THE SINGER DID NOT APPROVE THIS MESSAGE:

ANALYZING THE UNAUTHORIZED USE OF COPYRIGHTED MUSIC IN POLITICAL ADVERTISEMENTS IN *JACKSON BROWNE V. JOHN MCCAIN*♦

INTRODUCTION

On August 14, 2008, singer-songwriter Jackson Browne filed a copyright infringement lawsuit[1] against Republican presidential nominee Senator John McCain, as well as the Republican National Committee ("RNC"), and the Ohio Republican Party ("ORP") (collectively "Defendants"). While many presidential campaigns since Ronald Reagan have used copyrighted music without authorization,[2] Browne's action[3] marked the first time that an American presidential candidate has been sued for music copyright vio-

[1] Complaint, Browne v. McCain, 611 F. Supp. 2d 1062 (C.D. Cal. 2009) (No. 08-05334).

[2] *See infra* notes 15-31 and accompanying text.

[3] Steve Gorman, *Jackson Browne Sues John McCain*, REUTERS, Aug. 16, 2008, http://www.reuters.com/article/entertainmentNews/idUKN1533667420080816.

lation.[4]

The alleged infringement concerns the use of one of Browne's songs in an attack advertisement produced by the ORP. After then-Senator Barack Obama suggested that Americans could help reduce gasoline prices by properly inflating their tires,[5] the ORP broadcast a television ad criticizing that suggestion.[6] At the end of the approximately one minute and twenty second advertisement,[7] a portion of Browne's signature 1977 song "Running on Empty"[8] plays in the background, presumably to insinuate that Obama is running for president without realistic energy policy ideas. Browne, a supporter of Democratic causes and candidates,[9] filed a complaint that Defendants obtained neither license nor permission to use the song.[10]

As far back as George Washington and the song "Follow Washington,"[11] presidential candidates have used music to energize potential voters. Early presidential campaigns composed original songs[12] or rewrote the lyrics to traditional melodies.[13] In the latter part of the 20th century, campaigns increasingly turned to the power of established popular songs to drive home the candidate's message.[14] Some songwriters balked. In 1984, Bruce Springsteen publically objected when Ronald Reagan invoked Springsteen's name and music at a reelection rally in New Jersey.[15] In each recent presidential election, at least one campaign has been asked to cease unauthorized public performances of an artist's music, including Bob Dole in 1996 ("Dole Man," modifying

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[4] Research within the Westlaw database and media reports uncovered no other civil complaints filed by a music copyright holder against a presidential candidate or campaign. Rondor Music International, Inc. threatened legal action against the Bob Dole campaign in 1996 but did not file suit. *See infra* note 16 and accompanying text.

[5] Brian Knowlton, *In Speech and New Ad, Obama Shifts Focus to Energy*, N.Y. TIMES, Aug. 4, 2008, *available at* http://www.nytimes.com/2008/08/04/world/americas/04iht-campaign.4.14997565.html?_r=1.

[6] Browne v. McCain, 611 F. Supp. 2d 1062, 1066-67 (C.D. Cal. 2009).

[7] *Id.*

[8] JACKSON BROWNE, RUNNING ON EMPTY (Asylum Records 1977).

[9] Complaint, *supra* note 1, at ¶ 1.

[10] Complaint, *supra* note 1, at ¶ 2.

[11] OSCAR BRAND, FOLLOW WASHINGTON (Smithsonian Folkways Recordings 1999). A clip from the song is available at http://www.amazon.com/Follow-Washington-George/dp/B000S388HQ.

[12] Geoff Boucher, *Songs in the Key of Presidency*, L.A. TIMES, Oct. 11, 2000, http://articles.latimes.com/2000/oct/11/news/mn-34788 (e.g., George Washington, John Quincy Adams, and Stephen A. Douglas).

[13] *Id.* (e.g., John Adams, Thomas Jefferson, and James A. Garfield).

[14] *See infra* notes 15-31 and accompanying text.

[15] Todd Leopold; *Analysis: The Age of Reagan*, CNN, June 16, 2004, *available at* http://edition.cnn.com/2004/SHOWBIZ/06/16/reagan.80s/index.html; Anthony DeCurtis; *Music; From the Quiet of a Bedroom, Raw Songs of America*, N.Y. TIMES, Dec. 31, 2000, *available at* http://www.nytimes.com/2000/12/31/arts/music-from-the-quiet-of-a-bedroom-raw-songs-of-america.html.

the lyrics of "Soul Man" by Isaac Hayes and David Porter),[16] George W. Bush in 2000 ("Brand New Day" by Sting),[17] Bush again in 2004 ("Still the One" by Orleans),[18] and Mike Huckabee in 2008 ("More Than a Feeling" by Boston).[19] At least ten artists requested or demanded that McCain stop unauthorized public performances of their music,[20] including Browne,[21] Heart ("Barracuda"),[22] John Cougar Mellencamp ("Our Country" and "Pink Houses"),[23] Van Halen ("Right Now"),[24] Foo Fighters ("My Hero"),[25] Frankie Valli ("Can't Take My Eyes Off of You"),[26] ABBA ("Take a Chance on Me"),[27] Bon Jovi ("Who Says You Can't Go Home"),[28] Survivor ("Eye of the Tiger"),[29] and the owner of the rights to "Gonna Fly Now," the trumpet anthem from the film "Rocky."[30] This far ex-

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[16] *Dole Campaign Agrees to Change Its Tune*, N.Y. TIMES, Sept. 14, 1996, at A9, *available at* http://www.nytimes.com/1996/09/14/us/dole-campaign-agrees-to-change-its-tune.html.

[17] Jake Tapper, *Spinning Records*, SALON NEWS, Sept. 15, 2000, http://www.salon.com/news/politics/feature/2000/09/15/music/index.html.

[18] *Bush Stops Using Orleans' 'Still the One,'* BILLBOARD.COM, Oct. 29, 2004, http://www.billboard.com/bbcom/news/article_display.jsp?vnu_content_id=1000694581.

[19] Andy Greene, *"More Than A Feeling" Writer Says Mike Huckabee Has Caused Him "Damage,"* ROLLING STONE, Feb. 14, 2008, http://www.rollingstone.com/rockdaily/index.php/2008/02/14/more-than-a-feeling-writer-says-mike-huckabee-has-caused-him-damage/.

[20] Additionally, at least one non-music artist asked McCain to stop using his material. Saturday Night Live alumnus Mike Myers complained after McCain used footage from the variety show without authorization. In the campaign's Internet ad "Fan Club," a video clip of Myers and Dana Carvey, playing music fanatics Wayne and Garth, chant "we're not worthy" in a context meant to mock Obama's celebrity. After complaints from Myers, McCain expunged the video clip from the ad, though "we're not worthy" still appeared on the screen. Posting of Dan Morain to L.A. Times' Top of the Ticket Blog, http://latimesblogs.latimes.com/washington/2008/08/mccain-mike-mye.html (Aug. 12, 2008, 15:07 PST).

[21] Complaint, *supra* note 1.

