

## POLITICAL FAIR USE

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### ABSTRACT

*During election season, politicians and political campaigns often use pop culture or iconic works, such as viral memes or popular songs, to help convey their political messages—often without authorization from the copyright owners of these works. As politics and politicians become ever more divisive, these unauthorized political uses of copyrighted works can be particularly objectionable to copyright owners. In addition to offending their political or moral inclinations, artists and copyright owners frequently claim that these political uses infringe their copyrights. Politicians and campaigns argue that their right to use copyrighted works for political purposes is protected by the First Amendment and that such political uses are presumptively fair use. This Article examines unauthorized political uses of copyrighted works under copyright law's fair use doctrine to demonstrate that, in fact, both sides are correct.*

*Through a series of case studies, this Article identifies a pattern in political fair use decisions: in disputes arising from the unauthorized*

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*political uses of copyrighted works, courts appear to implicitly modify their analyses and balancing of the fair use factors under section 107 of the Copyright Act in order to both accommodate the import of political speech and to respect copyright owners' dignity and rights to control use of their expressive works. Under the courts' political fair use analysis, one determination—the nature of the original copyrighted work—seems to exert an outsized influence on the determination of all four fair use factors, permitting certain unauthorized political uses of copyrighted works to appear presumptively fair. This contradicts the Supreme Court's guidance to courts not to subject copyright to independent First Amendment review nor to expand copyright's fair use doctrine in infringement cases involving political or public figures. It also disregards certain copyright owners' right to control use of their work but permits other copyright owners the right to curtail infringing behavior that causes no market harm. This Article highlights these concerns and explores the normative implications of political fair use on litigation certainty and predictability, incentives to create political expressive works, and the balance between respecting creators' dignity and rights to control use of their expressive works with guaranteeing free and open discussion of politicians and political candidates.*

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## INTRODUCTION

It seems almost monthly a politician or political campaign is accused of copyright infringement. News headlines such as “Trump’s Video Taken Off Twitter After Band Nickelback Complains,”<sup>1</sup> “Mother of ‘Success Kid’ Demands Steve King Stop Using His Meme,”<sup>2</sup> and “Warner Bros. Shut Down Trump’s 2020 Video for Using the ‘Dark Knight Rises’ Score”<sup>3</sup> represent just a handful of recent examples. In order to reach voters, politicians and political campaigns use pop culture or iconic works, including viral memes, iconic movie clips, or popular songs, to convey their political messages—often without authorization from the copyright owners of these works. As politics and politicians become ever more divisive, these unauthorized political uses of copyrighted works, especially uses by polarizing politicians, can be particularly objectionable to copyright owners.

In response to these unauthorized political uses of their works, copyright owners publicly condemn these uses on social media,<sup>4</sup> rely on the Digital Millennium Copyright Act’s (DMCA) notice and takedown process to have these objectionable uses removed,<sup>5</sup> send cease-and-desist letters threatening politicians with infringement suits,<sup>6</sup> and sometimes file copyright infringement actions against politicians and political campaigns for their unauthorized political

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1. Alex Hern, *Trump’s Video Taken Off Twitter After Band Nickelback Complains*, GUARDIAN (Oct. 3, 2019, 5:31 AM), <https://www.theguardian.com/us-news/2019/oct/03/donald-trump-video-taken-off-twitter-copyright-nickelback> [<https://perma.cc/U3FY-RTS6>].

2. Alan Yuhas, *Mother of “Success Kid” Demands Steve King Stop Using His Meme*, N.Y. TIMES (Jan. 28, 2020), <https://www.nytimes.com/2020/01/28/us/politics/steve-king-success-kid-meme.html> [<https://perma.cc/32TX-BDTB>].

3. Adam B. Vary, *Warner Bros. Shut Down Trump’s 2020 Video for Using the “Dark Knight Rises” Score*, BUZZFEED NEWS (Apr. 10, 2019, 2:06 AM), <https://www.buzzfeednews.com/article/adambvary/donald-trump-the-dark-knight-rises-warner-bros> [<https://perma.cc/J46Q-8WXW>].

4. See, e.g., Morgan Gstalter, *Brendon Urie Tells Trump Campaign to Stop Using Panic! At The Disco Songs at Rallies*, HILL (June 24, 2020, 7:33 AM), <https://thehill.com/homenews/campaign/504250-brendon-urie-tells-trump-campaign-to-stop-using-panic-at-the-disco-songs-at> [<https://perma.cc/AY94-TZH4>].

5. See, e.g., *Linkin Park Take Action After Donald Trump Retweet*, BBC NEWS: NEWSBEAT (July 20, 2020), <https://www.bbc.com/news/newsbeat-53469855> [<https://perma.cc/77SR-6GW6>].

6. See, e.g., *id.*

uses of copyrighted content.<sup>7</sup> This practice has become so pervasive, especially during election seasons, that it is not unusual for one single politician or political campaign to face multiple copyright complaints from multiple copyright owners. In a span of just one month, Tom Petty,<sup>8</sup> Panic! At The Disco,<sup>9</sup> The Rolling Stones,<sup>10</sup> Neil Young,<sup>11</sup> and Linkin Park<sup>12</sup> all publicly denounced and demanded that Donald Trump cease using their music to promote his 2020 reelection campaign. Additionally, during John McCain's 2008 presidential campaign against Barack Obama, at least five different artists, including Heart, John Mellencamp, Boston, Van Halen, and Jackson Browne, demanded that McCain and his campaign cease using their original copyrighted songs to promote McCain's political campaign.<sup>13</sup> During Sharron Angle's 2010 campaign for U.S. Senate against Harry Reid, Angle was both on the giving and receiving end of copyright infringement accusations: she accused her opponent of reproducing her old campaign webpage without her authorization,<sup>14</sup> Righthaven sued her for reposting two news articles on her campaign website,<sup>15</sup> and Hasbro accused her of copyright infringement

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7. See, e.g., Devon Ivie, *The Ongoing History of Musicians Saying "Hell No" to Donald Trump Using Their Songs*, VULTURE (Oct. 27, 2020), <https://www.vulture.com/article/the-history-of-musicians-rejecting-donald-trump.html> [<https://perma.cc/EH5Z-3MQM>]; Complaint, Griner v. King, No. 20-CV-3848 (D.D.C. Dec. 30, 2020).

8. Tom Petty (@tompetty), TWITTER (June 20, 2020, 10:22 PM), <https://twitter.com/tompetty/status/1274527971513004033/photo/1> [<https://perma.cc/6WV2-V8KC>].

9. Gstalter, *supra* note 4.

10. Alex Young, *The Rolling Stones Threaten to Sue Donald Trump over Unauthorized Use of Their Music*, CONSEQUENCE OF SOUND (June 27, 2020, 4:44 PM), <https://consequenceofsound.net/2020/06/the-rolling-stones-trump-lawsuit/> [<https://perma.cc/EFF8-XQYE>].

11. *Neil Young Objects to Donald Trump Using His Songs at Mount Rushmore Event: 'This Is NOT OK with Me'*, DAILY MAIL (July 4, 2020, 3:44 AM), <https://www.dailymail.co.uk/tvshowbiz/article-8489097/Neil-Young-objects-Donald-Trump-using-songs-Mount-Rushmore-event.html> [<https://perma.cc/U5ED-EZMV>].

12. See *Linkin Park Take Action After Donald Trump Retweet*, *supra* note 5.

13. Claire Suddath, *John McCain: Take a Chance on Me; Barracuda*, TIME, [http://content.time.com/time/specials/packages/article/0,28804,1840981\\_1840998\\_1840943,00.html](http://content.time.com/time/specials/packages/article/0,28804,1840981_1840998_1840943,00.html) [<https://perma.cc/X7TE-2SKE>].

14. Max Fisher, *Inside Harry Reid and Sharron Angle's Internet War*, ATLANTIC (July 7, 2010), <https://www.theatlantic.com/politics/archive/2010/07/inside-harry-reid-and-sharron-angle-s-internet-war/344953/> [<https://perma.cc/QKS6-8PQV>].

15. Steve Green, *Sharron Angle Hit with R-J Copyright Infringement Lawsuit*, VEGAS INC (Sept. 3, 2010, 7:50 PM), <https://vegasinc.lasvegassun.com/business/legal/2010/sep/03/sharron-angle-hit-r-j-copyright-lawsuit/> [<https://perma.cc/4SGY-2L6V>].

for her use of the Monopoly game imagery to criticize Reid.<sup>16</sup> But are unauthorized political uses of copyrighted works infringement? Are politicians or political campaigns immune to copyright infringement claims under the First Amendment? How do courts balance copyright owners' exclusive rights under copyright law with the public's interest in free and open discussion of politicians and political candidates? This Article examines the unauthorized political uses of copyrighted works under copyright law's fair use doctrine to answer these questions and more.

A major purpose of the First Amendment is to protect citizens' right to discuss governmental affairs and candidates running for public office.<sup>17</sup> While political speech occupies a privileged space under the First Amendment, the Supreme Court has held that an independent First Amendment analysis is unnecessary in cases involving copyright infringement,<sup>18</sup> with most lower courts abiding by this guidance.<sup>19</sup> Even though copyright essentially functions as a state-granted monopoly suppressing others from exercising full expression,<sup>20</sup> courts almost uniformly recognize that the Copyright Act has built-in First Amendment safeguards, including the fair use doctrine.<sup>21</sup> In light of the First Amendment safeguards already embodied in the Copyright Act, the Supreme Court has declined to create a separate public figure or political speech exception to copyright.<sup>22</sup>

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16. Amanda Terkel, *Sharron Angle Gets Cease and Desist Letter from Hasbro over 'Harry Reid's Amnesty Game'*, HUFFPOST (May 25, 2011), [https://www.huffpost.com/entry/sharron-angle-hasbro-ceasedesist\\_n\\_777107](https://www.huffpost.com/entry/sharron-angle-hasbro-ceasedesist_n_777107) [<https://perma.cc/4RKY-36E6>].

17. *Mills v. Alabama*, 384 U.S. 214, 218 (1966).

18. See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556-60 (1985).

19. See, e.g., *TD Bank N.A. v. Hill*, 928 F.3d 259, 284 (3d Cir. 2019); *New Era Publ'ns Int'l v. Henry Holt & Co.*, 873 F.2d 576, 584 (2d Cir. 1989).

20. Margaret Chon, *Copyright's Other Functions*, 15 CHI.-KENT J. INTELL. PROP. 364, 364 (2016).

21. See, e.g., *Harper & Row*, 471 U.S. at 560; *A&M Recs., Inc. v. Napster, Inc.*, 239 F.3d 1004, 1028 (9th Cir. 2001); *Eldred v. Reno (Eldred I)*, 239 F.3d 372, 376 (D.C. Cir. 2001), *aff'd sub nom. Eldred v. Ashcroft (Eldred II)*, 537 U.S. 186 (2003); *Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc.*, 166 F.3d 65, 74 (2d Cir. 1999) ("We have repeatedly rejected First Amendment challenges to injunctions [against] copyright infringement on the ground that First Amendment concerns are protected by and coextensive with the fair use doctrine."); *L.A. News Serv. v. Tullo*, 973 F.2d 791, 795-96 (9th Cir. 1992).

22. *Harper & Row*, 471 U.S. at 560.

Nevertheless, through a series of case studies, this Article identifies a pattern in political fair use decisions: in disputes arising from the unauthorized political uses of copyrighted works, courts appear to implicitly modify their analyses and balancing of the fair use factors under section 107 of the Copyright Act in order to both accommodate the import of political speech and to respect copyright owners' dignity and rights to control objectionable uses of their expressive works. Under the courts' political fair use analysis, one determination—the nature of the original copyrighted work—seems to exert an outsized influence on the determination of all four fair use factors, permitting certain unauthorized political uses of copyrighted works to appear presumptively fair. This Article examines political fair use and potential issues and concerns with political fair use by proceeding as follows: Part I provides a high-level overview of the intersection and conflict between the First Amendment, political speech, and copyright law. Part II defines “political use” and examines disputes, litigation, and motivations involving unauthorized political uses of copyrighted works. Part III analyzes litigated fair use decisions in political use cases and identifies a pattern of political fair use in which courts implicitly modify their analyses of the fair use factors in cases arising from political uses of copyrighted works. This pattern appears to allow the determination of one factor, the nature of the copyrighted work, to influence consideration of all of the fair use factors. Finally, Part IV examines the normative implications of political fair use decisions, including implications on litigation certainty and predictability, incentives to create, censorship of political expression, and authorial dignity and autonomy.

## I. COPYRIGHT, POLITICAL SPEECH, AND THE FIRST AMENDMENT

The Supreme Court has explained that “[t]he First Amendment ‘has its fullest and most urgent application to speech uttered during a campaign for political office.’”<sup>23</sup> While the First Amendment

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23. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 339-40 (2010) (quoting *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989)); *see also* *Buckley v. Valeo*, 424 U.S. 1, 15 (1976) (per curiam) (“[I]t can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political

generally provides that “Congress shall make no law ... abridging the freedom of speech, or of the press,”<sup>24</sup> it is undisputed that *political* speech occupies a privileged space under the First Amendment. The Court has expressed on numerous occasions that a major purpose of the First Amendment is “to protect the free discussion of governmental affairs ... includ[ing] discussions of candidates.”<sup>25</sup> In order to maintain the vitality of our democratic institutions, “[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution,” and these debates must be “uninhibited, robust, and wide-open.”<sup>26</sup> Therefore, the Court has ordered that “political speech must prevail against laws that would suppress it, whether by design or inadvertence.”<sup>27</sup>

Copyright law appears in conflict with the First Amendment. The Copyright Act essentially confers upon copyright owners “a governmentally granted means to prevent others from exercising full expression.”<sup>28</sup> When it comes to copyright disputes involving the potential to suppress political expression, the court in *Keep Thomson Governor Committee v. Citizens for Gallen Committee* warned:

[T]he Court must be aware that it operates in an area of the most fundamental First Amendment activities. Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution.... Although First Amendment protection is not confined to the exposition of ideas, there is practically universal agreement that the major purpose of that Amendment was to protect the free discussion of governmental affairs, including discussions of candidates.... In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential,

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office.” (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)).

24. U.S. CONST. amend. I.

25. *Mills v. Alabama*, 384 U.S. 214, 218 (1966); *see also* *Mia. Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 257 (1974) (quoting *Mills*, 384 U.S. at 218).

26. *Buckley*, 424 U.S. at 14 (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

27. *Citizens United*, 558 U.S. at 340.

28. *Chon*, *supra* note 20, at 364.

because the identities of those who are elected will inevitably shape the course that we follow as a nation.<sup>29</sup>

At the same time, courts have explained that the Copyright Act and the First Amendment were, in fact, “drafted to work together” to encourage creation and dissemination of speech and expression.<sup>30</sup> Courts have explained that “the laws of the Copyright Act already embrace First Amendment concerns,”<sup>31</sup> and one court even made the (later rejected) claim that therefore “copyrights are categorically immune from challenges under the First Amendment.”<sup>32</sup> Even in copyright disputes involving the potential suppression of works of public interest, courts find that a separate First Amendment analysis is unnecessary because the Copyright Act already embodies First Amendment safeguards.<sup>33</sup> These safeguards include copyright’s distinction between copyrightable expression and uncopyrightable facts and ideas and—most importantly for this Article—copyright law’s fair use doctrine.<sup>34</sup> This means that, even in infringement actions involving political speech or public figures, courts have refused to expand the doctrine of fair use to create a political use or public figure exception in copyright law.<sup>35</sup> In *Peterman v. Republican National Committee*, for instance, the court confirmed this position when it explained:

The RNC asks the Court to go several steps further, arguing that its use of the [copyrighted] Work to further a political message is entitled to First Amendment protection above and beyond that built into the Copyright Act. However, the fair use

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29. 457 F. Supp. 957, 959-60 (D.N.H. 1978) (citing *Buckley*, 424 U.S. at 14-15).

30. *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1263 (11th Cir. 2001).

31. *Religious Tech. Ctr. v. Henson*, Nos. 97-16160, 98-16146, 1999 WL 362837, at \*1 (9th Cir. June 4, 1999).

32. The D.C. Circuit made this statement in *Eldred I*, 239 F.3d 372, 375 (D.C. Cir. 2001), which was later rejected by the Supreme Court in *Eldred II*, 537 U.S. 186, 221 (2003) (“[T]he D.C. Circuit spoke too broadly when it declared copyrights ‘categorically immune from challenges under the First Amendment.’”).

33. See *Harper & Row, Publishers, Inc., v. Nation Enters.*, 471 U.S. 539, 560 (1985).

34. See *Eldred II*, 537 U.S. at 219; *Harper & Row*, 471 U.S. at 560; *Suntrust Bank*, 268 F.3d at 1263.

35. See, e.g., *Harper & Row*, 471 U.S. at 555-56, 560 (rejecting Nation Enterprises’ contention that “First Amendment values require a different rule ... ‘when the information conveyed relates to matters of high public concern’” (quoting *Consumers Union of the U.S., Inc. v. Gen. Signal Corp.*, 724 F.2d 1044, 1050 (2d Cir. 1983))).

defense is itself a “built-in First Amendment accommodation,” and the RNC cites to no precedent supporting its position that the First Amendment demands an additional layer of protection.<sup>36</sup>

While most courts reaffirm the position that they need not apply separate First Amendment analyses or special fair use exceptions in copyright infringement disputes, including disputes involving unauthorized political uses of copyrighted works,<sup>37</sup> some court decisions emphasize the importance of First Amendment concerns in these political copyright cases.<sup>38</sup> Several scholars have questioned whether copyright’s built-in accommodations, including fair use, in fact serve to safeguard free expression from copyright’s censorship.<sup>39</sup> Regardless, most courts appear to follow the Supreme Court’s guidance on not creating a separate First Amendment analysis or a special free speech exception in copyright infringement cases, even in cases arising from the unauthorized political uses of copyrighted works.

## II. POLITICAL USES OF COPYRIGHTED WORKS

This Article defines “political use” as the use of original copyrighted works by politicians or about politicians. Specifically, political use of a copyrighted work occurs when a politician or political candidate uses another’s creative expression to express political speech or when a person or party uses another’s creative expression to speak about a politician or candidate. These instances include a politician’s use of a popular copyrighted meme to seek

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36. *Peterman v. Republican Nat’l Comm.*, 369 F. Supp. 3d 1053, 1062 n.4 (D. Mont. 2019) (quoting *Eldred II*, 537 U.S. at 219)

37. *See id.*; *see also* Jennifer E. Rothman, *Liberating Copyright: Thinking Beyond Free Speech*, 95 CORNELL L. REV. 463, 482 (2010).

38. *See, e.g.*, *Keep Thomson Governor Comm. v. Citizens for Gallen Comm.*, 457 F. Supp. 957, 959-60 (D.N.H. 1978).

39. *See, e.g.*, Rebecca Tushnet, *Copyright as a Model for Free Speech Law: What Copyright Has in Common with Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation*, 42 B.C. L. REV. 1, 7 (2000) [hereinafter Tushnet, *Copyright as a Model*]; Rebecca Tushnet, *Essay, Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 545 (2004); Joseph P. Bauer, *Copyright and the First Amendment: Comrades, Combatants, or Uneasy Allies?*, 67 WASH. & LEE L. REV. 831, 873 (2010).

campaign contributions,<sup>40</sup> a political committee’s use of a same-sex engagement photo to criticize a candidate’s policies,<sup>41</sup> a political candidate’s use of a popular commercial advertisement to promote his campaign,<sup>42</sup> or a politician’s use of an iconic song to criticize his opponents.<sup>43</sup> This Article’s definition of “political use” excludes disputes involving the use of copyrighted works to promote or criticize public policies or political advocacy,<sup>44</sup> to criticize public

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40. See, e.g., Yuhas, *supra* note 2; *infra* Part II.A.

