

Fair Use on the Campaign Trail

By Jonathan Bloom and Olivia Greer

I. Introduction

As the election season begins to heat up, and campaign rallies hit stadiums, VA halls, and lodges around the country, we can expect to see more recording artists objecting to use of their songs by candidates without permission, usually to fire up crowds. It is a truism that the First Amendment “has its fullest and most urgent application to speech uttered during a campaign for political office.”¹ Yet although political speech is entitled to the highest level of constitutional protection, the unauthorized use of copyrighted works is not immune from liability simply because the use is connected to a political campaign.

Over the years courts have analyzed a variety of scenarios in which a copyrighted work has been used without permission in a political context. From the unlicensed use of a song in the background of a campaign advertisement to the unauthorized use of a copyrighted photograph in a political pamphlet, the cases discussed in this article illustrate how courts have determined whether uses of copyrighted works are protected by the fair use doctrine in a political context.

II. The Fair Use Doctrine

As noted, political speech sits atop the First Amendment hierarchy.² And yet even in connection with political speech, copyright works cannot necessarily be used without permission, as such use may or may not be a fair use—and thus may or may not be actionable—depending on how the work is used.³

By way of background, the fair use doctrine prevents “rigid application” of copyright rights from “stifl[ing] the very creativity which that law is designed to foster.”⁴ In doing so, fair use advances copyright’s purpose of promoting “the Progress of Science and useful Arts.”⁵ The preamble to section 107 of the Copyright Act lists several types of potential fair uses, including criticism, comment, and news reporting. The list, which does not purport to be exhaustive, does not include any reference to political speech, although political pamphlets, advertisements, or speeches could, in theory, be characterized as criticism or comment. Even uses on the illustrative list, however, are fair in a given case only if the balance of the four statutory factors favors fair use. (Section 107 states that the “fair use”—not the “use”—of a copyrighted work for purposes such as criticism, comment, etc. is not an infringement.) The fair use factors are: (1) the purpose and character of the use, including whether the use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and sub-

stantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.⁶

In cases involving political speech, courts often emphasize the first factor, which focuses primarily on whether the use is transformative but also takes into account whether the use is commercial—which courts hold is less important when the use is transformative.

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A. Transformative Use

There has been a fair amount of recent litigation over what constitutes a transformative use. The Supreme Court has stated that whether the use is transformative is the “central purpose” of the first-factor inquiry, and it has defined the inquiry as “whether the new work merely ‘supersede[s] the objects’ of the original creation...or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”⁷ Whether the use of a copyrighted work is transformative is “more critical” than whether it is commercial.⁸

The Second Circuit addressed transformativeness recently in *Cariou v. Prince*.⁹ That case turned on the fair use defense asserted by appropriation artist Richard Prince, who had created and sold a series of collage paintings featuring (in some cases only slightly) altered versions of photographs taken in Jamaica by plaintiff Patrick Cariou and published in his 2000 book *Yes Rasta*. In his deposition, Prince admitted that he did not intend in his works to create a new meaning or message and that he was not interested in Cariou’s original intent.¹⁰

The district court found that Prince’s works were not transformative because they did not comment on Cariou’s photographs. The court also found that the use was highly commercial and that Prince had acted in bad faith, all of which contributed to its determination that the first factor weighed against fair use. Determining that the remaining fair use factors all weighed against Prince, the district court granted Cariou’s motion for summary judgment.¹¹ On appeal, the Second Circuit reversed in part and remanded.

With respect to the first factor, the court of appeals explained that “[t]he law imposes no requirement that a work comment on the original or its author in order to be considered transformative” and that a secondary work “may constitute a fair use even if it serves some purpose other than those...identified in the preamble to the statute”; the only requirement is that the new work “generally must alter the original with ‘new expression, meaning, or message.’”¹² Applying this standard, the court found that 25 of the 30 Prince works at issue were transformative on the ground that they reflected a wholly different aesthetic from Cariou’s photographs. Whereas the district court had found that Prince’s lack of intended commentary on Cariou’s work militated against a finding of transformativeness, the Second Circuit held that the relevant inquiry was “how the work in question appears to the reasonable observer, not simply what an artist might say about a particular piece or body of work.”¹³ In other words, the test of transformativeness is objective, not subjective.

