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## Copyright and Political Campaigns: How Much Control Should a Copyright Owner Have Over the Use of Their Musical Work in a Political Campaign

Jared Zim

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# Copyright and Political Campaigns: How Much Control Should a Copyright Owner Have Over the Use of Their Musical Work in a Political Campaign

Jared Zim

*Music often tells a powerful story, driving emotional connections. As a result, politicians rely on music in every aspect of their political campaigns from political advertisements to campaign rallies. There is a long history of such political uses of music, often without an artist's permission. While most disputes over such uses have ended in either settlement or the campaign stopping use of the infringed work, former President Donald Trump's unauthorized use of music on the campaign trail sparked countless artist complaints. The complaining musicians feared any implication that they endorsed Trump and did not want any association with a political figure who they did not support. Politicians and campaigns argue their right to use copyrighted works for political purposes is fair use, they are protected by the First Amendment, or that they are the owner of a valid license in a particular work through a blanket license. Recently, in *Grant v. Trump*, the U.S. District Court for the Southern District of New York denied Trump's motion to dismiss copyright infringement, finding Trump's use of a song in his campaign advertisement did not constitute fair use. Politician's use of a song must not constitute fair use when no change is made to the work, and politicians must ask for permission when using a copyrighted work. This comment will analyze the recent ruling in *Grant v. Trump* declining dismissal of a copyright infringement claim based on fair use, consider constitutional rights in copyright, discuss the role music has played in political campaigns and recent suits on the matter, and examine ways to protect copyright owners.*

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## I. INTRODUCTION

Since the American revolution, politicians have used music as an important part of their political campaigns.<sup>1</sup> They have done so for strategic political reasons, presumably to energize the crowd, use song lyrics to support substantive positions, imply endorsement by the performer, or suggest something about the politician’s identity, positions, coolness and cultural literacy.<sup>2</sup> Although many such uses have not been specifically authorized by the music’s composers or performers, copyright lawsuits over the use of music in political campaigns have historically been rare.<sup>3</sup> Recently, however, musicians have more publicly and actively objected to the unauthorized use of their work to support political

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<sup>1</sup> See The Great American Songbook Foundation, *Introduction to Campaign Music*, (Oct. 16, 2020), <https://thesongbook.org/about/news-media/the-songbook-blog-items/introduction-to-campaign-music/>.

<sup>2</sup> See Cathay Y. N. Smith, *Political Fair Use*, 62 WM. & MARY L. REV. 2003, 2027, 2069 (2021).

<sup>3</sup> See Blake Brittain, *Trump Says He Fairly Used ‘Electric Avenue’ in Biden Attack (1)*, REUTERS (Nov. 12, 2020, 1:39 PM), <https://news.bloomberglaw.com/ip-law/trump-says-he-made-fair-use-of-electric-avenue-to-attack-biden>.

campaigns.<sup>4</sup> Particularly, former President Donald Trump's ("Trump") use of musical selections has spurred numerous musicians to object to the unauthorized use of their songs in support of his candidacy.<sup>5</sup> One such objector, Eddy Grant, recently sued Trump over his unauthorized use of Grant's 1983 hit song 'Electric Avenue' in a political campaign video.<sup>6</sup>

On August 12, 2020, Trump published a Tweet from his personal Twitter account containing a fifty-five-second animated video denigrating the Democratic Party's 2020 presidential nominee, now-President Joe Biden.<sup>7</sup> The Trump campaign had neither sought nor received any licenses or permission from the copyright owners to use the song.<sup>8</sup> Grant's work can clearly be heard for forty-seconds of the video, along with excerpts of President Biden's speeches.<sup>9</sup> The video had been viewed nearly fourteen million times, was "liked" more than 350,000 times, was re-Tweeted more than 139,000 times, and had about 50,000 comments.<sup>10</sup> Grant notified Trump that he did not authorize the use of the copyrighted work and demanded that his campaign cease and desist from further infringing conduct.<sup>11</sup> Trump argued that the use of Grant's song was fair use,<sup>12</sup> a complete defense to a claim for copyright infringement under the Copyright Act of 1976.<sup>13</sup> Trump's motion to dismiss Grant's complaint was denied, as all fair use factors weighed in favor of Grant.<sup>14</sup>

Part I of this Comment sketches the role music has played in American politics over time and addresses the apparent increase in musicians' objections to the unauthorized use of their work in political campaigns. Part II explores relevant laws and policies of performing rights organizations, and the current political polarization which may also give rise to claims by musicians against politicians. Part III analyzes the motion to dismiss opinion in *Grant v. Trump*, the most recent case addressing fair use in the context of such political uses of music. Moreover, it argues that the *Grant v. Trump* decision was appropriate, as politicians should be

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<sup>4</sup> See Marc Hogan, *Here's How Candidates Can Use Songs in Their Campaigns, Even if Songwriters Don't Like it*, PITCHFORK (Apr. 13, 2016), <https://pitchfork.com/thepitch/1098-heres-how-candidates-can-use-songs-in-their-campaigns-even-if-songwriters-dont-like-it/>.

<sup>5</sup> See *id.*

<sup>6</sup> *Grant v. Trump*, No. 20-CV-7103 JGK, 2021 WL 4435443 at 1-2 (S.D.N.Y. Sept. 28, 2021).

<sup>7</sup> *Id.* at 3.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 3-4.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> See 17 U.S.C. § 107.

<sup>14</sup> *Grant v. Trump*, 2021 WL 4435443 at \*8.

required to obtain permission from copyright owners for the use of their songs as part of a political campaign. Lastly, Part IV considers the degree to which composers and musical performers should be able to control public performances of their works in light not only of copyright law, but of constitutional commitments to expressive freedom. Part IV further examines the association between musicians and politicians regarding use of songs during a campaign.

## II. HISTORY OF THE USE OF MUSIC IN POLITICS

### A. *The Past*

The use of songs in connection with political campaigns traces back to the United States' first president and founding father, George Washington.<sup>15</sup> Washington's campaign used an altered version of the anthem "God Save the King," inserting Washington's name instead of "King."<sup>16</sup> Years later, America's ninth president, William Henry Harrison, redefined the presidential campaign by organizing parades, floats, concerts, and songs to support his campaign.<sup>17</sup> In 1932, Franklin D. Roosevelt was the first presidential candidate to use a popular song – "Happy Days Are Here Again" – for his campaign.<sup>18</sup> Although Americans were in the midst of the worst effects of the Great Depression, Roosevelt's use of the song resonated with Americans as the song promised happier days, an optimistic message that responded musically to the Great Depression.<sup>19</sup> It is unclear whether the songs previously mentioned were in fact authorized by the owner.

Even if these political uses of popular music were unauthorized by the songs' composers and performers, the practice did not become a subject of public objection and virtually never led to litigation. It was not until 1984, during Ronald Reagan's presidential campaign, that a musician took public issue with a candidate.<sup>20</sup> After Bruce Springsteen's "Born in the

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<sup>15</sup> Stefan Michel, *You Can't Always Get What You Want? A Comparative Analysis of the Legal Means to Oppose the Use of Campaign Music*, 18 J. MARSHALL REV. INTELL. PROP. L. 169,170 (2018).

<sup>16</sup> *Introduction to Campaign Music*, SONG BOOK FOUND. (Oct. 16, 2020), <https://thesongbook.org/about/news-media/the-songbook-blog-items/introduction-to-campaign-music/>.

<sup>17</sup> *See id.*

<sup>18</sup> *See* Esther M. Morgan-Ellis, *Music as Political Advocacy*, UNIV. OF N. GA. PRESS (Sept. 12, 2021) [https://human.libretexts.org/Bookshelves/Music/Resonances\\_-\\_Engaging\\_Music\\_in\\_its\\_Cultural\\_Context\\_\(Morgan-Ellis\\_Ed.\)/04%3A\\_Music\\_for\\_Political\\_Expression/10%3A\\_Support\\_and\\_Protest/10.02%3A\\_Music\\_as\\_Political\\_Advocacy](https://human.libretexts.org/Bookshelves/Music/Resonances_-_Engaging_Music_in_its_Cultural_Context_(Morgan-Ellis_Ed.)/04%3A_Music_for_Political_Expression/10%3A_Support_and_Protest/10.02%3A_Music_as_Political_Advocacy).

<sup>19</sup> *See id.*

<sup>20</sup> *See* Eveline Chao, *Stop Using My Song: 35 Artists Who Fought Politicians Over Their Music*, ROLLING STONE (July 8, 2015, 12:27 PM), <https://www.rollingstone.com/politics/>

USA” was released, Reagan mentioned the song’s “message” during a political rally, which Springsteen protested publicly in order to dissociate himself from Reagan’s campaign.<sup>21</sup>

Admittedly, even though there was no actual litigation, owners of music copyrights protested campaigns over their unauthorized use, and sent the campaigns cease and desist letters.<sup>22</sup> For example, when George W. Bush’s 2000 campaign used Tom Petty’s song “I Won’t Back Down” at events, Petty protested and sent the campaign a cease and desist letter demanding that the Bush campaign stop use of the song.<sup>23</sup> To prevent a potential lawsuit and bad publicity, the Bush campaign complied.<sup>24</sup> In the past, then, musicians would send cease and desist letters instead of actually bringing suits or voicing their displeasure publicly, and the campaigns would typically stop their unauthorized use of the songs.<sup>25</sup> Even there, the cease and desist letters would only issue when the musicians became aware of the unauthorized uses.<sup>26</sup> The campaigns’ immediate compliance would avoid costly litigation and publicity. Since it is realistic to assume that only a subset of unauthorized uses came to the attention of the owners of the music, this pattern implicitly reassured political candidates that unauthorized use of music did not present a significant monetary or reputational threat.<sup>27</sup>

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politics-lists/stop-using-my-song-35-artists-who-fought-politicians-over-their-music-75611/katrina-and-the-waves-vs-michele-bachmann-32427/.

