Law is a Battlefield: Why Musicians and Politicians Both Lose with Blanket Licensing

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When musicians allege that politicians they dislike have used their music without authorization, those allegations make the news, but rarely, if ever, do those news sources mention when the politicians have purchased licenses for that music. Unsurprisingly, copyright law is never a topic of media mention.

Licensing is a straightforward, nondiscriminatory procedure that allows anyone who pays the necessary fee the right to exercise the license. When it comes to political uses, however, copyright law loses in a landslide to public opinion, which dictates how vocal opponents think licenses should work without acknowledging how licenses do work. Academia can count on one hand the number of times legal scholars have attempted to reconcile these misconceptions and misrepresentations with reality, though those few attempts have yet to strike a chord. Those that have proposed changes to licensing have not been able to do so without implementing biases for the benefit of musicians, nor without unintentionally proposing reforms that set up the possibility of discrimination in licensing.

This Comment explores the need for music licensing reform specifically for political uses, and suggests means of implementing reforms into licensing practice that do not write discrimination into the necessarily neutral process.

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A message from the author: Thank you to my parents, John and Shelly Schrauth, for their constant support and understanding; to my late grandfather, Michael A. Schrauth, for sharing his love of music and his work ethic; to my grandmother, Patricia Schrauth, for her quick wit; to my sisters and nephews, who love me even when I am too busy to notice and for reminding me why I am here; to my friends, for never letting me forget where I came from and always standing by me while I get where I’m going; to Associate Dean Yolanda King for her guidance and help in making sure I used the law correctly, for her review of my finished product, and for the incredible example she sets as a woman in IP; to Jason Meares of BMI for his review and help in understanding consent decrees; to Professor Carliss Chatman for her encouragement and excitement in teaching me the law; to the NIU Law Review; to all of those who have helped, encouraged, loved, and inspired me over the years; and to Stevie Nicks, thank you for the magic.
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“Music is everybody's possession. It's only publishers who think that people own it.”
- John Lennon

ARTICLE I. INTRODUCTION

For as long as the United States has had elected presidents, campaign music has been utilized as a tool to help get candidates elected. While many
musicians have been more than happy to help the candidates of their choosing succeed, countless others have taken issue with politicians they do not support using their songs.\(^4\) Artists such as Bruce Springsteen, Heart, Queen, Adele, The White Stripes, and a whole slew of others have made headlines by telling politicians not to use their music.\(^5\) For many, it might seem a simple process; artists send politicians letters to cease and desist, so campaigns obey. Even political satirist John Oliver made a video (joined by many of the previously named) where he opined that the demand to stop using an artist’s music should be the end of its use.\(^6\) While much of the time termination of use is exactly what happens, the law does not mandate this result; instead, compliance is a courtesy.\(^7\) Rather than follow the simple aforementioned process, the law creates barriers that prevent artists from protecting their interests by allowing politicians public performance use of copyrighted materials, so long as they pay the proper Performing Rights Organization (PRO) for a blanket license.\(^8\) Artists are not asked permission to license and often can only act retroactively once they learn that their material has been used.\(^9\) Further, since the law does not dictate a way in which artists can lawfully act,

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5. Id.; Matthew J. Cursio, Comment, Born to Be Used in the USA: An Alternative Avenue for Evaluating Politicians’ Unauthorized Use of Original Musical Performances on the Campaign Trail, 18 VILL. SPORTS & ENT. L. J. 317 (2011); Sarah Schacter, Note, The Barracuda Lacuna: Music, Political Campaigns, and the First Amendment, 99 GEO. L. J. 571 (2010); 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 (2010); Michelle Lin, Keep on Rockin' in the Free World: Trademark Remedies for Musicians, 93 J. PAT. & TRADEMARK OFF. SOC'y 98 (2011) (There are many more instances, though they are too many to include in the footnote. These are just some of the examples, some of which will be discussed in this article).


their arguments are limited, as are successes. Artists then, are truly at the mercy of the campaign in question. This can often lead to war: candidates and campaigns, armed with blanket licenses versus artists, fighting for their rights with very little legal ammunition in their artilleries.

Various academics have questioned this process over the years, trying to reach an answer as to why copyright holders find themselves head to head with politicians over the use of their music while politicians, having paid for their right to use licensed music, are unfairly labeled as copyright infringers every time a disagreement over their exercising the right to use music erupts. The courts, to their credit, do what they can to find fair remedies, though the lack of support via legislation tends to leave them in a lurch. Regardless of an outcome rendered, one party is always destined to feel cheated by the system if they are playing by the rules of licensing. Many argue that the only solution to this ongoing struggle is for the United States to adopt their own version of moral rights, a concept that will be discussed in Section IV, though I disagree with those claims. Still, others bring up arguments in favor of artists, like their right of publicity, right to avoid false endorsements, and other rights also originating under the Lanham Act (Trademark Act of 1946). While those arguments are great tools for artists to use to fight use of their music in some cases, there is still something that feels less than

10. Most of the time, disagreements never go to court. Those that do are limited in acceptable arguments. See infra note 156.

11. One question that many ask is, “Why?” If artists own their own copyrights, why are they often the last to know when a politician uses their work? As will be discussed later in the paper, artists do not issue licenses for the public performance of their music; rather, that task is delegated to the artist’s PRO. The communication between the two parties (artists and PRO) does not often entail PROs alerting artists when licenses have been granted because first, artists are too busy to keep up with the demand for licenses, which is why PROs function in the first place, and second, because these blanket licenses are for every work in the catalogue. It would be needlessly difficult to alert all artists every time a license is granted when the works that are going to be used have not been decided yet and the chances of one artist versus another being used is relatively small.

12. This Comment discusses almost all of the eight law review articles that even mention both political campaigns and blanket licenses.


14. Moral rights do exist in the United States, though they are not applicable to musical works. Rather, they cover certain modes of visual arts, and the breadth of their coverage is only fractional to that covered overseas. See 17 U.S.C. § 106(a) (2016).

15. See generally White v. Samsung Elecs. Am., Inc., 971 F.2d 1395 (9th Cir. 1992); infra note 75.


honest about taking candidates to court over the use of a good that they have paid (and legally been granted the right) to use.\textsuperscript{18}

The alarming difference between what the law is and what the law should be (as proposed by many) should be enough to open a dialogue between artists and politicians, law scholars and lawmakers, and everyone in between. However, as each election cycle comes and goes, so does the opportunity to rectify the wrongs left by the gaps in copyright law.\textsuperscript{19} The silence prevails, even as artists continue to announce, file suit, and “tweet”\textsuperscript{20} their disapproval.\textsuperscript{21}

This Comment will explore the issues artists and politicians face with blanket licensing and discuss proposed solutions, as well as propose new solutions to the problems licensing presents. Section II will describe the history of music and political campaigns, from the major cases throughout history through the most recent election. Section III will discuss the law on blanket licensing of music and how or when politicians are lawfully entitled to use music as well as issues presented. Section IV will discuss proposals by others on ways to fill the gaps between the law and artistic interests. Section V will offer and analyze those proposals, outlining their merits and downfalls. Section VI will outline a new proposal. Section VII will conclude.

II. TIME AFTER TIME: A HISTORY OF LEGAL CONFLICT BETWEEN MUSICIANS AND POLITICAL CAMPAIGNS

The legal conflict between musicians and politicians (and their campaigns) is not one that emerged overnight or during the last election cycle. The shocking truth is that ever since blanket licenses have been the standard,\textsuperscript{18}

\textsuperscript{18} Using Music in Political Campaigns: What You Should Know, ASCAP, https://www.ascap.com/about/legislation/advocacy-resources/using-music-in-political-campaigns-what-you-should-know.aspx [https://perma.cc/G9T8-L58B] (Source, a PRO, says artists can sue even if all of the proper licensing steps have been taken, noting the core arguments that will be discussed in Section III B.).

