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Let the Beat Drop: The Use of Recorded Music in Political Campaigns

Most audiences would prefer to let the beat go on but in certain situations the musicians must disagree. One such scenario is the use of previously recorded songs by political campaigns. Artists have objected to the use of their music being played during rallies and in association with candidates through visual presentations, such as Youtube videos.¹ As the American system of copyright law only protects economic rights of musicians, the fair compensation of an artist for use of their work, rather than moral rights, the objection by an artist to the particular use of a work, copyright law is unable to provide the remedies artists seek when their works are used by political campaigns. Several examples of such conflicts have occurred in the last five years. However, most have been settled confidentially, resulting in a minimum of legal precedent.² The few decisions that have been reached are partial and ambiguous, met with a lack of consensus in the federal courts.

This commentary will be confined to the use of previously recorded music in the context of rallies and visual presentations. Several high profile disputes have arisen from political campaigns over the past five years. The McCain/Palin presidential campaign drew several complaints from musicians regarding their use of music, specifically, the band Heart (“Barracuda”), John Mellencamp (“Pink Houses”), Van Halen (“Right Now”) and John Hall (“Still the One”).³ These complaints focused on songs played at rallies which will be a narrow focus of this commentary. We will restrict our investigation to the use of recorded, copyrighted

¹ Robert W. Clarida, Andrew P. Sparkler, *Singing the Campaign Blues Politicians Often Tone Deaf to Songwriters' Rights*, 3 LANDSLIDE 6, 7 (2010).

² *Id.* at 7.

³ *Id.* at 7-9.

music played in a traditional venue, such as an auditorium or convention center, which is played at a time when the focus of the rally or appearance is trained on the candidate, such as an introduction before or a departure after a speech. Restricting our sample set in this manner eliminates extraneous questions of law regarding the requirement of licenses under copyright law for non-traditional venues and the question of Youtube videos under false endorsement trademark law (although we will discuss Youtube as precedent for trademark law related to campaign appearances).

Our thesis to be proven or disproven will be that the current legal structure of copyright and trademark law is unable to protect artists from exploitation for political gain and therefore a new law is necessary. After evaluating the current recourse available to musicians, this commentary will evaluate the impact upon all concerned parties by the net-benefit theory of economics to evaluate the incentives, and propose new legislation to solve this problem. However, due to our government structure, it is difficult to foresee how elected officials would voluntarily enact such legislation. Indeed, it is unclear any legal action should be taken to solve this impasse.

In Part I, we will discuss the failure of current legal protections in terms of challenges musicians must overcome in order to prevent political campaigns from using their previously recorded music. Part II will analyze the problem under the net benefit theory of intellectual property law, evaluating the benefits to be gained by both candidates and musicians. Part III will weigh these benefits and determine whether new legislation is warranted and how a new law would control this dispute.

- I. The Failure of Legal Protections
 - A. Copyright Law Does Not Protect the Moral Rights of Musicians
 - B. Trademark Law Has Failed to Protect False Endorsement
 - C. First Amendment Complications

- i. First Amendment's Impact on Copyright
 - ii. First Amendment's Impact on Trademark
- II. Net-Benefit Theory Evaluation
- III. Should New Legislation be Created and How It Could Solve The Problem

I. The Failure of Existing Law

A. Copyright Law Does Not Protect the Moral Rights of Musicians

The foundation of this problem lies in copyright law. Musicians expect copyright law to protect their work from unlicensed use, but there is no need to obtain a license from each artist in order to play their music. Publisher's rights organizations (PRO), such as ASCAP, BMI, and SESAC enter into contracts with musicians in order to sell performance licenses for their music. The most prevalent form of performance license is a blanket license, enabling the purchaser to play all of the music under contract by a particular PRO. These licenses are purchased by traditional meeting places such as auditoriums and convention centers and allow these venues to play music from the entire of the PRO. While PRO's are not required by copyright law, there are several benefits to this procedure, such as lower per transaction costs, allowing venues to avoid contracting with musicians individually, and a diversification of music played due to the flat-rate nature of being able to play a PRO's entire catalogue after purchasing the license.⁴

In creating these blanket licenses, PRO's are protecting the only right copyright law promises to protect in the interest of musicians; the economic right the musician owns to earn compensation for the playing of their music. The right which is not protected by this tandem of copyright law and the blanket license is the moral right of a musician to object to a particular use of their work.⁵ Since copyright law does not consider moral rights of musicians, artists have no

⁴ See Lauren Bilasz, *Copyrights, Campaigns, and the Collective Administration of Performance Rights: A Call To End Blanket Licensing of Political Events*, 32 CARDOZO L. REV. 305, 322-36 (2010).

⁵ Carolina Chavez, *Copyright's "Elephant in the Room": A Realistic Look at the Role of Moral Rights in Modern American Copyright*, 36 AIPLA Q.J. 125, 127-28 (2008).

recourse under copyright to prevent such usage based only on a moral objection. Campaigns claim that after purchasing these licenses that there is no legal basis to object. Since the current copyright law configuration does not protect moral rights, artists can only ask candidates to stop using their music during rallies, as was done during the McCain/Palin campaign.

As this problem receives more publicity, musicians and their attorneys are exploring original arguments to create new interpretations of the law and contracts to PRO's . Recently the band Rush has advised the campaign of Rand Paul for the Kentucky Senate that "the public performance of Rush's music is not licensed for political purposes: any public venue which allows such use is in breach of its public performance license and also liable of copyright infringement."⁶ This letter did not accompany a lawsuit, but seems to have been an attempt to open a new method of recourse within the copyright structure. No lawsuit or resolution through alternative means followed this action. Any possible contract claims regarding the necessity to specify a political use remain to be seen but is unlikely. However, as a more popular alternative to copyright law claims, some musicians have brought trademark claims as a means to close the gap left by copyright law.

