

# THE NEED FOR SONGWRITERS' CONTROL: A PROPOSAL TO PREVENT UNWANTED USES OF MUSICAL COMPOSITIONS AT POLITICAL RALLIES

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## INTRODUCTION

Put yourself in the shoes of Dave Grohl, the lead singer, guitarist, and songwriter for the rock band Foo Fighters.<sup>1</sup> You co-wrote one of the band's hit singles, entitled "My Hero."<sup>2</sup> Then, a political candidate you do not support walked out to "My Hero" at a campaign rally without first obtaining permission from you or your band, manager, record label, or music publisher.<sup>3</sup> As a result, your fans now falsely believe that you and your band support this candidate.

Despite your efforts to stop this unsolicited use, the current state of music licensing prevents you from controlling political uses of your music – your intellectual property. In fact, under copyright law, it is legal for all political campaigns to play any of your songs if a blanket license exists.<sup>4</sup> Countless songwriters, including Jackson Browne and Eddie Van Halen, have experienced the frustration triggered by political candidates using their music without permission.<sup>5</sup> Foo Fighters themselves explained, "It's

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1. See *Foo Fighters Bio*, ROLLING STONE, <http://www.rollingstone.com/music/artists/foo-fighters/biography> (last visited Sept. 30, 2017).

2. *My Hero*, BMI, <http://repertoire.bmi.com/DetailView.aspx?detail=titleid&keyid=3990060&ShowNbr=0&ShowSeqNbr=0&blnWriter=True&blnPublisher=True&blnArtist=True&blnAltTitles=True> (last visited Sept. 30, 2017).

3. Daniel Kreps, *Foo Fighters Slam McCain for Using "My Hero"*, ROLLING STONE (Oct. 6, 2008), <http://www.rollingstone.com/music/news/foo-fighters-slam-mccain-for-using-my-hero-20081008>.

4. See *ASCAP Payment System: Who does ASCAP Collect From?*, ASCAP, <https://www.ascap.com/help/royalties-and-payment/payment/whocollect> (last visited Sept. 30, 2017).

5. Kreps, *supra* note 3.

frustrating and infuriating that someone who claims to speak for the American people would repeatedly show such little respect for creativity and intellectual property.”<sup>6</sup> Under current law, songwriters must swallow this frustration and accept the fact that their intellectual property can be appropriated by political campaigns and used in furtherance of political candidates and other political ends despite songwriters’ own associations.<sup>7</sup> Songwriters – unjustly – have no means to remedy the issue.

In response to this dilemma, the U.S. Department of Justice should grant songwriters the power to opt out of uses of their musical compositions during political rallies. This note advocates for the rights of songwriters who either own the copyrights in their musical compositions or have sold or assigned their copyrights to their music publishers to administer their works.<sup>8</sup>

To publicly perform a song at a rally, the only license a political campaign needs to obtain is a public performance license from the songwriter of the musical composition.<sup>9</sup> Under U.S. copyright law, musical compositions are distinguished from sound recordings.<sup>10</sup> A songwriter’s copyright in a musical composition protects the music and lyrics that comprise the work but does not cover specific recordings of that composition.<sup>11</sup> Further, U.S. copyright law provides a public performance right only for compositions – not sound recordings.<sup>12</sup> In 1995, however, the Digital Performance Right in Sound Recordings Act granted sound recording owners a limited performance right in “digital audio

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6. *Id.*

7. *See id.*

8. Songwriters can sell or assign their copyright interests in individual compositions to music publishers, who then assist in licensing those works in exchange for a chunk of the revenue derived from their exploitation. On one extreme, songwriters can create their own publishing company to publish their songs. These songwriters are entitled to both songwriter and publisher royalties. On the other extreme, songwriters may not have ever owned the copyrights in their musical compositions. A common example of this occurs when an employer hires a songwriter to write a song for the employer. The resulting composition is referred to as a work made for hire, and the employer not only owns the copyright, but is also credited as the author. *See* EVE LIGHT HONTHANER, *THE COMPLETE FILM PRODUCTION HANDBOOK* 304 (4th ed. 2012); *BMI Member FAQs: Publishing*, BMI, <http://www.bmi.com/faq/category/publishing> (last visited Sept. 30, 2017); *Songwriters and Copyright*, BMI, [http://www.bmi.com/creators/detail/songwriters\\_and\\_copyright](http://www.bmi.com/creators/detail/songwriters_and_copyright) (last visited Sept. 30, 2017).

9. *Resources & Learning: For Political Campaigns*, RIAA, <https://www.riaa.com/resources-learning/for-political-campaigns/> (last visited Sept. 30, 2017).

10. *See* 17 U.S.C. § 102(a) (2012).

11. U.S. COPYRIGHT OFFICE, *COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES* § 802.2(B) (3d ed. 2014) [hereinafter *COMPENDIUM*].

12. HONTHANER, *supra* note 8, at 304.

transmissions,” which exempts traditional television and radio broadcasts.<sup>13</sup> Thus, when a campaign plays a song at a rally, even if the rally is broadcast on traditional television or radio, it is not necessary for a campaign to obtain a separate public performance license to cover the sound recording.<sup>14</sup>

Instead of negotiating public performance licenses for compositions with the copyright owners themselves, performing rights organizations (“PROs”) exist for this function.<sup>15</sup> Songwriters enter into agreements with PROs to have the PROs license their public performance rights on their behalf.<sup>16</sup> Of the three PROs in the United States, this note concerns only the American Society of Composers, Authors and Publishers (“ASCAP”) and Broadcast Music, Inc. (“BMI”) because both are governed by consent decrees.<sup>17</sup> These consent decrees were established after the United States brought antitrust lawsuits against ASCAP and BMI for monopolizing the licensing of public performance rights.<sup>18</sup> The consent decrees designate the U.S. District Court for the Southern District of New York as the “rate court.”<sup>19</sup> The federal judges in this court set the rates that ASCAP and BMI can reasonably charge customers for license fees.<sup>20</sup>

To grant songwriters the power to opt out of uses of their musical compositions during political rallies, the U.S. Department of Justice should amend ASCAP’s and BMI’s consent decrees because the rate court has diminished songwriters’ control by construing the consent decrees to require “all or nothing” licensing. This requirement states that ASCAP and BMI must license public performance rights for all musical compositions in their repertoires to any licensee willing to pay the associated fee.<sup>21</sup> Thus,

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13. Additionally, the Digital Millennium Copyright Act modified the Digital Performance Right in Sound Recordings Act. *See id.* at 304-05.

14. Additionally, political campaigns can avoid utilizing specific sound recordings altogether by having a live band at a campaign event or by creating a new sound recording of a musical composition with performers that perform pursuant to a work made for hire agreement. *See* RIAA, *supra* note 9.

15. *See* HONTHANER, *supra* note 8, at 305.

16. *See* United States v. Am. Soc’y of Composers, Authors & Publishers, No. 41-1395(WCC), 2001 WL 1589999, at \*2 (S.D.N.Y. June 11, 2001).