41. See, e.g., Hill v. Pub. Advoc. of the U.S., 35 F. Supp. 3d 1347 (D. Colo. 2014); *infra* Part II.A.

42. See *infra* Part II.D.

43. See *infra* Part II.B.

44. For example, in 2018, artist Anish Kapoor sued the National Rifle Association for copyright infringement for including an image of Kapoor’s famous Chicago sculpture, Cloud Gate (The Bean), in its video titled “The Violence of Lies.” Sopan Deb, *N.R.A. to Pull Image of Sculpture from Its Video*, N.Y. TIMES (Dec. 6, 2018), <https://www.nytimes.com/2018/12/06/arts/design/anish-kapoor-nra-bean.html> [<https://perma.cc/56JS-YQWP>]. The video featured a spokesperson speaking directly into the camera, “excoriating liberals for ‘using their media to assassinate real news’” and “us[ing] their ex-president to endorse the Resistance,” while featuring an image of Kapoor’s sculpture. *Id.* Similarly, in *Wojnarowicz v. American Family Ass’n*, artist David Wojnarowicz sued the American Family Association for copyright infringement for publishing a pamphlet featuring his art. 745 F. Supp. 130, 133-34 (S.D.N.Y. 1990). The pamphlet’s purpose was to stop public funding by the National Endowment for the Arts of art works, such as Wojnarowicz’s, featured in the pamphlet. *Id.* at 134. Another example is *Northland Family Planning Clinic, Inc. v. Center for Bio-Ethical Reform*, in which the Northland Family Planning Clinic sued defendants for using Northland’s videos—which were created to destigmatize abortion—in defendants’ antiabortion videos. 868 F. Supp. 2d 962, 966 (C.D. Cal. 2012). Defendants’ videos were created by copying verbatim clips from Northland’s videos and cutting them with “graphic, up-close images of the surgical procedure of dismembering and removing fetuses.” *Id.* at 967. Similarly, in *Worldwide Entertainment Corp. v. Club for Growth*, the plaintiff sued The Club for Growth for infringing its movie *The Blob* by creating a thirty-second video advertisement, *The Tax Blob*, “alerting viewers to the threat to growth posed by record high federal taxes.” No. 01-cv-07279, slip op. at 2 (C.D. Cal. June 19, 2002). Even though the uses of copyrighted works in these instances were to promote or criticize public policies, they do not involve the use of original copyrighted work by or about politicians or political candidates. Therefore, these instances—and other instances similar to them—are excluded from the definition and analysis of “political use” for the purpose of this Article. These exclusions avoid interpreting politics in everything and ensure that this Article remains focused on uses by or about politicians and not an overbroad review of copyright fair use generally.

figures who are not politicians or candidates for public office,<sup>45</sup> or for primarily commercial purposes.<sup>46</sup>

Political use disputes arise most frequently during election season. Politicians or political campaigns want to use a particular song to energize the crowds at campaign rallies, a popular meme to attract voters' attention, a video recording to criticize opponents, or a photograph taken at a political campaign rally or fundraiser to send a political message. Oftentimes, politicians or campaigns do not get permission from copyright owners of these works.<sup>47</sup> As politics and politicians become more divisive, unauthorized political uses of copyrighted works—especially uses by polarizing politicians or uses to attack or criticize candidates—can be particularly objectionable to copyright owners. In response to unauthorized uses of their copyrighted works, copyright owners publicly condemn and shame these unauthorized uses on social media, file takedown notices to remove the unauthorized uses, send cease-and-desist letters to politicians and campaigns threatening to sue, and file copyright infringement actions against defendants who use their

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45. Examples include, for instance, *Hustler Magazine, Inc. v. Moral Majority, Inc.*, in which Hustler Magazine sued Moral Majority for copyright infringement when Moral Majority reproduced an ad parody from the magazine mocking Jerry Falwell's first sexual experience as involving Campari liquor, his mother, and an outhouse. 606 F. Supp. 1526, 1529 (C.D. Cal. 1985). Moral Majority reproduced the parody ad in letters soliciting donations to fund a legal battle to fight Hustler Magazine's "tasteless and libelous attack on [Falwell and his mother] by 'Porno King' Larry Flynt." *Id.* at 1530. Even though these cases involved the use of copyrighted work by a public figure or of a public figure, it is not by a politician or political candidate. Therefore, these instances—and others similar to them—are excluded from this Article.

46. An example is the dispute in *Furie v. Infowars, LLC*, in which Infowars used Furie's Pepe the Frog image in its Make America Great Again (MAGA) poster. 401 F. Supp. 3d 952, 956, 959 (C.D. Cal. 2019). In that case, Infowars' purpose for its use of Furie's work was to create and sell political celebrity posters, and its primary purpose was commercial use rather than political use. *See id.* at 959. The MAGA poster featured a collage of "several politically significant figures during the 2016 presidential election season," including an image of Furie's Pepe the Frog. *Id.* The court in *Furie* found that "there is no doubt that Defendant's use of Pepe the Frog in the MAGA posters is commercial in nature." *Id.* at 972. While Infowars' use was in a politically themed poster featuring images of politically significant figures, including Trump, it does not fit within this Article's definition of political use because it is not political speech or expression by a politician or about a politician. Infowars' use was commercial in nature—similar to a company that sells celebrity or boy band posters.

47. *See* Steve Knopper, *Why Politicians Keep Using Songs Without Artists' Permission*, ROLLING STONE (July 9, 2015, 7:13 PM), <https://www.rollingstone.com/music/music-news/why-politicians-keep-using-songs-without-artists-permission-36386/> [<https://perma.cc/F3UP-5HVN>].

copyrighted works politically. This Part illustrates the extensiveness of disputes arising from unauthorized political uses of copyrighted works by surveying litigated cases involving political uses of original photography, music, video recordings and texts, and commercial expression, and by highlighting some of the recent disputes between copyright owners, politicians, and parties who use copyrighted works for political purposes.

### A. *Original Photography*

The maxim that “a picture is worth a thousand words” seems particularly true in political photography. Many of the published legal decisions in political fair use involve the unauthorized political uses of original photographs. These disputes involve unauthorized uses of politicians’ headshots, artistic portraits of political candidates, candid images of campaign parades, photo memes of children, and engagement pictures of private individuals. While in many of these cases defendants defend their unauthorized uses of these photographs as “for [protected] political purposes”<sup>48</sup> or transformatively “alter[ing] the expressive content or message of the original work,”<sup>49</sup> courts recognize that “defendants should [not] be allowed to appropriate someone else’s copyrighted efforts ... when so many non-copyrighted alternatives (including snapshots they could have taken themselves) were available,”<sup>50</sup> and courts explain that “[t]he fair-use privilege ... is not designed to protect lazy appropriators.”<sup>51</sup>

One of the most recent disputes involving the unauthorized political use of a photograph was Iowa Representative Steve King’s unauthorized use of Success Kid, a photograph-turned-viral meme, in a campaign fundraising advertisement.<sup>52</sup> Laney Griner, the mother of Success Kid, took the photograph of her son, Sam, on a beach when he was eleven months old.<sup>53</sup> The photograph features

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48. Hill v. Pub. Advoc. of the U.S., 35 F. Supp. 3d 1347, 1358 (D. Colo. 2014).

49. Peterman v. Republican Nat’l Comm., 369 F. Supp. 3d 1053, 1061 (D. Mont. 2019) (quoting Seltzer v. Green Day, Inc., 725 F.3d 1170, 1177 (9th Cir. 2013)).

50. Galvin v. Ill. Republican Party, 130 F. Supp. 3d 1187, 1193-94 (N.D. Ill. 2015) (quoting Kienitz v. Sconnie Nation LLC, 766 F.3d 756, 759 (7th Cir. 2014)).

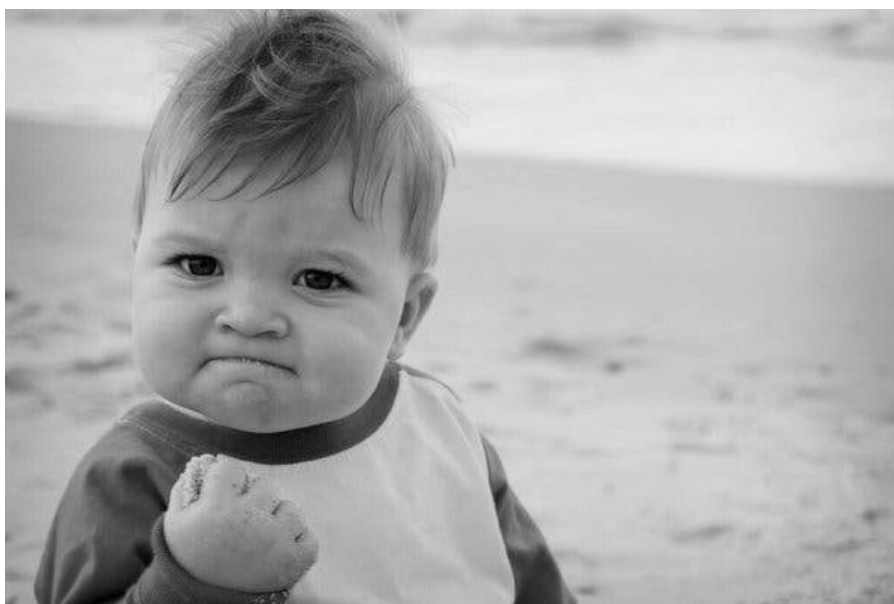
51. Kienitz, 766 F.3d at 759.

52. See Yuhas, *supra* note 2.

53. *Id.*

Sam looking intently at the camera and raising his fist.<sup>54</sup> The photograph became a viral meme that was reused, reshared, and repurposed all over the internet “to express relish over a hard-won victory or demonstrate an iron determination to bounce back.”<sup>55</sup>

Figure 1. Original Photo<sup>56</sup>



In January 2020, Success Kid appeared on WinRed, an online campaign donor platform for King’s campaign for Congress.<sup>57</sup> The image of Sam and his fist was superimposed over a blurred image of the U.S. Capitol Building, with the words “FUND OUR MEMES!!!” added to the top of the frame.<sup>58</sup> The advertisement

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54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*; Stephanie K. Baer, *The Mom of “Success Kid” Sent Rep. Steve King a Cease-and-Desist Letter for Using the Meme in an Ad*, BUZZFEED NEWS (Jan. 27, 2020, 5:47 PM), <https://www.buzzfeednews.com/article/skbaer/success-kid-meme-steve-king-ad> [<https://perma.cc/533H-B4N5>].

58. Yuhas, *supra* note 2; Baer, *supra* note 57.

linked to a platform accepting donations to King's campaign for Congress.<sup>59</sup>

Figure 2. Unauthorized Use<sup>60</sup>



Griner, Sam's mother and the copyright owner of the Success Kid photograph, posted the following statement on Twitter:

I recently learned that Iowa Representative Steve King is using my copyrighted photograph of my minor son Samuel known as "Success Kid" to raise money in a "Fund our Memes" online campaign, also implying that he has some kind of ownership in it. Representative King and his campaign staff appropriated "Success Kid" without my permission. "Success Kid[]" is about positivity and celebrates achievement. Neither I, my son, nor "Success Kid" have any affiliation with Representative King, nor would we have ever agreed to this use. I do not endorse Representative King and, like most people, I strongly disagree with his views. Representative King should remove "Success Kid" from his webpages immediately, issue a statement to acknowledge that the image was taken without our permission and

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59. Yuhas, *supra* note 2.

60. Baer, *supra* note 57.

endorsement, and refund the money his campaign received from misusing [“]Success Kid.”<sup>61</sup>

Griner’s attorney followed up with a cease-and-desist letter to King’s campaign,<sup>62</sup> and on December 30, 2020, filed a copyright infringement claim against King and his campaign.<sup>63</sup>

In *Peterman*, professional photographer Erika Peterman was hired by the Montana Democratic Party to take photos of an annual Democratic fundraising event.<sup>64</sup> Peterman is a documentary, fine art photographer in Montana whose works sell for thousands of dollars and are exhibited in art museums around the state.<sup>65</sup> Peterman’s photos have also appeared in *The Guardian*, *Big Sky Journal*, and *Paddle World Magazine*, among other places.<sup>66</sup> At the Democratic fundraising event, Peterman took a photograph of Democratic candidate Rob Quist, who was running for representative for Montana’s at-large congressional district against Republican candidate Greg Gianforte.<sup>67</sup> The photograph featured the back of Quist’s head while he stared off in the distance toward three stage lights, his cowboy hat appearing slightly illuminated.<sup>68</sup> Peterman edited the photo and granted the Montana Democratic Party and the Quist campaign licenses to use the photo.<sup>69</sup>

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61. Laney Griner (@laneymg), TWITTER (Jan. 27, 2020, 3:49 PM), <https://twitter.com/laneymg/status/1221898122928033797> [<https://perma.cc/P438-MXUR>].

62. Baer, *supra* note 57.

63. Complaint, Griner v. King, No. 20-CV-3848 (D.D.C. Dec. 30, 2020).

64. *Peterman v. Republican Nat’l Comm.*, 369 F. Supp. 3d 1053, 1057 (D. Mont. 2019).

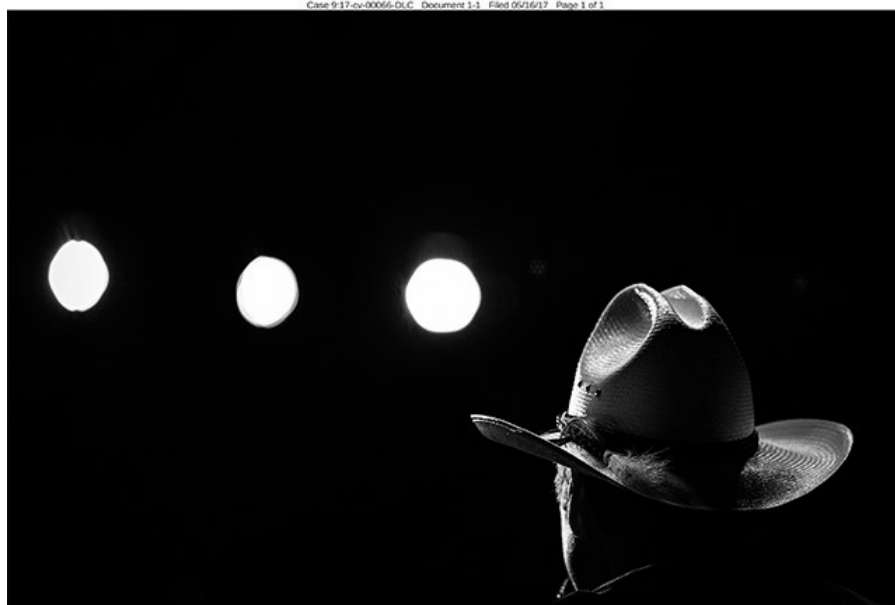
65. See Cory Walsh, *Missoula Art Museum Raises \$130K at Annual Auction*, MISSOULIAN (Feb. 8, 2020), [https://missoulain.com/entertainment/arts-and-theatre/missoula-art-museum-raises-130k-at-annual-auction/article\\_4f4fedaf-7fcb-54c1-b819-fa9e89e2432f.html](https://missoulain.com/entertainment/arts-and-theatre/missoula-art-museum-raises-130k-at-annual-auction/article_4f4fedaf-7fcb-54c1-b819-fa9e89e2432f.html) [<https://perma.cc/7T2B-4RSG>]; MISSOULA ART MUSEUM, THE MISSOULA ART MUSEUM 2020 ANNUAL BENEFIT AUCTION 27 (2020), <https://missoulaartmuseum.org/docs/uploaded-2020/2020-auction-catalog.pdf> [<https://perma.cc/KHH8-XKAN>].

66. *Who We Are*, SOVA PARTNERS, <https://sovapartners.com/about> [<https://perma.cc/9AAC-D4HU>].

67. *Peterman*, 369 F. Supp. 3d at 1057-58. Congressman Greg Gianforte was a divisive character who famously body slammed a journalist from *The Guardian* and was, nevertheless, elected as Montana’s U.S. Representative the next day. See Julia Carrie Wong, *Greg Gianforte Mised Police After Assault of Guardian Journalist, Incident Report Shows*, GUARDIAN (Nov. 18, 2017, 3:12 PM), <https://www.theguardian.com/us-news/2017/nov/17/greg-gianforte-guardian-reporter-ben-jacobs-assault> [<https://perma.cc/2WFFQ-6L7Q>].

68. *Peterman*, 369 F. Supp. 3d at 1057.

69. *Id.*

Figure 3. Original Photo<sup>70</sup>

Less than two months later, the Republican National Committee (RNC) copied and altered Peterman’s photo and reproduced it on a flyer attacking and criticizing Quist in an effort to promote Quist’s Republican opponent, Gianforte.<sup>71</sup> The RNC altered Peterman’s photo by cropping it slightly, adding a stream of light from the three stage lights shining at Quist, and adding a treble clef and text that read “For Montana Conservatives, / Liberal Rob Quist / Can’t Hit the Right Note.”<sup>72</sup>

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70. Complaint at Exhibit A, *Peterman*, 369 F. Supp. 3d 1053 (No. 9:17-cv-00066).

71. *Peterman*, 369 F. Supp. 3d at 1057-58.

72. *Id.* at 1058.

Figure 4. Unauthorized Use<sup>73</sup>

Peterman sued the RNC for copyright infringement, and the RNC raised fair use as an affirmative defense.<sup>74</sup> The court ultimately granted the RNC's motion for summary judgment on fair use.<sup>75</sup>

In *Galvin v. Illinois Republican Party*, a photographer took an original photo of a man at a political parade, driving a convertible car with posters advertising the Democratic candidate for the Illinois House of Representatives, Sam Yingling.<sup>76</sup>

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73. Defendant's Memorandum in Support of Motion for Summary Judgment or, in the Alternative, Partial Summary Judgment at 9, *Peterman*, 369 F. Supp. 3d 1053 (No. 9:17-cv-00066).

74. *Peterman*, 369 F. Supp. 3d at 1058-59.

75. *Id.* at 1066.

76. 130 F. Supp. 3d 1187, 1190 (N.D. Ill. 2015).

Figure 5. Original Photo<sup>77</sup>

The photographer, Quenton Galvin, gave Yingling's campaign a license to post the photograph on Yingling's campaign website.<sup>78</sup> A few months later, without Galvin's permission, the Illinois Republican Party copied the photo and changed it to look like the man in the convertible was driving away from the Illinois State Capitol with piles of money flying out of the back seat.<sup>79</sup> The defendants copied the altered photograph onto a campaign flyer criticizing Yingling's fiscal policies and promoting his Republican opponent Rod Drobinski.<sup>80</sup> While not essential to the court's final decision in

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77. Complaint at Exhibit A, *Galvin*, 130 F. Supp. 3d 1187 (No. 14-cv-10490).

78. *Galvin*, 130 F. Supp. 3d at 1190.

