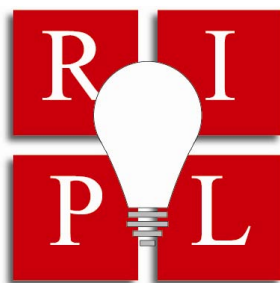


# THE JOHN MARSHALL REVIEW OF INTELLECTUAL PROPERTY LAW



## YOU CAN'T ALWAYS GET WHAT YOU WANT? A COMPARATIVE ANALYSIS OF THE LEGAL MEANS TO OPPOSE THE USE OF CAMPAIGN MUSIC

STEFAN MICHEL

### ABSTRACT

The conflict between politicians and musicians over the use of songs as campaign music is a recurring issue in almost every election cycle. Due to its energizing and unifying force, music can be an efficient instrument in political campaigning. However, artists feel aggrieved as the use of their music might invite the assumption that they are somehow endorsing the candidate.

After giving a brief overview of the history of campaign music and the qualities that make it so attractive for campaigning, this piece will analyze the chances a musician stands in the jurisdictions of the U.S., the UK and Germany. The choice of the assessed jurisdictions is reflective of the common law approach to copyright found in the U.S. and in the UK and the author's right system represented by Germany.

In the absence of an express moral rights regime for musical works in the U.S., artists need to rely on adjacent claims, including copyright, the right of publicity and trademark law, to vindicate their moral interests. It will be seen, though, that these claims are futile in the assessed scenario in which the campaign obtains a public performance license.

While the UK implemented statutory moral rights into its copyright law, the situation does not look promising either. The considerably narrow scope of acts that trigger the integrity right bars a successful moral rights claim.

In contrast, musicians in Germany could assert their moral rights against a campaign that performed their songs publicly although a public performance license has been purchased.

The comparative analysis shows that this outcome can be traced back to the basic rationales of copyright and author's rights. Because moral rights are the "backbone" of author's rights protection, a strong emphasis is put on the personal interests of the author. Contrastingly, the U.S. and the UK show less conviction towards moral rights and rather perceive copyright material as a commodity. It will be argued that this pre-understanding and the ensuing reluctant efforts in providing for moral rights protection are what renders the prospects in the U.S. and the UK less promising.

Lastly, it will be argued that musicians may well vindicate their moral interests in pursuing non-legal avenues and using their popularity to advance their aims. If artists turn to the media and

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condemn the use of their songs, they are able to generate negative publicity for the campaign and compel candidates to comply with their demands. Considering this, the increasing importance of social media will give musicians more leverage as they can communicate with the public and their fans more directly.

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## YOU CAN'T ALWAYS GET WHAT YOU WANT? A COMPARATIVE ANALYSIS OF THE LEGAL MEANS TO OPPOSE THE USE OF CAMPAIGN MUSIC

STEFAN MICHEL\*

### I. INTRODUCTION

In the early morning of Nov. 9, 2016, an unprecedented race for the forty-fifth presidency of the United States came to an end as Donald Trump defeated Hilary Clinton. Later, president elect Donald Trump gave his victory speech, which finished with the Rolling Stones' renowned 1969 song "You Can't Always Get What You Want".<sup>1</sup> Despite his rather ironic song selection, arguably poking fun at his competitors and political enemies, Trump had been using the song throughout his whole campaign, amongst pieces by other artists like Adele, Queen, REM and Neil Young.<sup>2</sup> The band, unhappy with the use of their song, requested to cease all use of their song since they have not given Trump the permission to use it.<sup>3</sup> Yet, Trump's defiance about the ban led the band to proclaim in public that they did not endorse Donald Trump.<sup>4</sup> The appropriation of songs by politicians to succeed in elections is nothing new and can be traced back to eighteenth century candidates such as George Washington.<sup>5</sup> In fact, using music to rouse rally crowds has grown more popular with each presidential election.<sup>6</sup> Moreover, artists increasingly declare their endorsement of a candidate in public or even play at campaign events.<sup>7</sup> Considering this, it

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<sup>1</sup> *How You Can't Always Get What You Want Became Donald Trump's Bizarre Theme Song*, THE GUARDIAN (Nov. 9, 2016), <https://www.theguardian.com/us-news/shortcuts/2016/nov/09/how-you-cant-always-get-what-you-want-became-donald-trumps-bizarre-theme-song>.

<sup>2</sup> *Id.*; Queen (@QueenWillRock), TWITTER (July 19, 2016, 7:18 AM), <https://twitter.com/QueenWillRock/status/7554064692694500752>. Queen tweeted that the use of their song at the RNC has been unauthorized and against their wishes.

<sup>3</sup> *Rolling Stones Tell Trump to Stop Using Their Music*, BBC NEWS (May 5, 2016), <http://www.bbc.co.uk/news/entertainment-arts-36210829>.

<sup>4</sup> Lauren Craddock, *Rolling Stones Say Trump Used 'You Can't Always Get What You Want' Without Permission at RNC*, BILLBOARD (July 22, 2016), <http://www.billboard.com/articles/columns/rock/7446637/rolling-stones-donald-trump-rnc-you-cant-always-get-what-you-want>. This occurred in a tweet which was deleted in the meantime but referenced in: *Rolling Stones Say Trump Used 'You Can't Always Get What You Want' Without Permission at RNC*.

<sup>5</sup> Eric T. Kasper & Benjamin S. Schoening, *"I Won't Back Down" or Will I?: The Law and Politics Surrounding Presidential Candidates' Unauthorized Use of Copyrighted Songs*, 49 PS: POL. SCI. & POLITICS 53 (2016).

<sup>6</sup> David C. Johnston, *The Singer Did Not Approve This Message: Analyzing the Unauthorized Use of Copyrighted Music in Political Advertisements in Jackson Browne v. John McCain*, 27 CARDOZO ARTS & ENT. L. J. 687, 691 (2010).

<sup>7</sup> Leo Benedictus, *Backing Bands: Which Musicians Endorse Which US Presidential Candidates?*, THE GUARDIAN (Feb. 2, 2016), <https://www.theguardian.com/us-news/2016/feb/01/backing-bands-which-musicians-endorse-which-us-presidential-candidates>; Roisin O'Connor, *How UK Rappers Helped Jeremy Corbyn in the General Election*, THE INDEPENDENT (June 9, 2017), <http://www.independent.co.uk/arts-entertainment/music/features/corbyn-general-election-labour-seats-hung-parliament-uk-rappers-win-akala-stormzy-jme-aj-tracey-a7781371.html>.

becomes apparent that an undesired appropriation of one's work might interfere with the musicians' interest to control who is utilizing the force of their songs to advance a political message. Since media outlets heavily scrutinize presidential campaigns, artists often fear association with unsympathetic candidates and negative exposure.<sup>8</sup> If songs are used to convey political objectives, it may appear to the public that the songwriter or performer actually supports the candidate's point of view, much to the concern of the artist.<sup>9</sup> Addressing this topic, several pop stars gathered on John Oliver's show "Last Week Tonight" for a sing-along expressing their displeasure over the appropriation of their music called "Don't Use Our Song".<sup>10</sup> Another prominent example of an undesired appropriation derives from Venezuela where the country's controversial president Maduro presented an altered version of the song "Despacito".<sup>11</sup> The Puerto Rican singers Luis Fonsi and Daddy Yankee immediately expressed their disapproval with the politics of Maduro and him changing the lyrics to promote his political intentions.<sup>12</sup>

Although the conflict between musicians and the campaigners is a recurring issue in every election, it has only rarely been subject to litigation in front of a court.

This piece will analyze whether a musician, whose work has been used by a candidate, stands a chance to stop the candidate from doing so in the jurisdiction of the United States the United Kingdom, and Germany. Although politicians occasionally use songs in a transformative way, the analysis is constrained to the performance of an unaltered song in the course of a campaign event. Transformative ways of implementing music in campaigns may well invite interesting considerations of free speech or even parody. Yet, the transformative use of a piece is the exception rather than the rule, which makes the performance of an original song in the context of a political campaign the main concern of the aggrieved musicians. Therefore, this scrutiny will focus on the performance of an unaltered song. Nonetheless, there will be digressions and references to cases of transformative use and further literature whenever it is appropriate.

The choice of jurisdictions reflects the different premises regarding the justification of copyright throughout the world. While copyright law is based on economic considerations in common law countries (such as the U.S. and the UK), author's rights legislations argue that the authorial personality embodied in the work merits protection. This different approach has implications on the scope of moral rights within the assessed jurisdictions. In the author's rights system

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Noting that the #Grime4Corbyn campaign by several British rappers lead to an increasing youth vote which ultimately swung the result of the General Election.

<sup>8</sup> Erik Gunderson, *Every Little Thing I Do (Incurs Legal Liability): Unauthorized Use of Popular Music in Presidential Campaigns*, 14 LOY. L.A. ENT. L. J. 137, 169-170 (1993).

<sup>9</sup> Arlen W. Langvardt, *Musicians, Politicians and the Forgotten Tort*, 27 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 429, 434 (2017).

<sup>10</sup> Last Week Tonight, *Campaign Songs: Last Week Tonight with John Oliver* (HBO), YOUTUBE (July 24, 2016), <https://www.youtube.com/watch?v=32n4h0kn-88>.

<sup>11</sup> NBC News, *President Maduro Presents New Political Take on 'Despacito'* (NBC News), YOUTUBE (July 25, 2017), <https://www.youtube.com/watch?v=stVrq3fptl0>.

<sup>12</sup> *Despacito Stars Condemn Venezuela's Maduro Over Political Remix*, BBC NEWS (July 25, 2017), <http://www.bbc.co.uk/news/world-latin-america-40708836>; Luis Fonsi (@luisfonsi), INSTAGRAM, [https://www.instagram.com/p/BW8NL\\_chkCU/?taken-by=luisfonsi](https://www.instagram.com/p/BW8NL_chkCU/?taken-by=luisfonsi) (last visited July 24, 2017); Daddy Yankee (@daddyyankee), INSTAGRAM, <https://www.instagram.com/p/JJBW8MpchAjz/?taken-by=daddyyankee&hl=en> (last visited July 24, 2017).

Germany, moral rights provide the backbone for copyright (or precisely author's rights) protection. Contrasting this rationale, U.S. law does not even provide for moral rights in musical works expressly. In the absence of any relief under copyright law or a moral rights regime, artists attempted to vindicate their interests using claims within adjacent branches of law. In this regard, U.S. law offers interesting avenues to secure one's personal interests, which include publicity right claims and false endorsement claims under Federal trademark law. It will be seen, though, that all of these are insufficient to provide relief in the assessed scenario.

The UK finds itself somewhat in the middle of these two extremes as it has implemented statutory moral rights into its copyright law. However, the narrow scope of these prevents artists from pursuing their moral interests against politicians effectively. In fact, there has not even been any litigation arising from the use of campaign music in the UK.

Yet, in Germany artists ultimately succeeded against political parties asserting their moral rights, which is illustrative of the crucial importance thereof in an author's rights system.

Thereafter, it will be pointed out why the chances of prevailing differ within the scrutinized legislations. In this comparative analysis, it will be examined how the differing scope of moral rights conferred to authors affects the standing against the unsympathetic use of music. Eventually, the fundamentally differing prospects can be traced back to the basic rationales of copyright law in the respective jurisdiction. After all, these fundamental disparities are the reason why musicians are unlikely to succeed in the U.S. and the UK. Lastly, it will be argued that artists may be able to pursue their interests more effectively in a non-legal manner relying on their publicity and fame to gain leverage against campaigns.

## II. HISTORY OF CAMPAIGN MUSIC; HOW DOES IT 'SELL' A CANDIDATE?

The use of music to energize potential voters and to emphasize the candidate's political message has a long tradition. In the first ever U.S. presidential election in 1789, George Washington employed the song "Follow Washington", marking the first example of campaign music.<sup>13</sup> While adopting popular songs for campaigns is common nowadays,<sup>14</sup> earlier campaigns composed original songs.<sup>15</sup> Later, campaigns also used to rewrite the lyrics of existing popular tunes like the modified version of Frank Sinatra's "High Hopes" used by the John F. Kennedy campaign.<sup>16</sup> Neither the commissioning of an original song nor the modification of an existing tune, which was typically customized by its original songwriters, caused trouble for the campaign as it enjoyed the support of the copyright owners and songwriters.<sup>17</sup> However, in 1984 Ronald Reagan became the first candidate to use a song, namely "Born in the U.S.A." by Bruce Springsteen, without permission.<sup>18</sup> After Reagan mentioned his name

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<sup>13</sup> Johnston, *supra* note 6, at 688.

<sup>14</sup> Gunderson, *supra* note 8, at 137; Johnston, *supra* note 6, at 688.

<sup>15</sup> Johnston, *supra* note 6, at 688.

<sup>16</sup> Sarah Schacter, *The Barracuda Lacuna: Music, Political Campaigns, and the First Amendment*, 99 GEO. L. J. 571, 577 (2011).

<sup>17</sup> Kasper & Schoening, *supra* note 5, at 54.

<sup>18</sup> Gunderson, *supra* note 8, at 139.

during a rally, Springsteen protested publicly in order to dissociate himself from the campaign.<sup>19</sup> Ever since, political campaigns were requested to cease the unauthorized use of songs in various countries, including the ones scrutinized in this piece.<sup>20</sup> Conflicts often arise because pop and rock artists tend to be rather liberal, which often makes conservatives a target for their objections.<sup>21</sup> This tendency is highlighted by statistics proving that 84 % of the donations by people from the fields of TV, movies and music went to the Democrats during the 2016 U.S. election cycle.<sup>22</sup>

Despite the recurring controversies, candidates of all political stripes carry on using popular songs, making them a common feature of contemporary campaigns.<sup>23</sup> This is mainly the result of two important characteristics of music that make it valuable in political campaigning.

Firstly, music touches people without being obtrusive and conveys a feeling of unity amongst a crowd. Historically, using pre-existing hits and the public endorsement of pop and rock artists reflects the strategies of social movements of the 60s and 70s, which were largely incorporating rock musicians.<sup>24</sup> As research about campaign music in communication studies shows, music possesses a significant affective power.<sup>25</sup> Deploying this power, music moves people by establishing a unity between them and creating euphoria, which makes it a desirable feature for political campaigns.<sup>26</sup> Sociomusicologist Simon Frith argues that the collective experience of pop music transforms us haphazardly into an emotional alliance with the performer and the performer's other fans surrounding us, similar to the collective pride experienced in watching sports.<sup>27</sup> This argument is based on Frith's general premise that music and pop culture play a key role in the construction of one's identity and in giving people a sense of themselves.<sup>28</sup> The aforementioned alliance between performer and fans does arguably also extend to the politician using the music.<sup>29</sup>

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<sup>19</sup> Kurt Loder, *The Rolling Stone Interview: Bruce Springsteen on 'Born in the U.S.A.'*, ROLLING STONE (Dec. 7, 1984), <http://www.rollingstone.com/music/news/the-rolling-stone-interview-bruce-springsteen-on-born-in-the-u-s-a-19841206>. Springsteen called invoking his name and using his song a "manipulation" in an interview.