17. The third PRO in the United States is the Society of European Stage Authors and Composers, Inc. (“SESAC”). SESAC is not governed by a consent decree because it is a private entity that operates on a for-profit basis. Todd Brabec, *The Performance Right—A World in Transition*, 42 MITCHELL HAMLINE L. REV. 16, 18-19 (2016).

18. United States v. Broad. Music, Inc., 275 F.3d 168, 171-72 (2d Cir. 2001).

19. *See* Hannah Karp & Brent Kendall, *Justice Department to Review Music-Fee System*, WALL ST. J. (June 4, 2014, 12:09 AM), <http://www.wsj.com/articles/justice-department-to-review-music-fee-system-1401854888>.

20. *See id.*

21. *See* Pandora Media, Inc. v. Am. Soc’y of Composers, Authors & Publishers, No. 12 Civ. 8035(DLC), 2013 WL 5211927, at \*1 (S.D.N.Y. Sept. 17, 2013).

“all or nothing” licensing currently prohibits songwriters from opting out of political uses of their intellectual property because ASCAP and BMI cannot legally deny any political campaign a public performance license.

This note argues that the consent decrees should be amended to no longer require “all or nothing” licensing. Part I of this note explains how current licensing norms prohibit the use of U.S. copyright law to protect against unwanted political uses of musical compositions. Part II examines the ineffectiveness of right of publicity and false endorsement challenges in providing an alternative remedy to songwriters. Part III proposes steps that ASCAP and BMI could take, after “all or nothing” licensing is revoked, to allow songwriters to opt out of uses of their musical compositions at political rallies. Overall, this note argues that songwriters should have control over how their intellectual property is licensed in today’s polarized political climate.

## I. CURRENT LICENSING NORMS PROHIBIT PROTECTION UNDER U.S. COPYRIGHT LAW

This Part explains how current licensing norms prohibit songwriters from relying on U.S. copyright law to protect against unwanted political uses of their musical compositions. Section A walks through the process of how songwriters obtain copyright protection for their musical compositions and what that protection entails. Section B sets forth the musical composition licensing structure, introducing songwriters’ agreements with ASCAP and BMI and the means in which political campaigns rely on varying licenses to publicly perform registered compositions at rallies. Section C explains how the “all or nothing” licensing rule came to be and why it needs to be eliminated. Overall, this Part sheds light on the lose-lose situation songwriters face by entering into agreements with ASCAP and BMI. Songwriters must either subject themselves to the rate court’s “all or nothing” standard, thus giving up all licensing control over their intellectual property, including control in connection with political uses, or miss out altogether on the immense benefits that registering with ASCAP and BMI offers.

### A. *U.S. Copyright Law Background*

The U.S. Copyright Office defines musical compositions as “original works of authorship consisting of music and any accompanying words.”<sup>22</sup> Under the U.S. Supreme Court’s requirements, a musical composition is

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22. COMPENDIUM, *supra* note 11, § 802.1.

original when the songwriter independently creates it without copying from other compositions, and it possesses “some minimal degree of creativity.”<sup>23</sup> A songwriter’s copyright in a musical composition is secured automatically upon the work’s creation,<sup>24</sup> and the work is created when it is fixed in a tangible medium of expression.<sup>25</sup> The fixation requirement is satisfied when a musical composition is written in sheet music or recorded onto a material object that embodies sound, such as a cassette tape, CD, or vinyl disc.<sup>26</sup> When determining whether a musical composition is copyrightable, the U.S. Copyright Office examines the melody, rhythm, harmony, and lyrics that together create an original composition.<sup>27</sup>

Further, section 106 of the Copyright Act grants songwriters the exclusive right to publicly perform their musical compositions.<sup>28</sup> Section 101 of the Copyright Act broadly defines a performance as playing a musical composition “either directly or by means of any device or process.”<sup>29</sup> Section 101 also dictates that a performance is public when it occurs “at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered.”<sup>30</sup> Thus, when a political campaign plays a song at a live rally in front of a substantial group of unknown people, the campaign has triggered a public performance.

As explained in the Introduction, for a political campaign to publicly perform a song at a political rally, a public performance license must exist to cover the use of the underlying musical composition.<sup>31</sup> PROs provide political campaigns with these necessary licenses.<sup>32</sup> Thus, the next section explains why songwriters enter into agreements with ASCAP and BMI and how, through these arrangements, licenses are obtained.

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23. See *Feist Publ’ns, Inc. v. Rural Tele. Serv. Co., Inc.*, 499 U.S. 340, 345 (1991).

24. U.S. COPYRIGHT OFFICE, COPYRIGHT BASICS 3, <http://www.copyright.gov/circs/circ01.pdf> (last updated May 2012).

25. See 17 U.S.C. § 102(a) (2012).

26. Sheet music would constitute a “copy” under copyright law, while material objects that embody sound are referred to as “phonorecords.” See COPYRIGHT BASICS, *supra* note 24, at 3.

27. COMPENDIUM, *supra* note 11, § 802.3.

28. 17 U.S.C. § 106(4) (2012).

29. 17 U.S.C. § 101 (2012).

30. *Id.*

31. RIAA, *supra* note 9.

32. See *id.*; see also *United States v. Am. Soc’y of Composers, Authors & Publishers*, No. 41-1395(WCC), 2001 WL 1589999, at \*2 (S.D.N.Y. June 11, 2001).

### B. *Licensing Norms*

Songwriters enter into crucial, profit-generating agreements with ASCAP and BMI for the purpose of having these PROs license their public performance rights on their behalf for a fee.<sup>33</sup> PROs only license out the public performance right attached to musical compositions – not sound recordings.<sup>34</sup> Additionally, PROs collect and distribute royalties that accrue from music users who cause public performances of songwriters' musical compositions.<sup>35</sup> ASCAP and BMI both operate on a not-for-profit basis, paying songwriters approximately eighty-eight cents on each collected dollar, which accounts for operating expenses.<sup>36</sup>

Most ASCAP and BMI customers – not member songwriters – pay the PROs an annual blanket license fee for the right to publicly perform all musical compositions within the two repertoires.<sup>37</sup> BMI licenses almost thirteen million musical compositions owned by more than 800,000 BMI members.<sup>38</sup> ASCAP licenses more than ten million musical compositions owned by more than 625,000 ASCAP members, which equates to over one trillion performances annually.<sup>39</sup>

Songwriters who fail to register with a PRO must collect their own performance royalties, which is a difficult, labor-intensive undertaking.<sup>40</sup> BMI explained that monitoring the hundreds of thousands of businesses that publicly perform music would be practically impossible for individual songwriters.<sup>41</sup> Thus, PRO membership is an industry standard.

Political campaigns tend to hold live rallies in venues that customarily host musical performances and, thus, already employ blanket venue licenses that allow campaigns to publicly perform music while at these venues.<sup>42</sup> Music users who secure blanket licenses are granted permission to use

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33. See RIAA, *supra* note 9.

