



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
) MUR 6357
American Crossroads, *et al.*)

STATEMENT OF REASONS
Chair CAROLINE C. HUNTER and Commissioners DONALD F. McGAHN and
MATTHEW S. PETERSEN

At issue in this matter is whether American Crossroads¹ made an excessive in-kind contribution to the Portman for Senate Committee (“Portman Committee”) by airing television advertisements that included several fleeting snippets of Portman Committee video footage obtained from publicly available Internet websites. In 2010, American Crossroads funded the advertisement in question, “Jobs for Ohio,” and filed a timely report with the Commission disclosing the expenditure shortly after it was made. The Ohio Democratic Party filed a complaint alleging that the American Crossroads advertisement amounted to “replication of campaign materials” and, thus, constituted an excessive in-kind contribution to the Portman Committee—Rob Portman’s principal campaign committee for U.S. Senate in Ohio. Under this theory, American Crossroads allegedly violated the contribution limits and disclosure provisions of the Federal Election Campaign Act of 1971, as amended (“the Act”), that apply to political committees.

We voted against finding reason to believe that American Crossroads and Margee Clancy, in her official capacity as treasurer, violated 2 U.S.C. §§441a(a) and 434(b) by making an excessive in-kind contribution as a result of republishing campaign materials and by failing to disclose the cost of the communication as a contribution.² American Crossroads’ use of the

¹ American Crossroads is an independent expenditure-only political committee registered with the Commission.

² Because we concluded that “Jobs for Ohio” was not an in-kind contribution to the Portman Committee, we need not address the complainant’s assertion that because American Crossroads made a contribution by republishing campaign materials, it was thereafter subject to a \$5,000 contribution limit and the prohibition on contributions from corporations and labor unions.

OGC also recommended that the Commission dismiss, as a matter of prosecutorial discretion, the allegation that American Crossroads and Margee Clancy, in her official capacity as treasurer, violated 2 U.S.C. §§ 441a(f) and 441b by accepting excessive and prohibited contributions. For the reasons stated in the First General Counsel’s Report, we agree for purposes of 2 U.S.C. § 437g(a)(8).

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video footage snippets in its own communication was consistent with the Act and Commission regulations covering republication of campaign materials and fits squarely within Commission precedent dismissing allegations of campaign material republication in similar cases. This statement provides the basis for our conclusion.

I. Background

In 2010, American Crossroads spent \$454,341.80 on a television advertisement entitled “Jobs for Ohio.” The complainant alleges that this spending was an excessive in-kind contribution to the Portman Committee “by financing the republication of Senate candidate Rob Portman’s campaign materials.”

The complaint identifies a YouTube video, “Portmans Celebrate Memorial Day,” posted by the YouTube user “PortmanforSenate” on June 1, 2010, as the source of a portion of the footage of Rob Portman contained in the advertisement.³ This Portman Committee video consists primarily of unembellished footage of Rob Portman and his family on the campaign trail. It appears that several images in the “Jobs for Ohio” advertisement, including footage of Portman walking in a parade and eating at a picnic table, were obtained from this video.

A second video posted on YouTube—“Portman’s Statewide Jobs Tour,” posted by the “robportman”—is the apparent source of additional images of Rob Portman contained in the “Jobs for Ohio” advertisement.⁴ It appears that clips of Rob Portman talking to individuals or groups of workers and speaking at a podium holding up a brochure entitled “Portman Plan to Create Ohio Jobs” in the “Jobs for Ohio” advertisement was obtained from this video.

In contrast to the “day in the life”-style of the Portman Committee footage, American Crossroads’ “Jobs for Ohio” advertisement consists of numerous fleeting images—including several brief snippets of Portman Committee video footage—that are incorporated into a checkerboard-style graphic and set alongside text, images, and visuals that are unique to this advertisement. Moreover, American Crossroads adds its own audio and narration to this spot.

American Crossroads filed a 48-Hour Independent Expenditure Report disclosing the costs of the advertisement on August 17, 2010.⁵ Thus, the advertisements were fully disclosed

In addition, although the complaint does not specifically allege that American Crossroads coordinated the advertisement with the Portman Committee, the Commission voted unanimously to accept OGC’s recommendation to find no reason to believe that the Portman Committee violated 2 U.S.C. § 441a(f) by accepting an excessive in-kind contribution from American Crossroads in the form of a coordinated communication. The basis for this finding is the Factual and Legal Analysis for the Portman Committee available in the publicly available file.

³ See <http://www.youtube.com/watch?v=10r6Y6cmoi4>.

⁴ See <http://www.youtube.com/watch?v=3Xs3j8gibo8>.

