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I CAN'T GET NO (LEGAL PROTECTION): THE UNAUTHORIZED USE OF MUSIC IN POLITICAL CAMPAIGNS

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I. INTRODUCTION

In the latter part of the 20th century, political campaigns increasingly turned to the power of established popular songs to energize potential voters and drive home the candidate's message.[1] In 1984, Ronald Reagan used Bruce Springsteen's "Born in the U.S.A." as his campaign theme song.[2] Springsteen did not approve of or authorize the song's use, which marked the first major controversy about nonpermissive use of a copyrighted song in a presidential campaign.[3] Today, it is common for political campaigns to use popular music—without permission from the artist. In recent years, this practice has seemingly created the most frequent conflicts between Republican politicians and

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[1] *See* James C. McKinley, *G.O.P. Candidates Are Told, Don't Use the Verses, It's Not Your Song*, N.Y. TIMES (Feb. 3, 2012), https://www.nytimes.com/2012/02/04/arts/music/romney-and-gingrich-pull-songs-after-complaints.html.

[2] *See* Chet Flippo, *The 25 Most Intriguing People of 1984: Bruce Springsteen*, PEOPLE, Dec. 31, 1984, at 28.

[3] *Id.* Reagan praised Springsteen as a "man so many Americans admire" at a campaign rally in New Jersey. *Id.* "Bruce [Springsteen] refused to endorse either candidate; he wasn't coy about where he stood on the issue. In Pittsburgh, two days after the President's comments, he said of Reagan: 'I got to wondering what his favorite album must have been. I don't think he's been listening to this one.' And he launched into *Johnny 99*, a bitter plaint on the fate of a laid-off worker." *Id.*

Democratic-supporting artists who do not support their candidacy.[4]

This Note argues that the nonpermissive use of music in political campaigns is an issue taken for granted in the contemporary political landscape. Part II of this Note highlights the most controversial nonpermissive uses of popular music in recent American history. Parts III and IV identify deficiencies in existing copyright and trademark law that have resulted in weak protection for artists from nonpermissive use by political campaigns. Part V examines potential solutions proposed in prior academic articles, including expansion of the moral rights doctrine, and points out deficiencies in these approaches. Part VI of this Note then proposes two novel strategies for addressing this problem: altering blanket licenses to exempt political use altogether or including a political-use opt-out in musicians' membership agreements.

II. NONPERMISSIVE USE IN RECENT AMERICAN HISTORY

The issue of nonpermissive use gained widespread public attention during the 2016 presidential election. Leading up to the 2016 Republican National Convention, Republican presidential candidate Donald Trump used Queen's "We Are the Champions" at multiple rallies on the campaign trail.[5] Brian May, Queen's lead

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[4] *See* James Frazier, *Liberal Musicians Demand Conservative Pols Stop the Music*, WASH. TIMES (Feb. 1, 2012), http://www.washingtontimes.com/news/2012/feb/1/songwriters-have-history-of-asking-politicians-to-/; S*ee also* Eriq Gardner, *Michele Bachmann in Legal Spat for Using Tom Petty's 'American Girl' at Rally*, HOLLYWOOD REPORTER (June 28, 2011, 11:48 AM), http://www.hollywoodreporter.com/thr-esq/michele-bachmann-legal-spat-using-206257 (explaining that many complaints are by liberal-learning artists against conservative candidates); Chris Richards, *Campaigns Adopting Songs Is Nothing New, But Squabbles With Musicians Are*, WASH. POST (June 29, 2011), https://www.washingtonpost.com/lifestyle/style/campaigns-adopting-songs-is-nothing-new-but-squabbles-with-musicians-are/2011/06/29/AGKpKIrH_story.html?utm_term=.aa4bde4bab37 (determining that 80% of donations from individuals in the music industry have been to Democrats).

[5] *See* Melinda Newman, *Why Queen Cannot Stop Donald Trump's Use of 'We Are the Champions,'* FORBES (July 19, 2016, 3:38

guitarist, made a public statement saying, "I can confirm that permission to use the track was neither sought nor given. Regardless of our views on Mr. Trump's platform, it has always been against our policy to allow Queen music to be used as a political campaigning tool."[6] One month after May's public statement, Trump walked out on stage to "We Are the Champions" at the Republican National Convention.[7] Trump's use of the song, written by the late Freddie Mercury, who died of bronchial pneumonia resulting from AIDS, sparked outrage among the LGBTQ community.[8] Hundreds of LGBTQ advocates took to Twitter, arguing that Trump's campaign should not be authorized to play songs created by LGBTQ artists if he does not recognize LGBTQ rights.[9] Queen responded by tweeting, "An unauthorised use at the Republican Convention against our wishes. -Queen."[10] Sean Spicer, communications director for the Republican National Committee, disputed Queen's claim by

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PM), https://www.forbes.com/sites/melindanewman/2016/07/19/why-queen-cannot-stop-trumps-use-of-we-are-the-champions/#14d8936f6d4b.

[6] *See* Debbie Emery, *Trump Defies Brian May by Using 'We Are the Champions' as RNC Walkout Song*, THE WRAP (July 18, 2016, 9:09 PM), https://www.thewrap.com/trump-defies-brian-mays-ban-by-using-we-are-the-champions-as-rnc-walkout-song/.

[7] *See* Newman, *supra* note 5.

[8] *See infra* note 9 and accompanying text.

[9] *See, e.g.*, Dan Ramos (@RepDanRamos), TWITTER (July 18, 2016, 7:25 PM), https://twitter.com/RepDanRamos/status/755227134545780737 ("Hey #RNCinCLE. Don't play "We Are the Champions" by Queen, or any other song sung by GLBT people, if you don't recognize GLBT rights."); Chris Cillizza (@CillizzaCNN), TWITTER (July 18, 2016, 7:23 PM), https://twitter.com/CillizzaCNN/status/755226642356862977 ("My guess is that Freddie Mercury would not likely have been a Trump supporter"); Igorvolsky (@igorvolsky), TWITTER (July 18, 2016, 7:24 PM), https://twitter.com/igorvolsky/status/755226755984535552 ("Trump comes out to Freddie Mercury, who the GOP platform would send to ex-gay therapy"); Sara Benincasa (@SaraJBenincasa), TWITTER (July 19, 2016), https://twitter.com/SaraJBenincasa/status/755226755984535452 ("Donald Trump appeared in a dry ice silhouette while Freddie Mercury played because he loves queer immigrant men oh wait nope").

[10] Queen (@QueenWillRock), TWITTER (July 19, 2016, 7:18 AM), https://twitter.com/QueenWillRock/status/755406469269450752.

tweeting, "Big fan but you are wrong @GOPconvention paid to license the use of song in the arena . . . ."[11]

Brian May is not the only artist who has publicly scolded Donald Trump for using his music. Other artists who have taken similar actions include The Rolling Stones, Adele, Cher and Neil Young.[12] Two of the most recent artists to face these issues were Pharrell Williams and Rihanna.[13] In October 2018, President Trump played Pharrell Williams' song "Happy" at a political event in Indiana hours after a mass shooting at a Pittsburgh synagogue.[14] Williams' lawyer sent a cease-and-desist letter to President Trump saying, "Pharrell has not, and will not, grant you permission to publicly perform or otherwise broadcast or disseminate any of his music."[15] The letter continued, "On the day of the mass murder of 11 human beings at the hands of a deranged 'nationalist,' you played his song Happy to a crowd at a political event in Indiana. There was nothing 'happy' about the tragedy inflicted upon our country on Saturday and no permission was granted for your use of this song for this purpose."[16] Even more recently, in November 2018, Donald Trump played Rihanna's song "Don't Stop the Music" at a political event at the University of Tennessee.[17] The song was played despite Rihanna's public denouncement of Donald Trump in 2017, in which she called him

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[11] Sean Spicer (@seanspicer), TWITTER (July 19, 2016, 9:42 AM), https://twitter.com/seanspicer/status/755442824376676352.

[12] *See* Lauren Craddock, *29 Artists Who Have Spoken Out Against Donald Trump (So Far)*, BILLBOARD (July 18, 2016), https://www.billboard.com/articles/news/7430903/musicians-against-donald-trump.

[13] *See infra* notes 14–17 and accompanying text.

[14] *See* Sarah Rulz-Grossman, *Pharrell Sent Trump Cease-And-Desist Letter for Playing 'Happy' After Synagogue Shooting*, HUFFINGTON POST (Oct. 29, 2018, 10:05 PM), https://www.huffingtonpost.com/entry/pharrell-williams-trump-letter-happy_us_5bd7b36ee4b017e5bfd501ed.