34. *Id.*

35. See *BMI Members FAQ: Royalties*, BMI, <http://www.bmi.com/faq/category/royalties> (last visited Sept. 30, 2017).

36. See *ASCAP Payment System*, ASCAP, <https://www.ascap.com/help/royalties-and-payment/payment/> (last visited Sept. 30, 2017); see also *Music Users: Licensing FAQ*, BMI, <http://www.bmi.com/licensing> (last visited Sept. 30, 2017).

37. See *ASCAP Payment System: Who Does ASCAP Collect From?*, *supra* note 4.

38. BMI, <http://www.bmi.com/about> (last visited Sept. 30, 2017).

39. See ASCAP, <https://www.ascap.com/about-us> (last visited Sept. 30, 2017).

40. See Anna J. Mitran, *Facing the Music: Moral Intellectual Property Rights as a Solution to Artist Outrage About Music Torture*, 101 CORNELL L. REV. 505, 511 (2016).

41. *BMI and Performing Rights*, BMI, [http://www.bmi.com/licensing/entry/business\\_using\\_music\\_bmi\\_and\\_performing\\_rights](http://www.bmi.com/licensing/entry/business_using_music_bmi_and_performing_rights) (last visited Sept. 30, 2017).

42. Robert W. Clarida & Andrew P. Sparkler, *Singing the Campaign Blues: Politicians Often Tone Deaf to Songwriters' Rights*, LANDSLIDE, Nov./Dec. 2010, at 9.

numerous compositions for a single fee.<sup>43</sup> ASCAP licenses to over 700,000 ASCAP customers,<sup>44</sup> including many music venues, sports arenas, and theaters.<sup>45</sup> These venues secure blanket public performance licenses in the form of venue licenses through ASCAP and BMI.<sup>46</sup> These blanket licenses are non-exclusive licenses that cover public performances of all musical compositions within ASCAP's and BMI's repertoires.<sup>47</sup>

While some venue licenses exclude music use during political conventions and campaign events, these narrow licenses are limited to only some convention centers, arenas, and hotels.<sup>48</sup> Political rallies, however, are not limited to these few locations. Thus, during rallies at venues with general venue licenses that do not exclude political uses, political campaigns are permitted to play compositions without obtaining a license themselves.<sup>49</sup> When this occurs, political campaigns get the benefit of utilizing music to further their political agendas without paying songwriters for using their intellectual property.

To ensure that their musical composition uses are protected under U.S. copyright law, political campaigns can also obtain blanket public performance licenses in the form of campaign licenses through ASCAP and BMI.<sup>50</sup> These blanket licenses allow political campaigns to publicly perform all musical compositions within ASCAP's and BMI's repertoires wherever the campaign trail leads them.<sup>51</sup> There is a disincentive, however, to obtain and pay for these licenses when political campaigns can instead hold their rallies at venues that already employ venue licenses that do not exclude political uses.<sup>52</sup>

Further, the current exclusion of political conventions and campaign events within some venue licenses is an ineffective means of granting

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43. MARK LITWAK, *DEALMAKING IN THE FILM & TELEVISION INDUSTRY* 379 (4th ed. 2016).

44. *ASCAP Payment System: Keeping Track of Performances*, ASCAP, <https://www.ascap.com/help/royalties-and-payment/payment/keepingtrack> (last visited Sept. 30, 2017).

45. See Clarida & Sparkler, *supra* note 42, at 9.

46. See Jana Moser, *Songs in Contention*, 36 L.A. LAW. 28, 30 (2013).

47. See *United States v. Am. Soc'y of Composers, Authors & Publishers*, No. 41-1395(WCC), 2001 WL 1589999, at \*1 (S.D.N.Y. June 11, 2001).

48. *Using Music in Political Campaigns: What You Should Know*, ASCAP, [https://www.ascap.com/-/media/files/pdf/advocacy-legislation/political\\_campaign.pdf](https://www.ascap.com/-/media/files/pdf/advocacy-legislation/political_campaign.pdf) (last visited Sept. 30, 2017).

49. Moser, *supra* note 46, at 30.

50. See RIAA, *supra* note 9.

51. These licenses are also referred to as "traveling licenses" because they travel with political candidates through all campaign events. See *id.*

52. See *id.*

songwriters control because political campaigns can simply obtain campaign licenses to publicly perform music. While campaigns do pay for the ability to use songwriters' intellectual property by securing campaign licenses, they still do not request permission from songwriters to do so. Therefore, the employment of exclusions for political uses in some venue licenses does not grant songwriters the power to control how their intellectual property is used. These political exclusions also do not remedy the issue of songwriters' fans believing that songwriters support the candidates that use their music.

C. *"All or Nothing" Licensing Prohibits a Copyright Remedy*

Amending ASCAP's and BMI's consent decrees to provide songwriters with an opt-out ability in connection with uses of their compositions at political rallies is necessary because current licensing norms prohibit the use of U.S. copyright law to protect against these uses.<sup>53</sup> The consent decrees that govern ASCAP and BMI require "all or nothing" licensing, which denies these entities the power to refuse to grant public performance rights to political campaigns.<sup>54</sup> Instead, ASCAP and BMI must license public performance rights for all musical compositions within their repertoires to any requesting music user willing to pay the applicable rates.<sup>55</sup>

"All or nothing" licensing came about when the rate court interpreted ASCAP's consent decree to require ASCAP to license all of its musical works to Pandora Media, Inc. ("Pandora").<sup>56</sup> This interpretation occurred despite songwriters' wishes to not have ASCAP license their musical compositions to "New Media" services,<sup>57</sup> including online music services.<sup>58</sup> Before this ruling, ASCAP allowed its registered songwriters to withdraw their public performance rights if requesting licensees, such as Pandora, sought to make "New Media Transmissions" of their musical compositions.<sup>59</sup>

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53. See, e.g., *Pandora Media, Inc. v. Am. Soc'y of Composers, Authors & Publishers*, No. 12 Civ. 8035(DLC), 2013 WL 5211927, at \*1 (S.D.N.Y. Sept. 17, 2013).

54. See *id.*

55. *United States v. Am. Soc'y of Composers, Authors & Publishers*, No. 41-1395(WCC), 2001 WL 1589999, at \*4 (S.D.N.Y. June 11, 2001).

56. *Pandora*, 2013 WL 5211927, at \*1.

57. *Id.*

58. Brabec, *supra* note 17, at 18.

59. *Pandora*, 2013 WL 5211927, at \*2.