\textsuperscript{19} Though this Comment focuses primarily on Presidential Elections because of their more easily recognizable parties and disputes, other large-scale and even local elections suffer the same licensing maladies. While Presidential races occur every four years, some races are as frequent as every two years (or every year in some jurisdictions), calling into question why after nearly 250 years of elections, this issue has yet to be settled definitely in a court.


issues with them have come up time and again. Though solutions for issues with licensing music for a wide array of entities such as television, movies, and even for use by restaurants have developed over the years, solutions for disagreements between musicians and politicians using their music have never really become commonplace. The reasons may vary, though when it comes to the use of music licensed by a PRO and paid for by campaigns, the courts have been silent. This is because under current law, no solution can be created that would make the situation fair for either party: if an artist prevails, politicians who have legally obtained licenses are punished for following the law; if a politician prevails, the artist may be stuck in a situation where their music is associated with a cause they oppose.

Take for instance the 2008 McCain/Palin Presidential ticket. While this combination is best known for its contributions to the staff writers of Saturday Night Live, it is also one of the most notorious for having had conflict with musicians, much of which was documented publicly. In 2008, vice presidential candidate Sarah Palin began her portion of the campaign by accepting the nomination at the Republican National Convention that September. As the crowd waited for Palin to appear and give her speech, Heart’s “Barracuda” played for the crowd — including approximately 50% of the American populous, as the event was televised. The move was motivated by Palin’s high school nickname, so widely known that CBS News referred to her as “Sarah ‘Barracuda’ Palin” in an early profile of the former Alaska Governor. When Heart sisters, Ann and Nancy Wilson, learned of the use of their song by the Republican candidate, the noted political activists

23. This refers to the cases of TV, movies, and restaurants.
24. While courts have ruled that certain actions of campaigns have or have not violated certain rights or claims of artists, the courts have never addressed the issue of licensing as being valid or not.
28. Id.
immediately warned the campaign to quit using their music.\textsuperscript{30} Guitarist Nancy Wilson was outraged by the situation, saying, "Sarah Palin's views and values in no way represent us as American women."\textsuperscript{31} In an interesting (and legal) twist of events, McCain's camp initially refused to stop using the music because they had gotten the proper PRO issued licenses beforehand, though they did eventually acquiesce.\textsuperscript{32} While McCain's original response is seemingly insubordinate to the public interest, it is entirely valid under the current law of licensing, and will be discussed further in the next section.\textsuperscript{33}

Not one to be outdone, McCain also had a legal battle of his own over using music made by a musician who adamantly opposed McCain’s platform. Unlike the conflict between the Wilson sisters and Sarah Palin, John McCain’s scuffle made its way to the court in \textit{Browne v. McCain}.\textsuperscript{34} While McCain and the Republican National Committee already had the licenses needed to play Jackson Browne’s music, the artist was able to take McCain to court over his use of the song “Running on Empty,” because McCain featured it in a commercial that discussed a major public interest, wherein Browne was allowed to argue that it interfered with his right to publicity.\textsuperscript{35} Browne, a supporter of Barack Obama, did not want to be associated with McCain’s energy platform.\textsuperscript{36} The right of publicity claim was allowed to move forward, and McCain eventually pulled the commercials and the song from his repertoire.\textsuperscript{37} Browne’s success on that matter, as well as other tools that artists have at their disposal, will be discussed further in the next section.\textsuperscript{38}

\textsuperscript{30} Eveline Chao, \textit{Stop Using My Song: 35 Artists Who Fought Politicians Over Their Music}, \textsc{Rolling Stone} (July 8, 2015), http://www.rollingstone.com/music/lists/stop-using-my-song-34-artists-who-fought-politicians-over-their-music-20150708/heart-vs-sarah-palin-20150629 (The sisters have a reputation for being very politically involved, having openly opposed the Vietnam War and defiantly moving to Canada with Ann’s boyfriend to avoid the draft.) [https://perma.cc/3G88-GUYA].

\textsuperscript{31} \textit{Id.}

\textsuperscript{32} Michelle Lin, \textit{Keep on Rockin’ in the Free World: Trademark Remedies for Musicians}, \textsc{93 J. Pat. & Trademark Off. Soc’y} 98, 99 (2011).

\textsuperscript{33} See infra Part III.

\textsuperscript{34} Browne v. McCain, 611 F. Supp. 2d 1062 (C.D. Cal. 2009).

\textsuperscript{35} \textit{Id.} at 1068. Further, commercials typically do require artist permission, unlike use of music at a venue or event. For more information, See Bridgeport Music, Inc. v. Still N the Water Pub’g, 327 F.3d 472, 481 n.8 (6th Cir. 2003).

\textsuperscript{36} Trent Hooper and Marley Clark, \textit{Feature Story: Cover Story: Law and Politics: Campaign Branding: The IP Hoops and Hurdles of Marketing a Candidate}, \textsc{Mont. Lawyer}, Sept. 2012, at 12, 14.


\textsuperscript{38} See infra Part III.
It must be acknowledged however, that the McCain/Palin ticket did not mark the first time in which a presidential hopeful faced tough criticism from a recording artist for using his music.\textsuperscript{39} In the 1980s, artist versus politician turmoil raged in the disagreement Bruce Springsteen had with Ronald Reagan over the use of the former’s anti-war, anti-establishment anthem, “Born in the USA.”\textsuperscript{40} Reagan used the song as a representation of what he interpreted to be the core of American values and patriotism.\textsuperscript{41} Reagan spoke publicly in New Jersey where he referenced the song, “America’s future rests in a thousand dreams inside our hearts. It rests in the message of hope in the songs of a man so many young Americans admire: New Jersey’s own Bruce Springsteen.”\textsuperscript{42} Springsteen, however, took great offense to the song’s use, as he wrote it in criticism of the treatment of those returning from the Vietnam War by the American public and most importantly, by government officials who he felt did nothing to aide returning veterans with joblessness and the physical and mental trauma they suffered as soldiers.\textsuperscript{43} Springsteen cited politicians just like Reagan as being the people who his song was meant to criticize.\textsuperscript{44}

The chaos of blanket licensing to politicians when performers vehemently oppose was perhaps best exemplified in the Presidential Race of 2016. From the date of filing candidacy, President Donald Trump\textsuperscript{45} collected opposition from virtually every artist whose songs he dared to use under license.\textsuperscript{46} Where dozens of artists combated the use of their music to help further a cause they did not support, they failed to render results.\textsuperscript{47} In some

\begin{thebibliography}{99}
\bibitem{39} Nor, as seen, would it be the last.
\bibitem{40} Kimberlianne Podlas, \textit{I Do Not Endorse This Message! Does a Political Campaign's Unauthorized Use of a Song Infringe on the Rights of the Musical Performer?}, 24 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 1 (2013) (As an aside, Ronald Reagan shares a hometown with the author of this Comment.).
\bibitem{41} \textit{Id} at 6.
\bibitem{43} \textit{Id}.
\bibitem{45} Donald Trump was sworn in as President of the United States on January 20, 2017.
cases, their music was chosen more than it was before they took issue.\textsuperscript{48} Even still, the licensing of the music protected the campaign from any serious repercussion.\textsuperscript{49}

Looking into the past, it becomes clear that the same issues recur every election cycle, and yet history repeats itself in the stalemate that results from license holders and artists feuding over rights to use music. If music has played a key role in campaigns since the Washingtonian era,\textsuperscript{50} and music licensing has been the standard way to obtain permissions to use music since 1914,\textsuperscript{51} then it is scandalous that American politicians have not yet been given a standard of procedure that permits them to use music they want, that also allows for the artists who make that music to receive equitable remedies in court when they oppose the use of their materials.\textsuperscript{52}

III. WHAT’S LAW GOT TO DO WITH IT?\textsuperscript{53}

The standard of practice for obtaining and using music in political campaigns is through blanket licensing.\textsuperscript{54} Blanket licensing is done through three major Performing Rights Organizations (PROs): American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and Society of European Stage Authors and Composers (SESAC).\textsuperscript{55} While the

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\textsuperscript{51} Podlas, supra note 4.