[15] *Id.*

[16] *Id.*

[17] *See* Antonia Noori Farzan, *Rihanna Doesn't Want Trump Playing Her Music at His 'Tragic Rallies,' but She May Not Have a Choice*, WASH. POST (Nov. 5, 2018), https://www.washingtonpost.com/nation/2018/11/05/rihanna-doesnt-want-trump-playing-her-music-his-tragic-rallies-she-may-not-have-choice/?noredirect=on&utm_term=.7169c3a2af60.

an "immoral pig" after he signed an executive order banning citizens of seven majority-Muslim countries from entering the United States.[18] Upon hearing of the unauthorized use, Rihanna tweeted, "[Don't Stop the Music will] not [be played] for much longer . . . [neither] me nor my people would ever be at or around one of those tragic rallies . . . ."[19]

President Trump was not the first presidential candidate to come under fire for nonpermissive use of a copyrighted song. In fact, the most notorious transgressor was the 2008 McCain-Palin campaign, which received the most artist objections to song use of any campaign in American history.[20] Following his New Hampshire primary win, Republican presidential hopeful John McCain walked out on stage to the Orleans song "Still the One."[21] At the time, John Hall, a former Orleans member and the co-writer of "Still the One," was serving as a Democratic congressman. Hall sent a cease-and-desist letter and publicly condemned the use of his song at a Republican rally.[22] Shortly thereafter, McCain used the Van Halen song "Right Now" during a televised rally.[23] Van Halen issued a statement saying, "Permission was not sought or granted nor would it have been given."[24] Around the same time, McCain used the John Mellencamp songs "Our Country" and "Pink Houses" at several political events.[25] John Mellencamp, who called himself "as left wing as you can get," asked the

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[18] *Id.*

[19] Rihanna (@rihanna), TWITTER (Nov. 4, 2018, 4:26 PM), https://twitter.com/rihanna/status/1059240423091245056.

[20] *See infra* notes 21–32 and accompanying text.

[21] *See* Charles Stockdale & John Harrington, *35 Musicians Who Famously Told Politicians: Don't Use My Song*, USA TODAY (July 16, 2018, 3:10 PM), https://www.usatoday.com/story/life/music/2018/07/16/35-musicians-who-famously-told-politicians-dont-use-my-song/784121002/.

[22] *Id.*

[23] *See* Michael Scherer, *The Most Misused Song in GOP Politics: Van Halen's "Right Now,"* TIME (Apr. 18, 2011), http://swampland.time.com/2011/04/18/the-most-misused-song-in-gop-politics-van-halens-right-now/.

[24] *Id.*

[25] *See* Eveline Chao, *Stop Using My Song: 35 Artists Who Fought Politicians Over Their Music*, ROLLING STONE (July 8, 2015, 12:27 PM), https://www.rollingstone.com/politics/politics-lists/stop-using-my-song-35-artists-who-fought-politicians-over-their-music-75611/heart-vs-sarah-palin-30713/.

presidential candidate to cease and desist.[26] McCain then used ABBA's song "Take a Chance on Me" at multiple political events, for which the band sent him a cease-and-desist letter.[27] Most notably, McCain used the Foo Fighters song "My Hero" as his campaign theme song during his presidential run.[28] The Foo Fighters made a public statement saying, "It's frustrating and infuriating that someone who claims to speak for the American people would repeatedly show such little respect for creativity and intellectual property." The band went on to say, "To have [My Hero] appropriated without our knowledge and used in a manner that perverts the original sentiment of the lyrics just tarnishes the song."[29]

John McCain's running mate, Sarah Palin, also received backlash from numerous artists over her nonpermissive use of music. At the Republican National Convention, Palin walked out on stage to Heart's song "Barracuda" as a nod to her childhood nickname Barracuda.[30] Heart sent a cease-and-desist letter, and Heart's lead singer Nancy Wilson released a public statement saying, "I feel completely [screwed] over. Sarah Palin's views and values in no way represent us as American women."[31] Shortly thereafter, Palin began using Martina McBride's "Independence Day" to introduce herself at rallies.[32] Gretchen Peters, who wrote

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[26] *Id.*

[27] Jason Szep, *Would Abba Take a Chance on McCain?*, REUTERS (Feb. 18, 2008, 5:29 PM), http://www.reuters.com/article/idUSN1820870620080219 (reporting McCain's comments on the difficulties of using music on the campaign trail).

[28] *See* Chao, *supra* note 25.

[29] *Id.*

[30] *See* Tom Leonard, *Sarah Palin: Don't Use Our Barracuda Song as Your Anthem, Says Rock Band Heart*, THE TELEGRAPH (Sept. 8, 2008, 5:12 PM), https://www.telegraph.co.uk/news/newstopics/uselection2008/johnmccain/2706276/Sarah-Palin-Dont-use-our-Barracuda-song-as-your-anthem-says-rock-band-Heart.html.

[31] *See* Chao, *supra* note 25.

[32] *See* Martin Chilton, *Adele, Rolling Stones and Other Musicians Angry at Politicians Using Their Songs*, THE TELEGRAPH (May 5, 2016, 7:05 AM), https://www.telegraph.co.uk/music/artists/adele-and-other-musicians-angry-at-politicians-using-their-songs/.

the country hit, released a public statement saying, "The fact that the McCain/Palin campaign is using a song about an abused woman as a rallying cry for their Vice Presidential candidate, a woman who would ban abortion even in cases of rape and incest, is beyond irony."[33] Around the same time, Sarah Palin was playing Jon Bon Jovi's song "Who Says You Can't Go Home" at a handful of rallies. Bon Jovi released a statement condemning the use of his song at a Republican rally, saying, "We were not asked, [and] we do not approve of their use of [the song]."[34]

Despite objections from several artists, John McCain and Sarah Palin continued using the songs.[35] The two politicians released a joint statement saying, "The McCain-Palin campaign respects copyright. Accordingly, this campaign has obtained and paid for licenses from performing rights organizations, giving us permission to play millions of different songs . . . ."[36] This joint statement illustrates the deficiencies of existing law in protecting artists from nonpermissive use by political campaigns. Some of these deficiencies are highlighted in the following Part.

III. FAILURE OF EXISTING COPYRIGHT LAW

A. BLANKET LICENSING

A copyright is a form of property ownership which grants individuals the exclusive right to use and disseminate their creative works for a fixed number of years.[37] The Copyright Act of 1976 (the "Act") is the primary basis of copyright law in the United States.[38] Section 106 of the Act provides copyright holders with the exclusive right to publicly perform the copyrighted work.[39] This "performing right" helps ensure that a copyrighted

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[33] *Id.*

[34] *See* Chao, *supra* note 25.

[35] *Id.*

[36] *Id.*

[37] 17 U.S.C. §§ 101–810 (1976).

[38] *Id.* at § 106.

[39] To "perform" a work "means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show images in any sequence or to make the sounds accompanying it audible." *Id.* at § 101. To perform or display a work "publicly" means (1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and

song will not be played in public without the owner's permission.[40] However, there are hundreds of thousands of establishments in the United States where music is publicly performed, including restaurants, hotels, stadiums, radio and television stations, and the like.[41] It is impossible for individuals to monitor these establishments themselves. As a result, virtually all songwriters affiliate with a performing rights organization (a "PRO").[42]

A PRO is an agency that acquires rights to songs from songwriters and publishers and ensures that those songwriters and publishers are paid for the public performance of their songs.[43] To legally play a copyrighted song at an establishment or on a radio or television station, the entity playing the song must first purchase a public performance license from a PRO.[44] PRO representatives regularly visit public establishments, monitor broadcasts, and browse the internet for public performance of their members' copyrighted songs.[45] When they identify unauthorized performances, they send automated take-down notices, cease-and-desist letters, and demands for public performance payments.[46] Once a PRO collects the public performance payments, it distributes the royalties to the songwriters and publishers, minus

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its social acquaintances is gathered; or (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times. *Id.*

[40] *Id.*

[41] Michael R. Cohen, 25B *West's Legal Forms, Intellectual Property*, § 23:22 (2014) ("Since it would be virtually impossible for publishers and songwriters to monitor and control the large number of users of their songs, the enforcement and control of such performance rights usually falls to one of three performing rights organizations…").

[42] *Id.*

[43] *See* Stanley M. Besen et al., *An Economic Analysis of Copyright Collectives*, 78 VA. L. REV. 383, 385 (1992).

[44] *See* Cohen, *supra* note 41, at 22.

[45] *See generally* P. DRANOV, INSIDE THE MUSIC PUBLISHING INDUSTRY, 124–26 (1980).

