

The logo for Astrachan Gunst Thomas features a stylized, swirling blue graphic to the left of the firm's name. The name "astrachan gunst thomas" is written in a lowercase, sans-serif font, with "astrachan" in black and "gunst thomas" in blue.

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## **Running On Empty**

By: James B. Astrachan

Did you read the news about the politician who co-opted a police helicopter, a harbor patrol boat and a compliment of Baltimore's Finest to help him propose to his girlfriend? Did he really need police protection to propose? If so, aren't there plenty of qualified private security firms available for the job?

The real question this incident raises is whether being an elected official confers free access to public property? It shouldn't, nor should status as an elected official create an entitlement to private property. But this happens not infrequently and recently it happened to music star Jackson Browne when John McCain's campaign grabbed Browne's music.

John McCain ran for President of the United States last year. He was in the throes of a desperate battle with then Senator Barack Obama, and his campaign people were looking for something really catchy that would express McCain's disdain for Obama's advice that filling auto tires to proper pressure will save gas. They decided, after many beers I am sure, that Jackson Browne's 1977 hit song RUNNING ON EMPTY fit the bill. The album on which the song was recorded was also called *Running on Empty* and was well known, having achieved Platinum status seven times over. That the song was subject to United States copyright protection should pose no problem, I am certain they thought. For them, the song was free for the plucking. They were, after all, a national political campaign, running a United States Senator for the highest elected office in the land. And pluck the song they did.

The chemistry could not have been worse. McCain was a fairly conservative Republican candidate; Jackson Browne has closely associated himself with liberal causes and democratic political candidates. Browne may not have performed for Obama, but he has performed at political rallies for other democratic contenders. And Browne was very much associated with his music. I suspect that the words RUNNING ON EMPTY, spoken as a question to persons over age eighteen, would often elicit the response, "Jackson Browne."

The song ran as background to a one minute twenty second ad for approximately 30 seconds and it was unmistakable. The ad was aired by the campaign in Ohio and Pennsylvania. It also made its way onto YouTube and was highlighted by the national media. Browne claims he received numerous inquiries asking why he would permit use of his song by Republicans. Browne then sued McCain and his campaign in California alleging copyright infringement, false endorsement, and violation of his right of publicity, reminiscent of an old-time case where an anti-tobacco athlete's persona was used to sell cigarettes.

Most interesting about Browne's suit are the defenses raised that the use of a copyrighted song in a political campaign is a fair use under copyright law, that the contents of a political ad can not violate the Lanham Act and that a political ad can not violate a person's right of publicity.

Generally, the fair use defense to copyright infringement is invoked when a work is used for education, comment, scholarship, news, reporting and criticism – like when the drama critic reads a few lines from a play on TV to explain or critique the play. The court declined to analyze whether this use was a fair use because not enough facts were plead and no discovery had occurred. But this California U.S. District Court did note that a District Court located in the Fourth Circuit had ruled that copyright claims based on unauthorized use of a copyrighted work in a political campaign are not barred, as a matter of law under the fair use doctrine.

The campaign also defended on the grounds that the Lanham Act claim for false endorsement or false association is also barred on the grounds that the Lanham Act only applies to commercial speech, and that its use of the song was permitted under the First Amendment without restriction.

These defenses were also brushed aside by the court, which ruled that these Lanham Act claims can apply to non-commercial speech of a political nature. The campaign also had the temerity to claim that its unauthorized use of the song made the ad an expressive work, barring a claim under the First Amendment and the artistic relevance test. Artistic relevance becomes a defense where a mark or name is used in connection with a work in a relevant way. For example, use of the name "Ginger" in the title of a movie, "Fred and Ginger," about two kids who through dance emulate Fred Astaire and Ginger Rogers was permitted as a fair use under trademark law. The campaign's ad was held not to be an artistic work invoking application of the artistic relevance test. Other courts have also held that the Lanham Act does not bar actions that arise out of political ads.

The campaign asserted that because it clearly identified itself as the source of the ad, there could be no likelihood of confusion as to source under the Lanham Act. In other words, it claimed, no one would believe Browne was the origin of the ad. That

defense missed the boat, and the court held that merely because the campaign identified itself as the source of the ad does not prevent people from believing that Browne endorsed McCain by allowing his song to be used in the ad.

Finally, the court held that showing that the campaign uses Browne's identity through use of his song made out a prima facie violation of his right of publicity.

It's hard to imagine that a campaign worker took the proposed use of the Jackson Browne song to a lawyer well versed in copyright law and asked whether its use was permissible. Or that the lawyer opined the campaign was good to go. A more likely scenario is that someone on behalf of the campaign liked the song and took it, and the campaign then backed into the defenses it raised when sued.

It was, after all, a political campaign for President of the United States – a campaign at the highest level. And a taking at that level would appear to set the tone for some aspirants to pretty much do what they want with another's property, private or public. That's just wrong for so many reasons, and the case was settled, out of court, early this month.

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*James B. Astrachan is the author of The Law of Advertising, published by Matthew Bender-Lexis/Nexis.*