The court reasoned that, under ASCAP's consent decree entitled the Second Amended Final Judgment ("AFJ2"),<sup>60</sup> there are two provisions that prohibit ASCAP from denying a blanket license to Pandora.<sup>61</sup> The first, AFJ2 § VI, requires ASCAP to grant non-exclusive licenses to perform all musical compositions within its repertoire to any requesting customer.<sup>62</sup> The second, AFJ2 § IX(E), provides that music users still enjoy the right to perform any of the musical works in ASCAP's repertoire pending any rate negotiations.<sup>63</sup> The rate court reasoned that ASCAP's repertoire is defined in terms of "works," or each registered musical composition that comprises the repertoire, and not "individual rights" in works, such as the public performance right attached to each composition.<sup>64</sup> This definition rejected ASCAP's interpretation that its repertoire refers solely to the rights it has been granted.<sup>65</sup> Therefore, despite the fact that some songwriters had withdrawn their public performance rights for "New Media" users, their musical compositions remained in ASCAP's repertoire for Pandora's use.<sup>66</sup>

Further, the rate court declined to invite the U.S. Department of Justice to participate in resolving the "all or nothing" licensing issue despite requests to do so from ASCAP and various non-party music publishers, including EMI, Sony, and Universal.<sup>67</sup> The same year this case was decided, "all or nothing" licensing was also established for BMI's consent decree.<sup>68</sup>

Contrary to the Pandora ruling, ASCAP's and BMI's consent decrees permit songwriters to partially withdraw their rights in connection with grand performing rights.<sup>69</sup> Grand rights are those rights associated with musical compositions performed in connection with a dramatic work.<sup>70</sup> Dramatic works include choreographies, pantomimes, plays, and scripts.<sup>71</sup> Dramatic works are treated the same as musical works under section 106 of

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60. *Am. Soc'y of Composers, Authors & Publishers*, 2001 WL 1589999, at \*1.

61. *Pandora*, 2013 WL 5211927, at \*1.

62. *Am. Soc'y of Composers, Authors & Publishers*, 2001 WL 1589999, at \*4.

63. *Id.* at \*7.

64. *Pandora*, 2013 WL 5211927, at \*5.

65. *See id.*

66. *Id.* at \*1, \*5.

67. *Id.* at \*11.

68. *Broad. Music, Inc. v. Pandora Media, Inc.*, No. 13 CIV. 4037 (LLS), 2013 WL 6697788, at \*5 (S.D.N.Y. Dec. 19, 2013).

69. *United States v. Am. Soc'y of Composers, Authors & Publishers*, No. 41-1395(WCC), 2001 WL 1589999, at \*4 (S.D.N.Y. June 11, 2001).

70. *Grand Rights 101*, SOCAN.ca, <http://www.socan.ca/creators/member-resources/grand-rights-101> (last visited Mar. 23, 2017).

71. *Id.*

the Copyright Act, which grants copyright owners the exclusive right to publicly perform their dramatic works.<sup>72</sup>

According to BMI's CEO, Michael O'Neill ("O'Neill"), for decades, music publishers have withheld from BMI the right to license their "grand" performing rights.<sup>73</sup> This specific withholding is embodied in BMI's standard agreement with music publishers.<sup>74</sup> In addition, Provision 1(b) within ASCAP's writer agreement states that songwriters withhold from ASCAP the right to license performances of musical plays and "dramatico-musical compositions" completely.<sup>75</sup> These established songwriter opt-out abilities are in direct conflict with the "all or nothing" licensing requirement.

According to O'Neill, "all or nothing" licensing could compel songwriters and their music publishers to not register with a PRO in order to explore opportunities for digital music rights.<sup>76</sup> Todd Brabec, former ASCAP Executive Vice President, explained that "all or nothing" licensing would force those who chose to remove their works from the "\$150 million PRO annual license fee area of the online world" to also remove their works from the "\$1.35 billion in PRO domestic licenses fees being generated by traditional media."<sup>77</sup> O'Neill explains that withdrawing from a PRO results in songwriters either incurring the costs of "licensing, monitoring, and collecting royalties from tens of thousands" of establishments or forgoing licensing their public performance rights and the royalties that result from doing so.<sup>78</sup> He warns that songwriters withdrawing from their PROs "threatens the entire licensing ecosystem that BMI services, including songwriters [and] . . . the hundreds of thousands of music users who depend on blanket licenses to comply with copyright law."<sup>79</sup> Thus, BMI is pursuing the ability to provide for partial withdrawal of rights.<sup>80</sup> Even though BMI is concerned about digital music rights, this same argument applies to uses of compositions at political rallies because "all or nothing"

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72. 17 U.S.C. § 106 (2012).

73. *Hearing on Music Licensing Under Title 17, Part One Before the Subcomm. on Courts, Intellectual Prop., and the Internet of the U.S. H.R. Comm. on the Judiciary*, 113th Cong. 5 n.2 (2014) (written statement of Michael O'Neill) [hereinafter O'Neill].

74. *Id.*

75. *ASCAP Writer Agreements*, ASCAP, <https://www.ascap.com/-/media/files/pdf/join/ascap-writer-agreement.pdf> (last visited Sept. 30, 2017).

76. *See* O'Neill, *supra* note 73, at 6 n.3.

77. Brabec, *supra* note 17, at 25.

78. *See* O'Neill, *supra* note 73, at 6 n.3.

79. *Id.* at 6.

80. *Id.*

licensing is the same restriction that prevents ASCAP and BMI from allowing songwriters to opt out of these political uses.

In conclusion, by entering into agreements with ASCAP and BMI, songwriters can easily and efficiently generate and then collect vital public performance royalties, but they are subjected to the rate court's "all or nothing" licensing standard when they do so. Songwriters currently face a lose-lose situation because they only have limited options. If songwriters fail to register with ASCAP or BMI, they miss out on the benefits that registering offers.<sup>81</sup> On the other hand, if they register, they give up all licensing control over their musical compositions, including control over political uses.<sup>82</sup> Songwriters should not be forced to subject their intellectual property to unwanted and damaging uses because this is a draconian measure that violates common sense.

## II. RIGHT OF PUBLICITY AND FALSE ENDORSEMENT CLAIMS ARE INEFFECTIVE FOR PROVIDING PROTECTION

Looking to alternative approaches outside of copyright law that could provide songwriters with a remedy, right of publicity and false endorsement challenges are both ineffective means for songwriters to assert control over unwanted, political uses of their musical compositions. Courts have yet to accept either of these claims by a songwriter against a political campaign that possesses a public performance license from the songwriter's PRO.<sup>83</sup> Because political campaigns can raise First Amendment defenses to both claims, Section A provides an overview of the broad protection that the First Amendment affords political speech. Section B explains how, due to the requirement that political uses of songwriters' likenesses be of a commercial nature, right of publicity claims do not provide songwriters with control. Section C describes why, due to the requirement that songs be adopted as campaign "theme songs," false endorsement claims fail to protect songwriters' intellectual property.

### A. *First Amendment Protection of Political Speech*

Political campaigns faced with right of publicity and false endorsement challenges can claim that the First Amendment, which affords the broadest

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81. See ASCAP Writer Agreements, *supra* note 75, at 2-3.