[46] *See* Besen, *supra* note 43, at 385.

the PRO's administration costs.[47] The three primary PROs are the American Society of Composers, Authors, and Publishers ("ASCAP"), Broadcast Media, Inc. ("BMI"), and the Society of European Stage Authors and Composers ("SESAC").[48] Together, ASCAP and BMI represent approximately ninety percent of the musical composition market in the United States.[49] SESAC does not release its market share information, but it is estimated to represent somewhere between five and ten percent of the United States musical composition market.[50] Songwriters are only allowed to join one PRO, so they must register all of their works with one group.[51]

A common practice among PROs is blanket licensing.[52] A blanket license enables the licensee to play all of the music under contract by the particular PRO.[53] For example, if a radio station is issued a blanket license by BMI, then the station has the right to play all music by BMI-represented musicians. Most large venues, stations, and streaming services purchase blanket licenses from all three PROs, allowing them to play virtually any song.[54] The fees for blanket licenses vary depending on how much music the licensee plays and how large of a listener base the licensee has. Large radio stations can pay millions of dollars in blanket licensing fees per year, while small venues and restaurants may

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[47] *Id.*

[48] *See* U.S. COPYRIGHT OFFICE, COPYRIGHT AND THE MUSIC MARKETPLACE 20 (2015), http://copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf; *see also About Us*, SESAC, http://www.sesac.com/About/History.aspx (last visited Jan. 9, 2019).

[49] *See* COPYRIGHT AND THE MUSIC MARKETPLACE, *supra* note 48, at 20.

[50] *Id.*

[51] *Id.*

[52] *See* Stanley Rothenberg, *Copyright and Public Performance of Music,* at 40 (1987); John Ryan, *The Production of Culture in the Music Industry: The ASCAP-BMI Controversy*, SOCIAL FORCES at 77-85; *see also CBS v. ASCAP*, 400 F. Supp. 737, 742 (S.D.N.Y. 1975).

[53] *See, e.g.*, *United States v. Broad. Music, Inc.*, 275 F.3d 168, 172 (2d Cir. 2001); *United States v. Am. Soc'y of Composers, Authors & Publishers*, 831 F. Supp. 137, 166–67 (S.D.N.Y. 1993).

[54] *See* Rothenberg, *supra* note 52, at 41.

only pay a couple hundred dollars per year.[55] The licensing fees collected from blanket licenses are the main source of public performance payment for songwriters and publishers.[56]

Whenever a political campaign plays a song at a rally, the campaign must have a public performance license that covers that song.[57] If a rally is held at a major public venue like an arena or convention center, the venue's blanket license protects politicians, who may play any song in that PRO's repertoire.[58] Since most venues purchase blanket licenses from multiple PROs, political campaigns may legally play virtually any song.[59] However, politicians are not always campaigning in large venues, so most national political campaigns also purchase their own blanket licenses covering all campaign events, no matter where the event is held.[60] Once a political campaign purchases a blanket license from a PRO, the artists signed with that PRO have no legal ground to object to the use of their music.[61] Accordingly, when politicians are accused of unauthorized use, they typically respond like the McCain-Palin campaign did with a simple statement declaring that the "campaign has obtained and paid for licenses from performing rights organizations. . . ."[62]

During the 2016 presidential election, nonpermissive use gained public attention and ASCAP and BMI were scrutinized for limiting the legal remedies available to artists for nonpermissive use by political campaigns.[63] In response, BMI explained that it

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[55] *See* Vincent D. Paragano, *Making Money From the Airwaves The Basics of Music Licensing*, 183 N.J. LAW 10, 11-12 (Mar. 1997).

[56] *See* The ASCAP Payment System, *supra* note 55; *see* BMI Royalty Information, *supra* note 55; *see* Everything You Need to Know About Getting Paid, *supra* note 55.

[57] *See generally*, Cohen, *supra* note 41, at 22.

[58] *See* Rothenberg, *supra* note 52, at 17.

[59] *Id.* at 41.

[60] *See* Geoff Boucher, *Songs in the Key of Presidency*, L.A. TIMES, Oct. 11, 2000, at A1; Claire Suddath, *A Brief History of Political Campaign Songs*, TIME, Sept. 12, 2008.

[61] Boucher, *supra* note 60; Suddath, *supra* note 60.

[62] *See* Chilton, *supra* note 32.

[63] *See* Travis Andrews, *The Rolling Stones demand Trump stop using its music at rallies, but can the band actually stop him?*, THE WASHINGTON POST, May 5, 2016.

allows artists to opt out of blanket licenses during the initial contracting phase.[64] If an artist opts out of blanket licenses in her contract, her music will be excluded from all licenses purchased by political campaigns.[65] Although this optout option seems promising on paper, it is unrealistic for most artists. If an artist opts out of blanket licenses in her contract, her music will be excluded from licenses purchased not only by political campaigns but also by arenas, convention centers, restaurants, hotels, radio and television stations, and the like.[66] Licensing fees collected from blanket licenses are the main source of public performance royalties for an artist.[67] When an artist opts out, her revenue stream all but disappears.[68] Because of this, artists rarely opt out of blanket licenses.[69] Consequently, their music is available to any politician-licensee and they have no legal recourse under copyright law.

B. FAIR USE

Even if a political campaign does not purchase a blanket license from a PRO, it may still use a copyrighted song if that use is "fair."[70] Fair use is an affirmative defense available when, without authorization, a party appropriates a copyrighted work for limited purposes such as "comment," "news reporting," and "teaching."[71] This is a centuries-old doctrine but was first codified

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[64] *Id.*

[65] *Id.*

[66] *See* Rothenberg, *supra* note 52, at 41.

[67] *See* Richard Schulenberg, *Legal Aspects of the Music Industry: An Insider's View*, 289 (2005).

[68] *Id.*; *see also Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 20-23 (1970) (the loss of benefits that would result from non-membership in a PRO effectively makes non-membership an unfeasible option.).

[69] *Id.*

[70] *See* 17 U.S.C. § 107 (codifying fair use defense).

[71] *See* 17 U.S.C. § 107 (codifying fair use defense). Section 107 gives examples of favored uses: "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research." If the use falls into one of these favored categories, it is more likely to be fair use. However, a favored use may not qualify as fair use, and a use outside of these categories may nevertheless be fair.

in the Act.[72] It seeks to balance artists' interests in protecting their creative works against the public's interest in protecting free speech and the free dissemination of ideas.[73] The Act fails to define "fair use," which has required courts to determine whether a use is fair on a case-by-case basis.[74]

Courts must consider four factors set forth by the Act: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the work as a whole; and (4) the effect on the potential market.[75] In practice, the first and fourth factors weigh most heavily in the analysis.[76] As with any affirmative defense, the burden is on the defendant to demonstrate fair use.[77]

Two cases have considered fair use in the context of political campaigns. A court first considered the fair use defense in political advertisements in *Mastercard Int'l, Inc. v. Nader 2000 Primary Committee, Inc.*[78] During the 2000 presidential campaign, Mastercard sued independent presidential candidate Ralph Nader for modeling one of his political ads after Mastercard's "Priceless" advertisements.[79] Nader's political advertisement mimicked Mastercard's advertisements by listing items synonymous with dirty politics, the "prices" for each item, and concluding: "Finding out the truth: priceless."[80] On summary

[72] 17 U.S.C. §§ 101-810 (1976).

[73] *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 584 (1994) (noting that fair use requires "sensitive balancing of interests); *see also* Hustler Magazine, Inc. v. Moral Majority, Inc., 796 F.2d 1148, 1151–52 (9th Cir. 1986) ("Courts balance these factors to determine whether the public interest in the free flow of information outweighs the copyright holder's interest in exclusive control over the work." (citing D.C. Comics, Inc. v. Reel Fantasy, Inc., 696 F.2d 24, 27 (2d Cir. 1982))).

[74] *See Campbell*, 510 U.S. at 577 ("the task [of determining fair use] is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis.").

[75] *See* 17 U.S.C. § 107.

[76] *See Campbell*, 510 U.S. 569.

[77] MasterCard Int'l Inc. v. Nader, No. 00-6068, 2004 U.S. Dist. LEXIS 3644, at *35 (S.D.N.Y. Mar. 8, 2004).

[78] *Id.*

[79] *Id.* at *2.

