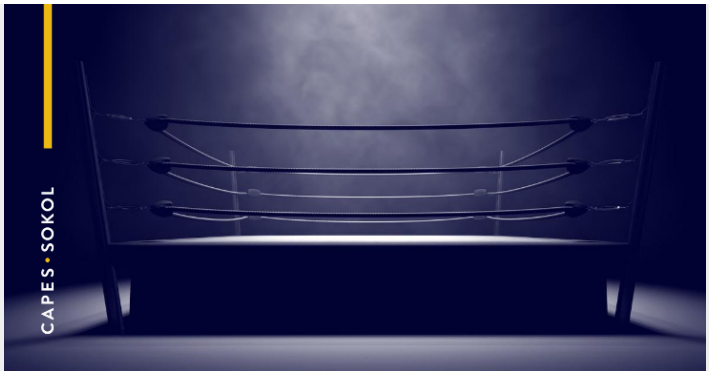
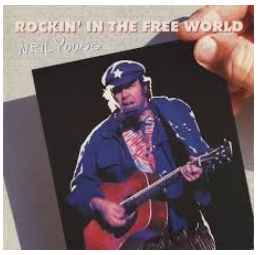
THIS LAWSUIT'S FOR YOU: NEIL YOUNG V. DONALD TRUMP IN THE COPYRIGHT INFRINGEMENT RING

Posted on August 11, 2020 by Pete Salsich



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Rocker Neil Young has re-invented himself many times throughout his long and illustrious career – from his earliest days as a solo artist in Canada and Los Angeles, to his time with super groups Buffalo Springfield and CSNY, many years of rocking on and off with Crazy Horse, a patch of New Wave on his Trans album, Rockabilly with The Shocking Pinks, and a return to prominence as the Godfather of Grunge.



He's an activist and a philanthropist, was a founding force behind Farm Aid and the Bridge School Concert and is still recording and releasing music today. Throughout it all, however, he has remained true to a guiding principle – he doesn't allow his music to be used to sell things, products OR political campaigns.

He removed any doubt about where he stood on this issue over 30 years ago with his 1988 song *This Note's For You*, skewering other artists as shills for corporate America in a scathing video which was initially banned on MTV, but ultimately won Video of the Year. He followed that up a year later with

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his classic *Rockin' in the Free World* – a blistering criticism of what the "free world" of Ronald Reagan and George Bush left behind.

Like a Hurricane:

Neil Young v. Donald Trump

Which brings us to 2020 and the Donald Trump reelection campaign, which has been playing *Rockin' in the Free World* and another Neil Young song, *Devil's Sidewalk*, at campaign rallies, including the controversial June 20th rally in Tulsa.


(SAUL LOEB/AFP)

Trump has used this song before – all the way back to during his descent on an escalator in 2015 announcing his candidacy – and Young did not like it then either. Until recently, however, he had chosen not to file suit, instead writing a letter to President Trump in July after another one of his songs was played by the Trump campaign at a rally hosted at Mt. Rushmore. But when Trump sent federal military into Portland to battle protestors, Young reconsidered.

Shortly before filing suit, Young posted his feelings about Trump's use of his song:

> *"Imagine what it feels like to hear 'Rockin' in the Free World' after this President speaks, like it is his theme song. I did not write it for that."*

Being connected to the Trump campaign finally became just too much for old Neil, so on August 4, he filed suit for copyright infringement.

It's easy-to-understand Young's position. Regardless of where you stand politically, if a candidate's message is contrary to an artist's position, the artist likely would not want their songs used by the candidate. Many artists have complained about such use, especially this year. But is such use copyright infringement?

Lookin' for a Leader:

The American Society of Composers, Authors and Publishers

At issue in this case is whether the public performance of Young's songs is covered by a blanket license obtained by the Trump campaign. The American Society of Composers, Authors and Publishers (ASCAP) is a performing rights organization (PRO) that licenses millions of songs. Young's songs are licensed by ASCAP. Political campaigns can obtain a specific blanket license from ASCAP to use the songs in the ASCAP library. Trump's campaign claims to have such a license.

But ASCAP's published guidelines for Using Music in Political Campaigns appear to contain an opt-out for artists who don't want their music used by candidates.

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The guidelines state:

> ***"What Music is Covered by the ASCAP License for Political Campaigns?"***
>
> *The ASCAP Political Campaign License agreement provides a blanket license to perform any or all of the millions of compositions in the ASCAP repertory. However, ASCAP members may ask ASCAP to exclude specific songs from a particular political campaign's license. In that event, ASCAP will notify the campaign of the excluded works.*

While Young's complaint does not state whether he has requested that his songs be excluded from the blanket license for political campaigns, the day after the suit was filed an ASCAP representative confirmed that the songs in question were in the ASCAP library and that Young had requested they be excluded.

However, it's not clear whether Young's exercise of the ASCAP opt-out request would stand up in court because it may be contrary to the terms of an almost 80-year-old antitrust consent decree.

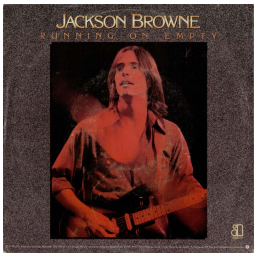
Prisoners of Rock and Roll*:*

80-year-old Antitrust Consent Decree

Back in the 1940s when only the underlying musical composition of a song was legally recognized under copyright law, publishing companies and PRO's like ASCAP truly controlled access to almost all music. In an antitrust action, the Department of Justice entered into a Consent Decree with ASCAP which requires ASCAP to provide licenses to all of its songs to services and venues on equivalent terms if the requesting party pays the license fees.

Whether that consent decree provision for all songs would trump (*pun intended*) ASCAP's opt-out provision for specific songs has never been tested in court, and it's not clear how it the case would come out.

This case differs from Jackson Browne's copyright infringement suit against the John McCain campaign in 2008 over the use of Browne's song *Running on Empty*, as that involved the use of the song in a television commercial – a use that clearly required a synchronization license which Browne had not granted.



Interestingly, ASCAP's guidelines also state that even if an artist's songs are covered by the blanket license, an artist may still have claims for violation of their Right of Publicity or False Endorsement under the Lanham Act. Maybe, but under the Supreme Court's *Dastar* decision, the Copyright Act's complete preemption prevents copyright owners from using the Lanham Act and other causes of action to get around deficiencies in their copyright claims. So far, Young has only sued for copyright infringement, perhaps because of *Dastar*.

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Stay tuned for the Trump Campaign's Answer – that might tell us a lot about how this will go.

In the meantime, keep on rockin!

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