79. *Id.* The man featured in the photo was Jacob Meister, *id.*, a Chicago lawyer and one-time candidate for U.S. Senate. *Meister Drops Out of Senate Race, Endorses Giannoulis*, WBEZ CHI. (Jan. 31, 2010, 1:00 PM), <https://www.wbez.org/stories/meister-drops-out-of-senate-race-endorses-giannoulis/db14a55b-ea2b-4526-8209-7dd353f60f54> [<https://perma.cc/7YBQ-P23J>]. Meister also ran for Cook County Clerk of the Circuit Court in Illinois in 2020. *Jacob Meister*, BALLOTPEdia, [https://ballotpedia.org/Jacob\\_Meister](https://ballotpedia.org/Jacob_Meister) [<https://perma.cc/23UU-2CW7>].

80. *Galvin*, 130 F. Supp. 3d at 1190.

this case, the defendants mistakenly believed that the man featured in the photograph was political candidate Sam Yingling.<sup>81</sup>

Figure 6. Unauthorized Use<sup>82</sup>



Galvin sued the Illinois Republican Party for copyright infringement, and the defendants argued that their use of the photograph was fair use.<sup>83</sup> The court agreed and granted the defendants' motion to dismiss based on fair use.<sup>84</sup>

In *Hill v. Public Advocate of the United States*, professional wedding photographer Kristina Hill took engagement photos of Brian Edwards and Thomas Privitere, a same-sex couple.<sup>85</sup> One photo was of Edwards and Privitere holding hands and kissing in front of the New York skyline.<sup>86</sup> With Hill's permission, Edward and Privitere shared the photo on their wedding blog.<sup>87</sup>

81. *Id.*

82. Complaint at Exhibit B, *Galvin*, 130 F. Supp. 3d 1187 (No. 14-cv-10490).

83. *Galvin*, 130 F. Supp. 3d at 1191.

84. *Id.* at 1197.

85. 35 F. Supp. 3d 1347, 1351-52 (D. Colo. 2014).

86. *Id.* at 1352.

87. *Id.*

Figure 7. Original Photo<sup>88</sup>

In 2012, Public Advocate, an antigay organization that, in its own words, “oppose[d] [s]ame sex marriage and the furtherance of so called ‘Gay Rights,’” altered the engagement photo and copied it onto political flyers sent to Colorado residents.<sup>89</sup> In one instance, Public Advocate lifted the image of Edwards and Privitere kissing and superimposed it onto a snowy landscape background adding the following caption: “State Senator Jean White’s Idea Of ‘Family Values?’”<sup>90</sup> Jean White, the Republican state senator for Colorado’s Eighth District, was in a primary race for reelection and had supported same-sex civil unions in Colorado.<sup>91</sup>

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88. Complaint at 2, *Hill*, 35 F. Supp. 3d 1347 (No. 12-cv-02550).

89. *Hill*, 35 F. Supp. 3d at 1352 (second alteration in original) (cleaned up).

90. *Id.*

91. *Id.* Jean White lost the election. Daniel Nasaw, *Privitere and Edwards: Our Photo Used in Anti-Gay Union Ad*, BBC NEWS: MAG. (Oct. 4, 2012), <https://www.bbc.com/news/magazine-19804286> [<https://perma.cc/56ST-YBMK>].

Figure 8. Unauthorized Use<sup>92</sup>

Public Advocate created a second mailer, this time superimposing the kissing couple onto a background of clouds, to criticize Jeffrey Hare, Republican candidate for Colorado’s House District Forty-Eight seat who supported same-sex marriage.<sup>93</sup> The caption on the second mailer read, “Jeffrey Hare’s Vision For Weld County?”<sup>94</sup> Hill sued Public Advocate for copyright infringement, and Public Advocate raised a fair use defense.<sup>95</sup> The court denied Public Advocate’s motion to dismiss based on fair use,<sup>96</sup> and the case subsequently settled.<sup>97</sup>

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92. Complaint at 3, *Hill*, 35 F. Supp. 3d 1347 (No. 1:12-cv-02550).

93. *Hill*, 35 F. Supp. 3d at 1352.

94. *Id.*

95. *Id.*

96. *Id.* at 1360. In the same opinion, the court found that the First Amendment privilege barred Edwards and Privitere’s right-of-publicity claim against Public Advocate for appropriation of their likeness because Public Advocate’s use was noncommercial and reasonably related to a legitimate matter of public concern. *Id.* at 1357. For more information on the right of publicity’s intersection with the First Amendment, see, for example, JENNIFER E. ROTHMAN, *THE RIGHT OF PUBLICITY* (2018); Roberta Rosenthal Kwall, *The Right of Publicity vs. the First Amendment: A Property and Liability Rule Analysis*, 70 *IND. L.J.* 47 (1994).

97. Aaron Brown, *Kristina Hill Wins Copyright Infringement Settlement Against Anti-Gay*

In *Dhillon v. Does 1-10*, Harmeet Dhillon commissioned photographs of herself to support her candidacy for member of the California State Assembly.<sup>98</sup> One photograph featured her headshot set against a gray background, which Dhillon used in connection with her candidacy and “other political campaigns, activities, and professional marketing efforts.”<sup>99</sup> Dhillon owned the copyright in the photograph.<sup>100</sup> Years later, anonymous bloggers on the website MungerGames.net published, without alteration, the photograph accompanying an article titled “Meet Harmeet.”<sup>101</sup> The Meet Harmeet article criticized Dhillon’s political activities and questioned her political ideology.<sup>102</sup>

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*Activist Group*, FSTOPPERS (July 12, 2014), <https://fstoppers.com/originals/kristina-hill-wins-copyright-infringement-settlement-against-anti-gay-activist-21165> [<https://perma.cc/BXK7-J3L7>].


98. No. C 13-01465SI, 2014 WL 722592, at \*1 (N.D. Cal. Feb. 25, 2014).

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at \*5; *see also* Defendant Doe 1’s Notice of Motion and Motion for Judgment on the Pleadings Pursuant to FRCP 12(c) or for Summary Judgment; Memorandum of Points and Authorities, *Dhillon*, 2014 WL 722592 (No. C 13-01465SI).

Figure 9. Unauthorized Use<sup>103</sup>



## THE MUNGER GAMES

*“WASTING HIS PATRIMONY”*

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### Meet Harmeet

[Leave a reply](#)



*Harmeet Dhillon*

We have asked the question, “[Who is Charles Munger, Jr.?](#)”

Although we haven’t finished answering it, we also need to ask ourselves, “What does he want?”

To begin with, he wants to control and re-shape the California Republican Party, and the way he is going about it right now is by supporting [Harmeet Dhillon for CRP Vice Chairman](#). Dhillon is the chair of the [San Francisco Republican Party](#).

It will take more than one blog post to paint a complete picture of Harmeet Dhillon, but we can start with her deep, active involvement with the [American Civil Liberties Union](#).

RECENT POSTS

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[The Most Interesting Top-Two Primary In the World](#)  
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Dhillon sued Does 1 through 10 for copyright infringement of her headshot, and Doe 1 raised a fair use defense.<sup>104</sup> The court ultimately granted Doe 1’s motion for summary judgment based on copyright fair use.<sup>105</sup>

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103. Declaration of Krista L. Shoquist in Support of Opposition to Defendant Doe 1’s Motion for Judgment on the Pleadings Pursuant to FRCP 12(c) or for Summary Judgment at Exhibit B, *Dhillon*, 2014 WL 722592 (No. C 13-01465SI).

104. *Dhillon*, 2014 WL 722592, at \*1-2.

105. *Id.* at \*7.

## B. Original Music

While the most *litigated* political use cases appear to be over original photography, the most common political use *disputes* involve unauthorized uses of original music, often at campaign rallies.<sup>106</sup> Music is an effective way to energize crowds at campaign rallies and can also be an effective medium to convey political messages.<sup>107</sup> Music and politics have intertwined since the 1800s;<sup>108</sup> Andrew Jackson's supporters, for instance, used the song "The Hunters of Kentucky" to highlight Jackson's leadership.<sup>109</sup> In addition to using music without authorization at campaign rallies, politicians also incorporate music in campaign advertisements,<sup>110</sup> and political groups use music to parody or criticize politicians and their policies.<sup>111</sup> Many modern disputes involving unauthorized political uses of music are not litigated. The unauthorized use of music at campaign rallies is generally one-off, sometimes licensed under a performance-rights organization's blanket license, and disputes frequently settle with musicians publicly denouncing the uses or campaigns promising not to use the songs again.<sup>112</sup> The more often litigated cases arising from unauthorized political use of music involve music incorporated into campaign advertisements.<sup>113</sup> Even

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106. See Deidre A. Keller, "What He Said." *The Transformative Potential of the Use of Copyrighted Content in Political Campaigns—or—How a Win for Mitt Romney Might Have Been a Victory for Free Speech*, 16 VAND. J. ENT. & TECH. L. 497, 500 (2014).

107. See Matthew J. Cursio, Comment, *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, 317 (2011).

108. *Songs Along the Campaign Trail*, NPR (Oct. 5, 2008, 8:00 AM), <https://www.npr.org/templates/story/story.php?storyId=95408459> [<https://perma.cc/6RYE-5REE>].

109. See Cursio, *supra* note 107, at 317; Max Heninger, *The Hunters of Kentucky*, POLITICS OF THE PRESIDENCY: WASHINGTON TO LINCOLN (Dec. 2, 2012), <https://sites.williams.edu/hist359f2012/1824/the-hunters-of-kentucky> [<https://perma.cc/PM4X-5S53>].

110. See, e.g., *Keep Thomson Governor Comm. v. Citizens for Gallen Comm.*, 457 F. Supp. 957, 959-60 (D.N.H. 1978); Kyle Swenson, *Trump Shared a Campaign Video with 'Dark Knight Rises' Music. Warner Bros. Yanked It from Twitter.*, WASH. POST (Apr. 10, 2019, 5:23 AM), <https://www.washingtonpost.com/nation/2019/04/10/trump-shared-campaign-video-with-dark-knight-rises-music-warner-bros-yanked-it-twitter/> [<https://perma.cc/NY86-LCTS>].

111. See, e.g., *Henley v. DeVore*, 733 F. Supp. 2d 1144, 1148-49, 1156-57 (C.D. Cal. 2010); *Browne v. McCain*, 612 F. Supp. 2d 1125, 1128-29 (C.D. Cal. 2009).

112. See, e.g., Suddath, *supra* note 13 (describing requests by musicians, including Heart, John Mellencamp, Boston, Van Halen, and Jackson Browne, to the McCain/Palin campaign to stop using their songs).

113. See, e.g., *Browne*, 612 F. Supp. 2d at 1128-29; *Keep Thomson Governor Comm.*, 457 F.

so, those cases also escape litigation because parties voluntarily remove the allegedly infringing campaign advertisements, or they get taken down by internet service providers in response to copyright owners' takedown notices.<sup>114</sup> “[P]oliticians often shrink from publicly fighting artists who don’t want their work associated with them.... ‘Most of the time when they take these things down, its [sic] usually the time when they give up.’”<sup>115</sup>

In April 2019, Trump shared on his Twitter feed a fan-made video for his 2020 reelection campaign, featuring a song from the Warner Bros. 2012 Batman movie, *The Dark Knight Rises*.<sup>116</sup> The song, Hans Zimmer’s “Why Do We Fall,” played in the background of the two-minute campaign video showing footage of Trump from his first two years in office and clips of his political rivals Barack Obama and Hillary Clinton and celebrity critics Rosie O’Donnell, Amy Schumer, and Bryan Cranston.<sup>117</sup> Using the font from the movie *The Dark Knight Rises*, the title cards in the campaign video moved through the words: “First they ignore you, then they laugh at you, then they call you racist. Donald J. Trump. Your vote. Proved them all wrong. Trump: The Great Victory. 2020.”<sup>118</sup> The video ended with an image of Trump raising his fist in the air at the same time as Zimmer’s song “hit a dramatic crescendo.”<sup>119</sup> The video was viewed over two million times before Warner Bros. had it removed from YouTube and Twitter.<sup>120</sup> Warner Bros. issued a statement condemning the

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Supp. at 959-60.

114. See, e.g., Kyle Jahner, *Twitter Yanks Trump Nickelback Meme Video in Copyright Spat (1)*, BLOOMBERG L. NEWS (Oct. 3, 2019, 5:56 PM), <https://news.bloomberglaw.com/ip-law/trump-tweets-nickelback-biden-video-pulled-at-warners-request> [<https://perma.cc/7SWY-36U8>]; Swenson, *supra* note 110.

115. Jahner, *supra* note 114 (quoting copyright attorney John Krieger of Dickinson Wright LLP).

116. Joanna Walters, *Warner Bros Takes Legal Action Against Trump over Batman Music*, GUARDIAN (Apr. 10, 2019, 12:55 PM), <https://www.theguardian.com/us-news/2019/apr/10/warner-bros-takes-legal-action-trump-batman-music> [<https://perma.cc/7B6D-QHSY>].

117. Jon Blistein, *Trump Campaign Video Pulled for Unauthorized Use of ‘Dark Knight Rises’ Score*, ROLLING STONE (Apr. 10, 2019, 8:54 AM), <https://www.rollingstone.com/movies/movie-news/trump-campaign-video-dark-knight-rises-score-twitter-820438/> [<https://perma.cc/W6F4-AGA2>].

118. *Id.*

119. Melissa Locker, *This Is the Trump 2020 Video that Got Removed for Using the Wrong Superhero Movie Score*, TIME (Apr. 10, 2019, 9:33 AM), <https://time.com/5566736/trump-dark-knight-rises/> [<https://perma.cc/6M58-CLYS>].

120. Erin Nyren, *Trump Campaign Video that Used ‘Dark Knight Rises’ Score Removed*

unauthorized use, stating that “[t]he use of Warner Bros.’ score from *The Dark Knight Rises* in the campaign video was unauthorized.... We are working through the appropriate legal channels to have it removed.”<sup>121</sup> There is no record that Trump or the creator of the campaign video filed a counter-notice to challenge the takedown.

More recently, on October 2, 2019, Trump tweeted a short video featuring Nickelback’s music video from their 2005 song “Photograph” to criticize former vice president and then-Democratic presidential candidate Joe Biden.<sup>122</sup> The video began with Biden explaining that he has “never spoken to [his] son about his overseas dealings.”<sup>123</sup> The video then quickly cut to a clip from Nickelback’s music video in which lead singer Chad Kroeger holds up a framed photograph and sings, “Look at this photograph, Every time I do it makes me laugh, How did our eyes get so red, And what the hell is on Joey’s head.”<sup>124</sup> Instead of the photo in the Nickelback’s original music video, the video was altered to show Kroeger holding up a picture of Biden with his son, Hunter Biden, and a man who was labeled in the video as a “Ukraine Gas Exec.”<sup>125</sup>

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*After Warner Bros. Takes Legal Action*, VARIETY (Apr. 9, 2019, 8:23 PM), <https://variety.com/2019/film/news/trump-campaign-video-dark-knight-rises-warner-bros-legal-action-1203185454/> [<https://perma.cc/268T-VMXX>]; see also Swenson, *supra* note 110.

121. Swenson, *supra* note 110.

122. Jahner, *supra* note 114.

123. Today 7, *Video: Trump Hilariously Tweets Biden Photo in Nickelback Music Video*, YOUTUBE (Oct. 3, 2019), <https://www.youtube.com/watch?v=HUIZNSJGFzQ&feature=youtu.be> [<https://perma.cc/Y5TT-YLEH>].

124. *Id.*

125. *Id.*

Figure 10. Unauthorized Use<sup>126</sup>

The video was taken down less than twelve hours later in response to a takedown notice filed by Warner Music Group.<sup>127</sup> Trump did not file a counter-notice.<sup>128</sup>

Even though disputes arising from unauthorized political uses of music do not frequently result in litigation, there are reported legal cases involving music incorporated into campaign advertisements. In *Browne v. McCain*, in anticipation of then-Democratic presidential candidate Obama’s visit to Ohio, McCain’s campaign created and released a video criticizing Obama’s energy policy.<sup>129</sup> The campaign video used, without authorization, the song “Running on Empty”<sup>130</sup> by Rock & Roll Hall of Famer and Songwriter’s Hall of Famer Jackson Browne.<sup>131</sup> The lyrics from “Running on Empty” included the chorus, which is repeated three times throughout the

126. Madison Malone Kircher, \*Nickelback Voice\* Look at This DMCA Takedown Notice, VULTURE (Oct. 3, 2019), <https://www.vulture.com/2019/10/trump-tweets-nickelback-photo-graph-meme.html> [<https://perma.cc/VG4B-A3PW>].

127. Hern, *supra* note 1.

128. See Jahner, *supra* note 114.

129. 612 F. Supp. 2d 1125, 1128 (C.D. Cal. 2009).

130. *Id.*

131. *Biography*, JACKSON BROWNE, <https://www.jacksonbrowne.com/biography/> [<https://perma.cc/59MJ-PLXT>].

five-minute song: “Running on—running on empty, Running on—running blind, Running on—running into the sun, But I’m running behind.”<sup>132</sup> McCain’s campaign video began with the caption “Pain at the Pump,” followed by clips of different Ohio news broadcasters complaining about the high prices of gas.<sup>133</sup> The montage ended with one reporter asking, “[S]o how do you bring down the price of gas here in northeast Ohio and across the U.S.A.?”<sup>134</sup> The advertisement then cut to Obama at a campaign rally stating, “[M]aking sure your tires are properly inflated.”<sup>135</sup> The advertisement then explained McCain’s plans to reduce gas prices.<sup>136</sup> “Running On Empty” is heard playing in the background of the second half of the campaign advertisement, which highlighted criticisms of Obama and his tire-inflation gas policy.<sup>137</sup> Browne’s biography on his website described him as having “defined a genre of songwriting charged with honesty, emotion and personal politics.”<sup>138</sup> He was a well-known liberal and supporter of Obama.<sup>139</sup> Browne sued McCain and the RNC for copyright infringement, and the defendants raised a fair use defense.<sup>140</sup> The court denied the defendants’ motion to dismiss based on fair use,<sup>141</sup> and the case settled.<sup>142</sup>

In *Keep Thomson Governor Committee*, a political committee promoting the reelection of the incumbent Republican governor of New Hampshire (“the Committee”) purchased the musical composition, lyrics, and sound recordings for the song “Live Free or Die.”<sup>143</sup> “Live Free or Die” is a three-minute song, with the first sixty seconds comprised of vocals, the second sixty seconds featuring

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132. *Browne*, 612 F. Supp. 2d at 1128.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at 1129.

138. *Biography*, *supra* note 131.

139. See Maral Vahdani, *Running on Empty: The Problem with Politicians and Stealing Music*, 32 LOY. L.A. ENT. L. REV. 75, 76 (2011).

140. *Browne*, 612 F. Supp. 2d at 1129-30.

141. *Id.* at 1130-31.

142. Mike Masnick, *John McCain Settles Jackson Browne Lawsuit over Song Use*, TECHDIRT (July 21, 2009, 9:21 PM), <https://www.techdirt.com/articles/20090721/1545365612.shtml> [<https://perma.cc/PNJ9-BMPW>].

