 2d at 1065. Additionally, Browne’s public support for the Democratic Party and Barack Obama is well-known.

\textsuperscript{109}Id. The suit also named RNC which is the Republican National Committee and a non-profit political organization based in the District of Columbia. As well as ORP, which is the Ohio Republican Party.

\textsuperscript{110}Id. at 1066. In anticipation of then-Democratic Presidential candidate Barack Obama’s visit to Ohio the week of August 4, 2008, ORP, acting as an agent for the RNC and Senator McCain, created a web video - the commercial - to criticize and comment on Barack Obama’s energy policy and his suggestion that the country could conserve gasoline by keeping their automobile tires inflated to the proper pressure. During this commercial, the sound recording of the composition of Jackson Browne’s, “Running On Empty” plays in the background.

\textsuperscript{111}Id. The commercial concludes with a black screen containing small print at the bottom that reads “Paid for by the Ohio Republican Party.” Available at www.ohiogop.org. Not authorized by any candidate or candidate committee.

\textsuperscript{112}Id. at 1067.

\textsuperscript{113}Id. After receiving a letter from Browne’s counsel, ORP removed the commercial from YouTube August 6, 2008, a few days later.

\textsuperscript{114}Id. Browne claimed associated himself with Senator McCain and the Republican Party when “nothing could be further from the truth.”
impression of endorsement.\textsuperscript{115} Additionally, the resulting injury in damages exceeded $75,000 and the evidence showed no licensing fee payment occurred by RNC for use of the composition.\textsuperscript{116}

McCain and the Republican Party argued that the First Amendment affords broad protection of political expression and therefore the claim should be barred.\textsuperscript{117} However, the court reasoned that RNC did not show that the political expression First Amendment protection bars, as a matter of law, all actions based on allegedly improper use of a person’s identity in campaign related materials.\textsuperscript{118} The case eventually settled giving no direction for future disputes.\textsuperscript{119}

\textbf{B. Settlement Does Not Give Direction for Future Disputes}

Under the terms of the settlement, McCain, RNC, and ORP jointly settled the lawsuit with Browne and paid an undisclosed sum, as well as issued a statement of apology.\textsuperscript{120} Perhaps most significant became the trio pledging they would get artists' permission in the future before using their works.\textsuperscript{121} However, this could prevent future Republican candidates from using certain music as most popular rock and pop

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\textsuperscript{115}\textit{Browne v. McCain}, 611 F. Supp.2d at 1071.
\textsuperscript{116} Id. Accordingly, the Court held that Browne established a probability of success on his Right of Publicity Claim.
\textsuperscript{117} Id. at 1072. Generally, political expression and speech used during a campaign for public office will have broad First Amendment Protection. See Buckley v. Valeo, 424 U.S. 1, 14 (1976). But if the speech is false or misleading the protection is diminished.
\textsuperscript{118} Id. Further, the court held this notion is not warranted in light of Browne's allegation that the commercial gave the misleading impression that Browne endorsed McCain's candidacy.
\textsuperscript{119} Jeff Simon, \textit{Browne, McCain campaign settle suit over use of music}, Politicalticker, Cnn Politics, (July 21, 2009), available at politicalticker.blogs.cnn.com/2009/07/21/browne-mccain-campaign-settle-suit-over-use-of-music/. The terms of the settlement with Browne call for McCain, the RNC and the ROP to “issue a statement of apology, and a pledge that in the future campaigns they will seek the permission of music artists prior to playing their songs.” The financial terms were kept confidential.
\textsuperscript{120} Ashby Jones, \textit{John McCain, Jackson Browne, Bury the Hatchet Over Use of Song}, The Wall Street Journal, Law Blog, (July 21, 2009, 5:10 P.M.), available at blogs.wsj.com/law/2009/07/21/john-mccain-jackson-ee-bury-the-hatchet-over-use-of-song. The statement released read, “We apologize that a portion of the Jackson Browne song ‘Running on Empty’ was used without permission. Although Senator McCain had no knowledge of, or involvement in, the creation or distribution of the Web campaign video, Senator McCain does not support or condone any actions taken by anyone involved in his 2008 presidential election campaign that were inconsistent with artists’ rights or the various legal protections afforded to intellectual property.
\textsuperscript{121} Id.
artists support Democrats. Ultimately, Browne claimed not a partisan issue, but instead about the rights of musicians.

There are only two instances where Democratic candidates were asked to stop playing an artist’s music. In 2000, the artist Sting, asked Democratic candidate, Al Gore, to stop playing his song “Brand New Day” only after Republican candidate, George W. Bush, also began using the song. The artist claimed he did not want to take a side in an election in a country where he is a “guest,” as the singer is from Europe. The only instance in which a musician sent a cease-and-desist letter to a Democratic candidate was in 2008, when Sam Moore, from the band Sam & Dave, asked President Barack Obama to stop playing the song “Hold On, I’m Coming” at his rallies. Despite the fact on a personal level, he found it “thrilling” that an African American was running for President.

Because the McCain case settled, the court was left without an opportunity to determine if McCain had a “fair use” defense and resolve the argument about “musician’s rights.” Was Jackson Browne really upset that his composition use went without permission for certain campaign events or that the use involved a Republican campaign event? John McCain had the opportunity to have a person cover the same song. “Running on Empty,” at a campaign event or used the cover in a commercial, assuming the venue paid and obtained a mechanical compulsory performance license.