[80] *Id.* at *2–3.

judgment, the court held that Nader's political advertisement was fair use and, in turn, Nader was not liable for copyright infringement.[81]

The court held that the first fair use factor, the purpose and character of use, heavily favored Nader because his political advertisement was a transformative work.[82] The advertisement was deemed a parody because, although it used a large portion of the original work, it conveyed a different message than Mastercard's original advertisement and provided commentary on materialism and political corruption. Parodies are deemed transformative because they "[add] something new, with a further purpose or different character, altering the first new expression, meaning or message."[83] The creation of transformative works is considered a factor in favor of a finding of fair use.[84]

The court also held that the fourth factor, the effect on the potential market, strongly favored a finding of fair use because the Nader advertisement served a political purpose that was entirely different than the commercial purpose of the Mastercard advertisements.[85] Mastercard argued that Nader's advertisement was commercial in nature because he used the commercial to solicit donations, but the court rejected this argument. The court stated that "all political campaign speech would also be 'commercial speech' since all political candidates collect contributions."[86] This cut against the Act's legislative history, which "clearly indicate[ed] that Congress did not intend for the Act to chill political speech."[87] The court afforded the second and third factors little significance.[88]

A different federal court reached the opposite conclusion in *Henley v. DeVore*.[89] In 2009, Don Henley filed suit against Republican senatorial candidate Charles DeVore for using two of his songs in online political advertisements.[90] DeVore

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[81] *Id*. at *42–43, 48–49.
[82] *Id.*
[83] *Id.* at *42–43.
[84] *Id.*
[85] *Id.* at *49.
[86] *Id.*
[87] *Id*. at *23–24.
[88] *Id.* at *44–48.
[89] *See* Henley v. DeVore, No. 09-0481, 2010 U.S. Dist. LEXIS 67987, at *9 (C.D. Cal. 2009).
[90] *Id.*

downloaded the karaoke version of Henley's song "Boys of Summer" and altered the lyrics into "The Hope of November," which was aimed at criticizing President Barack Obama. DeVore also downloaded the karaoke version of Henley's song "All She Wants to Do is Dance" and altered the lyrics into "All She Wants to Do is Tax," which was aimed at criticizing Democratic senator Barbra Boxer's cap-and-trade and global warming policies.[91] On summary judgment, the court held that DeVore's political advertisements were not fair use.[92]

In coming to this conclusion, the court held that the first factor, the purpose and character of use, favored Henley because the altered songs were merely "satirical," as they simply "evoked the same themes of the original in order to attack an entirely separate subject."[93] The court reasoned that a satire is not transformative enough to support a finding of fair use.[94] The court held that the fourth factor, the effect on the potential market, favored Henley because the DeVore songs were commercial in nature as DeVore "benefitted or gained an advantage without having to pay customary licensing fees."[95] The court further reasoned that it could not hold, as a matter of law, that "widespread dissemination of similar satirical spins" on Henley's songs would not harm the market for the original works, even though it was not clear that DeVore's songs actually threatened the market for Henley's songs.[96]

The fair use analyses undertaken in *Nader* and *Henley* provide persuasive, conflicting precedent for cases involving the unauthorized use of music in political campaigns. While the *Nader* court held that political advertisements, even those soliciting donations, are noncommercial political speech under the fourth fair use factor,[97] the *Henley* court held that political advertisements could be commercial insofar as the political campaign benefits without paying licensing fees or harms the

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[91] *Id.* at *24–25.

[92] *Id.* at *37.

[93] *Id.* at *33.

[94] *Id.*

[95] *Id.* at *38 (citing Worldwide Church of God v. Phila. Church of God, Inc., 227 F.3d 1110, 1118 (9th Cir. 2000)).

[96] *Id.* at *44–49.

[97] *See Nader*, 2004 U.S. Dist. LEXIS 3644, at *23–24.

future sales of the artist.[98] In addition, while the *Nader* court applied a lenient standard of "parody," which saw the incorporation of an exact copy of an original work into a second work as "transformative" under the first fair use factor,[99] the *Henley* court applied a strict standard of "parody," which requires more than using the same "themes and devices to mock a separate subject. . ."[100] Therefore, future musician-plaintiffs have persuasive precedent under *Henley* to find against fair use, while defendant-politicians have a persuasive precedent under *Nader* to find for fair use.

However, the *Nader* and *Henley* decisions share one common attribute that limits hope for artists–the cases substantially outlasted the campaigns. The Nader advertisement was used during the 2000 presidential campaign, but summary judgment was not handed down until 2004.[101] Similarly, DeVore parodied Henley's songs in 2009, but summary judgment was not handed down until 2010, after DeVore had already lost his bid for the United States Senate seat.[102] In addition, both courts denied preliminary injunctions during the defendants' campaigns.[103] As such, it is unlikely that copyright law can provide timely and effective assistance to artists seeking to prevent, by injunction, impermissible use by political campaigns.

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[98] *See Henley*, 2010 U.S. Dist. LEXIS 67987, at *38.

[99] *See Nader*, 2004 U.S. Dist. LEXIS 3644, at *42–43.

[100] *See Henley*, 2010 U.S. Dist. LEXIS 67987, at *29–33.

[101] *See Nader*, 2004 U.S. Dist. LEXIS 3644, at *1–4.

[102] *See Henley*, 2010 U.S. Dist. LEXIS 67987, at *1 (stating date of decision); *see also* Associated Press, *Fiorina Wins GOP Senate Primary in California*, CBS NEWS (June 9, 2010, 12:20 AM), http://www.cbsnews.com/stories/2010/06/09/politics/main6563065.shtml. (reporting Carly Fiorina's victory in California Republican primary held on June 8, 2010).

[103] *See Nader*, 2004 U.S. Dist. LEXIS 3644, at *4 (stating court denied MasterCard's motion for preliminary injunction during 2000 presidential campaign); Am. Family Life Ins. Co. v. Hagan, 266 F. Supp. 2d 682, 685 (N.D. Ohio 2002) (denying plaintiff's motion for preliminary injunction).

IV. FAILURE OF EXISTING TRADEMARK LAW

A. FALSE ENDORSEMENT

Another potential avenue of protection for artists is trademark law. A trademark is a "word, name, symbol, or device, or any combination thereof" that is used to identify and distinguish one's goods or services from those of another.[104] Federal trademark rights are governed by the Lanham Act.[105] The Lanham Act's purpose is to foster fair competition, protect consumers from deceiving business practices, and protect the mark holder's goodwill in the marketplace.[106] Section 43(a) of the Lanham Act imposes liability for "false endorsement," where a defendant appropriates a distinctive attribute of a celebrity, giving the impression that the celebrity endorsed the defendant in some manner.[107]

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[104] 15 U.S.C. § 1127 (2010).

[105] 15 U.S.C. §§ 1051–1141 (2012).

[106] *See* Stephanie D. Zimdahl, Comment, *A Celebrity Balancing Act: An Analysis of Trademark Protection Under the Lanham Act and the First Amendment Artistic Expression Defense*, 99 NW. U.L. REV. 1817, 1823 n.38 (2005) (explaining Supreme Court interpretation and congressional intent of Lanham Act).

[107] Section 43(a) reads:

> (1) Any person who, on or in connection with any good or services, or any container of goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact- which
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> (A) [I]s 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
>
> (B) [I]n commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes he or she is or is likely to be damaged by such act.

To succeed on a claim of false endorsement, the celebrity must show: (1) its mark is legally protectable; (2) it owns the mark; (3) the defendant uses the mark in commerce to identify its goods or services; and (4) the use of the mark in commerce is likely to confuse, deceive or mislead consumers into falsely believing that the celebrity approves, sponsors or endorses the goods or services at issue.[108] In false endorsement cases, the "mark" at issue is the celebrity's identity and it is presumed the celebrity owns his identity.[109] The third and fourth factors are typically the controlling issues.[110] When analyzing the fourth factor—likelihood of confusion—courts examine the "level of recognition that the celebrity enjoys among members of society"[111] and "the reasons for or source of the plaintiff's fame."[112]

In *Waits v. Frito-Lay*, after singer Tom Waits refused Frito-Lay's endorsement offer, Frito-Lay used a sound-alike of him in an advertisement.[113] Waits then sued Frito-Lay for false endorsement.[114] The court determined that Waits' voice was his "identity" because it had a unique "raspy, gravelly" quality, which was widely recognized and helped him achieve commercial and critical success in his musical career.[115] In turn, the court determined that Frito-Lay misused Waits' identity by imitating Waits' voice in a way that would lead consumers to mistakenly

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15 U.S.C. § 1125 (a) (2012); Courts interpret section 43(a) to include false endorsement. *See, e.g.*, White v. Samsung Electronics Am., Inc., 971 F.2d 1395, 1399–1401 (9th Cir. 1992); Allen v. Nat'l Video, Inc., 610 F. Supp. 612, 625–30 (S.D.N.Y. 1985); Abdul-Jabbar v. Gen. Motors Corp., 85 F.3d 407, 410 (9th Cir. 1996) (false endorsement "based on the unauthorized use of a celebrity's identity" is actionable as trademark infringement).

[108] *See* 15 U.S.C. § 1125(a)(1)(A) (2012).

[109] Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1106–07 (9th Cir. 1992).

[110] Estate of Barré v. Carter, 272 F. Supp. 3d 906, 942 (E.D. La. 2017).

[111] *See* Zimdahl, *supra* note 106, at 1829 (analyzing likelihood of confusion factors in celebrity cases).

[112] *Id.*

[113] *See* Waits, 978 F.2d at 1097.

[114] *Id.* at 1106–07.