143. *Keep Thomson Governor Comm. v. Citizens for Gallen Comm.*, 457 F. Supp. 957, 958-59 (D.N.H. 1978).

narration about “the tradition and spirit of New Hampshire,” and the final sixty seconds consisting of more musical performance.<sup>144</sup> Citizens for Gallen Committee (“Citizens”), a committee promoting the election of the Democratic candidate Hugh Gallen, recorded a sixty-second political advertisement that copied fifteen seconds from “Live Free or Die.”<sup>145</sup> The rest of Citizens’ advertisement consisted of criticism of Peter Thomson.<sup>146</sup> The Committee sued Citizens for copyright infringement and sought an injunction against Citizens’ use of the music, and Citizens raised fair use as a defense.<sup>147</sup> The court denied the Committee’s injunction, finding that Citizens’ use was fair use.<sup>148</sup>

Most disputes relating to political uses of original music, as discussed above, involve defendants who use music at campaign rallies or in political advertisements without making any alterations to the music. *Henley v. DeVore*, on the other hand, involved a politician who published two songs that he rewrote and re-recorded.<sup>149</sup> Specifically, in *Henley*, Don Henley—“a world-famous, Grammy-winning, multi-platinum-album-selling songwriter and recording artist”—sued politician Charles DeVore for his unauthorized use of two popular songs, “The Boys of Summer” and “All She Wants to Do Is Dance.”<sup>150</sup> “The Boys of Summer” (“Summer”), written by Henley, described the “nostalgia for a past summer romance.”<sup>151</sup> The iconic song began, “Nobody on the road / Nobody on the beach / I feel it in the air / The summer’s out of reach / Empty lake, empty streets / The sun goes down alone / I’m drivin’ by your house / Though I know you’re not home.”<sup>152</sup>

DeVore, a California assemblyman who was seeking the Republican nomination for the Senate, incorporated “Summer” into a campaign video making fun of Obama, Nancy Pelosi, and Obama’s supporters.<sup>153</sup> DeVore rewrote the lyrics from “Summer” and created

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144. *Id.* at 959.

145. *Id.*

146. *Id.*

147. *Id.* at 958-60.

148. *Id.* at 961.

149. 733 F. Supp. 2d 1144, 1148 (C.D. Cal. 2010).

150. *Id.* at 1147-48.

151. *Id.* at 1147.

152. *Id.* at app. A.

153. *Id.* at 1148.

and recorded “The Hope of November” (“November”) using the music from “Summer.”<sup>154</sup> The lyrics for “November” began, “Obama overload / Obama overreach / We feel it everywhere / Trillions in the breach / Empty bank, empty Street / Dollar goes down alone / Pelosi’s in the House / So we now all must atone.”<sup>155</sup> DeVore then created a campaign video using his song and featuring images of Obama, Pelosi, and others, and he posted the video to YouTube and other online websites.<sup>156</sup>

DeVore created a second song, “All She Wants to Do Is Tax” (“Tax”), based on “All She Wants to Do Is Dance” (“Dance”).<sup>157</sup> “Dance” is about an American couple traveling in a foreign country where there is violence and unrest, but all the woman wants to do is dance and party.<sup>158</sup> DeVore’s “Tax” criticized U.S. Senator and Democratic candidate Barbara Boxer and the Democrats’ climate change policies.<sup>159</sup> Similar to “November,” DeVore incorporated “Tax” into a video campaign advertisement with various images and video clips and posted it on YouTube.<sup>160</sup> Henley sued DeVore for copyright infringement, and DeVore raised fair use as a defense.<sup>161</sup> The court denied DeVore’s fair use defense and granted Henley’s summary judgment on his claim of copyright infringement.<sup>162</sup>

### *C. Original Video Recordings and Texts*

Some politicians or political campaigns have taken text from website or news articles or video recordings from television news, political commentary sites, and government assemblies to criticize or comment on political candidates and elected officials and their policies and governance. Many of these disputes settle without final decision by a court.<sup>163</sup>

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154. *Id.*

155. *Id.* at app. A.

156. *Id.* at 1148. Henley filed a takedown notice to remove the video on YouTube, and DeVore filed a counter-notice to YouTube requesting that it be reposted based on fair use. *Id.*

157. *Id.* at 1149.

158. *Id.* at 1148.

159. *Id.* at 1149.

160. *Id.*

161. *Id.* at 1147.

162. *Id.* at 1164, 1169.

163. *See Keller, supra* note 106, at 502.

In 2012, Mitt Romney was seeking the bid for the Republican presidential nomination against Newt Gingrich and Michele Bachmann.<sup>164</sup> The Romney campaign released a thirty-second advertisement titled “History Lesson,” featuring a January 21, 1997, clip of Tom Brokaw on NBC Nightly News.<sup>165</sup> The clip had aired the day the House voted to reprimand Gingrich, former Speaker of the House, on ethics charges.<sup>166</sup> In the news clip, Brokaw stated, “Good evening. Newt Gingrich, who came to power, after all, preaching a higher standard in American politics, a man who brought down another Speaker on ethics accusations—tonight he has on his own record the judgment of his peers, Democrat and Republican alike,” and continued to explain how the House voted to find Gingrich guilty of ethics violations.<sup>167</sup> NBC sent Romney’s campaign a cease-and-desist letter asking it to remove NBC News’s copyrighted material from all campaign advertisements.<sup>168</sup> Even though Romney’s campaign claimed its use of the NBC News clip was fair, the campaign capitulated and removed the advertisement from the campaign’s website.<sup>169</sup>

In *City of Inglewood v. Teixeira*, Joseph Teixeira operated the website Inglewoodwatchdog.wix.com and posted videos on YouTube, including six video recordings of Inglewood City Council meetings.<sup>170</sup> Teixeira used portions of the city council’s recorded meetings to make his own videos in order to criticize the city council, including Mayor James Butts.<sup>171</sup> Specifically, Teixeira’s videos featured video clips from city council meetings with added narrations criticizing the mayor, cropped with images of city documents, such as reports by the city clerk.<sup>172</sup> The City of Inglewood sued Teixeira for copyright infringement for his use of the city council videos, and Teixeira

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164. *Id.* at 501.

165. *Id.*; Josh Lederman, *NBC, Tom Brokaw Ask Romney to Take Down Ad Made with News Footage*, HILL (Jan. 28, 2012, 4:38 PM), <https://thehill.com/video/campaign/207195-romney-ad-uses-brokaw-clip-to-hit-gingrich-on-ethics-violations> [https://perma.cc/9CBB-G2LZ].

166. Lederman, *supra* note 165.

167. *Id.*

168. Keller, *supra* note 106, at 502; Lederman, *supra* note 165.

169. Keller, *supra* note 106, at 502.

170. No. CV-15-01815, 2015 WL 5025839, at \*3 (C.D. Cal. Aug. 20, 2015).

171. *Id.* at \*3, \*6.

172. *Id.* at \*8.

raised a fair use defense.<sup>173</sup> The court ultimately found that, even if the City could claim copyright ownership over works it created as a public entity,<sup>174</sup> Teixeira's use was protected by fair use.<sup>175</sup>

In 2010, Senate Majority Leader Harry Reid ran for reelection against Republican candidate and Tea Party favorite Sharron Angle.<sup>176</sup> During the Republican primary, Angle ran and won on an ultraconservative platform, advertising on her campaign website her plans to abolish the Departments of Education and Energy and to phase out Social Security.<sup>177</sup> After winning the Republican nomination, Angle took down her ultraconservative website and replaced it with a more moderate website in an attempt to win over independent voters.<sup>178</sup> The Reid campaign saved the old version of Angle's website and reproduced it on a website called "The Real Sharron Angle."<sup>179</sup>

The Angle campaign sent Reid a cease-and-desist letter claiming that Reid's conduct infringed Angle's copyright in her website.<sup>180</sup> Angle threatened to sue Reid and his campaign, claiming that "[y]our Web site is like you[:] ... it's your intellectual property. So they can't use something that's yours, intellectual property, unless they pay you for it or get your permission."<sup>181</sup> Reid's campaign responded, "It's called free speech, ... and it's nearly absolute under the First Amendment."<sup>182</sup> Despite Angle's threat "to pursue all

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173. *Id.* at \*3.

174. In addition to fair use, Teixeira also argued that the City, as a local government, could not claim copyright protection over the city council meeting videos. *Id.* The court agreed, finding that a California public entity may not claim copyright protection for a work it created. *Id.* at \*3-4, \*6.

175. *Id.* at \*12.

176. Eduardo M. Peñalver & Sonia Katyal, *The Fair Use Senator: Can Harry Reid Really Post Sharron Angle's Old Campaign Web Site?*, SLATE (July 9, 2010, 3:02 PM), <https://slate.com/news-and-politics/2010/07/can-harry-reid-post-sharron-angle-s-old-web-site.html> [<https://perma.cc/SP7M-RDZ5>].

177. *See* Fisher, *supra* note 14.

178. Peñalver & Katyal, *supra* note 176; Eric Kleefeld, *Angle Sends Cease-and-Desist to Reid—for Reposting Her Own Website*, TALKING POINTS MEMO (July 5, 2010, 10:52 AM), <https://talkingpointsmemo.com/dc/angle-sends-cease-and-desist-to-reid-for-reposting-her-own-website> [<https://perma.cc/J6GG-LH25>].

179. Kleefeld, *supra* note 178.

180. Peñalver & Katyal, *supra* note 176.

181. *Id.*

182. *Id.*

available legal remedies” against Reid and his campaign,<sup>183</sup> there is no record that Angle pursued any legal action against Reid.

Ironically, during that same campaign, Angle was sued for copyright infringement herself by notorious copyright troll Righthaven<sup>184</sup> for her unauthorized copying of two news articles owned by the Las Vegas Review-Journal on her campaign website: “It’s the jobs, stupid” and “Angle: Reid’s clout misguided.”<sup>185</sup> As with most Righthaven victims, Angle settled the case,<sup>186</sup> and the complaint against her was dismissed.<sup>187</sup>

#### *D. Original Commercial Expression*

Politicians and campaigns sometimes like to use well-known commercial expression from viral advertisements or iconic products in order to capture the public’s attention and to benefit from the public’s familiarity with or nostalgia for popular and iconic commercial expression. For instance, during Angle’s campaign for U.S. Senate, Hasbro sent Angle a cease-and-desist letter in response to Angle’s use of Monopoly game images, including the property squares, the “Go” corner, fonts, “Chance” and “Community Chest” cards, title deeds, and the Mr. Monopoly character.<sup>188</sup> Angle’s campaign used an image of the iconic Monopoly game, replaced Mr. Monopoly’s face with Harry Reid’s face, and published “Harry Reid’s Amnesty Game” that was “[f]un for the whole illegal family” on Angle’s campaign website.<sup>189</sup>

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183. John W. Dean, *How Harry Reid Might Respond to Sharron Angle’s Planned “SLAPP” Suit*, FINDLAW (July 9, 2010), <https://supreme.findlaw.com/legal-commentary/how-harry-reid-might-respond-to-sharron-angles-planned-slapp-suit.html> [<https://perma.cc/3R5W-EJ6S>].

184. See Richard Esguerra, *Righthaven’s Brand of Copyright Trolling*, ELEC. FRONTIER FOUND. (Sept. 2, 2010), <https://www.eff.org/deeplinks/2010/09/righthavens-own-brand-copy-right-trolling> [<https://perma.cc/G5J6-HHTD>].

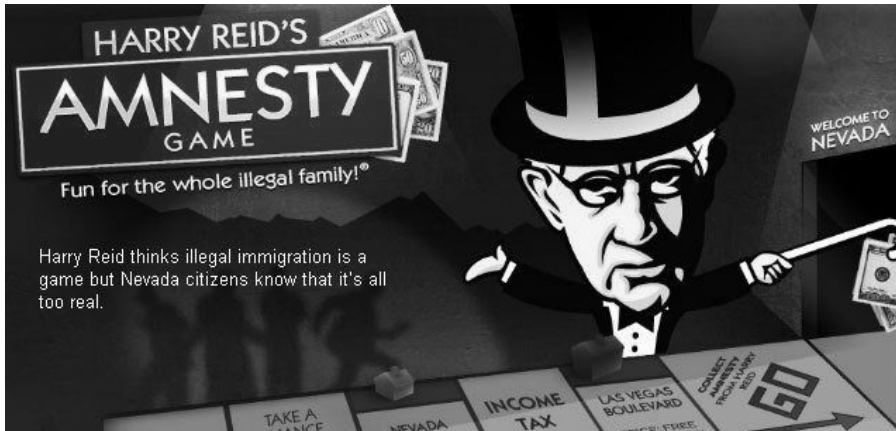
185. Green, *supra* note 15; Joint Stipulation of Voluntary Dismissal with Prejudice at 1, *Righthaven LLC v. Angle*, No. 2:10-cv-01511 (D. Nev. Nov. 16, 2010) [hereinafter *Joint Stipulation*].

186. Steve Green, *Righthaven Settles with Sharron Angle over R-J Story Posting*, VEGAS INC (Nov. 17, 2010, 2:28 PM), <https://vegasincl.asvegassun.com/news/2010/nov/17/righthaven-settles-sharron-angle-over-r-j-story-po/> [<https://perma.cc/94MC-6WEF>].

187. *Joint Stipulation*, *supra* note 185, at 1.

188. Terkel, *supra* note 16.

189. *Id.*

Figure 11. Unauthorized Use<sup>190</sup>

Hasbro sent a cease-and-desist letter to Angle’s campaign, explaining that

Hasbro has consistently sought to prevent the use of its popular family-oriented products in political campaigns.... Aside from the strictly legal aspects of the matter, we hope that you would respect Hasbro’s desire to avoid associations of its toys and games with partisan politics and that you would understand the damage that can be done to the image of the company and its products from such an association, regardless of person, party, or issue for which they are used.<sup>191</sup>

There was no follow-up litigation over the Angle campaign’s use of Monopoly, and the campaign removed the Harry Reid’s Amnesty Game image from its campaign materials.<sup>192</sup>

In *MasterCard International, Inc. v. Nader 2000 Primary Committee*, Ralph Nader’s 2000 presidential campaign used, without authorization, MasterCard’s viral “Priceless Advertisements.”<sup>193</sup> The Priceless Advertisements featured images of goods or services

190. *Id.*

191. *Id.*

192. See Irin Carmon, *Monopoly Parent Kills Sharron Angle’s “Amnesty Game,”* JEZEBEL (Nov. 2, 2010, 6:03 PM), <https://jezebel.com/463533283> [<https://perma.cc/E2CV-YT3T>] (noting that Angle had removed the site).

193. No. 00 Civ.6068 (GBO), 2004 WL 434404, at \*1 (S.D.N.Y. Mar. 8, 2004).

purchased by a customer and, in a voice-over and through title cards, announced the price of each item.<sup>194</sup> At the end of each advertisement, a phrase identified a “priceless intangible,” “such as a day where all you have to do is breathe,” followed by the words: “Priceless. There are some things money can’t buy, for everything else there’s MasterCard.”<sup>195</sup> The Nader campaign ran a political advertisement that included a display of items with prices, such as “grilled tenderloin for fund-raiser[:] \$1,000 a plate; campaign ads filled with half-truths: \$10 million; promises to special interest groups: over \$100 billion.”<sup>196</sup> The political advertisement ended with a phrase identifying the “priceless intangible”: “finding out the truth: priceless. There are some things that money can’t buy.”<sup>197</sup> MasterCard sued the Nader campaign for, among other things, copyright infringement.<sup>198</sup> The Nader campaign raised a fair use defense claiming that its political advertisement was a fair use parody of MasterCard’s Priceless Advertisements.<sup>199</sup> The court granted Nader’s motion for summary judgment on the basis that the political advertisement was fair use.<sup>200</sup>

While this Part attempts to discuss all reported political use cases litigated to resolution, it is able to capture only a small fraction of the unlitigated disputes involving unauthorized political uses of copyrighted works. It shows the extensiveness of disputes involving unauthorized political uses of copyrighted works and demonstrates their expanding scope because of easier access to copyrighted works online and the increasingly politicized and politically divisive climate. As discussed above, many of these political use cases settle, either through parties voluntarily removing the objectionable uses, internet service providers removing the uses in response to take-down notices, or copyright owners publicly denouncing the unauthorized political uses of their works. Sometimes, however, copyright owners file infringement suits against politicians, campaigns, or third parties for their unauthorized political uses of copyrighted

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194. *Id.*

195. *Id.* (internal quotation marks omitted).

196. *Id.* (internal quotation marks omitted).

197. *Id.*

198. *Id.*

199. *Id.* at \*10.

200. *Id.* at \*15.

works. In those cases, defendants often raise fair use as a defense, arguing that their uses are transformative, primarily commentary, or noncommercial political uses authorized under the First Amendment. Part III examines how courts treat unauthorized political uses under copyright's fair use doctrine and identifies a pattern in courts' analyses and balancing of fair use factors in these political fair use cases.

### III. POLITICAL FAIR USE

Fair use guarantees "breathing space within the confines of copyright."<sup>201</sup> It is also considered one of the First Amendment safeguards in copyright law.<sup>202</sup> Fair use is codified in section 107 of the Copyright Act.<sup>203</sup> The preamble to section 107's fair use provision explicitly lists "criticism, comment, news reporting, teaching ..., scholarship, or research" as purposes that may limit a copyright owner's exclusive rights under fair use.<sup>204</sup> However, this list does not "single out any particular use as presumptively a 'fair' use."<sup>205</sup> Instead, courts must make a case-by-case determination on whether an unauthorized use is fair by considering four factors:

- (1) the purpose and character of the [defendant's] use[;] ...
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion [defendant] used in relation to the copyrighted work as a whole; and
- (4) the effect of the [defendant's] use upon the potential market for or value of the copyrighted work.<sup>206</sup>

"Courts have balanced, weighed, and applied those four factors in a number of infringement cases to excuse, for instance, defendants who copied" copyrighted works for parody or criticism of the works,<sup>207</sup> adapted copyrighted works for purposes of creating new

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201. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

202. *See Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985); *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1263 (11th Cir. 2001).

203. 17 U.S.C. § 107.

204. *Id.*

205. *Harper & Row*, 471 U.S. at 561.

206. 17 U.S.C. § 107.

207. Cathay Y. N. Smith, *Creative Destruction: Copyright's Fair Use Doctrine and the Moral*

artistic content,<sup>208</sup> and replicated copyrighted works for the purpose of making them searchable on the internet.<sup>209</sup>

This Part examines fair use decisions in cases involving unauthorized political uses of copyrighted works. In archetypical fair use cases, the first factor of fair use (the purpose and character of defendant's use) and the fourth factor (the effect of defendant's use on the potential market for or value of the copyrighted work) appear to be the most important factors that can predict the ultimate outcome. In political fair use, it is the second factor—the nature of the copyrighted work—that seems to have the most influence on the final fair use outcome. Specifically, as detailed below, the determination of the political nature of the original copyrighted work can implicitly influence the court's analysis of all four fair use factors in political fair use.

### A. *Nature of the Copyrighted Work*

The second fair use factor contemplates the nature of the original copyrighted work.<sup>210</sup> This factor recognizes “that creative works are ‘closer to the core of intended copyright protection’ than informational and functional works.”<sup>211</sup> In other words, under this factor, a secondary use of a copyrighted work is less likely to be considered fair use if the original copyrighted work was creative rather than informational.<sup>212</sup> For instance, under the second fair use factor, a defendant's unauthorized use of a fictional short story is less likely

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*Right of Integrity*, 47 PEPP. L. REV. 601, 624 (2020) (first citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578-94 (1994); then citing *Suntrust*, 268 F.3d at 1264-65, 1267-68; and then citing *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 112-17 (2d Cir. 1998)).