<sup>21</sup> Michel, *supra* note 15, at 172-73. Reagan said the following: “America’s future rests in a thousand dreams inside your hearts. It rests in the message of hope in songs of a man so many young Americans admire, New Jersey’s own Bruce Springsteen. And helping you make those dreams come true is what this job of mine is all about.” Daoud Tyler-Ameed, *What does ‘Born In The U.S.A’ Really Mean?*, NPR (Mar. 26, 2019, 5:03 AM), <https://www.npr.org/2019/03/26/706566556/bruce-springsteen-born-in-the-usa-american-anthem>.

<sup>22</sup> See generally Katie Balevic, *Dr. Dre told ‘hateful’ Majorie Taylor Greene not to use his song. Here are 10 other times musicians told politicians to stop using their music at events*, INSIDER (Jan. 11, 2023, 12:50 PM), <https://www.insider.com/times-musicians-told-politicians-stop-using-their-music-2023-1>.

<sup>23</sup> Morgan-Ellis, *supra* note 18.

<sup>24</sup> Michel, *supra* note 15, at 199-200.

<sup>25</sup> See Travis Andrews, *The Rolling Stones Demand Trump Stop Using Its Music at Rallies, But Can the Band Actually Stop Him?*, WASH. POST (May 5, 2016, 5:45 AM), <https://www.washingtonpost.com/news/morning-mix/wp/2016/05/05/the-rolling-stones-demand-trump-stop-using-its-music-at-rallies-but-can-the-band-actually-stop-him/>.

<sup>26</sup> See generally Elizabeth A. Harris, *Axl Rose and Rihanna Want Trump to Stop Playing Their Music. Can They Succeed?*, N.Y. TIMES, (Nov. 5, 2018), <https://www.nytimes.com/2018/11/05/arts/axl-rose-rihanna-trump-rallies.html>.

<sup>27</sup> See *id.*

### B. *How Things Have Changed*

By contrast to this history, there has been a marked increase in public statements of objection from musicians since Donald Trump's presidential candidacy in 2016.<sup>28</sup> Many A-list musical stars including Tom Petty, Pharrell Williams, Rihanna, the Rolling Stones, Elton John, and Neil Young have spoken out against Trump's use of their music and/or sent cease and desist notices to the Trump campaign.<sup>29</sup> There is an increase in artists' input given the development of the digital age and social media.<sup>30</sup> Musicians have outwardly objected to unauthorized uses of their music in political campaigns by voicing their objections on social media and have sent cease and desist letters to political campaigns.<sup>31</sup> In addition, musicians recently engaged in collaborative activity to ensure political candidates seek consent from recording artists and songwriters before using their music in political settings.<sup>32</sup>

On July 28, 2020, more than 60 musicians from the Artist Rights Alliance – including Elton John, Aerosmith, Elvis Costello, Green Day, and Mick Jagger – signed a public letter urging US politicians to stop using songs in their political campaigns without consent.<sup>33</sup>

This is the only way to effectively protect your candidates from legal risk, unnecessary public controversy, and the moral quagmire that comes from falsely claiming or implying an artist's support or distorting an artists' expression in such a high stakes public way . . . Being dragged unwillingly into politics in this way can compromise an artist's personal values while disappointing and alienating fans<sup>34</sup>

The Artist Rights Alliance letter argues that unauthorized public use confuses a song's message, undermines its effectiveness, and gives rise to falsely implying support or endorsement from an artist or songwriter.<sup>35</sup> They also argue that artists should have fundamental rights, like all other citizens, to control their work and make free choices regarding their

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<sup>28</sup> See Jennifer Hussein, *22 Artists Who Have Spoken Out Against President Trump Playing Their Music at His Events*, INSIDER (Oct. 26, 2020, 4:09 PM), <https://www.insider.com/artists-who-dont-want-trump-using-their-music-2018-11>.

<sup>29</sup> *Id.*

<sup>30</sup> Michel, *supra* note 15, at 200.

<sup>31</sup> Hussein, *supra* note 28.

<sup>32</sup> See *Letter to Campaign Committees*, ARTIST RTS. ALL. (July 28, 2020), [https://artistsalliance.org/letter\\_7\\_28\\_20](https://artistsalliance.org/letter_7_28_20).

<sup>33</sup> *See id.*

<sup>34</sup> *Id.*

<sup>35</sup> *See id.*

political expression and participation.<sup>36</sup> In other words, there should be greater recognition of the right to prohibit the use of their songs than even copyright law currently allows.

i. Accounting For This Shift:

Technological changes, in the practices of both musical artists and political campaigns, and in the political atmosphere of the country, have all played a role in significant alterations to prior practice.<sup>37</sup> Perhaps there were fewer complaints by musicians in the past because it was more difficult to obtain information about campaign uses of music.

First, global and immediate dissemination of information on the internet and social media have made it easier for musicians to track whether their songs have been used in political campaigns.<sup>38</sup> Their own easy access to the public through social media has also empowered the musicians—and especially celebrity musicians—to respond immediately with any objections.<sup>39</sup> Second, streaming platforms and social media such as Twitter have amplified the ability of political candidate messages to be spread globally with immediacy.<sup>40</sup> This has indubitably created realistic concerns for musical artists that global audiences might associate them with unauthorized political messages.

Third, musical celebrities have increasingly focused on their image and associated their musical brands with political stances. Today, many musicians endorse political campaigns by making statements on social media platforms, performing at rallies, or by publicly speaking out.<sup>41</sup> Beyond being entertainers, musicians create a brand for themselves with which fans identify.<sup>42</sup> There may be a potential conflict between the

<sup>36</sup> *Id.*

<sup>37</sup> See Bridgett Henwood, *The History of American Protest Music, from “Yankee Doodle” to Kendrick Lamar*, VOX (May 22, 2017, 2:13 PM), <https://www.vox.com/culture/2017/4/12/14462948/protest-music-history-america-trump-beyonce-dylan-misty>.

<sup>38</sup> *See id.*

<sup>39</sup> See Hannah Yasharoff, *Linkin Park Says it Sent Cease-and-Desist Letter to President Trump for Using Their Song*, USA TODAY (July 19, 2020, 1:59 PM), <https://www.usatoday.com/story/entertainment/music/2020/07/19/trump-not-authorized-use-linkin-park-song-tweet-band-says/5468040002/>.

<sup>40</sup> See Lauren Feiner, *Twitter to Flag Abusive Tweets by World Leaders in Move that Could Impact Trump*, CNBC (June 27, 2019, 12:07 PM), <https://www.cnbc.com/2019/06/27/twitter-says-it-will-start-labeling-tweets-from-influential-government-officials-who-break-its-rules.html>.

<sup>41</sup> See Anna Chan, *Here Are All the Musicians Backing Democratic Presidential Candidates*, BILLBOARD (Mar. 3, 2020), <https://www.billboard.com/articles/news/politics/9327495/musicians-endorsing-2020-democratic-presidential-candidates>.

<sup>42</sup> See Eugene Scott, *Musicians Discuss Politics Because They Have Identities Beyond Being Entertainers*, WASH. POST (Jan. 29, 2018, 3:14 PM), <https://www.washingtonpost.com/news/the-entertainment-weekly/wp/2018/01/29/musicians-discuss-politics-because-they-have-identities-beyond-being-entertainers/>.



musical artist and the publishers or owners of the songs. Publishers may be okay with authorizing uses that will generate money even if the performers or writers do not like the associations.<sup>43</sup>

Fourth, there has been a new resistance on the part of at least some political campaigns to cease use of popular music once asked to desist.<sup>44</sup> To be sure, the full panoply of public complaints by celebrity musicians has undoubtedly impacted the behavior of at least some political campaigns. Negative publicity on social media platforms may compel politicians to comply with artist demands. Americans spend, on average, more than 1,300 hours a year on social media.<sup>45</sup> Social media is not only a way to keep up with friends and family, but is also how about half of Americans stay up to date on current events.<sup>46</sup> Although not every fan may attend a live performance, social media is a way for fans to stay connected with their favorite artists beyond their copyrighted works.<sup>47</sup> Moreover, some politicians – out of respect for the artist – will immediately stop use upon request.<sup>48</sup> However, not all politicians today comply with requests to stop unauthorized uses of music. Former President Trump is the foremost example of this trend.<sup>49</sup>

Strikingly, the refusal of politicians to comply with requests to stop using objecting musicians' work has been accompanied by assertions of the politicians' constitutional and copyright law rights.<sup>50</sup> Now, however,

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fix/wp/2018/01/29/musicians-discuss-politics-because-they-have-identities-beyond-being-entertainers/.

<sup>43</sup> A study in 2017 showed that it took an average of 4.53 writers to create one hit single. Mark Savage, *How Many People Does It Take to Write a Hit Song*, BBC (May 16, 2017), <https://www.bbc.com/news/entertainment-arts-39934986>.

<sup>44</sup> See Michel, *supra* note 15, at 199-200.

<sup>45</sup> Peter Suci, *Americans Spent on Average More Than 1,300 Hours on Social Media Last Year*, FORBES (June 24, 2021, 3:47 PM), <https://www.forbes.com/sites/petersuci/2021/06/24/americans-spent-more-than-1300-hours-on-social-media/?sh=2ccb41e92547>.

<sup>46</sup> See Mason Walker & Katerina Eva Matsa, *News Consumption Across Social Media in 2021*, PEW RSCH. CENTER (Sept. 20, 2021), <https://www.pewresearch.org/journalism/2021/09/20/news-consumption-across-social-media-in-2021/>.

<sup>47</sup> See *Twitter Accounts with the Most Followers Worldwide as of January 2023*, STATISTICA RSCH. DEP'T OF (last visited Feb. 8, 2023), <https://www.statista.com/statistics/273172/twitter-accounts-with-the-most-followers-worldwide/>. Of the top 10 most followed Twitter accounts in 2021, six are musicians, including Justin Bieber, Katy Perry, Rihanna, Taylor Swift, Lady Gaga, and Ariana Grande.

