

# POLITICAL CAMPAIGNS PUT COPYRIGHT BASICS IN THE SPOTLIGHT

By Bradley L. Smith

**MUSICIAN JACKSON BROWNE RECENTLY** settled a copyright case Browne had brought against former presidential candidate John McCain and the Republican party for the unauthorized use of Browne's song, "Running on Empty" (to mock his opponent's policies) during the 2008 Presidential campaign.

An even bigger litigation free-for-all has ensued over the copyright to the image of Barack Obama captured in a now-famous poster. This dispute involves the photographer who took the picture, the Associated Press, which published and distributed it, and the young man who used the photo to create the poster.

With multi-media options proliferating, the number of outlets that can share copyrighted content such as songs, photos, literature, commentary and entertainment

without permission is growing as well. But is the protection of these works waning? On the contrary, the Jackson Browne case suggests that the courts will continue to defend copyright holders and the long-held basic principles of copyrighting regardless of medium.

What are these basics? A copyright is the exclusive right to copy a work. It can protect literary works (books, printed materials and software), dramatic and musical works, audiovisuals, movies, recordings and art. There is no requirement that the work be useful or have value, but it must reflect some element of creativity and must be independently created by the author.

Importantly, copyright protection is limited to the expression of the idea, not the idea itself. Copyright protection does not extend to any idea, procedure, process,

method, concept or discovery — only to the way the idea is expressed.

To be copyrightable, a work must be original and not copied from another work. At least a minimum degree of independent skill or judgment must have been introduced into the work by the author. The work must fall within one of the following groups of copyrightable subject matter:

- A literary work (books, catalogs, software).
- Musical works, including any accompanying words.
- Dramatic works, including any accompanying words.
- Pantomimes and choreographic work.
- Pictorial, graphic and sculptural works.
- Motion pictures and other audiovisual work.
- Sound recordings.
- Architectural works.

Some categories of subject matter are expressly excluded from copyright protection. These include trademarks, short phrases, slogans and many utilitarian articles, such as automotive wheel covers.

A copyright arises at the moment of creation, which is the moment at which the work is fixed for the first time in a tangible medium of expression that is reproducible. This copyright exists even if the work is not published.

A copyright generally lasts for the life of the author, plus 70 years. For anonymous and pseudonymous works and works made for hire, the term is 95 years from the year of first publication or 120 years from the year of creation, whichever expires first.

The copyright is owned, at least initially, by the author of the work. In the case of a joint work, the joint

authors are joint owners or co-owners of the copyright. In the absence of a different agreement between co-owners, each has the right to freely use the jointly-owned copyright. However, if one uses the work in a manner which results in gain, he or she must inform the other owner so profits can be shared.

The Copyright Act accords copyright owners six exclusive rights: (1) reproduction, (2) derivative works, (3) distribution, (4) performance, (5) display and (6) digital transmission.

A copyright is infringed by the unauthorized exercise of any of these exclusive rights by another. Copyright infringement cases are virtually always heard in federal court. To prevail in a copyright infringement claim, the plaintiff must prove ownership of a valid copyright and that at least one of the six exclusive rights has been violated. Although the Copyright Act criminalizes some types of infringement, nearly all enforcement is by civil action brought by a copyright owner, as was the case with Jackson Browne and various parties involved in the Obama “Hope” poster case.

The take-away is that original expression can be valuable to the owner, and infringement expensive for those who ignore others’ copyrighted works. A tip for political candidates: Negotiate a license before using somebody else’s material.



*Bradley L. Smith is a shareholder and intellectual property litigator in the Ann Arbor office of Brinks Hofer Gilson & Lione. [bsmith@usebrinks.com](mailto:bsmith@usebrinks.com)*

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