208. *Id.* at 624-25 (citing *Blanch v. Koons*, 467 F.3d 244, 253 (2d Cir. 2006)).

209. *See, e.g.*, *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 97 (2d Cir. 2014); *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 720, 733 (9th Cir. 2007).

210. 17 U.S.C. § 107(2).

211. *Henley v. DeVore*, 733 F. Supp. 2d 1144, 1151 (C.D. Cal. 2010) (quoting *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 803 (9th Cir. 2003)). *But see* Matthew Sag, *The New Legal Landscape for Text Mining and Machine Learning*, 66 J. COPYRIGHT SOC'Y U.S.A. 291, 324 (2019) (arguing that this factor is important to help analyze the objectives of plaintiff's use compared to defendant's uses and not because “there are works of a *more preferred* nature or a *less preferred* nature”).

212. *See, e.g.*, *Campbell*, 510 U.S. at 586; *Hustler Mag., Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1153-54 (9th Cir. 1986).

to be deemed fair than its use of a news broadcast,<sup>213</sup> conversely, a defendant's use of a candid photograph is more likely to be deemed fair than its use of an expressive song.<sup>214</sup> In most fair use cases, courts tend to quickly dispense with this second factor. The finding of the work to be creative versus informational rarely influences the final outcome of fair use.<sup>215</sup> Some courts expressly discount the importance of the second factor.<sup>216</sup> Scholars acknowledge that the second factor is of little use in predicting fair use.<sup>217</sup> Empirical works on fair use also show that, statistically, the second factor rarely influences the final fair use outcome.<sup>218</sup>

In political fair use cases, however, determining the nature of the copyrighted work plays a surprisingly significant role. Specifically, in political fair use cases, if the original copyrighted work has a political nature, such as a photograph of a political candidate,<sup>219</sup> an image of a campaign parade,<sup>220</sup> or music for a political advertisement,<sup>221</sup> courts overwhelmingly find the secondary political use of the copyrighted work to be fair. Sometimes courts are explicit and reach that conclusion by categorizing works with a political nature as primarily informational or factual. In *Galvin*, for instance, the

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213. See *Stewart v. Abend*, 495 U.S. 207, 237-38 (1990).

214. *Compare Galvin v. Ill. Republican Party*, 130 F. Supp. 3d 1187, 1195 (N.D. Ill. 2015), with *Henley*, 733 F. Supp. 2d at 1160.

215. See *Oracle Am., Inc. v. Google LLC*, 886 F.3d 1179, 1205 (Fed. Cir. 2018), *rev'd*, 141 S. Ct. 1163 (2021).

216. See, e.g., *id.* at 1205 (“[T]his second factor ‘typically has not been terribly significant in the overall fair use balancing.’” (quoting *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1402 (9th Cir. 1997))); *Leibovitz v. Paramount Pictures Corp.*, No. 94 Civ. 9144 (LAP), 2000 WL 1010830, at \*4 (S.D.N.Y. July 21, 2000) (“It is well-established that the second factor—the nature of the copyrighted work—is not very important to the fair use analysis.”).

217. See, e.g., *Keller*, *supra* note 106, at 526. *But see* Eric Goldman & Jessica Silbey, *Copyright’s Memory Hole*, 2019 BYU L. REV. 929, 992 (“[T]he second fair use factor ... has a much more significant role to play when copyright claims implicate privacy concerns.”).

218. Clark D. Asay, Arielle Sloan & Dean Sobczak, *Is Transformative Use Eating the World?*, 61 B.C. L. REV. 905, 948-49 (2020) (describing factor two as statistically irrelevant); Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. PA. L. REV. 549, 584-86 (2008).

219. *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756, 757, 760 (7th Cir. 2014); *Peterman v. Republican Nat’l Comm.*, 369 F. Supp. 3d 1053, 1057, 1066 (D. Mont. 2019); *Dhillon v. Does 1-10*, No. C 13-01465SI, 2014 WL 722592, at \*1, \*6 (N.D. Cal. Feb. 25, 2014).

220. *Galvin v. Ill. Republican Party*, 130 F. Supp. 3d 1187, 1190, 1197 (N.D. Ill. 2015).

221. *Keep Thomson Governor Comm. v. Citizens for Gallen Comm.*, 457 F. Supp. 957, 958-59, 961 (D.N.H. 1978).

court categorized a photograph of a man in a convertible at a political parade as primarily informational rather than creative under the second fair use factor.<sup>222</sup> The court was persuaded by the fact that the photo was “a candid image taken of [a politician] at a political event,”<sup>223</sup> that the photograph was taken at a live parade without any staging by the photographer, and that “[w]hatever artistry he contributed (by way of the angle, framing, or other composition of the Photograph) could not plausibly outweigh its factual nature.”<sup>224</sup> The court ultimately found the political use of this copyrighted photograph, which had a political nature, to be fair.<sup>225</sup> Similarly, in *Keep Thomson Governor Committee*, the court noted in its analysis of the second factor of fair use that “[t]he nature of the copyrighted work here demonstrates that the recording which defendant has partially copied is itself in part a political campaign message.”<sup>226</sup> In other words, in that case, the song that defendants used was itself a political advertisement. Recognizing the importance of the political nature of the original copyrighted work, the court ruled “that defendants’ use of the plaintiff’s political advertisement, derived from the copyrighted recording, constitute[d] ‘fair use.’”<sup>227</sup> In these cases, courts recognized the political nature of the original copyrighted works, categorized them as primarily informational or factual due to their political nature, and found that the defendants’ political uses of original political works to be fair use.

In *Peterman*, the court found the artistic photograph of a political candidate to be “functional” but “also unequivocally creative.”<sup>228</sup> Even though the photograph was intended “to document the Mansfield-Metcalf Dinner,” the artistic and specific “framing and composition” of the image demonstrated it to be “[m]ore than a simple snapshot of a political candidate speaking at a campaign event.”<sup>229</sup> While the Court acknowledged that “the creative decisions

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222. *Galvin*, 130 F. Supp. 3d at 1195.

223. *Id.* (alteration in original) (internal quotation marks omitted) (quoting *Kienitz*, 766 F.3d at 1052).

224. *Id.*

225. *Id.* at 1197.

226. *Keep Thomson Governor Comm.*, 457 F. Supp. at 961.

227. *Id.*

228. *Peterman v. Republican Nat’l Comm.*, 369 F. Supp. 3d 1053, 1064 (D. Mont. 2019).

229. *Id.*

made by Peterman push the Work ‘closer to the core of intended copyright protection,’” the Court nevertheless found this factor to be inconclusive.<sup>230</sup> Ultimately, however, because the original copyrighted work featured an image of a political candidate at a fundraising dinner, which had a political nature, the court found the RNC’s use of the photograph to be fair use.<sup>231</sup>

Other times, courts have been less explicit with their recognition of the political nature of the original copyrighted works. For instance, courts in some cases may categorize the original copyrighted political work as “creative” under the second factor, but implicitly consider the political nature of the original copyrighted work when deciding that a defendant’s secondary use is fair.<sup>232</sup> For instance, in *Dhillon*, the court admitted that “the headshot photo [of politician Harmeet Dhillon] was used for the purpose of identifying herself to the public. Thus, it seems that the headshot photo was intended to be more informational than creative.”<sup>233</sup> However, because the photographer of the political headshot presented evidence of the creative choices he made in creating the headshot photo, the court categorized the headshot photo as “creative” for the purpose of the second factor.<sup>234</sup> Regardless, similar to other cases involving the use of original copyrighted works with a political nature, the court found the defendant’s use of the political headshot to be fair use.<sup>235</sup>

On the other hand, if the nature of the original copyrighted work is a nonpolitical expressive work, such as an engagement photo of a same-sex couple,<sup>236</sup> or a popular song about a summer romance,<sup>237</sup> the secondary political use of the work is less likely to be considered fair use. In *Hill*, the defendants used an engagement photo of a same-sex couple in the defendants’ political mailers.<sup>238</sup> The engagement photo, taken by Kristina Hill, featured Brian Edwards and Thomas Privitere, two private individuals holding hands and

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230. *Id.* (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994)).

231. *Id.* at 1066.

232. *See, e.g., id.* at 1063-64.

233. *Dhillon v. Does 1-10*, No. C 13-01465SI, 2014 WL 722592, at \*5 (N.D. Cal. Feb. 25, 2014) (citation omitted).

234. *Id.*

235. *Id.* at \*6.

236. *Hill v. Pub. Advoc. of the U.S.*, 35 F. Supp. 3d 1347, 1352, 1360 (D. Colo. 2014).

237. *Henley v. DeVore*, 733 F. Supp. 2d 1144, 1148, 1169 (C.D. Cal. 2010).

238. *Hill*, 35 F. Supp. 3d at 1352.

kissing in front of the Brooklyn Bridge and New York City skyline.<sup>239</sup> Neither Edwards nor Privitere were politicians or political candidates, and there was nothing explicitly or implicitly political about their engagement photo; in other words, the nature of the original copyrighted work was not political.<sup>240</sup> Instead, examining the photo, the court stated that “[i]nspection of the photo reveals that it is more creative than informational or functional and that Hill, as a professional wedding photographer, took special care in taking the photo and making sure it depicted the appropriate tone for the occasion.”<sup>241</sup> The court found that the political use of the nonpolitical engagement photo created “a plausible copyright infringement claim.”<sup>242</sup>

Similarly, in *Henley*, the defendant politician used Henley’s songs “Boys of Summer” and “All She Wants to Do Is Dance” to criticize political opponents.<sup>243</sup> The song “Boys of Summer” is “a song about nostalgia for a lost summer romance. The narrator laments the fact that summer is over and that his love interest has gone.”<sup>244</sup> While most of the song did not have a political nature, the defendant attempted to argue that one verse of the original song—“Out on the road today, / I saw a DEADHEAD sticker on a Cadillac / A little voice inside my [h]ead said, / ‘Don’t look back. You can never look back.’ / ... / Those days are gone forever / I should just let them go”—was political.<sup>245</sup> Similarly, while “All She Wants to Do Is Dance” is not considered an explicitly political song, the defendant argued that it “can be interpreted as a criticism of American foreign policy in Latin America in the 1980’s ... and the American public’s indifference toward the situation.”<sup>246</sup> Nevertheless, at least on the surface, neither song had a political nature. Instead, the court found them to be “highly expressive work[s] ... at the core of copyright”;<sup>247</sup>

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239. *Id.*

240. *See id.*

241. *Id.* at 1359.

242. *Id.* at 1360.

243. *Henley v. DeVore*, 733 F. Supp. 2d 1144, 1147-49 (C.D. Cal. 2010).

244. *Id.* at 1156.

245. *Id.*

246. *Id.* at 1157.

247. *Id.* at 1160.

and the court ultimately found that the political uses of these two popular expressive songs were not fair use.<sup>248</sup>

Even though courts do not explicitly conform their analyses of the remaining fair use factors based on their finding that the original copyrighted work had a political nature, as discussed below, courts do seem to implicitly consider the political nature of the copyrighted work in assessing and weighing all of the fair use factors. In political fair use, the determination that the original copyrighted work had a political nature is a good predictor of the ultimate fair use outcome. In almost every case in which the original copyrighted work had a political nature, courts have found its secondary use to be fair use and not infringing.<sup>249</sup>

Indeed, this prediction seems to extend to cases that involve political uses of copyrighted works that may not strictly meet this Article's definition of political use. For instance, in the recent decision *Hughes v. Benjamin*, the court dismissed a copyright infringement complaint on fair use when a defendant created and posted on YouTube a "one minute and fifty-eight second[]" video "comprised entirely of six clips" of the plaintiff's original video with no added commentary in the video by the defendant.<sup>250</sup> The original copyrighted work, filmed and produced by Akilah Hughes, was a nine-minute-and-fifty-second video, "We Thought She Would Win," which consisted of campaign party footage from Hillary Clinton's 2016 presidential election, Hughes's thoughts about the election night (both before and after the election's result), and her commentary and concerns about Trump's defeat of Clinton.<sup>251</sup> Hughes's original copyrighted video clearly had a political nature; even though the defendant's work consisted entirely of portions of the original work, with no independent creation or commentary besides the title, the court found the defendant's work to be fair use and dismissed the copyright infringement complaint.<sup>252</sup>

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248. *Id.* at 1164.

249. *See, e.g.*, *Peterman v. Republican Nat'l Comm.*, 369 F. Supp. 3d 1053, 1057, 1066 (D. Mont. 2019); *Keep Thomson Governor Comm. v. Citizens for Gallen Comm.*, 457 F. Supp. 957, 961 (D.N.H. 1978).

250. 437 F. Supp. 3d 382, 386-88 (S.D.N.Y. 2020).

251. *Id.* at 387.

252. *Id.* at 386, 394. While it is true that "a new work may be transformative even where it consists entirely of portions of the original work," in this case, the court found defendant's

On the one hand, this seems fair and can help predict fair use outcomes in political fair use disputes. A reasonable argument can be made that creators of political expressive works, such as a song, campaign website, political video, or photograph, can anticipate that their works may be used by others for political criticism, commentary, or expression of opposing political messages. Just as the words someone speaks can be used against them, so too can political expression be used against their creators. We cannot allow copyright law to be used as a tool for political censorship, and political opponents and the public should be able to use these political works to criticize politicians and candidates, such as using a politician's earlier writings on her webpage to identify and criticize her changed positions during her political campaign.<sup>253</sup> Predictable results in fair use can also help original creators of political works and secondary users of those works make judgment calls in practice.<sup>254</sup>

On the other hand, just because the original work had a political nature should not mean that any secondary use of the original copyrighted work is presumptively fair. Courts have insisted that "the politically significant nature of the subject matter of a work does not afford it any more or less copyright protection than less topical works."<sup>255</sup> If any use of a political copyrighted work is automatically considered fair use,<sup>256</sup> it would deprive copyright protection from a genre of work and prejudice creators who create those works of significant public interest. Indeed, "to propose that fair use be imposed

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video to be transformative by relying almost entirely on two facts: the new title to the defendant's work, "SJW Levels of Awareness" (because the acronym SJW, which stands for Social Justice Warrior, "has sufficiently entered the modern lexicon such that there can be no serious dispute as to its pejorative meaning"); and the "broader context of [the defendant's] YouTube channel," where the allegedly infringing video was posted (because "a reasonable observer who came across the video would quickly grasp its critical purpose"). *Id.* at 390-92 (emphasis omitted).

253. See Fisher, *supra* note 14 (discussing Angle's dispute with Reid's posting of Angle's former campaign website).

254. See Rebecca Tushnet, *Content, Purpose, or Both?*, 90 WASH. L. REV. 869, 873-74 (2015) ("A number of academics have identified patterns in fair use cases that can be used to predict outcomes and make judgment calls in ordinary practice.... The clearest example comes from the statement of fair use best practices for documentary filmmakers, which enabled filmmakers to get insurance and distribution while relying on fair use.").

255. *Galvin v. Ill. Republican Party*, 130 F. Supp. 3d 1187, 1193 (N.D. Ill. 2015) (citing *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 545 (1985)).

256. It is difficult to imagine a secondary use of a political work that is not a political use.

whenever the ‘social value [of dissemination] ... outweighs any detriment to the artist,’ would be to propose depriving copyright owners of their right in the property precisely when they encounter those users who could afford to pay for it.”<sup>257</sup>

### *B. Purpose and Character of the Use*

The first factor of fair use, the purpose and character of the use, examines the purpose of the defendant’s use of the copyrighted work.<sup>258</sup> Secondary uses that are noncommercial, for instance, are more likely to be considered fair.<sup>259</sup> Secondary works that transform the original by giving it new meaning, message, or purpose are also more likely to be considered fair use.<sup>260</sup>

Under the first fair use factor’s noncommercial analysis, most courts that have examined political fair use determine that the political use of a copyrighted work, such as using a copyrighted work for a political campaign, is noncommercial use.<sup>261</sup> A few courts, however, do not automatically give political use this easy of a pass. For instance, in *Henley*, the court found that the political defendants’ use of Henley’s songs for campaign purposes was “for commercial purposes.”<sup>262</sup> The *Henley* court explained that “in the Ninth Circuit, ‘monetary gain is not the sole criterion[,] particularly in a setting where profit is ill-measured in dollars.’”<sup>263</sup> Specifically, the court reasoned that the political defendants in *Henley*

stood to gain publicity and campaign donations from their use of Henley’s music. In fact, the videos contained links directing viewers to the DeVore campaign website, encouraging them to donate. Thus ... the Defendants “profited” from their use by

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257. Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1615 (1982) (quoting Note, *Parody and Copyright Infringement*, 56 COLUM. L. REV. 585, 595 (1956)).

258. 17 U.S.C. § 107(1).

259. *See id.*

260. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).

261. *Henley v. DeVore*, 733 F. Supp. 2d 1144, 1159 (C.D. Cal. 2010) (“District courts that have actually considered whether campaign advertisements are commercial in the fair use context come down on the side of noncommercial.”).

262. *Id.*

263. *Id.* (alteration in original) (quoting *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110, 1117 (9th Cir. 2000)).

gaining an advantage without having to pay customary licensing fees to the Plaintiffs.<sup>264</sup>

Similarly, the Court in *Harper & Row* explained that “[t]he crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.”<sup>265</sup> Relying on this distinction, the Court in *Harper & Row* found a news publication’s use of President Ford’s copyrighted memoir to be commercial use.<sup>266</sup>

In cases involving unauthorized political uses of copyrighted material, such as the use of a photograph of a rival political candidate, it seems true that the political user benefits from appropriation of the copyrighted work “without paying the customary price.”<sup>267</sup> Indeed, in many political use cases, the political defendants likely did not need to use the copyrighted work. For instance, why would a political campaign need to use a specific image of its opponent “when so many non-copyrighted alternatives (including snapshots they could have taken themselves) [are] available”?<sup>268</sup> Fair use “is not designed to protect lazy appropriators. Its goal instead is to facilitate a class of uses that would not be possible if users always had to negotiate with copyright proprietors.”<sup>269</sup> In most political use cases, defendants are not using the copyrighted work to comment on the creator’s skills or their artistry but to comment on the subject matter or politician featured in the copyrighted work, which can be achieved through non-copyrighted alternatives. Nevertheless, most political use decisions find those uses, particularly political campaign uses, to be noncommercial.<sup>270</sup> This is true even when the defendant is using the original copyrighted work to fundraise and solicit financial contributions.<sup>271</sup>

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264. *Id.* (quoting *Worldwide Church of God*, 227 F.3d at 1118).

265. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985).

266. *Id.*

267. *Id.*

268. *See Kienitz v. Sconnie Nation LLC*, 766 F.3d 756, 759 (7th Cir. 2014).

269. *Id.*

270. *See Henley v. DeVore*, 733 F. Supp. 2d 1144, 1159 (C.D. Cal. 2010) (surveying political fair use case law on the distinction between commercial and noncommercial uses).

271. *See, e.g., MasterCard Int’l Inc. v. Nader 2000 Primary Comm., Inc.*, No. 00 Civ.6068 (GBD), 2004 WL 434404, at \*8, \*12 (S.D.N.Y. Mar. 8, 2004).