<sup>48</sup> See Joel Rose, *Music in Political Campaigns 101*, NPR (Feb. 29, 2021, 12:08 PM), <https://www.npr.org/sections/therecord/2012/02/29/147592568/music-in-political-campaigns-101>.

<sup>49</sup> See Sarah Hansen, *Neil Young—Just Like the Rolling Stones, Rihanna, REM, Etc.—Blasts Trump For Using His Song, Again*, FORBES (July 4, 2020, 3:10 PM), <https://www.forbes.com/sites/sarahhansen/2020/07/04/neil-young-just-like-the-rolling-stones-rihanna-rem-etc-blasts-trump-for-using-his-song-again/?sh=69898cbd3658>.

<sup>50</sup> See Smith, *supra* note 2, at 2010.

artists appear more willing to sue, while politicians seem more willing to assert what they claim as their own rights to use the works without artist censorship. Although there is an inherent conflict between musicians and campaigns regarding the use of copyrighted works, this issue has rarely been litigated.<sup>51</sup> While some lawsuits have been filed over the years, almost all have been settled before any court could rule on their arguments.<sup>52</sup>

### C. *Previously Decided Cases*

The District Court in *Grant* distinguished *Henley v. DeVore*, where a politician changed lyrics of copyrighted songs, provided their own vocals, and used the songs as vehicles for their political messaging.<sup>53</sup> There, the United States District Court for the Central District of California found the secondary works satirical; however, the uses were not transformative as they appropriated too much of the songs in relation to any legitimate parodic purpose.<sup>54</sup> Henley further argued false endorsement claims based on the politicians use of the work in campaign ads and videos.<sup>55</sup> In the court's analysis, the Ninth Circuit held that the plaintiff must prove a likelihood of confusion, "as to whether the individual actually sang in the advertisement" to establish a false endorsement claim.<sup>56</sup> As in *Henley*, Politicians consider using a musician's work and changing the lyrics is authorized under copyright.

Recently, artist, Twisted Sister, won a copyright suit over the unauthorized use of their song "We're Not Gonna Take It" in an Australian political advertisement.<sup>57</sup> The politician changed the lyrics to "Australia ain't gonna cop it," arguing the lyrics of the song were his own original work, and thus, held the copyright in those words.<sup>58</sup> At the time the political ad was released, Twisted Sister's lead singer and songwriter, Dee Snider, went to Twitter stating that the band did not endorse the politician, and that the song was about "EVERYONE's right to free choice . . . [the politician and his party] are NOT pro choice . . . so THIS AIN'T HIS

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<sup>51</sup> Michel, *supra* note 15, at 171.

<sup>52</sup> Elizabeth A. Harris, *Axl Rose and Rihanna Want Trump to Stop Playing Their Music. Can They Succeed?*, N.Y. TIMES, (Nov. 5, 2018), <https://www.nytimes.com/2018/11/05/arts/axl-rose-rihanna-trump-rallies.html>.

<sup>53</sup> *Henley v. DeVore*, 733 F. Supp. 2d. 1144, 1148-49 (C.D. Cal. 2010).

<sup>54</sup> *Id.* at 1163-64.

<sup>55</sup> *Id.* at 1169 (granting summary judgment in favor of the politician on the musician's false endorsement claim).

<sup>56</sup> *Id.* at 1166.

<sup>57</sup> See Yan Zhuang, *Australian Politician Loses Court Fight Over Twisted Sister Song*, N.Y. TIMES (Apr. 30, 2021), <https://www.nytimes.com/2021/04/30/world/asia/australia-twisted-sister-song.html>.

<sup>58</sup> *Id.*

SONG!”<sup>59</sup> A video producer, on behalf of the politician, was quoted a fee of \$116,000 by Universal Music to license the song; however, the politician’s team counteroffered for 20% that amount, and Universal rejected.<sup>60</sup> At the same time, the politician provided evidence at trial that he was inspired by a movie for the lyrics, wrote down the idea on his bedside table, but a member of his staff threw it out before he woke.<sup>61</sup> The court noted this contradiction, and ordered the politician to pay Universal \$1.16 million in damages for copyright infringement, “flagrant disregard for Universal’s rights,” and for giving “false evidence, including concocting a story to exculpate himself, indicating that the need for both punishment and deterrence is high.”<sup>62</sup>

In *Browne v. McCain*, a musician, Jackson Browne, sued Republican Presidential Candidate, John McCain, for copyright infringement arising out of the use of a song in a campaign commercial.<sup>63</sup> McCain argued that the use of the song was transformative because a “mood evoking soft composition about the lifestyle of a musician” was turned into “a biting commentary on aspects of a Presidential candidate’s proposed energy plan.”<sup>64</sup> Contrary to *Grant v. Trump*, the court in *Browne* declined to undertake a fair use analysis at the motion to dismiss stage, reasoning the early stage of the case and undeveloped factual record.<sup>65</sup>

Moreover, the court rejected McCain’s argument that a section 43(a) false endorsement claim only applied to commercial speech and not to commercial speech of a political nature.<sup>66</sup> The court further disagreed with McCain’s argument that the commercial was an expressive work and barred under the First Amendment.<sup>67</sup> The case eventually settled for a public apology, an undisclosed amount of money, and “a pledge that the

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<sup>59</sup> Graham Hartmann, *Twisted Sister Threaten to Sue Australian Politician For ‘We’re Not Gonna Take It’ Parody*, LOUDWIRE, (Jan. 2, 2019), <https://loudwire.com/twisted-sister-threaten-to-sue-australian-politician/>.

<sup>60</sup> See Yan Zhuang, *Australian Politician Loses Court Fight Over Twisted Sister Song*, N.Y. TIMES (Apr. 30, 2021), <https://www.nytimes.com/2021/04/30/world/asia/australia-twisted-sister-song.html>.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Browne v. McCain*, 612 F. Supp. 2d 1125, 1128 (C.D. Cal. 2009).

<sup>64</sup> Aaron Moss, *Why Trump Will Lose (on Copyright Fair Use)*, COPYRIGHT LATELY (Nov. 17, 2020), <https://copyrightlately.com/trump-copyright-fair-use/>.

<sup>65</sup> *Browne*, 612 F. Supp. 2d at 1130-31.

<sup>66</sup> *Browne v. McCain*, 611 Supp. 2d 1073, 1079 (C.D. Cal. 2009); see also *Browne*, 612 F. Supp. 2d at 1131 (“The mere fact that a defendant is engaged in political speech, alone, does not bar a plaintiff’s Lanham Act claim”).

<sup>67</sup> *Id.* at 1132 (Under this test, “[a]n artistic work’s use of a trademark that otherwise would violate the Lanham Act is not actionable [1] ‘unless the use of the mark has no artistic relevance to the underlying work whatsoever, or, [2] if it has some artistic relevance, unless it explicitly misleads as to the source or content of the work.’”).

Republicans will respect and uphold the rights of artists . . . [and] obtain permissions and/or licenses for copyrighted works where appropriate.”<sup>68</sup> This pledge was not followed by past Republican President Trump.

In *Grant*, Trump further cited to *MasterCard Int’l Inc. v. Nader 2000 Primary Comm. Inc.*, where a political advertisement’s parody of a popular Mastercard commercial was a noncommercial use.<sup>69</sup> There, the district court found similarity in a case ruling noncommercial use involving a political campaign’s parody use of the famous “AFLAC Duck” commercial.<sup>70</sup> Where a political campaign used an original work “as part of his communicative message, in the context of expressing political speech,” it was found to be noncommercial.<sup>71</sup> In these cases, the integral part of the political advertisement poked fun at the well-known commercials. Conversely, the same cannot be true of Trump’s use of ‘Electric Avenue’ in the background of a political advertisement, which incorporated Grant’s song only to make the video more entertaining and memorable.<sup>72</sup>

### III. THE LEGAL LANDSCAPE

#### A. *Constitutional Rights and Copyright Law*

Article I, section 8 of the United States Constitution grants to Congress the authority to establish copyright protection for authors and inventors.<sup>73</sup> Congress has the power “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>74</sup> Pursuant to this authority, Congress enacted the Copyright Act of 1976, which protects original works of authorship against the infringement of those works by

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<sup>68</sup> Daniel Kreps, *Jackson Browne Settles with GOP over “Running on Empty” Ad Use*, ROLLING STONE (July 21, 2009, 5:48 PM), <https://www.rollingstone.com/music/music-news/jackson-browne-settles-with-gop-over-running-on-empty-ad-use-250454/>; see 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, 473 (2017) (The court left open the question of whether the fair use defense would have applied in the McCain case since the case settled).

<sup>69</sup> *MasterCard Int’l Inc. v. Nader 2000 Primary Comm., Inc.*, No. 00-cv-6068, 2004 WL 434404, at 7-9 (S.D.N.Y. Mar. 8, 2004).

<sup>70</sup> *Id.* at 8.

<sup>71</sup> *Id.*

<sup>72</sup> See *Grant* 563 F. Supp. 3d at 289.

<sup>73</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>74</sup> *Id.*

others.<sup>75</sup> Under the Copyright Act, there are several exclusive rights given to the copyright owner:

(1) reproduction of the work in copies or records; (2) the preparation of derivative works based on the original work; (3) distribution of copies or phonorecords of the work to the public by sale or other transfers, or by rental, lease, or lending; (4) the public performance of the work; (5) the public display of the work; and (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.<sup>76</sup>

While exclusive rights exist for copyright, a defense to copyright infringement may be awarded for fair use. Fair use is a concept under United States law which permits the use of copyrighted works without permission in certain circumstances.<sup>77</sup> Section 107 of the Copyright Act provides the framework for determining whether something is fair use and identifies several examples – including “criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.”<sup>78</sup> The outcome of a fair use claim is a fact-specific inquiry that considers four factors,<sup>79</sup> which will later be discussed in depth in this Comment. In regard to the use of copyrighted works in political campaigns, copyright law provides distinct licenses depending on how the work is used.<sup>80</sup>

#### i. Use at Campaign Rallies and in Campaign Videos

The use of a copyrighted song at a campaign event falls under the scope of the public performance right.<sup>81</sup> Virtually all artists are members of a performing rights organization,<sup>82</sup> e.g., the American Society of

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<sup>75</sup> 17 U.S.C. §§101-1332 [hereinafter “Copyright Act”].