82. See O'Neill, *supra* note 73, at 6.

83. See *Keep Thomson Governor Comm. v. Citizens for Gallen Comm.*, 457 F. Supp. 957, 960 (D.N.H. 1978).

protection to political speech,<sup>84</sup> protects their uses of songwriters' likenesses. The campaigns' argument is that political uses of musical compositions in connection with an issue of public concern constitute protected communicative news.<sup>85</sup> The U.S. Supreme Court stated in *Buckley v. Valeo* that the First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office."<sup>86</sup>

The main purpose of enacting the First Amendment was "to protect the free discussion of governmental affairs, including discussions of candidates."<sup>87</sup> The First Amendment reflects the United States' "commitment to the principal that debate on public issues should be uninhibited, robust, and wide-open."<sup>88</sup> Therefore, the First Amendment fundamentally protects political campaigns' discussions of public issues.<sup>89</sup>

In response, songwriters can shed light on the significant distinction that exists between political speech and the music utilized in conjunction with a political campaign's event.<sup>90</sup> A political candidate's words in connection with public issues constitute protected political speech.<sup>91</sup> Although a political campaign strategically chooses music that corresponds with the campaign's message,<sup>92</sup> the words that make up the musical composition are not the candidate's direct political speech.<sup>93</sup> Even when a political candidate speaks simultaneously with the playing of a purposefully selected composition, the candidate is not engaging in "pure musical expression but the appropriation of music" to further the campaign's message.<sup>94</sup> Thus, the use of music in this context does not constitute protected political speech under the First Amendment.<sup>95</sup>

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84. *Id.*

85. *See Buckley v. Valeo*, 424 U.S. 1, 16 (1976).

86. *Id.*

87. *Keep Thomson Governor Comm.*, 457 F. Supp. at 960.

88. *Id.*

89. *See id.* at 959.

90. *See* MARK V. TUSHNET, ALAN K. CHEN & JOSEPH BLOCHER, *FREE SPEECH BEYOND WORDS: THE SURPRISING REACH OF THE FIRST AMENDMENT* 13 (N.Y.U. Press ed., 2017).

91. *Keep Thomson Governor Comm.*, 457 F. Supp. at 959-60.

92. *See* Patrick Ryan, *Candidates Carry a Tune on Campaign Trail*, USA TODAY (July 15, 2015, 6:36 PM), <http://www.usatoday.com/story/life/music/2015/07/15/campaign-music-hillary-clinton-donald-trump-scott-walker-2016-candidates/30159661/>.

93. *See* TUSHNET, *supra* note 90, at 34.

94. *Id.*

95. *Id.* at 35.

### B. Right of Publicity as an Ineffective Remedy

State-law-based right of publicity protection is an ineffective claim for songwriters to defend against unwanted uses of their compositions<sup>96</sup> due to multiple issues, including the requirement that the challenged uses of songwriters' likenesses be of a commercial nature.<sup>97</sup> Additionally, the current state of First Amendment defenses may allow political campaigns to use songwriters' likenesses.<sup>98</sup> Further, federal copyright law may preempt state law right of publicity protection.<sup>99</sup> Lastly, courts have yet to accept a songwriter's right of publicity claim against a political campaign that possesses a public performance license from the songwriter's PRO to use the composition at a political rally.<sup>100</sup>

The right of publicity allows individuals to preclude others from commercially exploiting aspects of their identity, including their name, image, likeness, or voice, without authorization.<sup>101</sup> In California, a songwriter would have to show that the political campaign at issue knowingly used the songwriter's likeness for a commercial purpose, without the songwriter's consent, resulting in damages to the songwriter.<sup>102</sup>

Songwriters who do not sing their own compositions face a harder time proving a prima facie case for right of publicity than recording artists who can claim their voice is distinct and identifiable when used by political campaigns.<sup>103</sup> For example, in *Browne v. McCain*,<sup>104</sup> the court found that Jackson Browne's voice, which had been used in a political commercial, was recognizable and, therefore, gave the false impression that he supported the candidate's campaign.<sup>105</sup> Songwriters who only write songs and do not record them, however, would have to prove that their likeness is implicated in their writing styles – in the notes or lyrics of their compositions – which is a much more difficult standard.

Courts require political campaigns' uses of songwriters' likenesses to be of a commercial nature in order to balance songwriters' right of publicity

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96. Anna J. Mitran, *Facing the Music: Moral Intellectual Property Rights as a Solution to Artist Outrage About Music Torture*, 101 CORNELL L. REV. 505, 514 (2016).

97. *Id.* at 513.

98. *Id.* at 525.

99. *Id.* at 514.

100. Moser, *supra* note 46, at 33.

101. Lynne M. J. Boisineau, *Intellectual Property Law: The Right of Publicity and the Social Media Revolution*, LANDSLIDE, Nov./Dec. 2012, at 5.

102. CAL. CIV. CODE § 3344 (Deering 2005); Moser, *supra* note 46, at 33.

103. *See* Boisineau, *supra* note 101, at 5.

104. *Browne v. McCain*, 611 F. Supp. 2d 1073 (C.D. Cal. 2009).

105. Moser, *supra* note 46, at 33.

protection with political candidates' First Amendment rights.<sup>106</sup> Courts have deemed political campaign speech noncommercial despite the fact that it results in contributions.<sup>107</sup> This applies broadly to political advertisements aired on television and radio – not just mere political rally appearances.<sup>108</sup> In *Mastercard Int'l. Inc. v. Nader 2000 Primary Comm., Inc.*, the court reasoned that if it held the political advertisement in question to be commercial in nature because it generated campaign contributions,<sup>109</sup> then all political speech would be classified as “commercial speech” because all political campaigns collect donations.<sup>110</sup> The court further reasoned that the term “commercial” does not encompass political advertising and campaign promotion because these acts are protected political speech.<sup>111</sup>

Even if songwriters could effectively argue that their likenesses were used without permission for commercial purposes, songwriters must also successfully rebut the campaigns' First Amendment defenses. As explained in Section A, a political campaign faced with a right of publicity challenge can claim that the First Amendment, which affords the broadest protection to political speech,<sup>112</sup> protects the use of a songwriter's likeness. In response, a songwriter could argue that a clear distinction exists between the candidate's direct political speech and the words that comprise the composition at issue.<sup>113</sup> Realistically, the argument would never reach this stage because songwriters cannot overcome the hurdle of proving a commercial use.

State-law-based right of publicity challenges also face the possibility of federal copyright law preemption.<sup>114</sup> State laws are subject to preemption under the supremacy clause of the U.S. Constitution if they conflict with a

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106. See Boisineau, *supra* note 101, at 5.

107. See *Mastercard Int'l. Inc. v. Nader 2000 Primary Comm., Inc.*, No. 00 Civ.6068(GDB), 2004 WL 434404, at \*7-9 (S.D.N.Y. Mar. 8, 2004).

108. See *id.*

109. *Id.*; see also Matthew J. 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, 341 (2011).

110. *Mastercard Int'l. Inc.*, 2004 WL 434404, at \*7-9.

111. *Id.* at \*8 (quoting 134 Cong. Rec. H. 1297 (daily ed. Apr. 13, 1989) (statement of Wisc. Rep. Kastenmeier)).

112. *Keep Thompson Governor Comm. v. Citizens for Gallen Comm.*, 457 F. Supp. 957, 960 (D.N.H. 1978).

113. See TUSHNET, *supra* note 90, at 34 (explaining that instrumental music, as speech, is worthy of First Amendment protection comparable to that provided to verbal expression; thus, if instrumental music is speech and protected as such, musical compositions that incorporate lyrics are undoubtedly distinct from other verbal expression, such as a candidate's political speech).

