DONALD TRUMP V. MICK AND KEITH: YOU CAN'T ALWAYS PLAY WHAT YOU WANT

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Back in June of 2015, on the day he launched his campaign for the Republican presidential nomination, Donald Trump rode down the escalator at the Trump Tower with the rock anthem "Rockin' in the Free World" blaring from all the speakers. While the rest of the audience listened to The Donald vow to Make America Great Again, we music lawyers waited for Neil Young to vow to **Make a Candidate Shamed Again**.

And we didn't have long to wait. Within 24 hours, Young's management company had formally objected, claiming that:**(a)** Trump did not have permission to use the song, **(b)** his use had created the false impression that Neil Young was endorsing Trump, and **(c)** "Neil Young, a Canadian citizen, is a supporter of Bernie Sanders for President of the United States of America." Predictably, The Donald took to Twitter to blast Neil Yong as "a total hypocrite" and to dismiss the song as not one of his favorites.

> *.@Neilyoung's song, "Rockin' In The Free World" was just one of 10 songs used as background*

> *music. Didn't love it anyway.*
>
> *— Donald J. Trump (@realDonaldTrump) June 24, 2015*

That day marked the beginning of The Donald's disputes with musicians. A few months later, the band R.E.M., sued Trump and Ted Cruz for $2.5 million over their use of the band's 1987 hit "It's the End of the World as We Know It (And I Feel Fine)," which played as the two candidates, during their short-lived bromance, stepped to the podium at a rally. Michael Stipe, the band's frontman, in an obscenity-laced screed via their bassist Mike Mill's Twitter, told the two politicos: "Do not use our music or my voice for your moronic charade of a campaign."

> *Personally, I think the Orange Clown will do anything for attention. I hate giving it to him.*
>
> *— Mike Mills (@m_millsey) September 9, 2015*

Later this Spring, The Donald celebrated his victory in the Indiana primary by swaggering onstage to the sound of the Rolling Stones' "Start Me Up"—which certainly started up the band, whose angry publicist informed CNN that "The Rolling Stones have never given permission to the Trump campaign to use their songs and have requested that they cease all use immediately."

Trump refused to be trumped. At the conclusion of his acceptance speech at the Republican National Convention in Cleveland—and just the day after the George Harrison estate had denounced him for the unauthorized playing of "Here Comes the Sun" in the introduction to Melania's speech—Trump basked in the Rolling Stones' "You Can't Always Get What You Want," whose lyrics seemed to many an ironic coda to the celebration.

> *The unauthorized use of #HereComestheSun at the #RNCinCLE is offensive & against the wishes of the George Harrison estate.*
>
> *— George Harrison (@GeorgeHarrison) July 22, 2016*

In any event, the Rolling Stones certainly did not get what they wanted, choosing instead to tweet: "The Rolling Stones do not endorse Donald Trump.'You Can't Always Get What You Want' was used

without the band's permission."

So what exactly is going on here?

Although each of the songs at issue is protected by copyright, a claim of infringement is typically not the issue with the candidate's use of a particular song. That's because the public broadcast of those songs during a live event is generally covered by a blanket license authorizing the very broadcast that triggers the objections from the musicians. The copyright license for those events is a cousin of the licenses that allow that cover band or DJ to play all of those same songs at your last wedding party or in your favorite nightclub.

Most campaign organizations are savvy enough to confirm that the venue where their candidate will appear has obtained the appropriate license. Although some campaigns—notably Ted Cruz's—have been sued for using songs in campaign ads that were licensed on a no-political-use basis, the Cruz lawsuit is the exception.

Instead, the intellectual property rights typically asserted arise not from the songwriter's musical notes but from their identities. Specifically, the artists claim a "false endorsement" in violation Section 43(a) of the Lanham Act, which is the federal statute that covers false advertising. They contend that the association of the artist with the politician creates, in the words of the statute, a "likelihood of confusion" based upon a misleading "association… with another person . . .as to the origin, sponsorship, or approval of his or her goods services.

So, too, the artist could claim of violation of the artist's "right of publicity"—a right in most states that prohibits the use of an individual's name, likeness, or identity for commercial purposes without that person's consent. Thus a candidate's use of a song without permission—especially one that is strongly identified with the songwriter—could constitute a violation of the artist's publicity rights.

These claims usually arise in the classic commercial context. A good example: the musician Tom Waits sued Frito-Lay and its ad agency over a radio commercial for SalsaRio Doritos that featured a jingle sung in a dead-on impersonation of Waits' haggard-voiced bluesy style—so close, in fact, that when Waits first heard the ad he feared that he'd recorded it in a drunken blackout in violation of his famous no-commercial vow. The evidence at trial proved that the Waits impression was intentional, and Frito-Lay ended up on the losing end of a $2.6 million verdict.

But unlike the Waits claim, the songwriter disputes with Trump reside somewhere along the First Amendment border. That's because protection for freedom of expression is particularly robust in the context of politics, and especially in election contests. For example, the California statute governing the right of publicity in that state, Cal. Civil Code § 3344, contains the following exemption:

> *"use of a name, voice, signature, photograph, or likeness in connection with . . . any political campaign shall not constitute a use for which consent is required under ."*

That exemption would apply if say, Trump's campaign created an ad using Hillary Clinton's name, photograph, voice, or likeness. He doesn't need her permission to use her identity. By contrast, it wouldn't apply if Trump ran an ad falsely representing that, say, George Clooney or Michael Jordan endorsed him. But as for a false endorsement claim by an angry musician over use her song as the theme song of a candidate's campaign—well, that issue falls in the gray zone.

While this unresolved issue has been out there since at least 1984, when Bruce Springsteen objected to use of "Born in the USA" in Ronald Reagan's presidential campaign, the risks to the politician have become, to paraphrase The Donald, so **YUGE** that the American Society of Composers, Artists, and Publishers (ASCAP), the leading U.S. performing artists rights organization and thus the licensor of millions of songs, includes an FAQ page on the use of music in political campaigns that, among other things, flags these very issues.

Whether this will be the campaign year that the issue finally ends up in court is anyone's guess. But until that happens, the use of a theme song for a campaign without the songwriter's permission is, to quote Mick and Keith, just "Tumbling Dice" that may end up with a campaign manager pleading to "Gimme Shelter."