<sup>76</sup> 17 U.S.C. § 106.

<sup>77</sup> See 17 U.S.C. § 107.

<sup>78</sup> *Id.*

<sup>79</sup> See *id.*; see also *U.S. Copyright Office Fair Use Index*, U.S. COPYRIGHT OFFICE (May 2021), <https://www.copyright.gov/fair-use/more-info.html>.

<sup>80</sup> See Joy Butler, *Music Licensing: The Difference Between Public Performance and Synchronization Licenses*, COPYRIGHT CLEARANCE CTR. (May 16, 2017), <https://www.copyright.com/blog/music-licensing-public-performance-license-synchronization/>.

<sup>81</sup> Michel, *supra* note 15, at 175.

<sup>82</sup> See *supra* text accompanying note 65, at 461-62 (Performing Rights Organizations help songwriters and publishers with: (1) getting paid for the usage of their music by collecting performance royalties when songs are played on the radio, television, or in live venues and (2) provide various licenses such as blanket licenses, which allow a licensee to publicly perform any of the musical works in the performing rights organization’s catalogue of music.

Composers Authors and Publishers (“ASCAP”) and Broadcast Music, Inc. (“BMI”), which issue blanket licenses to venues that host campaign events.<sup>83</sup> “Generally . . . the use of music at public events – political or otherwise – is covered by the blanket music licenses held by the venues in which they take place.”<sup>84</sup> Therefore, if a venue has a blanket license for a public performance of the work, then there would be no violation of the author’s public performance rights if the song were performed there. “While many venues have proper “public performance licenses,” the ASCAP licenses for convention centers, arenas, and hotels specifically excludes music during conventions, expositions, and campaign events.<sup>85</sup> Thus, when campaigns hold events at different venues, “it may be easier for the campaign itself to obtain a public performance license” from a performing rights organization.<sup>86</sup> Having such license guarantees compliance between the performance of music at the events and copyright law.

Alternatively, Trump’s use of Grant’s work in a political campaign video posted on the internet amounted to a reproduction and a distribution of the work, which requires a synchronization license.<sup>87</sup> In this case, the campaign must contact the song’s publisher and possibly the artist’s record label to negotiate the appropriate licenses.<sup>88</sup> Additionally, once a commercial is produced, the website transmitting the commercial must have a public performance license.<sup>89</sup> Politicians may acquire ASCAP’s Political Campaign License and/or BMI’s Political Entities License, which provide a blanket license with an array of compositions in each

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<sup>83</sup> Michel, *supra* note 15, at 175.

<sup>84</sup> Andy Malt, *Musicians Call on Politicians to Stop Using Their Music Without Permission*, COMPLETE MUSIC UPDATE (July 29, 2020), <https://completemusicupdate.com/article/musicians-call-on-politicians-to-stop-using-their-music-without-permission/>; see also Chloe Karis, *Ten Times Artists Have Beefed With Politicians over Improper Use of Their Music*, MIXDOWN MAGAZINE (June 5, 2021), <https://mixdownmag.com.au/features/ten-times-artists-have-beefed-with-politicians-over-improper-use-of-their-music/> (In 2018, Guns N’ Roses’ lead singer, Axl Rose, tweeted that “[u]nfortunately the Trump campaign is using loopholes in the various venues’ blanket performance licenses which were not intended for such craven political purposes, without the songwriters’ consent.”).

<sup>85</sup> See ASCAP, *Using Music in Political Campaigns: What You Should Know*, [https://www.ascap.com/~media/files/pdf/advocacy-legislation/political\\_campaign.pdf](https://www.ascap.com/~/media/files/pdf/advocacy-legislation/political_campaign.pdf) (last visited Jan. 30, 2023).

<sup>86</sup> *Id.*; see also Standard Writer Agreement, at paragraph 4, Broadcast Music, Inc., [https://www.bmi.com/forms/affiliation/bmi\\_writer\\_kit.pdf](https://www.bmi.com/forms/affiliation/bmi_writer_kit.pdf) (BMI grants BMI the right “to license others to perform, anywhere in the world, in any and all places and in any and all media, now known or which hereafter may be developed, any part or all of the Works.”).

<sup>87</sup> See Michel, *supra* note 15, at 176.

<sup>88</sup> See ASCAP, *supra* note 85.

<sup>89</sup> *Id.*

organization's repertoire.<sup>90</sup> However, both ASCAP and BMI permit members to exclude specific songs from political entities licenses with written notice.<sup>91</sup> Artists, such as the Rolling Stones and Neil Young, have successfully removed their songs from the list of works offered to political campaigns.<sup>92</sup> Nevertheless, the rules for using a song in a film or commercial are more transparent because there must be direct permission from a writer or their publisher.<sup>93</sup>

## ii. Political Polarization

Presently, there is a hyperpolarization and endless partisan warfare among political ideologies.<sup>94</sup> This too may explain why there is an increase in artist complaints. An association with a particular political group or politician can seriously affect an artist's revenues and reputation.<sup>95</sup> Again, this issue brings light to artists who have different beliefs than a candidate using their music, which could be viewed as an endorsement.<sup>96</sup>

Musicians can further argue their right of publicity and trademark confusion, by asserting that use of their work infringes on their right not

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<sup>90</sup> See *id.*; see also BMI, *Music License for Political Entities or Organizations*, BMI [https://www.rstreet.org/wp-content/uploads/2016/08/Political-Entities-Org\\_POL1.2016\\_1.pdf](https://www.rstreet.org/wp-content/uploads/2016/08/Political-Entities-Org_POL1.2016_1.pdf) (last visited Jan. 30, 2023).

<sup>91</sup> See *id.*

<sup>92</sup> Ben Sisario, *Can Neil Young Block Trump from Using His Songs? It's Complicated*, N.Y. TIMES (Aug. 12, 2020), <https://www.nytimes.com/2020/08/12/arts/music/neil-young-donald-trump-lawsuit.html>.

<sup>93</sup> *Id.*

<sup>94</sup> See Thomas B. Edsall, *How Much Does How Much We Hate Each Other Matter?*, N.Y. TIMES (Sept. 29, 2021), <https://www.nytimes.com/2021/09/29/opinion/political-polarization-partisanship.html>.

<sup>95</sup> Jennifer Kopp, *Can Artists Legally Stop Trump from Using Their Music?*, N.Y.U. J. INTELL. PROP. AND ENT. BLOG (Dec. 7, 2020), <https://blog.jipel.law.nyu.edu/2020/12/can-artists-legally-stop-trump-from-using-their-music/>.

<sup>96</sup> Jake Rossen, *Do Politicians Need a Musician's Permission to Play One of Their Songs at a Campaign Event?*, MENTAL FLOSS (July 6, 2020), <https://www.mentalfloss.com/article/625985/do-politicians-need-permission-play-music-at-campaign-events>; see also Daniel Kohn, *Neil Young Writes Open Letter to Trump Following Mt Rushmore Rally*, SPIN (July 7, 2020), <https://www.spin.com/2020/07/neil-young-writes-open-letter-to-donald-trump-following-mt-rushmore-rally/> (Young in an open letter stated, “[a]lthough I have repeatedly asked you to please not use my music because it indicates that I support your agenda, you have always played my songs anyway at your gatherings, with no regard for my rights, even calling me names on Twitter.”); Andy Greene, *John Fogerty Sends Cease and Desist to Trump Campaign Over Use of ‘Fortunate Son’ at Rallies*, ROLLING STONE (Oct. 16, 2020, 2:38 PM), <https://www.rollingstone.com/music/music-news/john-fogerty-cease-and-desist-order-trump-fortunate-son-1076914/> (After sending a cease and desist to the Trump Campaign, John Fogerty went to twitter stating, “[Trump] is using my words and my voice to portray a message that I do not endorse”).

to be associated with a certain political figure.<sup>97</sup> Established artists view their reputation as a business asset, therefore, a politician's use of a song can create confusion that harms the musician's reputation.<sup>98</sup> This specifically violates the Lanham Act – federal trademark law – as it “is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person.”<sup>99</sup> For instance, in Steven Tyler's (singer of Aerosmith) cease and desist letter to Trump, it stated:

As we have made clear numerous times, Mr. Trump is creating the false impression that our client has given his consent for the use of his music, and even that he endorses the presidency of Mr. Trump . . . By using ‘Livin’ On The Edge’ without our client’s permission, Mr. Trump is falsely implying that our client, once again, endorses his campaign and/or his presidency, as evidenced by actual confusion seen from the reactions of our client’s fans all over social media.<sup>100</sup>

Similarly, after two separate cease and desist letters, Trump stopped using Steven Tyler's song ‘Dream On,’ although Trump stated he had a legal right to use the song.<sup>101</sup> It seems that a common trend is for the musician to send a cease and desist and hope the politician stops its use.

### iii. What Can Politicians Argue?

At the other end of the spectrum, politicians may argue that attempts to use copyright law and other speech-suppressive regimes (*e.g.*, right of

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<sup>97</sup> See ASCAP, *supra* note 85 (The campaign can be subject to claims based on: “(1) the artist's Right of Publicity, which in many states provides image protection for famous people or artists; (2) the Lanham Act, which covers confusion or dilution of a trademark (such as a band or artist name) through its unauthorized use; (3) False Endorsement, where use of the artist's identifying work implies that the artist supports a product or candidate. 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 by the campaign.”)

<sup>98</sup> *When Politicians Use Music Without Permission It's Not a Copyright Issue, It's a Trademark Issue (But It Doesn't Matter Anyway)*, THE LEGAL ARTIST (Sept. 15, 2015), <https://www.thelegalartist.com/blog/when-politicians-use-music-without-permission-its-not-a-copyright-issue-its-a-trademark-issue-but-it-doesnt-matter-anyway>.