114. *Fleet v. CBS, Inc.*, 58 Cal. Rptr. 2d 645, 649 (Ct. App. 1996).

federal statute or act as an obstacle to the achievement of Congress's objectives.<sup>115</sup> The Copyright Act of 1976 expressly prohibits states from enacting copyright laws.<sup>116</sup> Section 301 provides that all rights equivalent to "the exclusive rights within the general scope of copyright as specified in section 106 . . . are governed exclusively by this title."<sup>117</sup> For federal copyright law to preempt state right of publicity law, two requirements must be met: first, the subject of the right of publicity claim must be a work that comes within the scope of copyright protection, and second, the right of publicity asserted under applicable state law must be equivalent to those rights encompassed in section 106.<sup>118</sup> As explained in Part I, Section A, original, fixed musical compositions come within the subject matter of copyright protection; thus, the first requirement is clearly satisfied.

Applying the second requirement, songwriters' right of publicity claims will likely be preempted by federal copyright law because political campaigns merely perform the compositions at issue. According to the California Court of Appeal in *Fleet v. CBS, Inc.*, "a right is equivalent to rights within the exclusive province of copyright when it is infringed by the mere act of reproducing, performing, distributing, or displaying the work at issue."<sup>119</sup> Thus, when songwriters assert their rights of publicity against political campaigns for performing their compositions, this right of publicity will likely be held equivalent to those rights within section 106, including the exclusive right to publicly perform.<sup>120</sup>

For the multiplicity of issues involved, right of publicity actions are an ineffective means for songwriters to assert control over political uses of their musical compositions at rallies. If federal copyright law does not initially preempt the claim, a political campaign's noncommercial use of a composition at a rally does not satisfy the elements required for a right of publicity challenge. A songwriter would also have to overcome the campaign's argument that the use was part of the campaign's message, and the First Amendment offers broad protection for this political speech.<sup>121</sup>

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115. *Id.*

116. *Id.*

117. 17 U.S.C. § 301 (2012).

118. *Fleet*, 58 Cal. Rptr. 2d at 650.

119. 58 Cal. Rptr. 2d at 653.

120. *See* 17 U.S.C. § 106 (2012).

121. *See* *Keep Thomson Governor Comm. v. Citizens for Gallen Comm.*, 457 F. Supp. 957, 961 (D.N.H. 1978).

### C. *False Endorsement as an Ineffective Remedy*

False endorsement actions are also not a viable remedy for songwriters to assert control over unwanted, political uses of their musical compositions because they are largely untested and require political campaigns to repeatedly use a particular song, adopting it as the campaign's "theme song."<sup>122</sup> Additionally, courts have yet to accept a false endorsement claim by a songwriter against a political campaign that possesses a public performance license from the songwriter's PRO to use the composition at a political rally.<sup>123</sup>

A songwriter can bring a false endorsement claim against a political campaign, arguing that the campaign's use of the songwriter's composition at political rallies falsely suggests that the songwriter endorses the candidate.<sup>124</sup> This claim is based on trademark law under section 43(a) of the Lanham Act.<sup>125</sup> The Lanham Act defines a trademark to include "any word, name, symbol, or device, or any combination thereof . . . used by a person . . . to identify and distinguish his or her goods . . . from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown."<sup>126</sup> The songwriter bringing a false endorsement claim would allege that the campaign misused the songwriter's trademark in the musical composition at issue in a way that caused confusion as to whether the songwriter supports that political candidate. In contrast with a right of publicity challenge, the Lanham Act is applicable to both commercial and noncommercial speech.<sup>127</sup>

Songwriters likely cannot meet the initial burden of proving trademark ownership in their musical compositions. Section 43(a) of the Lanham Act protects unregistered trademarks,<sup>128</sup> so songwriters are not required to first register their musical compositions in order to bring false endorsement claims. Even though courts have held that a musical composition can be a trademark, this is only true if it identifies a person's goods or services.<sup>129</sup> Unfortunately, the courts have concluded that a musical composition cannot serve as a trademark for itself.<sup>130</sup>

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122. RIAA, *supra* note 9.

123. Clarida & Sparkler, *supra* note 42, at 7, 8.

124. Moser, *supra* note 46, at 32.

125. 15 U.S.C. § 1125 (2012); Moser, *supra* note 46, at 32.

126. 15 U.S.C. § 1127 (2012).

127. Moser, *supra* note 46, at 32.

128. See EMI Catalogue P'ship v. Hill, Holliday, Connors, Cosmopolus Inc., 228 F.3d 56, 62 (2d Cir. 2000).

129. See *id.* at 62-63.

130. *Id.* at 63.



In *EMI Catalogue Partnership v. Hill, Holliday, Connors, Cosmopulos, Inc.*, the court explained that the claim that a song serves as a symbol or device to indicate its own source is a result of confusing the differences between copyright law and trademark law.<sup>131</sup> The purpose of trademark law is to protect symbols or devices that identify a product in the marketplace in order to prevent consumer confusion as to the product's source.<sup>132</sup> Trademark law does not protect a creative work's content as a trademark for itself.<sup>133</sup> Instead, copyright law protects copyright owners' rights that attach to creative works.<sup>134</sup>

While the title of a song, for example, may serve as a source-identifier, the musical composition itself would be the product the title identifies.<sup>135</sup> This does not satisfy the trademark ownership requirement because "a trademark must be derivative of the original work, used to identify that work or its source."<sup>136</sup> Thus, copyright law, not trademark law, is the means to protect songwriters' intellectual property rights in their musical compositions.<sup>137</sup> The court in *EMI Catalogue Partnership* reasoned, "A contrary conclusion would allow any copyright claim for infringement of rights in a musical composition to be converted into a Lanham Act cause of action."<sup>138</sup> As Part I explained, however, copyright law also does not provide songwriters with a remedy for unwanted, political uses of their compositions.

Even if songwriters could prove trademark ownership, they likely cannot meet the burden of showing that the political campaigns at issue created a likelihood of confusion about whether the songwriters were endorsing the political candidates. This inquiry examines whether ordinarily prudent consumers are likely to be confused as to the source of the goods at issue,<sup>139</sup> utilizing the eight-factor test set forth in *Polaroid Corporation v. Polarad Electronics Corporation*.<sup>140</sup> The key issue in a

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131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* at 64.

137. *Id.* at 63.

138. *Id.* at 64.

139. *See* *Mushroom Makers, Inc. v. R.G. Barry Corp.*, 58 F.2d 44, 47 (2d Cir. 1961).