[22] Steve Miletich, *Wilson Sisters Slam GOP's Use of Heart's "Barracuda,"* SEATTLE TIMES, Sept. 6, 2008, *available at* http://seattletimes.nwsource.com/html/nationworld/2008162066_heart06m.html.

[23] *Mellencamp Asks McCain to Stop Using Tunes*, ROLLING STONE, Feb. 4, 2008, http://www.rollingstone.com/rockdaily/index.php/2008/02/04/mellencamp-asks-mccain-to-stop-using-tunes/.

[24] *Van Halen None Too Thrilled about John McCain Using 'Right Now,'* MTV NEWS, Aug. 29, 2008, http://newsroom.mtv.com/2008/08/29/van-halen-none-too-thrilled-about-john-mccain-using-right-now/.

[25] Sean Michaels, *Foo Fighters Slam John McCain over Use of Song*, GUARDIAN (Manchester), Oct. 9, 2008, *available at* http://www.guardian.co.uk/music/2008/oct/09/foo.fighters.slam.john.mccain.

[26] Posting of Sarah Lai Stirland to Wired's Threat Level Blog, http://blog.wired.com/27bstroke6/2008/07/mccain-campai-1.html (July 25, 2008, 16:46 EST).

[27] Complaint, *supra* note 1, ¶ 3; *Music and Candidates: An Uneasy Alliance*, ASSOCIATED PRESS, May 28, 2008, *http://hosted.ap.org/dynamic/stories/M/MEASURE_OF_A_NATION_THE_MUSIC_MINEFIELD?SITE=AP&SECTION=HOME&TEMPLATE=DEFAULT*.

[28] *Bon Jovi Complains over Republican Rally Song*, REUTERS, Oct. 15, 2008, http://www.reuters.com/article/politicsNews/idUSTRE49E93V20081015.

[29] Natalie Finn, *Another Rocky Song Choice for McCain,* E!ONLINE, Oct. 14, 2008, http://www.eonline.com/uberblog/b63813_another_rocky_song_choice_john_mccain.html.

[30] Jason Szep, *Would ABBA Take a Chance on McCain?*, REUTERS, Feb. 19, 2008,

ceeds the requests and demands received by any previous presidential candidate.[31]

Browne filed suit in the U.S. District Court, Central District of California, asserting four causes of action.[32] The first cause alleged copyright infringement by all three defendants on the theory that they produced the advertisement together.[33] The second alleged copyright infringement by McCain and the RNC on the alternate theory that they have secondary liability as the principals of the ORP, which produced the advertisement.[34] The third cause alleged trademark infringement by all defendants.[35] The fourth alleged infringement of California's common law right of publicity, also by all defendants.[36]

In February 2009, the district court dismissed all claims against the ORP for lack of personal jurisdiction.[37] The court also denied motions by the RNC to dismiss the first three causes of action[38] and strike the fourth.[39]

This Recent Development will examine Defendants' possible defenses under current law and doctrine and discuss the potential outcomes if the suit goes to trial. Part I will analyze the fair use defense, including the purpose of the fair use exception, statutory fair use considerations, and common law considerations. Part II will analyze the First Amendment freedom of political speech defense.

[Author's note: On July 21, 2009, Browne settled with Defendants out of court.[40] The settlement required Defendants to issue a public apology and pledge to get artists' permission before using music in the future.[41] Browne also received an undisclosed sum of money.[42] In spite of this set-

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http://www.reuters.com/article/lifestyleMolt/idUSN1820870620080219.

[31] Research in the Westlaw database and media reports did not uncover another campaign that has received ten requests or demands to cease public performances of the artists' music.

McCain's running mate, Governor Sarah Palin, commented on the scarcity of artists who had *not* ordered the campaign to stop using their music: "In fact, we were on the bus today, we were making a list of who are some celebrity singers who could come out and help us and gosh, for the life of us, the pickings were slim there." Posting of Rebecca Sinderbrand to CNN Political Ticker, http://politicalticker.blogs.cnn.com/2008/10/17/enough-with-%E2%80%98joe-the-plumber%E2%80%99-palin-says/ (Oct. 17, 2008, 10:00 EST).

[32] Complaint, *supra* note 1, ¶ 19-43.

[33] *Id.* at ¶ 19-24.

[34] *Id.* at ¶ 25-31.

[35] *Id.* at ¶ 32-38.

[36] *Id.* at ¶ 39-43.

[37] *Browne*, 612 F. Supp. 2d at 1118.

[38] *Id.* at 1073.

[39] *Id.* at 1062.

[40] Posting by Jeff Simon to CNN Political Ticker, http://politicalticker.blogs.cnn.com/2009/07/21/browne-mccain-campaign-settle-suit-over-use-of-music/ (July 21, 2009, 15:35 EST).

[41] Id.

[42] Andy Greene, Browne Says McCain Camp's Apology Was Key to Settlement, Rolling Stone, Aug.17, 2009,

tlement, the issue presented in Browne v. McCain *will likely arise again. Defendants' pledge does not apply to any future presidential candidates, and even if it did, the pledge does not appear to have any enforcement mechanisms. Moreover, the use of copyrighted music has grown more popular with each presidential election. Accordingly, this Recent Development will analyze the defenses that could have been raised here and will likely be raised by future defendants in the wake of another presidential campaign.]*

I. FAIR USE DEFENSE

Defendants' strongest argument against the claim of copyright infringement was that using Browne's song in the advertisement fell under the fair use exception to the Copyright Act.[43] As fair use is an affirmative defense, the burden of proof is on the defendants.[44] In determining whether a use is fair use, a court will examine three elements: (1) the purpose of copyright, (2) the enumerated statutory considerations, and (3) other common law considerations.[45]

A. *Fair Use Factor: The Purpose of Copyright*

In granting Congress the authority to establish copyright law, the Constitution indicates that the purpose of copyright is "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[46] By 1976, "innumerable copyright actions" had established fair use as a common law defense to copyright infringement claims.[47] The fair use doctrine recognized that the rigid application of copyright protections could, in some situations, stifle the very artistic and scientific progress that copyright is intended to protect.[48] In 1976, Congress codified fair use to act as "a judicial safety valve, empowering courts to excuse certain quotations or copies of copyrighted material even though the literal terms of the Copyright Act prohibit them."[49] Hence, the purpose of copyright protection and that of the fair use exception are one in the same; both seek to ensure that copyright law promotes the advancement of art and science

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http://www.rollingstone.com/rockdaily/index.php/2009/08/17/browne-says-mccain-camps-apology-was-key-to-settlement/.

[43] 17 U.S.C. § 107 (2009).

[44] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590 (1994).

[45] *See infra* notes 46-155 and accompanying text.

[46] U.S. CONST. art.I, § 8, cl. 8.

[47] H.R. REP. NO. 94-1476, at 65 (1976), *as reprinted in* 17 U.S.C. § 107 (2006).

[48] Stewart v. Abend, 495 U.S. 207, 236 (1990); Iowa State Univ. Research Found., Inc. v. Am. Broad. Cos., Inc., 621 F.2d 57, 60 (2d Cir. 1980).

