

# Trump Trumped: Federal Court Finds Use of Copyrighted Music in Campaign Video Not a Fair Use

By David R. Ellis



In September 2021, a Federal District Court in New York denied a motion to dismiss a lawsuit brought against the Trump Campaign by a music composer for unauthorized use of his music in a campaign video. *Grant v. Trump*, 2021 WL 4435442 (SDNY 2021).

It is not unusual for songwriters to object to the use of their music by candidates they disagree with, believing that such use implies that they endorse the candidate. And even when candidates' positions are not anathema to composers, they have the right to control the use of their works by giving or withholding permission or requiring payment of a license fee before allowing their music to be used.

In this case, during the 2020 presidential election, the Trump Campaign released a 55 second animated video which included excerpts from the song "Electric Avenue" by Barbados musician Eddy Grant. The song was first released in 1983, spent five weeks at Number two on Billboard's Top 100 Chart, and was certified platinum by the Recording Industry Association of America.

The video begins with a depiction of a high-speed red train with the words "Trump Pence KAG [Keep America Great] 2020." After the red train passes, the beginning of the song "Electric Avenue" can be heard clearly, along with an excerpt of a speech by then-candidate Joe Biden in a way intended to disparage Biden and boost Trump. As of

September 1, 2020, the video had been viewed more than 13.7 million times and liked more than 350,000 times on Twitter.

Inasmuch as the Trump Campaign had not obtained permission or a license to use the song, Grant sued for copyright infringement and the defendants moved to dismiss, claiming that they had made "fair use" of the song, and that it was a parody and "transformative."

Section 107 of the Copyright Act, 17 U.S.C. §107, provides that the "fair use" of a copyrighted work for purposes such as criticism, comment, news reporting, teaching, scholarship or research is not an infringement, and sets out a number of factors for courts to consider.

These factors include the purpose and character of the use, including whether the use is of a commercial nature or is for nonprofit educational purposes; the nature of the copyrighted work; the amount and substantiality of the portion used; and the effect of the use upon the potential market for or value of the copyrighted work.

In this case, the court noted that Trump campaign was arguing that their use of the song was protected as a parody, relying on the Supreme Court case, *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994). In that case, the rap group Two Live Crew wrote a parody of Roy Orbison's iconic 1960s song "O Pretty Woman" and claimed it was a fair use. There, the Supreme Court held that parody, although not specifically

listed in §107, is a form of comment and criticism that may constitute a fair use of the copyrighted work being parodied.

Parody, which is directed toward a particular literary or artistic work, is distinguishable from satire, which more broadly addresses the institutions and mores of society. A work may be treated as a parody if its aim is to comment upon or criticize a prior work by appropriating elements of the original in creating a new artistic, as opposed to scholarly or journalistic, work. However, if the commentary has no critical bearing on the substance or style of the original composition, and the alleged infringer merely uses it to get attention or to avoid the drudgery of working up something fresh, the claim to fairness diminishes.

Here, the judge rejected the defendants' argument that their use of the song in their video qualified as fair use because it was a "transformative" parody. To be considered transformative, a secondary work cannot merely supersede the objects of the original creation, but must instead add something new, with a different purpose or character, altering the original with new expression, meaning, or message.

The judge said that the use of the song in the video was not transformative because the works serve different purposes. The video does not comment on the song or use it for a purpose other than for what it was originally created. The defendants did not edit the song's lyrics, vocals, or instrumentals, and the song is immediately recognizable. The video does not use the song as a vehicle to deliver a satirical message, and it makes no effort to poke fun at the song or Grant.

The judge also ruled that the defendants had used too much of the song for it to be a fair use. They did not edit the song's lyrics, vocals, or instrumentals, played the chorus repeatedly, and included most of the song's lyrics, which are of central importance to the song. The song was played for almost 75% of the video's length, so the quantity and value of the work used by the defendants was not reasonable in relation to its use.

The judge found that the defendants had used the song for commercial purposes without paying Grant the customary licensing fee, even though there was a well-established market for music licensing. The video did not use the song to express its political message, but rather to make the video more entertaining and memorable.

The judge found that the defendants' unlicensed use of Grant's popular song could threaten his ability to license the song in the future. Uncompensated use of songwriters' music in political or promotional videos could embolden

would-be infringers and undermine their ability to obtain compensation in exchange for licensing their music.

In conclusion, the judge rejected the defendants' assertions, finding that the they had made a wholesale copy of a substantial portion of Grant's music in order to make it more entertaining, not for criticism or comment. The video did not parody the music or transform it in any way, and thus was not a fair use.


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