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122 Dan Hartranft, In a Familiar Refrain, Music Industry Heavily Supports Dems, OpenSecrets.org, (April 19, 2012), available at www.opensecrets.org/news/2012/04/music-industry-heavily-supporting-d/. Of the $1.4 million in political contributions given by individuals in the recording industry so far in the past election cycle, 80 percent has go to support the Democratic party. This includes Will.i.am. of the Black Eyed Pease writing checks of $30,800 to the Democratic National Convention and $5,000 to Obama’s reelection campaign. The rapper additionally performed at President Barack Obama’s 2008 inaugural event. Barbara Streisand donated $32,500 to the Democratic National convention as well during the 2012 election cycle.


126 Doctor RJ, When politicians use music without asking permission, Daily KOS (Jan 26, 2015), available at www.dailykos.com/story/2015/1/26/1360245/-when-politicians-use-music-without-asking-permission. Moore sent Obama a gracious letter wishing him well on his campaign for the Democratic nomination but added “I have not agreed to endorse you for the highest office in our land…My vote is a very private matter between myself and the ballot box.” President Obama agreed to stop using the song.

127 Masnick, John McCain Settled Jackson Browne Lawsuit Over Song Use.

130 See id.

131 Alex Holz, How You Can Clear Cover Songs, Samples, and Handle Public Domain Works, ASCAP, (Jan. 26, 2011), available at www.ascap.com/playback/2011/01/features/limeilight.aspx. If a person is recording their own version of someone else’s previously recorded and distributed music, they need to secure a mechanical license. “A mechanical license is a ‘compulsory’ license granted to
Alternatively, if McCain used a cover, would Jackson Browne have a claim against McCain for right of publicity, arguing that use of this composition is still a false endorsement? Could he have made an argument for “musician’s rights”? Or instead, would there be no cause of action as McCain followed the proper procedure in regards to public performance of music and music licensing? These issues remain unanswered, because the case, like many others, settled.\textsuperscript{132} Instead, the case of Browne and McCain highlighted how arbitrary copyright laws are in many cases, and again the politician took the easy way out.\textsuperscript{133}

\textbf{C. Musicians Remain Upset Even If a Candidate Has Proper License}

Comparatively, McCain also faced other music challenges as the candidate received notice to stop playing the song “Barracuda” by the band Heart.\textsuperscript{134} Originally, the song became chosen because Sarah Palin, his Vice Presidential running mate, had the nickname “Sarah Barracuda” for her hardnosed style of play on the basketball court back in high school.\textsuperscript{135} Heart sent a cease-and-desist letter asking the campaign to quit using their song, after they learned of its use at a rally.\textsuperscript{136} The band issued a statement announcing the Republican campaign did not ask for permission and if they had, it would not have been granted.\textsuperscript{137} Regardless, the song remained in use again at a campaign rally during Sarah Palin’s entrance to the stage.\textsuperscript{138} Heart eventually issued another public statement claiming, “Sarah Palin’s views and values in NO WAY represent us as American women. We ask that our song ‘Barracuda’ no longer be used to promote her image.”\textsuperscript{139} However, this scenario contrasted from Ted Cruz, because the McCain campaign had legally obtained the music rights, so they did not violate the Copyright Act, and that is why the band did not file a lawsuit.\textsuperscript{140}

If the song remained “publicly performed” and the campaign obtained a blanket license from the performing rights organization of which the copyright holders of the

\textsuperscript{132}Masnick, \textit{John McCain Settled Jackson Browne Lawsuit Over Song Use}.\textsuperscript{133}Id.\textsuperscript{134}Daniel Kreps, \textit{Heart Lash Out At McCain Campaign’s Use of “Barracuda”}, Rolling Stone, September 5, 2008, available at www.rollingstone.com/music/news/heart-lash-out-at-mccain-campaigns-use-of-barracuda-20080905.\textsuperscript{135}Scott Conroy, \textit{Meet Sarah “Barracuda” Palin}, CBS NEWS, (August 29, 2008, 1:02 P.M.), available at www.cbsnews.com/news/meet-sarah-barracuda-palin.\textsuperscript{136}Kreps, \textit{Heart and Palin}, Rolling Stone.\textsuperscript{137}Id. Additionally the band stated, “We have asked the Republican campaign publicly not to use out music. We hope our wishes will be honored.”\textsuperscript{138}Id.\textsuperscript{139}Id. Additionally, the band further explained, “I think it’s completely unfair to be so misrepresented.” The band also stated that the song was originally written about the soulless corporate nature of the music business for women.\textsuperscript{140}Ryan Davis, \textit{Politicians, Musicians Clash Over Campaign Soundtracks}, Law360 (Sept. 7, 2011), available at www.law360.com/ip/articles/255605/politicians-musicians-clash-over-campaign-soundtracks. Ben Sheffner, a copyright attorney worked on John McCain’s 2008 presidential campaign. He stated “provided a license is in place, musicians who object to their song being played ‘don’t have a legal leg to stand on’ which is why no suits have been filed.”
musical works are members, there is no copyright infringement. The McCain campaign claimed to have obtained the proper license to play any music it chose at its rallies and therefore Heart did not have a legal cause of action to stop the use of the song. Merely, the musician had no cause of action for a copyright claim. Arguably, the band only sought legal action because of his own personal viewpoints as a politician. On the other hand, the band could have potentially argued a false endorsement claim.

D. A New Alternative For Musicians Lies with PROs

A blanket license allows the licensee to publicly perform any song out of the PRO catalogue of music in return for a flat fee or a percentage of gross receipts. When a campaign plays a song at a rally, they must ensure there is a public performance license covering the composition’s use. Most major public venues such as stadiums, hotels, and convention centers purchase blanket licenses from the PROs, allowing campaigns to “publicly perform” any song in the PRO catalogue. In conjunction, some campaigns also purchase their own blanket licenses in case the venue does not already have one. By obtaining a blanket license from the PRO, the licensee does not need to obtain permission from the individual copyright holder of the musical work themselves, bypassing the opportunity for the artist to give or deny permission. PROs began to promote member artists’ economic interests by allowing a wide exposure of their musical works. However, this expansive exposure, such as using blanket licenses, can be seen as exploiting their members’ personal interests by

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141 Id. Sheffiner said “As a matter of copyright law, the campaign is not violating the law if they have the rights.” This is in regards to when campaign rallies are held at places like hotels and stadiums, because the center usually holds a blanket music license already, giving the right to legally play millions of songs.