⁵ Available at <http://query.nictusa.com/cgi-bin/dcddev/forms/C00487363/488248/>.

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and included a full disclaimer identifying who paid for the communication, American Crossroads' website, and statements that American Crossroads was responsible for the content of the advertisement and the advertisement was not authorized by any candidate or candidate's committee.

The Office of General Counsel ("OGC") recommended that the Commission find reason to believe that American Crossroads and Margee Clancy, in her official capacity as treasurer, violated 2 U.S.C. §§ 441a(a) and 434(b) by making an excessive in-kind contribution as a result of republishing campaign materials and by failing to properly disclose the cost of its advertisement as a campaign contribution.

II. Analysis

Under the Act, "the financing by any person of the dissemination, distribution, or *replication*, in whole or in part, of any broadcast or any written, graphic, or other form of campaign materials prepared by the candidate, his campaign committees, or their authorized agents shall be considered to be an *expenditure*..."⁶

For several reasons, including the Commission's treatment of similar allegations in prior matters,⁷ we reject the arguments of complainants and OGC that American Crossroads' use of the snippets of Portman Committee footage resulted in an in-kind contribution to the Portman Committee. The activity at issue here does not constitute "replication of campaign materials" as contemplated by the Act and Commission regulations.⁸ In MUR 5996 (Tim Bee), the Commission did not find reason to believe that an independent group's use of a candidate's "head shot" photograph in a television advertisement constituted replication. The Commission voted to exercise its prosecutorial discretion and dismiss the allegation that the group made an excessive or prohibited contribution because the photograph was downloaded from a candidate's publicly available website and was shown for only a few seconds in the ad at issue. We

⁶ 2 U.S.C. § 441a(a)(7)(B)(iii) (emphasis added). Commission regulations, on the other hand, provide that the replication of campaign materials prepared by a candidate's authorized committee is "considered a *contribution* for purposes of contribution limitations and reporting responsibilities of the person making the expenditure." 11 C.F.R. § 109.23 (emphasis added). Notwithstanding the seeming incongruity between how the Act and Commission regulations treat replication (expenditure versus contribution), we need not address the discrepancy here since we conclude that the American Crossroads advertisement at issue does not amount to replication.

⁷ MUR 2272 (American Medical Association), MUR 2766 (Auto Dealers and Drivers for Free Trade Political Committee), MUR 5743 (Betty Sutton for Congress), MUR 5996 (Tim Bee), and MUR 5879 (Democratic Congressional Campaign Committee). Advisory Opinion 2008-10 (Votervoter.com) addressed a question similar to the one presented by this matter. There, the Commission concluded that given the facts of the request, "if an individual independently creates and uses his or her own footage of a candidate at a public appearance in an ad he or she posts on VoterVoter.com, the footage would not constitute candidate campaign materials." Here, American Crossroads created and used its own footage by incorporating snippets of Portman Committee video it obtained from YouTube.

⁸ MUR 5996 (Tim Bee), Statement of Reasons, Commissioners Matthew S. Petersen, Caroline C. Hunter, and Donald F. McGahn, at 3.

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explained in a separate Statement of Reasons that “[t]he traditional type of republication involves the reprinting and dissemination of a candidate’s mailers, brochures, yard signs, billboards, or posters—in other words, materials that copy and convey a campaign’s message.”⁹

In that statement, we reaffirmed the reasoning of Commissioners von Spakovsky and Weintraub in MUR 5743 (Betty Sutton for Congress). As they explained in that matter, “downloading a photograph from a candidate’s website that is open to the world, for incidental use in a large mailer that is designed, created, and paid for by a political committee as part of an independent expenditure without any coordination with the candidate, does not constitute the ‘dissemination, distribution, or republication of candidate campaign materials.’”¹⁰ We agree with this reasoning and apply it here.

Like MUR 5743 (Betty Sutton for Congress) and MUR 5996 (Tim Bee), the video footage of Rob Portman at issue was obtained without direct contact with the campaign; in this case, it was obtained from a publicly available Internet website. Furthermore, the generic Portman footage is shown only in a portion of the American Crossroads advertisement, which does not repeat the entirety, or even any substantial portion, of the Portman Committee footage. Thus, the snippets used are incidental to the advertisement as a whole.

Moreover, the overall audio and visual presentation in the American Crossroads advertisement is wholly different from that in the Portman Committee footage. As noted above, the few fleeting images from the Portman Committee footage are incorporated into a communication in which American Crossroads adds its own text, graphics, audio, and narration to create its own message. In other words, the American Crossroads advertisement—neither in whole nor in substantial part—is anything close to a carbon copy of the Portman Committee footage.