The more important consideration under the first factor of fair use is typically whether the secondary use was transformative.<sup>272</sup> Secondary uses that transform original works by giving them a new meaning, expression, message, or purpose are more likely to be fair.<sup>273</sup> For instance, in *Campbell v. Acuff-Rose Music, Inc.*, the seminal copyright fair use decision by the United States Supreme Court, the Court asked under the first factor “whether the new work merely ‘supersede[s] the objects’ of the original creation, ... or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is ‘transformative.’”<sup>274</sup> Indeed, “if [copyrightable expression in the original work] is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings—this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.”<sup>275</sup> Even though section 107 of the Copyright Act does not mention the word “transform,”<sup>276</sup> in most fair use decisions, determining whether the secondary use transformed the original copyrighted work can help predict the overall fair use outcome—more so than any other consideration under the first factor.<sup>277</sup> Secondary works typically transform original copyrighted works when there is a “creativity shift”; specifically, when the defendant uses an original creative work for an informational purpose or, vice versa, when a defendant uses an original informational work for a creative purpose.<sup>278</sup> Prior

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272. Tushnet, *supra* note 254, at 883 (“[T]here is general consensus that ‘the transformative use paradigm, as adopted in *Campbell v. Acuff-Rose* overwhelmingly drives fair use analysis in the courts today.” (quoting 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05(A)(1)(b) (2013))); Asay et al., *supra* note 218, at 918 (“Given the Court’s emphasis in *Campbell* on the transformative use concept, the doctrine has gained traction as one of the most important subfactors that courts consider when assessing whether a use of a copyrighted work is fair.”).

273. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

274. *Id.* (alteration in original) (citations omitted) (first quoting *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4,901); and then quoting Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990)).

275. *Blanch v. Koons*, 467 F.3d 244, 251-52 (2d Cir. 2006) (alteration in original) (quoting *Castle Rock Ent., Inc. v. Carol Publ’g Grp., Inc.*, 150 F.3d 132, 142 (2d Cir. 1998)).

276. See 17 U.S.C. § 107.

277. Asay et al., *supra* note 218, at 908.

278. *Id.* at 949 (quoting Matthew Sag, *Predicting Fair Use*, 73 OHIO STATE L.J. 47, 58

commentators have identified “that when defendants use copyrighted works for such fundamentally different purposes, courts tend to find that those uses are fair.”<sup>279</sup> These secondary uses that transform the original copyrighted work’s purpose, sometimes referred to as “[p]urpose-transformativeness,” are frequently found to be fair uses of the original copyrighted works.<sup>280</sup> Content-transformativeness, when the defendant physically alters the expressive content of the original copyrighted work, can also lead to a finding of fair use if the secondary use alters the message or meaning in a substantial way.<sup>281</sup> On the other hand, fair use is “seriously weaken[ed]” when the defendant’s work serves the same purpose or function as the original copyrighted work.<sup>282</sup>

In political fair use cases, however, a shift in the purpose might work against a finding of fair use. In cases involving an original political work used by another party for a political purpose—in other words, for the same underlying purpose—courts are more likely to find fair use,<sup>283</sup> but when the defendant uses a work that is not political, and transforms that original creative work by using it for a political purpose, courts tend not to find fair use.<sup>284</sup> Therefore, in political fair use cases, the first factor of fair use necessarily depends on the court’s determination of the second fair use factor (as discussed above).<sup>285</sup> Specifically, if the original copyrighted work had a political nature or was created for a political purpose, such as a campaign ad or a political headshot, and the secondary use is also

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(2012)).

279. *Id.* (citing *Sag*, *supra* note 278, at 74).

280. Tushnet, *supra* note 254, at 869 (“[D]efendants who made exact copies with transformative purposes (according to the courts) have done extremely well.”).

281. *See id.* at 869-70.

282. *Oracle Am., Inc. v. Google LLC*, 886 F.3d 1179, 1200 (Fed. Cir. 2018) (quoting *Wall Data Inc. v. L.A. Cnty. Sheriff’s Dep’t*, 447 F.3d 769, 778 (9th Cir. 2006)), *rev’d*, 141 S. Ct. 1163 (2021).

283. *See, e.g., Galvin v. Ill. Republican Party*, 130 F. Supp. 3d 1187, 1192, 1194, 1196-97 (N.D. Ill. 2015).

284. *Hill v. Pub. Advoc. of the U.S.*, 35 F. Supp. 1347, 1358-60 (D. Colo. 2014); *Henley v. DeVore*, 733 F. Supp. 2d 1144, 1156, 1158, 1164 (C.D. Cal. 2010).

285. *See Sag*, *supra* note 211, at 324 (“[I]t would be quite impossible to analyze the *purpose*, *proportion*, and *effect* of the defendant’s use without taking into account the nature of the [copyrighted] work. As the Court of Appeals notes in *Google Books*, ‘one cannot assess whether the copying work has an objective that differs from the original without considering both works, and their respective objectives.’” (quoting *Authors Guild v. Google, Inc.*, 804 F.3d 202, 220 (2d Cir. 2015))).

political, such as being used to comment or criticize the politician or their policies, the first fair use factor is more likely to favor fair use.

In *Galvin*, for instance, the original work—a photograph of a man at a campaign rally in a convertible car advertising a political candidate—had a political nature and was used by plaintiff for the purpose of political advertising.<sup>286</sup> The defendants also used that photograph for a political purpose in a flyer criticizing the political candidate in order to promote his political opponent.<sup>287</sup> Taking a photo created for a political purpose and using it for a political purpose does not seem to engender a “creativity shift” or transform the purpose of the original work. While the court in *Galvin* claimed that the defendant’s political “Flyer ‘transformed’ the Photograph by giving it ‘new meaning [and] message’ through political criticism,” the court never considered that the purpose of both uses of the photograph were for political commentary.<sup>288</sup>

Similarly, in *Peterman*, the original work—a photograph of a political candidate at a fundraising event—had a political nature and was used for the political purpose of promoting a candidate.<sup>289</sup> The defendants took that original work and also used it for a political purpose—namely, in a flyer criticizing that political candidate in order to promote his opponent.<sup>290</sup> Again, the use of a political work for political purposes did not transform the underlying purpose of the work. The court in *Peterman* explained that “[a] new purpose ‘by itself, does not necessarily create new aesthetics or a new work that alter[s] the first [work] with new expression, meaning or message.’”<sup>291</sup> The court ignored *Peterman*’s argument that the original copyrighted work lacked transformativeness in its purpose and character and ignored the fact that the original use and the secondary use both served a political purpose.<sup>292</sup>

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286. *Galvin*, 130 F. Supp. 3d at 1190.

287. *Id.*

288. *Id.* at 1192 (alteration in original) (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)).

289. *Peterman v. Republican Nat’l Comm.*, 369 F. Supp. 3d 1053, 1057-58 (D. Mont. 2019).

290. *Id.* at 1058.

291. *Id.* at 1061 (alterations in original) (quoting *Monge v. Maya Mags., Inc.*, 688 F.3d 1164, 1176 (9th Cir. 2012)).

292. *See id.* at 1061-62.

On the other hand, in political fair use cases, courts are less likely to find fair use when defendants use a nonpolitical, creative work—such as an engagement photo or song—for political purposes, even when the defendant has transformed the work by giving the work a new purpose or new meaning and message. In *Henley*, for instance, the political defendants used two popular songs—one lamenting the loss of a summer romance and the other commenting on a woman’s desire to dance while surrounded by chaos—for the political purpose of promoting a politician and criticizing his political opponents.<sup>293</sup> The court found the defendant’s use to not be transformative because he “made minimal changes to the lyrics of the Plaintiffs’ songs to make new songs about different subjects.”<sup>294</sup>

Similarly, in *Hill*, the original copyrighted work was an engagement photograph of a same-sex couple.<sup>295</sup> The photograph did not have an underlying political nature, nor did it serve a political purpose.<sup>296</sup> The defendants took the original work and transformed its purpose by using it for the political purpose of criticizing politicians, political candidates, and their views on same-sex marriage.<sup>297</sup> The court, however, did not find the defendant’s use of the work to be transformative. Specifically, the court’s analysis of transformativeness focused solely on content-transformativeness—ignoring the defendant’s argument on purpose-transformativeness—and found that “the [d]efendants merely took the lifted portion [of the original work] and superimposed it on a mailer.... [S]uch actions cannot be characterized as ‘highly transformative.’”<sup>298</sup> Even though the defendants in *Hill* transformed the purpose of the original creative work from nonpolitical to the political purpose of criticism and commentary, the court found that the work was not transformed and refused to dismiss Hill’s copyright claim.<sup>299</sup>

These cases seem at odds with the conventional wisdom and cases about copyright fair use transformativeness. In both *Henley* and *Hill*, the defendants not only transformed the purposes of the

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293. *Henley v. DeVore*, 733 F. Supp. 2d 1144, 1157 (C.D. Cal. 2010).

294. *Id.* at 1158.

295. *Hill v. Pub. Advoc. of the U.S.*, 35 F. Supp. 3d 1347, 1352 (D. Colo. 2014).

296. *See id.* at 1351-52.

297. *Id.* at 1352.

298. *Id.* at 1358.

299. *Id.* at 1360.

original copyrighted works, they also created secondary political works that transformed the message and meaning of the original copyrighted engagement photo and songs.<sup>300</sup> The courts in these cases, however, did not find transformativeness and denied the defendants' fair use defenses.<sup>301</sup> On the other hand, taking a political work and using it for political criticism may transform the message or context of the original copyrighted work from positive to negative, but it does not transform the purpose when both works were used for political commentary. Perhaps this latter use may fit under a broad definition of "transformative purpose," when defendants have "a different interpretive or communicative project than the plaintiff did in creating the original work"<sup>302</sup>—specifically, to politically criticize rather than politically promote. However, they appear far less transformative than the secondary works in *Henley* and *Hill*, in which the defendants engendered a creativity shift by using the original copyrighted works for fundamentally different purposes. Nevertheless, as these decisions demonstrate, the unauthorized political use of a nonpolitical expressive and creative work is less likely to be found to be fair use in the political fair use context.

Regardless of this tension with fair use case law, the result seems reasonable in political fair use. The preamble to section 107's fair use provision explicitly lists "criticism, comment, news reporting, teaching ..., scholarship, or research" as purposes that may limit copyright owners' exclusive rights under fair use.<sup>303</sup> While this list does not "single out any particular use as presumptively a 'fair' use,"<sup>304</sup> it provides examples "to give some idea of the sort of activities the courts might regard as fair use under the circumstances."<sup>305</sup> In political fair use, sometimes the most effective way to criticize or comment on a politician or political campaign is to use original copyrighted works that exhibit a political nature or that politicians have used for their campaign. For instance, in order to

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300. See *Henley v. DeVore*, 733 F. Supp. 2d 1144, 1157 (C.D. Cal. 2010); *Hill*, 35 F. Supp. 3d at 1352.

301. See *Henley*, 733 F. Supp. 2d at 1158; *Hill*, 35 F. Supp. 3d at 1358.

302. Tushnet, *supra* note 254, at 878.

303. 17 U.S.C. § 107.

304. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 561 (1985).

305. *Id.* (internal quotation marks omitted).

make a critical point about the mayor, what better way did Teixeira have than to use original copyrighted video recordings of the mayor in city council meetings?<sup>306</sup> In order to comment on a politician, is there a better way than to use that politician's own campaign advertisement?<sup>307</sup> Perhaps courts depart from past fair use patterns in political fair use in order to accommodate the import of political speech and the free and open discussion of candidates.

### *C. The Amount and Substantiality of the Portion Taken*

The third fair use factor examines “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.”<sup>308</sup> This analysis captures both “the quantity of the materials used” as well as “their quality and importance.”<sup>309</sup> Generally, under both a quantitative and qualitative analysis, the more a defendant takes and reuses from the original copyrighted work, the less likely the use will be considered fair use.<sup>310</sup> For instance, in *Hill*, the defendants used “only about 20% of the copyrighted Photograph” in their political flyers.<sup>311</sup> The 20 percent that the defendants used, however, was “the focal point, the most important portion of the photo: Edwards and Privitere holding hands and kissing.”<sup>312</sup> Because the “qualitative nature of the taking” is an important consideration under the third factor of fair use, and because the defendants in that case took the heart of the original copyrighted work, the court found this factor weighed against a finding of fair use.<sup>313</sup>

In political fair use, however, the third fair use factor is not a reliable predictor of the ultimate fair use outcome. Courts acknowledge in political fair use “that the extent of permissible copying

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306. See *City of Inglewood v. Teixeira*, No. CV-15-01815, 2015 WL 5025839, at \*3 (C.D. Cal. Aug. 20, 2015).

307. See *Keep Thomson Governor Comm. v. Citizens for Gallen Comm.*, 457 F. Supp. 957, 959 (D.N.H. 1978).

308. 17 U.S.C. § 107(3).

309. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 587 (1994).

310. *Peterman v. Republican Nat'l Comm.*, 369 F. Supp. 3d 1053, 1064 (D. Mont. 2019).

311. *Hill v. Pub. Advoc. of the U.S.*, 35 F. Supp. 3d 1347, 1359 (D. Colo. 2014).

312. *Id.*

313. *Id.* (quoting *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 565 (1985)).

varies with the purpose and character of [the defendant's secondary] use,"<sup>314</sup> and "wholesale copying does not preclude fair use *per se*."<sup>315</sup> Under this factor, courts in political fair use cases appear to consider the defendant's need to use the original copyrighted work to convey their specific political message. When the original work is not an "iconic image"<sup>316</sup> or there are a "plethora of alternative means"<sup>317</sup> for the defendants to express the same political message, courts tend to weigh the third factor against fair use.

For instance, in *Galvin*, the defendants used the candid photograph of a man driving a convertible car in order to criticize a politician's fiscal irresponsibility.<sup>318</sup> In that case, the court found it "relevant that Defendants did not need to use the copyrighted work in order to convey their political message."<sup>319</sup> The *Galvin* court explained that "to play off of taglines like 'Career Politician ... in the Driver's Seat' and 'Fiscal Responsibility Went out the Window,' Defendants needed to show the politician driving a car, but they did not need to use Plaintiff Galvin's copyrighted work in particular."<sup>320</sup> Because the court found that there was a "plethora of alternative means for Defendants to criticize [the politician]," the court weighed this third fair use factor against the defendants.<sup>321</sup> However, despite its finding under the third factor, the court ultimately held defendants' use to be fair use.<sup>322</sup>

Similarly, in *Peterman*, in which the RNC used the entirety of Peterman's artistic image of a political candidate in a critical advertisement against that candidate, the court emphasized the lack of the RNC's need to use Peterman's photo to send its political message.<sup>323</sup> Specifically, the *Peterman* court explained that Peterman's photograph of Quist was "not an iconic image associated with the Quist Campaign, and the RNC could have made its point

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314. *Campbell*, 510 U.S. at 586-87.

315. *Hustler Mag., Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1155 (9th Cir. 1986).

316. *Peterman v. Republican Nat'l Comm.*, 369 F. Supp. 1053, 1064 (D. Mont. 2019).

317. *Galvin v. Ill. Republican Party*, 130 F. Supp. 3d 1187, 1195 (N.D. Ill. 2015).

318. *Id.* at 1190.

319. *Id.* at 1195.

320. *Id.*

321. *Id.*

322. *Id.* at 1197.

323. *Peterman v. Republican Nat'l Comm.*, 369 F. Supp. 1053, 1064 (D. Mont. 2019).

as effectively without incorporating the Work into its mailer.”<sup>324</sup> Indeed, the *Peterman* court went so far as to assert that any argument that the RNC “could not reasonably appropriate part of the image and retain the meaning it wished to convey ... actually strengthen[ed] Peterman’s position” because it showed the qualitative value of the work that the RNC copied from Peterman.<sup>325</sup> Even though the court weighed this third fair use factor against the RNC, the *Peterman* court ultimately found the RNC’s use to be fair.<sup>326</sup>

A court’s emphasis on the necessity of a defendant’s use under the third fair use factor should play a more important role in the overall outcome in political fair use. In many of these cases, unless an image, song, text, or recording is iconic,<sup>327</sup> or there are no other effective or available ways for defendants to express their political message,<sup>328</sup> courts tend to weigh this third factor against fair use.<sup>329</sup> The third fair use factor underscores courts’ reluctance to protect “lazy appropriators” under fair use and stresses fair use’s goal of “facilitat[ing] a class of uses that would not be possible if users always had to negotiate with copyright proprietors.”<sup>330</sup> For instance, it may be more excusable under this factor for a defendant to use the official political headshot of a politician (such as the headshot of Dhillon the defendants used in *Dhillon v. Does*)<sup>331</sup> or another image of a politician that is deeply associated with that politician because those images are iconic images of a politician.<sup>332</sup>

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324. *Id.*

325. *Id.*

326. *Id.* at 1066.

327. *See Dhillon v. Does* 1-10, No. C 13-01465SI, 2014 WL 722592, at \*5-6 (N.D. Cal. Feb. 25, 2014). *But see Kienitz v. Sconnie Nation LLC*, 766 F.3d 756, 759 (7th Cir. 2014).

328. *See City of Inglewood v. Teixeira*, No. CV-15-01815, 2015 WL 5025839, at \*11 (C.D. Cal. Aug. 20, 2015).

329. *See R. Anthony Reese, How Much Is Too Much?: Campbell and the Third Fair Use Factor*, 90 WASH. L. REV. 755, 773 (2015) (“[C]ircuit court[s] ... display a general reluctance to weight this factor in favor of fair use, even when the court concludes that the amount used by the defendant was reasonable.”).

330. *See Kienitz*, 766 F.3d at 759.

331. *See Dhillon*, 2014 WL 722592, at \*1.

332. An official political headshot of a politician could be an iconic image when that politician used the image for the purpose of identifying herself to the public. *See id.* at \*5; *see also David Kravets, Associated Press Settles Copyright Lawsuit Against Obama ‘Hope’ Artist*, WIRED (Jan. 12, 2011, 1:16 PM), <https://www.wired.com/2011/01/hope-image-flap/#comments> [<https://perma.cc/5Z3L-SEPY>]. *But see Kienitz*, 766 F.3d at 759 (finding use of a political headshot “to mock the Mayor” to be lazy appropriation when “[t]here’s no good reason why

Similarly, it may be more excusable for a defendant to use video recordings of city council meetings in order to criticize city council proceedings, or images of politicians' repeated and inappropriate physical contacts with constituents to comment on that behavior, because there are no other effective ways for the defendants to express their criticism or political messages.<sup>333</sup> Defendants who use an original copyrighted work in order to avoid creating their own work or avoid paying a licensing fee, however, should not be entitled to any special treatment under political fair use.

At the same time, even if the defendant could create their own work in order to express the same political message, the effect of using a different expression may not be the same. For instance, the underlying message expressed by the words "Fuck the Draft" may be the same as "I Strongly Resent the Draft" or "Ban the Draft," but the effect of these statements is different.<sup>334</sup> Sometimes the most effective way to communicate a message, especially a critical political message, is to use the original copyrighted work, recognizing that "[g]overnment prohibitions on the use of certain words can have a significant effect on the communicative impact of expression. Some words may be more effective than others in conveying the speaker's intended message."<sup>335</sup> Therefore, even though courts might consider a defendant's alternative options under this factor, just because there is another way to express a message should not foreclose a defendant's fair use defense, particularly if the effect of the message might be strengthened by using the original copyrighted work.

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defendants should be allowed to appropriate someone else's copyrighted efforts as the starting point in their lampoon, when so many non-copyrighted alternatives (including snapshots they could have taken themselves) were available").