143 Ryan Davis, Politicians, Musicians Clash Over Campaign Soundtracks, Law360 (Sept. 7, 2011). Compared to other claims such as a false endorsement claim.

144 Id. Jacqueline Charlesworth is an attorney who has represented musicians in this type of scenario. She believes artist could have a claim of false endorsement if a song is played without permission at a campaign rally. “It violates the artist’s rights not to make a political statement. It’s like a First Amendment issue in reverse.” Eventually she is “hoping one of these cases will ultimately make it to court and be correctly decided.”


146 Ian Dunham & Kevin Erickson, Political Campaign and Music Licensing, Future of Music Coalition, (Sept. 9, 2015), available at futureofmusic.org/article/fact-sheet/political-campaigns-and-music-licensing.

147 Id.

148 Id.

149 Id.

150 About ASCAP, www.ascap.com/about-us. ASCAP licenses over 10 million songs and scores to the businesses that play them publicly, then send the money to their members as royalties, ensuring artists’ economic right remain protected.
hindering their voice in ways that conflict with their personal views. This outcome conflicts with the PRO’s overall goal of protecting their members’ rights.

However, PROS, specifically BMI, created a solution for artists that arise with the problems of blanket licenses. BMI created a Political Entities license with a provision that gives the BMI songwriter or publisher the ability to pull a musical work from the license per request. While the requests from artists are usually received after the song has been used, it aids in preventing further performance of that particular work. Currently, BMI is the only PRO with a policy about songs specifically used in political campaigns. This policy allows songwriters and publishers to send written notice to BMI when they object to a campaign’s use of their composition. BMI will then alert the campaign they no longer have permission under the BMI blanket license to utilize that song.

151 Rajan Desai, Music Licensing, Performance Rights Societies, and Moral Rights for Music: A Need in the Current U.S. Music Licensing Scheme and a Way to Provide Moral Rights, 10 U. Balt. Intell. Prop. L. J. 1, 1-3(2001). Specifically, at 8. The author discusses the problems of the current structure of PROs as they pose a problem for the artistic interests of musicians. While it is true the groups protect the artist from unauthorized use of their work, they broadly consent to performances that could conflict with the artist’s views. For a more detailed discussion see the author’s section on how moral rights could alleviate the problem.


We constitute ourselves a voluntary association under the name of ‘American society of composers, authors and publishers,’ for the following purposes, to wit: (a) to protect composers, authors and publishers of musical works against piracies of any kind; ... (d) to facilitate the administration of the copyright laws for the protection of composers, authors and publishers of musical works; ... (f) to promote and foster by all lawful means the interest of composers, authors and publishers of musical works; ... (i) to do any and all other acts or things which may be found necessary or convenient in carrying out any of the objects of the Society or in protecting or furthering its interests or the interests of its members.


Id. Corton learned from the President of BMI, Mike O’Neill, that the PRO had implemented this specific policy regarding music for political uses in the BMI license after the Dixie Chicks had a bad confrontation with President George W. Bush. See Gayle Thompson, 13 Years Ago: Natalie Maines Makes Controversial Comments About President George W. Bush, The Boot (March 10, 2016), available at Theboot.com/Natalie-maines-dixie-chicks-controversy/.

Specifically, the Dixie Chick stated, “We’re on the good side with y’all. We do not want this war...and we’re ashamed that the President of the United States is from Texas.”

154 Id. This scenario recently took place when President Trump used the song “We Are The Champions” during a rally in June 2016. Once the Queen’s management team contacted BMI complaining about President Trump’s use of the musical work, BMI sent a written letter to his campaign informing them that “We Are The Champions” or any other Queen song in the BMI catalogue could not be used during the campaign from that point forward.

155 Id.

156 Id.

157 BMI Music License for Political Entities or Organizations 2(a). “A specific work may be excluded from this license if notice is received from a BMI songwriter or publisher objecting to the use of their copyrighted work for the intended uses by Licensee.”

E. Problems with Right of Publicity Claims

The right of publicity is a state claim and therefore varies in different jurisdictions.159 There is no federal statute that provides for uniform protection for a claim of right of publicity.160 However, even if such a statute did not exist, it is uncertain whether an artist’s disagreement with a PRO licensed use at a campaign event would give rise to a right of publicity claim.161 Arguably, a political campaign event is seen as an advertisement for the candidate.162 Using a person’s voice to help advertise for the candidate, without the artist’s consent, can create a cause of action for a right of publicity.163 However, as seen by McCain, there are First Amendment exceptions in right of publicity statutes, including “political campaigning.”164

If a candidate obtains a blanket license they can play any of the songs in the PRO repertory, causing the repeated exploitation of the artists’ interests.165 Without PROs, candidates would have to go directly to the copyright holder, the artist, who would have the opportunity to grant or deny them at will.166 This continued to be a problem in mainly Republican political campaigns.167 The candidates obtain the proper license but the artist object because they do not want to be associated with the candidate’s viewpoints.168


162 See, e.g., Waits v. Frito-Lauv, Inc., 978 F.2d 1093 (9th Cir. 1992); Midler, 849 F.2d 460 (“car company and their advertising agency could be held liable to singer for appropriating singer’s voice by imitation in advertisement campaign because appropriation of singer’s distinctive voice was a tort in California.”)