B.Trademark Law Has Failed to Protect False Endorsement⁷

Due to the failure of copyright law to protect musicians, alternative means of litigation have been attempted. One such approach is to use trademark law as governed by the Lanham Act.⁸ Though trademark law is capable of protecting individuals from false endorsement, the application of this law to instances of political campaigns stretches the boundaries of the law and

⁶ Letter from Robert A. Farmer, Director of Legal Affairs, Anthem Entertainment Group, to Rand Paul for U.S. Senate (May 25, 2010), available at <http://www.scribd.com/doc/32872744/Letter-to-Rand-Paul-re-use-of-Rush-Music>.

⁷ See Matthew Cursio, *Born To Be Used In The USA: An Alternative Avenue For Evaluating Politicians' Unauthorized Use Of Original Musical Performances On the campaign Trail*, 18 VILL. SPORTS & ENT. L.J. 317 (2011).

⁸ See 15 U.S.C.S §§ 1051-1141.

such liberal interpretations are split in the federal courts. For such a claim to succeed, it would have to pass two tests: 1) a trademark would have to meet the statutory definition to exist, and 2) false endorsement would have to be found under § 43(a) of the Lanham Act. In this situation, the trademark would be the musician's reputation. A celebrity can own trademark rights for his or her identity or persona, for which he or she has "an economic interest . . . akin to that of" a commercial trademark holder.⁹

For a mark to be protected under the Lanham Act, the public must be able to (1) recognize the mark as identifying the goods or services with which the mark is associated and (2) distinguish those goods and services through the mark.¹⁰ To qualify as serving those functions, a mark must be "inherently distinctive" or acquire "secondary meaning." Secondary meaning attaches when the mark and the product or business the mark symbolizes "become synonymous in the mind of the public, submerging the primary meaning of the [mark] in favor of its meaning as a word identifying that [product or] business."¹¹ Most importantly, trademark law requires a trademark to be used in commerce before any right of action becomes available to plaintiffs.¹² This notion of secondary meaning has broad repercussions on the applicability of trademark law to false endorsement and an individual's reputation.

To succeed on a claim for trademark infringement under the Lanham Act, a plaintiff must prove (1) trademark ownership and (2) that the defendant's unauthorized use of the trademark is

⁹ See *Parks v. LaFace Records*, 329 F.3d 437, 445 (6th Cir. 2003) (explaining liability under § 43(a) includes unauthorized use of trademarks resulting in consumer confusion as to "sponsorship or approval"); *Brach Van Houten Holding, Inc. v. Save Brach's Coal. For Chi.*, 856 F. Supp. 472, 475 (N.D. Ill. 1994) ("[T]he Lanham Act is concerned not only with confusion over the source of goods but also with deceptive appearances of approval.").

¹⁰ See *Comedy III Prods. Inc. v. New Line Cinema*, 200 F.3d 593, 595 (9th Cir. 2000).

¹¹ See *Arrow Fastener Co. v. The Stanley Works*, 59 F.3d 384, 390 (2d Cir. 1995) ("Whether the mark is entitled to protection depends on whether it is inherently distinctive or, if merely descriptive, has acquired 'secondary meaning.'" (citing *Merriam-Webster, Inc. v. Random House, Inc.*, 35 F.3d 65, 70 (2d Cir. 1994), cert. denied, 513 U.S. 1190 (1995)).

¹² See *Dep't of Parks & Rec. v. Bazaar Del Mundo, Inc.*, 448 F.3d 1118, 1125 (9th Cir. 2006)

likely to cause consumer confusion.¹³ For our purposes, the second prong begins the challenging journey to proving false endorsement. Courts must determine whether “numerous ordinary prudent purchasers are likely to be misled or confused as to the source of the product in question because of the entrance in the marketplace of defendant's mark.” To evaluate likelihood of confusion, the Circuit Courts have developed various tests. The Second Circuit applies the following eight factors, which are known as the Polaroid factors: (1) strength of the mark; (2) degree of similarity between the two marks; (3) proximity of the products; (4) likelihood that the trademark holder will “bridge the gap” (i.e. likelihood that trademark holder will enter into the market of the alleged infringer); (5) actual confusion; (6) defendant's good faith in adopting the mark; (7) quality of the defendants' product; and (8) sophistication of the buyers.¹⁴

Other circuits have also adopted similar multi-prong evaluations to analyze likelihood of confusion. These factors, however, are not exclusive, and “[o]ther variables may come into play depending on the particular facts presented.”¹⁵ Liability under the Lanham Act is not limited to the misappropriation of a trademark in commercial activities. Though the statutory language of the Lanham Act only imposes liability for the unauthorized use of a trademark “in commerce,” that phrase is simply a description of federal courts' jurisdiction over acts that Congress may regulate pursuant to the Constitution's Commerce Clause.¹⁶

The first major obstacle a musician faces when attempting to sue for trademark infringement is for the Court to determine a political organization is a commercial body. The decision reached in *United We Stand America* was based on the Second Circuit's finding that the

¹³ See *Comedy*, *supra* note 10, at 595-96.

¹⁴ See *Polaroid Corp. v. Polaroid Elecs., Corp.*, 287 F.2d 492, 495 (2d Cir. 1961).

¹⁵ See *AMF, Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348-49 (9th Cir. 1979).