[49] PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY FROM GUTENBERG TO THE CELESTIAL JUKEBOX 68 (1994).

by restricting and permitting copies as appropriate.[50]

To ensure that fair use did not undermine copyright protections altogether, Congress stated that fair use is meant for "purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research."[51] While this list is not meant to be comprehensive, it demonstrates Congress' intent to protect the kinds of uses that disseminate information and ideas to the public. Moreover, "[t]he line which must be drawn between fair use and copyright infringement depends on an examination of the facts in each case. It cannot be determined by resort to any arbitrary rules or fixed criteria," including the statutory fair use considerations.[52]

To argue that the purpose of copyright and fair use weigh in their favor, Defendants could assert that art and science are broad, expansive concepts, and must include the art of manipulating harmless song lyrics into scorching political critique. Moreover, their advertisement achieves several of the fair use purposes enumerated by Congress.

In response, Browne could note that the Supreme Court has found these statutory fair use purposes to be "illustrative uses" only,[53] and that Congress intended the statute to restate the common law fair use doctrine rather than replace or enlarge it.[54] Additionally, the Supreme Court has emphasized that the fundamental goal of fair use is to promote the progress of science and the arts.[55] Browne could argue that Defendants' use failed to meet this goal because it did not further art or science; it merely copied his work without adding any artistic expression.

Because the objectives of copyright tip against fair use in these circumstances, the court could weigh this consideration in favor of Browne.

B. *Fair Use Factor: Enumerated Statutory Considerations*

To assess a fair use defense, a court will consider

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educa-

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[50] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 575 (1994) ("From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright's very purpose, '[t]o promote the Progress of Science and useful Arts.'") (quoting U.S. CONST. art. 1, § 8, cl. 8).

[51] 17 U.S.C. § 107 (2006).

[52] Meeropol v. Nizer, 560 F.2d 1061, 1068 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978).

[53] *Campbell*, 510 U.S. at 584.

[54] H.R. REP. NO. 94-1476, at 66 (1976), *as reprinted in* 17 U.S.C. § 107 (2006).

[55] *Campbell*, 510 U.S. at 575 ("From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright's very purpose, '[t]o promote the Progress of Science and useful Arts.'") (quoting U.S. CONST. art. 1, § 8, cl. 8).

> tional purposes;
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> (2) the nature of the copyrighted work;
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> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
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> (4) the effect of the use upon the potential market for or value of the copyrighted work.[56]

The court will explore these considerations together and in light of the purpose of copyright.[57] The next section analyzes this case in accordance with these considerations. The analysis omits the second consideration, the nature of the copyrighted work, because it exists to protect unpublished materials and is irrelevant here.[58]

1. Purpose and Character of the Use

The first considerations mandated by the statute are the purpose and character of the use.[59] In considering the purpose of the use, the court will determine commerciality, that is, "whether the user stands to profit from the exploitation of the protected material without paying the customary price."[60] Three district courts have addressed the question of commerciality in a political advertisement, and all three found that the advertisement was noncommercial.[61] In *MasterCard Intern. Inc. v. Nader 2000 Primary Committee, Inc.*, Ralph Nader invoked popular MasterCard commercials in his advertisement describing how much it would cost lobbyists to curry various political favors, then noting that the truth is priceless and "there are some things money can't buy."[62] The Southern District of New York found the advertisement to be noncommercial even if it increased donations to Nader because otherwise "all political campaign speech would also be 'commer-

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[56] 17 U.S.C. § 107 (2006).
[57] *See Campbell*, 510 U.S. at 578-79 ("Nor may the four statutory factors be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright").
[58] Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 563-64 (1985) (finding that "[t]he fact that a work is unpublished is a critical element of its 'nature'"); On Davis v. The Gap, Inc., 246 F.3d 152, 175 (2d Cir. 2001) ("[N]ature of the copyrighted work . . . is rarely found to be determinative"); 18 AM. JUR. 2D *Copyright and Literary Property* § 83 (2008) (this consideration is relevant only if the nature of the copy and the nature of the original are different).
[59] 17 U.S.C. § 107 (2006).
[60] *Harper & Row Publisher*s, 471 U.S. at 562.
[61] MasterCard Intern. Inc. v. Nader 2000 Primary Comm., Inc., 2004 WL 434404 (S.D.N.Y. 2004); Am. Family Life Ins. Co. v. Hagan, 266 F. Supp. 2d 682 (N.D. Ohio 2002) (finding a political attack ad bringing to mind the AFLAC duck to be noncommercial); Keep Thomson Governor Comm. v. Citizens for Gallen Comm., 457 F. Supp. 957 (D.C.N.H. 1978) (finding a political attack ad using the opposing campaign's copyrighted music to be noncommercial).
[62] *See MasterCard*, 2004 WL 434404.

cial speech' since all political candidates collect contributions."[63] Additionally, political campaigns are inherently non-profit enterprises, as they often cost more than their donations[64] and candidates are prohibited from keeping any leftover money.[65] Consequently, while Defendants may have gained politically from their use of a song without paying license fees, the court could consider the advertisement noncommercial.

The other major component of this factor is the extent to which the challenged use was transformative.[66] In a transformative use, "the copyrightable expression in the original work [must be] used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings."[67] Defendants have two possible transformative use arguments here: standard transformative use and parody.

Courts generally find transformative use when the new use serves a different function than the original use.[68] Accordingly, the Ninth Circuit found that a search engine's thumbnails of copyrighted images were transformative because they served as a tool to index and access images on the Internet, whereas the images' original purpose was to educate and engage in an aesthetic experience.[69] Similarly, the Southern District of New York found transformative use in the copyrighted images plastering the killer's apartment walls in the film "Seven" because the images were used to create a mood and atmosphere for the moviegoer.[70]

Courts have been reluctant to find transformative use when the new use is simply in a different medium, especially when dealing with audio.[71] In *Infinity Broad. Corp. v. Kirkwood*, the defendant retransmitted radio broadcasts over telephone lines and marketed the service as a way to audition on-air talent and as a way for adver-

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[63] *Id.* at 7.
[64] *See* Michael Luo, *For Clinton, Millions in Debt and Few Options*, N.Y. TIMES, June 10, 2008, *available at* http://www.nytimes.com/2008/06/10/us/politics/10clinton.html (describing the debt leftover after the failed presidential campaigns of Hillary Clinton, Rudolph Giuliani, and John Glenn).
[65] *See* Chris Good, *Obama Weighing What to Do with Left Over $29.9 Million*, HILL (Washington, D.C.), Dec. 5, 2008, http://hill6.thehill.com/leading-the-news/obama-weighing-what-to-do-with-left-over-29.9-million-2008-12-05.html ("Anything not designated by the FEC as 'personal use' . . . will be open to Obama as an option for the $29.3 million").
[66] *Campbell*, 510 U.S. 569 (finding that "[t]he more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use").
[67] Castle Rock Entm't v. Carol Publ'g Group, Inc., 150 F.3d 132, 141 (2d Cir. 1998) (quoting Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990)).
[68] *See* Kelly v. Arriba Soft Corp., 336 F.3d 811 (9th Cir. 2003); Sandoval v. New Line Cinema Corp., 973 F. Supp. 409 (S.D.N.Y. 1997).
[69] *See Kelly*, 336 F.3d at 818-19.
[70] *See Sandoval*, 973 F. Supp. at 413.
[71] *See Kelly*, 336 F.3d at 819.