163 Id.


165 Bilasz, Note: Copyrights, Campaigns and the Collective Administration of Performance Rights: A Call to End all Blanket Licensing of Political Events, 32 CARDOZO L. REV. 305

166 Id.

167 Walt Hickey, The Long History of Musicians Telling Republicans to Stop Playing Their Music, FIVETHIRTEIGHT (June 17, 2015). Republican candidates who have been asked to stop playing an artists music include: Ronald Reagan, George H.W. Bush, Bob Dole, George W. Bush, Mike Huckabee, John McCain, Mitt Romney, Michele Bachmann and President Donald Trump.

168 Deena Zaru and Jim Acosta, Get off my song! Stones to Trump, CNN, (Thursday May 5, 2016, 9:58 P.M. ET), available at www.cnn.com/2015/05/05/politics/rolling-stones-donald-trump. In the 2016 Presidential race President Donald Trump’s campaign was publicly criticized for using songs the artist never approved, even if he did possess the correct licenses. After he used the Neil Young song, “Rockin
Most recently, in the 2016 Presidential campaign, Republican Presidential nominee, and now President, Donald Trump, used the Rolling Stones song, “Start Me Up” and the band began publicly complaining about the use. However, President Trump obtained the necessary blanket license to use the song at a public event and the question remains: does the artist really have a right to ask them to stop? Many complaints arise when the candidate plays a song at a campaign rally, but the trouble arises when the song is used in a commercial, as royalties become an issue. Some experts have expressed beliefs that even if the candidate has the necessary license, the artist still has a claim for right of publicity.

Alternatively, other individuals believe that the required fee for the license and the publicity from exposure is actually good for the artist. This argument stems from

in the Free World” Young’s manager released a statement claiming, “Donald Trump was not authorized to use ‘Rockin in the Free World’. Neil Young, a Canadian Citizen, is a supporter of Bernie Sanders (Democrat) for President of the United States.” Furthermore, the band Aerosmith’s front man Steven Tyler sent President Trump a cease-and-desist letter asking him not to play “Dream On” at his rallies. President Trump publicly responded by tweeting “Even though I have the legal right to use Steven Tyler’s song, he asked me not too. Have a better one to take its place!” While then following it up with another tweet stating “Steven Tyler got more publicity on his song request than he’s gotten in ten years . . . .” (tweets sent on Oct. 14, 2015, 1:18 P.M.).

Additionally, on January 24, 2015 Wisconsin Governor, Scott Walker, a presidential candidate, used the song “I’m Shipping up to Boston” by the Dropkick Murphys. The band later tweeted at Walker, after hearing their song in his introduction, “Please stop using our music in any way... Love, Dropkick Murphys.”

Id. The Rolling Stones publicist, Fran Curtis, issued a statement to CNN explaining, “The Rolling Stones have never given permission to the Trump campaign to use their songs and have requested that they cease all use immediately.” To which President Trump responded that was “no problem” because he “likes Mick Jagger.”

Travis M Andrews, The Rolling Stones demand Trump stop using its music at rallies, but can the band actually stop him?, The Washington Post’s Morning Mix, May 5 2016, available at www.washingtonpost.com/news/morning-mix/wp/2016/05/05/. Experts urge political campaigns to stop using songs when an artist makes a request to stop as it can be bad for both parties. Sherin Siy, a copyright law expert told NPR in an interview, “The optics of it are so bad that there’s really not much point in continuing to use a piece of music when the musicians really don’t want you to.” Speaking on the artists viewpoint, Jon Landau, Bruce Springsteen’s manager, told Rolling Stone magazine, “The artist gets drawn into the question of whether or not to take any action, and run the risk of giving the politicians some additional publicity, or [allowing] the public for one second to think that someone like Neil Young was endorsing Donald Trump.”

Id. It is important to acquire permission if the song is going to be used in a commercial because royalties for that specific usage will have to be paid to whoever owns the song recording, and this includes YouTube. Copyright lawyer Lawrence Iser expanded on the issue explaining, “Just as if you were making commercials for any product you can think of...you want to make any kind of audio/video work that contains music — you do need to have licenses, you do need to have permission.” Further he stated his belief, “It’s uncontested in the political realm. Even if Donald Trump has the ASCAP right to use a Neil Young song, does Neil have the right to nevertheless go after him on right of publicity? I say he does.”

Id. Furthermore, Lawrence Iser, explained, “Because nobody sued, the candidates always thought they could get away with it, and they still think that today. What do you get? You got some publicity. You got a takedown letter. Typically, campaigns would stop using the piece.” Additionally, ASCAP states a general rule for campaigns, “The more closely a song is tied to the ‘image’ or message of the campaign, the more likely it is that the recording artist or songwriter of the song could object to the song’s usage in the campaign.”

Jazz Shaw, Hot Air. Rolling Stones and Donald Trump. “If the campaign paid for the rights and you already pocketed the cash you should probably use some of your profits to buy ear plugs if you don’t like it.”
the fact that once an artist licenses their music to a PRO, they essentially lose their voice to decide who can play their music.\textsuperscript{174}

\textbf{F. How the Ted Cruz Case is Different}

The case against the former 2016 Presidential candidate, Ted Cruz, remains an outlier against the history of this issue. In this case, Audiococket’s Standard Licensing Agreement expressly states that use of licensed songs for any political purpose is prohibited.\textsuperscript{175} Furthermore, the music publishing company’s use of License ID technology is able to identify infringements to enforce the artists’ intellectual property rights.\textsuperscript{176} This case is unique, because there is an express breach of contract, as two compositions from Audiococket’s repertory are used in Cruz’s campaign commercials.\textsuperscript{177} If the case goes to trial, the court could determine if artists have a right of publicity claim when a candidate uses an artist’s song without permission.\textsuperscript{178}

\textbf{IV. PROPOSAL}

The Proposal section will focus on how to effectively fix the problem of disputes between artists and political candidates by adding a license or creating court precedent. The current procedures are not effective in curbing the growing issue of copyright infringement in political campaigns, as politicians are not asking for permission.\textsuperscript{179} The problem is Republican candidates are not asking for this permission\textsuperscript{180} because the likelihood that the artist will allow them to use the song is

\textsuperscript{174} Id. In the article he expresses beliefs for the candidates. He argues that in relation to the artists: “You wanted to make money off your songs, but when you license out the music in blanket form you essentially lose control over who plays it.” Lastly, “If your goal is to sell as many CDs as possible do you really want to tick off your potential market by poking the finger in their eye?”