¹⁶ See *United We Stand Am., Inc. v. United We Stand, Am. N.Y., Inc.* 128 F.3d 86, 92 (2d Cir. 1997) (“The history and text of the Lanham Act show that ‘use in commerce’ reflects Congress's intent to legislate to the limits of its authority under the Commerce Clause, rather than to limit the Lanham Act to profit-seeking uses of a trademark.”).

political campaign engaged in “services” within the definition of the Lanham Act specifically, “in connection with the sale, offering for sale, distribution, or advertising of any goods or services.”¹⁷ Very few jurisdictions have taken up this interpretation to apply to political campaigns, but the *United We Stand America* court specified certain activities it determined to be indicative of services:

United We Stand America New York was incorporated to “solicit, collect and otherwise raise money” in support of the presidential candidacy of Ross Perot. Since its incorporation, it has engaged in political organizing, established and equipped an office; solicited politicians to run on the UWSANY slate; issued press releases intended to support particular candidates and causes; endorsed candidates; and distributed partisan political literature.¹⁸

The Court evaluated these activities to constitute a service within the stream of commerce, making the organization subject to the stipulations of the Lanham Act in spite of the fact that they were performed on a non-profit basis. Another case which agrees with this interpretation was *Brach Van Houten Holding, Inc. v. Save Brach’s Coalition for Chicago*, where the court held that “a group engaged in soliciting donation, preparing press releases, holding public meetings and press conferences, and organizing on behalf of its members’ interests was performing services within the meaning of the Lanham Act.”¹⁹ Under this interpretation, it is possible for political campaigns to be held liable for trademark infringement

Although we have now seen political campaigns can be held liable for trademark infringement, there must be a cause of action under the Lanham Act which will permit musicians to sue. Musicians have begun using section 43(a) of the Lanham Act to bring suit for false endorsement. Under this section, trademark takes on a different meaning than a mark as a means

¹⁷ *Id.* at 89.

¹⁸ *Id.* at 90.

¹⁹ *Brach Van Houten Holding, Inc. v. Save Brach;s Coalition for Chicago*, 856 F.Supp. 472, 475-76 (N.D. III 1994).

of identifying a brand, but rather in this context a trademark can protect a celebrity's persona in relation to such a persona's commercial value.

Section 43(a) of the Lanham Act extends liability for trademark misappropriation beyond consumer confusion as to source identification for a product but rather to a celebrity's persona. Under Section 43(a), trademark owners are protected against the misappropriation of their trademarks if the misappropriation (1) is likely to cause consumer confusion by creating a false association with or endorsement by the trademark holder or (2) constitutes false advertising.²⁰ Certain courts view the intentional confusion of the electorate regarding the source of political material to be very dangerous to the political process.²¹ Courts consider the same likelihood of confusion factors when determining liability for false association, endorsement, or advertising as they do when determining liability for consumer confusion regarding the source of trademarked goods.²²

Lanham Act protections under Section 43(a) are not only invoked by marketplace competitors but rather a celebrity can own trademark rights for his or her identity or persona, for which he or she has "an economic interest . . . akin to that of" a commercial trademark holder. Likewise, the Lanham Act also protects distinctive attributes, such as a singer's voice or a celebrity's physical appearance.²³ When analyzing the likelihood of confusion factors in Lanham Act cases involving celebrities, courts examine the "level of recognition that the celebrity enjoys

²⁰ See 15 U.S.C.S. 1125(a)(1) (2012)

²¹ See *United We Stand*, 128 F.3d at 90 ("The resulting confusion [due to different organizations employing the same trade name to endorse candidates] would be catastrophic; voters would have no way of understanding the significance of an endorsement or position taken by parties of recognized major names."); *Browne v. McCain*, 611 F. Supp. 2d 1073, 1079 (C.D. Cal. 2009) ("Indeed, the [Lanham] Act's purpose of reducing consumer confusion supports application of the Act to political speech, where the consequences of widespread confusion as to the source of such speech could be dire").

²² See *Time, Inc. v. Petersen Publ. Co.*, 173 F.3d 113, 117 (2d Cir. N.Y. 1999).

²³ See *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1107 (9th Cir. 1992) (holding Section 43(a) recognizes false endorsements claims "premised on the unauthorized imitation of an entertainer's distinctive voice" or physical appearance).

among members of society” to determine the “strength of the plaintiff’s mark.” Likewise, the “relatedness or proximity of the products” refers to “the reasons for or source of the plaintiff’s fame.” Once a question of confusion can be validly raised under such tests as *Sleekcraft*, courts tend to allow a jury determine if confusion is likely.²⁴

The most important recent case regarding § 43(a) was *Henley v. DeVore*.²⁵ This case brought a variety of copyright and trademark claims but for our purposes we will focus on the evaluation of § 43(a) and the likelihood of confusion in consumers. In *Henley*, a founding member of The Eagles, Don Henley, filed suit against Charles DeVore, a Republican candidate for the U.S. Senate in California, after DeVore posted a video featuring two songs performed or written by Henley, “The Boys of Summer” and “All She Wants to Do Is Dance,” with new lyrics by DeVore.²⁶ The court determined that the plaintiff could not maintain a Lanham Act claim based merely on the use of songs that Henley performed, noting that there is no precedent to support the proposition that a performer holds a trademark on the performance of a particular song. The court determined that since the public could not reasonably think that Henley himself actually performed the DeVore campaign video songs, defendants were entitled to summary judgment on the Lanham Act claim.²⁷

On August 5, 2010, it was announced that Henley and DeVore reached a confidential settlement in this case. As part of the settlement terms, DeVore issued a statement apologizing to Don Henley and his fellow songwriters for using their song “without respect for their rights under copyright law.” In an interview discussing the settlement, Henley insisted that the lawsuit

²⁴ *White v. Samsung Electronics*, 971 F.2d 1395

²⁵ See *Henley v. DeVore*, 733 F.Supp.2d 1144 (C.D. Cal. 2010)

²⁶ See Clarida and Sparkler, *supra* note 1, at 10-1.

²⁷ *Id.* at 11.

was not filed to make a political statement, but rather was “simply a matter of my copyrights being violated by music being used in a way it was never intended to be used.”²⁸

Under this examination we can see there is a high standard to be met by musicians in order to prove an infringement case against a political candidate and their campaign. An evaluating court must first come to the conclusion that a campaign is in fact rendering services which would subject the organization to the standards imposed on a commercial body. Such a court would then have to determine whether confusion among the electorate is likely under Section 43(a), using a test similar to the *Sleekcraft* examination. Finally, a musician would have to convince a jury that confusion is likely enough to cause false endorsement. Even if a musician were to reach this point in litigation, there are still complications to overcome.

