Can Musicians Stop Trump From Using Their Songs?

By Bill Donahue

Law360 (June 22, 2020, 8:29 PM EDT) -- Tom Petty's family is trying to block President Donald Trump from using "I Won't Back Down" at campaign rallies, but it isn't as easy as simply asking him to stop.

In a statement issued late Saturday, several members of the late rock legend's family said they sent a cease-and-desist letter after the 1989 hit was played at the president's Saturday night rally in Tulsa, Oklahoma.

"Trump was in no way authorized to use this song to further a campaign that leaves too many Americans and common sense behind," Petty's family wrote. "Both the late Tom Petty and his family firmly stand against racism and discrimination of any kind. Tom Petty would never want a song of his used for a campaign of hate."

With the letter, Petty's family joins a long list of those who have objected to the use of their music at Trump's rallies. Neil Young, Guns N' Roses, Pharrell, Rihanna and others have all made similar statements, saying they don't want their music associated with the president's brand of politics.

Yet while it might seem simple enough for artists to order someone to stop using their music, the actual legal grounds for acting on such gripes are less clear-cut than one might think.

"Songwriters and recording artists are sometimes unhappy when their songs or recordings are used by politicians at their political rallies," said Paul Fakler, a music copyright attorney at Orrick Herrington & Sutcliffe LLP. "Often, however, they cannot use copyright infringement claims to stop the political appropriation of their music."

Musicians or their publishers obviously own copyrights to their songs, but campaigns that publicly perform them have typically secured legal permission to do so, thanks to broad blanket licenses issued by so-called performance rights organizations like ASCAP and BMI.

Those licenses — which cover hundreds of thousands of songs — allow bars, retailers, stadiums and other public spaces to safely play most music without the risk of infringing copyrights. Under the PRO licenses, a user simply pays fees to the rights groups and doesn't need to seek consent from individual artists.

In recent years, ASCAP and BMI have tried to make it easier for artists to withdraw such permission when it comes to campaign rallies. They've creating special licenses for political entities, which allow artists to exclude individual songs from a particular campaign's blanket license.

But the hotels, convention centers and other venues where rallies take place have their own separate blanket licenses with ASCAP and BMI. Those will typically cover the songs that were excluded from the political license, and they can give a campaign some legal cover to keep using them. In 2018, Axl Rose accused the Trump campaign of exploiting such venue licenses to get
around restrictions in the political license.

"Unfortunately, the Trump campaign is using loopholes in the various venues' blanket performance licenses, which were not intended for such craven political purposes without the songwriters' consent," Rose wrote in a tweet.

If a copyright claim doesn't work, an artist might instead argue that the performance of a famous song will falsely imply she is endorsing the candidate, particularly if the lyrics echo the campaign's themes.

One way to bring such a claim would be to cite the so-called right of publicity — the state law right to control the commercial use of one's name, likeness or persona. An artist could also threaten to sue under the federal Lanham Act, which prohibits false endorsements.

Rebecca Tushnet, a professor at Harvard Law School, said that kind of claim might work, but deemed it "something of a stretch."

"The core question: Do people really think that the artist whose music is played at a venue endorses the event?" Tushnet asked. "While reasonable people are likely to infer that the campaign likes the musician, it's somewhat less reasonable to conclude that the musician endorses the campaign unless there are other acts indicating endorsement."

In the absence of direct legal recourse, the single-best method for forcing a campaign to stop using a song might simply be the one artists have thus far employed: strongly worded public condemnations.

After all, what campaign manager wants to be blaring a song by an artist that has openly expressed contempt for your candidate?

"These cease-and-desist letters and public objections are less about the likelihood of success in the courtroom," said Jennifer E. Rothman, a professor at Loyola Law School and an expert on publicity rights law. "They are about signaling disapproval of Trump."

"Given this common occurrence, campaigns might want to choose music for which the performers or their estates would speak out in support of the candidates rather than against them, simply as a matter of successful campaign strategy," Rothman added.

--Editing by Philip Shea.

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