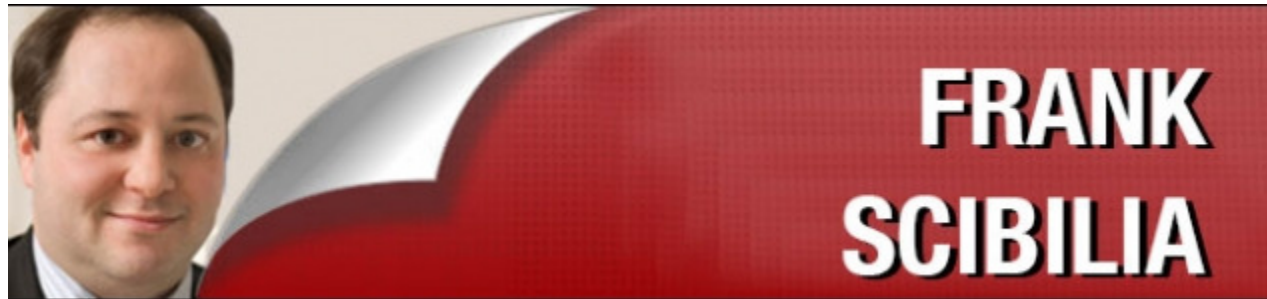


Sorry for Party Rocking: Copyrighted Music in Political 'Parodies'



[1]

« [Why Politicians' 'Theme Songs' Often Hit the Wrong Notes](#) [2]

Sorry for Party Rocking: Copyrighted Music in Political 'Parodies'

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Last month, we discussed the legality of using copyrighted music as a campaign “theme song” or in a commercial endorsement of a candidate. This month, we consider another related, time-honored election season tradition: the use of copyrighted music in political satires, performed or recorded by radio personalities (such as on ‘The Rush Limbaugh Show’), sketch comedy troupes, and (sometimes) the candidates themselves.



Perhaps the most well-known political satire group is The Capitol Steps, a touring ensemble whose act consists almost exclusively of putting topical lyrics (usually lampooning an elected official or political candidate) to well-known pop songs. The group’s most recent album, entitled “Take The Money And Run For President,” includes such tracks as “Help Me Fake It To The Right” (to the tune of the Kris Kristofferson classic, “Help Me Make It Through The Night”), in which a Mitt Romney imitator croons “I backed health care in the past/But to win a White House fight/Gotta change positions fast/Help me fake it to the right.”



It is widely assumed that even where these musical satires faithfully reproduce the melody of a famous song, they do not infringe copyright

because they are “parodies,” which -- according to the U.S. Supreme Court’s landmark 1994 decision involving 2LiveCrew’s use of the Roy Orbison song “Pretty Woman” -- are more likely to be protected by the doctrine of “fair use.”

But this assumption is generally mistaken. In the “Pretty Woman” case, the Court made clear that in order for a song to be a “parody,” it must use some elements of the original song to create a new one that, at least in part, comments *on the original work* itself (or on other works of the original author).

Thus, while adding new, topical lyrics to an existing copyrighted melody may constitute *political* commentary, such commentary, if it “has no critical bearing on the substance or style of the original composition,” and merely uses the original work as a vehicle for presenting a different story, or “to get attention or avoid the drudgery in working up something fresh,” is unlikely to be considered a fair use.

So-called musical “parody” in the political context was at issue in a 2009 case brought by Don Henley against California Senatorial candidate Charles DeVore. DeVore used karaoke recordings of the Henley works “Boys of Summer” and “All She Wants to Do Is Dance,” and altered the lyrics to create new recordings that were critical of the Barack Obama presidency and the policies of Senator Barbara Boxer. DeVore asserted a parody/fair use defense, arguing that his song “November” parodied “Summer” by using its themes of nostalgia and disillusionment to mock Henley and other Obama supporters who “look back wistfully at Obama’s campaign and bemoan his failure to deliver on the promised ‘hope.’”

The court held the works were not parodies. The nostalgic themes of “Summer” – the narrator’s supposed disillusionment with 1960’s politics -- were not critiqued or ridiculed in “November,” but rather, were merely echoed by the “November” narrator’s disappointment with Obama’s post-election performance. Similarly, DeVore’s Boxer satire – “All She Wants to Do Is Tax” – did not criticize or comment on the alleged political theme of “All She Wants to Do Is Dance,” that is, a critique of U.S. policy in Latin America in the 1980s and the American public’s indifference towards the situation. Rather, it merely used the same themes to comment on entirely different subjects, namely, the liberal policies of Barbara Boxer.

For these reasons, if one wants to use an existing work for the purposes of political satire, it is advisable to try to obtain a license from the owner of the existing work.

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