C. First Amendment Complications²⁹

Towering over any claims through either copyright or trademark law are the protections afforded candidates through the First Amendment protection on political speech. In this section we will evaluate the influence that the First Amendment has on protecting political speech and the direct effects on the likelihood of successfully suing under copyright and trademark law.

In order to succeed on the merits of either claim, a plaintiff must steer clear of the well-trodden path of political speech. The two types of speech that are relevant to disputes involving the unauthorized use of intellectual property by political candidates are core political speech and commercial speech. Core political speech relates to public issues, the conduct of government, and elections.³⁰ Commercial speech is speech that is “related solely to the economic interests of

²⁸ *Id.* at 11

²⁹ See Cursio, *supra* note 7, at 338-349.

³⁰ See *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346-47 (1995)(describing core political speech as “[d]iscussion of public issues,” “debate on the qualifications of candidates,” “discussion of governmental affairs,” and “conduct of campaigns for political office” (citing *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976) (per curiam))).

the speaker and its audience.”³¹ If a defendant is able to differentiate the instance of potential infringement of copyright or trademark law as core political speech as opposed to commercial speech, the First Amendment will shield a candidate from lawsuits.

Governmental and judicial restrictions on political speech and campaigns operate in “an area of the most fundamental First Amendment activities” because the “role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance.”³² As the Supreme Court noted in the landmark election-law case *Buckley v. Valeo*, the First Amendment “has its fullest and most urgent application precisely to the conduct of campaigns for political office.”³³ Accordingly, courts review infringements on core political speech under the highest constitutional standard—exacting scrutiny.³⁴ When applying exacting scrutiny, courts will only uphold regulations that are “narrowly tailored to serve an overriding state interest.”³⁵ For commercial speech, the Constitution “accords a lesser protection . . . than [it does for] other constitutionally guaranteed expression.”³⁶

In *American Family Life Insurance Co. (AFLAC) v. Hagan*, the District Court for the Northern District of Ohio addressed the distinction between commercial and core political speech in the context of a political campaign.³⁷ In *Hagan*, the campaign of Ohio gubernatorial candidate Tim Hagan posted an internet advertisement featuring a “crudely animated character made up of [his opponent] Governor Taft's head sitting on the body of a white cartoon duck,”

³¹ See *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561 (1980) .

³² See *Republican Party of Minn. v. White*, 536 U.S. 765, 781-82 (2002) .

³³ See *Buckley v. Valeo*, 424 U.S. 1, 15 (1976).

³⁴ See *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) (“When a law burdens core political speech, we apply ‘exacting scrutiny,’ and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest.”).

³⁵ *Id.* at 347.

³⁶ *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 563 (1980).

³⁷ *American Family Life Insurance Co. (AFLAC) v. Hagan*, 266 F.Supp.2d 682, 695 (N.D. Ohio 2002).

which quacks “TaftQuack several times during each commercial” (the “Hagan Advertisement”).³⁸ The figure in the Hagan Advertisement resembled the well-known quacking duck in AFLAC's insurance commercials.³⁹ The Hagan Advertisement also solicited campaign donations through an internet link.⁴⁰ The court held that, for the purposes of the Federal Trademark Dilution Act's exemption on noncommercial uses of trademarks, the solicitation of contributions by the Hagan Advertisement was “completely noncommercial political speech.”⁴¹ The court opined that it was “arguable whether Hagan's speech propose[d] a commercial transaction at all.”⁴² Rather, the Hagan Advertisement discussed “public issues and challenge[d] the qualifications of a political candidate.”⁴³ Notice this is directly opposed to the United We Stand decision referenced earlier regarding the commercial nature of campaigns. Although a political campaign may be viewed as a commercial entity, under the First Amendment, the particular use of a trademark, or under 43(a) a celebrity's persona, must be commercial in nature, not political. If the reviewing court concludes the aim of the statement was political, or at the very least partially political, the First Amendment will protect a candidate from a trademark claim.

Before discussing the next case with bearing on the First Amendment and how it colors a claim under copyright and trademark law, we will briefly discuss an aspect of trademark law which has become closed due to Congress's reshaping. In 1995, the Lanham Act was amended to include Section 1125(c), to protect against trademark dilution.⁴⁴ Dilution is defined as “lessening of the capacity of a famous mark to identify and distinguish goods and services,

³⁸ *Id.* at 686

³⁹ *Id.* at 686

⁴⁰ *Id.* at 686

⁴¹ *Id.* at 697

⁴² *Id.* at 697

⁴³ *Id.* at 697-698

⁴⁴ 15 U.S.C. § 1127 (2006 & Supp. II 2009).

regardless of the presence or absence of--(1) competition between the owner of the famous mark and other parties, or (2) likelihood of confusion, mistake or deception.”⁴⁵ This method of trademark challenge would have been useful to a musician claiming dilution of his or her persona through false endorsement. However, the original version of the statute has been updated to eliminate this possibility. The current version of the statute protects marks from dilution by the “use of a mark... in commerce,” and maintains an exception for noncommercial use.⁴⁶ Thus, “all speech which is not purely commercial, and would therefore be protected by the First Amendment, is subject to the exception.”⁴⁷ This measure protects political speech and does not allow even a mixed form of speech, including both commercial and political, from being considered under trademark dilution.⁴⁸ This approach not only closes trademark dilution as a possibility to musicians but also can be used as an indication of Congress’ intent to exempt political speech from the restrictions of federal law. It provides further evidence to courts that trademark law was not intended to protect political speech.