<sup>20</sup> Cat Koo, *Ten Songs Stolen by Politicians*, BBC NEWS (Sept. 24, 2010), <http://www.bbc.co.uk/news/entertainment-arts-11406906>.

<sup>21</sup> Adam Behr, *Trump Slammed By Musicians for Appropriating Music, But Pop and Politics Have a Long History*, THE CONVERSATION UK (Sept. 27, 2016), <https://theconversation.com/trump-slammed-by-musicians-for-appropriating-music-but-pop-and-politics-have-a-long-history-63901>; Kasper & Schoening, *supra* note 5, at 55.

<sup>22</sup> *TV/Movies/Music: Long Contribution Trends*, CTR. OF RESPONSIVE POLITICS (Feb. 27, 2017), <https://www.opensecrets.org/industries/totals.php?cycle=2014&ind=B02>.

<sup>23</sup> Gunderson, *supra* note 8, at 137, 169.

<sup>24</sup> Craig W. Hurst, *Twentieth-Century American Folk Music and the Popularization of Protest - Three Chords and the Truth*, in HOMER SIMPSON GOES TO WASHINGTON - AMERICAN POLITICS THROUGH POPULAR CULTURE 217, 229-231 (Joseph Foy ed., 2008). For instance, the Civil Rights Movement and the Anti-Vietnam War Movement employed music to transport their messages; Kasper & Schoening, *supra* note 5, at 54.

<sup>25</sup> David R. Dewberry & Jonathan H. Millen, *Music as Rhetoric: Popular Music in Presidential Campaigns*, 22 ATLANTIC J. COMM. 81, 87 (2014).

<sup>26</sup> *Id.* at 88.

<sup>27</sup> Simon Frith, *Towards an Aesthetic of Popular Music*, in MUSIC AND SOCIETY: THE POLITICS OF COMPOSITION, PERFORMANCE AND RECEPTION 133, 139 (Richard Leppert & Susan McClary eds., 1987).

<sup>28</sup> *Id.* at 138-139.

<sup>29</sup> Dewberry & Millen, *supra* note 25, at 87.

Other research in the field of media studies supports this assumption, stating that campaign music structures the feelings of a crowd and conveys a sense of identification with the candidate.<sup>30</sup> Adding to that, music has been used in propaganda material of all kinds and was often subject to state censorship.<sup>31</sup> As this is indicative of the potentially disruptive impact, music can have on its recipient, deploying this power for a candidate can be an effective campaigning instrument.<sup>32</sup>

Secondly, using a song by a popular artist somewhat latches onto the artist's popularity. Celebrity endorsements are an effective promotional strategy in marketing showcased by the fact that one in four advertisements makes use of them.<sup>33</sup> However, political movements employ such endorsements as well. For instance, the former FC Barcelona coach and player Pep Guardiola made a public appearance in front of a large Catalan independence rally crowd.<sup>34</sup> Furthermore, prominent artists and writers backing Scottish independence formed under the name "National Collective" and organized a festival called "Yestival" amongst other projects before the referendum in 2014.<sup>35</sup> Considering that artists increasingly declare their support for a particular candidate, it is easy to see that parties try to draw on works that have already proven to be popular.<sup>36</sup> Considering the choice of songs, Jim Loftus, an Al Gore campaign leader, stated that "big upfront songs" are useful to create excitement amongst the crowd or create a mood.<sup>37</sup> Later, he argued that rather than being sophisticated, campaign songs were more about emotional communication.<sup>38</sup> Hence, it appears that the ineffable force of pop music draws candidates to play renowned songs at their events. It reaches potential voters on an emotional level, rouses the crowd and unites people for a mutual purpose. All of these are welcome effects for a successful campaign that attracts the attention of the electorate making music a crucial vehicle for a candidate's message.

### III. U.S. SITUATION

The quadrennial U.S. election is likely the poll that draws the greatest attention throughout the world. Since performers are considerably entangled in campaigning and endorse politicians, the emergence of disputes is foreseeable, especially in the

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<sup>30</sup> Matthew F. Jordan, *Obama's iPod: Popular Music and the Perils of Postpolitical Populism*, 11 POPULAR COMM. 99, 103 (2013).

<sup>31</sup> John Street, *Fight the Power: The Politics of Music and the Music of Politics*, 38 GOV'T & OPPOSITION 113, 114-117 (2003).

<sup>32</sup> *Id.* at 114, 129.

<sup>33</sup> Amanda Spry, Ravi Pappu & T. Bettina Cornwell, *Celebrity Endorsement, Brand Credibility and Brand Equity*, 45 EUR. J. OF MARKETING 882 (2011).

<sup>34</sup> Stephen Burgen & Sam Jones, *Pep Guardiola joins call for referendum on Catalan Independence*, THE GUARDIAN (June 11, 2017), <http://www.theguardian.com/world/2017/jun/11/pep-guardiola-referendum-catalan-independence-barcelona-rally>.

<sup>35</sup> *Yestival*, NAT'L COLLECTIVE: IMAGINE A BETTER SCOTLAND (June 2014), <http://www.nationalcollective.com/category/members/>.

<sup>36</sup> BENJAMIN S. SCHOENING & ERIC T. KASPER, DON'T STOP THINKING ABOUT THE MUSIC - THE POLITICS OF SONGS AND MUSICIANS IN PRESIDENTIAL CAMPAIGNS (2012).

<sup>37</sup> Geoff Boucher, *Songs in the Key of Presidency*, L. A. TIMES (Oct. 11, 2000), <http://articles.latimes.com/2000/oct/11/news/mn-34788>.

<sup>38</sup> *Id.*



light of the almost permanent media coverage.<sup>39</sup> As will be seen, the Copyright Act will not provide relief against the mere performance of a song on the campaign trail. Besides the protection of pecuniary interests under U.S. copyright law, musical artists cannot rely on a strong scope of moral rights to vindicate their integrity either. In the absence of protection under traditional intellectual property law, artists seek to safeguard themselves against the alleged affiliation under alternative avenues. These include the state law of right of publicity, and the Federal Lanham Act that is principally concerned with trademarks. Both of them attach to the performer of a work, rather than to the copyright holder, which makes them a useful tool in a situation without available relief in the realm of copyright law. However, the analysis of the existing case law will showcase the inefficacy of both claims. It is argued that this eventually leaves the artist with little chance to prevail in court under the examined circumstances.

### A. Copyright Claims

According to § 106(4) of the Copyright Act of 1976,<sup>40</sup> the copyright owner of a musical work enjoys the exclusive right to perform the work publicly. It is of note that the copyright in a song is of dual nature, and encompasses the copyright in the actual composition, as well as in the performance embodied in the sound recording. The scope of protection for sound recordings is somewhat more constrained, as § 106(6) of the Copyright Act states that they are only protected against a public performance by means of a digital audio transmission.<sup>41</sup> The use of a copyrighted song in the course of a campaign event at issue here falls under the scope of the public performance right. However, a claim based on this right is prone to fail because virtually all artists are members of a performance rights organization (PRO)<sup>42</sup> that issues blanket licenses to the venue hosting the campaign event.<sup>43</sup> Blanket licenses are issued if the use of music cannot feasibly be tracked which is the usually the case in public locations such as bars, restaurants and stores.<sup>44</sup> The membership agreements of both major PROs in the U.S. – the American Society of Composers Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI) – require that the respective PRO is allowed to issue public performance licenses, irrespective of who is using the copyright material.<sup>45</sup> While most venues used for

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<sup>39</sup> Letters Signatories, ARTISTS & CULTURAL LEADERS FOR BERNIE SANDERS (April 2016), <https://berniesanders.com/artists/>.

<sup>40</sup> 17 U.S.C. § 106(4) (2012) [hereinafter “Copyright Act”].

<sup>41</sup> 17 U.S.C. § 106(6) (2012). Moreover, 17 U.S.C. § 114(a) clarifies that there is no public performance right in sound recordings.

<sup>42</sup> See 17 U.S.C § 101 (2012). This section of the Copyright Act provides a statutory definition of “PRO”.

<sup>43</sup> John Tehranian, *Guantanamo’s Greatest Hits: The Semiotics of Sound and the Protection of Performer Rights under the Lanham Act*, 16 VAND. J. ENT. & TECH. L. 11, 14 (2013).

<sup>44</sup> Schacter, *supra* note 16, at 576.

<sup>45</sup> Standard Writer Agreement, BROAD. MUSIC, INC., [https://www.bmi.com/forms/affiliation/bmi\\_writer\\_agreement\\_W800.pdf](https://www.bmi.com/forms/affiliation/bmi_writer_agreement_W800.pdf) (last visited Nov. 2018). The standard writer agreement of BMI (para. 4 (a)) reads that BMI is granted the right “to license others to perform anywhere in the world, in any and all places and in any and all media [...] any part or all of the Works”; the Same applies to the ASCAP writer agreement.

political rallies possess blanket licenses, campaigns typically purchase their own license in case the venue does not hold the required license, or the campaign wants to use music in more unusual locations.<sup>46</sup>

However, an artist may be able to object if the work is further disseminated, for instance via TV advertisements and the like. Doing so will amount to a reproduction and a distribution of the work, which are restricted acts under § 106(1), (3) of the Copyright Act, and therefore require a distinct synchronization license.<sup>47</sup> Several musicians have sued campaigns under such circumstances, including Jackson Browne.<sup>48</sup> Yet, in the scenario of a mere public performance, the artist will not be able to bring a copyright infringement suit under the Copyright Act.

### B. Moral Rights

Claims from the realm of moral rights will not provide relief either. As held in *Gilliam*, one of the leading cases in the ambit of moral rights, American copyright law seeks to vindicate economic interests rather than the personal interests of authors.<sup>49</sup> Accordingly, no express moral rights protection was enacted in U.S. law until the implementation of the Visual Artists Rights Act 1990 (hereinafter VARA) that occurred in the aftermath of the U.S. accession to the Berne Convention.<sup>50</sup> Prior to this, American officials held the belief that moral rights were sufficiently protected under copyright, unfair competition, contract, defamation and privacy law.<sup>51</sup>

Yet, due to its very nature, music is excluded from the restrictive definition of works of visual art eligible for moral rights protection conferred by the VARA enumerated in § 101 of the Copyright Act.<sup>52</sup> Concerning the use of music in an undesired context, the early case of *Shostakovich v. Twentieth Century-Fox Film Corp.* highlights the reluctant attitude of U.S. law towards moral rights.<sup>53</sup> After the defendant used the music of four Russian composers in the motion picture “The Iron Curtain”, the plaintiffs sought redress although their works did not enjoy copyright protection anymore.<sup>54</sup> Since the plot portrayed Soviet spies in Canada in a bad light, the composers argued that using their music falsely implies their approval of that representation and disloyalty to their home country Russia.<sup>55</sup> With the music being in the public domain, the court stated that providing relief for the plaintiffs inescapably leads to the doctrine of moral rights.<sup>56</sup> Yet, the court did not expressly

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<sup>46</sup> Marc Hogan, *Here’s How Candidates Can Use Songs in Their Campaigns. Even If Songwriters Don’t Like It*, THE PITCH (Apr. 13, 2016), <http://pitchfork.com/thepitch/1098-heres-how-candidates-can-use-songs-in-their-campaigns-even-if-songwriters-dont-like-it/>.

<sup>47</sup> Tehranian, *supra* note 43, at 15; Schacter, *supra* note 16, at 575.

<sup>48</sup> Browne v. McCain, 612 F. Supp. 2d 1125 (C.D. Cal. 2009).

<sup>49</sup> Gilliam v. Am. Broad., Inc., 538 F.2d 14, 24 (2d Cir. 1976).

<sup>50</sup> See 17 U.S.C. § 106A.

<sup>51</sup> Natalie Suhl, *Moral Rights Protection in the United States under the Berne Convention: A Fictional Work?*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 1203, 1213 (2002).

<sup>52</sup> 17 U.S.C. § 101 (2012). Ultimately excluding almost every type of work capable of commercial exploitation on a large scale.

<sup>53</sup> *Shostakovich v. Twentieth Century-Fox Film Corp.*, 80 N.Y.S.2d 575 (Sup. Ct. 1948).

<sup>54</sup> *Id.* at 576.

<sup>55</sup> *Id.* at 578.

<sup>56</sup> *Id.*

rule out any possibility of protection for moral rights in case the work is distorted or unfaithfully reproduced.<sup>57</sup> In the absence of any statutory guidance, the existence of such rights would be unclear and, if they were recognized, the intricate question of which standard should apply in determining an infringement would arise.<sup>58</sup> While it is remarkable that the court did not rule out the existence of moral rights in general, it is apparent that a mere public performance of a composition will not infringe any potential moral right, even if it is displayed in an unsympathetic political context.

In the light of this judicial lacuna, artists tried to pursue their moral interests with various other non-copyright claims. The following part of this piece will scrutinize these.

### *C. Publicity Right*

Artists may have a potential claim based on the right of publicity. The publicity right is a state law action recognized by over forty states including California and New York, and either protected by a statutory provision, common law, or both.<sup>59</sup> This right enables people to control with what and with whom their name, image and work are associated in a commercial context.<sup>60</sup> It is argued that using a song against the wishes of the musician leads to unwanted publicity on the artist.<sup>61</sup> However, if the identity of a person has a commercial value, the right of publicity empowers this particular person to control the commercial use of that identity.<sup>62</sup> When Ford employed a sound-alike singer imitating Bette Midler's vocal style in an advertisement, it was held that this impersonation pirates her identity.<sup>63</sup> The court concluded that mimicking a famous singer's distinctive voice in order to sell a product is an unlawful appropriation, and constitutes a tort in California.<sup>64</sup> Similarly, the imitation of Tom Waits' characteristic vocal style in a snack advertisement was held to be a misappropriation that violates his publicity right.<sup>65</sup> Because candidates usually incorporate renowned songs by popular artists it is very likely that the artist's identity has a commercial value. Furthermore, the right of publicity is not subject to the decision to let performing rights associations issue licenses to users.<sup>66</sup> However, it is doubtful that the right of publicity provides an effective remedy for a potential claimant.

Being a state-law action, there is no consistent availability or scope of the right throughout the U.S. For instance, the referenced case law derives from the Ninth

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.* ("Is it the standard to be good taste, artistic worth, political beliefs, moral concepts or what is it to be?").

<sup>59</sup> Zachary M. Vaughan, *The Paradox That Wasn't: Federal Preemption of State-Law Voice Misappropriation Claims*, 11 J. MARSHALL REV. INTEL. PROP. L. 695, 697 (2012).

<sup>60</sup> Stacey L. Dogan & Mark. A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1162 (2006).

<sup>61</sup> Gunderson, *supra* note 8, at 148.

<sup>62</sup> *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1098 (9th Cir. 1992); *Motschenbacher v. R. J. Reynolds Tobacco Co.*, 498 F.2d 821, 824-825 (9th Cir. 1974).

<sup>63</sup> *Midler v. Ford Motor Co.*, 849 F.2d 460, 463 (9th Cir. 1988).

<sup>64</sup> *Id.*

<sup>65</sup> *Waits*, 978 F.2d 1093, 1098

<sup>66</sup> Gunderson, *supra* note 8, at 148.

