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Politics as Entertainment, Fair Use, and the Campaign Industrial Complex

BY [RANDALL TESSER](#) / ON FEBRUARY 9, 2016

In the spirit of Comic-Con and Star Trek conventions, political junkies now have Politicon, a nexus where they can socialize, debate, share obscure knowledge, and hope to catch a glimpse of a famous political figure or two.[1] Politicon seems to have arrived at just the right time, in a decade when the overlap between politics and entertainment has never been more evident. Businessman-turned-reality-TV-star Donald Trump is once again dominating the airwaves in his new pursuit as a presidential candidate. Republicans and Democrats alike have turned the debates of both their own parties, and of their competitors' into social events with debate drinking games.[2] Though the entertainment value of political media is only now coming to the forefront of social consciousness, the phenomenon itself is nothing new. According to Washington Post opinion writer Charles Lane, "politics has always been about entertainment," from "the debate between Abraham Lincoln and Stephen A. Douglas," to "civil rights, women's suffrage [and] winning the cold war," events and movements supposedly predicated—though not necessarily justified—by their entertainment value. [3]

There is support for the idea that public American politics in large degree, possibly even principally, function as entertainment. In a famous recent study, professors at Princeton University and Northwestern University came to the conclusion that the United States government more closely resembles an oligarchy than a representative democracy, and that a majority of citizens have little chance of winning a fight against the wealthy elite. Their conclusion suggests that the average American, or even a majoritarian collective of average Americans, "actually have little influence over the policies our government adopts." [4] While additional spending on a political campaign does indeed impact voter turnout,[5] a system-level, policy-centric analysis might regardless question the political efficacy of such initiatives. Further, political campaigns and political media transmit relatively little substantive information to the public. "[H]orse-race' coverage of election—highlighting poll results, campaign slip-ups, and more tabloid-type information that sells—trumps detailed analysis of policy positions." [6]

Despite the foregoing, not everyone treats political and campaign media as products of an entertainment industry. Individuals and groups are permitted to use copyrighted materials for certain purposes under the "fair use" exception, which grants "a privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent." [7] The use of copyrighted materials, and of works derivative of copyrighted materials that might be considered fair use are to be evaluated by weighing the following factors: "(1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the potential market for or value of the copyrighted work." [8] In the political

arena, these uses often include parody and supposedly not-for-profit use. There is no widespread doctrine that supports inclusion of political material in the fair use exception; however, in considering the “purpose” arm of the fair use test, “[d]istrict courts that have actually considered whether campaign advertisements are commercial in the fair use context come down on the side of noncommercial.”[9] This is not to say that courts unconditionally find that political advertisements are deserving of fair use;[10] however, it seems that there is a preconception of a noncommercial nature of political media. In *Browne v. McCain*, a case in which singer Jackson Browne sued John McCain for using a clip of his song, *Running on Empty* in a campaign advertisement, the California Central District Court, while declining to grant summary judgment in favor of Senator McCain on the basis of the fair use doctrine, did explicitly equate political to noncommercial speech.[11]

Despite some courts’ lack of recognition of the existing financial incentives in politics, political scientists have acknowledged this reality in a phenomenon some are calling the campaign-industrial complex. While the funding of political campaigns has steadily become increasingly regulated, the disbursement of these funds remains relatively obscure from the public and from would-be auditors. Exposé-styled academic papers and books have detailed the immense profits that can be nefariously gained through working in the campaign industry, particularly as a “consultant.”[12,13] In a particularly dramatic example, the Romney campaign of 2012 doled out more than \$160 million in what was essentially self-dealing to non-staff members connected with the campaign.[14] The financial scale of political elections in the United States has been steadily increasing.[15] The immense entertainment value associated with campaigns might be an enabling factor in the profit incentives associated with campaigns.

It is commendable that the courts have not carved out an explicit blanket fair use exception for political media; however, as the internet has provided an avenue for easier manipulation of media, and the scale of politically funded or inspired spectacles seemingly grows ever larger, the justifications for considering political speech noncommercial are rendered slimmer, particularly relating to political advertisements. The potential for utilization of the fair use doctrine to diminish costs of political advertisements provides yet another financial incentive in the campaign-industrial complex. In light of the suspicious nature of the profitability of political campaigns, perhaps courts ought to view contentions of fair use in political campaign media with heightened skepticism.

1. Tamara Shayne Kagel, *Politics as Entertainment? There’s Now a Comic-Con for That*, *Vanity Fair* (Oct. 8, 2015).
2. *Debate Drinking*. <http://www.debatedrinking.com/>
3. Charles Lane, *It’s not just Donald Trump – politics has always been about entertainment*, *Washington Post* (Aug. 5, 2015)
4. Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, *Am. Pol. Sci. Assoc.*, Vol. 12, No. 3, Sept. 2014.
5. Ryan D. Enos & Anthony Fowler, *Aggregate Effects of Large-Scale Campaigns on Voter*

Turnout, Center for Competitive Politics, (Nov. 1, 2014).

6. Lori M. Poloni-Staudinger & Michael R. Wolf, *American Difference: American Politics from a Comparative Perspective* (2015).

7. *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985).

8. 17 U.S.C.A. § 107

9. *Henley v. DeVore*, 733 F. Supp. 2d 1144 (S.D.N.Y. 2014).

10. *Id.*

11. *Brown v. McCain*, 611 F. Supp. 2d 1073 (C.D. Cal. 2009).

12. Walter Shapiro, *The Campaign-Industrial Complex*, *Washington Monthly* (Jan./Feb. 2012).

13. Lee Aitken, *The Campaign Casino*, *Shorenstein Center on Media, Politics and Public Policy: Discussion Paper Series, #D-83*, Feb. 2014.

14. *Id.*

15. Derek Willis, *Election Spending is Changing, as Well as Expanding*, *TheUpshot* (Nov. 4, 2014).