In *Nader*, the S.D.N.Y. found the Hagan court's reasoning to be “persuasive,” holding the *Nader* Advertisement exempt from liability under the Federal Trademark Dilution Act because its use of MasterCard's trademarks was political in nature.⁴⁹ MasterCard argued that the *Nader* Advertisement was commercial in nature because contributions to the *Nader* campaign increased after the internet version of the *Nader* Advertisement, which contained a “Donate On-line” link, was released.⁵⁰ The court rejected that argument on two grounds. First, MasterCard provided “no evidence of a causal connection between the [*Nader* Advertisement] and the

⁴⁵ John Zevitas, *If It Doesn't Fit, Keep on Trying?: The Courts' Attempt to Find A Place for Pure Political Speech in the Lanham Act*, 60 CATH. U. L. REV. 243, 274 (2010); quoting 15 U.S.C.A § 1127 (2012).

⁴⁶ *Id.* at 275.

⁴⁷ *Griffith v. Fenrick*, 486 F. Supp. 2d 848, 853 (W.D. Wis. 2007) (citing *Mattel*, 296 F.3d at 906).

⁴⁸ See *American Family Life Insurance Co.*, 266 F.Supp.2d at 698.

⁴⁹ See *Mastercard International Inc. v. Nader 2000 Primary Committee, Inc.*, No. 00 Civ.6068 (GBD) U.S. Dist. WESTLAW 434404, 1 (S.D.N.Y. March 8, 2004).

⁵⁰ *Id.* at 1.

contributions.”⁵¹ Alternatively, even if the Nader Advertisement did spur an increase in donations to the Nader campaign, the court would have still held that the Nader Advertisement was political in nature.⁵² The court opined that the Nader Advertisement conveyed a “strong political message” - Nader's opinion that “other presidential candidates can be bought, but that the ‘truth,’ represented by himself, cannot.”⁵³

The court warned that if it held the Nader Advertisement to be commercial in nature solely because the advertisement increased campaign contributions, “all political campaign speech would also be ‘commercial speech’ since all political candidates collect contributions.”⁵⁴ Such a holding would be inconsistent with the Lanham Act's legislative history, which “clearly indicates that Congress did not intend for the Act to chill political speech.”⁵⁵ The court also quoted the following from the legislative history of the Act: “Political advertising and promotion is political speech, and therefore not encompassed by the [Lanham Act's] term ‘commercial.’” Accordingly, viewing this case as analogous to Hagan, the court held that the Nader Advertisement use of MasterCard's trademarks was political in nature.⁵⁶ The court further supported its finding that the Nader Advertisement was political in nature in its fair use analysis, opining that the Nader Advertisement's stated purpose was to “raise public awareness of Ralph Nader's desire to be included in the upcoming televised Presidential candidate debates.”⁵⁷

Affirmative defenses are an important aspect of First Amendment law to keep in mind during this evaluation. The most easily and frequently invoked is fair use.⁵⁸ Fair use permits the

⁵¹ *Id.* at 7.

⁵² *Id.* at 8.

⁵³ *Id.* at 8.

⁵⁴ *Id.* at 9.

⁵⁵ *Id.* at 9.

⁵⁶ *Id.* at 8.

⁵⁷ *Id.* at 8.

⁵⁸ 17 U.S.C.A. § 107 (1992).

use of protected works for certain purposes, such as criticism, commentary, research, and news reporting.⁵⁹ The statute provides:

[i]n determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include--(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality 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.⁶⁰

Briefly, (1) looks to whether the use is commercial (2) the degree to which the work is creative or factual (3) amount of work used (4) if such a use would harm the market for plaintiff's work, such as licenses.⁶¹ This defense could be used by politicians as a means to invoke the First Amendment protections. This is yet another analysis an evaluating court would have to perform to conclude the limits of First Amendment protections. It can be an effective defense from a claim but once again arguments in our context can be made. We are dealing with the use of works, recorded songs, which we argue are commercial in nature because there is no element of a political message, are entirely creative, used to the degree of recognition by and audience, and are subject to market forces due to licensing.

Although these cases cast a bleak pallor on a potential lawsuit challenging the use of a protected song due to the First Amendment's protection of political speech, a difference can be drawn from the context of our investigation. These cases dealt with the use of a trademark in order to make a direct statement pertaining to a politician's message. The examining Courts in these cases refuse to consider such use as commercial for good reason, because all political speech by a campaign is inherently aimed at fostering support and donations for a candidate.

⁵⁹ See *Claridia and Sparkler*, *supra* note 1, at 8

⁶⁰ See 17 U.S.C.A. § 107 (1992).

⁶¹ See *Clarida and Sparkler*, *supra* note 1, at 8-9.

However, as we will discuss later in Parts II and III of this discussion, the use of recorded music does not meet this standard. The use of music in the context of political campaign rallies says nothing about a politician's message and is therefore not political speech.

i. First Amendment's Impact on the Copyright Act⁶²

The Copyright Clause and the First Amendment are “intuitively in conflict” because of the contrary interests that they protect.⁶³ In *Eldred v. Ashcroft*, however, the Supreme Court explained that free speech protections are embodied in copyright law.⁶⁴ Because the First Amendment and Copyright Clause were adopted within a few years of each other, the Court reasoned that the Framers viewed “copyright's limited monopolies” to be “compatible with free speech principles.”⁶⁵ The Court further explained that copyrights promote free expression and dissemination of ideas by “establishing a marketable right to the use of one's expression.”⁶⁶

Additionally, the Court identified the Copyright Act's “built-in First Amendment accommodations.”⁶⁷ The Copyright Act precludes copyright ownership of ideas, facts and concepts while protecting the expression of such ideas, facts and concepts, which is known as the “idea/expression dichotomy.”⁶⁸ The idea/expression dichotomy “strikes a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression”; it allows the ideas, theories and facts behind copyrighted works to be “instantly available for public exploitation at the moment of publication.”⁶⁹ Furthermore, the Court reasoned that the fair use defense protects the First

⁶² See *Cursio*, *supra* note 7, at 342-44.

