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NEWSLETTER

Parsing Politics and (Intellectual) Property

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As the 2012 election season reached full-fevered pitch, it seemed that—at least in my home "swing" state of Virginia—political candidates and third-party advertisers had taken over the airwaves with positive and negative ads. Some of these ads came under immediate scrutiny of opposing candidates or media for truthfulness and accuracy, as well as from strangers to the election process for inclusion of infringing intellectual property. What are a station's obligations when it receives a cease and desist letter from someone claiming infringement of photos, music, video, or other materials?

Section 315 of the Communications Act prohibits broadcasters from censoring the content of advertising by a candidate. Essentially, this means that broadcasters cannot reject or remove an advertisement that is sponsored by a candidate or a candidate's official committee, if that ad includes the candidate's recognizable voice or image (*e.g.* "I'm [candidate xxx], and I approved this message"). Because broadcasters cannot censor, broadcasters are not liable for the content of the advertisement.

Advertisements placed by third parties (such as PACs and advocacy groups) do not fall under the protections of Section 315. This means that: (1) broadcasters are free to accept or reject third-party ads based on their content; and (2) broadcasters may be liable for infringing materials contained in those ads.

Section 315 also does not cover the ever-present viral videos put out by campaigns and third parties—these are subject to claims of infringement, as was the case in July, when music publisher BMG claimed that a Mitt Romney YouTube video advertisement that included a recording of President Obama singing Al Green's "Let's Stay Together" was infringing. BMG later made claims against the President's own advertisements that included the clip.

Here are a few issues for broadcasters to watch for when screening advertisements:

Beware the "Right Click"

The ready availability of materials on the Internet makes it easy for an advertiser to "right click" to save photos on the Internet or use third-party software to download videos from YouTube, and use them in advertising. In general, these materials will be copyright protected and not available for use except under license or a claim of fair use. Materials that are produced by the U.S. government (not state or local governments), however, are in the public domain by federal law—this will include official White House photos or official photos of members of Congress. This does not mean, however, that everything appearing on a U.S.

government website is public domain material; for example, the government can acquire copyright rights from third parties, and sometimes members of Congress use photos from private photographers on their webpages.

There Is No "20%" (or "30 Second") Fair Use Rule

The concept of fair use, which permits the use of copyrighted works of others under certain conditions, is frequently misunderstood. There is no bright line rule defining how much of a work can be taken and still be fair use. The Copyright Act contains a non-exhaustive list of examples of purposes for which a particular use of a work might be considered "fair" and not an infringement—such as criticism, comment, news reporting, teaching, scholarship and research. A proper fair use analysis also must include a balancing of four factors:

- The purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes (this includes an examination of the "transformative" nature of the use);
- The nature of the copyrighted work;
- The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- The effect of the use upon the potential market for or value of the copyrighted work.

The distinction between fair use and infringement is not easily defined and is highly factually dependent. The fourth "market" factor is generally considered the most important of the concerns. The first factor, including whether the material is "transformed" by altering the original with new expression, meaning, or message, is also considered a significant consideration, and this is a very subjective area. Clearly, although it is a consideration, the fact that a use is made in connection with a non-commercial political speech does not automatically bring a ruling of fair use. (Note that ads that solicit donations also may not be considered "non-commercial.")

Play that Funky Music . . . But Not Without a License

The last few election cycles have witnessed an uptick of complaints by musicians against the use of their songs in campaigns. The inclusion of music in advertisements can draw the ire of record companies, music publishers, and artists. For example, in 2010, David Byrne sued former Governor Charlie Crist over use of the Talking Heads' "Road to Nowhere" in a website and YouTube ad attacking then-candidate Marco Rubio. (Rubio was later challenged for using the Steve Miller Band's "Take the Money and Run" in a YouTube video attacking Crist, but no suit was filed.)

Recorded music embodies at least two separate works of authorship, each protected by separate copyrights: the musical composition and any accompanying lyrics (termed the "musical work") and a particular recorded rendition of that music (termed the "sound recording"). This means that, if you play recorded music in a commercial or over a digital medium such as the Internet, you likely will have to pay for at least one license (for the musical work) and possibly two (adding a license for the sound recording in certain cases). Finally, incorporating music into an audiovisual work (such as a television commercial or online video) will require a special type of license called a "synchronization" or "synch" license for use of the musical work and—if you are

using pre-recorded music—a "master use" license for use of the sound recording. Musicians tend to exercise much more direct control over the more expensive synch and master use licenses than the cheaper public performance licenses, which are typically handled through blanket licenses.

Even If There's No Copyright Violation, You Still May Have Issues

Even if the advertiser has secured licenses or determined that a use is "fair" under copyright law, recording artists and news outlets frequently assert objections that use of their personalities or works in political campaigns implies a false endorsement of the campaign under a right of publicity or federal Lanham Act theory. Any use of materials that feature or can be attributed to a public individual or organization that has not approved the use must be approached with extreme caution.