While *Cariou* arguably expands the scope of what may be considered transformative by not imposing a requirement that the taking be justified by the purpose of commenting on the original, the extent to which a use can be considered transformative based solely on a claimed “different purpose” without any actual alteration of the original is limited, at least in the absence of new functionality such as that offered by a search engine.¹⁴ In *Harper & Row, Pubs., Inc. v. Nation Enters.*,¹⁵ for example, the Supreme Court rejected the argument that the asserted public interest in, and public importance of, a news report about President Ford’s forthcoming memoir justified unauthorized verbatim copying from the manuscript by *The Nation* magazine.¹⁶ The Court explained that fair use does not empower a court to “ignore a copyright whenever it determines the underlying work contains material of possible public importance.”¹⁷

In some cases, however, factor one has been held to favor a use that involves neither alteration of the original nor the addition of new functionality. In *Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*,¹⁸ for example, the Second Circuit held that Bloomberg’s dissemination of an unaltered recording of the plaintiff’s earnings call to subscribers was fair use. Bloomberg “obtained a sound recording and written transcript of the call and made them both available online, without alteration or editorial commentary, to subscribers to its online financial research service known as Bloomberg Professional.”¹⁹ The court held that “where a financial research service obtains and disseminates important financial information about a foreign company in order to make that information available to American investors and analysts, that purpose supports a finding of fair use.”²⁰ The court noted that a secondary work “can be transformative in function or purpose without altering or actually adding to the original work,”²¹ and it found that because Bloomberg had disseminated the data with a different message and

(reportorial) purpose than Swatch had, Bloomberg’s use had “at least an arguably transformative character.”²²

In *Bill Graham Archives v. Dorling Kindersley Ltd.*,²³ the Second Circuit held that reproduction of reduced-size (and therefore somewhat altered) reproductions of Grateful Dead posters in a biography of the band “fulfill[ed] [the publisher’s] transformative purpose of enhancing the biographical information in [the book], a purpose separate and distinct from the original artistic and promotional purpose for which the images were created.”²⁴ Unlike in *Swatch*, however, the use in *Bill Graham Archives* involved incorporation of a reproduction of the copyrighted work into a new work of scholarship, which is one of the illustrative fair uses.

B. Commercial Use

In determining whether the use at issue is commercial, courts look at whether the original “was copied in good faith to benefit the public or primarily for the commercial interests of the infringer.”²⁵ The inquiry focuses on “whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.”²⁶

The fact that a use is made for profit is not necessarily of much fair-use significance. As the Supreme Court noted in *Campbell*, if the commercial character of the use presumptively weighed against fair use, that presumption “would swallow nearly all of the illustrative uses” listed in section 107, all of which generally are done for profit.²⁷ In *Swatch*, the Second Circuit found that although it was undisputed that Bloomberg was a commercial enterprise, “almost all newspapers, books and magazines are published by commercial enterprises that seek a profit,” such that the commercial nature of Bloomberg’s use was entitled to “relatively little weight.”²⁸

In the political arena, courts generally have found that political advertisements are not commercial simply because they solicit donations. For instance, in a copyright and trademark infringement case involving a political advertisement by presidential candidate Ralph Nader that parodied MasterCard’s “Priceless” advertisements, a New York district court held that the use was noncommercial because its purpose was “to raise public awareness of Ralph Nader’s desire to be included in the upcoming, televised Presidential candidate debates.”²⁹ Similarly, a gubernatorial campaign advertisement that parodied the insurance company AFLAC’s quacking duck commercials was found to have been “properly classified not as a commercial transaction at all, but completely noncommercial, political speech.”³⁰

Nevertheless, as the cases discussed below illustrate, a consistent definition of commercial use for purposes of the first fair use factor has yet to emerge; there has been little uniformity in how courts have determined what types of political speech are properly classified as com-

mercial or to what extent a finding of commercial use weighs against finding fair use.