⁶³ See *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1263 (11th Cir. 2001).

⁶⁴ See *Eldred v. Ashcroft*, 537 US 186 (2003).

⁶⁵ *Id.* at 188.

⁶⁶ *Id.* at 190.

⁶⁷ *Id.* at 190.

⁶⁸ *Id.* at 190.

⁶⁹ *Id.* at 190.

Amendment rights of copyright users, “allow[ing] the public to use not only facts and ideas contained in a copyrighted work, but also expression itself in certain circumstances.”⁷⁰

This notion of a dichotomy between idea and expression is incredibly important to our argument. Especially in the context of candidates using music with patriotic imagery, are they not using the expression of another to transmit their message or idea? Candidates should be free to express the ideas contained within a song but the direct expression of these ideas is the property of a musician.

In summary, after our examination of copyright law and the First Amendment, it seems that should a cause of action arise under copyright law, the First Amendment may not stand in the way of a musician attempting to sue for infringement. If a musician were able to argue a cause of action arising under moral rights, which currently does not exist, they would likely succeed. We will evaluate this further in Part II and III.

ii. First Amendment's Impact on the Lanham Act⁷¹

The First Amendment can provide a defense to a Lanham Act claim in a case involving the unauthorized use of a trademark in a similar manner as copyright. Though the unauthorized use of a trademark in political speech does not preclude Lanham Act liability per se, the Lanham Act should not be used to “chill political speech.”⁷² For trademark dilution claims in particular, political speech is fully protected because the Federal Trademark Dilution Act specifically excludes noncommercial uses of trademarks from liability.⁷³

⁷⁰ *Id.* at 190.

⁷¹ See *Cursio*, supra note 62, at 344-50.

⁷² See *Mastercard International Inc.*, WESTLAW 434404 at 7 (“The legislative history of the Lanham Act clearly indicates that Congress did not intend for the Act to chill political speech.”); see also *Rogers v. Grimaldi*, 875 F.2d 994, 997 (2d Cir. 1989) (“Because overextension of Lanham Act restrictions in the area of titles might intrude on First Amendment values, we must construe the Act narrowly to avoid such a conflict.”).

⁷³ See *MasterCard Int’l, Inc.*, WESTLAW 434404 at 7.

As a threshold matter, the First Amendment only provides a defense to a Lanham Act claim if the alleged infringer used the trademark to convey a communicative message, not if the alleged infringer used the trademark for source identification.⁷⁴ To determine if enforcing the Lanham Act violates the First Amendment rights of the alleged infringer, courts generally apply one of three tests: (1) the “likelihood of confusion” test; (2) the “alternative avenues” test; or (3) the *Rogers v. Grimaldi* test, which is commonly known as the Rogers or “artistic relevance” test.⁷⁵ The federal circuit courts are split as to which test is the proper method for balancing First Amendment and trademark interests, and the Second Circuit has even applied more than one test.⁷⁶

Under the likelihood of confusion test, courts apply a standard likelihood of confusion analysis, such as evaluating the Polaroid or Sleekcraft factors, without a separate First Amendment analysis.⁷⁷ Under the alternative avenues test, enforcing the trademark holder's Lanham Act rights does not violate the First Amendment when there are “sufficient alternative means” of communication available.⁷⁸ Courts that apply the alternative avenues test view trademarks as property rights that need not “yield to the exercise of First Amendment rights under circumstances where adequate alternative avenues of communication exist.”⁷⁹ Those courts reason that, if alternative means of communication are available, neither the speaker nor the public are deprived the benefit of the speaker's ideas.⁸⁰

⁷⁴ See *United We Stand America, Inc.* 128 F.3d at 92-3.

⁷⁵ See *Parks v. LaFace Records*, 329 F.3d at 448-9.

⁷⁶ See Stephanie Dotson Zimdahl, *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, 1830 (2005).

⁷⁷ *Id.* at 1828.

⁷⁸ See *Parks v. LaFace Records*, 329 F.3d at 448.

⁷⁹ See *Mutual of Omaha Ins. Co. v. Novak*, 836 F.2d 397, 402 (8th Cir. 1987).

⁸⁰ *Id.* at 402.

The seminal case for the alternative avenues test is *Lloyd Corp. v. Tanner*.⁸¹ In *Lloyd Corp.*, anti-war protesters were ejected from a privately-owned shopping mall after they tried to distribute anti-war handbills.⁸² Holding that there was no constitutional violation, the Court introduced the fundamental principle of the alternative avenues test.⁸³ The Court explained that infringing on the mall owner's property rights while the protesters had sufficient alternative means to exercise their First Amendment rights “would diminish property rights without significantly enhancing the asserted right of free speech.”⁸⁴ The Eighth Circuit is the only circuit to have adopted the alternative avenues test as its standard for evaluating First Amendment rights in Lanham Act disputes.⁸⁵

The alternative avenues test would almost certainly result in an outcome favorable to suing musicians. An evaluating court would be forced to view a candidate's use of recorded music as a violation of trademark law because there are alternative avenues through which to communicate their message. If a candidate could successfully argue that playing a song constitutes political speech, then certainly there are alternative avenues through which that message can be dispersed than through the playing of a protected song.

The First, Second, Sixth and Tenth Circuits have either rejected or significantly limited the alternative avenues test because, *inter alia*, (1) the test does not sufficiently protect the right to free expression, (2) trademark and real property rights should not be analogized for the purpose of balancing property rights with First Amendment rights and (3) the test could require a court to critically evaluate creative necessity.⁸⁶ In *Parks v. LaFace Records*, the Sixth Circuit

⁸¹ *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972)

⁸² *Id.* at 553.

⁸³ *Id.* at 567.

⁸⁴ *Id.* at 567.

⁸⁵ *Id.* at 568.