<sup>99</sup> 15 U.S.C. § 1125(a)(1)(a).

<sup>100</sup> Spencer Buell, *Steven Tyler is Ordering Trump to Stop Playing Aerosmith Songs, Again*, BOSTON MAGAZINE (Aug. 22, 2018, 4:08 PM), <https://www.bostonmagazine.com/arts-entertainment/2018/08/22/steven-tyler-trump-livin-on-the-edge/>.

<sup>101</sup> *Id.*



publicity and trademark) censor core political speech. Politicians may further argue artists deploy their copyright interests in ways that discriminate against certain politicians and political parties, skewing public political debate in harmful ways. Musicians may be using the copyright regime to censor rather than achieve the goal of copyright itself. ASCAP's Political Campaign License and BMI's Political Entities License may be a violation of antitrust law.<sup>102</sup> A core anti-competitive provision – the Federal Trade Commission Act<sup>103</sup> – deems “[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce,” as unlawful.<sup>104</sup>

A musician can allow one politician to use their song and simultaneously prohibit another politician from using the same one.<sup>105</sup> ASCAP allows its members to exclude specific songs from a particular campaign's license.<sup>106</sup> That is to say that musicians, through their performing rights organizations, are denying the use of their music to specific politicians.<sup>107</sup> However, this argument will likely fail, considering

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<sup>102</sup> 15 U.S.C. § 12 defines ‘antitrust laws’ as “[a]n Act to protect trade and commerce against unlawful restraints and monopolies . . . .”; see also Carolyn Wimby Martin & Ethan Barr, *Notes and Votes: Use of Copyrighted Music at Live Political Events*, LUTZKER & LUTZKER LLP (Oct. 22, 2020), <https://www.lutzker.com/notes-and-votes-use-of-copyrighted-music-at-live-political-events/> (“[I]n 1941, antitrust consent decrees were entered into in an effort to ensure fair access to performance rights of musical works owned by ASCAP and BMI. While the PROs may argue that withdrawing certain songs from political entities licenses is done solely to protect artists from appearing to endorse political views or social policies, political entity licensees may argue that this prevents them from having the same access to music as “similarly situated” campaigns. These consent decrees are currently under review by the U.S. Department of Justice (DOJ) and received hundreds of public comments . . . [a]ny consideration of anticompetitive effects could make it more difficult for artists, even those with industry influence comparable to the Rolling Stones, to withdraw their music from use in political campaigns.”).

<sup>103</sup> *Guide to Antitrust Laws*, FED. TRADE COMM’N, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws> (last visited Jan. 31, 2023) (The federal Trade Commission’s “competition mission is to enforce the rules of the competitive marketplace — the antitrust laws.”).

<sup>104</sup> 15 U.S.C. § 45(a)(1).

<sup>105</sup> See Roisin O’Connor, *Tom Petty Once Sent a Cease and Desist Letter to George W. Bush*, INDEPENDENT (Oct. 3, 2017), <https://www.independent.co.uk/arts-entertainment/music/news/tom-petty-dead-latest-cease-and-desist-letter-george-w-bush-i-won-t-back-down-politics-trump-transgender-rights-a7979771.html> (where Tom Petty sent a cease and desist letter to George W. Bush, then performed the same song at Bush’s rivals’ event).

<sup>106</sup> ASCAP, *Using Music in Political Campaigns: What You Should Know*, [https://www.ascap.com/~media/files/pdf/advocacy-legislation/political\\_campaign.pdf](https://www.ascap.com/~/media/files/pdf/advocacy-legislation/political_campaign.pdf) (last visited Feb. 1, 2023).

<sup>107</sup> See generally Eriq Gardner, *Today’s Biggest Antitrust Targets: Facebook, Google and Music Licensing (Yes, Really)*, HOLLYWOOD REPORTER (June 4, 2019, 12:31 PM), <https://www.hollywoodreporter.com/business/business-news/todays-biggest-antitrust-targets-facebook-google-music-licensing-yes-1215469/>.

that one can be allowed to use a quote from a book, while not allowing another to do so. Nevertheless, if a venue or politician has a license with a performing rights organization to use a song, there is no violation of an artist's rights.<sup>108</sup> In a political campaign, music can also be selected to express the ideas of others. Selecting and using a song that constitutes another person's speech can likely be held as protected speech.<sup>109</sup> There is also another view that the political speech interest of a candidate is protected by the First Amendment.<sup>110</sup> Candidates have sought First Amendment protection when musical artists sued to prevent the use of their song or sound recording.<sup>111</sup> Despite these potential arguments, many artists do not want to allow Trump to use their music.<sup>112</sup>

### B. *Musicians Against Trump*

Trump apparently does not respect the rights of artists as he continues to be threatened with legal action by dozens of artists.<sup>113</sup> Even back to the day Trump announced his candidacy in 2015, singer-songwriter Neil Young put out a public statement stating Trump was not authorized to play 'Rockin' In The Free World' at the announcement.<sup>114</sup> Countless artists have spoken out against Trump, sent cease and desist notices; however, few musicians have actually taken Trump to court for continuing to play their songs at campaign rallies.<sup>115</sup> During Trump's initial campaign trail in 2016, his organization had license agreements from performing rights organizations to use many popular songs at his events, so artists did not sue.<sup>116</sup>

In 2020, Trump again used Neil Young's song at an event, after denouncing its use, which provoked more criticism from Young.<sup>117</sup> This

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<sup>108</sup> See Jay Gabler, *Why Can't Musicians Get Politicians to Stop Playing Their Songs?*, THE CURRENT (Oct. 1, 2020), <https://www.thecurrent.org/feature/2020/09/29/politicians-music-permission>.

<sup>109</sup> Sarah Schacter, *The Barracuda Lacuna: Music, Political Campaigns, and the First Amendment*, 99 GEORGETOWN L.J. 571, 582 (2011).

<sup>110</sup> *Id.* at 582-83.

<sup>111</sup> *See id.* at 581.

<sup>112</sup> *See* Hussein, *supra* note 28.

<sup>113</sup> *See* Andrew Solender, *All the Artists Who Have Told Trump to Stop Using Their Songs at His Rallies*, FORBES (June 28, 2020, 3:13 PM), <https://www.forbes.com/sites/andrewsolender/2020/06/28/all-the-artists-who-have-told-trump-to-stop-using-their-songs-at-his-rallies/?sh=71fc6e574b87>.

<sup>114</sup> *Id.*

<sup>115</sup> *See* Hussein, *supra* note 28.

<sup>116</sup> *See* Anastasia Tsioulcas, *Neil Young Sues to Stop Trump Campaign from Using His Songs*, NPR (Aug. 4, 2020, 4:20 PM), <https://www.npr.org/2020/08/04/899023818/neil-young-sues-the-trump-campaign-over-song-use>.

<sup>117</sup> *See* Hansen, *supra* note 49.

prompted Young to sue Trump for not having a license to play his songs.<sup>118</sup> Young claimed he could not “allow his music to be used as a ‘theme song’ for a divisive, un-American campaign of ignorance and hate.”<sup>119</sup> The suit ultimately was voluntarily dismissed by Young, as it was “possible” the case settled, though there were no further statements by either Trump nor Young.<sup>120</sup> The unauthorized use of a song, especially when an artist denounces the use, must be protected by copyright law.

#### IV. THE CASE AT HAND – *GRANT V. TRUMP*

In *Grant v. Trump*, Trump (“Defendant”) used Grant’s song in his political campaign ad, infringing on Grant’s reproduction and distribution rights.<sup>121</sup> Grant wrote, recorded, and produced the 1983 hit song ‘Electric Avenue,’ which reached number two on the Billboard Hot 100 chart and went platinum in the United States.<sup>122</sup> Grant is a musician, songwriter, and sole owner of Greenheart UK and Greenheart Antigua.<sup>123</sup> All of Grant’s rights and interests in the musical composition and sound recording that comprise Electric Avenue were assigned to Greenheart Antigua.<sup>124</sup> Greenheart UK is an affiliated company and licensing agent of Greenheart Antigua with respect to Grant’s musical works, including Electric Avenue.<sup>125</sup>

As the ad was broadcasted to millions of followers on Twitter and news stations, Grant claimed Trump used the song without permission.<sup>126</sup> Despite Grant having sent a cease and desist the day after the video was released – objecting to the infringing conduct and demanding removal of the video<sup>127</sup> – and despite numerous comments on the tweet linking to

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<sup>118</sup> See Jon Blistein, *Neil Young Drops Lawsuit Against Trump Campaign Over Song Usage*, ROLLING STONE (Dec. 7, 2020), <https://www.rollingstone.com/music/music-news/neil-young-lawsuit-trump-campaign-rockin-in-the-free-world-1039173/>.

<sup>119</sup> Ben Beaumont-Thomas, *Neil Young Drops Lawsuit Against Donald Trump*, THE GUARDIAN (Dec. 8, 2020, 5:15 PM), <https://www.theguardian.com/music/2020/dec/08/neil-young-drops-lawsuit-against-donald-trump>.

<sup>120</sup> *Id.*

<sup>121</sup> See *Grant v. Trump*, 563 F. Supp. 3d 278 (S.D.N.Y. 2021).

<sup>122</sup> *Id.* at 282.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 283.