III. Recent Clashes Between Politics and Copyright

We next discuss six recent legal disputes in which a fair use defense was asserted in connection with allegedly infringing use of copyrighted works in a national political campaign.

A. Unauthorized Use of Songs by Political Campaigns

The unauthorized use of songs by political campaigns is a common source of conflict between political speech and intellectual property rights. Several lawsuits have challenged the public performance of songs or sound recordings at campaign events without permission. In such cases, the merit of the copyright infringement claim often hinges on whether the venue has a blanket license from a performance rights organization. But two recent cases arose in different settings: in one, a congressional candidate rewrote the lyrics of two famous songs to ridicule his political opponents; another involved a campaign ad that ran online and on television.

In *Henley v. DeVore*³¹ congressional candidate Charles DeVore modified the lyrics to the Don Henley songs “The Boys of Summer” (calling it “The Hope of November”) and “All She Wants To Do Is Dance” (calling it “All She Wants To Do Is Tax”) as a way of poking fun at DeVore’s political opponents, including President Obama and Senator Barbara Boxer. DeVore and his staff created music videos for the songs that featured DeVore singing the rewritten lyrics over karaoke tracks. Henley sued for copyright infringement, as well as for violation of the Lanham Act, in the Central District of California. DeVore defended the copyright claims by arguing on summary judgment that his versions of the songs were parodies and therefore constituted fair use.

In addressing whether the use was transformative, the court highlighted the distinction drawn by the Supreme Court between parody “in which the copyrighted work is the target” and satire “in which the copyrighted work is merely a vehicle to poke fun at another target.”³² The court recognized that parody “is not the only form of fair use,” but it emphasized that “satire faces a higher bar...because it requires greater justification for appropriating the original work.”³³ As for “The Boys of Summer,” the court found that the only respect in which the use might be considered transformative would be as parody of the author, on the theory that the song was intended to poke fun at Henley as a supporter of then-candidate President Obama. The court found this argument tenuous, but it allowed for the possibility that factor one could tip slightly in favor of DeVore. As for “All She Wants To Do Is Dance,” the court found that the use plainly was *not* parodic, as it was not designed to com-

ment on or criticize the original song or its author; rather it was satire—a vehicle to comment on and criticize DeVore’s political opponents. Because the court found that DeVore had “borrowed heavily from the creative aspects” of the original songs and made “minimal changes,” it concluded that the appropriation was not justified.³⁴

As for whether the use was commercial, the court acknowledged that most courts considering whether campaign advertisements are commercial in the fair use context “come down on the side of noncommercial”³⁵ But it found that DeVore stood to gain publicity and campaign donations from his use of the songs (the videos contained links to DeVore’s campaign website and encouraged donations) and that DeVore had profited by gaining an advantage without having to pay customary licensing fees.³⁶

The court found that the remaining three factors also weighed against finding fair use: the copied works were highly expressive (factor two); the defendants borrowed heavily from the originals (factor three); and the defendants failed to make an adequate showing that there would be no harm to the market for the originals (factor four). The court thus granted the plaintiffs’ motion for summary judgment on copyright infringement as to both songs.

