

TYPES NOT MAPPED YET July 26, 2016 | TTR not mapped yet | Mark Sableman

Political campaigns face copyright and robocall liabilities

Though it seems to come as a surprise to many of them, politicians — even presidential candidates — have to live with the same intellectual property and communications laws that bedevil the rest of us.

That means they're expected to respect copyrights and comply with telemarketing and text messaging rules, for example.

Copyright compliance seems to be a particular bugaboo in the political field. Practically every election year, candidates are accused of infringing music and other copyrights.

The Ted Cruz presidential campaign, for example, has been accused of copyright infringement through its repeated use in promotional materials of two recorded songs that were licensed on a no-political-use basis. So far, the case is not going well for the Cruz campaign. The court denied its motion to dismiss, and according to the allegations, the campaign continued to use the music even after receiving a written notice about the no-political-use license restriction.

The Cruz case involved Sarah Schachner's song, "Lens," and the Brad Couture song, "Fear of Complacency." According to the complaint, the Cruz campaign was perhaps more complacent than fearful, as it began using "Fear of Complacency" on YouTube before it ever licensed it. The campaign got caught, like so many infringers, by digital Internet searches that picked up its unauthorized use of watermarked digital files.

The case also sheds an interesting light on how political campaigns are perceived. The music licensing agency Audiosocket's standard music license prohibits use of its music "in pornographic work or for political purposes." (At least it distinguishes between the two.)

Music infringement claims seem to pop up every political season. The Huckabee campaign settled a case over its allegedly unlicensed use of the song, "Eye of the Tiger," after initially arguing that its playing of the song at a rally was fair use. In past years, other candidates have had to stop using that song and, at least in some cases, settle with the rights owner.

At times political campaigns have been charged with copyright or trademark infringement through their use of news footage. A court in St. Louis enjoined a political commercial that was made to look initially like a C-SPAN report; it consisted mostly of C-SPAN footage, with the network's logos prominently displayed. In another Missouri case, where a candidate used an excerpt from a news interview of the opposing candidate, the news organization sued but the candidate vigorously defended on fair use grounds.

If candidates stumble on copyrights, might other communications legal issues trip them up as well?

As they reach out to voters, they should take care to follow federal laws on communications to mobile telephones. Federal telemarketing and fax laws, written more than two decades ago, put special restrictions on calls to mobile phones, which in those days were relatively uncommon, and expensive to use. Today, mobile phones predominate, and the high per-call fees of the past are mostly gone. But the calling restrictions remain, and may frustrate politicians who want to reach supporters and potential supporters by text messages or automatic calls.

The Telephone Consumer Protection Act (TCPA) prohibits making "robocalls" (calls made using automatic dialing systems) to send voice or text messages. And there is no political exemption, as there is for calls to land lines (where political and charitable calls are permitted even for phone numbers listed on do-not-call lists). Nor is there any exemption for mere informational calls or texts.



Thus, political campaigns, like other marketers, need to obtain the prior express consent of the recipient before they can send unsolicited calls or text messages on a mobile phone – a difficult task, as commercial marketers can attest.

If political campaigns infringe copyrights, they will of course be subject to the Copyright Act's extensive damages regime, potentially involving statutory damages awards of up to \$150,000 per infringed work (which could be each different song used). And violations of the TCPA are often addressed in class actions seeking millions of dollars in relief.

Political campaigns, in short, may soon get a taste of the legal risks and penalties that ordinary marketers and communicators face every day.

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