\textsuperscript{53} That is, that both license holders and copyright holders have a method of practice that each can follow to ensure that disagreements may be solved in the fairest way possible. Contract seems to be the simplest way of achieving such an end.

\textsuperscript{54} This heading might also be considered a play on Tina Turner’s song, “What’s Love Got to Do With It?” While it wasn’t intended to be one, a footnote was advised anyway. TINA TURNER, WHAT’S LOVE GOT TO DO WITH IT (Capitol Records 1984).


\textsuperscript{56} Maria Schied, Copyright in Campaigns, COPYRIGHT CORNER (Sept. 30, 2015), https://library.osu.edu/blogs/copyright/2015/09/30/copyright-in-campaigns/.
Copyright Act of 1976\textsuperscript{56} provided artists with the exclusive right of use of their own music, the PRO each artist belongs to handles the granting of non-exclusive rights to third parties.\textsuperscript{57,58} These rights are granted when the party-seeking license, in this case, a campaign, contracts with the PRO or PROs they wish to license from and agrees to pay for use of the music covered under the license, even if it is not going to be used by the campaign.\textsuperscript{59} The music they do plan to use, however, is then available to them either in payment of the one-time license fee or on a per-play basis.\textsuperscript{60} Artist permission is not necessary for a license to be granted.\textsuperscript{61} Most interestingly, the entirety of the licensing is done by PROs, which are nongovernmental agencies.\textsuperscript{62} While PROs do operate under specific and closely followed consent decrees, they do not offer the same protections or remedies that traditionally come with governmental entities.\textsuperscript{63} Further, the consent decrees concern the practices of the PROs they govern and those the PROs personally contract with, not what happens when disagreements arise between copyright owners and license buyers.\textsuperscript{64} Where the Copyright Act of 1976 ends, PROs begin, and the vastness of the ambiguity left in between swallows each instance of political use of music under artist opposition.\textsuperscript{65}


\textsuperscript{57} 17 U.S.C.S. § 114(c) (LEXIS through Pub. L. No. 115-164, approved 4/11/18, with a gap of Pub. L. No. 115-141); Sonny Bono Copyright Term Extension Act, 112 Stat. 2827 (1998) (this 1998 amendment gave PROs the power to operate as royalty collection and price determination “agencies”, though they are not governmental agencies; perhaps an argument could be made that PROs do not have the authority to do so under the nearly extinct Nondelegation Doctrine?); See Dep’t of Transp. v. Ass’n of Am. R.R.s., 135 S. Ct. 1225 (2015).

\textsuperscript{58} Those are public performance rights, not sound recording use rights.


\textsuperscript{60} Id.


\textsuperscript{62} Id.

\textsuperscript{63} See Change is Now: What is the Consent Decree, BMI, https://www.bmi.com/pdfs/advocacy/about_bmi_consent_decree.pdf (last visited Sept. 2017). Many thanks to Jason Meares of BMI for his review of my article and pointing me to this helpful information.

\textsuperscript{64} Which makes it clear as to why it is so difficult for the people who come to licensing disagreements to solve them.

\textsuperscript{65} As seen in the following cases, it is very difficult for courts to decide what to do in these cases.
A. “I’ve Paid My Dues!:” A Political Perspective

Most of the time, controversies in political music use are brushed off by politician and artist alike. After all, it is much less time consuming for a politician to stop using a song that does not really affect the outcome of her campaign than it is to face potential litigation. In all fairness, however, any holder of a license has the non-exclusive right to use any music covered under that license in any way they wish, so long as that use is not part of an exemption to the agreement, as commercials sometimes are. Despite the permissive licensing practice, disagreements with artists often arise when an artist feels that their permission should have been a requirement to use the song in question.

Recall the case of Browne v. McCain where singer Jackson Browne sued John McCain and his campaign for use of his music. Browne asserted that his permission was not granted for use of sections of his song, “Running on Empty.” When asked to quit using the song, McCain did not initially agree. In that case, Browne’s argument actually had merit, as McCain’s use was as part of a commercial, which license agreements often require special permission to extend use to include, and because the issue presented was one of significant public interest. Looking at Browne’s victory, many outside the world of copyright law believe that, because Browne won on the argument that he never gave permission, artist permission is a necessary element of use of music. It is, therefore, incomprehensible to many that any politician dares to use music without first obtaining permission, though the

66. This heading is a play on lyrics from Queen’s “We Are the Champions.” QUEEN, WE ARE THE CHAMPIONS (Elektra 1977).
69. Chao, supra note 30.
71. Id. at 1065.
75. Mike Masnick, John Oliver’s Story on Campaign Music and Copyright is... Wrong, TECHDIRT (July 25, 2016, 11:47 AM), https://www.techdirt.com/articles/20160725/07541435058/john-olivers-story-campaign-music-copyright-is-wrong.shtml (explaining that artist permission is always necessary and neglect that the circumstances in which permission is required are different from those granted by license).
limited guidelines licenses provide do not require prior authorization. In that vein, legal minds must find themselves sympathizing with the devil; politicians using music they have paid to license have done nothing wrong.

It should come as no surprise, then, that politicians like John McCain become angry, and even hostile, toward musicians for calling them out and alleging infringement. How can any license holder protect themselves from controversy when, even after having taken every legal precaution against it, they are still left to defend the legality of their actions to a world that does not understand why they have the right to proceed without chastisement?

B. Artists Just Don’t Understand: Why Artist Arguments Aren’t Always on Key

“That's basically what's going on now: Everything is propaganda.”
- Lindsey Buckingham

Imagine existing in a world where people, admired for their talents alone, take it upon themselves to educate the public on topics of every variety, including the law. Luckily, or unluckily, one must not imagine too hard, as today’s world is just as described. To the credit of many artists, sometimes they get it right. However, when it comes to the law, very few are experts. It is one thing to be an expert in one’s own industry, but when not even the greatest law professors and academics available are able to pinpoint all the things wrong with copyright law, one simply cannot expect for musicians to have all of the answers. Certainly, they do not.

Where musicians have found legs to stand upon in the ongoing battle between performers and politicians, each has only been able to do so on an individual basis. Nothing that has managed to find a way through the courts has been applicable to the general world of music licensing for politicians on the whole. Some of the best arguments, however, have come close to filling

76. Id. (The celebrity comments within the video imply that their permission is always required.).
77. Likely for good reason, as they have secured the license legally in most cases.
78. Lindsey Buckingham, BRAINYQUOTE, https://www.brainyquote.com/quotes/quotes/l/lindseybuc305792.html (Lindsey Buckingham is the guitarist and male vocalist for Fleetwood Mac, arguably the greatest rock band of all time); see also Adam Nagourney, On the Trail; The Edwards Playlist, N.Y. TIMES (Dec. 20, 2007), http://query.nytimes.com/gst/full-page.html?res=9C03E1D61639F933A15751C1A9619C8B63&oref=collec-
tion%2Fbyline%2Fadamnagourney&action=click&contentCollection=undefined&regi-
gion=stream&module=stream_unit&version=search&contentPlacement=1&pgtype=collec-
tion (More relevant, he and Fleetwood Mac campaigned with Bill Clinton in 1992, where their song “Don’t Stop” served as slogan and major focus of the effort; their agreement to provide and perform the song did not delve into licensing, as they agreed to participate).
in part of the gaps left in the law. Among them: right of publicity,\textsuperscript{79} right to avoid false endorsements,\textsuperscript{80} and other rights having originated under the Lanham Act.\textsuperscript{81}

\textbf{1. Right of Publicity}

The right of publicity is difficult to specify, as it is not federally recognized, and instead depends on state law.\textsuperscript{82} While not every state is as influential as others, with new technology readily available to almost everyone in their own homes, it becomes increasingly more important that some consensus be reached nationally on what constitutes the right of publicity. That rapper from your hometown might just become a YouTube\textsuperscript{83} star after all. For the purposes of this Comment, California and New York Law will be most important as “these states are the domiciles of most American celebrities, and consequently their laws receive the greatest attention and scrutiny.”\textsuperscript{84}

