

<http://bigstory.ap.org/article/1d6f00a784d24ab086449db93b7227b5/survivor-sues-huckabee-campaign-over-eye-tiger-0>

Invoking the time of year, I would note: ‘Tis the season for suing presidential campaigns. And the more the merrier, all lawprofs and entertainment lawyers say??!! Or, as Ludacris would say, Ho, Ho, Ho.

One of my upcoming radio shows will be about judicial opinions and rock lyrics. I send it to you all, but please remember it is copyrighted, and should not be distributed beyond the Posse. If anyone else wants to join the group, he or she should drop me an email—no charge.

The Survivor/Huckabee petition filed yesterday is attached.

Happy Holidays to my Posse,

Michael

Class 30: Rock Lyrics and Judicial Opinions

How judges use language is among our most practiced and nuanced forms of narrative, with serious consequences and high stakes. And the United States Supreme Court, the highest court in the land, is the apex of our constitutional system, so its opinions are read carefully—almost Talmudically—and so SCOTUS justices fashion their arguments carefully and then publish them so we can all discuss and study them. With their formal rituals and strict protocols, and no televised proceedings, they are a serious and learned group. [delete this sentence if you need to do so]

So when an important criminal law case involving rap lyrics posted on social media sites was heard and decided (Elonis v. US), many musicians and entertainment law specialist both watched and listened.

And they were rewarded when Chief Justice John Roberts held for the bad-boy rapper who had recited, posted, published, and embellished very harsh and derogatory—some would say hateful—lyrics and then argued that his criminal conviction for uttering “threats” was a violation of his constitutional rights. In a very narrow opinion the majority held for *Elonis* and sent the case back to a lower court to apply the higher standard: “*Elonis*’s conviction, however, was premised solely on how his posts would be understood by a reasonable person. Such a “reasonable person” standard is a familiar feature of civil liability in tort law, but is inconsistent with “the conventional requirement for criminal conduct— awareness of some wrongdoing.” Although the majority opinions cites liberally from the vile lyrics, no hip hop or rap musicians were cited—presumably due to the sheer indecorous image they project. However, we were all thrilled when the SCOTUS oral arguments did refer to Eminem, and Justice Roberts had already broken through the rock and roll membrane in 2008 when he cited Dylan in a dissent: “When you got nothing, you got nothing to lose,” auto-correcting the actual lyrics (“When you ain’t got nothing, you got nothing to lose”). [Bob Dylan, "Like A Rolling Stone"] Two years later, the more colorful Justice Antonin Scalia also cited Dylan, uncorrected, in a concurring opinion, when he cribbed a snatch of "The times they are a-changin.’”

But while the Supreme Court has only occasionally reached into rock lyrics, lower courts have shown no such hesitation. In a 2007 study, a law professor used computerized decisions to review and analyze such musical references—he counted both decisions and legal scholarship—and found that the prolific Dylan was the most often quoted in both legal literature (160 times) and in judicial opinions (26 times). The other usual suspects in the Top Ten included The Beatles, Springsteen, Paul Simon, Woody Guthrie, The Stones, The Dead, Simon and Garfunkel (sounding like a law firm), Joni Mitchell, and REM. Such a list today would more likely cite others, including hip hop and other outsider genres of music—as well as many recognizable sports references (here, Yogi Berra is the equivalent of Dylan), movie quotes (trending towards lines

from the multi-volume Star Wars), and other cultural products. And across subject matter areas, legal scholarship that cites rock and roll has proliferated, drawing law teachers who regularly include Dylan lyrics in their article titles, who have published a clever “mini-rock opera of constitutional commentary parody [called] Rock ‘n’ Roll Law School,” and who have gathered special issues of law reviews that have focused on Bruce Springsteen, musical and intellectual property issues, and other such topics. Most law schools offer basic copyright and entertainment law courses, some with even more extensive curricular options in this growing area.

And not only do lyrics representing legal concepts abound (imagine all the potential uses of Dylan’s iconic “weatherman” metaphor or The Talking Heads’ “same as it ever was” to uphold precedents) [Talking Heads, “Once in a Lifetime”], but judicial opinions can hide other cultural and musical artifacts, such as the influential Circuit Judge Richard Posner incorporating a picture of the magnificently-dreadlocked Bob Marley in an opinion about prisoner hairstyle choices and safety policies. [Bob Marley, "Natty Dread"] Increasingly, of course, the various music copyright cases cite extensively from the specific musicological expertise evident in the trials. These can even figure in unrelated subjects, as in a Texas case interpreting the Artist’s Consignment Act, where the lawyers successfully used detailed sociological expert witness testimony to identify a group of artists’ country music recordings as a “commonly recognized art form” so as to protect them from a lender’s security interest in bankruptcy proceedings. (You would not have thought this was needed in Houston, of all places.) [Archie Bell and the Drells, “Tighten Up”]

And while there is that nagging problem of how to cite the exact language of a rock lyric—such as Chief Justice Roberts’ cleaning up the contractions in the Dylan reference, a bigger problem is how to clean up the language and to delete the expletives in more modern and transgressive music, such as figured in the Elonis case. While he was not an accomplished performer, many of the most talented use language that

would, in the words of Professor Henry Higgins from “My Fair Lady,” would make a sailor blush.