[115] *Id.* at 1097.

think he was endorsing their product.[116] Therefore, Frito-Lay was liable under a claim of false endorsement.[117]

There is disagreement among federal courts as to whether artists may bring false endorsement claims against political campaigns. To succeed on a claim of false endorsement, the Lanham Act requires that the unauthorized use of the trademark occur *in commerce*.[118] Many courts read the "in commerce" language in conjunction with § 1127's definition of "use in commerce," whereby the trademark must be physically placed on goods or services that the defendant sells or transports in commerce, or the trademark must be used in the sale or advertisement of goods or services that are rendered in commerce.[119] This interpretation prevents artists from bringing false endorsement claims against political campaigns because playing music to fire up a crowd and introduce the candidate has no obvious commercial connotation. A political campaign is not a business entity, no product is sold, and no commercial service is rendered.[120]

In contrast, in 2008, the Central District of California held that "the Lanham Act's reference to 'use in commerce' does not require a plaintiff who asserts a claim under section 43(a)(1)(A) to show that the defendant actually used the mark in commerce."[121] Rather, this reference "actually 'reflects Congress's intent to legislate to the limits of its authority under the Commerce Clause' to regulate interstate commerce."[122] This requires a party to show that the defendant's conduct only "affects interstate commerce, such as through diminishing the plaintiff's ability to control use of the mark, thereby affecting the mark and its relationship to interstate commerce."[123] Under this definition,

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[116] *Id.* at 1107.

[117] *Id.* at 1106–07.

[118] *See* Lanham Act, *supra* note 107.

[119] *See Waits*, 978 F.2d at 1108–09.

[120] *See, e.g.*, Am. Family Life Ins. Co. v. Hagen, 266 F. Supp. 2d 682, 697 (N.D. Ohio 2002) (candidate's political website is not commercial speech, but political).

[121] *See* Browne v. McCain, 611 F. Supp. 2d 1073, 1083 (C.D. Cal. 2009) (the only decision issued in Browne v. McCain was a ruling on the Browne Defendants' respective motions to dismiss).

[122] *Id.*

[123] *Id.*

nonpermissive use of music by political campaigns could be considered "use in commerce" if the artist can show that the politician's use of her song diminished her ability to control the song in commerce.

However, whether a mark must be used in commerce or what that phrase means may be irrelevant. To succeed on a claim of false endorsement, the Lanham Act requires "likely consumer confusion," which means use of the trademark that is likely to confuse *consumers* about affiliations in *commercial matters*.[124] While voters compare political platforms and choose among candidates, voters are not consumers and candidates are not goods that they purchase. A politician has no tangible goods or services to sell. In fact, it is illegal for a politician to monetize the power to vote.[125] So, even if the use of the song mark created some type of confusion as to the artist's sponsorship or endorsement of the politician, it would not create consumer confusion. As a result, even in jurisdictions that accept the expanded version of "use in commerce," an artist's false endorsement claim will likely fail for inability to show consumer confusion.

B. RIGHT OF PUBLICITY

Trademark law also offers legal protection to artists under rights of publicity. As recognized by common law or statutes in most states, the right of publicity rests on the notion that, through the expenditures of time and effort in honing professional talents and skills, a celebrity develops a potentially valuable property right in her name, likeness, and identity.[126] Based on this right, a celebrity is entitled to legal relief when another party appropriates the celebrity's name, likeness, or identity to her advantage, which causes the celebrity harm.[127] Unlike a claim of false endorsement, the right of publicity does not require the plaintiff to prove likely

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[124] *See* Eastland Music Grp., L.L.C. v. Lionsgate Entm't, Inc., 707 F.3d 869, 872 (7th Cir. 2013) (quoting Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 31 (2003)); Ray Commc'ns v. Clear Channel, 673 F.3d 294, 301 (4th Cir. 2012); Hormel Foods Corp. v. Jim Henson Prods, Inc., 73 F.3d 497, 502 (2d Cir. 1996).

[125] *See generally* Buckley v. Valeo, 424 U.S. 1, 14–15 (1976) (outlining legal and ethical restrictions of politicians).

[126] *See* J. THOMAS MCCARTHY ET AL., MCCARTHY'S DESK ENCYCLOPEDIA OF INTELLECTUAL PROPERTY 529 (3d ed. 2004).

[127] *Id.* at 528–31.

consumer confusion, which gives artists a better chance of success against defendant-politicians.[128]

Musicians can rely on *Browne v. McCain*[129] when bringing a right of publicity claim against a political campaign for nonpermissive use of music. In this case, Jackson Browne filed a right of publicity claim under California common law[130] against presidential candidate John McCain for nonpermissive use of Browne's song "Running on Empty" in a 2008 political advertisement.[131] The advertisement mocked presidential candidate Barack Obama's energy policies by playing a clip of Obama with "Running on Empty" playing in the background.[132] In ruling on McCain's motion to strike Browne's right of publicity claim, the court noted that in order to succeed on his claim, Browne needed to show that McCain used his name, likeness, or identity without his consent for McCain's "advantage, commercially or otherwise," and that McCain's actions caused injury to Browne.[133] The court determined that Browne's song was his "identity" because Browne presented "evidence that tends to show that his voice is sufficiently distinctive and widely known."[134] The court also determined that, without Browne's consent, McCain "appropriated his identity to [his] advantage" by seeking and perhaps obtaining "increased media attention for Senator McCain's candidacy."[135] Lastly, Browne made a sufficient showing of injury because the video "gave the false impression that he was associated with or endorsed" the McCain campaign, when in reality Browne was "closely associated with liberal causes and Democratic political candidates."[136] Therefore, Browne succeeded on each element of his right of publicity

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[128] *Id.* at 529.

[129] Browne v. McCain, 611 F. Supp. 2d 1073, 1075 (C.D. Cal. 2009).

[130] The statutory option would not have worked for Browne because the applicable statute has a political-use exemption which permits uses of a celebrity's voice in a political campaign. *Browne*, 611 F. Supp. 2d at 1069 n.3.

[131] *Id.*

[132] *Id.* at 1070.

[133] *Id.* at 1080.

[134] *Id.*

[135] *Id.* at 1082.

[136] *Id.* at 1083.

claim.[137] However, the parties settled the dispute, so there was no final ruling on the merits.[138]

Although rights of publicity appear to be the most promising avenue for artists, there are various reasons why courts may not reach the same conclusion as the court in *Browne*. The *Browne* court's treatment of the right of publicity claim came in the context of a ruling on the defendant's motion to strike, so Browne merely needed to demonstrate a probability of success on his right of publicity claim to fend off the strike, which means the court was applying a lower standard.[139] The court may have ruled differently had it been applying the preponderance of the evidence standard required to succeed on the claim.[140]

In addition, there is a dramatic lack of uniformity concerning the scope and substance of the rights of publicity recognized by different states. At one extreme, Indiana's right of publicity extends to one's "personality," which is defined by statute to encompass virtually every attribute, including a person's signature, voice, gestures, appearance, and mannerisms.[141] Indiana's right of publicity extends 100 years past the celebrity's death, and plaintiffs are given a wide range of remedies, such as statutory and punitive damages, attorney fees, and injunctive relief, including confiscation and destruction of infringing goods.[142] At the other end of the spectrum, New York has no common law right of publicity and recognizes a very narrow statutory right of publicity limited to a person's "name, portrait, picture or voice."[143] New York's right of publicity ends when the

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[137] *Id.*

[138] *Id.*

[139] McCain based his motion to strike Browne's right of publicity claim on California's anti-SLAPP statute, which provides a mechanism for early-stage dismissal of unmeritorious claims that arise from a defendant's exercise of free speech rights in regard to a matter of public interest. *Id.* at 1067–68; *see also* CAL. CIV. PROC. CODE § 425.16 (West 2015).

[140] *See* McCarthy, *supra* note 114.

[141] *See* IND. CODE ANN. § 32-36-1-7 (2002).

[142] *See* IND. CODE ANN. § 32-36-1-18 (2002).

[143] *See* Roberson v. Rochester Folding Box. Co., 171 N.Y. 538, 64 N.E. 442 (1902) (New York Court of Appeals rejects the common-law right of privacy); *see also* N.Y. CIV. RIGHTS § 50 (1999) (provides civil and criminal sanctions for the use of a living person's

celebrity dies.[144] In between Indiana and New York, there are dozens of states with different scopes of protection, scienter requirements, post-mortem rights, common law tests, and damages caps.[145] Some states, like California, even have political-use exemptions written into the statute, permitting use of a celebrity's voice in political campaigns.[146] With such varied treatment of the right of publicity, the success of the plaintiff-musician largely depends on where the lawsuit is filed, and plaintiff-musicians in states like New York will not be afforded adequate protection of their work. This lack of uniform legal protection under both copyright and trademark law is concerning, so many legal articles have proposed a solution under the moral rights doctrine, which is explored below.