Circuit applying Californian law, under which the violation of the publicity right is recognized as both a common law tort,<sup>67</sup> and a codified statutory provision.<sup>68</sup> On the other hand, some states only provide for a statutory right of publicity.<sup>69</sup> In some states, such as New York, the publicity right has been construed rather narrowly, and Schacter argues that it will probably not apply to a political use.<sup>70</sup> Furthermore, even Californian law, which is arguably more artist-friendly (see above case law in which the artists succeeded), excludes the use of one's image for any political campaign from the acts requiring permission.<sup>71</sup> This illustrates the inconsistent scope of the publicity right that ultimately renders it an unreliable remedy with regards to political campaigning.<sup>72</sup> This intricacy is further aggravated by the fact that rallies are carried out in the entirety of the U.S. making an all-encompassing court action futile.

Furthermore, if the allegedly infringing act is merely the public performance of a song, the state publicity right is in peril of being pre-empted by the Copyright Act. According to § 301(a) of the Copyright Act, actions under state or common law regarding copyrighted subject matter that provide for comparable relief as the Copyright Act are exclusively governed by the Federal Copyright Act. In *Laws v. Sony Music Entertainment, Inc.*, the defendant issued licenses that permitted using a sample of the plaintiff's sound recording, which the plaintiff deemed to be a violation of her publicity right.<sup>73</sup> Emphasizing that Californian law recognizes an interest in one's distinctive voice (as in *Waits* and *Midler*), the court held that copyright law pre-empts the publicity right insofar as the entire allegedly misappropriating performance is contained within a medium that is subject to copyright.<sup>74</sup> Other than in *Waits*, there was no imitation of the vocal style that would justify a non-copyright claim.<sup>75</sup> This approach has been confirmed in *Butler v. Target Corp.*, in which a retailer utilized a band's signature piece sound recording for commercials.<sup>76</sup>

Apart from this, the potentially pre-empted claim has to provide relief equivalent to that which is prescribed by copyright law.<sup>77</sup> This is the case if a work is infringed by the mere act of reproducing, performing, distributing, or displaying the work.<sup>78</sup> Consequently, a claim to prevent nothing more than these acts is subsumed by copyright law, and is thus pre-empted.<sup>79</sup> Hence, asserting the publicity right in the examined scenario would be in vain, as the public performance of a song does not exceed the realm of the acts governed by copyright law.

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<sup>67</sup> *Midler v. Ford Motor Co.*, 849 F.2d 460, 463.

<sup>68</sup> Cal. Civ. Code §§ 3344, 3344.1 (West 2018).

<sup>69</sup> See N.Y. Civ. Rights Law §§ 50, 51 (McKinney 2018). For instance, see the state of New York.

<sup>70</sup> Schacter, *supra* note 16, at 587 (citing *Stephano v. News Grp. Publ'ns, Inc.*, 474 N.E.2d 580, 584-586 (N.Y. 1984)).

<sup>71</sup> Cal. Civ. Code § 3344(d) (West 2018).

<sup>72</sup> Langvardt, *supra* note 9, at 460; Schacter, *supra* note 16, at 587-588.

<sup>73</sup> *Laws v. Sony Music Entm't, Inc.*, 448 F.3d 1134, 1134 (9th Cir. 2006).

<sup>74</sup> *Id.* at 1141.

<sup>75</sup> *Id.*

<sup>76</sup> *Butler v. Target Corp.*, 323 F. Supp. 2d 1052, 1055-1056 (C.D. Cal. 2004).

<sup>77</sup> See 17 U.S.C. § 301(a) (2018).

<sup>78</sup> *Fleet v. CBS Inc.*, 58 Cal. Rptr. 2d 645, 653 (Ct. App. 1996). Note that these represent the exclusive rights of copyright owners according to § 106 CA.

<sup>79</sup> *Id.* at 653.

*D. Lanham Act*

Artists asserting the publicity right frequently seek relief under Federal trademark law as well.<sup>80</sup> § 43(a) of the Lanham Act, found within Title 15 of the U.S. Code, seeks to remedy confusion as to the origin, approval or sponsorship of goods and services by the owner of a particular mark.<sup>81</sup> According to this provision, anyone using the mark in commerce to falsely imply a connection or association of the mark owner to the goods or services of the defendant is liable, provided that there is a likelihood of confusion.<sup>82</sup> Potential plaintiffs could argue that use of the music falsely implies an endorsement of the politician, which in turn damages their reputation and goodwill, as well as the future value of their services.<sup>83</sup> By ultimately safeguarding the integrity of the artist, the Lanham Act claim vindicates a traditional moral interest of the author. Yet, other than providing for moral rights, the Lanham Act's original objective is to avoid customer confusion.<sup>84</sup>

Clearly, the Lanham Act has not been contrived to serve against the use of copyrighted material in a political and therefore not traditionally commercial context.<sup>85</sup> However, in *Browne*, the court held that the Lanham Act applies to both commercial speech, and speech in a political context.<sup>86</sup> The court argued that the widespread confusion as to the source of political speech could have dire consequences.<sup>87</sup> Hence, the application of the Lanham Act to political speech is in line with the act's overall aim of reducing "customer" confusion.<sup>88</sup> Despite this broad interpretation, the Supreme Court also warned against an extension into a seemingly boundless claim of unfair competition.<sup>89</sup>

Another intricate question is what constitutes the requisite mark that is being allegedly misrepresented.<sup>90</sup> According to the judiciary, celebrities enjoy protection of their distinctive attributes where these attributes amount to an unregistered commercial "trademark".<sup>91</sup> This attribute can also be the distinctive voice of a

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<sup>80</sup> Tehranian, *supra* note 43, at 17. The plaintiffs in *Waits* and *Midler* referenced in the publicity right part did so as well.

<sup>81</sup> 15 U.S.C. § 1125(a) (2012) [hereinafter "Lanham Act"].

<sup>82</sup> 15 U.S.C. § 43 (a)(A) (2012).

<sup>83</sup> Gunderson, *supra* note 8, at 150.

<sup>84</sup> Maral Vahdani, *Running on Empty: The Problem With Politicians and Stealing (Music)*, 32 LOY. L.A. ENT. L. REV. 75, 82 (2011).

<sup>85</sup> 15 U.S.C. § 45 (2006). This becomes apparent regarding the intent of the Act laid down in § 45 of the Lanham Act.

<sup>86</sup> *Browne v. McCain*, 612 F. Supp. 2d 1125, 1131-1132 (C.D. Cal. 2009) (citing *United We Stand Am., Inc. v. United We Stand, Am. N. Y., Inc.*, 128 F.3d 86, 92-93 (2d Cir. 1997) and *MGM-Pathe Commc'ns. Co. v. Pink Panther Patrol*, 774 F. Supp. 869, 876 (S.D.N.Y. 1991)).

<sup>87</sup> *Browne*, 612 F. Supp. 2d at 1131.

<sup>88</sup> *Id.*

<sup>89</sup> *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 29 (2003).

<sup>90</sup> Kimberlianne Podlas, *I Do Not Endorse This Message! Does a Political Campaign's Unauthorized Use of a Song Infringe on the Rights of the Musical Performer?*, 24 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 1, 10 (2013) (Providing an in-depth analysis of this issue that goes beyond the scope of this piece.).

<sup>91</sup> *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1106 (9th Cir. 1992); *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200, 204 (2d Cir. 1979); *Allen v. Men's World Outlet, Inc.*, 679 F. Supp. 360, 368 (S.D.N.Y. 1988).

singer.<sup>92</sup> Whether the recognition of the voice as a protected subject matter will help a musician whose song is performed in any way is yet doubtful. It is worth noting that the defendant employed a voice-impersonator in *Waits*.<sup>93</sup> Contrasting this, the candidate in the envisioned scenario would use the actual sound recording and not an imitation. This difference has a profound impact on the outcome of the Lanham Act claim as showcased by *Oliveira v. Frito-Lay, Inc.*<sup>94</sup> The plaintiff, better known as Astrud Gilberto, attempted to sue the defendant for using “The Girl from Ipanema”, a song for which she provided the vocals, in an advertisement. Gilberto asserted that the song constitutes her signature piece, and that the public associates the performance with her.<sup>95</sup> In adding the music to the ad, Frito Lay would imply her endorsement of the defendant’s product. However, the court held that no trademark subsists in Gilberto’s signature performance.<sup>96</sup> Having a signature performance is nothing unique to Gilberto, and in her claim, she failed to provide any precedent showing that a trademark subsists in a famous performance.<sup>97</sup> This outcome might seem peculiar at first glance. While an artist facing an imitation of his or her vocal style can prevail, others whose actual performance has been taken stand without a claim. It appears dubious to conclude that the actual taking of a record is less prejudicial to the performer with regards to a false association. However, the judicial argument appears reasonable when one considers the implications of additional trademark protection for recorded performances. Providing for a Lanham Act claim would enable the right holder to assert claims against entities that have already purchased all necessary licenses.<sup>98</sup> Hence, the consequence would be a disruption of the entire market for copyright material.<sup>99</sup> It would ultimately entail unforeseen liabilities, upsetting reasonable commercial expectations.<sup>100</sup> In contrast, a distinctive voice is not fixed, and is therefore not eligible for copyright protection.<sup>101</sup> The *Midler* court concluded that a voice was more personal than any work of authorship.<sup>102</sup> Thus, the voice merits recognition under the Lanham Act. Taking a recorded song on the other hand does not appropriate the celebrity’s persona.<sup>103</sup> However, when it comes to copyright subject matter, the PRO regime comprehensively governs the licensing of music, and should not be undermined by an action alien to copyright law.<sup>104</sup>

These negative prospects for a Lanham Act claim are further showcased in *Henley v. DeVore*.<sup>105</sup> In this case, the defendant seeking nomination for the U.S. Senate produced two campaign videos in which he modified two of Henley’s renowned recordings. DeVore took karaoke versions of the Eagles’ songs “The Boys of Summer” and “All She Wants to Do Is Dance,” and proceeded to revise the lyrics into “The

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<sup>92</sup> *Waits*, 978 F.2d at 1106.

<sup>93</sup> *Id.*

<sup>94</sup> *Oliveira v. Frito-Lay, Inc.*, 251 F.3d 56, 62 (2d Cir. 2001).

<sup>95</sup> *Id.* at 59, 61.

<sup>96</sup> *Id.* at 62.

<sup>97</sup> *Id.*

<sup>98</sup> *Oliveira*, 251 F.3d at 63.

<sup>99</sup> Tehranian, *supra* note 43, at 32.

<sup>100</sup> *Oliveira*, 251 F.3d at 63.

<sup>101</sup> See 17 U.S.C. § 102(a) (2018).

<sup>102</sup> *Midler*, 849 F.2d 460 at 462.

<sup>103</sup> *Oliveira*, 251 F.3d at 62.

<sup>104</sup> Tehranian, *supra* note 43, at 32.

<sup>105</sup> *Henley v. DeVore*, 733 F. Supp. 2d 1144 (C.D. Cal. 2010).

Hope of November” and “All She Wants to Do Is Tax,” on which his campaign director supplied the vocal performance.<sup>106</sup> Besides a copyright claim, Henley claimed that using his songs would imply a false endorsement. The court affirmed *Oliveira*, stating that a performer does not hold a trademark in his or her own musical performance.<sup>107</sup> Henley argued that the vocal performance mimicking his style is not the use of an actual recording as in *Oliveira*, but rather akin to the imitation in *Waits*.<sup>108</sup> However, the court rejected this argument, noting that it finds *Oliveira*, persuasive and declining the grant of a trademark on a performance in order to avoid the negative implications illustrated above.<sup>109</sup> In contrast to *Waits*, where a professional singer attempted the imitation, the “less-than-angelic voice” of DeVore’s campaign manager compared to Henley’s “more soothing vocals” kept the public from establishing an association to the campaign.<sup>110</sup> Finally, the court ruled that *Oliveira* barred the Lanham Act claim of Henley.<sup>111</sup> Hence, the mere performance of an unaltered song in a political context being at issue here is certainly unable to give plaintiffs a successful Lanham Act claim. Adding to that, other Lanham Act claims, especially those involving a modification of a song, faced severe opposition due to defenses based on free speech considerations secured by the First Amendment.<sup>112</sup> In the light of the *Oliveira* decision and the uncertainty concerning the First Amendment, the hypothetical musician’s claim is unpredictable at best.<sup>113</sup> Yet, under the assessed circumstances, a Lanham Act claim would be pre-empted by the Copyright Act in the first place, and therefore would not provide any relief.

#### *E. Summary of the U.S. Approach*

As can be seen from the above, the prospects for an artist facing the assessed treatment are not promising. If campaigning venues purchased the necessary public performances license, the copyright claim is barred. Neither the publicity right nor trademark law provide for an alternative to vindicate the interests of the artist. The judiciary rightly takes into account that the exclusive domain of copyright would otherwise be undermined by adjacent claims. Sympathetic as the claim of an artist without any legal means at hand may appear, these circumstances cannot lead to an upset of the balance of copyright law and the collective management of rights.<sup>114</sup> The absence of a statutory moral rights regime also precludes the musicians from asserting their integrity interest. However, the U.S. approach to moral rights will be considered once again in the comparative part of this piece.<sup>115</sup> It will become apparent that the prospects for moral rights protection outside the scope of VARA do

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<sup>106</sup> *Id.* at 1148-1149.

<sup>107</sup> *Id.* at 1167.

<sup>108</sup> *Id.* at 1168.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 1168-1169.

<sup>111</sup> *Id.* at 1169.

<sup>112</sup> Schacter, *supra* note 16, at 596 (yet, exploring them would go beyond the scope of this piece); see Langvardt, *supra* note 9, at 467-474 (Providing an elaborate scrutiny of this issue.).

<sup>113</sup> Langvardt, *supra* note 9, at 480; Tehranian, *supra* note 43, at 27.

<sup>114</sup> Tehranian, *supra* note 43, at 34.

<sup>115</sup> See *infra* part VI of this article.

not look promising at all, especially after the Supreme Court handed down the *Dastar* decision.

As it is ultimately the politically indifferent way in which PROs issue licenses that takes the power to object away from artists, some scholars argued that blanket licenses for political events are inappropriate, and that the moral interests of artists should be increasingly recognized.<sup>116</sup> However, under the present legal regime, musicians will most likely not be able to prevail if only the public performance of a recorded song is at issue.