In *Browne v. McCain*³⁷ the musician Jackson Browne claimed that Senator John McCain’s presidential campaign, along with the Republican National Committee, infringed his copyright (and violated the Lanham Act) by using Browne’s song “Running on Empty” in the background of a campaign ad that was posted online and broadcast on television. The McCain campaign conceded that the use was unlicensed but moved to dismiss on fair use grounds. The court denied the motion, holding it inappropriate to evaluate fair use based on the pleadings rather than on a developed fact record. The court stated, however, that “[t]he mere fact that Plaintiff’s claim is based on Defendants’ use of his copyrighted work in a political campaign does not bar Plaintiff’s claim as a matter of law.”³⁸ In the end, the parties settled, with the defendants paying an undisclosed amount to Browne and issuing a public apology.³⁹

B. Political Materials

Another common form of political speech is pamphlets that support a candidate for elected office or promote a particular political view. In *Hill v. Pub. Advocate of the United States*,⁴⁰ Public Advocate—an organization opposed to same-sex marriage—published a pamphlet opposing the state senate campaign of a candidate who supported civil unions. The pamphlet featured a photograph of two men kissing. The men in question were a married couple who had posted the photograph on a personal blog they created to inform friends and family about their wedding. The couple, along with the photographer, who owned the copyright in the photograph, sued

for copyright infringement and misappropriation of the couple's names and likenesses. Public Advocate moved to dismiss on fair use and First Amendment grounds. The court held that although Public Advocate's use of the couple's names and likenesses was protected speech,⁴¹ the copyright infringement claim could not be dismissed on fair use grounds.

With respect to the first fair use factor, the court found that the pamphlet did not make transformative use of the photograph because Public Advocate had retained the most important part of it and had failed to add anything new.⁴² Like the *Browne* court, the court in *Hill* stated that "the mere fact that the photo was used for political purposes does not bolster the Defendants' argument."⁴³ The court held that although the record did not allow for a full fair use analysis, the plaintiffs had stated a plausible copyright infringement claim.

By contrast, in *Wojnarowicz v. Am. Family Ass'n*⁴⁴ the court held that the reproduction of copyrighted artwork in a political pamphlet was fair use where the purpose of the use was to criticize the underlying works. The American Family Association (AFA) had published a pamphlet criticizing funding by the National Endowment for the Arts of what the AFA characterized as offensive and blasphemous art. The AFA included in the pamphlet examples of art it found to be offensive, including fourteen "fragments" of art works by Hill. Hill sued, alleging copyright infringement, violation of the Lanham Act, and state law claims. The court held the pamphlet was fair use, based largely on the finding under factor one that criticism and comment were indisputably the defendants' "dominant purpose."⁴⁵ With respect to whether the use was commercial, the court acknowledged that "even a minimal level of commercial incentive weighs against a finding of fair use," but it emphasized that commercial use is not dispositive of the fair use analysis. Thus, although the pamphlet "involved some economic motivation" (it encouraged donations to the AFA), the court held that the "dominant objective" of criticism "far outweighed the secondary fund-raising purpose."⁴⁶

In another recent case that dealt not with pamphlets but with t-shirts, *Kienitz v. Sconnie Nation LLC*,⁴⁷ the Seventh Circuit found fair use where an apparel company created t-shirts, in collaboration with a local activist group, that featured an artistically altered version of the plaintiff's photograph of the mayor of Madison, Wisconsin. The shirt was created to highlight the mayor's opposition to an annual event that he had himself attended before becoming mayor. The t-shirts displayed the mayor's face, in black and lime green ink, with the slogan "Sorry for Partying" printed across the image.⁴⁸ After learning from the mayor that his photograph had been used on the shirt, the photographer sued for copyright infringement.

The district court held that the t-shirt made fair use of the photograph. The court found the t-shirts transformative.⁴⁹ The court emphasized that although "courts have been more willing to grant fair use protections to parodies...than to satires," under *Cariou* a work can be transformative without commenting on the original work or its author,⁵⁰ and it found that "the robust transformative nature" of the shirts tipped the first factor in favor of the defendants even though the shirts were a commercial product. The court found that the second factor was neutral and that the third and fourth factors favored fair use.