My favorite rap reference in the vernacular argot was by the late Circuit Judge Terence Evans, who passed away in 2011, and who is missed for his puckish sense of humor. In *United States v. Murphy*, a 2005 criminal procedure opinion, he wrote my favorite footnote in this entire genre:

The trial transcript quotes Ms. Hayden as saying Murphy called her a snitch bitch “hoe.” A “hoe,” of course, is a tool used for weeding and gardening. We think the court reporter, unfamiliar with rap music (perhaps thankfully so), misunderstood Hayden’s response. We have taken the liberty of changing “hoe” to “ho,” a staple of rap music vernacular as, for example, when Ludacris raps “You doin’ ho activities with ho tendencies.” [Ludacris, “Ho”]

Who can argue with such erudition and attention to detail in the service of criminal justice?

This is Michael Olivas, your Rock and Roll Law Professor, same as I ever was, appearing on the Gardening Channel, with the Law of Rock and Roll, on KANW, your NPR station in Albuquerque, New Mexico

(c) Michael A. Olivas, 2015

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS**

RUDE MUSIC, INC.,)	
)	
Plaintiff,)	
)	Case No. 15 CV 10396
v.)	
)	
HUCKABEE FOR PRESIDENT, INC.)	
)	
Defendant.)	
)	
)	
)	

COMPLAINT

Rude Music, Inc. (“Rude Music”) for its complaint against Huckabee for President, Inc. alleges:

NATURE OF THE CASE

1. This is an action for copyright infringement, in violation of 17 U.S.C. § 501, arising from the defendant’s unauthorized public performance and distribution of Rude Music’s copyrighted musical composition.

JURISDICTION AND VENUE

2. This Court has subject matter jurisdiction of this claim pursuant to 28 U.S.C. §§1331 and 1338(a).

3. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b) and (c) and § 1400(a), as Defendant solicits and does business in this district, and Rude Music is being injured in this district.

PARTIES

4. Rude Music is an Illinois corporation, with its principal place of business at 1223 North Lakeview Court, Palatine, Illinois. Rude Music is owned solely by Frank M. Sullivan III, and operates as the publisher of Sullivan's musical compositions.

5. Huckabee for President is a Georgia corporation, having a principal place of business at Little Rock, Arkansas. Huckabee for President is the principal committee supporting the presidential campaign of former Arkansas governor Mike Huckabee.

COUNT I – COPYRIGHT INFRINGEMENT

6. The musical band SURVIVOR was formed in 1977, with Sullivan as one of its founding members.

7. Sullivan is a co-author of the musical composition "Eye of the Tiger," which was the principal theme song for the movie *Rocky III* and achieved number one status in the United States and throughout the world. The song won Grammy and People's Choice awards and was Oscar-nominated.

8. "Eye of the Tiger" is the subject of a valid copyright, which is co-owned by Rude Music and was duly registered in the Copyright Office on June 7, 1982 (PA 141854).

9. During the campaign for the Republican presidential nomination, Huckabee for President knowingly caused a recording of "Eye of the Tiger" to be publicly performed at a campaign appearance by Mr. Huckabee. On September

8, 2015, Mr. Huckabee appeared at a Grayson, Kentucky rally supporting Kim Davis, the controversial county clerk who gained national attention after refusing to issue marriage licenses to same-sex couples; “Eye of the Tiger” was played as Mr. Huckabee escorted Ms. Davis from the Carter County Detention Center.

10. Huckabee for President’s unauthorized public performance, or inducement of or contribution to the public performance, of the copyrighted work infringes Rude Music’s copyright.

11. Huckabee for President’s infringement of “Eye of the Tiger” is willful. Mr. Huckabee is sophisticated and knowledgeable concerning the copyright laws, both as a private individual and media-savvy business owner. According to the records of the United States Copyright Office, Mr. Huckabee is the author or co-author of more than a dozen copyrighted works. Mr. Huckabee operated television stations in Arkansas, and for years he has hosted political commentary shows on the radio and on Fox News. Mr. Huckabee is himself a musician whose band, Capitol Offense, has performed at political and other public events; in 2007, Mr. Huckabee received a Music for Life Award from the National Association of Music Merchants. Moreover, Huckabee for President has a legal team.

12. Artists’ complaints of candidates’ unauthorized use of their songs have become an election-year staple. According to news reports, in 2008 the founder of the band Boston demanded that Mr. Huckabee’s presidential campaign stop playing the Boston hit “More Than a Feeling” at his events. On information and belief, many of Huckabee for President’s senior staffers and

communications and media consultants (including Sarah Huckabee Sanders, Chip Saltzman, Chad Gallagher, Alice Stewart, Hogan Gidley, Bob Wickers, Bryan Sanders and Chris Maiorana) are alumni of the 2008 campaign that encountered this very issue and therefore are knowledgeable of the copyright laws.

13. As a result of the defendant's willful infringement of Rude Music's copyright, Rude Music has been damaged.

PRAYER FOR RELIEF

WHEREFORE, Rude Music asks that the Court enter judgment in its favor and

1. Order that defendant, and all those in active concert or participation with it, be preliminarily and permanently enjoined from unauthorized performances of the copyrighted work;

2. Award Rude Music damages in an amount to be determined by the Court, including but not limited to actual damages and defendant's profits or statutory damages, pursuant to 17 U.S.C. § 504(a)(2), enhanced to reflect the defendants' willful infringement;

3. Award Rude Music its reasonable attorney fees, disbursements and costs, pursuant to 17 U.S.C. § 505; and

4. Such further relief that this Court deem just.

PLAINTIFF DEMANDS A TRIAL BY JURY.

Respectfully submitted,

/s/ Annette M. McGarry

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