<sup>127</sup> Grant’s attorney stated in their cease and desist letter that they would prefer to resolve the dispute “expeditiously to avoid costly and time-consuming litigation and the negative publicity that can surround unauthorized use of such an iconic musical composition (especially where the use indicates a fundamental misunderstanding of the very meaning of the underlying work).” Compl. Ex. C, *Grant v. Trump*, 563 F. Supp. 3d 278 (S.D.N.Y. 2021).

articles reporting on the infringement, Trump continued to use Grant's work in the campaign ad.<sup>128</sup> When the Complaint was filed, the video was still available on Twitter.<sup>129</sup> Neither Grant nor any agent licensed any rights in the composition or recording to Trump, or otherwise consented to Trump's use of the work in connection with the video.<sup>130</sup> Grant alleged in his complaint that Trump had infringed and continued to infringe upon Grant's "copyrights in the Composition and the Recording by creating, producing, distribution, promoting, advertising, performing by means of digital audiovisual transmission, and otherwise commercially exploiting the Infringing Video, and/or authorizing others to do the same, without Plaintiffs' authority or consent, in violation of 17 U.S.C. § 101."<sup>131</sup>

In response to Grant's Complaint, Defendant argued fair use,<sup>132</sup> and thus the Court analyzed the four factors provided by the Copyright Act: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>133</sup>

The fair-use doctrine seeks to strike a balance between an artist's intellectual property rights to the fruits of her own creative labor, including the right to license and develop (or refrain from licensing or developing) derivative works based on that creative labor, and the ability of other authors, artists, and the rest of us to express them- or ourselves by reference to the works of others.<sup>134</sup>

Specifically, Defendant claimed the video's use of Grant's song was transformative as the "video and song serve[d] different purposes."<sup>135</sup> The United States District Court for the Southern District of New York, however, found the use of Grant's work to be a wholesale copy of music accompanying a political campaign ad.<sup>136</sup> The District Court reasoned that Trump's political ad merely used Grant's work – without editing any

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<sup>128</sup> *Id.* ¶ 2.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* ¶¶ 45-46.

<sup>131</sup> *Id.* ¶ 47.

<sup>132</sup> *Grant v. Trump*, 563 F. Supp. 3d 278, 283 (S.D.N.Y. Sept. 2021).

<sup>133</sup> Copyright Act of 1976, 17 U.S.C. § 107; *see Grant*, 563 F. Supp. 3d at 283-84.

<sup>134</sup> *Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26, 36 (2d Cir. 2021) (quoting *Blanch v. Koons*, 467 F.3d 244, 250 (2d Cir. 2006)).

<sup>135</sup> *Grant*, 563 F. Supp. at 284.

<sup>136</sup> *Id.* at 285.

feature of the song – and did not use the work to “deliver a satirical message” or “poke fun” at the song or Grant.<sup>137</sup>

With respect to determining that all fair use factors favored Grant, the Court heavily weighed the purpose and character of the use and briefly discussed the remaining factors. Trump failed to demonstrate the fair use defense, and thus, his motion to dismiss the complaint was denied.<sup>138</sup> The District Court further reasoned that copyright law merely insists that, “just as artists must pay for their paint, canvas, neon tubes, marble, film, or digital cameras, if they choose to incorporate the existing copyrighted expression of other artists in ways that draw their purpose and character from that work . . . they must pay for that material as well.”<sup>139</sup> This fact-intensive inquiry of fair use is rarely appropriate in making a determination of fair use at the motion to dismiss stage of a case.<sup>140</sup>

#### A. *Fair Use Analysis in Grant v. Trump*

Although the fair use inquiry is rarely appropriate for a motion to dismiss, the District Court in *Grant v. Trump* discussed at length why Trump was not afforded protection under the four fair use factors. For the first factor – the purpose and character of the use<sup>141</sup> – the District Court examined the extent to which the secondary work was “transformative” and whether it was commercial.<sup>142</sup> To determine if the secondary work is transformative, courts ask “whether the new work merely supersedes the objects of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”<sup>143</sup> This inquiry requires the court to

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<sup>137</sup> *Id.*; see *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580-81 (1994) (“If . . . the commentary has no critical bearing on the substance or style of the original composition, which the alleged infringer merely uses to get attention or to avoid the drudgery in working up something fresh, the claim to fairness in borrowing from another’s work diminishes accordingly (if it does not vanish) . . . Parody needs to mimic an original to make its point, and so has some claim to use the creation of its victim’s . . . imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing.”); *Goldsmith*, 11 F.4th at 43 (concluding there was no fair use because the secondary work “retain[ed] the essential elements of the [original work] without significantly adding to or altering those elements”).

<sup>138</sup> *Grant*, 563 F. Supp. at 289-90.

<sup>139</sup> *Goldsmith*, 11 F.4th at 52.

<sup>140</sup> See *Graham v. Prince*, 265 F. Supp. 3d 366, 379 (S.D.N.Y. 2017) (“[I]t is conceivable—albeit highly unlikely—that a fair use affirmative defense can be addressed on a motion to dismiss[.]”) (citing *TCA Television Corp. v. McCollum*, 839 F.3d 168, 178 (2d Cir. 2016)).

<sup>141</sup> See 17 U.S.C. § 107(1).

<sup>142</sup> *Grant*, 563 F. Supp. At 284 (citing *Goldsmith*, 11 F.4th at 37).

<sup>143</sup> *Goldsmith*, 11 F.4th at 37 (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)).

discuss how the secondary work may reasonably be perceived.<sup>144</sup> The secondary work does not need to comment on the original work to qualify as fair use.<sup>145</sup> “Where a secondary work does not obviously comment on or relate back to the original or use the original for a purpose other than that for which it was created, the bare assertion of a higher or different artistic use is insufficient to render a work transformative.”<sup>146</sup> When discussing the character of the use, the Court found Trump did not modify the song or comment on the song or its author.<sup>147</sup> The song is immediately recognizable in the political video.

The Court further reasoned that although the song was a major component of the video, the video creator could have chosen nearly any other music to serve the same entertaining purpose.<sup>148</sup> The first fair use factor also considers whether the secondary work was commercial. The Court again stated that the song was not integral to the political message.<sup>149</sup> “In no sense [did] the video parody the copyrighted song or use the song for purposes of commentary.”<sup>150</sup> Trump should have sought a license to use the song, and thus, the use of the song was found to be commercial.<sup>151</sup>

As for the second fair use factor – the nature of the copyrighted work<sup>152</sup> – the District Court assigned limited weight as to the overall fair use determination.<sup>153</sup> Because Grant’s work was creative, published, and publicly available, this factor weighed in favor of Grant.<sup>154</sup> The third fair use factor considers the amount and substantiality of the portion used in relation to the copyrighted work as a whole.<sup>155</sup> “The ultimate question under this factor is whether the quantity and value of the materials used are reasonable in relation to the purpose of the copying.”<sup>156</sup> Given that the song was immediately recognizable, played for a majority of the animation, and included the chorus which was repeated six times during

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<sup>144</sup> *Id.* (quoting *Cariou v. Prince*, 714 F.3d 694, 707 (2d Cir. 2013)).

<sup>145</sup> *Id.* at 38.

<sup>146</sup> *Id.* at 41.

<sup>147</sup> *Grant*, 563 F. Supp. at 285.

<sup>148</sup> *Id.* at 286; *cf.* *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756, 759 (7th Cir. 2014) (“There’s no good reason why defendants should be allowed to appropriate someone else’s copyrighted efforts as the starting point in their lampoon, when so many noncopyrighted alternatives . . . were available”).

<sup>149</sup> *Grant*, 563 F. Supp. at 287.

<sup>150</sup> *Id.*

<sup>151</sup> *See id.*

<sup>152</sup> *See* 17 U.S.C. § 107(2).

<sup>153</sup> *Grant*, 563 F. Supp. at 288 (citing *Authors Guild v. Google, Inc.*, 804 F.3d 202, 220 (2d Cir. 2015) (“The second factor has rarely played a significant role in the determination of a fair use dispute.”)).

<sup>154</sup> *Id.*

<sup>155</sup> 17 U.S.C. § 107(3).

<sup>156</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994).

the song, the excerpt is of central importance to the original work, and therefore, also favored Grant.<sup>157</sup>

Lastly, the fourth fair use factor is whether the use will adversely affect the potential market for the copyrighted work.<sup>158</sup> Courts must “balance the benefit the public will derive if the use is permitted and the personal gain the copyright owner will receive if the use is denied.”<sup>159</sup> Specifically, the Court noted Trump’s political ad may threaten Grant’s licensing market, undermining Grant’s ability to obtain compensation in exchange for licensing the work, and based on the allegations of the complaint, Trump cannot show a lack of market harm.<sup>160</sup> The fourth factor also considers the public benefits that copying would likely produce.<sup>161</sup> Here, the creator of the video did not pay for a license, obtain permission from the copyright owner, or transform the work by altering it with new expression, meaning, or message.<sup>162</sup> The Court concluded all fair use factors weighed in favor of Grant, as the video did not parody the music or transform it in any way, and Trump failed to demonstrate fair use as a matter of law.<sup>163</sup>

## B. *Assessment of the Grant Decision*

### i. Evaluation of the Court’s Fair Use Analysis

The District Court was correct in its ruling favoring Grant in all fair use factors. Grant’s work used in Trump’s ad in no way altered the song. As the Court noted, the video creator could have chosen any other song to serve the same entertaining purpose.<sup>164</sup> If any song can be used, then there would be no endorsement, as other politicians have argued in this context. A fear of endorsement would likely exist when there is a particular reason for which the politician is using the song. Further, anyone who makes a video and uses someone else’s music in that video must acquire a license,<sup>165</sup> *unless* it is fair use. Trump too should have acquired a license from Grant to use his song. U.S. District Court Judge John Koeltl, who

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<sup>157</sup> *Grant*, 563 F. Supp. at 288.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 289.

<sup>161</sup> *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1206 (2021).

<sup>162</sup> *Grant*, 563 F. Supp. at 289.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 286.

