

**HEARING BEFORE THE U.S. SENATE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON INTELLECTUAL PROPERTY**

“How Does the DMCA Contemplate Limitations and Exceptions Like Fair Use?”

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Chairman Tillis, Ranking Member Coons, and Members of the Subcommittee, thank you for the opportunity to testify at today’s hearing. My name is Matthew Sanderson, I co-lead the Political Law Practice Group at the law firm Caplin & Drysdale, where I advise political committees, consultancies, advocacy groups, and other clients on laws that govern political activity, including campaign finance, lobbying, and government ethics rules.

As the Subcommittee can surmise from my professional credentials and background, I am not an expert or a specialist in intellectual property law. I will not pretend otherwise. I am here simply to describe my experience in helping the campaigns, political committees, and other advocacy groups that I represent and counsel navigate intellectual property matters.

Election and advocacy groups are intensive producers of original content and frequent users of content created and distributed by others. As such, they regularly encounter intellectual property concepts, issues, and disputes, oftentimes unwittingly.

Election and Advocacy Groups as Producers of Original Content

Election and advocacy groups play a vital role in public discourse by distributing content to the public about candidates for public office, potential and pending governmental actions, and public policy. They continuously disseminate text, photos, footage, and other information to voters and citizens.

Many do not think of these groups as rights-holders in an intellectual property context, perhaps because they have not aggressively asserted their interests in the past. In fact, these groups (and candidate campaign committees in particular) have historically been happy to have others use their logos, slogans, and other content because they were and are candidate-, party-, or issue-oriented, and even an unauthorized use of their intellectual property helps raise awareness of their position. This is still the case in many instances, as one can see in the example of candidates running for federal office who post long clips of campaign-filmed “B-roll” footage on their social media accounts that are then used by “super PACs” and other independent outside entities to create advertisements that closely resemble campaign-sponsored advertisements. “Consumer confusion” is something actively

¹ All views expressed are the personal opinion of Matthew Sanderson and are not attributable to Caplin & Drysdale, Chartered or any client of Caplin & Drysdale, Chartered.

fostered, and not combatted, by rights-holders using this commonplace and lawful campaign method.

This is not to say that election and advocacy groups' intellectual property is always used by others without repercussion or objection. Federal campaign finance rules effectively restrict the wholesale copying and republication of a candidate's "campaign materials." See 11 C.F.R. § 109.23. And election and advocacy groups are not always pleased to have others use their intellectual property. In recent election cycles, for instance, these groups have increasingly used t-shirts, bumper stickers, and other items featuring their logos, images, and/or slogans to attract small-dollar contributions, which not only boost their revenues but also provide a metric of "grassroots" support for their cause. Consequently, election and advocacy groups have generally become more assertive in protecting intellectual property that can be used in fundraising activity. It is now not at all unusual for lawyers representing these groups to submit take-down requests to online platforms whose users are utilizing a campaign or PAC logo to solicit money or sell items without authorization from the rights-holder. For a particularly popular campaign or PAC, this exercise can have the feel of playing "Whac-A-Mole" at a carnival, with infringing users cropping up faster than online platforms are able or willing to remove them under a take-down process.

Election and Advocacy Groups as Users of Others' Content

Election and advocacy groups are more regularly thought of as users of others' intellectual property. They incorporate music, photos, news interviews, video clips, footage from television programs and movies, Internet memes, and other material to punctuate their messages and events as they operate "in an area of the most fundamental First Amendment activities." *Keep Thomson Governor Comm. v. Citizens for Gallen Comm.*, 457 F. Supp. 957, 959 (D.N.H. 1978).

Many of these uses are, in my view, legally permissible and non-infringing uses. Although my clients and other groups in this space periodically receive cease-and-desist letters from rights-holders for utilizing materials such as news interview excerpts and photos of opponents with controversial figures, their inclusion of this content in their communications is typically a paradigmatic example of "fair use."

Their use of popular music at events is also generally covered by a license secured by the group itself or by the hosting venue. For some time, though, Republican candidates in particular have dealt with artists objecting to the use of a song, even in circumstances where the artists retained no rights to the song and where the candidates had obtained a valid "blanket license" from a performance rights organization that permitted the candidates' uses at events. ASCAP and BMI responded to this dynamic in an unfortunate manner by creating a new special category of licenses for political groups that allow an artist to exclude songs from the license of a *particular* candidate or group. This bait-and-switch adjustment to the prior status quo has created a scenario where a campaign could pay for a

license with the intention to use music by a specific artist or group of artists, only to have that license later revoked without possibility of a refund.

Election and advocacy groups as a category are characterized by some rights-holders as irresponsible with respect to intellectual property laws. While I recognize that infringement does take place among these groups, I do not attribute this to lack of responsibility on their part. Election and advocacy campaigns are not long-term, corporate-style operations. They are messy, hurried efforts. A group that has retained counsel can, of course, seek and receive legal advice to ensure compliance with copyright laws in a time-sensitive environment, and counsel is usually heavily involved in presidential campaigns, U.S. Senate campaigns, and national party committees. But many U.S. House campaigns, as well as state- and local-level campaigns and groups, lack the budget and wherewithal to hire counsel. This sometimes leaves the non-lawyer staff to parse the difference between parody and satire, appreciate the need to secure synch and master licenses for musically oriented videos similar to those they regularly see on TikTok, and understand other important distinctions in this area of law.

I do not bring with me today any recommendations for or against legislative reform. I believe the principal remedy to ongoing issues, at least with respect to election and advocacy organizations, is additional education. There is a general lack of awareness and knowledge about intellectual property among rights-holders with respect to permitted use of protected material in a political setting and among the class of political consultants who manage campaigns and create their public communications. The U.S. Copyright Office could do more, in my opinion, to inform the public about intellectual property in the context of election and issue-advocacy campaigns. The Office could, for example, publish specialized plain-language guidance focused on helping candidates and campaign workers to properly understand concepts like public domain and fair use, avoid infringing on others' intellectual property, and secure their own intellectual property. The Office could also seek educational partnerships with election-oriented government bodies like the Federal Election Commission, the Election Assistance Commission, and state-level election officials, as well as political actors such as the national party committees, in an effort to reach more politically active individuals. I believe this approach would help protect property rights without sacrificing an open and robust discussion of candidates, governance matters, and public policy issues.

I appreciate the Subcommittee's attention to this important issue and, again, for extending to me an opportunity to testify about how election and advocacy groups interact with the intellectual property legal regime in the United States. I am happy to answer any questions you may have. Thank you.