⁸⁶ See Zimdahl, *supra* at note 76, at ; *Parks v. LaFace Records*, 329 F.3d at 448.

rejected the alternative avenues test. The court noted the “awkwardness of analogizing property rights in land to property rights in words or ideas.”⁸⁷ For a communicative message, a change in wording is usually much more significant to the overall message's effectiveness than a difference in the location from which the message is communicated.⁸⁸ Furthermore, applying the alternative avenues test to a Lanham Act dispute would require a court to evaluate whether the unauthorized use of a trademark is “necessary” to communicate an idea, which according to the Parks court, is an inappropriate evaluation for the judiciary to make.⁸⁹

Finally, the Second, Fifth, Sixth, and Ninth Circuits and the Eastern District of Pennsylvania have adopted the Rogers test to determine if the Lanham Act's restrictions apply to an artistic work.⁹⁰ The Rogers test only permits the Lanham Act to preclude the use of a trademark in a work that contains artistic expression when “the public interest in avoiding consumer confusion outweighs the public interest in free expression.”⁹¹ Accordingly, the Lanham Act will only apply when (1) the use of the trademark has “no artistic relevance to the underlying work” or (2) if the use of the trademark has artistic relevance, that use “explicitly misleads as to the source or the content of the work.”⁹² The Rogers court limited the test to cases arising in the “context of allegedly misleading titles using a celebrity's name,”⁹³ but courts have since expanded its scope to cover any work of artistic expression.⁹⁴ After rejecting the likelihood of confusion and alternative avenues tests, the Parks court applied the Rogers test, opining that it

⁸⁷ See *Parks v. LaFace Records*, 329 F.3d at 450

⁸⁸ *Id.* at 450.

⁸⁹ *Id.* at 450.

⁹⁰ *Id.* at 450; *Rogers v. Grimaldi*, 875 F.2d at 999.

⁹¹ See *Rogers v. Grimaldi*, 875 F.2d at 998.

⁹² *Id.* at 999.

⁹³ *Id.* at 999.

⁹⁴ See *Cliffs Notes, Inc. v. Bantam Doubleday Dell Publ'g Grp., Inc.*, 886 F.2d 490, 495 (2d Cir. 1989).

is the “most appropriate method to balance the public interest in avoiding consumer confusion with the public interest in free expression.”⁹⁵

As we can see, the differences in the tests applied to the First Amendment question and trademark law vary greatly. The most favorable to musicians would likely be the alternative avenues test. However, the Rogers test could also be determined in favor of musicians. Again, we would have to look at how a song is used by a candidate. Even if the first part of the test were successful, proving that the use explicitly misleads is the central problem under a 43(a) claim. There is little evidence a candidate uses an artist’s music to intentionally confuse the electorate as to the source or endorsement of an artist.

In summary, should a cause of action be raised under §43(a), it is unclear if the First Amendment would protect a political candidate. The examples we have used are largely commercial in nature and so the context we investigate has not been tested. Of the three tests to evaluate the First Amendment’s protection of candidates, the alternative avenues test would likely prove most favorable to musicians. However, only the Eighth Circuit applies this test and the others will be hesitant to expand its’ application.

II. Evaluation of Incentives Under the Net Benefit Theory

In order to determine if a change to a law should be made, we must evaluate the costs related to such a change. Such a change would involve an increase in the level of protection or the rights granted to a musician. Such changes could be enacted through different means, which will be discussed in Part III. Several theories of evaluation exist but we will utilize one economic theory known as the net benefit principle. This theory dictates that “An increase in exclusive rights to intellectual property is justified only when the value of increased creative

⁹⁵ See *Parks v. LaFace Records*, 329 F.3d at 450.

activity resulting from increased incentives is greater than the value of the benefits lost from reduced access.”⁹⁶

By utilizing this principle, we are free to consider more intangible incentives. This will greatly help our evaluation since many of the considerations in this situation are non-monetary or undisclosed due to private settlements of disputes. We will compare the value of the benefits gained by candidates from an increase in access to recorded music against the decreased creative activity by artists resulting from decreased incentives. However, since the American system of intellectual property is not concerned with moral rights, only economic, we will introduce a modified net benefit evaluation which takes into account these rights.

The benefits resulting from the increased access to recorded music that candidates currently enjoy is minimal. Although the courts may view the use of recorded music at campaign appearances as protected core political speech, the reality is that their core message is not enhanced by the music or hindered by its absence. The benefit candidates gain by using recorded music is the associative value. Campaign appearances are not performed merely to reiterate a candidate’s platform but rather to include a degree of showmanship in order to excite the public. This can be done by building into a candidate’s message an association through music on several levels, which depend on the song selected. The uses we will postulate mirror the uses an evaluating court could determine when utilizing any of the tests mentioned above.

First, a song could be chosen to excite the crowd. It is in the candidate’s interest to have an excited crowd, which would be facilitated by playing loud or fast music. An excellent example of this is Sarah Palin’s use of the song Barracuda. A loud and fast song would excite the crowd, which in turn would tend to increase the amount of cheering at a campaign appearance, which increases the perception of a candidate’s popularity, not only for the crowd in

⁹⁶ William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471, 477 (2003).

attendance but also for television audiences. This use yields minimal benefit to a candidate beyond traditional showmanship.

Second, a song could be chosen for its associative imagery. An example of this is Ronald Reagan's use of the song *Born in the USA* by Bruce Springsteen.⁹⁷ By co-opting the patriotic imagery of the lyrics, Reagan hoped to portray himself as a candidate who treasured the principles of patriotism and working-class sensibilities. It is unlikely a court would find this use objectionable under trademark law because there must be the likelihood of confusion on the part of the electorate that the musician endorses a candidate, not that their ideas are similar.