#### IV. UK SITUATION

Campaigning in the UK appears arguably less ostentatious, as the numbers of campaign spending compared to the U.S. show. The total spent by all UK parties in the 2015 General Election was £37,631,706,<sup>117</sup> while the overall cost of the 2016 U.S. election (Congressional and Presidential race combined) amounts to \$6,511,181,587.<sup>118</sup> Despite its significantly greater population, the U.S. still outnumbers the UK substantially with a per capita spending of \$20.07 compared to £0.57.<sup>119</sup>

Nonetheless, British political parties are enthusiastic users of music in campaign efforts as well. The best-known example of a successful use of campaign music is certainly that of Tony Blair choosing “Things Can Only Get Better” by D:Ream as the anthem for the 1997 general election race.<sup>120</sup> The song became a symbol of the New Labour movement and the momentum the party gained in the “Cool Britannia” period as it eventually elevated Labour to its landslide victory after eighteen years of a Conservative government.<sup>121</sup> However, U2 publicly opposed the use of their song Beautiful Day as the “official election anthem” of the Labour Party in Tony Blair’s 2005 rally.<sup>122</sup> Moreover, the trip-hop band Massive Attack was

<sup>116</sup> Lauren M. Bilasz, *Copyrights, Campaigns and the Collective Administration of Performance Rights: A Call to End Blanket Licensing of Political Events*, 32 CARDOZO L. REV. 305 (2010); Rajan Desai, *Music Licensing, Performance Rights Societies, and Moral Rights for Music: A Need in the Current U.S. Music Licensing Scheme and a Way to Provide Moral Rights*, 10 U. BALT. INTELL. PROP. L. J. 1 (2001).

<sup>117</sup> *Political Party Spending at Previous Elections*, ELECTORAL COMMC’N (UK), <https://www.electoralcommission.org.uk/find-information-by-subject/political-parties-campaigning-and-donations/political-party-spending-at-elections/details-of-party-spending-at-previous-elections> (last visited Oct. 28, 2018).

<sup>118</sup> *Cost of Election*, CTR. OF RESPONSIVE POLITICS, WASH., <https://www.opensecrets.org/overview/cost.php?display=T&infl=Y> (last visited Oct. 28, 2018).

<sup>119</sup> *Overview of the UK population: July 2017*, UK OFFICE FOR NAT’L STATISTICS (July 21, 2017), <https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/articles/overviewoftheukpopulation/july2017>. The UK Office for National Statistics report states a population of 65.6 million in 2016; *U.S. and World Population Clock*, U.S. CENSUS BUREAU, <https://www.census.gov/popclock/> (last visited Aug. 8, 2018). The U.S. population on November 9, 2016 was 324,325,455.

<sup>120</sup> *Labour’s 1997 Party Political Broadcast - Things Can Only Get Better*, YOUTUBE (June 4, 2015), <https://www.youtube.com/watch?v=gi5j7jjhm4M>.

<sup>121</sup> *Things Can Only Get Better – Cool Britannia*, BBC RADIO (July 13, 2016), <http://www.bbc.co.uk/programmes/b01ndl32>.

<sup>122</sup> Julia Day, *Beautiful Day Turns Ugly for Labour*, THE GUARDIAN (Apr. 11, 2005),



unpleased with Conservative William Hague using “Man Next Door” at a conference, and called it a misappropriation of their music that would be dealt with in the strongest way they could.<sup>123</sup> Although this incident goes beyond the scope of this piece, statements of former Prime Minister David Cameron, in which he expressed he was an avid fan of “The Smiths,” created an outrage.<sup>124</sup> It has led the Smiths’ guitar player Johnny Marr to enjoin Cameron from liking their music on Twitter,<sup>125</sup> a ban that has also found support by the band’s singer Morrissey.<sup>126</sup> Cameron’s rather unexpected preference for the Smiths, with their left-leaning political standpoint shaped by the conservative Thatcherism, were also subject to provocative remarks in the Prime Minister’s questions in front of parliament.<sup>127</sup> Although Marr repeatedly expressed the Smiths were not “his kind of people”, Cameron defied the ban and said he will not hide his admiration for the band.<sup>128</sup> Yet, these are only a few examples in which artists objected the appropriation of their music.<sup>129</sup>

### A. Copyright Law

Similar to the situation in the U.S., the performance of a musical work in public is an act restricted to the copyright owner according to §§ 16(1)(c), 19 Copyright, Designs and Patents Act 1988 (UK) (hereinafter CDPA). However, most artists cannot seek redress under copyright law because they transferred their exclusive rights to collecting societies. With currently over 130,000 members, the Performing Right Society for Music (PRS) is Britain’s foremost performing rights society.<sup>130</sup> According to paragraph 2 (a) of its standard terms of assignment, the author assigns his or her performing and synchronization right to PRS absolutely, and for all parts

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<https://www.theguardian.com/media/2005/apr/11/advertising.politics>.

<sup>123</sup> Cahal Milmo & Andy McSmith, *Musical Fallout: Pop Goes the Politician*, THE INDEPENDENT (May 15, 2008), <http://www.independent.co.uk/news/uk/politics/musical-fallout-pop-goes-the-politician-829334.html>. Band members were confessing they were “completely fucked off with the Tories” and would hence “never support them.”

<sup>124</sup> John Harris, *Hands Off Our Music!*, THE GUARDIAN (Mar. 18, 2008), <https://www.theguardian.com/music/2008/mar/18/popandrock.politicsandthearts>.

<sup>125</sup> Johnny Marr (@Johnny\_Marr), TWITTER (Dec. 1, 2010, 11:41PM), [https://twitter.com/johnny\\_marr/status/10237162679177216?lang=en-gb](https://twitter.com/johnny_marr/status/10237162679177216?lang=en-gb).

<sup>126</sup> Sean Michaels, *Morrissey Supports Johnny Marr in David Cameron Row*, THE GUARDIAN (Dec. 6, 2010), <https://www.theguardian.com/music/2010/dec/06/morrissey-johnny-marr-david-cameron>.

<sup>127</sup> *David Cameron asked about liking The Smiths (Prime Minister's Questions, 8.12.10)*, YOUTUBE (Dec. 8, 2010), <https://www.youtube.com/watch?v=sitAQkQFCBU>. BBC Footage of the Prime Minister’s Questions on Dec. 8, 2010.

<sup>128</sup> *David Cameron: I'll defy Johnny Marr's Smiths 'Ban'*, BBC NEWS (Feb. 19, 2013), <http://www.bbc.co.uk/news/uk-politics-21509772>.

<sup>129</sup> *Dame Vera Lynn Takes on BNP Over White Cliffs of Dover*, THE TELEGRAPH (Feb. 18, 2009), <http://www.telegraph.co.uk/news/politics/4687730/Dame-Vera-Lynn-takes-on-BNP-over-White-Cliffs-of-Dover.html>; *Chasing the Blues Away*, NEW STATESMAN (May 15, 2008), <http://www.newstatesman.com/music/2008/05/paul-weller-jam-album-song>.

<sup>130</sup> *Big Numbers*, PRS FOR MUSIC (2017), <https://prsformusic.com/about-us/track-record/big-numbers> (last visited Oct. 2018).

of the world.<sup>131</sup> The same applies to the Phonographic Performance Limited (PPL) that governs the rights of record companies and performers.<sup>132</sup>

Hence, a copyright claim would be barred if the campaign or the venue in which the rally is held purchased the necessary licenses.

### *B. Moral Rights*

The situation for artists seeking protection under the moral rights scheme does not look promising either, as will become apparent later. In contrast to U.S. law, the CDPA provides for an express protection of moral rights in §§ 77-89. Yet, before moral rights were implemented in the CDPA in 1988, the British officials deemed the interests of authors to be sufficiently protected under copyright law and common law claims such as the law of contracts, passing off, and defamation.<sup>133</sup> As of then, the CDPA conferred a right to be identified as the author (attribution right), a right to object derogatory treatment of a work (integrity right), a right against false attribution, and a right of privacy of certain photographs and films. The first two of these four rights were enacted in accordance to Art. 6*bis* of the Berne Convention.<sup>134</sup> Clearly, the right to be identified as the author of a work associated with an undesired politician is one the author would not like to assert.<sup>135</sup> However, with regards to campaign music, the right to object to derogatory treatment of a work (§ 80 CDPA) is of particular interest.<sup>136</sup> Early publications on the 1988 Act considered it possible that a group of undesirables, using a work as its anthem, could infringe the right of integrity.<sup>137</sup> Yet, it turns out that integrity right claims against the mere use of an unaltered song will be in vain according to contemporary scholarly literature.

In order to claim a violation of the integrity right, the author must establish that the work has been subject to a treatment by the candidate and that this treatment qualifies as derogatory.<sup>138</sup> According to § 80(2)(a) CDPA, a “treatment” of a work requires an addition to, deletion from, alteration to or adaptation of the work.<sup>139</sup> The

<sup>131</sup> *PRS Standard Terms of Assignment - Writers*, PRS FOR MUSIC, <https://www.prsformusic.com/join/writer/prs-standard-terms-of-assignment-writers> (last visited Oct. 28, 2018).

<sup>132</sup> *UK PPB Assignment*, PHONOGRAPHIC PERFORMANCE, LTD., <http://www.ppluk.com/Document/s/Member%20Services/Terms%20and%20conditions/UK%20PPB%20terms%20and%20conditions.pdf> (last visited Oct. 28, 2018). Notable section found in paragraph 2.1.

<sup>133</sup> Sheila J. McCartney, *Moral Rights under the United Kingdom's Copyright, Designs and Patents Act of 1988*, 15 COLUM. - VLA J.L. & ARTS 205, 210 (1990).

<sup>134</sup> Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 25 U.S.T. 1341, 1161 U.N.T.S. 3 [hereinafter “Berne Convention”].

<sup>135</sup> Nick Scharf, *Not Alright Now: Music and Political Campaigning*, EASTMINSTER: A GLOB. POLITICS & POLICY BLOG (Aug. 18, 2016), <http://www.ueapolitics.org/2016/08/18/not-alright-now-music-and-political-campaigning/>.

<sup>136</sup> Copyright, Designs and Patents Act 1988, c. 48, § 205(F) (UK). The equivalent right for performers is governed by this section of the CDPA.

<sup>137</sup> ROBERT MERKIN, RICHARDS BUTLER ON COPYRIGHT, DESIGNS AND PATENTS: THE NEW LAW § 16.26 (1st ed. 1989) (citing JEREMY PHILIPS, INTRODUCTION TO INTELLECTUAL PROPERTY LAW § 18.2 (1st ed. 1986)).

<sup>138</sup> See Copyright, Designs and Patents Act 1988, c. 48, § 80(1).

<sup>139</sup> The exceptions for translations and rearrangements or transcriptions of musical works in § 80(2)(a)(i, ii) are irrelevant in this context.

scope of the integrity right is not limited to a treatment of substantial parts of the work but applies to any part of the work.<sup>140</sup> However, the concept of something being “done” to the work entails some difficulties. As copyright is an intangible form of property, the physical work itself remains unchanged by creating a different version of it.<sup>141</sup> The notion of the work employed here is however that of an autonomous artefact that is not tied to its surroundings or the works preceding it.<sup>142</sup> It rather has its internal structure and logic that eventually bestows an internal integrity on the work.<sup>143</sup> Therefore, the CDPA refers to an action that results in an altered version of that particular composition of the work.<sup>144</sup> According to the UK judiciary, even small modifications amount to a treatment.<sup>145</sup> Hence, the statutory definition covers virtually every change of the original material.<sup>146</sup> Yet, to play a song in an undesired environment neither performs any changes to the actual song as required by § 80(2)(a) CDPA, nor constitutes an alteration or an adaptation. The rather restrictive wording of the CDPA only covers modifications of a work or a performance, and not a prejudicial treatment of the work or performance itself.<sup>147</sup> It therefore precludes the assertion of the integrity right under circumstances in which only the context of the work, but not the work itself, have been subject to changes. Thus, it is universally acknowledged that the non-transformative use of a work in an inappropriate context does not amount to a treatment.<sup>148</sup>

Although this exceeds the scope of the acts assessed herein, it is worth noting that the artist may have a greater chance to succeed if the song is cut, and not played in its entirety. In *Morrison Leahy v. Lightbond Ltd.* it was held that taking bits of music and words of five George Michael songs and turning them into a medley amounts to a treatment.<sup>149</sup> Considering that even small modifications constitute a treatment,<sup>150</sup> cutting a song into a shorter “jingle” is enough to fulfil this criterion. It could be likely that a politician would rather use the chorus of a song separately, as it has more “musical bite” than the verses.<sup>151</sup> However, the cut version would still need to qualify as derogatory, but exploring this issue goes beyond the scenario examined here. Yet, going back to the conduct in question, moral rights do not provide relief to the aggrieved artist if an unaltered version of the song is performed.

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<sup>140</sup> Copyright, Designs and Patents Act 1988, c. 48, § 89(2).

<sup>141</sup> GILLIAN DAVIES & KEVIN GARNETT, *MORAL RIGHTS* § 8-012 (2d ed. 2016).

<sup>142</sup> LIONEL ET AL., *INTELLECTUAL PROPERTY LAW* 296 (5th ed. 2018).

<sup>143</sup> *Pasterfield v. Denham* [1999] FSR 168 at 180 (Eng.).

<sup>144</sup> DAVIES & GARNETT, *supra* note 141.

<sup>145</sup> *Harrison v. Harrison* [2010] EWPC 3 [60] (Eng.) (de minimis acts apart, even the addition of a single word can be a treatment); *Confetti Records v. Warner Music UK Ltd.* [2003] EWHC (Ch) 1274 [147] (Eng.) (adding a rap line to a song); *Morrison Leahy Music Ltd. v. Lightbond Ltd.* [1993] E.M.L.R. 144 at 150-151 (Eng.) (creating a medley of five songs interspersed with other pieces of music).

<sup>146</sup> GILLIAN DAVIES ET AL., *COPINGER & SKONE JAMES ON COPYRIGHT* § 11-47 (17th ed. 2016).

<sup>147</sup> H.I.L. LADDIE, PETER PRESCOTT & MARY VITORIA, *THE MODERN LAW OF COPYRIGHT AND DESIGNS* § 13.28 (4th ed. 2011).

<sup>148</sup> BENTLY ET AL., *supra* note 142, at 297; ELIZABETH ADENEY, *THE MORAL RIGHTS OF AUTHORS AND PERFORMERS: AN INTERNATIONAL AND COMPARATIVE ANALYSIS* §§ 14.63, 14.67 (2006); *McCartney*, *supra* note 133, at 236; LADDIE ET AL., *supra* note 147, § 13.28.

<sup>149</sup> *Morrison Leahy Music Ltd. v. Lightbond Ltd.* [1993] E.M.L.R. 144 at 151 (Eng.).

<sup>150</sup> See DAVIES ET AL., *supra* note 146.

<sup>151</sup> *Dewberry & Millen*, *supra* note 25, at 86.

### C. Criticism of the UK Integrity Right

Lastly, it is worth noting that the narrow ambit of the acts covered by the definition of “treatment” falls short of the standard set out in Art. 6*bis* RBC. The Berne Convention obliges its member states to provide for a claim to object any distortion, mutilation, or other modification of, *or other derogatory action in relation to the work*, which would be prejudicial to his honor or reputation.<sup>152</sup> The CDPA incorporates the former of these requirements almost verbatim, but omits reference to the latter. The wording of the provision is an attempt to achieve greater compliance with Art. 6*bis* RBC.<sup>153</sup> However, a derogatory action in relation to a work clearly seems to cover the use of an unaltered work in a prejudicial context.<sup>154</sup> Hence, the restrictive ambit of a “treatment” falls short of the obligations of the RBC.<sup>155</sup> This shortcoming appears particularly odd when considering the purpose of the provision. Art. 6*bis* RBC was drafted in order to preclude even contextual abuses of the work.<sup>156</sup> Therefore, it encompasses the use of a work in its original form in juxtaposition with matter the author perceives as inappropriate or offensive.<sup>157</sup> Regarding the initial aim of the UK legislator to align more closely to the RBC, the actual outcome makes these endeavors seem like mere pretense. However, it is doubtful that the referenced scholarly criticism will have a great impact, as Art. 6*bis* RBC is excluded from the TRIPs enforcement mechanism.<sup>158</sup> The practical implications of these shortcomings will be examined in detail in part VI.