California is one of only thirty-three states to recognize a public figure’s right to publicity.\textsuperscript{85} A strong common law supported by an additional state statute outlines the rights Californians have to protect their own public images.\textsuperscript{86} California has one of the most comprehensive statutory legal structures in recognizing the right of publicity for residents, covering the use of “‘name, voice, signature, photograph, or likeness’\textsuperscript{87} while their common law extends the protections to “any aspect or combination of aspects of an individual’s persona that serves to identify him or her”\textsuperscript{88} and post-mortem for an additional 70 years.\textsuperscript{89}

New York, while one of the slight majority of states and Washington D.C. recognizing a right of publicity, supports the right using only one

\begin{itemize}
  \item \textsuperscript{79} See generally White v. Samsung Elecs. Am., Inc., 971 F.2d 1395 (9th Cir. 1992); supra n.75.
  \item \textsuperscript{80} 15 U.S.C. § 1125 (2016).
  \item \textsuperscript{81} 15 U.S.C. § 1051 (2016).
  \item \textsuperscript{82} Jonathan D. Reichman, \textsc{Getting the Deal Through: Right of Publicity} (Kenyon & Kenyon LLP ed. 2016) (only 33 states and the District of Columbia have recognized the right).
  \item \textsuperscript{83} \textsc{Youtube}, WIKIPEDIA (May 3, 2018), https://en.wikipedia.org/wiki/YouTube.
  \item \textsuperscript{84} Jonathan D. Reichman, \textsc{Getting the Deal Through: Right of Publicity} (Kenyon & Kenyon LLP ed. 2016).
  \item \textsuperscript{85} See generally White v. Samsung Elecs. Am., Inc., 971 F.2d 1395 (9th Cir. 1992).
  \item \textsuperscript{86} Jonathan D. Reichman, \textsc{Getting the Deal Through: Right of Publicity} (Kenyon & Kenyon LLP ed. 2016).
  \item \textsuperscript{87} \textit{Id}.
  \item \textsuperscript{88} Jonathan D. Reichman, \textsc{Getting the Deal Through: Right of Publicity Question} 8 (Kenyon & Kenyon LLP ed. 2016).
  \item \textsuperscript{89} \textit{Id}. at bottom chart.
statute. The New York statute protects "name, portrait, picture, or voice" but does not recognize any common law protections, nor does the New York right of publicity extend past death of the person in question. New York’s recognition as compared to California’s is sparse.

While both states have recognized that the right of publicity exists to at least some extent (while an alarming 17 states have either yet to face a case of this nature and have thus not ruled for or against, or plainly rejected the right) they differ completely in their approaches and areas of coverage. If we consider that not even the two largest states for performing and creating can agree on the depth of the right of publicity, the idea that such a right could or would be recognized nationally (while barely half of the states and Washington D.C. have recognized it at all) and be interpreted the same ways by the judiciary is farfetched, if not foolish. While California and New York artists might succeed using the argument for publicity within their own states, the same cannot be guaranteed outside of their judicial bounds, particularly when the majority of the other states even recognizing the right limit the recognition by terms of their own common law systems.

2. False Endorsements and Trademarks

A more compelling argument is that artists have the right to avoid false endorsements. False endorsements are covered under section 43(a) of the Lanham Act. Section 43(a)(1) provides that any "endorsement or association of goods or services through the wrongful use of another’s distinctive"

90. Id.
92. Id.
95. This is an issue using only two states. Imagine the hurdles that would come up if one also considered Tennessee, home to Nashville and Memphis, two long-standing country music hotspots. The troubles multiply each time a state is added for consideration. Seattle, Boston, Chicago, and every other city in the country has a unique sound to match their unique laws. All of these factors are going to be problematic in the future if a unified federal procedure of practice is not adopted while the access to music from artists all over the country becomes less limited.
mark, name, trade dress, or other device” is a false endorsement. It makes sense that artists might try to use this line of argumentation if their point of view is that they don’t want others to think they support a candidate who has used their music. However, this thought has two serious faults: the Lanham Act does not cover copyrights and in most cases, campaign music does not meet the criteria for false endorsement.

First, the Lanham Act covers trademarks, not copyrights. In Oliveira v. Frito-Lay, Inc., the United States Court of Appeals for the Second Circuit heard a case in which a singer, Oliveira, sued Frito-Lay for using her song in a commercial for potato chips. The argument was that under Section 43(a) of the Lanham Act, Frito-Lay made it seem that Oliveira was endorsing their product by using her “signature song” in their commercial. The court ruled that there was no trademark violation because musical works cannot be trademarked, only copyrighted.

Next, the criteria for a successful false endorsement claim are that a plaintiff must prove a valid trademark has been violated and that the defendant using their trademark has done so in a way that could confuse consumers. The first element can never be met when dealing with music because music is copyrightable, but not able to be trademarked, so the real issue with music is the likelihood of confusion. How likely is it that a person will hear a song used to supplement a political campaign and think that the artists in question are endorsing the messages associated?

The court in Storball v. Twentieth Century Fox Film Corp. declared, “Mere use of a sound recording in a motion picture or audio/visual presentation, with truthful attribution of the performance to the performers in the credits, does not constitute a representation that the performers in the sound recording approve, sponsor or endorse the motion picture.” The court in Storball seemed to think it illogical for people to assume that just because a

99. Reasons why that fact is most important are discussed further. See Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23 (2003).
101. Id. at 61 (Per my interpretation: A “signature song” is the song an artist is most widely known for, especially in the case of a one-hit wonder).
102. Id.
song is used in a movie, the artist endorses or approves of the film.\textsuperscript{106} Rather, it seems pretty clear that when it is one’s job to sell use of their music, they tend to do so without discrimination, at least in every situation besides for political campaign use. The same conclusion should be made in the political sense.\textsuperscript{107} Musicians make money by selling licenses for use of their music; whatever happens with the license after that point is of little to no consequence to them.

The court in \textit{Storball} got it right. Consumers would not think that Neil Young\textsuperscript{108} is more likely to endorse a certain brand of dishwashing detergent just because they have used his music in marketing, so nor would it be any more logical for consumers to assume that he would endorse or support a candidate who uses his songs, especially without him present.\textsuperscript{109,110}

As the language in § 43(a)(1) indicates, use of a distinguishing feature can be evidence of a violation.\textsuperscript{111} Many artists argue that their voices are that distinct feature.\textsuperscript{112} While it is an interesting argument with a lot of merit, it still is not trademark material. Having an easily identifiable voice is certainly compelling to the argument that people might recognize it when a song is

\begin{itemize}
\item \textsuperscript{106} Contra Michelle Lin, Article, \textit{Keep on Rockin’ in the Free World: Trademark Remedies for Musicians}, 98, PAT. & TRADEMARK OFF. SOC’Y 98 (2011).
\item \textsuperscript{107} Kimberlianne Podlas, Article, \textit{I Do Not Endorse This Message! Does a Political Campaign’s Unauthorized Use of a Song Infringe on the Rights of the Musical Performer?}, 24 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 1, 3 (2013) (“...it is doubtful that a political campaign’s playing of a song would confuse or mislead consumers under the Lanham Act.”).
\item \textsuperscript{108} Neil Young, WIKIPEDIA (May 5, 2018), https://en.wikipedia.org/wiki/Neil_Young (Neil Young is an incredibly politically vocal Canadian musician with an instantly identifiable, unique singing voice; he would likely have a problem with any politician attempting to use his music, as he has problems with them regarding almost everything else).
\item \textsuperscript{109} An artist being physically present can be great evidence to support that they do support a candidate, especially if they perform their music at a rally for that candidate. Recalling the Fleetwood Mac example, the band would likely have failed suing President Clinton for use of their song as a false endorsement when they had publicly performed it for his rallies and events.
\item \textsuperscript{110} See infra. p. 17.
\item \textsuperscript{111} 15 U.S.C.S. § 1125(c)(1) (LEXIS, Lexis Advance through Pub. L. No. 114-329, approved 1/6/17). The law states “Injunctive relief. Subject to the principles of equity, the owner of a famous mark that is distinctive, inherently or through acquired distinctiveness, shall be entitled to an injunction against another person who, at any time after the owner's mark has become famous, commences use of a mark or trade name in commerce that is likely to cause dilution by blurring or dilution by tarnishment of the famous mark, regardless of the presence or absence of actual or likely confusion, of competition, or of actual economic injury.” \textit{Id}.
\item \textsuperscript{112} See Midler v. Ford, 849 F.2d 460 (9th Cir. 1988) (California common law at the time stated that voice recognition was a publicity right and afforded protections as such. The court later found that the common law was no longer good law and would not be the standard anymore); \textit{See also} Waits v. Frito-Lay, 978 F.2d 1093 (9th Cir. 1992) (also later abrogated in part). 
\end{itemize}
used, though it is no more likely to make consumers think that the singer is sending a message when their song is played.\textsuperscript{113}