V. MORAL RIGHTS DOCTRINE AND ITS SHORTCOMINGS

A commonly-proposed solution to the nonpermissive use of music is to grant artists moral rights in their work.[147] Many countries, especially in Europe, see copyright as a type of natural right.[148] Because an author creates a work, the work is an expression of the author's personality, and she should be able to control what happens to it.[149] Similarly, the author's reputation is tied to the work, so if someone injures the work, they injure the author.[150] Based on this philosophical approach to copyright, many countries have codified the moral rights of artists.[151] These laws transcend economic considerations and give artists the right

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name, portrait, picture, or voice for purposes of advertising or trade without his or her written consent).

[144] *See* N.Y. CIV. RIGHTS, *supra* note 143.

[145] RIGHT OF PUBLICITY ROADMAP, https://www.rightofpublicityroadmap.com (last visited Feb. 24, 2019).

[146] *See Browne*, *supra* note 129.

[147] *See* JOHN HENRY MERRYMAN & ALBERT E. ELSEN, LAW ETHICS, AND THE VISUAL ARTS, at 251–52 (4th ed. 2002).

[148] *See* JOHN HENRY MERRYMAN & ALBERT E. ELSEN, LAW ETHICS, AND THE VISUAL ARTS, at 251–52 (4th ed. 2002).

[149] RALPH E. LERNER & JUDITH BRESLER, ART LAW: THE GUIDE FOR COLLECTORS, INVESTORS, DEALERS, AND ARTISTS, at 944, 950–59 (2d ed. 1998).

[150] *Id.*

[151] *Id.*

to claim authorship and to object to any distortion, mutilation, or other modification of a work which would be prejudicial to her honor or reputation.[152] In contrast, the United States sees copyright law as a matter of economics rather than philosophy.[153] As such, the Act provided economic incentives for authors to create works but did not give any recognition to moral rights.[154]

In 1989, the United States became a member of the Berne Convention for the Protection of Literary and Artistic Works (the "Berne Convention").[155] The Berne Convention requires its members to grant moral rights, stating:

> Independently of the author's economic rights, and even after the transfer of said rights, the author shall have the right to claim authorship of the work, and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.[156]

Congress sought to limit the effects of the Berne Convention as much as possible by passing the Berne Convention Implementation Act of 1988, which stated that the United States would adhere to the Berne Convention in the "most limited sense," and federal and state statutes would not be "expanded or reduced by virtue of, or in reliance upon, the provisions of the Berne Convention."[157] Two years later, in response to growing domestic and international criticism over the United States' treatment of moral rights, Congress enacted the Visual Artists Rights Act of 1990 ("VARA"), which is codified in Section 106 of the

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[152] *Id.*

[153] *Copyright Valuation*, APPRAISAL ECONOMICS, https://www.appraisaleconomics.com/copyright-valuation/ (last visited Apr. 4, 2019).

[154] *See* Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101-1101).

[155] Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 25 U.S.T. 1341, 828 U.N.T.S. 221 (last revised July 24, 1971).

[156] *Id.* at 1333.

[157] Berne Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988).

Copyright Act.[158] VARA gives the author of a "work of visual art" the right to, among other things, prevent any intentional "distortion, mutilation, or other modification of the work that which would be prejudicial to his or her honor or reputation."[159] VARA only applies to works falling within the definition of "visual art," so musical works are not protected under this act.[160]

In existing academic articles discussing nonpermissive use of music by political campaigns, the proposed solution is often to expand VARA to include musical works.[161] Under this adaptation of VARA, an artist could prevent use of her music that is prejudicial to her honor or reputation.[162] One scholar uses Bruce Springsteen's song "Born in the U.S.A." to illustrate the application of an expanded VARA to the nonpermissive use of music.[163] He explains that "Born in the U.S.A." is meant to be critical of the United States government in telling the story of a "disillusioned Vietnam War Veteran," but Ronald Reagan used

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[158] Visual Artists Rights Act of 1990, Pub. L. No. 101-650, 104 Stat. 5128 (codified in scattered sections of 17 U.S.C.); *see also, e.g.*, *Moral Rights in Our Copyright Laws: Hearing on S. 1198 and S. 1253 Before the Senate Subcomm. On Patents, Copyrights and Trademarks of the Senate Comm. On the Judiciary*, 101st Cong. 85 (1990). During the hearings on VARA, Senator DeConcini addressed scholar Edward Damich's concerns about Berne compliance in the area of moral rights: "Then you're saying that in your opinion we are not part of the Berne Convention? We have not adopted the legislation necessary to be in compliance? What we did last year really doesn't put us in any better position than if we passed nothing?" *Id.* Edward Damich replied, "That's correct." *Id.*

[159] *See* H.R. 2690, 101st Cong. § 106A(a)(3) Cong. Rec. 12,597 (1989).

[160] *Id.* § 101, 135 (defining "work of visual art").

[161] *See, e.g.*, Aurele Danoff, *The Moral Rights Act of 2007: Finding the Melody in the Music*, 1 J. BUS. ENTREPRENEURSHIP & L. 181 (2007); Rajan Desai, *Music Licensing, Performance Rights Societies, and Moral Rights for Music: A Need in the Current U.S. Music Licensing Scheme and a Way to Provide Moral Rights*, 10 U. BALT. INTELL. PROP. L.J. 1 (2001); Erik Gunderson, *Every Little Thing I Do (Incurs Legal Liability): Unauthorized use of Popular Music in Presidential Campaigns*, 14 LOY. L.A. ENT. L. REV. 137 (1993).

[162] *See generally* Desai, *supra* note 161.

[163] *Id.*

the song at political rallies to incite feelings of patriotism.[164] Under an expanded moral rights doctrine, "[i]f Springsteen could show that his song has been used outside the context of his artistic vision for it, and the use has offended his integrity[,]" he could get an injunction to prevent Ronald Reagan from using his song.[165]

Although the strategy of expanding VARA sounds promising on paper, it is problematic for three main reasons. First, protecting artists' moral rights is strongly disfavored in the United States. As previously discussed, United States copyright law is a matter of economics rather than philosophy.[166] The United States resisted joining the Berne Convention for 102 years and had instead joined the competing Universal Copyright Convention (the "UCC"), largely because the UCC did not require the United States to protect moral rights.[167] It only agreed to join the Berne Convention after American artists experienced financial harm under the UCC.[168] One scholar notes:

> The major impetus for United States accession to the Berne Convention was not a new found desire to bring its copyright laws into harmony with those of the Berne Union, but instead resulted from a stronger, more traditional American impulse: pure economic self-interest. American copyright-based industries whose products were being pirated in international markets, with which the United States did not have copyright relations, wanted greater protection.[169]

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[164] *Id.* at 22.

[165] *Id.* at 22–23.

[166] *See Copyright Valuation*, *supra* 153.

[167] *See* Robert J. Sherman, *The Visual Artists Rights Act of 1990: American Artists Burned Again*, 17 CARDOZA L. REV. 373, 399-400 (1995).

[168] Cambra E. Stern, *A Matter of Life or Death: The Visual Artists Rights Act and the Problem of Postmortem Moral Rights*, 51 UCLA L. REV. 849, 857 (2004) ("By the mid-1980s, losses to U.S. copyright proprietors from piracy abroad had mounted into the billions of dollars. At that point, U.S. participation in the UCC seemed inadequate." (citing David Nimmer, *Nation, Duration, Violation, Harmonization: An International Copyright Proposal for the United States*, 55 LAW & CONTEMP. PROBS. 211, 215 (1992))).

[169] *Id.*

Even after the United States joined the Berne Convention, Congress passed the aforementioned Berne Convention Implementation Act, employing the "neither expand nor reduce" language to eliminate the chance that moral rights might creep into the United States Code through Berne Convention adherence.[170] The only time moral rights were treated positively in the United States was through the enactment of VARA.[171] However, VARA simply rode on the coattails of an unrelated key bill. It was tacked onto the Judicial Improvements Act of 1990 at the last minute "without so much as a word of debate or discussion."[172] The last-minute enactment was immediately criticized by many congressional leaders for being too significant of a departure from copyright and private property laws.[173] United States courts have chipped away at the power of VARA since its enactment in 1990.[174] Because of this tumultuous relationship between United States copyright law and the moral rights doctrine, it is unlikely that Congress will ever expand the scope of VARA.

Second, even if Congress were willing to expand the moral rights protection to include music, problems arise in its real-

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[170] *See* Natalie C. Suhl, *Moral Rights Protection in the United States Under the Berne Convention: A Fictional Work?*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1203, 1219 (2002).

[171] *See* Visual Artists Rights Act, *supra* note 158.

[172] John Henry Merryman & Albert E. Elsen, *Law, Ethics, and The Visual Arts* 283-84 (3d ed. 1998).

