

These Tunes Aren't Music to Their Ears

It's election season, which means, somewhere, a political candidate is using a song without the songwriter's blessing. Why do these political copyright fights keep happening?

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Some things never change. So it's logical that as Election Day 2010 nears, songwriters and politicians are again feuding over copyright infringement.

In May ex-Talking Heads leader David Byrne filed an infringement claim in federal district court in Florida against the state's Republican governor, Charlie Crist, who is running for the U.S. Senate as an independent. Byrne seeks \$1 million in damages for Crist's use of the Talking Heads' 1985 song "Road to Nowhere" in a campaign video posted on YouTube. (As of July, Crist's campaign had not filed an answer to Byrne's suit.) In June, a lawyer for Canadian power trio Rush's record label sent Rand Paul, the GOP candidate for U.S. Senate in Kentucky, a letter accusing him of violating copyright laws by using one Rush song in a fund-raising video and playing another at rallies. Those dustups follow last year's dispute between Don Henley and would-be California Republican Senate candidate Chuck Devore over Devore's use of a Henley song in a campaign video. (The judge in the case ruled for Henley on summary judgment.) Then there's 2008 GOP presidential candidate John McCain, whose use of pop songs drew cease-and-desist letters from Heart, John Mellencamp, and the Foo Fighters, as well as a suit by Jackson Browne over a pro-McCain ad that used Browne's "Running on Empty." (The suit eventually settled.) Sounds like a broken record to us.

In truth, musicians rarely sue politicians for infringement. That's because when candidates play a song at a public venue, they are usually safe if the songwriter licensed the song's public performance rights to the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music Inc. (BMI), or SESAC. If the venue has a license, it can legally play any of the millions of songs the groups control. McCain's campaign bought traveling blanket licenses in case venues where it stopped didn't have their own.

Byrne's lawyer, Kinsella Weitzman Iser Kump & Aldisert partner Lawrence Iser, says suing a candidate is a last resort. "Litigation is so expensive that it's not a good way to make money—you make money by licensing your work," says Iser, who also represented Browne in his suit against McCain. "You file when a politician takes an arrogant position which marginalizes your claim, and when they do that, the appropriate thing is to sue."

Artists also object to what they see as an implied false endorsement when politicians use their music. Iser says Byrne, who also hit Crist with a Lanham Act claim for that very reason, learned of the ad when others saw it and asked if he was backing Crist. Barry Richard, a Greenberg Traurig lawyer representing Crist in the Byrne suit, scoffed at that claim, saying it was highly unlikely that a voter would see the use of a song as an endorsement.

Ben Sheffner, a copyright specialist and NBC Universal Television Group's senior counsel, isn't surprised to see GOP politicians hit with infringement claims. "The vast majority of recording artists and songwriters are Democrats, and they're sort of personally offended by Republican politicians using what they consider their song," says Sheffner, who was special counsel to McCain's campaign. Such copyright issues, he adds, will be more common in the future. "Ten years ago, it was kind of technologically difficult to commit copyright infringement. Now, a 14-year-old kid who likes some political candidate can make a video with a music track in half an hour and create all sorts of potential for legal trouble."

For now, Iser says, suits like Byrne's are a reminder to those running that "if you want to take a place in the Senate, you ought to know the rules and follow them."