\textsuperscript{175} Leopona, Inc. v. Cruz for President, 2016 U.S. Dist. LEXIS 89706, at *3 and *5 (W.D.Wash 2016).

\textsuperscript{176} Compl. ¶ 16-18, 22-23 at 4.

\textsuperscript{177} Compl. ¶ 20-23 at 1, 13 at 8, 1 at 9.

\textsuperscript{178} Monica Nickelsburg, Ted Cruz settles suit with music-licensing startup Audiococket over songs in political ads, Geekwire (Nov. 14, 2016). Cruz and Audiococket reached a quick settlement due to the License ID technology used by Audiococket. CEO of Audiococket Brent McCrossen said “The technology was so incredibly damning as evidence, in and of itself, that this use was infringing and we drove this thing to a settlement in an incredibly expedient manner.” Further, “I think it put a really positive and necessary light on the rampant nature of copyright infringement.”

\textsuperscript{179} Using Music in Political Campaigns, What you Should Know; Guidelines prepared by ASCAP, www.ascap.com/-/media/files/pdf/advocacy-legislation/political_campaign.pdf. In a document prepared by ASCAP, the company suggests the campaign can protect itself against claims of Right of Publicity and copyright by contacting the management for the artists and songwriters of the songs in question and obtain their permission. Additionally, they suggest a separate negotiated license might need to be required by the publisher of the composition and if the song is used, the record label that controls the master recording.

\textsuperscript{180} Becca Longmire, 'She didn't give permission' Adele slams Donald Trump for using her music in campaign, Express Online (Feb. 1, 2016; Monday 3:53 PM GMT). President Trump had been playing Adele’s music, specifically the song ‘Rolling in the Deep’, at his warm up rallies because he is a big fan and has even attended her concerts. However, the spokesperson for Adele said that she never
very low. Republican candidates are even obtaining the correct music licenses to play a song, but artists remain upset they never asked for permission. On the other hand, Democratic candidates like Hillary Clinton are not having any problems with music choice and one famous pop artist, Katy Perry, even offered to write a theme song for her.

A. Asking for Permission Could Have its Benefits

Around 80% of the entertainment industry supports Democrats. Asking for permission may seem trivial to a candidate if they believe they will be turned down regardless, but candidates should be wary as they could possibly end up in a lawsuit.

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181 TV/Movies/Music: Long-Term Contribution Trends, available at www.opensecrets.org/industries/totals.php?cycle=2014&ind=802. The website depicts a chart showing the amount of donations to Democrats and Republicans from the TV, movies and music entertainment industry. In 2016, the amount of donations to Democrats totaled $42,911,748 accumulating 85% to Democrats. Donations to Republicans totaled $7,966,715 and was 16%.

182 Jeramey Johnson, Musicians go for Democrats...again, THE DAILY Caller (Apr. 27, 2012 12:50 PM), available at dailycaller.com/2012/04/27/musicians-go-for-democrats-again/. The article states that, of the $1.4 million in individual political contributions from the recording industry in the 2012 election, 80% has gone to support Democrats.

183 Id. Comparatively, when Hilary Clinton launched her campaign in New York she did not have an official tune, and popular artist Katy Perry offered to gladly write one. Specifically, the artist tweeted over social media on Twitter, for the whole world to see “I told Hilary Clinton that I would write her a 'theme' song if she needs it.” To which Hilary responded over Twitter, “Well that's not a Hard Choice. You already did! Keep letting us hear you Roar.”

184 Rob Boston, Bitten By A Tiger: Huckabee Must Pay For Unauthorized Use of Song, Americans United, Wall of Separation, June 28, 2016, available at www.au.org/blogs/wall-of-separation/bitten-by-a-tiger-huckabee-must-pay-for-unauthorized-use-of-song. In 2008, presidential candidate Mike Huckabee, took the stage at a campaign rally to the song “Eye of the Tiger” but there was a slight problem, as no one in Huckabee’s campaign thought to ask members of the band Survivor for
Here is a good example: Republican candidate Mitt Romney, asked musician, Kid Rock, if he could use his song “Born Free” as his theme song in the 2012 presidential race and he gladly granted him permission. Candidates are advertising themselves and want to align with the fans of certain music hoping to resonate with potential voters. This is why a candidate’s music choice on a campaign remains important. However, Kid Rock is an outlier among artists as he announced his music is available to any candidate of any political persuasion because “anyone running for president is trying to help the country.” The key point is that he asked. Similarly, while a candidate has not played any of artist Ziggy Marley’s music on the campaign trail, his ideas embody the same of Kid Rock – which is music is for anyone and he plays for the people and not for the policy. While asking may seem superficial, both Republican and Democratic candidates should respect the rights of the artist and take the extra step to ask for use of a song. In order to fix the problem, future political candidates should at least attempt to reach out to the artist for their permission.

permission to use the song. The lawsuit over the use of the song was settled out of court and Huckabee had to pay $25,000.