333. See *Teixeira*, 2015 WL 5025839, at \*11 ("Teixeira's use of the clips from the City Council Videos is limited to his purpose of criticizing [Mayor] Butts and the City Council, and commenting on the proceedings of the City Council. Teixeira chooses small and very specific parts of lengthy proceedings to make his point in his videos. The extent of his copying is reasonable in light of his purpose.").

334. See *Cohen v. California*, 403 U.S. 15, 16, 26 (1971); Lisa P. Ramsey, *Increasing First Amendment Scrutiny of Trademark Law*, 61 SMU L. REV. 381, 434 (2008); see also Tushnet, *Copyright as a Model*, *supra* note 39, at 9-10.

335. Ramsey, *supra* note 334, at 434; see also Tushnet, *Copyright as a Model*, *supra* note 39, at 10 ("[A]n inability to use the most evocative expression possible diminishes the power of a speaker's message.").

*D. The Effect of the Use on the Potential Market for or Value of the Copyrighted Work*

The fourth fair use factor examines “the effect of the [defendant’s] use upon the potential market for or value of the copyrighted work.”<sup>336</sup> This factor requires courts to examine the market harm caused by the infringement both to the original copyrighted work as well as to the potential market for derivative works.<sup>337</sup> The harm recognized under this fourth factor is commercial in nature; in other words, “[b]iting criticism [that merely] suppresses demand” for the original copyrighted work is not recognized as harm under this factor, but “copyright infringement[, which] usurps” demand for the original is.<sup>338</sup> Furthermore, when examining the harm to the potential market for derivative works, that market “includes only those that creators of original works would in general develop or license others to develop.”<sup>339</sup>

In political fair use, if the original copyrighted work had a political nature, as discussed above, courts frequently find that there is no further market for the original copyrighted work. In these cases, courts also imply that creators of political works for a candidate or political party are not likely to license their works to opponents to use to criticize their candidate or political party. For instance, in *Teixeira*, the court found that there was “no market for the City Council Videos” that Teixeira reproduced on his website, and Teixeira’s uses of the videos to criticize the city council were “not ... substitute[s] for the original works.”<sup>340</sup> In *Peterman*, the court claimed that “[i]t is unclear how the [photograph of a political candidate] could conceivably have any future commercial value to Peterman. The [photograph] has no recognizable value outside of Quist’s congressional campaign.”<sup>341</sup> Courts in political fair use cases

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336. 17 U.S.C. § 107(4).

337. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994).

338. *Id.* at 592 (alterations in original) (quoting *Fisher v. Dees*, 794 F.2d 432, 438 (9th Cir. 1986)).

339. *Galvin v. Ill. Republican Party*, 130 F. Supp. 3d 1187, 1196 (N.D. Ill. 2015) (quoting *Campbell*, 510 U.S. at 592).

340. *City of Inglewood v. Teixeira*, No. CV-15-01815, 2015 WL 5025839, at \*11 (C.D. Cal. Aug. 20, 2015).

341. *Peterman v. Republican Nat’l Comm.*, 369 F. Supp. 3d 1053, 1065 (D. Mont. 2019).

appear to presume that original copyrighted works that embody a political nature have no further marketability, and therefore, copyright owners cannot show that those unauthorized uses produce market harm under this factor. This presumption seems to ignore two considerations that courts contemplate under the fourth factor: the first is “whether unrestricted and widespread conduct of the sort engaged in by the defendant ... would result in a substantially adverse impact on the potential market’ for the original.”<sup>342</sup> The second presumption is whether the defendant’s conduct usurped the “potential market”<sup>343</sup> for the work, which only the copyright owner “has the right to enter ...; whether it chooses to do so is entirely its business.”<sup>344</sup>

Some copyright owners argue under the fourth factor that unauthorized political uses of their works harm their market and financial interests by damaging their reputations.<sup>345</sup> Indeed, certain artists

use—or attempt to use—copyright as a tool by which to preserve or advance their reputations as artists. While this purpose is not fully separate from the use of copyright as an economic lever, it is analytically distinct (under U.S. legal principles) insofar as control over image circulation relates to something other than direct revenue collection.<sup>346</sup>

For instance, in the dispute between Romney’s campaign and NBC over Romney’s use of a clip from NBC News, Brokaw, who was featured in Romney’s advertisement criticizing Gingrich, expressed his

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342. *Campbell*, 510 U.S. at 590 (quoting 3 NIMMER & NIMMER, *supra* note 272, § 13.05(A)(4) (1993)).

343. 17 U.S.C. § 107(4).

344. *Micro Star v. FormGen Inc.*, 154 F.3d 1107, 1113 (9th Cir. 1998); *see also Oracle Am., Inc. v. Google LLC*, 886 F.3d 1179, 1208 (Fed. Cir. 2018), *rev’d*, 141 S. Ct. 1163 (2021); *Salinger v. Random House, Inc.*, 811 F.2d 90, 99 (2d Cir. 1987).

345. Laura A. Heymann, *The Law of Reputation and the Interest of the Audience*, 52 B.C. L. REV. 1341, 1402-03 (2011) (“[C]opyright plaintiff[s] may be able to argue that such uses are not fair uses under the law by relying on the fourth statutory fair use factor, in which the court is asked to consider ‘the effect of the use upon the potential market for or value of the copyrighted work,’ to argue that uses that are inconsistent with the plaintiff[s] current reputational status will have an economic effect on the plaintiff[s] ability to license or sell copies of the work in the future.” (quoting 17 U.S.C. § 107(4))).

346. Jessica Silbey, Eva E. Subotnik & Peter DiCola, *Existential Copyright and Professional Photography*, 95 NOTRE DAME L. REV. 263, 312 (2019).

discomfort with the use of his image because it could compromise his future journalistic integrity.<sup>347</sup> Similarly, in Hasbro's cease-and-desist letter to Angle, Hasbro explained its concern with "the damage that can be done to the image of the company and its products from such a[] [political] association, regardless of person, party, or issue for which they are used."<sup>348</sup>

At least a couple of courts have, in dicta, appeared sympathetic to the argument that unauthorized political uses of creators' works could damage their reputations and cause commercial harm, such as losing out on future commissions because their works were picked up and used by the opposition.<sup>349</sup> In *Kienitz v. Scennie Nation*, for example, the court recognized that the unauthorized use of a photograph of the mayor

may injure [photographer] Kienitz's long-range commercial opportunities.... He promises his subjects that the photos will be licensed only for dignified uses. Fewer people will hire or cooperate with Kienitz if they think that the high quality of his work will make the photos more effective when used against them!<sup>350</sup>

In *Peterman*, Peterman argued that she possibly "lost additional revenue from customers who might have licensed her images but did not do so because [she] could not guarantee the images' exclusivity. In addition, the Montana Democratic Party may not hire [her] in the future to shoot their events because she cannot guarantee her images' exclusivity."<sup>351</sup> The plaintiff in *Galvin* made a similar argument that the defendant's unauthorized political use of his photograph "harms the reputation of Mr. Galvin's subjects and thus the value of his photographs."<sup>352</sup> The court in *Galvin* seemed willing

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347. Lederman, *supra* note 165 (quoting Tom Brokaw as stating that he was "extremely uncomfortable" with Romney's use of his image and "d[id] no[t] want [his] role as a journalist compromised for political gain by any campaign").

348. Terkel, *supra* note 16 (quoting Hasbro's cease-and-desist letter to Angle over Harry Reid's Amnesty Game).

349. *See, e.g.*, *Kienitz v. Scennie Nation LLC*, 766 F.3d 756, 759-60 (7th Cir. 2014); *Galvin v. Ill. Republican Party*, 130 F. Supp. 3d 1187, 1196 (N.D. Ill. 2015).

350. *Kienitz*, 766 F.3d at 759-60.

351. *Peterman v. Republican Nat'l Comm.*, 369 F. Supp. 3d 1053, 1065 (D. Mont. 2019) (second alteration in original).

352. *Galvin*, 130 F. Supp. 3d at 1197.

to recognize “such ‘negative complements’ can impair a plaintiff’s ‘long-range commercial opportunities’ even if a defendant’s unauthorized use does not reduce the value derived from the plaintiff’s original work.”<sup>353</sup> Courts in political fair use cases, however, generally reject these arguments because “[f]air use analyses do not take account of commercial depreciations that are due solely to critical commentary of underlying works”<sup>354</sup> and because copyright law “does not exist to protect artists’ general reputations. No artist can guarantee exclusivity; every copyrighted work is subject to fair use.”<sup>355</sup>

If there is no evidence of commercial harm or potential commercial harm to the original copyrighted work or its derivatives, this factor typically favors fair use.<sup>356</sup> Courts do not typically consider reputational harm caused by unauthorized uses of copyrighted works, even if that reputational harm could affect the copyright owner’s future economic interests.<sup>357</sup> Indeed, “[u]nder the standard

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353. *Id.* at 1196 (quoting *Kienitz*, 766 F.3d at 759).

354. *Id.* at 1197.

355. *Peterman*, 369 F. Supp. 3d at 1065 (citing 17 U.S.C. § 106).

356. *See, e.g., Bollea v. Gawker Media, LLC*, 913 F. Supp. 2d 1325, 1329 (M.D. Fla. 2012) (“Plaintiff in this case cannot legitimately claim that he seeks to enforce the copyright because he intends to publish the Video.... [I]t cannot reasonably be argued that Gawker Media is usurping Plaintiff’s potential market for the Video (which Plaintiff himself characterizes as a ‘sex tape’) by publishing excerpts of the video.”); *Michaels v. Internet Ent. Grp.*, No. CV 98-0583, 1998 WL 882848, at \*13 (C.D. Cal. Sept. 11, 1998) (“Lee is not in direct competition with Paramount in the production of television entertainment news programs such as *Hard Copy*. Paramount’s transformative use of the Tape excerpts to produce an entertainment news story does not affect Lee’s market for the same service, because Lee is not in such a market.”); Andrew Gilden, *Copyright’s Market Gibberish*, 94 WASH. L. REV. 1019, 1038-39 (2019) (“Because Núñez never tried to make money off the sale of the photographs, he had no cognizable market interest in the photos. Moreover, to the extent that what was *really* motivating the lawsuit was his ability to protect his professional reputation—in part by protecting the reputation, privacy, and dignity of clients like Giraud—the court concluded, “[t]he overall impact to Núñez’s business is irrelevant to a finding of fair use.” (alteration in original) (quoting *Núñez v. Caribbean Int’l News Corp.*, 235 F.3d 18, 24 (1st Cir. 2000))); M. Margaret McKeown, Keynote Address, *Censorship in the Guise of Authorship: Harmonizing Copyright and the First Amendment*, 15 CHI.-KENT J. INTELL. PROP. 1, 7 (2016) (explaining that, in *Garcia v. Google*, “there was a fundamental mismatch between Garcia’s claimed harm (death threats and reputational harm) and the purpose of the copyright laws (to stimulate creative expression, not to protect secrecy)” and that the court stated that Garcia’s “harms are untethered from—and incompatible with—copyright and copyright’s function as the engine of expression. In broad terms, ‘the protection of privacy is not a function of the copyright law’” (quoting *Garcia v. Google, Inc.*, 786 F.3d 733, 745 (9th Cir. 2015) (en banc))).

357. *But see* Jane C. Ginsburg, Essay, *Fair Use Factor Four Revisited: Valuing the “Value*

view, copyright law exists to solve an economic problem about creative incentives and public access.... [C]opyright law's remedial and fair use doctrines stress the importance of market harm as the primary, and perhaps even sole, feature of the wrongfulness of unauthorized use."<sup>358</sup>

While courts do not explicitly create an exception in copyright law for political speech when a copyrighted work is used for a political purpose, based on the analysis above examining fair use decisions in political use cases, courts' analyses and balancing of the four fair use factors change when defendants' uses are political. In these cases, the nature of the original copyrighted work—whether it had a political nature—seems to dominate the political fair use analysis.<sup>359</sup> If the original copyrighted work serves a political purpose or has a political nature, the secondary use of that work for political purposes is often considered to be transformative under the first factor even if both uses were political and the defendant barely altered the content.<sup>360</sup> Similarly, under the third factor, while courts acknowledge in some cases a defendant did not need to use the original copyrighted work to express their intended political message, and their use may be lazy appropriation, this determination does not change the ultimate outcome of fair use when the original copyrighted work had a political nature.<sup>361</sup> Finally, under the fourth factor, if the original copyrighted work has a political nature, courts find that the original copyrighted work has no further marketability and, therefore, the defendant's unauthorized use weighs in favor of fair use.<sup>362</sup>

These decisions demonstrate that the determination of the political nature of the original copyrighted work plays a significant role in political fair use and can appear to stampede the fair use

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*of the Copyrighted Work*," 4-5, 10-11 (Colum. Pub. L. Rsch. Paper, Paper No. 14-653, 2020), [https://scholarship.law.columbia.edu/faculty\\_scholarship/2677](https://scholarship.law.columbia.edu/faculty_scholarship/2677) [<https://perma.cc/J6LF-Y67V>] (arguing that the "value" of the work under fair use factor four should consider reputational damage that results in future economic losses to the copyright owner, citing *Video Pipeline, Inc. v. Buena Vista Home Entertainment, Inc.*, 342 F.3d 191 (3d Cir. 2003), in support).

358. Christopher Buccafusco & David Fagundes, *The Moral Psychology of Copyright Infringement*, 100 MINN. L. REV. 2433, 2444 (2016).

359. See *supra* Part III.A.

360. See *supra* Part III.B.

361. See *supra* Part III.C.

362. See *supra* Part III.D.

analysis. “The metaphor of stampeding” refers to situations in which “judges decide the outcome of a multifactor test based on a limited number of core factors, possibly only one. The judge then tends to ensure that most, if not all, of the remaining factors follow the lead of this dispositive factor.”<sup>363</sup> While fair use is, by its nature, meant to be applied flexibly to determine whether fair use is warranted in each instance,<sup>364</sup> each factor should be analyzed and weighed, and one single factor should not dictate or stampede the analysis of the rest. The courts’ political fair use decisions can be viewed as creating presumptive fair use in situations in which the original copyrighted work served a political purpose or had a political nature and the defendant used that work for a political purpose. This appears contrary to the Supreme Court’s guidance on not creating special fair use exceptions for political uses of works, and it may undermine its rule that original works that embody important public information should enjoy the same exclusive rights under copyright law.<sup>365</sup> Indeed, copyrighted works that embody a political nature should not be automatically excluded from copyright protection, and creators of works with a political nature should be afforded the same exclusivity as creators of other genres of works.

Regardless, as discussed in this Part, in almost every single case in which the original copyrighted work served a political purpose, its secondary political use was considered fair use. What are the implications of political fair use? Part IV analyzes the normative implications of political fair use on litigation certainty, creativity incentives, authorial dignity and autonomy, and political censorship.

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363. See Beebe, *supra* note 218, at 555 n.14.

364. See *Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1259 (11th Cir. 2014) (“[T]he fair use inquiry is a flexible one. The four statutory factors provide courts with tools to determine—through a weighing of the four factors in light of the facts of a given case—whether a finding of fair use is warranted in that particular instance.”).

365. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 559 (1985) (“It is fundamentally at odds with the scheme of copyright to accord lesser rights in those works that are of greatest importance to the public.”).

## IV. NORMATIVE IMPLICATIONS OF POLITICAL FAIR USE

The previous Part demonstrated a pattern in political fair use, in which courts overwhelmingly find fair use in cases arising from the unauthorized political uses of original copyrighted works if those copyrighted works have a political nature. So far, the goal in this Article has been to identify how courts implicitly modify fair use factors to find political fair use in these particular cases and to highlight concerns and justifications for those modifications. This Part examines the normative implications of political fair use, including implications on litigation certainty, incentives to create, authorial dignity, and political censorship.

*A. Balancing Litigation Certainty and Incentives to Create*

Political fair use can provide certainty and predictability to creators of political works. Commentators have accused fair use decisions of being unpredictable, often attributing its unpredictability to fair use's intensive case-by-case analysis.<sup>366</sup> At the same time, there have been a growing number of works documenting predictive patterns in fair use, including through empirical analyses of fair use decisions, or analyses of fair use patterns in particular fields or "policy-relevant clusters."<sup>367</sup> Predictable results in political fair use can provide courts with a consistent framework to handle disputes

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366. See, e.g., LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 187 (2004) ("[F]air use in America simply means the right to hire a lawyer to defend your right to create."); Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1090 (2007) ("[T]he doctrine[] ... is so case-specific that it offers precious little guidance about its scope to [those] ... who require use of another's copyrighted expression in order to communicate effectively."); Thomas F. Cotter, *Fair Use and Copyright Overenforcement*, 93 IOWA L. REV. 1271, 1284 (2008) ("Fair use ... remains fairly unpredictable and uncertain in many settings."); David Nimmer, *"Fairest of Them All" and Other Fairy Tales of Fair Use*, 66 LAW & CONTEMP. PROBS. 263, 280 (2003); Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525, 1666 (2004) ("Fair use is an *ex post* determination, a lottery argument offered by accused infringers forced to gamble, after the fact, that they did not need permission before.").

367. Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2541-43 (2009). See generally PATRICIA AUFDERHEIDE & PETER JASZI, *RECLAIMING FAIR USE* (2011); Madison, *supra* note 366; Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715 (2011); Sag, *supra* note 211.

resulting from unauthorized political uses of copyrighted works, can assist litigants in assessing their chances in political fair use litigation, and can help creators of political works and secondary users of those works make judgment calls in practice.<sup>368</sup> Based on the pattern in political fair use decisions, creators of political works can understand ahead of time that their works may be fairly used by others for political commentary, criticism, and other political purposes. Political users of copyrighted works can understand that using an original political work is more likely to be considered fair than using an original nonpolitical copyrighted work.

However, the complications posed by determining the original copyrighted work's nature could cut against some of the predictability and certainty in political fair use. Some works, such as campaign websites or political flyers, are clearly political, but the political nature of other works might be harder to identify. For instance, in *Henley*, DeVore argued that Henley's "Boys of Summer" song had a political nature.<sup>369</sup> Specifically, he argued that the lyrics lamented "the failure of 1960's liberal politics (symbolized by the Deadhead sticker) to change the status quo (symbolized by the Cadillac)."<sup>370</sup> Similarly, while the Success Kid meme has no apparent political message, the Obama administration licensed its use in 2013 to promote immigration reform.<sup>371</sup> Does that use change the nature of the copyrighted work—thereby making it political? Finally, even though the original copyrighted engagement photo in *Hill* was not created for a political purpose,<sup>372</sup> what if, years later, one of the persons featured in the photograph decides to run for public office? While the candidate for public office may have waived their right to privacy, should the photographer's rights in the photos be more vulnerable to unauthorized political use now that the photo arguably has a political nature? What about works that are politicized

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368. See Tushnet, *supra* note 254, at 873-74 ("A number of academics have identified patterns in fair use cases that can be used to predict outcomes and make judgment calls in ordinary practice.... The clearest example comes from the statement of fair use best practices for documentary filmmakers, which enabled filmmakers to get insurance and distribution while relying on fair use.")

369. *Henley v. DeVore*, 733 F. Supp. 2d 1144, 1156 (C.D. Cal. 2010).