On appeal, the Seventh Circuit, in an opinion by Judge Frank Easterbrook, affirmed on different grounds. The court expressly took issue with the Second Circuit's emphasis on transformative use in *Cariou*, opining that "asking exclusively whether something is 'transformative' not only replaces the list [of presumptively fair uses] in § 107 but also could override 17 U.S.C. § 106(2), which protects derivative works."⁵¹ The court criticized *Cariou* for failing to explain how every transformative use could be a fair use without "extinguishing the author's [derivative work] rights under § 106(2)."⁵² The court stated that it preferred to "stick with the statutory list [of fair use factors]," and it identified the fourth factor—market harm—as the most important.

In evaluating factor four, the court held that it favored fair use because the t-shirt was "no substitute for the original photograph," and the photographer had not alleged any actual or potential disruption of any plans to license the photograph to apparel companies. Factor three favored the defendants because they had taken the barest minimum of the photograph (using an already low-resolution version and stripping out the background, color, and shading). The court found that the remaining two factors didn't "do much," but it held that the first factor favored the defendants because, although they made a small profit, the design was chosen "as a form of political commentary," while the second factor was neutral.

C. Campaign Ads and Websites

Two disputes dating from the 2012 election season that were never adjudicated show the types of conflicts that can arise between political speech and intellectual property rights on the Internet. In 2010, Fox News sued Democratic Senate candidate Robin Carnahan for copyright infringement after the Carnahan campaign produced an ad containing a 24-second unlicensed clip from a 2006 Fox interview of Carnahan's opponent. Fox News alleged that using the clip in the ad had "harmed the value of the original work by compromising its apparent objectivity."⁵³ Although the Carnahan campaign initially claimed fair use (as well as that Fox had failed to register its copyright before filing the lawsuit), the parties ultimately settled. The Carnahan campaign publicly acknowledged that it had used the footage in a manner that "exceeded that which is permitted."⁵⁴

Also in 2010 Republican Senate candidate Sharron Angle threatened to sue incumbent Senator Harry Reid after Reid's campaign republished a prior version of Angle's campaign website that had showcased some of her more conservative political views during the Nevada primary campaign before being replaced, after the primaries, by a new website expressing more moderate views.⁵⁵ The Angle campaign sent a cease-and-desist letter arguing that the republication misappropriated Angle's intellectual property.⁵⁶ The Reid campaign claimed it had made fair use of the Angle material.⁵⁷ Angle threatened, but never filed, a lawsuit.

IV. Discussion

The body of cases addressing invocations of fair use in connection with political speech makes clear that the political context does not necessarily afford fair use protection, particularly where the use is not transformative. In *Hill*, for example, the court noted, on a motion to dismiss, that the political purpose for which the plaintiff's copyrighted photograph was used without permission did not make it a fair use as a matter of law. In both *Henley* and *Browne*, the political nature of the challenged uses did not appear to strengthen the defendants' fair use arguments; in *Henley*, the court rejected the fair use defense, and in *Browne* the court held that fair use did not bar the plaintiff's claim. However in the Seventh Circuit's ruling in *Kienitz*, the fact that the photograph at issue had been used for political commentary was held to favor fair use, although the use also was plainly transformative.

For a fair use defense to succeed in the context of political speech, it is not necessary that the use be parodic. In *Henley*, for example, the court recognized that parody "is not the only form of fair use," and in *Hill* the court focused, as had the Second Circuit in *Cariou*, on whether the challenged use added "something new" in a way that altered the original work "with new expression, meaning or message," without regard to whether the message was parodic. In *Kienitz*, moreover, the Seventh Circuit cautioned that undue focus on transformativeness risked undermining the right of the copyright owner to create and control derivative works.

It should be noted that the Seventh Circuit's critique in *Kienitz* of the Second Circuit's purported emphasis on transformativeness over market harm overlooked the fact that it was the Supreme Court in *Campbell* that situated transformativeness at the heart of the fair use inquiry, as well as the fact that one purpose of the concept of transformativeness is to help identify works that do not supersede the original and thus are less likely to cause market harm. Moreover, the scope of derivative rights is limited by the principle that copyright owners "may not preempt exploitation of transformative markets, which they would not 'in general develop or license others to develop.'"⁵⁸ This would apply to uses, like the t-shirt at issue in *Kienitz*, that involve critical commentary.