### D. Summary of the UK Situation

Briefly, there is no relief for musicians under UK law in the envisioned scenario. Copyright claims would be in vain if the campaign or the venue obtained a license, and the artist has no standing to sue for copyright infringement anyway after the standard assignment of rights. Although statutory moral rights exist, there is no chance to prevail when asserting the integrity right. The insufficient implementation of the Berne Convention resulted in a considerably narrow definition of “treatment”. This precludes the application of § 80(1) CDPA. Generally, the lacking efficacy of the UK moral rights scheme is showcased by the dearth of case law concerned with moral rights claims. Henceforth, even the statutory recognition of moral rights does not guarantee the existence of a full-fledged integrity right as required by the Berne Convention.

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<sup>152</sup> Berne Convention for the Protection of Literary and Artistic Works art. 6(1), Sept. 9, 1886, 25 U.S.T. 1341, 1161 U.N.T.S 3.

<sup>153</sup> ADENEY, *supra* note 148, § 14.67.

<sup>154</sup> DAVIES & GARNETT, *supra* note 141, § 8-022.

<sup>155</sup> LADDIE ET AL., *supra* note 147, § 13.28; ADENEY, *supra* note 148, § 14.67; Gerald Dworkin, *The Moral Right of the Author: Moral Rights and the Common Law Countries*, 19 COLUM. -VLA J. L. & ARTS 229, 250-251 (1994); W. R. Cornish, *Moral Rights under the 1988 Act*, 12 EUR. INTELL. PROP. REV. 449, 450 (1989); DAVIES & GARNETT, *supra* note 141, § 8-022.

<sup>156</sup> ADENEY, *supra* note 148, § 7.21.

<sup>157</sup> SAM RICKETSON & JANE C. GINSBURG, *INTERNATIONAL COPYRIGHT AND NEIGHBORING RIGHTS - THE BERNE CONVENTION AND BEYOND* § 10.23 (2d ed. 2005).

<sup>158</sup> BENTLY ET AL., *supra* note 142, at 286.

## V. GERMAN SITUATION

The following assessment of the situation in Germany serves as an example for the author's rights system. Several instances in which artists felt aggrieved by politicians using their music demonstrate the relevance of the legal measures that one can take against such a use. In 2005, the conservative party CDU (Christian Democratic Union of Germany) played the Rolling Stones' song "Angie" in the course of campaign events to promote the first candidacy of Angela Merkel (whose nickname used to be "Angie" at the time).<sup>159</sup> Although the party acquired the necessary public performance licenses, the band made a statement that they did not consent to the use of their song, after which the CDU ceased to use it.<sup>160</sup> During the celebrations for winning the 2013 elections, the CDU played a well-known tune by the German punk band "Die Toten Hosen" while the upper echelon of the party was singing along and dancing to it.<sup>161</sup> Unsurprisingly, the punk band was unhappy with being associated with the conservatives, considering the wide audience of the broadcasts immediately after an election.<sup>162</sup> However, in the aftermath of this event, Angela Merkel called the band's singer and apologized for trampling upon the song.<sup>163</sup> Yet, the band's opposition was not constrained to the CDU, as they also expressed their unease with Social Democrats playing their music.<sup>164</sup> While these conflicts were never brought to court, other musicians successfully sued political parties in similar circumstances.<sup>165</sup>

After a brief introduction of the German legal approach to moral rights protection, a case analysis will illustrate that artists may well prevail in court in the assessed scenario.

## A. Moral Rights in Germany

In order to understand the impact of moral rights in German law, it is worth looking at the basic rationale of protection in the author's rights world, as opposed to common law/copyright systems. The copyright system's rationale of protecting copyright as a property right is to prevent free riding on the investment in the creation of the work; it may therefore be considered an economic right.<sup>166</sup> In this

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<sup>159</sup> *Stones sauer wegen "Angie,"* SPIEGEL ONLINE (Aug. 22, 2005) <http://www.spiegel.de/kultur/gesellschaft/wahlkampf-hymne-stones-sauer-wegen-angie-a-370866.html>; Milmo & McSmith, *supra* note 123.

<sup>160</sup> Milmo & McSmith, *supra* note 123.

<sup>161</sup> *So feierte die CDU ihren Wahlsieg Kauder singt, Merkel tanzt,* YOUTUBE (Sep. 23, 2013), <https://www.youtube.com/watch?v=hSAdjUS71kQ>. Footage of the celebrations after the German General Election on Sept. 22, 2013.

<sup>162</sup> *Herr Campino, wird sind auf ihrem Lied herumgetrampelt,* SPIEGEL ONLINE (Nov. 15, 2014) <http://www.spiegel.de/politik/deutschland/anruf-von-merkel-bei-campino-wegen-tage-wie-diese-a-1003172.html>.

<sup>163</sup> *Id.*

<sup>164</sup> *Tote Hosen wollen nicht bei Wahlkampfauftritten gespielt werden,* SPIEGEL ONLINE (Aug. 28, 2013), <http://www.spiegel.de/kultur/musik/tote-hosen-wollen-nicht-im-wahlkampf-von-parteien-gespielt-werden-a-919050.html>.

<sup>165</sup> See *infra* Part IV.

<sup>166</sup> Andreas Rahmatian, *Originality in UK Copyright Law: The Old "Skill and Labour" Doctrine Under Pressure*, 44 IIC: INT'L R. INTELL. PROP. & COMPETITION L. 12, 4-34 (2013).

regard, granting a property right for the work indirectly protects the person creating the property right.<sup>167</sup>

In contrast, author's rights countries regard the authorial person as the centerpiece of the protection that the laws confer.<sup>168</sup> It is not the protection of the work that indirectly protects the author, but rather the author's protection as a person, which then extends to the work that bears the author's personality in it.<sup>169</sup> § 11 UrhG<sup>170</sup> is illustrative for this approach as it states that copyright protects the spiritual and personal relationship between the author and the work, and aims to provide an equitable remuneration for the use of the work. The German terminology for moral rights also reveals that their protection is vested in the personality rights of the author. According to the UrhG, moral rights are called "Urheberpersönlichkeitsrechte," which literally translates to "authorial personality rights." Thus, moral rights provide the foundation for the subsistence of copyright.<sup>171</sup> Building upon the notion of a bond between author and work, the German scholar Schack describes the work as the "spiritual child" of the author.<sup>172</sup> It is worth noting that Germany follows the monist approach concerning the relationship between economic and personal interests of authors.<sup>173</sup> Other than the dualist tradition that conceptually distinguishes between moral rights and economic rights, German law is founded upon the notion that personal and economic interest are inextricably intertwined.<sup>174</sup> Hence, author's rights can be neither assigned, nor generally waived.<sup>175</sup> As the personal aspect of the right is clearly inalienable, the economic aspect cannot be dealt with exclusively either, as both cannot be separated.<sup>176</sup> However, an exclusive license is the closest equivalent to an assignment of the right.<sup>177</sup>

The author's integrity right is governed by § 14 UrhG. This provision enables authors to prohibit the distortion or any other derogatory treatment of the work that is capable of prejudicing the author's legitimate intellectual or personal interests in the work. Moreover, § 75 UrhG recognizes the integrity right of the performing artist. Despite the somewhat different wording of § 75 UrhG, which more specifically states

<sup>167</sup> ANDREAS RAHMATIAN, COPYRIGHT AND CREATIVITY: THE MAKING OF PROPERTY RIGHTS IN CREATIVE WORKS 35 (2011).

<sup>168</sup> *Id.* at 47.

<sup>169</sup> *Id.*

<sup>170</sup> Gesetz über Urheberrecht und verwandte Schutzrechte, Sept. 9, 1965, BGBl. I at 1273 (Ger.), translation in: *Act on Copyright and Related Rights*, MINISTRY OF JUSTICE & CONSUMER PROT., [http://www.gesetze-im-internet.de/englisch\\_urhg/englisch\\_urhg.pdf](http://www.gesetze-im-internet.de/englisch_urhg/englisch_urhg.pdf) (last visited Sept. 2018) [hereinafter UrhG].

<sup>171</sup> RAHMATIAN, *supra* note 167, at 48.

<sup>172</sup> HAIMO SCHACK, URHEBER- UND URHEBERVERTRAGSRECHT § 353 (8th ed. 2017) (Ger.).

<sup>173</sup> Jochen Schlingloff, *Das Urheberpersönlichkeitsrecht im Spannungsfeld von Kunstfreiheit und politischer Betätigungsfreiheit [The Moral Rights of Morality in the Area of Conflict Between Freedom of Art and Political Freedom of Action]*, 119 GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT 572, 574 (2017) (Ger.).

<sup>174</sup> ADENEY, *supra* note 148, § 9.12.

<sup>175</sup> UrhG § 29(1) (stipulating that author's rights cannot be assigned because moral rights are inalienable - a blanket waiver is also invalid); THOMAS DREIER, GERNOT SCHULZE & LOUISA SPECHT, URHEBERRECHTSGESETZ: URHG, KOMMENTAR; URHG § 29, ¶ 10; COPYRIGHT LAW: URHG, COMMENTARY (6th ed. 2018) (Ger.).

<sup>176</sup> RAHMATIAN, *supra* note 167, at 49.

<sup>177</sup> See UrhG § 31(3).

that that the use must jeopardize the artist's standing or reputation as a performer, both provisions are deemed to entail the same requirements for moral rights.<sup>178</sup> To find an infringement, the German judiciary applies a three-step test.<sup>179</sup> Firstly, one needs to prove a distortion or mutilation of the work.<sup>180</sup> It is worth noting that the distortion of a work is a more severe form of a derogatory treatment, and covers changes to the work.<sup>181</sup> Secondly, one has to establish that there is prejudice to the legitimate moral interests of the author.<sup>182</sup> Once a distortion or another derogatory treatment is established, there is a presumption of prejudice.<sup>183</sup> Lastly, courts balance the author's interest in maintaining the work "as is" against the user's interest in order to decide whether the author should prevail.<sup>184</sup> This unwritten criterion is a corrective factor to avoid vexatious claims by overly sensitive authors.<sup>185</sup> Hence, the exercise of the German integrity right is not at the sole discretion of the author, but also takes the opposing interests of the user into account.<sup>186</sup> In the following paragraph, it will be seen how the judiciary applied this test to campaign music.

### B. Case Analysis

As in the U.S. and in the UK, the politically indifferent behavior of collecting societies bars a potential copyright claim.<sup>187</sup> Nonetheless, artists in Germany have successfully asserted their integrity right against political parties.

Two cases before the Oberlandesgericht Jena (hereinafter OLG Jena), one of which has been affirmed by the highest civil court Bundesgerichtshof (hereinafter BGH), showcase that artists are able to prevail in the assessed scenario. In both cases, the nationalist party "NPD" played songs after its candidate had given a speech and turned to the audience to have an informal chat.

In the first case, German pop singer Helene Fischer claimed that the NPD infringed her moral rights as a performer conferred by § 75 UrhG (as she was not the songwriter) by playing one of her most famous songs during a campaign event.<sup>188</sup> In

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<sup>178</sup> DREIER ET AL., *supra* note 175; UrhG § 75, ¶ 6-7; GERHARD SCHRICKER ET AL., URHEBERRECHT KOMMENTAR [COPYRIGHT COMMENTARY] UrhG § 75, ¶ 22 (5th ed. 2017).

<sup>179</sup> SCHRICKER ET AL., *supra* note 178; UrhG §14, ¶ 18; DREIER ET AL., *supra* note 175; UrhG § 14, ¶ 9.

<sup>180</sup> HARTWIG AHLBERG ET AL., MÖHRING/NICOLINI URHEBERRECHT: URHG, KUG, VERLG, VGG KOMMENTAR [MÖHRING/NICOLINI COPYRIGHT: URHG, KUG, VERLG, VGG COMMENTARY] UrhG § 14, ¶ 6 (3d ed. 2014) (Ger.); DAVIES ET AL., *supra* note 141, § 13-027.

<sup>181</sup> DREIER ET AL., *supra* note 175; UrhG § 14, ¶ 5.

<sup>182</sup> AHLBERG ET AL., *supra* note 180, UrhG § 14, ¶ 7.

<sup>183</sup> Oberlandesgericht München, Sept. 26, 1991, 42 GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT INTERNATIONALER TEIL, 332, 333 (1993) (Ger.); SCHACK, *supra* note 172, § 386.

<sup>184</sup> SCHRICKER ET AL., *supra* note 178; UrhG § 14, ¶ 28; DREIER ET AL., *supra* note 175, UrhG § 14, ¶ 16.

<sup>185</sup> ARTUR-AXEL WANDTKE ET AL., PRAXISKOMMENTAR ZUM URHEBERRECHT [PRACTICE COMMENT ON COPYRIGHT], (4th ed. 2014) (Ger.); UrhG § 14, ¶ 10.

<sup>186</sup> DREIER ET AL., *supra* note 141, § 13-027.

<sup>187</sup> SCHACK, *supra* note 172, § 1356.

<sup>188</sup> Oberlandesgericht Jena, Mar. 18, 2015, 2U674/14 (Ger.), <https://www.telemedicus.info/urteile/Allgemeines-Persoenlichkeitsrecht/1548-OLG-Jena-Az-2-U-67414-Schlagersaengerin-kann-Abspielen-eines-bekanntes-Hits-auf-Partei-Wahlkampfveranstaltung-untersagen-Atemlos.html>;

the absence of any changes to the internal structure of the work, there was no distortion. Thus, the court deliberated on whether playing a song amounts to a derogatory treatment. Scholarly literature and the judiciary agree that even an unaltered performance may constitute a derogatory treatment if it occurs in a prejudicial context that is capable of jeopardizing the honor and reputation of the artist.<sup>189</sup> In an older decision, a narrator could establish a derogatory treatment after an appropriation of his recorded performance by the conservative party CSU (Christian Social Union in Bavaria) in which they distributed the piece on a cassette tape amongst patriotic material.<sup>190</sup> The court held that a substantial part of the public would assume that the narrator is partaking in the campaign, that he or she is a member of the party or shares the party's political objectives.<sup>191</sup> In *Springtoifel* it was held that publishing a song on a sampler alongside music of far right bands amounts to a derogatory treatment although the song itself remains untouched.<sup>192</sup> The OLG Jena affirmed these lines of thought in its decision.<sup>193</sup> It found an indirect mutilation because the NPD played the song during an advertising event (as the court called the campaign event), and employed it as an instrument for political campaigning.<sup>194</sup> The fact that the song was used as incidental music and not as a "theme-song" is irrelevant in this context, as any performance during the event will be associated with the campaign.<sup>195</sup> As the song conveys a sense of unity, it also serves the purpose of attracting an audience.<sup>196</sup>

Then the court turned to the question of whether there is any prejudice to the honor and reputation of the claimant as a performing artist, which is examined through the eyes of an unbiased average consumer (not the aggrieved artist).<sup>197</sup> The court argued that this requirement is fulfilled if one cannot rule out that the average consumer suspects a connection between the political party and the artist.<sup>198</sup> In its analysis, the court concluded that the average consumer might wonder whether the artist is associated with the party, or shares the party's ideas and beliefs.<sup>199</sup> The court also argued that there would be a prejudicial effect if people who do not sympathize with the party, or who dislike artist endorsements in general, learn about the use of the music.<sup>200</sup> The OLG Jena then emphasized that the decision to

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Oberlandesgericht Jena, Mar. 18, 2015, 2U674/14 (Ger.), <https://www.telemedicus.info/urteile/Allgemeines-Persoenlichkeitsrecht/1548-OLG-Jena-Az-2-U-67414-Schlagersaengerin-kann-Abspielen-eines-bekanntes-Hits-auf-Partei-Wahlkampfveranstaltung-untersagen-Atemlos.html>.