Lawrence Iser, Campaign Music 101: Ask first!, POLITICO.COM (July 6, 2012 Friday 10:47 AM EST). Mitt Romney was able to avoid a storm of negative press, potential cease-and-desist letter and even a hard lawsuit by reaching out to the artist before appropriating the musician’s song for campaign events.

Id. Candidates are essentially advertising themselves to potential voters, which is why their song choice is important. When Romney decided to go with Kid Rock, he was saying, “I like Kid Rock, so if you like Kid Rock you should like me too.”

Id. Kid Rock, compared to other artists, allow any candidate regardless of political affiliation to use his music.

Id. Lawrence Iser, an intellectual property attorney, has resolved many copyright cases including Jackson Browne against John McCain, and David Byrne against Charlie Crist, for unauthorized use of music in campaign ads. He believes that Romney was on the right track when he asked for permission. Also, candidates should respect artists and copyrights, and can solve some of the problem by simply by asking the artists for permission.

Ryan Pearson, Marley puts politics aside to play for people, The Journal Gazette, (June 12, 2016 1:01AM) In an interview with Ziggy Marley, journalist Ryan Pearson asked him about other musicians boycotting North Carolina due to their choices about limiting protections to LGBT people and what Ziggy thought about that issue. Ziggy replied, “We play music for anyone, mon. Music come for freedom, so we have to give them the music, no matter who or what them saying...We can’t boycott the people.” And that “The people is who we are playing the music for, not for the state or the government – the people. So we come for the people, not for the policy.”

Doctor RJ, When politicians use music without asking permission, DAILY KOS (Jan. 26, 2015). Rapper K’Naan object to Romney’s use of his song “Wavin’Flag” and threatened legal action. He later released a statement “I have not been asked for permission by Mitt Romney’s campaign for the use of my song.” Artists Cyndi Lauper and Same Moore asked Democrats and the Obama campaign to stop using their songs. Lauper’s song “True Colors” was used in an Obama commercial to attack opponent Mitt Romney. She stated she was upset she was “never asked for approval.”

Iser, Ask first!. Iser, a copyright attorney, stated “The political establishment still hasn’t quite accepted the fact that campaigns can’t just use any song they think might work for them. They have to respect artists and copyrights: They just have to ask.”
B. Change the Federal Consent Agreements that Govern ASCAP and BMI

Obtaining permission is a choice the candidate should attempt, but many believe possessing a proper music license to play the song is enough. Some intellectual property attorneys believe that this type of dispute will continue unless federal action is taken to change the licensing laws through PROs like ASCAP and BMI by changing the consent agreements.

The National Music Publishers’ Association (NMPA) publicly complained about the change for these types of federal laws. Their main argument is against blanket licenses issued by PROs because they give songwriters little ability to refuse permission to someone who wants to license their song. Also, the PROs, such as BMI, operate under close antitrust scrutiny, which requires them to license its music to all comers on a nondiscriminatory basis. The NMPA argues that the consent agreements governing ASCAP and BMI are outdated and should be changed to give songwriters more of a voice in who plays their music. Overall, this would give musicians opportunity to retain their rights and decide who can use their music. Critics may disagree though, arguing if the candidate obtained the correct license, they should be allowed to use the music as they wish.

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196 Id. David Israellite is the president of the National Music Publishers’ Association, which is a group that publicly complains about what they believe are unfair regulations over music licensing.
197 Id.
198 Id. The blanket licenses are causing problems. President Trump obtained a blanket license to use a song by Aerosmith. The lead singer, Steven Tyler, was upset because President Trump never asked permission so he threatened to file a suit claiming false endorsement. Attorney, David Israellite believes this cycle will continue if federal laws are not implemented. Specifically, he said “The dispute between Mr. Tyler and Mr. Trump pointed to the need to change the federal consent agreements that govern ASCAP and BMI.”
199 Timothy B. Lee, Queen Want Donald Trump to stop to using their music. But the law might be on Trump’s side, Vox (July 19, 2016), available at www.vox.com/2016/7/19/12226858/donald-trump-queen-copyright. The non-discriminatory basis means the band does not have the option of licensing its music to BMI with a “no Donald Trump” or “no Republicans” restriction. Therefore “If the Republican Party paid for a BMI license, it can use any music Queen has licensed to BMI whether Queen likes it or not.”
200 Clara Kim, Songwriters’ Losing Out in the Music Streaming Gap, Roll Call (Oct. 28, 2015 5:00 AM), available at www.rollcall.com/news/home/songwriters-losing-out-in-the-music-streaming-gap-commentary. The article explains that songwriters are hamstrung by a regulatory process that was written into Federal law more than 70 years ago. Moreover, The agreements with the U.S. Department of Justice, governing this process for both ASCPA and BMI, known as consent decrees, limit how songwriters negotiate performing rights royalties – a source of income they are more heavily dependent upon as the shift from downloads to streaming continues.”
201 Id. “A music licensing system that reflects advances in technology and today’s competitive landscape would better serve everyone, allowing songwriters to continue creating the music that is loved by so many.”
202 Ryan Davis, Politicians, Musicians Clash Over Campaign Soundtracks, Law 360 (Sept. 7, 2011), IP layer Sheffner argues if a campaign has the correct license, the artist does not have a “legal leg to stand on.” Chris Arledge, a partner who represented candidate Chuck Devore, argues “the use of copyrighted works should be permissible in political ads unless it can be shown to have destroyed the value of the underlying work.”
C. The Court Could Set Precedent

The Ted Cruz case is important because his case involves an express breach of contract that specifically stated the songs could not be used for political purposes or campaigns.\(^{203}\) Other cases have settled or the candidate stops using the musicians' song per request because they do not want to deal with the bad publicity the artist ensues.\(^{204}\) Both lawyers and copyright experts have stated that the law is unclear, leaving a gray legal area to deal with complex types of music licenses because there is no decision from a court saying what is right and wrong.\(^{205}\)