tisers to verify the broadcasting of their commercials.[72] The Second Circuit found that such retransmission left the character of the radio broadcasts unchanged, and while retransmission *could* serve an alternate purpose in aiding industry professionals, they would still be listening for the entertainment value rather than factual content.[73] Consequently, the court found the use non-transformative.[74] Similarly, the Southern District of New York held that copying music compact discs and selling the contents as computer audio files was not transformative.[75] Here, Defendants could argue that the purpose of the song has transformed from entertainment to political criticism. However, in terms of the contents of the recording, they merely changed the medium from audio to television, and "a use of copyrighted material that 'merely repackages or republishes the original' is unlikely to be deemed a fair use."[76]

Defendants could also consider the transformative use argument of parody because the Supreme Court has found that "parody has an obvious claim to transformative value."[77] Parody, for the purposes of copyright law, "is the use of some elements of a prior author's composition to create a new one that, at least in part, comments on that author's works."[78] If, on the other hand, "the commentary has no critical bearing on the substance or style of the original composition, [then] the claim to fairness in borrowing from another's work diminishes accordingly (if it does not vanish)."[79] The court must decide whether "a parodic character may reasonably be perceived."[80] In *MasterCard*, the Southern District of New York found it could reasonably be perceived that the Nader ad commented on the original MasterCard ads.[81] The Supreme Court found parody in a rap version of Roy Orbison's 1964 ballad "Oh, Pretty Woman" that replaces the original's romantic naïveté with sexual come-ons and the ugliness of street life.[82] Conversely, in *Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*, the Ninth Circuit found no parody in a book about the O.J. Simpson trial that used rhyme patterns and illustrations similar to the Dr.

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[72] 150 F.3d 104 (2d Cir. 1998).
[73] *Id.* at 106.
[74] *Id.* at 108-09.
[75] UMG Recordings, Inc. v. MP3.Com, Inc., 92 F. Supp. 2d 349 (S.D.N.Y. 2000).
[76] *Infinity Broad. Corp.*, 150 F.3d at 108 (quoting Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990)).
[77] *Campbell*, 510 U.S. at 579.
[78] *Id.* at 580.
[79] *Id.*
[80] *Id.* at 582.
[81] *MasterCard*, 2004 WL 434404 at 13.
[82] *See Campbell*, 510 U.S. at 583.

Seuss children's books.[83] The court found that while the Simpson book broadly mimicked the works of Dr. Seuss, it did not hold the Seuss style up to ridicule; rather, it mimicked Seuss "to get attention" or "avoid the drudgery in working up something fresh."[84] Here, Browne could argue that Defendants' advertisement did not hold Browne or his music up to ridicule. The advertisement had critical bearing on Obama, not Browne. Because Defendants' use resembles that in *Dr. Seuss* and has no critical bearing on "Running on Empty," the court would probably not find that a parodic character could reasonably be perceived.

Consequently, the court here could find that the purpose of the use was noncommercial, weighing in favor of fair use, but that the character was non-transformative, weighing against fair use.

2. Proportion of the Whole Used

Under the third statutory factor, a court will consider "the amount and substantiality of the portion used in relation to the copyrighted work as a whole."[85] There is no clear standard to this test, and courts have rejected absolute rules regarding what proportion is too much to possibly be considered fair use, and what proportion is so insignificant that it must be fair use.[86]

In conducting the proportion analysis, a court will consider both the quantitative proportion used and the qualitative proportion used.[87] For the quantitative proportion, a court will analyze how much of the entire original work the defendant copied.[88] The court will perform this analysis in light of the first statutory factor to determine "whether '[t]he extent of . . . copying' is consistent with or more than necessary to further 'the purpose and character of the use.'"[89] In *Keep Thomson Governor Comm. v. Citizens for Gallen Comm.*,[90] the District Court of New Hampshire found fair use when one-twelfth of a song was used in a campaign ad; however, the court found the small amount used relevant only to the extent that it affected the market for or value of the song.[91] Similarly, the

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[83] Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc., 109 F.3d 1394 (9th Cir. 1997).
[84] *Id.* at 1401 (quoting *Campbell*, 510 U.S. at 580).
[85] 17 U.S.C. § 107(3) (2006).
[86] Maxtone-Graham v. Burtchaell, 803 F.2d 1253, 1263 (2d Cir. 1986) (citing Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 447-55 (1984), in which the Supreme Court permitted fair use even when home video recorders could copy entire television programs).
[87] *See Campbell*, 510 U.S. at 587 ("[T]his factor calls for thought not only about the quantity of the materials used, but about their quality and importance, too"); Rogers v. Koons, 960 F.2d 301, 311 (2d Cir. 1992).
[88] *See Campbell*, 510 U.S. at 586-89.
[89] *Castle Rock Entm't*, 150 F.3d at 144 (quoting *Campbell*, 510 U.S. at 586-87).
[90] 457 F. Supp. 957 (D.C.N.H. 1978).
[91] *Id.* at 961 ("The alleged infringement takes approximately 15 seconds from a total recording of three minutes in length, and it is clear to the Court that the effect of the use

Eastern District of Michigan found fair use after one-sixth of a copyrighted song was used in an after-school television program; however, the court focused less on the quantitative analysis and more on the qualitative characteristic that the song was "barely audible."[92] Courts tend to weigh the quantity factor against fair use when the entire work is copied.[93] In *Zomba Enterprises, Inc. v. Panorama Records, Inc.*,[94] the Sixth Circuit weighed the quantity factor against fair use because a karaoke album producer copied the entire music tracks and lyrics from multiple songs.[95]

Defendants' advertisement used approximately thirty seconds of Browne's song, first by playing the melody in the background and then ending the ad with the "Running on Empty" chorus.[96] These thirty seconds amount to approximately ten percent of the entire song.[97] Defendants could argue that ten percent of the song is quantitatively small, so this part of the factor should support a finding of fair use. However, case law indicates that this is relevant only to the extent that it impacts other considerations such the qualitative analysis and the market for the copyrighted work.[98]

Generally, the qualitative analysis is more important than the quantitative analysis in weighing the "proportion of the whole used" factor.[99] The court will analyze the "substantiality" of the portion copied[100] to identify whether it is distinctive or important.[101] In *Harper and Row Publishers v. Nation Enters.*,[102] The Nation magazine printed 300 to 400 words of former President Gerald Ford's unpublished memoirs without permission. Though the words copied were an "insubstantial portion" of the memoirs,[103] the Supreme Court weighed this factor against fair use because the quotations were the "heart" of the memoirs, the most moving and powerful passages specifically chosen because they "qualitatively embodied Ford's distinctive expression."[104] The Court analyzed this factor in light of the others, finding that the portion copied

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upon the potential market or value of the copyrighted work is nil").

[92] *Higgins v. Detroit Educ. Television Found.*, 4 F. Supp. 2d 701, 707-08 (E.D. Mich. 1998).