Another consideration to broad association could be explained by the general, all-encompassing nature which campaigns draw battle-lines around. Politics and campaigns appear to increasingly draw cultural boundaries when seeking to persuade the electorate. By this, we mean that campaigns have increasingly taken a "with us or against us" pitch, where stereotypes and associations can be more important than the direct message a candidate delivers. An example would be candidates playing country music during an appearance, in order to associate himself or herself with the cultural boundaries drawn to appeal to a rural audience. The benefits of this use are vague at best, bordering on unconscious, which would be impossible to prove causally. This is unlikely to be considered by an evaluating court because of the lack of clearly defined goals and results.

Lastly, a song could be selected for the purpose of associating a candidate directly with an artist and his or her popularity, the direct embodiment of objections and lawsuits brought by musicians. While these are strong benefits, they only serve to augment the candidate and the message. Should an evaluating court determine the use of a song to be as such, the ramifications would certainly lead a court to look favorably on a musician's false endorsement suit. Such a

⁹⁷ See Bilasz, *supra* note 4, at 306.

determination would pass the false endorsement test as well as any of the three First Amendment tests for protection from trademark law.

The benefits experienced by musicians are potentially great, if American intellectual property law would consider moral rights. Musicians create not only as a source of income but also as an outlet for self-expression. Preventing others from co-opting creative and personal expression without particular authorization could be of great value to musicians. While some musicians would be pleased with or indifferent to a candidate's use of their songs, politics inherently involves controversial issues and personal choice. The greatest benefit musicians would gain by increased protection would be the embodiment of personal choice in disagreeing with the views espoused by candidates of which they disapprove. While these are not rights protected by the law, these are principles held in highest regard by our national principles of self-determination and free choice.

When considering the moral rights of musicians, the benefits gained by musicians through increased protections outweigh the benefits experienced by lower protections. Increased protection does not necessarily mean the absence of access to candidates. Depending on the nature of any change in law, which will be discussed in the next section, authorization can still be granted to candidates, although it would be more challenging to obtain.

III. Should New Legislation Be Created and How It Could Solve This Problem

An evaluation under the net benefit principle indicates that the benefits enjoyed by musicians in the case of an increase of protections would outweigh the benefits experienced by candidates under the current law with its lower level of protection. The law discussed above does not properly protect the artist from unfair use of music and the association with campaigns and viewpoints with which they may disagree. Copyright claims covered by blanket licensing do

not protect the moral rights of musicians. Trademark claims under false association or endorsement seem to be able to succeed, provided several challenges are met. First, a court must determine a political campaign is a commercial body. Second, there must be a likelihood of confusion. Lastly, the use would have to fail to meet one of the First Amendment tests described above in order to be subject to trademark law. Only then would a false endorsement claim succeed. While it is possible, it is unlikely.

A new law would have to possible approaches under copyright law: 1) one which holds a hard line granting artists total control of their works, prohibiting unauthorized use or 2) a more moderate approach, granting special consideration to use in the political realm. Should a candidate use previously recorded music, the artist may sue in a manner similar to that in 17 USC § 118 which protects synchronization licenses. Because of the political nature of the use, increased audience exposure while highly focused, and potential disagreements in view between musician and candidate, an increased fee or penalty should be utilized. However, using this structure crosses a line that American copyright law has been unwilling to brave, the protection of moral rights for musicians. Should this occur, it is unlikely the First Amendment will stand in the way of such a claim. If an evaluating court were to maintain the precedent discussed above, the separation of an idea and its expression would yield a positive outcome for musicians. The idea is protected by the First Amendment but not the expression, which would fall under copyright protection. A new law would have to specifically carve out a new realm of coverage for musicians under moral rights. The first option is very unlikely to occur. The second is possible and would need to apply a reasonableness standard to the costs of licenses.

A new law under trademark law would be a break from the precedent opposing the chilling of political speech under the Lanham Act. A new law under the Lanham Act would

likely fall under the false endorsement claim, perhaps carving-out a specific claim for musicians whose music has been used in a political context. Such a carve-out would be unlikely though given the historical attitudes towards political speech and trademark law.

However, although it does not play a role in the net benefit evaluation, the benefits of another party should be considered when addressing the idea of potential legislation; the government. The solution to this problem will likely only be found in new legislation. Any new law would have to be passed by a system of government made up of individuals who were at one point candidates and very likely will be candidates again in the future. Therefore, there exists an inherent bias against any change in the status quo. As such, potential legislation would be hotly contested. It is unlikely an elected official would enact restrictions on themselves for what they can and cannot do on the campaign trail. Even if a candidate were able to bargain for authorization to play recorded music at a campaign appearance, elected officials would prefer to avoid the increase in red tape and bureaucratic difficulties. Additionally, since most of these cases have been brought by liberal leaning musicians against conservative candidates, a political firefight would ensue. Although this would be a powerful motivator for liberal representatives to enact laws which would potentially limit the ability of their conservative opponents to run a campaign with all the flair and audience appeal liberals would likely still enjoy, the absolute freedom to use any music would likely prevent a party-line conflict.

Finally, we should consider whether new legislation is necessary because of the practical outcome these cases have followed in the recent past. In the most recent election, very few cases of candidates using recorded music become contentious due to the pattern of use, followed by complaint, followed by disuse which has become prevalent.⁹⁸ Candidates do not want the bad press associated with a musician complaining about or bringing suit over the use of their music.

⁹⁸ See Cursio, *supra* note 71, at 371.

It is easier for a candidate to simply discontinue using a musician's song. In light of this, it is even more unlikely any change in law will occur.

Revisiting our thesis, that current law is insufficient to protect musician and therefore a new law should be enacted, we must conclude in the negative. First, it is not entirely clear a false endorsement claim would fail under trademark law. Although the standard which must be met is extremely high, it is possible. It is also extremely unlikely that a new law would be passed by those who would be most directly subject to it, our government representatives. Given the small number of people affected, the overwhelming support needed is unlikely to materialize.