It also bears noting that while political speech does occupy a privileged place under the First Amendment, courts do not conduct an independent First Amendment analysis in copyright infringement cases because application of the fair use factors takes account of the defendant's First Amendment interests. As the Supreme Court has explained, copyright law "contains built-in First Amendment accommodations," one of them being fair use.⁵⁹ Accordingly, any claim by a political campaign that its use of a copyrighted work without permission should be protected by the First Amendment because it disseminates political ideas generally carries little weight. In the words of the Supreme Court, it would be "fundamentally at odds with the scheme of copyright to accord lesser rights in those works that are of greatest importance to the public."⁶⁰

V. Conclusion

There is no clear consensus as to whether use of a copyrighted work to generate support for a political campaign is a commercial use. However, even where the use is found to be commercial, in a political context this factor may not carry much weight unless the defendant is exploiting the work in a blatant manner, such as by using it unaltered in a campaign ad. Escaping infringement liability for unauthorized use of copyrighted material by a political campaign generally requires a creative modification of the work to convey a critical message other than simply "If you like this song, vote for me."

Endnotes

1. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010) (internal quotations omitted). See also *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 (1995) ("Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution.") (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)); *Meyer v. Grant*, 486 U.S. 414 (1988) (First Amendment protection "at its zenith" in the political arena); *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971) (The First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office.").
2. *Mills v. Alabama*, 384 U.S. 214, 218 (1966) ("[T]here is practically universal agreement that a major purpose of the First Amendment was to protect the free discussion of governmental affairs.").
3. 17 U.S.C. § 107 ("[T]he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.").
4. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994) (quoting U.S. Const., Art. I, sec. 8 cl. 8) (additional citations omitted).
5. *Id.* at 577.
6. 17 U.S.C. § 107.
7. *Campbell*, 510 U.S. at 579.
8. *Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc.*, 150 F.3d 132, 141 (2d Cir. 1998).
9. 714 F.3d 694 (2d Cir. 2013).