<sup>189</sup> SCHRICKER ET AL., *supra* note 178; UrhG § 75, ¶ 30; WANDTKE ET AL., *supra* note 185; UrhG § 75, ¶ 11; DREIER ET AL., *supra* note 175; UrhG § 75, ¶ 10; Bundesgerichtshof, Nov. 20, 1986, I ZR 188/84; NEUE JURISTISCHE WOCHENSCHRIFT, 334, 335 (1998) (Ger.), [https://www.jurion.de/urteile/bgh/1986-11-20/i-zr-188\\_84/](https://www.jurion.de/urteile/bgh/1986-11-20/i-zr-188_84/).

<sup>190</sup> Landgericht München I, Nov. 20, 1979, 87 ARCHIV FÜR URHEBER- FILM- FUNK- UND THEATERRECHT, 342, 345 (1980) (Ger.).

<sup>191</sup> *Id.*

<sup>192</sup> Oberlandesgericht Frankfurt/Main, Dec. 20, 1994, 97 GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT, 215, 216 (1995) (Ger.).

<sup>193</sup> OLG Jena, *supra* note 188.

<sup>194</sup> *Id.* ¶ II.2.c.aa.

<sup>195</sup> *Id.* ¶ II.2.c.aa.

<sup>196</sup> *Id.* ¶ II.2.c.aa.

<sup>197</sup> WANDTKE ET AL., *supra* note 185; UrhG § 75, ¶ 13.

<sup>198</sup> OLG Jena, *supra* note 188.

<sup>199</sup> *Id.*

<sup>200</sup> LG München I, *supra* note 190, at 345.



disclose one's political beliefs must be reserved to the individual.<sup>201</sup> Adding to that, it is irrelevant which party is using the work.<sup>202</sup>

In the ensuing balancing of interests, the intensity and the impact of the mutilation, the economic interest, and the level of creativity are considered.<sup>203</sup> The court ruled in favor of the singer, arguing that the false endorsement of a political party is a highly severe mutilation of the personal interest of the artist.<sup>204</sup> Moreover, the association with political aims that are not shared by a vast majority of the public may also entail negative economic implications.<sup>205</sup> The NPD attempted to assert its constitutional privileges under Art. 21(3) GG.<sup>206</sup> This provision safeguards equal opportunities for each political party.<sup>207</sup> Although the GG generally does not create any obligations for individuals, but rather for the state, it serves as a guideline in the construction of broad legal concepts in private disputes.<sup>208</sup> Provisions such as § 14 UrhG, which apply rather vague concepts such as the notion of a "legitimate interest", are subject to a construction in accordance with the constitutional provisions.<sup>209</sup> However, denying the party the use of the song neither precludes its participation in the political process, nor interferes with the equal opportunities for each party.<sup>210</sup> Furthermore, it does not silence the political message the party wants to get across, as the song is merely used to raise attention and to entertain.<sup>211</sup>

Consequently, the claimant's personality interests outweigh the parties' interests because a singer's performance is closely intertwined with the performer's persona, as well as their honor and reputation.<sup>212</sup>

The subsequent decision delivered by the OLG Jena considered the moral rights of authors under § 14 UrhG, as the songwriters of the appropriated song were suing the nationalist party. The OLG did not permit an appeal against the decision before Germany's highest civil court BGH. The NPD then filed a complaint against this non-admission in order to bring the case to the BGH. Yet, the BGH (which resolves these complaints itself) ruled there was no ground for a complaint as there is already settled case law concerning the conflicting interests, and therefore no need for a new

<sup>201</sup> OLG Jena, *supra* note 188, ¶ II.2.c.bb.

<sup>202</sup> *Id.*; LG München I, *supra* note 190, at 345.

<sup>203</sup> DREIER ET AL., *supra* note 175; UrhG § 75, ¶ 7.

<sup>204</sup> OLG Jena, *supra* note 188, ¶ II.2.c.cc.

<sup>205</sup> Citing Bundesgerichtshof, Mar. 18, 1959, 61 GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT 430 (1959) (Ger.).

<sup>206</sup> GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND, *translation at*: [https://www.gesetze-im-internet.de/englisch\\_gg/englisch\\_gg.pdf](https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.pdf).

<sup>207</sup> WERNER HEUN, THE CONSTITUTION OF GERMANY – A CONTEXTUAL ANALYSIS 94 (2011); HANS D JARASS & BODO PIEROTH, GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND (GG) KOMMENTAR [BASIC LAW OF THE GERMAN FEDERAL REPUBLIC COMMENTARY], ART. 21, ¶ 22 (15th ed., 2018).

<sup>208</sup> Bundesverfassungsgericht, Jan. 15, 1958, vol. 7; Bundesverfassungsgerichts 198, 1958 (Ger.) (1 BvR 400/51), [https://www.bundesverfassungsgericht.de/e/rs19580115\\_1bvr040051.html](https://www.bundesverfassungsgericht.de/e/rs19580115_1bvr040051.html); HEUN, *supra* note 207, at 199 (describing this as the "horizontal effect" of the GG provisions).

<sup>209</sup> Schlingoff, *supra* note 173, at 577. Yet, the "Helene Fischer" court was not sure if UrhG § 75 requires an interpretation in accordance to the GG. As UrhG § 75 and UrhG § 14 are construed in similar fashion (*see supra* note 178 and accompanying text), it is suggested that UrhG § 75 is also considered with regards to the constitutional principles.

<sup>210</sup> OLG Jena, *supra* note 188, ¶ II.2.c.cc.6.

<sup>211</sup> *Id.*

<sup>212</sup> OLG Jena, *supra* note 188, ¶ II.2.c.dd.

precedent.<sup>213</sup> Nonetheless, the BGH deliberated on how to construe the provisions in question. Reference to these findings will be given when appropriate. Otherwise, the rather extensive analysis of the OLG Jena will be discussed.

The circumstances of the case were very much like those in the “Helene Fischer” case. The NPD played songs by the party band “Höhner”.<sup>214</sup> The reasoning in finding a derogatory treatment in the sense of § 14 UrhG was strikingly similar to that given in the “Helene Fischer” case.<sup>215</sup> The OLG also found a derogatory treatment due to the use of music as a political instrument, and a likelihood of confusion regarding whether the band endorsed the candidate.<sup>216</sup> The BGH confirmed this, adding that using the song was not merely incidental, but part of the entire campaign event’s dramaturgy.<sup>217</sup> Interestingly, the BGH clearly stated that even playing music during discussions between the candidate and members of the public constitutes a substantial part of the campaigning strategy, while the OLG remained more circumspect considering this aspect.<sup>218</sup> Moreover, the BGH emphasized the fact that the band members had previously spoken out against the party and its agenda. It reasoned that even utilizing the mood conveyed by a song is capable of jeopardizing the legitimate interest of the author.<sup>219</sup> According to the BGH, pop artists do not have to foresee an appropriation by a party whose aims are anti-constitutional.<sup>220</sup> Concerning the balancing of interests, the OLG considered whether § 52(1) UrhG bars a moral rights claim.<sup>221</sup> According to this provision, one is permitted to perform a work publicly if the event is non-commercial, the participants can attend for free, and the author receives royalties. Yet, the court rejected this argument. The mere fact that a public performance is permissible under § 52(1) UrhG does not imply that the author consents to any mutilation.<sup>222</sup> The party cannot claim that the band gave consent to the performance because the collecting society GEMA issued a license to the NPD.<sup>223</sup> Due to the inalienability of moral rights, a public performance license (which should secure the economic compensation of the author) does not entail any permission or disclaimer regarding moral rights.<sup>224</sup> This holding is particularly interesting because the BGH considered the entitlement to alter a work in a prior decision.<sup>225</sup> In that case, the collecting society issued a license to produce a ringtone and, in turn, considered whether this permission constrains the ambit of a moral rights claim of the author. The court concluded that the general licensing agreement

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<sup>213</sup>Bundesgerichtshof, May 11, 2017, IZR 147/16, (Ger.), <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en>.

<sup>214</sup> Oberlandesgericht Jena, June 22, 2016, 119; GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT 622, 623 (2017) (Ger.).

<sup>215</sup> *Id.* ¶¶ 10-32.

<sup>216</sup> *Id.* ¶¶ 22, 24-26.

<sup>217</sup> BGH, *supra* note 213, ¶ 13.

<sup>218</sup> OLG Jena, *supra* note 214, ¶ 21; OLG Jena, *supra* note 188, ¶ II.2.c.aa.

<sup>219</sup> BGH, *supra* note 213, ¶ 14.

<sup>220</sup> *Id.*

<sup>221</sup> OLG Jena, *supra* note 214, ¶ 33.

<sup>222</sup> *Id.* ¶ 33.

<sup>223</sup> *Id.* ¶ 35.

<sup>224</sup> *Id.* ¶ 35.

<sup>225</sup>Bundesgerichtshof, Dec. 18, 2008, I ZR 23/06, Klingeltöne, <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=46785&pos=0&anz=1>.

implies the consent to commonplace and predictable uses by licensees.<sup>226</sup> This conclusion is however troublesome, as it contradicts the personal and inalienable notion of moral rights; the economical licensing agreement with the collecting societies preempts the exercise of moral rights by the individual.<sup>227</sup> Considering this authority, OLG and BGH found that even if the aforementioned standards applied, a performance in the course of a campaign event is not a common and foreseeable type of performance.<sup>228</sup> Different from the ringtone case, the party did not acquire any special contractual permission to alter the work or its context that would in turn justify a confined scope of moral rights.<sup>229</sup> Hence, the band could prevail on the same grounds on which the claimant in the prior case could.

### C. Summary of the German Situation

Other than in the U.S., it is not common for German musicians and celebrities to endorse political campaigns.<sup>230</sup> However, authors and performers of musical works are likely to prevail in court against the political appropriation of their songs. Because the decontextualization of an otherwise unaltered work constitutes a derogatory treatment, German law enables artists to assert an integrity right claim. As the courts opined, it is irrelevant that the defendant has been the controversial nationalist party NPD<sup>231</sup> (although the party's anti-constitutional agenda might render the prejudice to the personal interests more severe, according to the BGH).<sup>232</sup> It is also remarkable that the use of music during a discussion with the electorate was deemed to be a derogatory treatment, as playing music in the background does not imply an association as strongly as the use as a "theme song". Yet, the courts also opined that the violation of the integrity right is arguably even more severe if a song is used before a candidate walks onto stage.<sup>233</sup> This displays that there is a relatively low threshold in claiming an integrity right infringement. Therefore, the artist in the scrutinized scenario will likely succeed in asserting his or her moral rights against an undesirable candidate.

## VI. COMPARATIVE ANALYSIS

In the preceding parts, it has become apparent that artists lack an efficient legal remedy against the public performance of an unaltered song in the U.S. and in the UK. The subsequent paragraph will analyze why the odds of prevailing with a claim based on the personal interest of the author are substantially higher under German

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<sup>226</sup> *Id.*

<sup>227</sup> See MIRA SUNDARA RAJAN, MORAL RIGHTS PRINCIPLES, PRACTICE AND NEW TECHNOLOGY 360-361 (2011) (an elaborate scrutiny of this controversial finding).

<sup>228</sup> BGH, *supra* note 213, ¶ 15; OLG Jena, *supra* note 214, ¶ 35.

<sup>229</sup> OLG Jena, *supra* note 214, ¶ 35.

<sup>230</sup> SPIEGEL ONLINE, *supra* note 164.

<sup>231</sup> OLG Jena, *supra* note 214, ¶ 26; OLG Jena, *supra* note 188, ¶ II.2.c.bb; LG München I, *supra* note 190, at 345.

<sup>232</sup> BGH, *supra* note 213, ¶ 15.

<sup>233</sup> OLG Jena, *supra* note 214, ¶ 21.

law. It will be argued that these disparities can be traced back to the differing basic rationales upon which common law copyright and author's rights are founded. In the end, the fundamentally different approach to the personal interest of the author in general, and to moral rights in particular, is what renders the situation less promising in the U.S. and the UK compared to Germany. The analysis will start with a brief summary of the common law's relationship to moral rights. Subsequently, the conceptual importance of moral rights and their impact in practice within the examined jurisdictions will be outlined. These findings will then be summarized in a table that comprises the essential features of the different legislations. To conclude, this table will be used to illustrate that the reluctant approach in finding an integrity right infringement, and the basic commercial premise of common law copyright, are what distinguishes the U.S. and the UK from the more artist-friendly German approach.

### A. Common Law and Moral Rights

Common law jurisdictions have shown considerable skepticism with regard to implementing moral rights into their copyright regimes.<sup>234</sup> Common law copyright is largely based on a commercial rationale, with limited emphasis on the personal interest of authors.<sup>235</sup> There has been concern that moral rights give authors grounds to interfere with the exploitation of works, which will in turn impinge upon the general economic activity.<sup>236</sup> This reluctance is showcased by the history of the U.S. accession to the Berne Convention. Tellingly, the U.S. refused to join the Berne Union for 102 years (until they acceded the Convention in 1988) in order to avoid implementing moral rights into their copyright law, amongst other reasons.<sup>237</sup> The UK had already ratified the Convention when the moral rights scheme in Art. 6bis RBC was amended in 1928 during the Rome Convention.<sup>238</sup> Nonetheless, it was not until 1988 that UK legislators enacted express moral rights provisions in the CDPA.

Despite the obligation to confer a minimum standard of moral rights found in Art. 6bis RBC, the actual implementation in their domestic laws falls short of the scope envisioned in the Convention. In fact, U.S. law does not provide for express moral rights protection for musical works at all. Neither the adjacent claims in U.S. law, nor the provisions of VARA, will give the personal interest of artists more leverage, especially in the aftermath of *Dastar*, as will be seen below.<sup>239</sup> However, the Berne Convention envisions the possibility of an integrity claim that protects against the placing of a work in a prejudicial context.<sup>240</sup>

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<sup>234</sup> Irimi Stamatoudi, *Moral Rights of Authors in England: The Missing Emphasis on the Role of Creators*, 1 INTELL. PROP. Q. 478, 502 (1997).