[173] The last-minute enactment of VARA was criticized by George C. Smith, chief minority counsel for the Senate Judiciary Subcommittee on Technology and the Law. "Without so much as a word of debate or discussion, the Artists Act (sic) became law. The lack of debate is unfortunate because the new statute constitutes one of the most extraordinary realignments of private property rights ever adopted by Congress." *Id.*; *see also* 136 Cong. Rec. 12,610 (1990) (Representative Fish commented, "This legislation should not be viewed as precedent for the extension of so-called moral rights into other areas. This legislation addresses a very special situation in a very careful and deliberate way.").

[174] *See, e.g.*, 17 U.S.C. § 106A(a)(3)(B) (VARA will only protect "a work of recognized statute."); 17 U.S.C. § 106(A)(c)(2) (VARA does not protect against deterioration resulting from public presentation, including damage caused by lighting or placement.); Carter v. Helmsley-Spear, Inc., 71 F.3d 77, 85 (VARA does not protect works for hire or "applied art.").

world application. Recall the "Born in the U.S.A." example, where Springsteen could obtain an injunction by showing that his "song has been used outside the context of his artistic vision for it."[175] Although this solution is promising on paper, it fails to clarify how a court would determine whether there has been a violation of the artist's vision for her work.[176] This was the fundamental issue in *Shostakovich v. Twentieth Century-Fox Film Corp*.[177] There, four Soviet Russian composers sought to enjoin the use of their music in the movie "The Iron Curtain," which had an anti-Soviet theme.[178] The composers argued, among other things, that the themes of the film went against the artistic vision of their music.[179] The court's fundamental point was that there was no way to determine the violation of a musician's vision.[180] The court asked whether the standard should be "good taste, artistic worth, political beliefs, moral concepts" or some other standard.[181] The court dismissed the case, and the issue still stands.[182]

Third, VARA allows artists to waive their moral rights via contract. According to Section 106(e) of VARA, the creator may waive her moral rights by "consenting in a written and signed instrument specifically identifying the artwork and the uses of that work."[183] In response to this provision, most visual art contracts now contain moral rights waivers, which artists are required to sign during the initial contracting phase.[184] This eliminates the legal recourse promised to visual artists under VARA. The application of VARA to the music industry would be detrimental because of this waiver. It is virtually impossible for an artist to

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[175] *See* Desai, *supra* note 161, at 22–23.

[176] *Id.* at 21–23.

[177] Shostakovich v. Twentieth Century-Fox Film Corp., 80 N.Y.S.2d 575, 579 (Sup. Ct. 1948); aff'd, 275 App. Div. 695, 87 N.Y.S.2d 430 (1st Dept. 1949).

[178] *Id.* at 576.

[179] *Id.*

[180] *Id.* at 579.

[181] *Id.*

[182] *Id.*

[183] *See* Visual Artists Rights Act, *supra* note 158.

[184] *See, e.g.*, 1B NICHOLS CYCLOPEDIA OF LEGAL FORMS ANNOTATED § 24:19 (Nov. 2018) (drafting checklist that includes waiver of artist's moral rights); 5B AM. JUR. 2D *Legal Forms* § 72:67 (Nov. 2018) (example of standard moral rights waiver).

operate without a PRO.[185] Because there are only three PROs, artists have very little negotiating power.[186] If VARA is extended to cover music, artists will likely be required to sign moral rights waivers in exchange for memberships and public performance royalties. This eliminates any cause of action an artist may have against a licensee, negating any protection the moral rights doctrine attempts to create. Because of these shortcomings, alternative solutions are explored below.

VI. PROPOSED SOLUTIONS

The solution to nonpermissive use by political campaigns lies in the hands of PROs. History has demonstrated the immense importance of PROs in furthering the interests of their musicians, and their ability to adapt to new developments in the music industry in order to do so. From radio to television to the internet, new technologies have threatened licensing revenues, and PROs have changed business strategies to better market their artists and secure public performance royalties from the newest channels for music distribution.[187] Recognizing their versatility in the face of new problems, we should look at PROs, and not Congress, to make the necessary changes to protect artists from nonpermissive use.

There are two advantages of using PROs over Congress—lower transaction costs and greater flexibility.[188] PROs already have valuation, monitoring, and enforcement mechanisms in place, which drastically lower the costs of administering new rights.[189] In contrast, amending the Act or Lanham Act would be a tedious process with high transaction costs.[190] Proponents of an

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[185] *See generally* notes 39–49 and accompanying text.

[186] *See* COPYRIGHT AND THE MUSIC MARKETPLACE, *supra* note 48.

[187] *See, e.g.*, Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CAL. L. REV. 1293, 1338 (1996).

[188] *Id.* at 1296.

[189] *Id.* at 1320.

[190] *Id.* at 1312–13 n.52 ("t is a well-accepted precept in the intellectual property field that 'U.S. intellectual property law is extremely difficult to change . . . . In Washington, it is much easier to stop a bill than to move one through the legislative maze, and any party that feels short-changed can exercise virtual veto-power.'" (quoting

amendment have to win a sequence of victories in subcommittee, in committee, in Rules Committee, in conference, on the floors of both chambers, and in the White House.[191] During this process, large sums of money are spent educating and lobbying Congress.[192] Even if successful, Congress is ill-suited to respond to needs for further change.[193] In contrast, PROs are made up of people knowledgeable about the music industry and thus in tune with its needs. Their structure allows for ongoing adjustment to meet those needs.[194] Given these advantages, we must turn to PROs to solve the problem of nonpermissive use.

It is in PROs' best interest to make the necessary changes to protect their members from nonpermissive use. With the 2020 presidential election on the horizon, the animosity between Democratic-supporting artists and Republican politicians is growing, and artists are becoming increasingly frustrated with their lack of legal protection.[195] A PRO like BMI could use this frustration to poach members from ASCAP and SESAC. If BMI takes a hard stance against nonpermissive use in the political sphere and implements new protections for its members, ASCAP and SESAC artists may transfer their musical catalogs to BMI to better protect themselves. Because nonpermissive use injures the most popular musicians, BMI could secure memberships from top-tier artists like Rihanna, Pharrell, and Queen, increasing its performance royalties by millions of dollars per year.[196] On the opposite side of the same coin, it is in the best interest of all three PROs to take affirmative steps to protect their members so they do not lose them. Two potential changes are explored below.

A. EXEMPT POLITICAL USES FROM BLANKET LICENSES

PROs can end the feud between politicians and artists by modifying their standard operating agreements in one of two

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Ralph Oman, *Intellectual Property After the Uruguay Round*, 42 J. COPYRIGHT SOC'Y U.S.A. 18, 21 n.8 (1994))).

[191] Ralph Oman, *Intellectual Property After the Uruguay Round*, 42 J. COPYRIGHT SOC'Y U.S.A. 18, 32 (1994).

[192] Merges, *supra* note 187, at 1299.

[193] *Id.*

[194] *Id.* at 1300 ("Society and the industry will be better off if Congress exercises restraint, creating an environment in which private organizations can flourish.").

[195] *See generally supra* text accompanying notes 5–32.

[196] *See* Besen, *supra* note 43, at 384.

ways. First, PROs can exempt political uses from their blanket licenses, thus requiring politicians to receive direct permission from the artist. Direct permission is not a new concept; it is required for use of music in dramatic works like operas or Broadway plays.[197] The reason for this distinction is that dramatic uses are much easier for the individual copyright holder to license and police.[198] Unlike the hundreds of thousands of establishments in the United States that are playing popular music right now, Broadway plays are relatively infrequent, take months of preparation, and receive a lot of publicity.[199] Consequently, it is reasonable for musical directors to contact artists directly to receive permission before using their songs. Recognizing this, PROs exclude dramatic works from their blanket licenses.[200] Their justification for declining to license dramatic works also applies to political uses. Political events, like operas or Broadway plays, involve lengthy preparation and publicity.[201] They are also relatively infrequent, as presidential elections only occur once every four years, and Senate and House elections every two years.[202] Because of these similarities, it would be reasonable for campaign directors to contact artists directly to receive permission before using their songs at political events.

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[197] "A dramatic performance usually involves using the work to tell a story or as party of a story or plot." *Common Licensing Terms Defined*, ASCAP, https://www.ascap.com/help/ascap-licensing/licensing-terms-defined (last visited Apr. 30, 2019). The term "dramatico-musical work" includes, but is not limited to, a musical comedy, opera, play with music, revue or ballet. *Id.* Such performances involve dramatic rights, also referred to as "grand rights," while PROs only have the right to license non-dramatic public performances. *Id.*

[198] *See* Davis, *infra* note 199.

[199] *Robert Stigwood Group Ltd. v. Sperber*, 457 F.2d 50, 52 (2d Cir. 1972); *Rice v. Am. Program Bureau*, 446 F.2d 685, 689 (2d Cir. 1971); Brent Giles Davis, *Identity Theft: Tribute Bands, Grand Rights, and Dramatico-Musical Performances*, 24 CARDOZO ARTS & ENT. L.J. 845, 868 (2006).