<sup>165</sup> See *How to Get Permission to Use a Song*, COPYRIGHT ALLIANCE, <https://copyrightalliance.org/faqs/how-to-get-permission-to-use-a-song/> (last visited Feb. 8, 2023).

rejected Trump's motion to dismiss, said the use was "best described as a wholesale copying of music to accompany a political campaign ad."<sup>166</sup>

Anyone – including politicians and political campaigns – may use copyrighted works in a way that qualifies as fair use with or without permission from the copyright owner.<sup>167</sup> "Fair use is a fact-specific inquiry that requires a close analysis of the nature of the *use* at issue, not the nature of the *user*."<sup>168</sup> In regard to the first fair use factor, the purpose and character of the use,<sup>169</sup> recent disputes involving campaigns point to whether the work has been "transformed."<sup>170</sup> In other fair use contexts, a work is more likely fair use where the secondary work transforms the original by giving it new meaning, message, or purpose.<sup>171</sup>

As the *Grant* decision discussed, the Supreme Court's pivotal copyright fair use decision in *Campbell v. Acuff-Rose Music, Inc.* asked "whether the new work merely 'supersede[s] the objects' of the original creation, . . . or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is 'transformative.'"<sup>172</sup> Although Trump argued that the use was transformative, simply adding music to a video does not alone qualify as a transformative use of the work.<sup>173</sup> Trump must have added something new to the work, by altering it with new expression, meaning, or message, in order for this factor to weigh in his favor.<sup>174</sup>

For the second fair use factor, the nature of the copyrighted work,<sup>175</sup> the Court assigned limited weight because Grant's work was creative, and thus weighed against a finding of fair use.<sup>176</sup> Factor three, the amount and substantiality of the portion used in relation to the copyrighted work as a whole,<sup>177</sup> looks quantitatively at whether the portion used is the "heart" of the work.<sup>178</sup> Here, the song was unedited, played for over two-thirds of the

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<sup>166</sup> *Grant*, 563 F. Supp. at 4.

<sup>167</sup> *See Is It Considered Fair Use for a Political Campaign to Use Music or Other Copyrighted Works?*, COPYRIGHT ALLIANCE, <https://copyrightalliance.org/education/qa-headlines/music-in-political-campaigns-fair-use/>.

<sup>168</sup> *Id.*

<sup>169</sup> *See* 17 U.S.C. § 107(1).

<sup>170</sup> *See* COPYRIGHT ALLIANCE, *supra* note 167.

<sup>171</sup> *See* *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 569, 579 (1994).

<sup>172</sup> *Id.* at 579.

<sup>173</sup> COPYRIGHT ALLIANCE, *supra* note 167.

<sup>174</sup> *See* *Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26, 37 (2d Cir. 2021).

<sup>175</sup> 17 U.S.C. § 107(2).

<sup>176</sup> *Grant v. Trump*, 563 F. Supp. 3d 278, 288 (S.D.N.Y. 2021).

<sup>177</sup> 17 U.S.C. § 107(3).

<sup>178</sup> COPYRIGHT ALLIANCE, *supra* note 159.



video, and was *instantly recognizable*,<sup>179</sup> because its recognizable chorus was highlighted in the ad.<sup>180</sup>

Trump's argument for the fourth factor, the effect of the use upon the potential market for or value of the copyrighted work,<sup>181</sup> was incomplete. Trump argued, "[i]t is utterly implausible that fans of Mr. Grant's music, or pop music listeners in general, would opt to acquire the Animation in preference to the Song, in order to watch the Animation and thereby to hear the warped snippet of the Song accompanied Former VP Biden's voiceover."<sup>182</sup> Trump's argument did not discuss the licensing market for Grant's work.<sup>183</sup>

The District Court appropriately noted that Trump did not "seriously dispute" this factor, as it was the defendant's burden to show a lack of market harm, and therefore, Grant satisfied any initial burden identifying the licensing for promotional video market as a market that Trump's copying would harm.<sup>184</sup> Courts often look to expert testimony to determine whether a licensing market has been affected by the defendant's use.<sup>185</sup> Here, potential arguments exist against the 'Electric Avenue' market, including the fact that the song has now been used in an ad, and that it was associated with a particular politician.<sup>186</sup> Just as the market-killing effect of a parody is not the kind of harm that is recognizable under the fourth factor,<sup>187</sup> this too is an indirect harm.

## ii. What the Court Left Out

Interestingly, the District Court did not address the compulsory license issue under Section 115.<sup>188</sup> This is likely because the Trump campaign did

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<sup>179</sup> Blake Brittain, *Trump Loses Bid to Escape 'Electric Avenue' Copyright Lawsuit*, REUTERS (Sept. 28, 2021, 7:04 PM), <https://www.reuters.com/legal/transactional/trump-loses-bid-escape-electric-avenue-copyright-lawsuit-2021-09-28/>.

<sup>180</sup> Aaron Moss, *Why Trump Will Lose (on Copyright Fair Use)*, COPYRIGHT LATELY (Nov. 17, 2020), <https://copyrightlately.com/trump-copyright-fair-use/>.

<sup>181</sup> 17 U.S.C. § 107(4).

<sup>182</sup> Moss, *supra* note 174.

<sup>183</sup> Aaron Moss, *Why Trump Will Lose (on Copyright Fair Use)*, COPYRIGHT LATELY (Nov. 17, 2020), <https://copyrightlately.com/trump-copyright-fair-use/>.

<sup>184</sup> *Grant v. Trump*, 563 F. Supp. 3d 278, 289 (S.D.N.Y. 2021).

<sup>185</sup> Moss, *supra* note 180.

<sup>186</sup> *Id.*

<sup>187</sup> See generally Nathan Johnson, *The Doctrine of Fair Use: All You Need to Know*, LARSON & LARSON (June 21, 2021), <https://larsonpatentlaw.com/blog/the-doctrine-of-fair-use-all-you-need-to-know/#:~:text=The%20Effect%20of%20the%20Use%20Upon%20the%20Potential%20Market&text=Again%20parody%20offers%20a%20different,the%20framework%20of%20fair%20use.>

<sup>188</sup> See 17 U.S.C. § 115 (explaining that under Section 115, an individual or entity, subject to certain terms and conditions, may make and distribute an original work of authorship consisting of music that has been distributed to the public under the authority

not pay the compulsory license or notify Grant – the copyright owner of the sound recording and musical composition – that it would use the song.<sup>189</sup> Additionally, it may not have been addressed because the use of the song was not for distribution to the public in a phonorecord, as the song was used in an advertisement. Trump and his campaign sought to gain an advantage by using Grant’s hit song without paying the customary licensing fee.<sup>190</sup> As the District Court noted, “widespread, uncompensated use of Grant’s music in promotional videos – political or otherwise – would embolden would-be infringers and undermine Grant’s ability to obtain compensation in exchange for licensing his music.”<sup>191</sup> Grant’s attorney, Brian D. Caplan, finds the fair use defense is not a viable defense in a politician’s use of a song:

a politician misappropriating a popular song recording and synchronizing it in a totally unrelated political advertisement . . . [t]he decision serves to send a message that recording artists’ and songwriters’ creative output cannot be arbitrarily usurped by politicians who wish to avoid obtaining permission to use their recordings and pay appropriate licensing fees.<sup>192</sup>

Following the *Grant* ruling, in a formal response submitted to the Court, Trump “den[ied] that they have willfully and wrongfully infringed Plaintiffs’ copyrights,” stating Grant’s claims “are barred, either in whole or in part, by the doctrines of fair use and/or nominative use.”<sup>193</sup> Trump further asserted he had “Presidential absolute immunity.”<sup>194</sup> Although the fair use defense may be raised at a later stage of the case,<sup>195</sup> a favorable

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of the copyright owner). *Compulsory License for Making and Distributing Phonorecords*, U.S. COPYRIGHT OFFICE, (Jan. 2018), <https://www.copyright.gov/circs/circ73.pdf>. (explaining the “compulsory license includes the right to authorize others to engage in the making and distribution of phonorecords and to distribute the phonorecord by means of a digital phonorecord delivery,” which is the digital transmission of a sound recording regardless of whether the digital transmission is also a public performance of the sound recording).

<sup>189</sup> See Lauren Berg, *Trump Can’t Unplug ‘Electric Avenue’ Attack Ad IP Suit*, LAW360 (Sept. 28, 2021, 10:34 PM), <https://www-law360-com.daytona.law.miami.edu/articles/1426202/trump-can-t-unplug-electric-avenue-attack-ad-ip-suit>.

<sup>190</sup> *Id.*

<sup>191</sup> *Grant v. Trump*, 563 F. Supp. 3d 278, 288 (S.D.N.Y. 2021).

<sup>192</sup> *Id.* at 288-89.

<sup>193</sup> Aaron Katersky, *Donald Trump versus ‘Electric Avenue’s’ Eddy Grant*, ABC NEWS (Oct. 19, 2021, 1:56 PM), <https://abcnews.go.com/Politics/donald-trump-versus-electric-avenues-eddy-grant/story?id=80664068>.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

determination will likely be sustained in favor of Grant. While this ruling is in favor of the musician, hopefully politicians will comply with copyright laws in the future when using an artists' work.

## V. A POLICY ASSESSMENT

The First Amendment to the United States Constitution requires that “Congress shall make no law . . . abridging the freedom of speech.”<sup>196</sup> The Supreme Court held that music, as a form of expression and communication, is protected under the First Amendment.<sup>197</sup> A major purpose of the First Amendment is to protect citizens’ right to discuss governmental affairs and candidates running for public office.<sup>198</sup> In copyright infringement cases, the Supreme Court has held that an independent First Amendment analysis is unnecessary.<sup>199</sup> Copyright law seems to conflict with the First Amendment.<sup>200</sup> Although copyright functions to suppress others from exercising full expression, courts recognize the Copyright Act has a built-in First Amendment safeguard, including the fair use doctrine.<sup>201</sup> In light of these safeguards, the Supreme Court has declined to expand the fair use doctrine to create a separate public figure or political use exception to copyright.<sup>202</sup> However, copyright remains susceptible to challengers under the First Amendment.<sup>203</sup> Owners of copyrights in musical works should be able to

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<sup>196</sup> U.S. CONST. amend. I.

<sup>197</sup> *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989).

<sup>198</sup> *Smith*, *supra* note 2, at 2008.

<sup>199</sup> *See generally Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556-60 (1985).