<sup>235</sup> Mira Sundara Rajan, *Moral Rights in Information Technology: A New Kind of Personal Right?*, 12 INT'L J. L. & INFO. TECH. 32, 37 (2004).

<sup>236</sup> Dworkin, *supra* note 155, at 263.

<sup>237</sup> RAJAN, *supra* note 227, at 138-139.

<sup>238</sup> RICKETSON & GINSBURG, *supra* note 157, § 3.28; *Contracting Parties to the Berne Convention*, WORLD INTELLECTUAL PROP. ORG., [http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty\\_id=15](http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15) (last visited Oct. 2018). The UK signed the Convention in 1886

<sup>239</sup> See *infra* part VI (C).

<sup>240</sup> See *supra* part IV (C).

### *B. Comment on the UK Situation*

While UK law provides for statutory moral rights for musical works, their actual effect in practice remains negligible. In the event of the performance of an unaltered song, the integrity right does not even apply. This renders its assertion futile in the assessed scenario. In contrast, the aggrieved songwriters and performers in the German cases succeeded on a moral rights claim under the examined circumstances.

As mentioned before, the definition of “treatment” regarding the integrity right is too narrow to live up to the standard of Art. 6*bis* RBC.<sup>241</sup> Moreover, the approach to waivers illustrates a crucial difference to German law.<sup>242</sup> § 87(2) CDPA permits waiving any of the moral rights, conferred in writing. Different from the German and other author’s rights-influenced legislations, a waiver is not subject to any conditions.<sup>243</sup> In fact, the combination of an assignment of copyright with a waiver of moral rights is common, and eventually leads to an absolute alienation of the author from the work.<sup>244</sup> This generous attitude towards waivers is “indicative of the British anti-moral right attitude,” according to Stamatoudi.<sup>245</sup> Due to the lacking bargaining power of creators, moral rights are practically rendered insignificant as publishers will coerce creators to relinquish their rights in contractual negotiations.<sup>246</sup> Ginsburg and Rigamonti concluded that the statutory recognition added little to the protection enjoyed by artists because the limitations and exceptions render the implementation of moral rights largely symbolic.<sup>247</sup> The reluctant approach to moral rights under the 1988 Act was further described as being “cynical, or at least half-hearted.”<sup>248</sup> Accordingly, moral rights were “timid things, venturing little further than their common law forbears”.<sup>249</sup> This evaluation fits well into the findings of this piece, and explains the dearth of case law deriving from moral rights claims. In their current shape, moral rights do not give the artist any leverage in the assessed scenario of use in political campaigns. Even if a politician used an abridged version of a song, the common practice of waivers may well preclude artists from asserting an integrity right claim. The UK officials’ reluctant implementation in the CDPA therefore demonstrates the lack of real conviction in the overall system of moral rights.<sup>250</sup>

Although the UK provides for express moral rights in the CDPA, the generous approach to waivers and the high threshold in finding a “treatment,” which does not meet the requirements of the RBC, illustrate that the UK is not a passionate advocate of moral rights. Consequently, the chances for an artist whose pecuniary interests are satisfied do not look promising, as the emphasis in UK law is still predominantly on the economic side of copyright law.

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<sup>241</sup> See *supra* part IV (D).

<sup>242</sup> Cornish, *supra* note 155, at 452.

<sup>243</sup> AHLBERG ET AL., *supra* note 180; UrhG § 11, ¶ 11. A blanket waiver is impermissible – only a precisely circumscribed disclaimer in the individual case is permitted.

<sup>244</sup> BENTLY ET AL., *supra* note 142, at 302; RAHMATIAN, *supra* note 167, at 239.

<sup>245</sup> Stamatoudi, *supra* note 234, at 495.

<sup>246</sup> Jane C. Ginsburg, *Moral Rights in a Common Law System*, 1 ENT. L. REV. 121, 128 (1990); Cyrill Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT’L L. REV. 353, 404 (2006).

<sup>247</sup> Rigamonti, *supra* note 246, at 400.

<sup>248</sup> Ginsburg, *supra* note 246, at 129.

<sup>249</sup> Cornish, *supra* note 155, at 449.

<sup>250</sup> Ginsburg, *supra* note 246, at 129.

*C. Comment on the U.S. Situation*

Turning to the U.S. situation, the prospects for moral rights do not appear promising either. The conclusion that moral interests of authors were sufficiently recognized in non-copyright claims has always been considered doubtful.<sup>251</sup> Nonetheless, one could argue that authors were able to vindicate their moral interests, at least to some extent, as demonstrated by the successful Lanham Act claim in *Gilliam*.<sup>252</sup> However, both the enactment of VARA, and the *Dastar* decision by the Supreme Court, entail grave implications for subject matter falling outside of the narrow scope of the VARA. *Dastar Corp. v Twentieth Century Fox Film* concerned a claim against false attribution under § 43(a) Lanham Act.<sup>253</sup> The claimant made use of a work in the public domain with slight alterations and published it under his own name. The court opined that the provisions of the general Lanham Act might conflict with the more specific law of copyright.<sup>254</sup> Therefore, the application of the more general Lanham Act would cause the specific provisions of the VARA superfluous.<sup>255</sup> Justice Scalia held that doing so would result in a “species of mutant copyright law”.<sup>256</sup> Although *Dastar* referred to a work in the public domain, subsequent judgements have extended its reasoning to works still protected by copyright.<sup>257</sup> This further construction of the Lanham Act makes it fair to say that *Dastar* established a principle for both areas.<sup>258</sup> It is of note though that the case considered the attribution right of the creator. Nonetheless, the court’s reasoning easily applies to the integrity right, as VARA contains specific provisions on the integrity right as well.<sup>259</sup> It is therefore likely that *Dastar* is a precedent that precludes the assertion of moral interests regarding works that do not fall within the definition of the VARA. In this regard, the exclusive moral rights regime for some works invites the argument that Congress implied that works outside the scope of the VARA should not receive any moral rights protection.<sup>260</sup>

In contrast to the personality-based rationale in Germany, the adjacent claims in the U.S., namely the publicity right and the Lanham Act claim, are based in commercial law. The identity of the celebrity that the publicity right is concerned with is arguably a notion akin to the personality of the right holder. However, it initially secures the commercial exploitation of one’s identity.<sup>261</sup> Furthermore, the Lanham Act ultimately focuses on consumer confusion. As already held in *Gilliam*, the Lanham Act does not deal with artistic integrity, but only with false representations of origin and source.<sup>262</sup> Hence, the ensuing protection of moral interests is merely a side effect, and is not rooted in the personal grievance of the

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<sup>251</sup> See Suhl, *supra* note 51, at 1203.

<sup>252</sup> *Id.* at 1223-1224.

<sup>253</sup> *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003).

<sup>254</sup> *Id.* at 33.

<sup>255</sup> *Id.* at 34-35.

<sup>256</sup> *Id.* at 34.

<sup>257</sup> See Rigamonti, *supra* note 246, at 411 (providing further evidence).

<sup>258</sup> SUNDARA RAJAN, *supra* note 227, at 148; Graeme W. Austin, *The Berne Convention as a Canon of Construction: Moral Rights After Dastar*, 61 N.Y.U. ANN. SURV. AM. L. 111, 113 (2005).

<sup>259</sup> 17 USC § 106A(a)(2).

<sup>260</sup> Rigamonti, *supra* note 246, at 407.

<sup>261</sup> Dogan & Lemley, *supra* note 60, at 1162.

<sup>262</sup> *Gilliam v. Am. Broad., Inc.*, 538 F.2d 14, 27 (2d Cir. 1976).

author. The crucial importance of the authorial personality is what ultimately distinguishes the common law copyright system from the author's right world, and explains the differing odds in the U.S. and in Germany. Strangely enough, right of publicity and Lanham Act claims still have a certain overlap with the moral rights doctrine. When the *Midler* court held that a voice "is more personal than any form of authorship" and "to impersonate it is to pirate her identity," this comes close to the spiritual bond between the work and its creator that moral rights are bound to protect. In addition, the false association with a party can be prejudicial to the integrity of an artist, which the Lanham Act seeks to prevent. Yet, both claims are likely pre-empted if there is only a public performance of an original song. This is consistent with the proper functioning of the market for copyright works.<sup>263</sup> Ironically, the repeated consideration of both claims shows that the U.S. judiciary recognizes the moral interests of musicians. However, the aggrieved artists fail to succeed because those interests are not considered in the Copyright Act, which results in the aforementioned pre-emption. Hence, the early holding in *Shostakovich* saying that the recognition of such personal interests inevitably leads to a moral rights doctrine<sup>264</sup> still holds true. However, the U.S. judiciary has been unwilling to construe the adjacent claims in this direction. The implementation of a broader scope of moral rights is yet unlikely, as VARA explicitly confers moral rights, akin to those found in author's rights systems, to a small group of works, and thus not in general. The hostile U.S. attitude to moral rights is further showcased in the outcome of the TRIPs negotiations. The TRIPs agreement<sup>265</sup> under the governance of the WTO bolsters up the effect of the Berne provisions, implementing them in Art. 9 (1), and providing means to impose compliance with the WTO dispute settlement system.<sup>266</sup> Yet, Art. 6bis RBC is excluded from the TRIPs agreement, making it a "toothless obligation."<sup>267</sup> A similar exception of Art. 6bis RBC is visible in the North American Free Trade Agreement.<sup>268</sup> These two examples display the initiative of the U.S. imposing effective enforcement of intellectual property rights, but only on their own terms, leaving out the inconvenient parts of the international legal framework (given the fact that the United States had a substantial influence on the drafting of these treaties).<sup>269</sup>

#### *D. Comment on the German Situation*

Compared with the U.S. and the UK, German law provides for viable moral rights claims. This is largely due to the emphasis on the authorial personality in the

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<sup>263</sup> See *infra* part III (E).

<sup>264</sup> *Shostakovich v. Twentieth Century-Fox Film Corp.*, 80 N.Y.S.2d 575 (Sup. Ct. 1948).

<sup>265</sup> Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPs].

<sup>266</sup> Art. 64 TRIPs.

<sup>267</sup> Austin, *supra* note 258, at 115 (comment regarding the fact that the potential enforcement before the International Court of Justice was never practiced).

<sup>268</sup> North American Free Trade Agreement § 1701 Annex 1701.3, Dec. 17, 1992, 107 Stat. 2057, 32 I.L.M. 605 (1993) ("this Agreement confers no rights and imposes no obligations on the United States with respect to Art. 6bis of the Berne Convention").

<sup>269</sup> RICKETSON & GINSBURG, *supra* note 157, §§ 4.42, 10.41.

justification of author's rights. Moral rights are the "foundation and ultimate reason for the protection of works" in the author's rights system.<sup>270</sup> The interlocking of personal and proprietary interests in the monist system demonstrates the crucial importance of moral rights in the German doctrine, and their impact on dealing with the work. As mentioned above, the inalienable personal relationship with the work precludes an assignment of author's rights, which is a common feature of copyright systems.<sup>271</sup> The author is the essential factor in the production of works, and therefore his or her concerns are emphasized to a greater extent.<sup>272</sup> This focus becomes further apparent in § 2(2) UrhG, which states that only a *personal* intellectual creation of the author is sufficiently original for receiving protection.

Moreover, the German approach to waivers is more circumspect.<sup>273</sup> Different from the UK, blanket waivers are impermissible.<sup>274</sup> In contrast, § 106A(e) of the Copyright Act only allows waiving one's moral rights with respect to a specific work and uses specified in writing. However, the limited scope of VARA renders this more restrictive approach practically insignificant. As became clear from part IV, the courts ultimately ruled in favor of the aggrieved songwriters and performers because of their personal interests.<sup>275</sup> With the moral rights overriding the interest in a smooth economic exploitation in these cases, there is proof that claims based on moral interests have actual bite in Germany, and cannot be perceived as a mere pretense. Nonetheless, German law does not confer boundless claims. One might fear that an overly sensitive artist may undermine the functioning of the market, but the balancing of interests in assessing an integrity claim ensures that this will not occur.<sup>276</sup> Furthermore, the criticism that moral rights provide for an additional economic asset, and create a double tier system in the managements of rights, does not convince. Artists in the assessed scenario seek no additional remuneration. On the contrary, their motivation is not economical, as they do not want their works to be used at all.

### *E. Concluding Comparative Analysis*

Although the U.S. and the UK opted for different ways to implement moral rights domestically, both countries came up with similar results. The generous approach to waivers in the UK, and the inefficacy of the U.S. claims, demonstrate that both jurisdictions seek to avoid moral rights encroaching upon the economic exploitation of the work. The findings also show that the statutory recognition does not guarantee a viable moral rights claim for artists. The bottom row of the table shows that the applicability of the integrity right to mere decontextualizations is crucial for the success under the scrutinized circumstances. Because the Berne Convention envisions this approach, the shortcomings of U.S. and UK law in this

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<sup>270</sup> RAHMATIAN, *supra* note 167, at 48.

<sup>271</sup> See 35 U.S.C. § 201(d); Copyright, Designs and Patents Act 1988, c. 48, § 90.

<sup>272</sup> Stamatoudi, *supra* note 234, at 501.

<sup>273</sup> See AHLBERG ET AL., *supra* note 180; UrhG § 11, ¶ 11. A blanket waiver is impermissible – only a precisely circumscribed disclaimer in the individual case is permitted.

<sup>274</sup> Rigamonti, *supra* note 246, at 377.

<sup>275</sup> See *infra* part IV (B).

<sup>276</sup> AHLBERG ET AL., *supra* note 180, UrhG §14, ¶ 21.



regard illustrate their respective lack of conviction for moral rights. Hence, the particular approach to the integrity interest of authors, and the general rationale of the system that lead to these outcomes, can be identified as the main factors that prevent musicians in the U.S. and the UK from bringing a successful claim.

These jurisdictions' common commercial rationale ultimately sets them apart from the author's rights world (represented by Germany) that perceives the work as an expression of the author's personality, rather than as a commodity. To conclude, it is quite illustrative for this different approach that the *Shostakovich* case was successfully brought in an author's rights jurisdiction, namely France.<sup>277</sup>

## VII. PUBLICITY GIVING ARTISTS FURTHER LEVERAGE?

Even if artists are not able to assert a successful claim in court, they may well pursue another avenue to vindicate their interests. Especially well-known musicians receive considerable media coverage, and have often times turned to the press when feeling aggrieved by the appropriation of their music. Indeed, several musicians managed to coerce candidates to cease the use of their music in the past.<sup>278</sup> For instance, the German CDU stopped using "Angie" because the Rolling Stones expressed that they were unhappy with the appropriation.<sup>279</sup> Furthermore, Mitt Romney caved in after he received complaints for using Survivor's "Eye of the Tiger" and K'naan's hit "Wavin' Flag."<sup>280</sup> The ASCAP guidelines on using music in political campaigns recognize that negative publicity will ensue from the controversies surrounding the unauthorized use of music.<sup>281</sup> The guidelines recommend obtaining the musician's permission to avoid being sued on the claims presented in the above paragraphs, as well as the ensuing negative limelight for the candidate.<sup>282</sup> In this part it will be argued that the implications of the digital age will facilitate compelling politicians to stop using one's music, and that artists will likely continue to succeed with non-legal means. It is often the mere threat of a lawsuit and the resulting negative press that will eventually make politicians back down.