While this has been an ongoing battle between politicians and musicians for many years, it grew to become more and more prevalent in a post-Napster\(^ {206}\) era where artists are more in tune with their intellectual property rights.\(^ {207}\) The claim Audiosocket filed against Ted Cruz could give the court an opportunity to set a course for guidance in the future. A clear breach of contract and copyright violation remained, as Ted Cruz and his political staff did not obtain the correct licenses.\(^ {208}\) Additionally, the contracts entered into expressly prohibited use for political purposes.\(^ {209}\)

The only other case that made it through court, before settling behind closed doors, was Browne v. McCain.\(^ {210}\) Again, because the case settled, the court did not get an opportunity to clearly state what political campaigns can and cannot do when it comes to music licensing.\(^ {211}\) The cases are similar in the fact they both deal with

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\(^{203}\) Leopona, Inc. v. Cruz for President, 2016 U.S. Dist, LEXIS 89706 (W.D.Wash. 2016).

\(^{204}\) Sisario, Candidates Stumble. Both lawyers and copyright experts explain these types of disputes rarely make it to court because the candidate will simply stop using the song to avoid bad publicity; See also Ryan Davis, Politicians, Musicians Clash Over Campaign Soundtracks, LAW360 (Sept.7, 2015) Attorney Sheffner explained when an artist publicly complains the majority of campaigns will stop using the song because “campaigns are trying to win elections. They’re not trying to make interesting copyright law.”

\(^{205}\) Id. Experts in the area believe that there is a legal gray area over licensing rules for music in political campaigns. Furthermore, because cases rarely make it to court, and if they do they settle, leaves the law “somewhat unclear” on what rights candidates and musicians may have when it comes to using songs.

\(^{206}\) Margaret Rouse, Napster Definition, TECHTARGET (Sept., 2005), available at Searchcio.techtarget.com/definition/Napster. “Napster is a controversial application that allows people to share music over the Internet without having to purchase their own copy on CD. After downloading Napster, a user can get access to music recorded in the MP3 format from other users who are online at the same time.”

\(^{207}\) Iser, Ask first! Politico. Iser believes that artists are becoming more and more attuned to their rights. He states, “Artists and songwriters want to protect their intellectual property rights and ensure they are not involuntary endorsers of candidates and their messages.”

\(^{208}\) Compl. ¶ 13-26 at 5, 16-26 at 6, 19-26 at 7, 3-12 at 8.

\(^{209}\) Id.

\(^{210}\) Browne v. McCain, 611 F. Supp.2d at 1065.

\(^{211}\) David C. Johnston, 27 CARDOZO ARTS & ENT L. J. 687 Note and Recent Development: The Singer Did Not Approve This Message: Analyzing the Unauthorized Use of Copyrighted Music in Political Advertisements in Jackson Browne v. John McCain. The note states the settlement that was reached with Jackson Browne and John McCain “deprived the court of an opportunity to clearly state that presidential campaigns cannot legally use copyrighted music in advertisements without authorization.” The note argues that until courts correct the behavior, presidential candidates will continue to “flout state and federal law in their quest to become America’s chief law enforcers.”
The unauthorized use of musical compositions in commercials. If the courts never get a chance to issue a decision, the cycle could continue between artists and candidates, due to the complexities of the law. Despite the need for a precedent, the courts do not have much control over this. The parties ultimately will decide if the dispute should settle or continue on in litigation.

D. Lobby PROs to Adopt “Political Entities” Clauses Similar to BMI

First, the songwriters and publishing community need to be made more aware that BMI offers a “political entities” license. From the ongoing disputes, it seems as though artists do not have knowledge of BMI’s opt-out provision or they would be taking greater advantage of it. This provision allows the songwriter or publisher to send written notice to BMI when they learn their song is being used in a campaign they are not comfortable with, and BMI will put the campaign on notice they no longer have permission under the license to use that song. The music industry should lobby other PROs to create political-use clauses in their blanket licenses, allowing every songwriter and publisher the opportunity to retain their voice in politics. This would help to combat the problem because it gives artists full written approval rights over their use of music in politics so they are not associated with opposing views. For example, the political entities clause became invoked after the band, Queen, learned that President Trump used their song “We Are the Champions at a campaign rally. Queen’s management team contacted BMI, who then sent a letter to President Trump’s campaign stating “We Are the Champions” or any other Queen song in BMI’s repertoire

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212 Compl. ¶ 13-26 at 5, 3-9 at 6, 19-26 at 7, 3-12 at 8. The complaint filed by Audiosocket is about Cruz for President campaign using unauthorized songs in commercials that was broadcast nationally and on YouTube.

213 Ben Sisario, In Choreographed Campaigns, Candidates Stumble Over Choice of Music, NY TIMES (Oct. 12, 2015) Those cases that do reach the courts usually do not end in a judgment, leaving the law unclear on what rights candidates and musicians may have. Furthermore, the problems seem to continue, in part because of the legal complexities.

214 Ryan Davis, Politicians, Musicians Clash Over Campaign Soundtrack, Law360 (Sept. 7, 2011) Attorney Lincoln Bandlow stated, “These cases tend to go away really easily” as “the politicians tend not to fight too hard” and will just stop playing the song. This is due to politicians wanting to avoid any controversy because they are ultimately trying to win an election.


216 Id. The BMI Grant of a license states: “BMI grants a non-exclusive license to perform during Events or Functions . . . of all musical works of which BMI shall have the right to grant public performance licenses . . . provided, however, that a specific work may be excluded from this license if notice is received from a BMI songwriter or publisher objecting to the use of their copyrighted work for the intended uses by Licensee.”

