

“And Really, THAT Song?” – Use of Copyrighted Music by Political Campaigns

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In recent years, more politically attuned artists and writers have sent cease and desist letters to political campaigns to prevent candidates from playing their music at rallies. These letters often serve as little more than public relations maneuvers as they easily grab headlines and make the rounds on social media. For example, Celine Dion recently condemned the Trump campaign’s use of her iconic song “My Heart Will Go On” at rallies, stating, “In no way is this use authorized, and Celine Dion does not endorse this or any similar use [...] And really, THAT song?”

Yet, few of these situations result in litigation. And, when they do, the cases often quietly resolve. For example, cases against Republican John McCain (by Jackson Browne) and Democrat Charlie Crist (by David Byrne of the Talking Heads), were settled before any significant ruling by the court. Both of those cases were related to the use of copyrighted music in political attack ads.

Modern political operatives typically understand that to use a song in a commercial for a candidate, they need a synchronization license for the underlying musical composition — the song, melody, and lyrics — and a master use license to use the original sound recording. There is a different licensing system for using music at live campaign events. Campaigns must obtain a license from performing rights organizations like the American Society of Composers, Authors, and Publishers (“ASCAP”) or Broadcast Music Inc. (“BMI”), each of which has more than 20 million musical works at its disposal for what’s called a political entities license. The organizations have similar licenses for venues like stadiums, retailers, and bars.

However, several recent lawsuits against the Trump Campaign illuminate the legal boundaries concerning the unauthorized use of copyrighted works and demonstrate further pitfalls for political campaigns.

The first case, *Grant v. Trump*, involves a viral 2020 video featuring the unlicensed use of “Electric Avenue.”^[1] This video features an animated “Trump Train” versus a Biden handcar, described by the campaign as a colorful critique of rival political figures.^[2] “Electric Avenue” is played while clips of Biden’s statements are layered over top. The video was never used in a traditional “campaign ad.” Rather, the video, created by unknown sources was widely shared via social media channels. The Trump Campaign defended the video’s use of the song by claiming it fell under the “fair use” doctrine, which allows for the limited use of copyrighted material without permission for specific purposes such as commentary or satire.

“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.”^[3] Typically there are four factors that courts consider in making a fair use determination 1) the purpose and character of use such as commercial versus educational; 2 the nature of the copyrighted work; 3) the amount and substantiality of the portion used in relation to the copyrighted work; and 4) the effect of the use on the potential market for or the value of the copyrighted work.^[4]

The Court found that nearly all of the factors weighed against the Trump campaign, ultimately ruling that the campaign had infringed on Grant’s copyright.

According to the Court, the video at issue was a “wholesale copying of [the] music,” where the song was “immediately recognizable,” and unedited except for length. While the Trump campaign contended that the video’s political intent favored fair use, the Court emphasized that the political purpose alone does not automatically make the use of a non-

political work transformative. The video did not alter the song; it merely played it alongside an animated visual. Even though the video had its own agenda, style, or purpose, the transformative impact was negligible.

The lack of commercial use of the video did not favor fair use in this instance. Citing 2nd Circuit holding in *Hachette Book Groups*, the Court found that “it is surely true that the use of the copyrighted material has fewer aspects of a “commercial nature” because it is not used for profit, but the lack of a profit motive is insufficient to overcome the lack of a “transformative use” for purposes of the first fair use factor.”[5]

In a second recent ruling against the Trump campaign, a federal court in Georgia issued an injunction against using the Isaac Hayes-penned song “Hold On, I’m Comin’” at future campaign events.[6] This case is particularly noteworthy because the Trump campaign obtained a “blanket license” from BMI. However, BMI recently changed its licensing policies so that copyright holders can opt out of specific political campaigns, and in this instance, the Hayes estate chose to do so. Thus, even though the Trump campaign had a blanket license, once it had notice that the Hayes estate had rejected the campaign’s use of the song, the Trump campaign should have refrained from further use of the music.

A third recent case will likely toe the line between *Grant* and *Hayes*. The White Stripes (Jack White and Megan White) recently filed suit against the Trump campaign for use of “Seven Nation Army” in promotion videos posted on social media.[7] The complaint alleges that the White Stripes previously “denounced [the use] on various social media platforms in 2016.” The complaint, however, does not state whether the White Stripes opted out of the blanket license from BMI or ASCAP prior the Trump campaign’s use in 2024. Since this case is only a week old, there have not been any significant rulings by the Court to date.

[1] *Grant v. Trump*, Case No. 20-cv-7103(JK) 2024 WL4179057 (S.D.N.Y. 2020)

[2] <https://youtu.be/aEEVimV3eF4>

[3] *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)), aff’d 598 U.S. 508 (2023).

[4] 17 U.S.C.A. § 107.

[5] See *Hachette Book Grp., Inc. v. Internet Archive*, No. 23-1260, 2024 WL 4031751, at *12 (2d Cir. Sept. 4, 2024) (transformativeness remains the ‘central’ focus of the first factor”)

[6] *Hayes v. Trump*, Case No. 24-CV-3639-TWT 2024 WL 4148758 (N.D.G. 2024.)

[7] *White, et al. v. Trump*, Case No. 24-CV-06811 (S.D.N.Y. 2024)

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