Whether or not a musician feels that use of their songs by a politician they don’t approve of is a false endorsement, arguing under the Lanham Act is not the way to win. As the right to avoid false endorsements exemplified, the best arguments in favor of artists’ rights will still fail if they are argued as trademark issues when they are copyright issues. The Lanham Act, also known as the Trademark Act of 1946, is specifically for trademarks.\textsuperscript{114} The purpose was, “[t]o provide for the registration and protection of trade-marks used in commerce . . .”\textsuperscript{115} In the future, it would not be a surprise or a stretch of the law to see an amendment raised that would allow the same kind of coverage for copyrightable materials.\textsuperscript{116} As of right now, however, the coverage is limited, by the very definition of the Act, to trademarks.\textsuperscript{117} Musicians can argue their positions using the Lanham Act and support their conclusions with the most compelling evidence available yet still lose because they are arguing the completely wrong kind of law.\textsuperscript{118}

Artists and politicians alike have argued the law back and forth time and again, even when the laws were not applicable. The results have varied, but for the most part, regardless of who wins and who loses, the cases are one-of-a-kind and do not come out with any case law or community standard that can be built upon or used again in subsequent cases.\textsuperscript{119} While no legal standard has come to be, legal scholars and academics have put in some serious thought. The subsequent section will be a discussion and analysis of some of the proposals that others have come up with.

IV. PROPOSALS BY OTHERS

This argument, never settled through the judicial process, has only seen minor discussion from just a handful of scholars, severely limiting the


\textsuperscript{114} Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23 (2003).


\textsuperscript{116} Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23 (2003).

\textsuperscript{117} Kimberlianne Podlas, Article, \textit{I Do Not Endorse This Message! Does a Political Campaign’s Unauthorized Use of a Song Infringe on the Rights of the Musical Performer?}, 24 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 1 (2013) (Here, the author proposes that even if the protections could theoretically be shifted to encompass copyrights as well as trademarks, there would be some conflict or preclusion in Copyright Law itself that would prevent success).

\textsuperscript{118} Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23 (2003).

\textsuperscript{119} Which is one facet of the legal issue. Courts are free to adjudication but not agency rulemaking. PROs aren’t agencies, so they can’t make those decisions that are applicable to all.
potential to develop procedure that could appease all.\textsuperscript{120} While solutions are not so easy to come by, authors have tried.\textsuperscript{121} The three central arguments that academics have made are: that the United States should extend trademark protections provided by the Lanham Act to musical compositions;\textsuperscript{122} that the United States should implement a system of recognition for moral rights on copyright owners’ behalves, or at least a process for approval;\textsuperscript{123} and if nothing else, the right for artists to ask for preliminary injunctions once their music has been used.\textsuperscript{124}

\textbf{A. Consideration for Trademark Protections}

The first proposal is that trademark protections sanctioned under § 43(a) of the Lanham Act should be extended to musical compositions.\textsuperscript{125} In Section III B 2, there was discussion on what falls under § 43(a) of the Lanham Act and what cannot.\textsuperscript{126} As discussed, copyrightable works, such as musical compositions, cannot be trademarked.\textsuperscript{127} There was, however, the idea that distinctiveness of voice might compel an exception to that interpretation.\textsuperscript{128} Some have furthered support for that idea, claiming that if a voice, though still not a song, is distinct enough, trademark protections should be an achievable option.\textsuperscript{129}

Though not different from the previously discussed concept, this argument adds to the conversation the idea that even though a song cannot be trademarked, a voice itself can be.\textsuperscript{130} As mentioned before, the argument posits that the use of a distinct voice leads to confusion by the public.\textsuperscript{131} The confusion is escalated by the fact that in today’s political climate, many

\textsuperscript{120} Midler v. Ford, 849 F.2d 460 (9th Cir. 1988) (California common law at the time stated that voice recognition was a publicity right and afforded protections as such. The court later found that the common law was no longer good law and would not be the standard anymore); See also Waits v. Frito-Lay, 978 F.2d 1093 (9th Cir. 1992) (also later abrogated in part).
\textsuperscript{121} See supra notes 4-12.
\textsuperscript{122} Podlas, supra note 4.
\textsuperscript{123} Lin, supra note 5.
\textsuperscript{125} Michelle Lin, Article, \textit{Keep on Rockin' in the Free World: Trademark Remedies for Musicians}, 93 J. PAT. & TRADEMARK OFF. SOC’Y 98, 119 (2011).
\textsuperscript{126} Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23 (2003).
\textsuperscript{127} Id.
\textsuperscript{129} Michelle Lin, Article, \textit{Keep on Rockin' in the Free World: Trademark Remedies for Musicians}, 93 J. PAT. & TRADEMARK OFF. SOC’Y 98, 104 (2011).
\textsuperscript{130} Id. at 111.
\textsuperscript{131} Id.
celebrities do openly endorse politicians.\textsuperscript{132} Supporters of this approach argue that such issues could be remedied by enforcement of the right to avoid false endorsements.\textsuperscript{133} Allowing trademark protections to cross over into musical compositions could, as they see it, stop such complications where they begin.\textsuperscript{134}

Still, others state outright that trademark rules, the Lanham Act in particular, fail as remedies to disagreements in blanket licensing for political campaigns.\textsuperscript{135} First, the key to a successful claim under § 43(a) would have to prove that a likelihood of confusion did exist.\textsuperscript{136} Second, and perhaps most significant, sound recordings would probably not violate Lanham Act § 43(a) because sound recordings cannot be trademarked, even if the voice on them can be.\textsuperscript{137}

On the likelihood of confusion basis, Professor Kimberlianne Podlas says,

\begin{quote}
First and fundamentally, since a politician is not engaged in commerce, there is no commercial matter and no consumers involved. As a result, even if the use of the song mark created some type of confusion, it would not create consumer confusion about a commercial matter. Therefore, it would not constitute trademark infringement.\textsuperscript{138}
\end{quote}

While certainly an easy fix to the problem artists find themselves in, the likelihood of success on a Lanham claim is low even before considering that the necessary element of confusion is hard to prove.