140. These factors include the strength of the trademark, similarity of the marks, proximity of the products and their competitiveness with one another, evidence that the senior user may "bridge the gap" by developing a product for sale in the market of the alleged infringer's product, evidence of actual consumer confusion, evidence that the imitative mark was adopted in bad faith, respective quality of the products, and sophistication of consumers in the relevant market. *Starbucks Corp. v. Wolfe's Borough Coffee, Inc.*, 588 F.3d 97, 115 (2d Cir. 2009).

songwriters' false endorsement claim would be whether the audience at a political rally believed that the songwriter sponsored or otherwise approved of the political use of the songwriter's intellectual property. Because courts have found that distinctive voices merit protection as trademarks under section 43(a),<sup>141</sup> songwriters who also perform their musical compositions would have a stronger case because the audience hears their voices and, therefore, could actually recall these songwriters' names. Songwriters who merely write compositions behind the scenes without performing them would have a more difficult time proving likelihood of confusion because the audience does not hear their voices and likely cannot recall the songwriters' names.

Further, courts are unlikely to find false endorsement when political campaigns use a musical composition only once or twice.<sup>142</sup> Instead, political campaigns must embrace a musical composition and use it repeatedly for courts to find false endorsement. ASCAP explained that the closer a song is tied to a political campaign's message, the greater the likelihood that the songwriter will criticize the campaign for its political use.<sup>143</sup> The Recording Industry Association of America explained that the chances of a false endorsement claim succeeding increases significantly when a campaign repeatedly uses a particular composition such that it is adopted as the campaign's "theme song."<sup>144</sup> Campaign theme songs, such as Sarah Palin's repeated use of Heart's "Barracuda,"<sup>145</sup> imply a close association between the composition and the political campaign.<sup>146</sup>

First Amendment considerations are also implicated in false endorsement actions. The legislative history of the Lanham Act plainly shows that Congress did not intend for the Act to chill broadly protected political speech.<sup>147</sup> Therefore, courts must also take into consideration the broad protection of political speech when analyzing false endorsement challenges.

Overall, unless a political campaign has adopted a particular composition as the campaign's "theme song," false endorsement actions are not an effective means for songwriters to assert control over political uses of their musical compositions. The multiplicity of barriers songwriters

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141. *EMI Catalogue P'ship*, 228 F.3d at 63.

142. *See Moser, supra* note 46, at 32.

143. *Using Music in Political Campaigns, supra* note 48.

144. *RIAA, supra* note 9.

145. *Moser, supra* note 46, at 29.

146. *RIAA, supra* note 9.

147. *Mastercard Int'l. Inc. v. Nader 2000 Primary Comm., Inc.*, No. 00 Civ.6068(GDB), 2004 WL 434404, at \*7 (S.D.N.Y. Mar. 8, 2004).

face, including proving trademark ownership and likelihood of confusion, likely remove false endorsement as a viable remedy.

In concluding Part II, songwriters' right of publicity and false endorsement challenges to political uses of their musical compositions are bound to fail due to their inability to satisfy the necessary elements of the claims and overcome the current state of First Amendment defenses. The fact that courts have yet to accept either claim by a songwriter against a political campaign that possesses a public performance license from the songwriter's PRO shows that courts also believe these claims are ineffective and not worth litigating. Thus, with songwriters currently lacking a remedy from copyright law, right of publicity challenges, and false endorsement claims, the licensing structure for musical compositions must adapt to protect songwriters' intellectual property from unwanted, political uses. Part III explores how this protection can be created through amending ASCAP's and BMI's consent decrees.

### III. AMENDING THE CONSENT DECREES TO NOT REQUIRE "ALL OR NOTHING" LICENSING

If the U.S. Department of Justice amended ASCAP's and BMI's consent decrees to no longer require "all or nothing" licensing, the PROs could then allow songwriters to opt out of uses of their musical compositions at political rallies. Section A explains how ASCAP and BMI could incorporate an opt-out provision within their initial agreements with songwriters. Section B argues that ASCAP and BMI should require political campaigns to obtain campaign licenses instead of relying on already existing venue licenses. Section C illuminates how ASCAP and BMI can still allow for political uses when political campaigns have obtained direct approval from songwriters. Overall, these proposals are directed at granting songwriters the control they deserve over political uses of their intellectual property.

#### A. *Opt-Out Provision*

ASCAP and BMI could provide either a comprehensive or a limited opt-out provision within their initial agreements with songwriters to grant songwriters the control to opt out of political uses of their musical compositions. As explored within this section, a comprehensive opt-out provision is more desirable because a limited opt-out provision imposes serious limitations.

ASCAP's writer agreement currently includes an opt-out provision for radio and television broadcasting with reasonable restrictions that can be

adopted as a limited opt-out provision for political uses.<sup>148</sup> ASCAP's writer agreement allows songwriters to "at any time . . . , in good faith, restrict the radio or television broadcasting of compositions . . . for the purpose of preventing harmful effect upon such . . . compositions . . ."<sup>149</sup> This accepted language could be adopted for political uses. First, the good faith requirement imposes a higher standard on songwriters when they seek to restrict the broadcasting of their compositions. Second, this language would require that songwriters restrict political uses for the purpose of preventing harmful effects upon the musical compositions being restricted. This purpose acts as a limit on songwriters' ability to restrict political uses for artificial reasons.

This purpose would likely still allow those political candidates affiliated with the same political party as a songwriter to use that songwriter's registered musical compositions. Arguably, there would be no harmful effect on a songwriter's musical compositions when they are used by a political campaign that furthers the campaign and songwriter's shared political beliefs. In sum, adopting ASCAP's established language as an opt-out provision for political uses acts to narrowly restrict those political uses that songwriters personally disagree with.

Adopting a limited opt-out provision poses multiple issues, however, including the creation of evidentiary issues for courts. First, there is no simple, accurate means for political campaigns to discover a songwriter's political beliefs when determining whether to use a particular musical composition. Second, two or more co-writers with different political beliefs may collectively create a musical composition. This raises the issue of whether a political use by a political campaign that parallels one co-writer's morals but not another's would create a harmful effect on the composition. When the musical composition is registered with each co-writer's PRO, the registrations will designate each co-writer's name and the ownership percentages assigned to each.<sup>150</sup> Suppose that, between two co-writers, one owns 75% of the musical composition while the other owns only 25%. A political campaign would argue that a political use that furthers the first co-writer's political beliefs would not harm the work, or at least 75% of the work. Thus, having to litigate such issues, the adoption of a limited opt-out provision would cause time-intensive evidentiary issues for the courts.

If, instead, PROs adopted a comprehensive opt-out provision for uses of compositions at political rallies, these issues would not be a concern.

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148. *ASCAP Writer Agreements*, *supra* note 75.

149. *Id.*

150. See *Online Title Registration Guide*, ASCAP, <https://enterprise.ascap.com/cwrreg/Web%20Registration%20For%20Members.pdf> (last visited Sept. 30, 2017).

PROs could simply designate within their repertoires whether particular songwriters have opted out of political uses of their musical works or not. This would make it simple for political campaigns to look up whether or not they can utilize certain compositions.

Even if a certain songwriter has opted out of political uses, a political campaign that really wants to use a composition can reach out to that songwriter for permission. As explained later in Section C, PROs are legally restricted from preventing songwriters from directly licensing out their public performance rights.<sup>151</sup> Thus, even when a comprehensive opt-out provision is utilized, songwriters can still grant permission to use their compositions to approved political candidates. This gives songwriters the ability to direct who can adopt their intellectual property for political reasons.