10. *Id.* at 707.
11. *Cariou v. Prince*, 784 F. Supp. 2d 337 (S.D.N.Y. 2011).
12. *Cariou*, 714 F.3d at 706 (quoting *Campbell*, 510 U.S. at 579).
13. *Id.* at 707.
14. *See, e.g., Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2002).
15. 471 U.S. 539, 569 (1985).
16. *Id.* at 556.
17. *Id.* at 558.
18. 756 F.3d 73 (2d Cir. 2014).
19. *Id.* at 78.
20. *Id.* at 83.
21. *Id.* at 84 (citation omitted).
22. *Id.* at 85.
23. 448 F.3d 605 (2d Cir. 2006).
24. *Id.* at 610.
25. *American Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 922 (2d Cir. 1994) (quoting *Rogers v. Koons*, 960 F.2d 301, 309 (2d Cir. 1992)).
26. *Harper & Row*, 471 U.S. at 562.
27. *Campbell*, 510 U.S. at 584; *see also Cariou*, 714 F.3d at 708.
28. *Swatch*, 756 F.3d at 83 (quoting *Consumers Union of U.S., Inc. v. Gen. Signal Corp.*, 724 F.2d 1044, 1049 (2d Cir. 1983) (alterations omitted)).
29. *MasterCard Int'l Inc. v. Nader 2000 Primary Comm.*, No. 00 Civ. 6068(GBD), 2004 WL 434404, at *12 (S.D.N.Y. Mar. 8, 2004).
30. *American Family Life Insurance Co. v. Hagan*, 266 F. Supp. 2d 682, 697 (N.D. Ohio 2002).
31. 733 F. Supp. 2d 1144, 1149 (C.D. Cal. 2010).
32. *Id.* at 1152 (quoting *Dr. Seuss Enters., L.P. v. Penguin Books*, 109 F.3d 1394, 1399 (9th Cir. 1997); *Campbell*, 510 U.S. at 580).
33. *Id.* at 1158.
34. *Id.* at 1152.
35. *Id.* at 1159 (citing *MasterCard*, 2004 WL 434404, at *12; *Keep Thomson Governor Comm. v. Citizens for Gallen Comm.*, 457 F. Supp. 957, 961 (D. N.H. 1978)).
36. *Id.*
37. 612 F. Supp. 2d 1125 (C.D. Cal. 2009).
38. *Id.* at 1130.
39. Ashby Jones, *John McCain, Jackson Browne, Bury the Hatchet Over Use of Song*, THE WALL STREET JOURNAL, July 21, 2009, available at <http://blogs.wsj.com/law/2009/07/21/john-mccain-jackson-browne-bury-the-hatchet-over-use-of-song/> (last visited July 15, 2015).
40. 35 F. Supp. 3d 1347, 1357 (D. Colo. 2014).
41. *Id.* at 1355-57.
42. *Id.* at 1358.
43. *Id.*
44. 745 F. Supp. 130, 134 (S.D.N.Y. 1990).
45. *Id.* at 144.
46. *Id.*
47. 766 F.3d 756, 759 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 1555 (2015).
48. *Id.* at 757.
49. *Kienitz v. Sconnie Nation LLC*, 965 F. Supp. 2d 1042, 1050 (W.D. Wis. 2013).
50. *Id.* at 1051.
51. *Kienitz*, 766 F.3d at 758.
52. *Id.*
53. Complaint, *Fox News Network, LLC v. Robin Carnahan For Senate, Inc.*, No. 4:10-cv-00906-GAF (Sept. 15, 2010 W.D. Mo.), available at http://www.politico.com/static/PPM170_100916_fox.html (last visited July 15, 2015).
54. David Catanese, *Carnahan and Fox Settle Lawsuit*, Politico.com, February 4, 2011, available at http://www.politico.com/blogs/davidcatanese/0211/Carnahan_and_Fox_settle_lawsuit.html (last visited July 15, 2015).
55. Stephanie Condon, *Sharron Angle Accuses Harry Reid of "Dirty Tricks" in Campaign Website Scuffle*, CBS News, July 6, 2010, available at <http://www.cbsnews.com/news/sharron-angle-accuses-harry-reid-of-dirty-tricks-in-campaign-website-scuffle/> (last visited July 15, 2015); Sam Stein, *Sharron Angle's Tea Party Agenda Gets a Drastic Makeover*, THE HUFFINGTON POST, July 1, 2010, available at http://www.huffingtonpost.com/2010/07/01/sharron-angle-tea-party-a_n_632958.html (last visited July 15, 2015).
56. Letter from Cleta Mitchell, Foley & Lardner LLP, to Marc Elias, Perkins Coie (July 2, 2010), available at <https://drive.google.com/file/d/0BxV7je3uiiuGqMzY4NTcwNjQtNzMwMCM0MWRjLWE3YmYtZWVkJzJjNTYyNjZj/view?ddrp=1&hl=en#> (last visited July 15, 2015).
57. Eduardo M. Peñalver and Sonia Katyal, *The Fair Use Senator*, Slate.com, July 9, 2010, available at http://www.slate.com/articles/news_and_politics/jurisprudence/2010/07/the_fair_use_senator.html (last visited July 15, 2015).
58. *Castle Rock*, 150 F.3d at 146 n.11 (citing *Campbell*, 510 U.S. at 592).
59. *Eldred v. Ashcroft*, 537 U.S. 186, 190 (2003).
60. *Harper & Row*, 471 U.S. at 559; *see also id.* at 560 (declining to expand the fair use doctrine "to create what amounts to a public figure exception to copyright").

Jonathan Bloom, the editor-in-chief of *Bright Ideas*, is counsel at Weil, Gotshal & Manges LLP. Olivia Greer is an associate with the firm.

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