\textsuperscript{132} Id. at 111.
\textsuperscript{133} 15 U.S.C. § 1125 (2016) (Full section reads, “(a) 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, or…”).
\textsuperscript{134} That is since it would be easier to allow coverage in the case of copyright instead of creating a new parallel copyright procedure.
\textsuperscript{136} Id. at 594.
B. You Gotta Fight for Your (Moral) Rights

The second proposal is that moral rights should be adopted in the United States.\textsuperscript{139} While some seek moral rights as support for allowing the trademark claims to encompass campaign music,\textsuperscript{140} others contend that moral rights on their own would eliminate the problems artists face when in opposition to politicians who hold licenses to their music.\textsuperscript{141}

Moral rights are the rights artists have to keep their creations from being used or interpreted as different from how they were intended.\textsuperscript{142} Though not adopted in their entirety in the United States,\textsuperscript{143} they are generally: the right of attribution, integrity, disclosure, withdrawal, and resale royalties.\textsuperscript{144} These rights allow artists to “blow the whistle” when their product is used in a way they do not approve.\textsuperscript{145} While these rights might greatly

\begin{enumerate}
\item[139.] See 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, 311 (2010) (Bilasz states that recognition of moral rights would solve most of the problems that artists have in dealing with campaign music, but quickly clarifies that she does not see an adoption of those rights in the future).
\item[140.] Michelle Lin, Article, Keep on Rockin' in the Free World: Trademark Remedies for Musicians, 93 J. PAT. & TRADEMARK OFF. SOC’Y 98 (2011).
\item[141.] 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, 311 (2010).
\item[142.] See generally Susan P. Liemer, Article, Understanding Artists’ Moral Rights: A Primer, 7 B.U. PUB. INT. L. J. 41, 44 (1998) (Professor Liemer stresses the importance of these rights, saying, “When an artist creates, she produces something that allows others a glimpse into her individual human consciousness.”).
\item[143.] See supra notes 4-12.
\item[144.] Michelle Lin, Article, Keep on Rockin’ in the Free World: Trademark Remedies for Musicians, 93 J. PAT. & TRADEMARK OFF. SOC’Y 98, 119 (2011).
\item[145.] E.g., Kimberly Y.W. Holst, Article, A Case Of Bad Credit?: The United States And The Protection Of Moral Rights In Intellectual Property Law, 3 BUFF. INTELL. PROP. L.J. 105, 106 (2006) (Referring to the authority to regulate as part of author’s ‘credit’).
\end{enumerate}
impact the way political campaigns use music, they are currently only adopted as limited to visual works of art.\textsuperscript{146}

Some argue that while the United States should adopt these rights, as they would make it easier for copyright holders to maintain the integrity of their works, it is unlikely, as doing so would change the entire Copyright Act.\textsuperscript{147} Rather than focus on their adoption, practitioners should inspire academics to come up with new solutions that offer many of the same freedoms but keep PROs and governmental interests separate.\textsuperscript{148}

\textbf{1. Approval}

The battle for moral rights has left many empty-handed. In the interests of finding alternative approaches that the United States might actually adopt, some legal scholars have suggested that prior approval of song use for political purposes is a good solution to the problem.\textsuperscript{149} One argument in favor of pre-approval is that everyone involved in the process of creating the songs in question can say yes or no before any conflict occurs, thus avoiding harm.\textsuperscript{150} Further, all of blanket licensing would not be mandated to this process; it would be just for political purposes, keeping the rest of blanket licensing streamlined.\textsuperscript{151}

In a similar proposal, authors suggested that if neither moral rights nor prior approval are feasible options, there could at least be the opportunity for artists to pull their works from blanket licensing agreements for certain

\begin{flushleft}
\textsuperscript{146} \textit{Id.} \\
\textsuperscript{147} Bilasz, supra note 5, at 311. \\
\textsuperscript{148} \textit{Id.} at 312. \\
\textsuperscript{151} See \textit{id.}
\end{flushleft}
contexts, such as political campaigns, after they have been used.\textsuperscript{152} This proposal is supported by the idea that if an artist found herself in a situation such as that between Heart and the McCain/Palin standoff, she could have their music removed immediately, instead of being at the mercy of campaigns to honor her requests.\textsuperscript{153}

C. Stop! In the Name of Law

The third proposal is that, if no other remedy or preventative measure is possible, artists should, at the very least, be allowed to file for a preliminary injunction if a politician has used their music and they disapprove.\textsuperscript{154} Similar to the idea of retroactively having their music pulled, authors have suggested that artists can file for preliminary injunctions so that campaigns have to suspend use until a court can determine that a use is authorized as a fair use or not.\textsuperscript{155}

The court, under this suggestion, should use an “alternative avenues test” rather than a bright-line rule.\textsuperscript{156} By weighing the rights of the property (copyright) holder against the needs of the politician, the court is also able to make their determination while maintaining the First Amendment rights that could come into argument.\textsuperscript{157}

V. THE TROUBLE WITH THE ABOVE

While some of what has been proposed in the past is sound and would be excellent if able to be implemented, the problems are just that; implementation is not always an option, even for the best ideas.\textsuperscript{158} Other aspects, however, are not practicable on the basis of ideological differences or a disinterest

\textsuperscript{152} 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, 333 (2010).
\textsuperscript{153} 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, 334 (2010).
\textsuperscript{154} Matthew J. Cursio, Comment, Born to Be Used in the USA: An Alternative Avenue for Evaluating Politicians’ Unauthorized Use of Original Musical Performances on the Campaign Trail, 18 VILL. SPORTS & ENT. L. J. 317, 365 (2011); See also Bilasz, supra note 5 (to a lesser extent).
\textsuperscript{155} Id. at 365.
\textsuperscript{156} Id. 364.
\textsuperscript{157} Id. 366.
\textsuperscript{158} This is not to say that good ideas can never be implemented, though it is important to note that many times, changes to certain procedures requires overhaul of more than one entity; an endeavor that takes considerable time and money in a majority of situations.
by those in charge of the systems at play.\textsuperscript{159} The following section outlines the merits and downfalls of each of the mentioned proposals.

\textbf{A. The Merits of Recognizing Trademark Rights in Copyright}

It makes sense theoretically to extend trademark protections to copyrights when there is opportunity to end the debate by simply saying that the Lanham Act has been violated by a political use of music and allowing the parties to walk away without much afterthought. The benefits of such recognition quickly fall apart, both when the elements come into play and when the outcome is considered.

\textbf{B. The Downfalls of Trademark Rights in Copyright}

The first problem with recognizing trademark protections in copyright is that overlapping the two disciplines sets a dangerous precedent. Once one exception or inclusion is made, the door for more is open, which can contribute additional complications to the entire field of intellectual property. If there is no longer any distinction between trademarks and copyrights, the system fails.

It was put best when the court said that intermingling the two fields of law would, “stretch the definition of trademark - and the protection under 43(a) - too far and give trademark law a role in protecting the very essence of the song, an unwarranted extension into an area already protected by copyright law.”\textsuperscript{160} Trademarks and copyrights are different for a reason.\textsuperscript{161} Though the protections offered in § 43(a) of the Lanham Act are good for artists seeking recourse for use of their music, to use them in a copyright setting would be an abuse of the system.\textsuperscript{162}

Justice Scalia spent a great deal of time outlining the importance of keeping trademark (which he often referred to as trade dress) and copyright protections separate.\textsuperscript{163} In \textit{Dastar Corp. v. Twentieth Century Fox Film Corp.}, 539 U.S. 23 (2003), the Supreme Court (through Justice Scalia’s opinion) discussed the importance of those different applications as they pertain

\textsuperscript{159} Some suggestions are barred because PROs are not regulated as governmental agencies.


\textsuperscript{161} \textit{Dastar Corp. v. Twentieth Century Fox Film Corp.}, 539 U.S. 23 (2003).

\textsuperscript{162} \textit{Id}.

The court described the basic difference between trademark protections under § 43 and what a copyright application using § 43 would be by focusing on the specific language in the statute that states application is limited to an “origin of goods.” The Court further solidified the necessity of separation by stating:

[T]he phrase "origin of goods" is in our view incapable of connoting the person or entity that originated the ideas or communications that "goods" embody or contain. Such an extension would not only stretch the text, but it would be out of accord with the history and purpose of the Lanham Act and inconsistent with precedent.

The same standard can be applied to the instance of musicians arguing that they are entitled to § 43 protections for their copyrights. Not only can courts point to the basic differences between trademarks and copyrights, but they can also cite that the Supreme Court found that application of such protections “would be akin to finding that § 43(a) created a species of perpetual patent and copyright, which Congress may not do.” The authority the courts have to offer a remedy for copyright protection using trademark law does not exist.