Ironically, George W. Bush received a cease and desist letter by Tom Petty because his song "I Won't Back Down" was played while Bush was running for president.<sup>283</sup> However, in the light of a potential lawsuit and the jeopardy of more

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<sup>277</sup> *Societe Le Chant du Monde v. Societe Fox Europe and Societe Fox Americaine Twentieth Century*, Cour d'appell Paris 1953, D.A. Jur. 16 (Fr.).

<sup>278</sup> See Eveline Chao, *Stop Using My Song: 35 Artists Who Fought Politicians Over Their Music*, ROLLING STONE (July 8, 2015), <http://www.rollingstone.com/music/lists/stop-using-my-song-34-artists-who-fought-politicians-over-their-music-20150708/dropkick-murphys-vs-scott-walker-20150629> (for several artists prevailing in an out-of-court action).

<sup>279</sup> Milmo & McSmith, *supra* note 123.

<sup>280</sup> James C. McKinley Jr., *G.O.P. Candidates Are Told, Don't Use Our Verses, It's Not Your Song*, N.Y. TIMES (Feb. 3, 2012), <http://www.nytimes.com/2012/02/04arts.musicromney-andgigrich-pull-songs-after-complaints.html>.

<sup>281</sup> *Using Music in Political Campaigns: What You Should Know*, ASCAP [https://www.ascap.com/~media/files/pdf/advocacy-legislation/political\\_campaign.pdf](https://www.ascap.com/~/media/files/pdf/advocacy-legislation/political_campaign.pdf) (last visited Oct. 2018).

<sup>282</sup> *Id.*

<sup>283</sup> Kasper & Schoening, *supra* note 5, at 53.

bad publicity, the campaign stopped using the song.<sup>284</sup> Even in cases with only little legal merit, it is advisable to cease the use if the artist persistently objects to it.<sup>285</sup> Hence, issuing a cease and desist letter is often merely a way of making the musician's objection a matter of public record.<sup>286</sup> Any positive impact on communicating a political message would be undermined, as swing voters will associate the campaign with the bad publicity they perceived in the media.<sup>287</sup> Thus, it is not worth it to carry on using the song once artists express their disapproval.<sup>288</sup> The embarrassment of the controversy will simply outweigh the benefits of playing the song.<sup>289</sup> The usual efficacy of this practice is also one of the reasons for the dearth of case law emerging from unauthorized campaign music. Most cases simply do not go beyond the stage of a cease and desist letter, and the subsequent backing down of the politician.<sup>290</sup>

It can be argued that this trend is likely to continue in the emergence of the digital age and social media. The internet makes it easier for the musicians to track whether their songs have been used in political campaigns.<sup>291</sup> With more newspapers and international press being available, and campaign events being broadcast online or uploaded on platforms like YouTube, artists may become aware of the use of their songs when the limitations of analogue media and communication did not allow them to. Talking Heads' singer David Byrne used digital means to condemn a politician's conduct in another interesting way. After a settlement in a copyright dispute with Byrne emerging from the use of his music on the campaign trail, politician Charlie Crist was forced to issue a video apology that is now retrievable via YouTube.<sup>292</sup> Furthermore, musicians can be increasingly vocal about their discontent with the appropriation of their works. Social media facilitates a direct communication of the artists with their fans and the public and, consequently, enables them to reprimand politicians for their conduct.<sup>293</sup> Pop stars and musicians generally acquire a considerable number of followers on social media. In fact, four of the five most followed Twitter accounts belong to musicians.<sup>294</sup> These four musicians alone have a following of over 362 million people in sum. This immense reach of pop stars' social media presences demonstrates their strong voice in the public discourse. Considering that people spend an increasing amount of time on social media, it will have an even

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<sup>284</sup> *Id.*

<sup>285</sup> *Music in Political Campaigns 101*, NPR: THE RECORD (Feb. 29, 2012), <http://www.npr.org/sections/therecord/2012/02/29/147592568/music-in-political-campaigns-101>; Travis M. Andrews, *The Rolling Stones demand Trump stop using its music at rallies, but can the band really stop him?*, WASHINGTON POST (May 5, 2016), [https://www.washingtonpost.com/news/morning-mix/wp/2016/05/05/the-rolling-stones-demand-trump-stop-using-its-music-at-rallies-but-can-the-band-actually-stop-him/?utm\\_term=.8a1686eca9d6](https://www.washingtonpost.com/news/morning-mix/wp/2016/05/05/the-rolling-stones-demand-trump-stop-using-its-music-at-rallies-but-can-the-band-actually-stop-him/?utm_term=.8a1686eca9d6).

<sup>286</sup> Behr, *supra* note 21.

<sup>287</sup> Kasper & Schoening, *supra* note 5, at 56.

<sup>288</sup> Behr, *supra* note 21.

<sup>289</sup> Gunderson, *supra* note 8, at 159.

<sup>290</sup> Langvardt, *supra* note 9, at 434.

<sup>291</sup> McKinley Jr., *supra* note 280.

<sup>292</sup> Charlie Crist, *Official Apology to David Byrne for Copyright Infringement*, YOUTUBE (Apr. 11, 2011), <https://www.youtube.com/watch?v=s4k13LmlcUE>.

<sup>293</sup> Podlas, *supra* note 90, at 7.

<sup>294</sup> *Social Blade Twitter Stats*, SOCIALBLADE, <https://socialblade.com/twitter/> (last visited Oct. 2018). Only Barack Obama makes the cut amongst Katy Perry, Justin Bieber, Taylor Swift and Rihanna.

stronger influence in the future.<sup>295</sup> The statistics regarding media consumption underline this tendency towards online content and social media. In 2015, U.S. consumers spent more time using mobile apps than watching TV.<sup>296</sup> Furthermore, in the UK, the time spent online outweighed that spent in front of the TV screen for the first time in 2016 according to research firm Childwise.<sup>297</sup> The recent conduct of musicians whose songs have been used without their blessings further confirms the aforementioned hypothesis. Turning back to the authors of “Despacito” which was appropriated by Venezuela’s president Maduro, as mentioned above, Luis Fonsi and Daddy Yankee were unhappy with the association to what they called a “dictatorial regime” and a “joke”.<sup>298</sup> Singer Luis Fonsi issued an emotional statement in which he expressed his disapproval on his Instagram account.<sup>299</sup> His collaborator Daddy Yankee did so as well, and released a post explaining his aversion alongside an image of Maduro with a large red cross on it.<sup>300</sup> Both found enormous attention, receiving over 245,000 likes each, and a massive press coverage.<sup>301</sup> Hence, artists are now able to raise the awareness of the public without consulting any intermediaries, and make use of that opportunity. For instance, Boston punk band Dropkick Murphys turned to Wisconsin governor Scott Walker who played one of their songs tweeting “please stop using our music in any way...we literally hate you !!! Love, Dropkick Murphys”.<sup>302</sup> In the aftermath of this statement, there has not been any reported performance in the course of his campaign again. Also, older bands such as Queen and The Rolling Stones objected to Donald Trump playing their songs via Twitter.<sup>303</sup> Whether or not the artists succeeded with their respective complaints, they certainly raised great awareness for their concerns. Because contemporary politicians prefer to use established popular music,<sup>304</sup> it is likely that their songwriters and/or performers will have a considerable number of fans within the electorate. Considering this influence

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<sup>295</sup> David Cohen, *How Much Time Will the Average Person Spend on Social Media During Their Life?*, ADWEEK (Mar. 22, 2017), <http://www.adweek.com/digital/mediakix-time-spent-social-media-infographic/> (referencing a study by influencer marketing agency Mediakix).

<sup>296</sup> Sarah Perez, *U.S. Consumers Now Spend More Time In Apps Than Watching TV*, TECHCRUNCH (Sept. 10, 2015), <https://techcrunch.com/2015/09/10/u-s-consumers-now-spend-more-time-in-apps-than-watching-tv/>.

<sup>297</sup> Jasper Jackson, *Children Spending More Time Online Than Watching TV for the First Time*, THE GUARDIAN (Jan. 26, 2016), <https://www.theguardian.com/media/2016/jan/26/children-time-online-watching-tv>. Five-to-fifteen-year-olds were spending 3 hours online opposed to 2.1 hours watching TV.

<sup>298</sup> *Despacito Stars Condemn Venezuela’s Maduro Over Political Remix*, BBC NEWS (July 25, 2017), <http://www.bbc.co.uk/news/world-latinamerica-40708836>; Luis Fonsi (@luisfonsi), INSTAGRAM, [https://www.instagram.com/p/BW8NL\\_chkCU/?taken-by=luisfonsi](https://www.instagram.com/p/BW8NL_chkCU/?taken-by=luisfonsi) (last visited July 24, 2017); Daddy Yankee (@daddyyankee), INSTAGRAM, <https://www.instagram.com/p/JJBW8MpchAjzl/?taken-by=daddyyankee&hl=en> (last visited July 24, 2017).

<sup>299</sup> *Id.*

<sup>300</sup> *Id.*

<sup>301</sup> *Id.*

<sup>302</sup> Dropkick Murphys (@DropkickMurphys), Twitter (Jan. 24, 2015 6:08 PM), <https://twitter.com/DropkickMurphys/status/559170864420507648>.

<sup>303</sup> Lauren Craddock, *Rolling Stones Say Trump Used ‘You Can’t Always Get What You Want’ Without Permission at RNC*, BILLBOARD (July 22, 2016), <http://www.billboard.com/articles/columns/rock/7446637/rolling-stones-donald-trump-rnc-you-cant-always-get-what-you-want>. This occurred in a tweet which was deleted in the meantime but referenced in: *Rolling Stones Say Trump Used ‘You Can’t Always Get What You Want’ Without Permission at RNC*.

<sup>304</sup> Podlas, *supra* note 90, at 3; Johnston, *supra* note 6, at 688.

that famous celebrities enjoy, candidates will perhaps think twice about whether they want to carry on using a song against the will of the artist. The risk of a backlash in social and traditional media may even coerce them to seek permission to avoid an adverse effect on their publicity, especially amongst the younger electorate. Backing down to this pressure is perhaps merely based on “economic” considerations, and not on the respect for the integrity interests of the aggrieved artist. However, the great concern of the public ensuing from the emotional statements of musicians might well demonstrate a strong sympathy for the personal interests of the artist. If the media and the musicians’ fans ally in their disapproval of a candidate’s conduct, they form a strong force that will eventually make the candidate recognize the moral interests of an artist, even if only indirectly.

#### VIII. CONCLUSION

Music has a unique power over people, especially on an emotional level. It is almost self-evident that politicians have tried to make use of this capacity for their own objectives.<sup>305</sup> While musicians do at times feel aggrieved by the taking of their music, the legal means to oppose differ substantially across the assessed jurisdictions. The common law world, represented by the U.S. and the UK, confers at best limited leverage for the artist whose works are appropriated by an undesired candidate. With their more market friendly approach, personal interests are less emphasized in copyright law, which becomes apparent in the approach to moral rights. Despite the different ways both countries incorporate moral interests in their regime, the previous analysis illustrates that the artist cannot prevail in the assessed scenario in either jurisdiction. In contrast, an aggrieved artist can successfully bring the examined case in a court in Germany as displayed by the analyzed case law. As aforementioned, this different outcome is due to the personality-focused premise upon which author’s rights are founded. However, the outlook for moral rights protection in accordance with the Berne Convention does not look promising, as the TRIPs agreement does not incorporate the relevant provisions. Nonetheless, many artists were able to stop politicians from using their music with the help of the media that picked up their emotional statements. This non-legal approach to the issue is even more likely to give artists leverage in the advent of social media. Usually, candidates complied with the artists’ wishes to avoid bad publicity. Even though politicians like Trump and Madura defied all public dissociations, they are arguably not representative of the tactics employed by most other candidates. Hence, musicians may have a quicker and less costly way of pursuing their aims at hand without asserting any legal claims.

Moreover, politicians appear to recognize the moral interests of musicians somewhat more (or merely fear the bad publicity of a lawsuit) amidst the emergence of alternative approaches to using music. For instance, former President Obama released his official summer playlist in 2016 comprising his favorite picks.<sup>306</sup> He also

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<sup>305</sup> SCHOENING & KASPER, *supra* note 36, at xvi.

<sup>306</sup> Kori Schulman, *Listen to President Obama’s Summer Playlist*, THE WHITE HOUSE (Aug. 11, 2016), <https://obamawhitehouse.archives.gov/blog/2016/08/10/listen-president-obamas-summer-playlist>.

made a 2012 campaign playlist in the course of the election that year.<sup>307</sup> His opponent Mitt Romney in turn followed suit.<sup>308</sup> Hilary Clinton picked up on that in the 2016 campaign, and compiled her favorites in the “Official Hilary Playlist 2016” on Spotify.<sup>309</sup> This different approach is also capable of pushing the campaign message forward, but does not entail the risks of an unauthorized public performance.<sup>310</sup> Adding to that, the playlist enables the candidate to use a wider variety of styles to appeal to larger parts of the electorate.<sup>311</sup> Another way of sidestepping disputes with musicians is commissioning a campaign song, as the Conservative Party did during the 2001 UK General Election.<sup>312</sup> It remains to be seen how candidates will continue using alternative ways to rely on popular music. However, in the light of politicians defying artists’ wishes, and the weak legal remedies that are available to deter politicians from appropriating music, the issue is likely to recur in the run-up to the next election.

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<sup>307</sup> Chris Richards, *The Mixed Bag of Obama’s Campaign Song Playlist*, WASHINGTON POST (Feb. 9, 2012), [https://www.washingtonpost.com/lifestyle/style/the-mixed-bag-of-obamas-campaign-song-playlist/2012/02/09/gIQAVCqX2Q\\_story.html?utm\\_term=.8ba40b61d21d](https://www.washingtonpost.com/lifestyle/style/the-mixed-bag-of-obamas-campaign-song-playlist/2012/02/09/gIQAVCqX2Q_story.html?utm_term=.8ba40b61d21d).

<sup>308</sup> John Pareles, *Romney Releases His Playlist*, N.Y. TIMES: THE CAUCUS (Mar. 9, 2012, 5:35 PM), <https://thecaucus.blogs.nytimes.com/2012/03/09/romney-releases-his-playlist/>.

<sup>309</sup> Hillary Clinton, *The Official Hillary 2016 Playlist*, GENIUS (June 13, 2015), <https://genius.com/Hillary-clinton-the-official-hillary-2016-playlist-annotated> for the track selection.

<sup>310</sup> Kasper & Schoening, *supra* note 5, at 57.

<sup>311</sup> *Id.*

<sup>312</sup> Street, *supra* note 31, at 113.