### *B. Requiring Campaign Licenses*

If an opt-out provision is implemented, allowing songwriters to opt out of political uses of their registered musical compositions, its language can also be incorporated into specific campaign licenses to reinforce the effect that opting out carries. For this to be effective, however, political campaigns must first be obligated to secure campaign licenses.

ASCAP and BMI should require political campaigns to obtain campaign licenses, preventing them from blindly relying on venue licenses that were not adopted specifically for the campaigns' purposes. Political campaigns should be required to pay for campaign licenses and should not be allowed to freely rely on venue licenses without contributing monetarily. Campaigns pay for all other rally necessities, including insignificant elements like balloons and banners, so it does not follow that they should not have to pay for music – a strategic tool that has the power to “inspire, motivate and energize a campaign.”<sup>152</sup> At a campaign rally, specifically, a candidate “makes an entrance to a song designed to characterize and elevate the politician’s public persona and agenda.”<sup>153</sup>

Further, the use of music implicates songwriters’ legal rights – their intellectual property rights.<sup>154</sup> Political campaigns should not be allowed to freely incorporate music to further their own political agendas without compensating the copyright owners for the benefit they receive from the use of music. This premise parallels the bundle of legal rights that are granted

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151. Brabec, *supra* note 17, at 28.

152. *Using Music in Political Campaigns*, *supra* note 48.

153. Moser, *supra* note 46, at 29.

154. *Id.*

to real property owners. A campaign cannot hold a campaign rally on another's property without permission and fair compensation,<sup>155</sup> so the campaign should not be able to freely appropriate another's intellectual property without permission and fair compensation.

After making the securement of campaign licenses a requirement, ASCAP and BMI could then modify these licenses to disallow the public performances of all musical compositions for which songwriters have elected to employ the opt-out provision. As a result, political campaigns would simply be blocked from publicly performing these musical compositions at rallies. The next section, however, explains how political campaigns can still publicly perform "blocked" musical compositions by simply obtaining approval from songwriters.

### C. *Direct Approval from Songwriters*

ASCAP and BMI must still allow political campaigns to publicly perform those musical compositions that the campaigns obtain approval directly from songwriters to use.<sup>156</sup> This gives songwriters the control to dictate which political candidates, if any, they would like their musical compositions to be associated with.

Songwriters currently have the ability to directly license their musical compositions even if they are registered with a PRO.<sup>157</sup> PROs are granted a non-exclusive, contrasted with an exclusive, right to license members' public performance rights.<sup>158</sup> Both consent decrees governing ASCAP and BMI incorporate language guaranteeing PRO members the right to directly license to music users.<sup>159</sup> BMI requires that it "be notified in writing within ten days of the issuance of the license or within three months of the performance, whichever comes first."<sup>160</sup> ASCAP requires that it be notified "promptly" of any direct licenses issued by its members.<sup>161</sup> The license fees

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155. *Know Your Rights: Demonstrations and Protests*, ACLU, [https://www.aclu.org/sites/default/files/field\\_pdf\\_file/kyr\\_protests.pdf](https://www.aclu.org/sites/default/files/field_pdf_file/kyr_protests.pdf) (last visited Sept. 30, 2017).

156. *See* Brabec, *supra* note 17, at 28.

157. *Id.*

158. COMPENDIUM OF ASCAP RULES AND REGULATIONS, AND POLICIES SUPPLEMENTAL TO THE ARTICLES OF ASSOCIATION, ASCAP r. 2.7.1 (2014), <https://www.ascap.com/-/media/files/pdf/members/governing-documents/compendium-of-ascap-rules-regulations.pdf>.

159. SESAC also incorporates language into its agreements with songwriters that guarantees songwriters' rights to directly license. Brabec, *supra* note 17, at 28.

160. *How We Pay Royalties*, BMI, [http://www.bmi.com/creators/royalty/miscellaneous\\_royalty\\_rules](http://www.bmi.com/creators/royalty/miscellaneous_royalty_rules) (last visited Sept. 30 2017).

161. COMPENDIUM OF ASCAP RULES, *supra* note 158, r. 2.7.1.

for these direct licenses cannot be collected by PROs,<sup>162</sup> so songwriters themselves are responsible for ensuring they collect their appropriate royalties.

This proposal mirrors the negotiations that already occur between political campaigns and songwriters for the use of musical compositions in political advertisements. If there is a synchronization of music with a campaign's video, the campaign must contact the songwriter or the songwriter's music publisher directly to negotiate what is known as a synchronization license.<sup>163</sup> Synchronization licenses allow music users to utilize compositions in audiovisual works.<sup>164</sup> PROs do not issue synchronization licenses,<sup>165</sup> so campaigns must negotiate with individual songwriters to obtain such licenses.

Once a campaign advertisement has been produced, the campaign is also responsible for securing public performance licenses for all media on which the advertisement will be featured.<sup>166</sup> Performance licenses allow music users to show their videos that incorporate compositions to the public.<sup>167</sup> A license is required for each individual television station, radio station, and website.<sup>168</sup>

Proposing that political campaigns obtain direct approval from songwriters also furthers what PROs already encourage political campaigns to do.<sup>169</sup> ASCAP urges campaigns to contact songwriters to obtain permission in order to eliminate the possibilities of right of publicity and false endorsement claims.<sup>170</sup>

In concluding Part III, these proposals are directed at granting songwriters control over their intellectual property in connection with uses of their musical compositions at political rallies. They represent the logical steps that should be taken after recognizing that songwriters are currently left with no remedy to protect their works from unwanted uses. Through abolishing the "all or nothing" licensing rule, the U.S. Department of Justice would open the door for ASCAP and BMI to provide their registered songwriters with the control and protection they deserve.

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162. *See id.*

163. *Using Music in Political Campaigns*, *supra* note 48; RIAA, *supra* note 9.

164. THOMAS A. CROWELL, *THE POCKET LAWYER FOR FILMMAKERS: A LEGAL TOOLKIT FOR INDEPENDENT PRODUCERS* 264 (2nd ed. 2011).

165. *See BMI and Performing Rights*, *supra* note 41.

166. *Using Music in Political Campaigns*, *supra* note 48.

167. CROWELL, *supra* note 164, at 264.

168. *Using Music in Political Campaigns*, *supra* note 48.

169. *See id.*

170. *Id.*

## CONCLUSION

The U.S. Department of Justice must provide songwriters with the ability to opt out of political uses of their musical compositions because the rate court, in considering challenges to the consent decrees that govern ASCAP and BMI, has diminished songwriters' control through the "all or nothing" licensing ruling. Songwriters currently have no viable remedies to turn to for relief. Current licensing norms do not provide songwriters with control through copyright law, right of publicity challenges will fail due to the noncommercial nature of political rallies, and false endorsement actions require rare, particular facts to be present for success.

Songwriters' current lack of control over their intellectual property is an unjust reality that violates common sense. The U.S. Department of Justice must step in to protect the creative works themselves from appropriation and tarnishment and to safeguard songwriters' reputations and livelihoods.

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