217 Id.


219 Id. This policy is very supportive of the songwriter’s objections to uses in political settings.

220 Id.
could not be performed any longer in the campaign.\textsuperscript{221} Further, the legal recourse for artists’ is limited when a candidate holds a blanket license.\textsuperscript{222}

Comparatively, other critics have argued against such “opt out” clauses, stating they are not needed and are unusual.\textsuperscript{223} They believe that licensing under a PRO is “all in or all out” because it is a compulsory blanket license under a consent decree from the U.S. Justice Department and blanket licenses by definition do not let a person opt out.\textsuperscript{224} They have criticized use of the opt-out provision because of the use of blanket license.\textsuperscript{225} The Quicken Loans Convention Center, where President Trump’s rally took place had a blanket license to play songs in BMI’s catalogue, with no such opt out clause making BMI’s opt-out provision confusing.\textsuperscript{226} Theoretically, President Trump could go to any other venue with a blanket license and play the Queen song without infringing because Queen already assigned the rights of their songs to BMI.\textsuperscript{227} In this view, once licensing rights are assigned to a PRO, anyone can use the music for any purpose if they obtain the correct license.\textsuperscript{228} However, the BMI political entities clause acts as an exception to a blanket license use, allowing artists to retain their rights.\textsuperscript{229}

Overall, PROs create new licenses for political entities or add in political use clauses to their blanket licenses, similar to BMI’s policy and opt-out provision.\textsuperscript{230} While the artists’ requests transpire after the performance has occurred, it would help prevent further use of the artist’s work.\textsuperscript{231} If artists do not want their music to be associated with certain political views, this avenue is the most helpful and available as it specifically targets political entities.\textsuperscript{232}

\textsuperscript{221} Id.
\textsuperscript{222} Id. Corton explains that legal recourse is limited because “the financial harm may not be much when a song is performed at a rally, yet the cost of mounting a case is quite high.” Further, use of the Lanham Act are usually untested in court as most lawsuits wind up settling.
\textsuperscript{223} Sasha Moss, Give Trump a Break (on his campaign, at least), Bloomberg View (Sept. 2, 2016), available at www.masslive.com/opinion/index.ssf/2016/09/give_trump_a_break_on_his_camp.html.
\textsuperscript{224} Id. Moss argues that it is unusual for PROS to allow an exception because “under U.S. copyright law, campaigns can use music as much as they want at their events without explicit permission of the artist, so long as they have purchased a ‘blanket license’ from a PRO.”
\textsuperscript{225} Id.
\textsuperscript{226} Id.
\textsuperscript{227} Id. Further, Moss argues that artists have other avenues to pursue unwanted use of their songs, including the right of publicity, the federal Lanham Act, and false endorsement.
\textsuperscript{228} Id. Under this argument, blanket licenses should remain broad without any exceptions because PROS “facilitate low-friction transactions, streamline the distribution of royalties and help create a broader market for an artist’s work.” Essentially blanket licenses help artists get their music widely distributed at different venues including bars, stores, and digital and broadcast radio.
\textsuperscript{229} Monica Corton, Why Do Many Politicians Use Music Without Artist Consent, Brian Solis (Aug. 19, 2016).
\textsuperscript{230} ABC News Radio, Performing Rights Organization BMI Says RNC No Longer Will Be Authorized to Play Queen Music, (July 20, 2016), available at Abcnewsradioonline.com/music-news/2016/7/20/performing-rights-organization-bmi-says-rnc-no-longer-will-b.html. A rep for BMI explained that “while RNC holds a ‘conventions license’ allowing them to play any song in the performing rights organization’s catalog at its event, the convention is being transitioned to a ‘political entities license’ that lets BMI exclude certain musical works at the request of an artist or songwriter.”
\textsuperscript{231} Monica Corton, Why Do Many Politicians Use Music Without Artist Consent, Brian Solis, (Aug. 19, 2016).
\textsuperscript{232} BMI Music License for Political Entities or Organizations.
V. CONCLUSION

Music continues to be used in the campaign process because it is a way for candidates to reach potential voters. Essentially, political candidates are marketing themselves towards individuals, hoping to grab their vote, using the same strategies other companies use for marketing products. Music evokes different moods in people and candidates use it as an effective tool to promote themselves, attempting to create a link between the song and themselves or to communicate a candidate’s message. Unless change is made, this topic will continue to remain in dispute. Candidates need to start asking directly for artists’ permission. Congress needs to change the federal consent decrees with PROs, a court needs to set precedent, or PROs should change their blanket licenses to allow for opt-out clauses for political entities. Most significant are the PROs, as they hold the power to retain artists’ rights. While it may take time to implement, the good news is that there are four more years until the next election cycle.

233 Eric R. Danton, *Politicians hope music puts them in tune with voters*, Los Angeles Times, Nov. 7, 2003. Harry Rubenstein, a political-history curator at the National Museum of History in Washington explains that music has always been around and “From the very beginning, the political process in America has always been coupled with serious dialogue of issues and entertainment.”

234 Id. Ravi Dhar, professor of marketing at the Yale School of Management explains how advertisers are the same as candidates. “Advertisers use music, particularly pop music, to associate their products with the feelings such music evokes in their target audiences: moods, nostalgia, hipness and so on. The same principles apply in political campaigns.”

235 Id. Dhar breaks down exactly why music is an effective tool for marketing candidates. For example, he states “You often use music of the generation of the people you’re trying to attract and relate to. If you like a certain type of music, and then you hear that music, you sort of transfer that liking to the politician...because in a way you might assume they have similar taste.”

236 Ryan Davis, *Politicians, Musicians Clash Over Campaign Soundtrack*, LAW360 (Sept. 7, 2011)