[93] *Cf.* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984) (finding fair use when home video recorders could copy entire television programs).

[94] 491 F.3d 574 (6th Cir. 2007).

[95] *See also* Leadsinger, Inc. v. BMG Music Publ'g, 429 F. Supp. 2d 1190 (C.D. Cal. 2005).

[96] *Browne*, 611 F. Supp. 2d at 1066-67.

[97] *Id.* at 1065-67 (based on a four-minute and fifty-six second runtime of the song).

[98] *See supra* notes 90-91 and accompanying text; *see infra* notes 100-107 and accompanying text.

[99] *See Rogers,* 960 F.2d at 311 ("Even more critical than the quantity is the qualitative degree of the copying: what degree of the essence of the original is copied in relation to its whole").

[100] 17 U.S.C. § 107(3) (2006).

[101] *Campbell*, 510 U.S. at 586.

[102] 471 U.S. 539 (1985).

[103] *Harper & Row*, 471 U.S. at 564.

[104] *Id.* at 565.

was so qualitatively substantial that printing it would have a deleterious effect on the market for subsequent authorized publications.[105] In another case, the Southern District of New York found that copying two to four minute clips of Charlie Chaplin films was quantitatively small but qualitatively substantial, as they were among Chaplin's best scenes and each clip was central to its respective story.[106]

Conversely, the Supreme Court found that fair use permits copying a work's "most distinctive and memorable features" for a parody as long as the defendant duplicates no more than is necessary to make the parody effective.[107] However, as previously discussed, Defendants could not effectively assert parody here.[108]

Browne could argue that because the ad uses the chorus, it copied the heart of his signature song, one central to his music identity and embodying his distinctive expression. Accordingly, Browne could argue this is qualitatively substantial copying that undermines the fair use defense.

3. Effect of the Use on the Potential Market

The final statutory consideration analyzes what effect the alleged infringement has on the market for or value of the copyrighted work.[109] The Supreme Court has called this "undoubtedly the single most important element of fair use"[110] and the "most important, and indeed, central fair use factor."[111]

In analyzing this consideration, a court will explore two areas: the effect of the alleged use on the potential market and the hypothetical effect of "unrestricted and widespread conduct of the sort engaged in by the defendant."[112] If either effect would result in a "substantially adverse impact" on the market for the copyrighted work, then this factor weighs against fair use.[113] The court will strike a balance

> between the benefit the public will derive if the use is permitted

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[105] *See infra* notes 115-117 and accompanying text.
[106] Roy Export Co. Establishment of Vaduz, Liechtenstein, Black Inc., A. G. v. Columbia Broad. Sys., Inc., 503 F. Supp. 1137 (D.C.N.Y. 1980), *aff'd*, 672 F.2d 1095 (2d Cir. 1982), *cert. denied*, 459 U.S. 826 (1982).
[107] *Campbell*, 510 U.S. at 588-90. *See also* Abilene Music, Inc. v. Sony Music Entm't, Inc., 320 F. Supp. 2d 84 (S.D.N.Y. 2003).
[108] *See supra* notes 77-84 and accompanying text.
[109] 17 U.S.C. § 107(4) (2006).
[110] *Harper & Row*, 471 U.S. at 566.
[111] Stewart v. Abend, 495 U.S. 207, 238 (1990) (quoting 3 M. Nimmer & D. Nimmer, Annotation, *Nimmer on Copyright*, § 13.05[A], 13-81 (1989)).
[112] *Campbell*, 510 U.S. at 590 (quoting M. Nimmer & D. Nimmer, Annotation, *Nimmer on Copyright*, § 13.05[A] [4] (1993)). *See also Harper & Row*, 471 U.S. at 566 ("Isolated incidents of minor infringements, when multiplied many times, become in the aggregate a major inroad on copyright that must be prevented").
[113] *Campbell*, 510 U.S. at 590.

> and the personal gain the copyright owner will receive if the use is denied. The less adverse effect that an alleged infringing use has on the copyright owner's expectation of gain, the less public benefit need be shown to justify the use.[114]

Courts weigh this factor against fair use when the infringement is a market substitute directly competing with the copyrighted work. In *Harper & Row*, Time Magazine contracted with the publishers of Ford's highly anticipated memoirs to print the first excerpts.[115] The Supreme Court found evidence of actual damage to Time when another magazine, without authorization, printed the "heart" of the memoirs.[116] The Court held that the unauthorized publication acted as a substitute by directly competing with Time and reducing the market for Time's subsequent excerpts.[117] Similarly, the Second Circuit found in favor of a Japanese business news organization after another company sold abstracts of the news organization's articles.[118] The market effect consideration weighed against fair use because the abstracts directly competed with and substituted the articles.[119] In an earlier case, the Second Circuit held that while a book containing episode summaries of the television series "Twin Peaks" was not a direct substitute for the show, it still had a significant effect on the market because someone who missed an episode could read the book rather than rent the video.[120]

Conversely, courts weigh this consideration in favor of fair use when the use would have zero impact or a positive impact on the market for the copyrighted work. In *National Rifle Ass'n of America v. Handgun Control Federation of Ohio*, petitioner mailed to its members a list of state legislators to call and voice opposition to an impending gun control bill.[121] Respondent copied that list, mailed it to its own members, and urged them to voice *support* for the bill.[122] The Sixth Circuit found that respondent was a nonprofit organization, the list had little value, and respondent made no attempts to sell it.[123] Accordingly, respondent's copies had no effect on the nonexistent market for the list.[124]

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[114] MCA, Inc. v. Wilson, 677 F.2d 180, 183 (2d Cir. 1981) (citations omitted).
[115] *Harper & Row*, 471 U.S. at 539.
[116] *Id.* at 564-65.
[117] *Id.* at 566-69.
[118] Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc., 166 F.3d 65 (2d Cir. 1999).
[119] *Id.*
[120] Twin Peaks Prods., Inc. v. Publ'ns Intern., Ltd., 996 F.2d 1366 (2d Cir. 1993).
[121] Nat'l Rifle Ass'n of Am. v. Handgun Control Fed'n of Ohio, 15 F.3d 559 (6th Cir. 1994), *cert. denied*, 513 U.S. 815 (1994).
[122] *Id.* at 560.
[123] *Id.* at 560-62.
[124] *Id.* at 562.

In *Nuñez v. Caribbean News Corp.*,[125] a newspaper printed copyrighted photographs, without authorization, as part of a front-page article. The First Circuit found that the reproductions were poor quality and not a market substitute for the actual photographs.[126] The court then found it unlikely that if the photographer prevailed, the newspaper would buy rights to print the photographs long after the story had passed.[127] Consequently, the First Circuit held that the impact of the newspaper's use on the market for the photographs was small, and might even result in positive publicity.[128]

In accordance with this second line of cases, Defendants could argue that their advertisement is not a market substitute for or in direct competition with Browne's music. A consumer interested in purchasing "Running on Empty" could not just as easily watch a replay of the television advertisement containing ten percent of the song.[129] If anything, the advertisement raised awareness of the song three decades after its initial release. Some viewers may be motivated to purchase it. As the Sixth Circuit put it, perhaps the advertisement "helped *create* a market" for the song.[130]

Browne can distinguish *National Rifle Ass'n* because that case involved a dispute between dueling lobbyists, not a third party musician unwillingly thrust into a polarized election. Additionally, *National Rifle Ass'n* does not address the potential financial backlash by Obama supporters who might have abandoned plans to buy Browne's music after hearing it in a McCain advertisement. However, the fair use statute explicitly limits the market impact consideration to the "potential market for or value of the *copyrighted work*."[131] *Nuñez* thus limited its analysis to the market for the photographs copied; as for the market for the photographer himself, "[t]he overall impact to Nuñez's business is irrelevant."[132]

Here, Defendants can argue that the lack of market substitutability and the potentially positive impact on the song's market parallels *National Rifle Ass'n* and *Nuñez*, supporting a finding of fair use for this portion of the market factor.