[200] *Id.*

[201] *See* S.J. GUZZETTA, THE CAMPAIGN MANUAL: A DEFINITIVE STUDY OF THE MODERN POLITICAL CAMPAIGN PROCESS (7th ed. 2006).

[202] While local elections may occur more often than federal elections, the issue of artists objecting to PRO-licensed performances at political events has yet to come up in a local election.

Exempting political uses from blanket licenses would be an easy update that can mirror the provisions created to exclude dramatic works. ASCAP excludes dramatic works from its blanket licenses in two ways. First, its blanket licensing agreement begins by saying: "[ASCAP] grants and LICENSEE accepts a license to perform or cause to be performed publicly . . . *non-dramatic* renditions of the separate musical compositions . . . in the repertory of [ASCAP]."[203] PROs can use the same disclaimer for political uses, updating their blanket licensing agreements to cover "*non-political*, *non-dramatic* renditions of separate musical compositions." Second, ASCAP's licensing agreement contains the following limitation: "This license is limited to non-dramatic performances, and does not authorize any dramatic performances. For purposes of this agreement, a dramatic performance shall include, but not be limited to, the following . . . ."[204] PROs can

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[203] In its entirety, it reads:

(a) SOCIETY grants and LICENSEE accepts a license to perform or cause to be performed publicly at "LICENSEE'S business locations" and at "LICENSEE'S event locations" (each as defined below), and not elsewhere, non-dramatic renditions of the separate musical compositions now or hereafter during the term of this Agreement in the repertory of SOCIETY, of which SOCIETY shall have the right to license such performing rights. *Music in Business, Blanket License Agreement*, AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, https://www.ascap.com/~/media/files/pdf/licensing/classes/musicbsblank.pdf (last visited Feb. 24, 2019).

[204] In its entirety, it reads:

(2)(f) This license is limited to non-dramatic performances, and does not authorize any dramatic performances. For purposes of this Agreement, a dramatic performance shall include, but not be limited to, the following:

(i) performance of a "dramatico-musical work" (as defined below) in its entirety;

(ii) performance of one or more musical compositions from a "dramatico-musical work" (as defined below) accompanied by dialogue, pantomime, dance, stage action, or visual representation of the work from which the music is taken;

(iii) performance of one or more musical compositions as part of a story or plot, whether accompanied or unaccompanied by dialogue, pantomime, dance, stage action, or visual representation;

draft a parallel limitation for political uses: "This license is limited to non-political performances, and does not authorize any political use. For purposes of this agreement, a political use shall include, but not be limited to, the following: political rallies, campaign fundraisers, political speeches, political conventions, political commercials on television, radio, and internet." These two minor updates will effectively disallow any political entity from obtaining a blanket license for political events.

No solution is airtight, and the central issue with this solution is that it does not address the fair use doctrine. Recall that even if a political campaign does not purchase a license from a PRO, the politician may be able to use a copyrighted song if that use is "fair" under the precedent set by *Nader*.[205] However, the *Nader* precedent is only applicable in a minute number of cases, where the politician transforms the song into a parody that evokes different themes than the original.[206] In all of the cases presented in Part II of this Note, the politician used a song in its original form, eliminating any chance of a fair use defense.[207] Therefore, the issue of fair use will only arise in a small number of cases where the politician does not use the actual song. It is impossible to contract or legislate around fair use, so it is the courts' job to determine whether the use is fair on a case-by-case basis.[208]

B. CREATE POLITICAL-USE OPT-OUT IN MUSICIANS' MEMBERSHIP AGREEMENTS

In the alternative, if PROs are reluctant to completely eliminate political uses from blanket licenses, they can create a political-use opt-out in musicians' membership agreements. This

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(iv) performance of a concert version of a "dramatico-musical work" (as defined below).

The term "dramatico-musical work" as used in this Agreement, shall include, but not be limited to, a musical comedy, opera, play with music, revue, or ballet. *Id.*

[205] *See* MasterCard Int'l Inc. v. Nader, No. 00-6068, 2004 U.S. Dist. LEXIS 3644, at *42–43 (S.D.N.Y. Mar. 8, 2004).

[206] *Id.*

[207] *See generally supra* text accompanying notes 5–32.

[208] *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994) ("[T]he task [of determining fair use] is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis.").

can be as simple as a box that musicians can check or initial if they wish to exclude their musical catalog from blanket licenses sold to political campaigns. If the musician checks this box, her music cannot be sold for political use and, in turn, she will not receive royalties from any blanket licenses sold to political campaigns. Given the technological advancements embraced by PROs,[209] they could easily set up a system that tracks the musicians who opt-out, compiles a master list of songs political campaigns are not permitted to use under their licenses, and monitors whether those campaigns adhere to their licenses. If a campaign plays a song that is not covered under the campaign's blanket license, that artist can sue the campaign for copyright infringement or breach of contract. Checking the opt-out box does not prohibit artists from licensing their music to political campaigns, it simply defaults to a direct permission system in which politicians must ask musicians directly for permission to use their music.[210]

This solution contains one potential loophole in that it does not consider blanket licenses sold to large venues. Recall that if a political rally is held at a major public venue like an arena or convention center, politicians are protected by the venue's blanket license and may play any song licensed to the venue.[211] Since most venues purchase blanket licenses from multiple PROs, political campaigns may legally play virtually any song within the confines of the venue.[212] This means that, even if the musician opts to exclude her musical catalog from blanket licenses sold to political organizations, the political organization can still use her music at events held in arenas or convention centers. However, PROs can remove this loophole by altering their blanket licenses to include a special limitation for venues. This limitation can say: "All VENUE LICENSEES who license their business location to political organizations must prohibit the political organizations from playing songs excluded from political use, attached as Exhibit A." Exhibit A will be the master list of songs political

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[209] For a discussion of the ways in which PROs have harnessed new technology to improve their transactional infrastructure, *see* Robert P. Merges, *The Continuing Vitality of Music Performance Rights Organizations* 20–21 (UC Berkeley Public Law Research Paper No. 1266890), http://ssrn.com/abstract=1266870.

[210] This is analogous to direct permission required for dramatic works.

[211] *See* Rothenberg, *supra* note 52, at 17.

[212] *Id.* at 41.

campaigns are not permitted to use. Under this new limitation, if a campaign plays a song exempted from political use, the PRO can sue to enforce the contract, and the artist can sue the venue for indirect copyright infringement[213] or breach of contract. This minor update will effectively disallow any political entity from sidestepping the limitations placed on political licenses.

VII. CONCLUSION

The practice of playing popular songs at political rallies has grown to be a common feature of contemporary political campaigns. In a time where every detail of a political campaign is scrutinized by the public and press, artists fear negative association with politicians appropriate their work. Copyright law fails to remedy nonpermissive use because, by purchasing a blanket license from a PRO, political campaigns can legally play any song under contract by the PRO without infringing on an artist's copyright. Even if a political campaign does not purchase a blanket license, defendant-politicians have persuasive precedent under *Nader* to raise a fair use defense, which might protect their nonpermissive use through the life of their campaign. Federal trademark law fails as an effective remedy because false endorsement requires consumer confusion, a standard that plaintiff-musicians cannot meet because voters are not consumers and candidates are not goods that they purchase. State trademark law fails as an effective remedy because of the dramatic lack of uniformity concerning the scope and substance of the rights of publicity recognized by different states. Prior academic articles have proposed a solution under a modified moral rights doctrine, but the moral rights doctrine is strongly disfavored in the United States, violations of such rights are not clearly defined, and VARA

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[213] A defendant is guilty of indirect copyright infringement when he induces, controls, or contributes toward another's act of direct infringement. There are two types of indirect infringement: contributory infringement and vicarious liability. Contributory infringement requires the defendant: (1) have the right and ability to supervise or control the direct infringer; and (2) receive a direct financial benefit. Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, 545 U.S. 913, 919 (2005). Vicarious liability requires the defendant: (1) have knowledge of the infringement; and (2) induce or materially contribute to the infringement. A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1027 (9th Cir. 2001).

allows artists to waive their moral rights via contract, which negates any protection the doctrine attempts to create.

One possible solution is for PROs to alter their blanket licenses to exempt political use, requiring political campaigns to receive direct permission from the artist before using her song. Another possible solution is for PROs to include a political-use opt-out in musicians' membership agreements whereby musicians may exclude their musical catalog from blanket licenses sold to political campaigns. No matter what solution is ultimately chosen to combat the issue of nonpermissive use, it should be implemented soon. With the 2020 presidential election on the horizon, the animosity between musicians and politicians is growing. Now is the time to clearly define the legal rights of musicians in the political arena.