Next, recognizing trademark rights in copyright for political music doesn’t make sense because the likelihood of confusion still is not there. Mentioned before, it is not logical to hear a song and think that the artist is endorsing the product, let alone person, associated with it unless they affirmatively state that they are. To claim otherwise is somewhat of an insult to the American public. People are smart enough to know that a song is often just a song, not a political statement, unless the artist says otherwise. One example of the reasonable possibility of confusion is given in the context of artists supporting candidates, though it is not compelling enough to base an entire argument upon.

Another downfall of treating copyright issues with trademark protections is that damages would be incredibly unjust. A politician with a blanket

165. Id. at 32.
166. Id.
167. Id. at 37.
169. No disrespect to Michelle Lin, but Kimberlianne Podlas got it right on this one.
170. Cf. Podlas, supra note 4 (Springsteen’s Born in the USA was a political statement and he made that known).
license has paid for the right to use the music. Any legal victory an artist was to be awarded using the Lanham Act and trademark protections would be conversion. The result would likely be that politicians will no longer bother with purchasing licenses and instead, use whatever music they want, knowing that whether they pay for it or not, they are going to get sued. That is not great practice.

Lastly, and put most simply, using trademark protections for copyrights would be hard. The courts have honored the argument that distinct voices can be trademarked, but songs themselves cannot be. Further, not every singer owns the copyright to the songs that have made them famous. The standing required to adjudicate would preempt artists from seeking trademark protections on copyrights they do not own because they are not the appropriate party to bring the infringement forward. This would complicate matters tremendously if there were one performer who owned the copyright to a song but was not the voice used. For instance, music producers write a great deal of music and perform the instrumentals, but not vocal portions of their songs. The vocalists they bring in are the voices on the recordings, but those voices are not those of the people who own the rights in the music. The same can be said for rappers who have pop singers as featured vocalists on their songs. The rappers have often written the lyrics, but rarely do they sing them. Additionally, many rappers sample other artists’ songs to use as hooks in their songs. A rapper could have written the rap portions of a song, but they have no copyright rights in the music samples that they have used.

Were that not difficult enough, sometimes members of the same band do not have the copyrights to their music. Take for instance Fleetwood

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173. It would be conversion because it is the same thing as taking something someone else owns and keeping it from them.
174. EMI Catalogue P'ship v. Hill, Holliday, Connors, Cosmopolous Inc., 228 F.3d 56, 64 (2d Cir. 2000) (Reinforcing the idea that musical compositions cannot be trademarked).
176. The appropriate party would be the actual owner in copyright.
179. *Id.*
Stevie Nicks has one of the most easily recognizable and distinct voices in music today. Although Ms. Nicks writes most of the songs that she sings, she has not written all of them. Moreover, there are many instances in which different members of the group have co-written songs together. On one occasion, all five members of the most famous line up wrote a song together. Regardless of the personnel on any given song, it is only the writer or writers who have copyrights on them. So, if Ms. Nicks were the copyright holder on a song that was used for political purposes, and her band mate Lindsey Buckingham did not approve of its use, what are his options? Mr. Buckingham is part of the most well-known line up of the band and he would be associated with any of their publicity, yet he does not own the copyright, nor is his voice the distinct voice on the recording. Enforcing a trademark solution to this issue, when it is clearly not a trademark issue, is too needlessly difficult. Trademarks and copyrights are different for very good reason.

C. The Merits of Moral Rights and Pre-Approval

It seems to make good sense that there is an instinct to go to an alternative that makes it easier for artists to call the shots on their own works. In adopting moral rights in the United States, the opportunity for artists to make their wishes known presents itself and could help to lessen the tensions that erupt when artists and politicians have issues. On one hand, moral rights would allow creators to keep creating without anxiety that their work could be used to support a cause they do not support. On the other, recognizing them could lead to issues that could have an overwhelmingly negative impact on the industry.

Pre-approval, too, is a promising concept. If artists have the chance to say no at the start of the campaign, there is no opportunity to cause a public outcry if it is made clear that the politician or campaign will not be allowed to use the songs. This can complicate things, though, because it would mean that campaigns would have to know ahead of time what they would like to

180. FLEETWOOD MAC, https://fleetwoodmac.com/#! [https://perma.cc/6YY9-CD7A] (Fleetwood Mac is the greatest band to have ever existed).
182. This is true of most artists.
183. Stevie Nicks and Lindsey Buckingham, as well as Buckingham and Christine McVie, often pair together to write.
185. LINDSEY BUCKINGHAM, https://lindseybuckingham.com/ (last visited Feb. 6, 2018) (Lindsey Buckingham was used because he is also an American. Were it another band member who took issue with the use of a song, that would delve into the world of international law, as the three remaining band members are British.).
play, which limits the freedoms that make blanket licensing so appealing. There is also a potential for great harm to the industry, because biases would quickly make themselves known.¹⁸⁶

D. The Downfalls of Moral Rights and Pre-Approval

Recognizing moral rights could cause a significant negative industrial and economic disadvantage because artists could use their moral rights to practice discrimination. Similarly, artists who exercise discretion on certain issues could face backlash for their views.

First, an artist could use their moral rights to practice discrimination. Hopefully the discrimination would limit itself to a political basis, though it is easy to see how it could quickly become based on religion, race, gender, sexual orientation, and a number of other discriminatory categories that are hurtful and uncalled for.¹⁸⁷ It is common practice that most of the hullabaloo for use of music has to do with Republicans or conservatives using music that artists with differing beliefs have made.¹⁸⁸ While the occasional Democrat or liberal is asked to cease use of music, the numbers are overwhelmingly on their side.¹⁸⁹

If moral rights or pre-approval were adopted, it might become the norm that certain religious persuasions, social groups, and other significant affiliations were continually turned down for licenses on those bases. If that in itself were not wrong enough, the fewer licenses sold, the fewer royalties can be collected, leading to an economic disaster for smaller scale industry insiders, such as studio musicians, who count on those monies to provide for themselves and their families. While it might not hurt celebrities directly, the average worker would suffer.

Second, even if artists did not discriminate, they could face severe backlash for rejecting a use. In 2003, country artists The Dixie Chicks,¹⁹⁰ faced incredible backlash for their criticisms of President George W. Bush and his

¹⁸⁶ One positive of the current licensing scheme is that there is no discrimination written into it. It is very simply a matter where payment equals procurement. In allowing pre-approval or veto powers, artists would be free to insert discrimination if they wanted to.
¹⁸⁷ That is, if outright discrimination were to happen at all, it would be morally reprehensible if it were on grounds other than politically motivated, though all discrimination is morally reprehensible.
¹⁸⁹ Id.
involvement in Iraq and Afghanistan.\footnote{Commonly referred to as “The War in Iraq” and “The War on Terror” though no actual war has ever been declared.} They did not recover for years after their statements.\footnote{Daniel Schorn, \textit{Dixie Chicks: Not Ready to Make Nice}, \textit{60 MINUTES} (May 11, 2006), \url{http://www.cbsnews.com/news/dixie-chicks-not-ready-to-make-nice/} [https://perma.cc/H8GF-8BF4] (It appears that only one member of the group made these statements, yet all members suffered; perhaps another consideration is that one’s obligations to their band members to promote prosperity should be another consideration as to why pre-approval and moral rights are not ideal).\footnote{See, \textit{Still Not Ready to Make Nice: What Does the Dixie Chicks Saga Tell Us About Freedom in America?}, \textit{SCHOLARS & ROUGES} (Apr. 4, 2009), \url{https://scholars-and-droguess.com/2009/04/04/still-not-ready-to-make-nice-what-does-the-dixie-chicks-saga-tell-us-about-freedom-in-america/} [https://perma.cc/TUN5-Q56R].} Despite a short comeback, the group was forced to take a hiatus that kept each of their careers on hold.\footnote{See, \textit{Using Music in Political Campaigns: What You Should Know}, ASCAP, \url{https://www.ascap.com/about/legislation/advocacy-resources/using-music-in-political-campaigns-what-you-should-know.aspx} (last visited Nov. 8, 2016).}\footnote{\textit{Id}.} Certainly fear of backlash should not keep people from standing up for their convictions, though it should not be a surprise that doing so can be detrimental to their careers and public images.\footnote{Such practice would make things far too complicated.}

Finally, the whole point of the Performing Rights Organizations being the ones to issue blanket licenses is to keep the artists from having to go through the process of keeping track of who may be using their music at any given time.\footnote{\textit{Id}.} In contracting with their PRO, an artist gives them the authority to handle licenses.\footnote{\textit{Id}.} Were approval necessary, the artist would have to spend time working on those issues, or hire them out, which defeats the purpose of having an organization to take care of licensing in the first place.\footnote{\textit{Id}.} 

\section*{E. The Merits of Preliminary Injunction}

Preliminary injunctions, similar to the pre-approval process, can be very advantageous in that they would make the process for ending unauthorized use much clearer and accessible. This would be great if it were successful, though the worry is that the nature of regulating use is still the responsibility of the PRO.\footnote{\textit{Id}.} One clear advantage, though, is that if the injunction right
were extended only in cases of political use, other blanket licensing interests would remain intact while debate went on politically.