A court will then analyze the hypothetical effect of widespread use similar to Defendants' use, noting the effect on the

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[125] 235 F.3d 18 (1st Cir. 2000).
[126] Nuñez v. Caribbean Int'l News Corp., 235 F.3d 18, 24-25 (1st Cir. 2000).
[127] *Id.*
[128] *Id.*
[129] This is particularly true when the entire song is available (though not downloadable) on YouTube. *See* http://www.youtube.com/watch?v=bww2prhAWEA (last viewed October 30, 2009).
[130] *Nat'l Rifle Ass'n of Am.*, 15 F.3d at 562 (emphasis in original).
[131] 17 U.S.C. § 107(4) (2006) (emphasis added).
[132] *Nuñez*, 235 F.3d at 24.

market for derivative works[133] and licenses.[134] Observing that every fair use inherently involves lost royalty revenue because the user did not pay for a license,[135] courts weigh the license market consideration against fair use only when the license market is "traditional, reasonable, or likely to be developed."[136] In *American Geophysical Union v. Texaco Inc.*,[137] the Second Circuit found that academic journals lost license fees when the respondent photocopied their articles rather than purchasing copies in an online database such as LexisNexis. In two other cases, the Ninth Circuit and Southern District of New York both found that widespread unauthorized distribution of songs as mp3 files would harm the present and future market for authorized mp3s, even though the authorized mp3 market was not well established.[138] More closely matching the instant facts is *Zomba Enterprises, Inc. v. Panorama Records, Inc.*[139] There, a purveyor of karaoke albums duplicated the music and transcribed the lyrics of petitioner's copyrighted songs without authorization.[140] The Sixth Circuit held that because petitioner regularly sells licenses to its songs for use in karaoke albums, widespread use similar to respondent's would deprive petitioner of substantial license revenues.[141]

On the other hand, courts weigh the derivative market consideration in favor of fair use when the market for such licenses is

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[133] *Harper & Row*, 471 U.S. at 568 ("This inquiry [on widespread similar use] must take account not only of harm to the original but also of harm to the market for derivative works").

[134] Am Geophysical Union v. Texaco, Inc., 60 F.3d 913, 929 (2d Cir. 1994), *cert. dismissed*, 516 U.S. 1005 (1995) ("It is indisputable that, as a general matter, a copyright holder is entitled to demand a royalty for licensing others to use its copyrighted work, and that the impact on potential licensing revenues is a proper subject for consideration in assessing the fourth factor").

[135] *Am. Geophysical Union*, 60 F.3d at 930, n.17 (citing Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1124 (1990)). "[W]ere a court automatically to conclude in every case that potential licensing revenues were impermissibly impaired simply because the secondary user did not pay a fee for the right to engage in the use, the fourth fair use factor would *always* favor the copyright holder." *Id.* (emphasis in original).

[136] *Id.* at 929-30. *See also Campbell*, 510 U.S. at 592 ("The market for potential derivative uses includes only those that creators of original works would in general develop or license others to develop."); *Harper & Row*, 471 U.S. at 568 ("[A] use that supplants any part of the *normal* market for a copyrighted work would ordinarily be considered an infringement") (emphasis added) (quoting S. Rep. No. 473, 94th Cong., 1st Sess. 65 (1975)).

[137] 60 F.3d 913 (2d Cir. 1994).

[138] A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001); UMG Recordings, Inc. v. MP3.Com, Inc., 92 F. Supp. 2d 349 (S.D.N.Y. 2000).

[139] 491 F.3d 574 (6th Cir. 2007).

[140] Zomba Enters., Inc. v. Panorama Records, Inc., 491 F.3d 574 (6th Cir. 2007), *cert. denied*, 128 S. Ct. 2429 (2008).

[141] *Id.* at 583-84. *See also* Fitzgerald v. CBS Broad., Inc., 491 F. Supp. 2d 177 (D. Mass. 2007) (holding that when a television news program displayed a freelance photographer's photograph without authorization, widespread use would have a deleterious effect on the well-established and only market for such photographs).

nonexistent[142] or when the use is sufficiently transformative that it does not substitute or supersede the market for the original.[143] The Second Circuit found no harm to the derivative market when a photo owner admitted that she never published or licensed the photo after respondent's use, she never licensed any of her photos for visual art, and the value of the photo did not fall as the result of respondent's use.[144] Courts tend to find fair use in thumbnail images of larger copyrighted images because thumbnails often serve a different purpose than the original. Thumbnails of concert posters became historical artifacts in a graphic timeline,[145] and thumbnails of photographs help a search engine connect Internet users to the copyright owner's website.[146] Courts apply transformative use to music cases when the disputed use is a parody of the original song;[147] however, as previously discussed, Defendants cannot effectively argue parody here.[148]

Browne could argue that, like *Zomba*, here there is a clearly established, traditional market for licensed copies. Browne contracts with the American Society of Composers, Authors and Publishers (ASCAP) to sell licenses for "Running on Empty."[149] ASCAP routinely licenses the public performances of its 360,000 members' copyrighted works.[150]

Rather than paying the standard license to ASCAP, Defendants copied Browne's song on their own, causing a small loss in Browne's royalty revenue. Browne has a strong argument that if Defendants' use became commonplace, political campaigns would regularly circumvent and subsequently harm the traditional market for song licenses. Consequently, the court could find that this market consideration undermines the fair use defense.