370. *Id.*

371. Yuhas, *supra* note 2.

372. *Hill v. Pub. Advoc. of the U.S.*, 35 F. Supp. 3d 1347, 1351-52 (D. Colo. 2014).

against a copyright owner's will, such as artist Matt Furie's cartoon of Pepe the Frog?<sup>373</sup>

While there are many benefits to predictability, a concern with political fair use's predictability is that it creates a presumptive fair use rule for a particular use of a specific genre of work. This is not what the legislature intended for fair use analysis; instead, "Supreme Court precedent and the legislative history ... make clear that fair use analysis is not appropriately conducted through the use of bright line rules, but must be dealt with on a case by case basis."<sup>374</sup> Under political fair use, however, unauthorized political uses of works that have a political nature are almost always fair.<sup>375</sup> This result can deprive original political works of copyright protection, which original works in other genres enjoy, possibly prejudicing creators of works of significant political or public interest. The level of copyright protection a work enjoys should not be influenced by the political nature or subject matter of the work, and "[i]t is fundamentally at odds with the scheme of copyright to accord lesser rights in those works that are of greatest importance to the public."<sup>376</sup>

While political fair use may only limit a political work's right to exclude unauthorized *political* uses of the work, there are likely only a few instances in which the secondary uses of a political work would not also be considered political. This means that, by creating an almost-presumptive rule for political fair use, creators of expressive political works could always be deprived of their exclusive rights in their works "precisely when they encounter those users who could afford to pay for it."<sup>377</sup>

Political fair use may also implicate incentives to create. If creators of political expressive works are unable to stop unauthorized

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373. See *Furie v. Infowars, LLC*, 401 F. Supp. 3d 952, 958-60 (C.D. Cal. 2019); Aja Romano, *Pepe the Frog Was Killed by His Creator. But His Alt-Right Legacy Lives On*, VOX (May 9, 2017, 1:00 PM), <https://www.vox.com/culture/2017/5/9/15583312/matt-furie-kills-pepe-frog-alt-right-meme> [<https://perma.cc/JS6X-VCJC>].

374. *Furie*, 401 F. Supp. 3d at 971; see also *Oracle Am., Inc. v. Google LLC*, 886 F.3d 1179, 1191 (Fed. Cir. 2018) ("The Supreme Court has cautioned against adopting bright-line rules and has emphasized that all of the statutory factors 'are to be explored, and the results weighed together, in light of the purposes of copyright.'" (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994))), *rev'd*, 141 S. Ct. 1163 (2021).

375. See *supra* Part III.A.

376. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 559 (1985).

377. See Gordon, *supra* note 257, at 1615 (quoting Note, *supra* note 257, at 595).

political uses of their works, creators could be less inclined to create politically themed works, or perhaps put less effort into making those works compelling. Commentators have argued that creators can be less incentivized to create when they “operate in an environment they perceive to be unfair,”<sup>378</sup> and “solicitude for, and sometimes protection of, creators’ moral-rights interests can strengthen utilitarian incentives in copyright ... law.”<sup>379</sup> Take, for example, the dispute between photographer Peterman and the RNC over the RNC’s unauthorized use of Peterman’s photograph of Quist in an attack ad mailer.<sup>380</sup> After the court dismissed her copyright claim against the RNC for fair use, Peterman stated,

I do a lot of political photography and work hard to create compelling, creative photos for the [political] candidates I work with. And, like any photographer or artist, I also want to share my work. However, if I know that my photos can be used for “political criticism” without my permission, it creates a major dilemma for me.<sup>381</sup>

While political fair use may not stop Peterman from taking political photos in the future, it perhaps could influence her choice to put time, effort, and artistry into creating compelling political works. It may also discourage her from freely and openly sharing her works on social media or through other more publicly accessible content platforms. It is true that political fair use may provide more certainty and predictability to creators and secondary users of expressive political works.<sup>382</sup> This benefit, however, should be balanced against the potential for political fair use to create presumptive rules that could disincentivize creation of a specific genre of work.

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378. Stephanie Plamondon Bair, *Rational Faith: The Utility of Fairness in Copyright*, 97 B.U. L. REV. 1487, 1490 (2017) (citing Stephanie Plamondon Bair, *The Psychology of Patent Protection*, 48 CONN. L. REV. 297, 339 (2015)).

379. Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745, 1763 (2012).

380. *Peterman v. Republican Nat’l Comm.*, 369 F. Supp. 3d 1053, 1057-58 (D. Mont. 2019).

381. Conor Risch, *Updated: RNC Didn’t Infringe Photographer’s Copyright, Montana Judge Rules*, PDN PULSE (Mar. 18, 2019), <https://pdnpulse.pdnonline.com/2019/03/rnc-copyright-erika-peterman.html> [<https://perma.cc/86VY-UUQC>].

382. *See Tushnet, supra* note 254, at 873-74.

*B. Balancing Political Censorship and Authorial Dignity*

Political fair use attempts to balance two important considerations: creators' interests in dignity and autonomy over their works and the public's interest in free and open political expression. Based on the cases discussed above, political fair use may be both too narrow in certain cases and too broad in others to achieve the appropriate balance between these important social and public interests. In almost all of the copyright disputes arising from unauthorized political use discussed above, market-based incentives played little to no role in copyright owners' decisions to sue or complain about the unauthorized political uses of their works.<sup>383</sup> Instead, in political use cases, copyright owners are motivated by other considerations, including censoring of political criticism, publicly repudiating apparent endorsement, and protecting their dignity rights by preventing use of expressive works, either for political purposes<sup>384</sup> or by politicians or political campaigns that copyright owners disagree with or morally oppose.<sup>385</sup> These types of uses of copyright "do not ... align with the dominant commercial rationale for copyright,"<sup>386</sup> and courts and scholars have generally devalued these other uses of copyright law.<sup>387</sup> One concern with political fair use's presumptive rule is that its treatment of unauthorized political uses of copyrighted work fails to differentiate between these very different motivations and uses of copyright law.

For instance, some of the copyright owners in political use cases use copyright to censor political speech and criticism. Angle's use of copyright to stop her opponent Reid from sharing her former campaign webpage was an attempt to censor Reid's political criticism of Angle's political views and her attempt to hide those

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383. See, e.g., *Peterman*, 369 F. Supp. 3d at 1065; *Henley v. DeVore*, 733 F. Supp. 2d 1144, 1161-63 (C.D. Cal. 2010).

384. Terkel, *supra* note 16.

385. See, e.g., Yuhas, *supra* note 2 ("She fears the copyrighted photo of her son ... will become associated with the 'bigotry' of Representative King, an Iowa Republican who used it in a campaign fund-raising ad.").

386. Chon, *supra* note 20, at 365.

387. See McKeown, *supra* note 356 (discussing copyright as censorship); Shyamkrishna Balganes, *Private Copyright*, 73 VAND. L. REV. 1, 21 n.65 (2020) (surveying scholarship critical of using copyright to protect dignitary or privacy interests).

views from voters.<sup>388</sup> Angle's use of copyright in this case was probably one of the more egregious uses of copyright in order to erase her prior writings and deny that they ever existed.<sup>389</sup> The City of Inglewood's copyright suit against Teixeira for his use of video recordings of city council meetings was also an attempt to censor Teixeira's criticism of the mayor and city council members.<sup>390</sup> These types of censorial uses of copyright, for the sole purpose of suppressing information, facts, or a specific political message, can prohibit the full and free discussion of important public issues and are dangerous to democracy.

Another example of copyright owners using copyright to promote noneconomic interests is copyright owners who file suit or complain about political uses of their works in order to publicly repudiate any perceived endorsement of a political candidate, party, or cause. "Artists may ... use copyright law to assert what is essentially a trademark-related claim—in other words, they use their ability to control the exploitation of the work to challenge uses that suggest an authorization or sponsorship of the message conveyed by the defendant's use."<sup>391</sup> For instance, in the dispute between Romney's campaign and NBC over Romney's use of clips from NBC News, Brokaw, who is featured in Romney's advertisement criticizing Gingrich, stated, "I am extremely uncomfortable with the extended use of my personal image in this political ad ... I do no[t] want my role as a journalist compromised for political gain by any campaign."<sup>392</sup>

Commentators have expressed concern with copyright owners' use of copyright to protect their reputation because "copyright law was not designed to be a general-purpose ... or reputation-enhancing law. As a result, copyright law lacks the doctrinal features necessary" in order to ensure that society-enhancing works perform their vital role.<sup>393</sup> Nevertheless, in some political use cases, artists use

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388. Peñalver & Katyal, *supra* note 176.

389. *See id.*

390. *See City of Inglewood v. Teixeira*, No. CV-15-01815, 2015 WL 5025839, at \*2 (C.D. Cal. Aug. 20, 2015).

391. Heymann, *supra* note 345, at 1402.

392. Lederman, *supra* note 165.

393. Goldman & Silbey, *supra* note 217, at 932; *see also Oliveira v. Frito-Lay, Inc.*, 251 F.3d 56, 62 (2d Cir. 2001) (noting that generally musicians cannot assert a false endorsement claim

copyright law for precisely this purpose, using “cease-and-desist letters [to] simply raise publicity and let the general public know that the particular band or artist does not want to be associated with the candidate.”<sup>394</sup>

More often, however, copyright owners who object to the unauthorized political uses of their works are protecting other socially valuable personal interests, including privacy interests<sup>395</sup> or dignity interests in their works.<sup>396</sup> These copyright owners do not want their expressive works politicized or associated with a politician, political party, or policy with which they disagree or to which they are morally opposed.<sup>397</sup>

For instance, in the dispute between Hasbro and Angle over Angle’s use of Monopoly game imagery to criticize Reid, Hasbro

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based on the unauthorized use of their musical performance); *Henley v. DeVore*, 733 F. Supp. 2d 1144, 1166-67 (C.D. Cal. 2010).

394. See Krista L. Cox, *Copyright and Campaigns*, ABOVE L. (Aug. 1, 2019, 11:43 AM), <https://abovethelaw.com/2019/08/copyright-and-campaigns/> [<https://perma.cc/AC5G-PGTL>].

395. See, e.g., Pamela Samuelson, *Protecting Privacy Through Copyright Law?*, in *PRIVACY IN THE MODERN AGE* 191, 194-98 (Marc Rotenberg et al. eds., 2015) (discussing cases, including *Hill v. Public Advocate of the United States*, suggesting copyright law as an alternative way to protect privacy interests); Chon, *supra* note 20, at 366-68 (describing copyright’s role in protecting victims of nonconsensual pornography, that is, revenge porn); Goldman & Silbey, *supra* note 217, at 982-87 (discussing uses of copyright to protect privacy or reputational interests, including *Hill* and *Dhillon*); Amanda Levendowski, Note, *Using Copyright to Combat Revenge Porn*, 3 N.Y.U. J. INTELL. PROP. & ENT. L. 422, 442 (2014) (“Revenge porn victims are a perfect example of the ways in which negative copyrights incentivize creation: those images would never have been shared if victims did not believe they could control who saw them.”); Patrick R. Goold, *Unbundling the “Tort” of Copyright Infringement*, 102 VA. L. REV. 1833, 1865-67 (2016).

396. See, e.g., Goold, *supra* note 395, at 1868 (“[C]ommentators have pointed out how courts use ‘copyright law to vindicate reputational rights when certain uses or modifications of the author’s work are likely to cause audiences to form a particular judgment about the author.’” (quoting Heymann, *supra* note 345, at 1401)); Bair, *supra* note 378, at 1511 (“Perceived fairness also grows when creators feel that they have a voice in decision-making and are treated considerately and with dignity.”); Yuhas, *supra* note 2 (“Usually ... people register copyrights on memes either to guard against associations they do not want—as with ‘Pepe the Frog’—or when there’s money to make with licensing.”); Balganes, *supra* note 387, at 52.

397. See Buccafusco & Fagundes, *supra* note 358, at 2452; Cox, *supra* note 394 (“Typically, the artists are not objecting to the use of their music generally, but object to being associated with a particular candidate or campaign.”); see, e.g., Gustav Niebuhr, *Sculpture in a Movie Leads to Suit*, N.Y. TIMES (Dec. 5, 1997), <https://www.nytimes.com/1997/12/05/us/sculpture-in-a-movie-leads-to-suit.html> [<https://perma.cc/2WAS-BLLW>] (discussing a sculptor who sued Warner Bros. for its unauthorized use of his sculpture because the sculpture was meant “to express ‘creation as the metamorphosis of divine spirit and energy’” but was used in Warner Bros.’s movie *Devil’s Advocate* as “an instrument of the Devil ... [and] all things demonic”).

explained in its cease-and-desist letter to Angle's campaign that it rejects any association of its products with partisan politics because of the damage that such association could do to the image of Hasbro and its products.<sup>398</sup> Hasbro's complaint was not based on Angle's failure to license her use of the Monopoly game imagery; Hasbro simply did not want its works associated with partisan politics.<sup>399</sup> In the disputes between musicians, such as Browne and Henley, and between politicians and their campaigns who use their music without authorization, musicians typically do not want their music "to become associated with causes that might undermine the perceived meaning of their works."<sup>400</sup> It is possible that these artists would have been more comfortable with unauthorized uses of their music had those uses been by Democratic politicians or liberal political campaigns that more closely aligned with the artists' own political beliefs.<sup>401</sup>

Similarly, in the dispute between Peterman and the RNC, Peterman objected to the unauthorized use of her work by the RNC and by a candidate whom she opposed and with whom she disagreed on many political and social issues, but the court assumed that Peterman would have welcomed the appropriation of her work by social media users whose politics aligned with hers.<sup>402</sup> Finally, in the recent dispute between Griner and King over King's use of Griner's photograph of her son, the Success Kid meme, Griner explained that she "would never attach [her son's] face willingly to any negative ad, ... but Steve King is just the worst of the worst.... [B]igotry is just the antithesis of what we want to be the association with the meme."<sup>403</sup>

While the uses of copyright in this last example may be categorized as a form of censorship in that they are an attempt to "curb[] the dissemination of protected expression, regardless of its market

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398. Terkel, *supra* note 16.

399. *See id.*

400. John Tehranian, *The New Censorship*, 101 IOWA L. REV. 245, 281 (2015).

401. *See id.*

402. *Peterman v. Republican Nat'l Comm.*, 369 F. Supp. 3d 1053, 1063 (D. Mont. 2019) ("Peterman herself would have welcomed reposts, retweets, and other forms of appropriation by other pro-Quist social media users.").

403. Yuhas, *supra* note 2.

effects,”<sup>404</sup> they are not primarily motivated by censoring a particular political message. Specifically, these copyright owners are not using copyright to suppress the political messages that defendants want to express or using copyright to erase all public knowledge of their works; they simply want to prevent defendants from using their copyrighted works and their creative expressions to express the defendants’ political messages. In these cases, the desire to suppress the defendants’ particular expression is “an animating factor”—but not the primary motivator—in their decisions to file or threaten infringement.<sup>405</sup>

Copyright law typically does not care about a copyright owner’s motivations for filing suit.<sup>406</sup> Certain commentators argue “that copyright law ought to be invoked only when the creative incentive (and its connected market attributes) is at issue, and not otherwise”<sup>407</sup> and describe uses of copyright law that are not motivated by copyright’s economic rationale as “censorship in the guise of authorship.”<sup>408</sup> At the same time, other commentators acknowledge that “not all copyright suits lacking an economic driver are censorious in nature,”<sup>409</sup> and this is especially true in cases when copyright is used to protect socially valuable interests, including vindicating an author’s dignity or privacy interests and upholding a commitment to authorial autonomy.<sup>410</sup> Some commentators have even argued for a commitment for copyright law to be used to prevent and remedy the moral and dignity harms to creators and copyright owners caused by unauthorized copying.<sup>411</sup>

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404. Balganesch, *supra* note 387, at 7.

405. Tehranian, *supra* note 400, at 281.

406. Balganesch, *supra* note 387, at 60.

407. *Id.* at 4 (describing this popular view).

408. McKeown, *supra* note 356, at 1 (describing a “growing number of claims that invoke copyright protection to remedy a broad array of personal harms” and arguing that these “trumped up copyright claim[s] cannot justify censorship in the guise of authorship”).

409. Tehranian, *supra* note 400, at 280.

410. *See* Balganesch, *supra* note 387, at 5; Buccafusco & Fagundes, *supra* note 358, at 2452-53 (explaining that “many authors object to copyright infringement not because it harms the market for their works, but instead because they believe that the use is unfair, immoral, or obscene,” and summarizing such cases, including *Henley and Browne*); Chon, *supra* note 20, at 366-67, 369-70; Silbey et al., *supra* note 346, at 312-17; Tehranian, *supra* note 400, at 280.

411. *See, e.g.*, Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945, 1986 (2006); Susan P. Liemer, *Understanding Artists’ Moral Rights: A Primer*, 7 B.U. PUB. INT. L.J. 41, 41-42, 44 (1998);

Political fair use appears overinclusive in certain scenarios when it fails to account for the privacy, dignity, or economic interests of creators of works that happen to embody a political nature and underinclusive in other scenarios in which concerns for the dignity rights of a creator seem to override common applications of parody, transformativeness, and fair use. As discussed in Part I, political speech occupies a privileged space under the First Amendment and deserves the strongest protection from attempts to censor it. We cannot allow copyright law to be used as a tool for political censorship, and political opponents or the public should be able to use these political works, such as a politician's earlier writings on her webpage or a photo of a politician acting inappropriately, in order to criticize that politician or their political views or messages.<sup>412</sup>

The potential to use copyright law to censor protected political speech is most evident in cases in which copyright owners file or threaten to file infringement actions for reasons other than to protect their economic interests, including filing or threatening to file suit for the sole purpose of censoring political criticism.<sup>413</sup> At the same time, however, copyright loses some of its meaning if copyright owners and creators have no control over even the most objectionable or debasing uses of their creative expressions. Perhaps political fair use, with its emphasis on the political nature of the original copyrighted works, is the courts' imperfect attempt to strike a balance between protecting copyright owners' exclusive rights to their works and protecting the public interest in a full and free discussion of issues relating to elections, politicians, and political candidates and campaigns.

## CONCLUSION

In light of copyright law's built-in First Amendment accommodations, courts do not engage in separate First Amendment analyses or create special fair use exceptions for disputes arising from the unauthorized political uses of copyrighted works. This Article,

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Jane C. Ginsburg, *Have Moral Rights Come of (Digital) Age in the United States?*, 19 CARDOZO ARTS & ENT. L.J. 9 (2001).

412. See, e.g., Peñalver & Katyal, *supra* note 176.

413. See *supra* notes 388-90 and accompanying text.

however, identifies a pattern of political fair use in infringement and fair use decisions arising from the unauthorized political uses of copyrighted works. In political fair use, the determination that the original copyrighted work embodies a political nature creates a stampeding effect through all of the fair use factors in section 107 of the Copyright Act. This allows courts to more easily find fair use in disputes arising from unauthorized political uses of copyrighted works that also have a political nature.

This implicit modification of copyright's fair use doctrine to accommodate political fair use can have implications on litigation certainty and fair use predictability and on incentives for creators to create political expressive works. It can also affect the appropriate balance between respecting creators' dignity and autonomy rights in their expressive works and guaranteeing the free and open discussion of politicians and political candidates. While political fair use makes a decent attempt to balance these important public interests, its steadfast application of a doctrine designed for flexibility and case-by-case analysis can cause overinclusivity by excusing unauthorized uses that should not be fair use and underinclusivity by denying fair use in cases that result in censorship of important political speech and expression.