If a preliminary injunction were a remedy only for political licenses, artists would not have to suspend all licenses in order to protect their music interests from being used in ways they disapprove. Restaurants, malls, and all sorts of nonpolitical avenues that also require blanket licenses, can keep using music that politicians might be barred from using.\footnote{199}{Only political use would be barred.} This beats an alternative where an artist would have to suspend licensing to prevent politicians from using their music.

\textit{F. The Downfalls of Preliminary Injunction}

Though there are clear positives in allowing for preliminary injunctions after a political use has been opposed, there are some real disadvantages to the process. Namely, doing so would keep artists in court more often than not.

Again, the entire point of PROs issuing licenses is to make it easy for the artist to not have to keep track of when their music has been used and the royalties they are due. If artists have to take the responsibility for tracking their own music, the PRO becomes a futile body.\footnote{200}{As stated, the PRO is responsible for licensing and tracking licenses. Removing the ability to do so renders PROs useless.} Even if the PRO was given the power to provide the injunctions, they still would lack standing necessary to keep artists out of court.

\textbf{VI. A Whole New World: How Artists and Politicians Might Both Come Out Winners}

A clear problem in the prior proposals is that each proposal reaches further than necessary in an attempt to remedy the situation at hand. Though there are many good ideas, they are bigger than they need to be. Perhaps that is the reason why no judiciary has come up with a satisfactory legal remedy as of yet: law students and lawyers think too much. They want to reinvent the wheel when all they need to do is change the tire.

For those reasons, I propose a few simple approaches to the issue that could keep the process uncomplicated and perhaps help future instances of disagreements in blanket licensing for political campaigns from becoming unpredictable, unfixable, and unbearable.
A. In the End: Amend

In an attempt to clarify where blanket licenses end for political use, Section 203 of the Copyright Act (the one that gives PROs power) should be amended to include limitations or an exception of license for political campaigns.\(^{201}\) This amendment would add a limitation or exception to the current section, which allows for an artist to either limit the use of license to non-political license seekers, or to add an exception in their individual licensing that would either allow all politicians to license their music without consent, or would bar all politicians.

The first option would allow everyone except for politicians to continue to get licenses as normal. Politicians would not be allowed license. If an artist wanted one politician to have access to their discography, they would have the option to perform live,\(^ {202}\) or to set up a special contract with the campaign that gave only that campaign the right to play the artist’s music. This would certainly be easier than the current model for both artist and politician because there is no chance for disagreement or public embarrassment. Instead, each is bound by contract only if there is a mutual agreement on terms. The need for costly litigation would vanish and any conflict would have a place to be resolved in contract court.

Adding an all-inclusive exception is another viable option. Instead of picking and choosing who is allowed or who is not allowed to use their music, artists can say that every politician may use their music, or that no politician may use their music. If an artist wanted to make a special exception for one campaign or another, they still have the option to contract privately.

Even with those strong points in favor, there are still drawbacks to the approach. One drawback is that amending an Act can be quite time consuming.\(^ {203}\) Depending on the nature of the amendment, there can be years spent debating it in each chamber. Even if it passes through the first, the second chamber can always send it back with changes. The process can be endless.

To even begin, however, there needs to be support from legislators.\(^ {204}\) Without their support, nobody is going to see any changes in the law. Significantly, the last time the Copyright Act was amended at all was almost twenty years ago.\(^ {205}\) This means that the last time there was a discussion on the

\(^{202}\) As many artists have done before: Fleetwood Mac for Bill Clinton and Katy Perry for Hillary Clinton, to name two.
Copyright Act before it was amended in 1998, the Communications Decency Act of 1996 had just passed. Often considered the first piece of legislature to control the Internet, at its creation, nobody knew how easy it would be for the people of today to use the Internet to gain access to music. The Copyright conversation undoubtedly failed to cover the nuisances the music industry faces. The state of the industry as it has evolved might make covering all of the new issues to satisfaction more than what lawmakers are able to handle.

**B. Show (PROs) the Way: Guide**

The second option is to set better guidelines for PROs, which includes requiring contracts between artists and their PROs to adopt political operation procedure. If PROs are required to update their contracts to include political clauses, the issue of blanket licensing to politicians can be cured quickly. If done correctly, the guidelines for operation and required contractual addendums can expedite the blanket licensing process for all, while maintaining artistic integrity by discussing well before the issue arises, what they will do if a political dispute is to occur.

One necessary precaution, however, is that PROs have to be sure that the government doesn’t move in too far to private industry when they set up the guidelines. If Congress were to create a new agency to cover the job PROs currently do, there would be more red tape to cut through.

**C. Say It Isn’t So: Disclaim**

The last option is to require a disclaimer at every political event where a blanket license has been issued that states that the use of an artist’s music does not reflect the views of the artists, nor does it endorse a candidate. This simple fix is the best option, because it costs nothing, requires no additional time, and does not open any argument one might have that the use of music equals a political endorsement.

One potential drawback to this method would be that campaigns would need to be sure that their disclaimers were thorough enough to disclaim any potential issues that having a license would not already protect. However, such measures would be beneficial to them. Artists would not have the right to assert any §43 claims against politicians when they make it clear that the artist has not endorsed their campaign. That would free up courts to decide only copyright issues when legal battles commence.

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207. See Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23 (2003) (Justice Scalia noted in the opinion that there are certain intrusions into copyright law that the courts cannot make, and that Congress may not create without appropriate procedures).
While the best conceptually, the disclaimer approach still might fail to appeal to artists, who could still claim that use of their music by politicians they don’t support cannot be allowed, even though it is made clear that the artist has no connection to the campaign. The disclaimer, when paired with another option, such as per-individual contract, or the all-or-none approach, could ease those apprehensions and make it easier for artists and politicians to refine their expectations to a more agreeable middle ground. If compromises cannot be made, the pairing of other approaches allows an artist to keep the politician from licensing from the start.

VII. IT’S THE END OF THE WORLD AS WE (CAMPAIGN BLANKET LICENSES) KNOW IT?

As a nation, we have come a great deal further than we were when Washington became the first political candidate to use campaign music. Despite the advances in technology, medicine, science, and nearly every area where advancement is possible, our treatment of intellectual property is still far behind where it should be. Our treatment of the blanket licensing of music for political purposes is in special need of work, as the protections they provide are vague and they leave many open to legal battles. As music technology becomes more readily available to non-industry laypeople nationwide, it is of utmost importance that a standard be set that allows everyone equitable remedies when things go awry. If the legal community chooses to amend the current Copyright Act, offer more guidance to the operational and contractual obligations given to PROs, or requires disclaimers at political events that absolve musicians of their potential to be mistaken as supporters of their least favorite politicians, they will become one step closer to reaching a mecca in the world of copyright law that will continue to allow for growth of artists and secure the rights of politicians to use the licenses they have paid for in the ways they find best suited for their campaigns.


210. There has yet to be a judicial standard in this area.