C. *Fair Use Factor: Other Common Law Considerations*

At common law, courts consider the scope of fair use to be wider when the disputed use surrounds an issue of public concern

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[142] *See, e.g., Nat'l Rifle Ass'n of Am.*, 15 F.3d 559; Blanch v. Koons, 467 F.3d 244 (2d Cir. 2006).
[143] *Campbell*, 510 U.S. at 591. *See, e.g.*, Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605 (2d Cir. 2006); *Kelly*, 336 F.3d 811.
[144] *Blanch*, 467 F.3d at 258.
[145] *Bill Graham Archives*, 448 F.3d at 609.
[146] *Kelly*, 336 F.3d at 821-22.
[147] *See, e.g., Campbell*, 510 U.S. at 590-94 (1994); Abilene Music, Inc. v. Sony Music Entm't, Inc., 320 F. Supp. 2d 84, 93-94 (S.D.N.Y. 2003).
[148] *See supra* notes 77-84 and accompanying text.
[149] ASCAP ACE Title Search, http://www.ascap.com/ace/search.cfm?requesttimeout=300&mode=results&searchstr=480119413&search_in=i&search_type=exact&search_det=t,s,w,t,b,v&results_pp=10&start=1 (last visited Oct. 30, 2009).
[150] About ASCAP, http://www.ascap.com/about/ (last viewed Oct. 17, 2009).

such as a political debate.[151] In *National Rifle Ass'n*, the Sixth Circuit held that respondent's duplication of the legislator list was an exercise of its First Amendment rights to free speech and to petition the government.[152] The court found fair use in part because "[t]he scope of the fair use doctrine is wider when the use relates to issues of public concern."[153] Likewise, when a controversial minister copied a magazine's illustration lampooning him,[154] the Central District of California emphasized that "when an act of copying occurs in the course of a political, social or moral debate, the public interest in free expression is one factor favoring a finding of fair use."[155]

Defendants can argue that this consideration expands the scope of fair use here because their advertisement discussed energy policy in the context of a national presidential election. Defendants can argue that these are issues of public concern consistent with *National Rifle Ass'n* and its gun control debate. Accordingly, the court could find that this factor supports Defendants' argument that theirs was a fair use and not infringement.

D. *Aggregate Assessment of the Fair Use Factors*

The Supreme Court requires that "all [fair use considerations] are to be explored, and the results weighed together, in light of the purposes of copyright."[156] The purpose of copyright is to promote the advancement of art and science by barring unauthorized uses of artists' creations.[157] The purpose of the fair use exception is to promote the same advancement by permitting some unauthorized uses.[158]

Defendants have five arguments that support fair use. First, because the use occurred in the course of a national political campaign and addressed an issue of public concern, the scope of fair use is broad.[159] Second, Defendants' use is consistent with the statute's enumerated fair use purposes, including criticism, com-

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[151] *See Nat'l Rifle Ass'n of Am.*, 15 F.3d 559; Consumers Union of U.S., Inc. v. General Signal Corp., 724 F.2d 1044 (2d Cir. 1983), *cert. denied*, 469 U.S. 823 (1984) ("The scope of the [fair use] doctrine is undoubtedly wider when the information conveyed relates to matters of high public concern"); Hustler Magazine, Inc. v. Moral Majority, Inc., 606 F. Supp. 1526 (D.C. Cal. 1985), *aff'd*, 796 F.2d 1148 (9th Cir. 1986). *Cf. Harper & Row*, 471 U.S. at 560 (1985) (rejecting a complete exception to copyright protections when the subject is a public figure).

[152] *Nat'l Rifle Ass'n*, 15 F.3d 559.

[153] *Id.* at 562.

[154] *Hustler Magazine*, 606 F. Supp. 1526.

[155] *Id.* at 1536. *See also* Keep Thomson Governor Comm. v. Citizens for Gallen Comm., 457 F. Supp. 957 (D.C.N.H. 1978).

[156] *Campbell*, 510 U.S. at 578.

[157] *Id.* at 578-79.

[158] *See supra* notes 46-50 and accompanying text.

[159] *See supra* notes 151-155 and accompanying text.

ment and news reporting.[160] Third, the advertisement was non-commercial and Defendants did not profit from use of the song.[161] Fourth, the advertisement used only ten percent of "Running on Empty," a quantitatively small portion.[162] Fifth, the segment of the song in the ad is not a market substitute for the song itself.[163]

Browne has four arguments that oppose fair use. First, the enumerated statutory fair use purposes are "illustrative" only, and Defendants' use fails to meet the Supreme Court's requirement that a fair use promote progress in art or science.[164] Second, Defendants' use did not have transformative character; it was simple copying and editing.[165] Third, Defendants copied the heart of Browne's signature song, and qualitative analysis weighs more than quantitative analysis.[166] Fourth, unrestricted and widespread conduct similar to Defendants' would have a deleterious effect on substantial licensing fees in a traditional market.[167]

While Defendants have a greater number of arguments, courts have found more weight in Browne's arguments, particularly the issue of harm to the potential market.[168] Because the court will analyze all fair use considerations together in light of the purpose of copyright, and because both the purpose and considerations weigh more heavily against fair use, the court is likely to reject a fair use defense here.

II. FIRST AMENDMENT DEFENSE

Defendants could also argue that the advertisement is covered by the First Amendment's protections for political speech.[169] This argument is not likely to survive scrutiny as a defense to copyright violation. Multiple circuits have rejected a First Amendment defense separate from the protections afforded by fair use, holding that "except perhaps in an extraordinary case, 'the fair use doctrine encompasses all claims of first amendment in the copyright field.'"[170] An extraordinary case would be for something like

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[160] *See supra* notes 51-52 and accompanying text.
[161] *See supra* notes 59-65 and accompanying text.
[162] *See supra* notes 85-98 and accompanying text.
[163] *See supra* notes 109-132 and accompanying text.
[164] *See supra* notes 46-55 and accompanying text.
[165] *See supra* notes 66-84 and accompanying text.
[166] *See supra* notes 99-108 and accompanying text.
[167] *See supra* notes 133-150 and accompanying text.
[168] *See supra* notes 109-111 and accompanying text.
[169] U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech").
[170] Twin Peaks Prods., Inc. v. Publ'ns Intern., Ltd., 996 F.2d 1366, 1378 (2d Cir. 1993) (quoting New Era Publ'ns Int'l, ApS v. Henry Holt and Co., 873 F.2d 576 (2d Cir.1989), *cert. denied*, 493 U.S. 1094 (1990)). *See also* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1028 (9th Cir. 2001) ("First Amendment concerns in copyright are allayed by the presence of the fair use doctrine"); Roy Export Co. Establishment of Vaduz, Liechtenstein

the Zapruder film of the Kennedy assassination in which "it is at least arguable that the informational value of [the] film cannot be separated from the photographer's expression . . . indicating that both should be in the public domain."[171] In *Roy Export Co.*, the Second Circuit held that broadcasting clips from Charlie Chaplin films was not essential to a television news report of his death, considering how the public was familiar with his work and public domain films could accomplish the same objective.[172] Here, a court could find there is little informational value in "Running on Empty," the public is generally familiar with Browne's work, and the use of this particular song was not essential to Defendants' advertisement. Accordingly, the court could hold that this is not an exceptional case.

In such circumstances, a court will incorporate First Amendment considerations into the fair use defense and may then afford them substantial weight.[173] Defendants could thereby incorporate First Amendment protections for political speech into the purpose and character factor of the fair use defense.[174] Additionally, Defendants can argue that the scope of fair use expands for issues of public concern such the instant political debate.[175] Accordingly, the court could decide not to recognize the First Amendment as an independent defense to copyright infringement here.