The Act’s republication provision is designed to capture situations where third parties, in essence, subsidize a candidate’s campaign by expanding the distribution of communications whose content, format, and overall message are devised by the candidate. But clearly that is not what happened here. American Crossroads did not repeat verbatim the Portman Committee’s message; rather, it created its own. Therefore, we concluded that the American Crossroads advertisement did not constitute “a republication of campaign materials.”

In this matter, OGC raised two additional arguments in support of its reason to believe recommendation. First, OGC argues that the video images “convey meaning that is central to the advertisement’s message.” The idea, however, that the Portman Committee video segments purportedly conveyed a campaign theme—namely, creating jobs—is not materially significant.

⁹ *Id.*

¹⁰ MUR 5743 (Betty Sutton for Congress), Statement of Reasons of Commissioners Hans A. von Spakovsky and Ellen L. Weintraub. The Commission dismissed the matter but admonished EMILY’s List for using candidate photographs obtained directly from the candidate’s website in several mail pieces. However, we have declined the invitation to admonish committees as a form of punishment because the statute does not list admonishment as a power vested with the Commission, and for that reason we read MUR 5743 as a dismissal by the Commission.

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As prior Commissioners said in a similar matter, it is “reasonably attributed to the common sense conclusion that most parties and candidates will be addressing a defined set of campaign issues in their advertising. The Commission has no legal basis to assign a legal consequence to these similarities without specific evidence of prior coordination.”¹¹ Here, there is absolutely no indication of prior coordination.

Moreover, this argument has been rejected by the Commission in prior MURs. For example, in MUR 2272 (*American Medical Association, et al.*), Commissioner Josefiak explained, “the regulations do not convert independent expenditures for those communications into contributions based upon a similarity or even identity of themes with the campaign effort. Ideas and information can come from many sources, and their commonality is of itself insufficient to demonstrate either coordination or ‘copying.’”¹² Likewise, the Commission rejected a similar theory in MUR 2766 (*Auto Dealers and Drivers for Free Trade Political Committee, et al.*). Commissioner Josefiak noted: “The practical reality is that an intelligently planned independent expenditure effort will always employ similar themes and issues, or attack the same weaknesses of the opponent, as the campaign of the beneficiary candidate.”¹³ Ultimately, “the Commission cannot turn independent expenditures into presumptively illegal activity.”¹⁴ Therefore, the mere fact that “Jobs for Ohio” and the Portman campaign both focused on job creation provides no basis to find that this triggered the Act’s republication provision.

Second, OGC asserts that the brief quote exception to the republication rule¹⁵ “is inapplicable because the video does not ‘quote’ the candidate on a particular issue,” nor does “Jobs for Ohio” use a quotation of a campaign publication. We disagree with this excessively narrow reading of the brief quote exception. The dictionary defines “quote” to mean, among other things, “to use a brief excerpt from: *The composer quotes Beethoven’s Fifth in his latest work.*”¹⁶ It would be odd to suggest that a direct candidate quote would be less republication than use of images. Thus, we rejected OGC’s reading of the exception and believe it includes more. Though we need not rely on this exception to determine that American Crossroads did not

¹¹ MUR 5369 (*Rhode Island Republican Party*), Statement for the Record, Commissioners David M. Mason, Bradley A. Smith, and Michael E. Toner, at 5.

¹² MUR 2272 (*American Medical Association, et al.*), Statement of Reasons, Commissioner Thomas J. Josefiak at 8.

¹³ MUR 2766 (*Auto Dealers and Drivers for Free Trade PAC*), Statement of Reasons, Commissioner Thomas J. Josefiak at 23.

¹⁴ MUR 2766 (*Auto Dealers and Drivers for Free Trade PAC*), Statement of Reasons of Chairman Lee Ann Elliot and Commissioners Joan Aikens and Thomas Josefiak at 3.

¹⁵ The republication rule contains five exceptions, the relevant exception being if the campaign material consists of a brief quote of materials that demonstrate a candidate’s position as part of a person’s expression of its own views then such use will not constitute a contribution to the candidate who originally prepared that material. 11 C.F.R. § 109.23(b)(4).

¹⁶ Random House Webster’s Unabridged Dictionary, 2d ed. (2005).

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run afoul of the law, it does provide an additional basis to conclude that "Jobs for Ohio" does not amount to republication of campaign materials.

III. Conclusion

For the foregoing reasons, we voted not to find reason to believe that American Crossroads violated the contribution limitation and disclosure provisions of the Act by republishing Portman Committee campaign materials.

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2/22/12
Date


CAROLINE C. HUNTER
Chair

2/22/12
Date


DONALD F. MCGAHN II
Commissioner

2/22/12
Date


MATTHEW S. PETERSEN
Commissioner

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