<sup>200</sup> *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 339-40 (2010) (the Supreme Court has explained that “[t]he First Amendment ‘has its fullest and most urgent application to speech uttered during a campaign for political office.’”) and (“[P]olitical speech must prevail against laws that would suppress it, whether by design or inadvertence.”).

<sup>201</sup> *Smith*, *supra* note 2, at 2008.

<sup>202</sup> *See Harper & Row*, 471 U.S. at 555-56, 560. “The RNC asks the Court to go several steps further, arguing that its use of the [copyrighted] Work to further a political message is entitled to First Amendment protection above and beyond that built into the Copyright Act. However, the fair use defense is itself a ‘built-in First Amendment accommodation,’ and the RNC cites to no precedent supporting its position that the First Amendment demands an additional layer of protection.” *Peterman v. Republican Nat’l Comm.*, 369 F. Supp. 3d 1053, 1062 n.4 (D. Mont. 2019) (quoting *Eldred II*, 537 U.S. at 219).

<sup>203</sup> The Supreme Court rejected the D.C. Circuit’s statement that copyright is immune from challenges under the First Amendment. *See Eldred II*, 537 U.S. 186, 221 (2003) (“[T]he D.C. Circuit spoke too broadly when it declared copyrights ‘categorically immune from challenges under the First Amendment.’”).

control public performances of their works, of course subject to fair use. Many musicians use their music to spread their own beliefs and political views, recognizing that they can use their voice to influence the public.<sup>204</sup> For example, the early 1960's Sam Cooke song, 'A Change Is Gonna Come,' became an anthem during the civil rights movement.<sup>205</sup>

Moreover, John Lennon's music from the late 1960's and early '70's became a weapon of social and political change as an anti-war movement for the Vietnam war.<sup>206</sup> Even fifty years later, musicians such as Childish Gambino continue to use their music to promote social and political change.<sup>207</sup> Childish Gambino's song, 'This Is America,' describes gun violence in America, furthering this issue as a national conversation.<sup>208</sup> It is clear that musicians' First Amendment rights must be protected. However, fair use should not be broadly interpreted solely because of our constitutional and social commitment to free speech. The Constitution contemplates both protection of free speech and congressional protection of expressive works under copyright law.<sup>209</sup>

Ironically, however, a self-declared economic and social conservative candidate may still use a socially progressive protest song during his campaign.<sup>210</sup> For example, Trump's use of Neil Young's 'Rockin' in the Free World' discounted the lyrics in the verses, while focusing on the chorus ("keep on rockin' in the free world").<sup>211</sup> Politicians occasionally use songs that are essentially at odds with their own political beliefs. It is clear there is a power in music considering "the very fact that Trump was able to create an impression of resolve and strength through . . . music, despite the meaning of the song lyrics."<sup>212</sup> Music can be used during a

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<sup>204</sup> *Sing For Your Rights*, NAT'L CONST. CTR., [https://constitutioncenter.org/springsteen/SingforYourRights\\_final.pdf](https://constitutioncenter.org/springsteen/SingforYourRights_final.pdf).

<sup>205</sup> Greg Tate, *A Change Is Gonna Come: One of Soul's Greatest Songs*, BBC (Oct. 14, 2020), <https://www.bbc.com/culture/article/20201013-a-change-is-gonna-come-one-of-souls-greatest-songs>.

<sup>206</sup> Rachel Johnson, *John Lennon: Revolutionary Man as Political Artist*, POP MATTERS (Oct. 9, 2020), <https://www.popmatters.com/john-lennon-2496108495.html>.

<sup>207</sup> See Mahita Gajanan, *An Expert's Take on the Symbolism in Childish Gambino's Viral 'This Is America' Video*, TIME (May 7, 2018), <https://time.com/5267890/childish-gambino-this-is-america-meaning/>.

<sup>208</sup> *Id.*

<sup>209</sup> See Legal Information Institute, *Copyright and the First Amendment*, CORNELL L. SCH., <https://www.law.cornell.edu/constitution-conan/article-1/section-8/clause-8/copy-right-and-the-first-amendment>.

<sup>210</sup> See Liam Viney, *Donald Trump and Neil Young: What That Song Communicates*, THE CONVERSATION (June 18, 2015, 10:38 PM), <https://theconversation.com/donald-trump-and-neil-young-what-that-song-communicates-43531>.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

political campaign as a powerful tool to sway a viewer's opinion.<sup>213</sup> Similarly, McCain used Browne's song 'Running on Empty' in a campaign ad to highlight criticisms of his opponent's tire-inflation gas policy.<sup>214</sup>

In political fair use cases, courts are "less likely to find fair use when a defendant uses a nonpolitical" work, such as a song – for political purposes – "even when the defendant has transformed the work by giving the work a new purpose or new meaning and message."<sup>215</sup> To demonstrate, the political defendant in *Henly* used two songs for the political purpose of promoting himself and criticizing his opponent.<sup>216</sup> There, the politician "made minimal changes to the lyrics of the Plaintiffs' song to make new songs about different subjects," thus lacking transformative use.<sup>217</sup>

Some musicians seem to assume that the public will associate them with a politician whose view they disagree with, especially if they are clear and up front about their political leanings. From the point of view of the politicians, they may be looking for the message of a song, an implicit association with an artist, or even to try to tap into a cultural experience and association. Even if they are not inferring endorsement, they may be looking for association with the meaning and cultural salience of the song and/or the artist.

American copyright law seeks to vindicate economic interests rather than the personal interests of authors.<sup>218</sup> Under the moral rights protection enacted in the U.S. by the Visual Artists Rights Act of 1990 (VARA), music is excluded from the restrictive definition of works of visual art eligible for moral rights protection.<sup>219</sup> Some commentators have "argued for a commitment for copyright law to be used to prevent and remedy the moral and dignity harms to creators and copyright owners caused by unauthorized copying."<sup>220</sup> While artists may assert moral rights-type values when making copyright arguments, the United States has not yet

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<sup>213</sup> See Asa Royal, *Duke Ad Watch: Candidates Continue to Look for Musical Edges Over Opponents*, REPORTER'S LAB (Oct. 25, 2016), <https://reporterslab.org/election-2016-campaign-ads-music/>.

<sup>214</sup> Smith, *supra* note 2, at 2030-31.

<sup>215</sup> *Id.* at 2052.

<sup>216</sup> See *Henley v. DeVore*, 733 F. Supp. 2d 1144, 1156 (C.D. Cal. 2010).

<sup>217</sup> *Id.* at 1158.

<sup>218</sup> Michel, *supra* note 15, at 176.

<sup>219</sup> See *id.* at 176-77.; This Article will not further discuss the moral rights protections.

<sup>220</sup> Smith, *supra* note 2, at 2072 (citing Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945, 1986 (2006)); see Susan P. Liemer, *Understanding Artists' Moral Rights: A Primer*, 7 B.U. PUB. INT. L.J. 41, 41-42, 44 (1998); see also Jane C. Ginsburg, *Have Moral Rights Come of (Digital) Age in the United States?*, 19 CARDOZO ARTS & ENT. L.J. 9 (2001)).

adopted the use of such rights.<sup>221</sup> The music industry is influenced by moral association, and artists should be able to protect their own musical works.<sup>222</sup>

The song ‘Electric Avenue,’ at issue in *Grant v. Trump*, was written in response to the 1981 Brixton race riots in London rooted by black men being treated unfairly by the police, high unemployment, poor housing, and high crime rates.<sup>223</sup> Grant stated that the song was intended to be a wake-up call for politicians about the lack of opportunity for black people.<sup>224</sup> Although Trump used ‘Electric Avenue’ as part of his advertisement to mock Biden,<sup>225</sup> the use of the work will not be transformed.<sup>226</sup> While experts suggest that some combination of an artist’s right of publicity and the Lanham Act may protect against misappropriation, copyright law remains the most viable way artists may claim alleged misuse of their music.<sup>227</sup>

## VI. CONCLUSION

The tension between musicians and politicians has intensified during the campaign trail. It is clear that artists do not want their songs standing for a political figure they do not agree with. While campaigns can acquire blanket licenses through performing rights organizations, some campaigns have resorted to using music without permission because artists tend to be left leaning and more liberal. A politician’s use of a song may not only change the meaning of a song, but also show an association among a musician and particular political party. In light of recent suits, artists’ public statements, and negative publicity, some politicians have surrendered and stopped use of a song when requested. However, despite countless artists who have spoken out against Trump’s use of their music during campaign rallies and advertisements, Trump continued to use their

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<sup>221</sup> Ashley Cook, *Moral Rights and the Use of Popular Music in Political Campaigns*, BERKLEE COLL. OF MUSIC, <https://www.thembj.org/2019/09/moral-rights-and-the-use-of-popular-music-in-political-campaigns/>.

<sup>222</sup> *See id.*

<sup>223</sup> *See* Emma Nolan, ‘Electric Avenue’ Meaning? Trump Video Uses Song About Race Riots and Police Brutality, NEWSWEEK (Aug. 13, 2020, 4:48 AM), <https://www.newsweek.com/electric-avenue-meaning-trump-song-eddy-grant-brixton-riots-race-1524821>.

<sup>224</sup> Dave Simpson, *How We Made Eddy Grant’s Electric Avenue*, THE GUARDIAN (Sept. 3, 2018, 11:48 EDT), <https://www.theguardian.com/culture/2018/sep/03/how-we-made-eddy-grant-electric-avenue>.

<sup>225</sup> *See* Blake Brittain, *Trump Says He Fairly Used ‘Electric Avenue’ in Biden Attack (1)*, REUTERS (Nov. 12, 2020, 1:39 PM), <https://news.bloomberglaw.com/ip-law/trump-says-he-made-fair-use-of-electric-avenue-to-attack-biden>.

<sup>226</sup> *See* Smith, *supra* note 2, at 2052.

<sup>227</sup> Wimby, *supra* note 102.

music. The *Grant v. Trump* decision was a win for artists everywhere and will hopefully prove the importance of requesting permission to use an artist's copyrighted work moving forward.