Defendants could also consider a First Amendment defense to trademark infringement. Browne claims that the use of his song in the ad is a false endorsement meant to confuse voters into thinking that Browne supports McCain.[176] However, First Amendment defenses to false endorsement claims generally succeed only when the use does not imply endorsement[177] or when

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v. Columbia Broad. Sys., Inc., 672 F.2d 1095, 1099 (2d Cir. 1982), *cert. denied,* 459 U.S. 826 (1982) ("No Circuit that has considered the question, however, has ever held that the First Amendment provides a privilege in the copyright field distinct from the accommodation embodied in the 'fair use' doctrine"); Dallas Cowboy Cheerleaders, Inc. v. Scoreboard Posters, Inc., 600 F.2d 1184, 1187-88 (5th Cir. 1979); *Hustler Magazine*, 606 F. Supp. at 1536 ("[T]he first amendment does not provide a defense to copyright infringement").

[171] Iowa State Univ. Research Found., Inc. v. American Broad. Cos., Inc., 621 F.2d 57, 61 n.6 (2d Cir. 1980).

[172] *Roy Export Co.*, 672 F.2d at 1095.

[173] *See Twin Peaks*, 996 F.2d at 1378; *Consumers Union of U.S.*, 724 F.2d 1044 (holding that the purpose and character factor weighs in favor fair use after considering the First Amendment interest in conveying useful, factual information to consumers).

[174] *See Hustler Magazine*, 606 F. Supp. at 1536 (finding the purpose and character factor weighs in favor of fair use after considering the First Amendment interest in free debate concerning pornography and other social issues).

[175] *See supra* notes 151-155 and accompanying text.

[176] Complaint, *supra* note 1, ¶ 32-38.

[177] New Kids on the Block v. News America Pub., Inc., 971 F.2d 302 (9th Cir. 1992); *see also* Kournikova v. General Media Commc'ns Inc., 31 Media L. Rep. 1201 (C.D. Cal. 2002), *aff'd*, 51 Fed. Appx. 739 (2002) (finding that a magazine photograph falsely purporting to be tennis celebrity Anna Kournikova sunbathing on a nude beach was not false endorsement because the headline and context made clear that the individual did not pose voluntarily).

the defendant uses only the title of the work or the artist's name.[178] In *Waits v. Frito-Lay, Inc.*, respondent hired a Tom Waits sound-alike to record a parody song for a tortilla chip commercial.[179] The Ninth Circuit found sufficient evidence that consumers were likely to be misled into believing Waits endorsed the chips.[180] In *New Kids on the Block v. News America Publishing, Inc.*, a newspaper invited fans of a popular band to call a profit-generating 900 number and designate their favorite member.[181] There, the Ninth Circuit found no false endorsement because respondent did not mean to capitalize on consumer confusion; rather, its use was nominative because the trademark name was "the only word reasonably available to describe a particular thing."[182]

Browne could argue that contrary to *New Kids*, Defendants' use was more than nominative because they could have conveyed the same message without using Browne's persona. Here, voters are even more likely to be confused about Browne's endorsement than Waits' because the ad uses Browne's actual song rather than a parody song performed by a mimic. Accordingly, a First Amendment defense to false endorsement would be tenuous here.

Finally, Defendants could consider a First Amendment defense to Browne's right of publicity claim. A right of publicity claim turns on whether the defendant used the plaintiff's name or likeness to the defendant's advantage without consent, causing damage to the plaintiff.[183] In balancing the right of publicity with First Amendment rights, courts distinguish between "communicative" uses, in which free speech predominates, and "commercial" uses.[184] In *Zacchini v. Scripps-Howard Broadcasting Co.*,[185] a reporter filmed a fifteen-second human cannonball act at a county fair without authorization, then sold the footage to a local news station. The Supreme Court rejected a communicative news defense because showing the entire fifteen-second act harmed the market for live performances.[186]

Subsequently, lower courts began balancing free speech rights against publicity rights, with neither inherently trumping the other.[187] The Ninth Circuit found that using photos of surfing

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[178] *New Kids on the Block*, 971 F.2d 302; Rogers v. Grimaldi, 875 F.2d 994 (2d Cir. 1989).
[179] Waits v. Frito-Lay, Inc., 978 F.2d 1093, *cert. denied*, 506 U.S. 1080 (1993).
[180] *Id.*
[181] *New Kids on the Block*, 971 F.2d at 302.
[182] *Id.* at 308.
[183] Laws v. Sony Music Entm't, Inc., 448 F.3d 1134, 1138 (9th Cir. 2006), *cert. denied*, 549 U.S. 1252 (2007).
[184] J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 28:41 (4th ed. 2008).
[185] 433 U.S. 562 (1977).
[186] Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977).
[187] *See, e.g.,* ETW Corp. v. Jireh Publ'g, Inc., 332 F.3d 915 (6th Cir. 2003) (balancing right

celebrities in a surf-themed clothing catalog was commercial use ineligible for full First Amendment protection.[188] Conversely, in *Hoffman v. Capital Cities/ABC, Inc.*,[189] the Ninth Circuit held that superimposing actor Dustin Hoffman's head onto a photo of a fashion model did not violate Hoffman's publicity rights.[190] The court found the image was part of a communicative news article humorously mocking fashion and *not* a commercial use of Hoffman's identity to sell clothes.[191]

Citing *Hoffman*, Defendants could argue that they used "Running on Empty" to humorously comment on the news of Obama's energy policy and not to co-opt Browne's celebrity. Moreover, like the *Hoffman* article, the ad was noncommercial.[192] Consequently, the court could accept a First Amendment defense against the right of publicity violation.

CONCLUSION

Looking at all of the fair use factors together in light of the purpose of copyright, the *Browne v. McCain* court could find that the considerations do not support fair use here. Strict enforcement of copyright protections in these circumstances would not slow artistic progress; rather, it would encourage political campaigns to find innovative ways to convey their messages without the unauthorized use of copyrighted music. While using a song in the context of a noncommercial political debate weighs in favor of fair use, it cannot outweigh the fact that widespread similar use could devastate the traditional market for song licenses.

Defendants could put forth a separate First Amendment political speech defense, but it is likely to survive scrutiny only against the right of publicity violation. There, the combined weight of protected communicative news and protected humorous commentary could sustain a First Amendment defense.

The *Browne v. McCain* settlement deprived the court of an opportunity to clearly state that presidential campaigns cannot legally use copyrighted music in advertisements without authorization. In the silence, there is little to deter campaigns from the powerful temptation to boost their rallies and commercials by

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of publicity against First Amendment for prints of Tiger Woods' image); Cardtoons, L.C. v Major League Baseball Players Ass'n, 95 F.3d 959 (10th Cir. 1996) (balancing right of publicity against First Amendment for parody celebrity trading cards); Comedy III Prod., Inc. v. Gary Saderup, Inc., 25 Cal. 4th 387 (2001), *cert. denied*, 122 S. Ct. 806 (2002) (balancing right of publicity against First Amendment for depictions of celebrities on T-shirts).

[188] Downing v. Abercrombie & Fitch, 265 F.3d 994 (9th Cir. 2001).

[189] 255 F.3d 1180 (9th Cir. 2001).

[190] Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180 (9th Cir. 2001).

[191] *Id.*

[192] *See supra* notes 59-65 and accompanying text.

playing songs without thinking to pay for them. Until the courts correct this behavior, presidential candidates will continue to flout state and federal law in their quest to become America's chief law enforcers.

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