

## A Copyright Hangover: Political Fair Use Revisited, Again

January 3, 2012 by [David Kluff](#)



Political primary season is upon us and, just like a bad hangover, one particular political speech question just keeps creating headaches. To what extent is the unauthorized use of copyrighted material in political campaign advertisements protected by the fair use doctrine? Can political ads borrow a clip from a presidential debate? From a televised sporting event? How about a photograph created by an opponent's campaign?

We previously reported on [copyright dustups over the "Miracle On Ice" ads by former U.S. Presidential candidate Tim Pawlenty](#), and [attack ads against Canadian Liberal Party leader Michael Ignatieff](#). In both of these instances, political campaigns ads used copyrighted material from major news organizations. In each case, the news organizations made some noise about copyright infringement and then backed down before things got litigious.

Then, in October, as [reported](#) by [Talking Points Memo's Benjy Sarlin](#), Presidential candidate Mitt Romney's campaign released the ["Ready to Lead?" internet attack ad](#) against Texas Governor Rick Perry. The ad questioned Perry's general competence with clips of "brutal" reviews of his debate performances by television commentators from CNN, FOX and elsewhere. (In one clip, Fox News' Britt Hume announces: "Perry really did throw up all over himself in the debate."). CNN, claiming copyright infringement, [demanded that Romney remove the video from the internet](#). This time, it was the candidate that backed down. Romney's campaign vigorously claimed that it was protected by the fair use doctrine . . . but nonetheless took the video down only a few hours after it was posted.

So is anybody going to hang in there, to sue or be sued, so we can develop some modern case law on this issue?

The latest candidate for political fair use torch-bearer is [Los Angeles County Deputy District Attorney Alan Jackson](#). In his bid to knock [City Attorney Carmen Trutanich](#) out of the race for Los Angeles District Attorney in 2012, Jackson released [an attack ad inspired by “The Hangover” movie franchise](#), featuring various photographs of Trutanich instead of the movie characters.

So, who’s complaining? The producers of the “The Hangover”? Nope. The Trutanich campaign? Well, maybe. [The Contra Costa times has reported](#) that the photographs of Trutanich which were used in the ad were actually taken by a Trutanich campaign photographer in 2009. The photographer has retained counsel and sent a demand letter threatening a copyright infringement claim. Jackson’s campaign, for its part, has invoked the First Amendment, presaging a fair use defense.

Is this one going to go the distance? Will the photographer really bring suit and force Jackson to defend on the basis of fair use, perhaps resulting in a big fat juicy Ninth Circuit opinion? Or, as the Jackson campaign has implied, is the threatened lawsuit nothing more than a concoction of the Trutanich campaign, designed to evaporate once the requisite political points are scored? If history is any judge, it will probably be the latter, and we’ll be left to nurse our political fair use headaches once again.

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