



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)

Hickenlooper for Colorado, *et al.*)

) MUR 7670
)
)
)

**STATEMENT OF REASONS OF CHAIRMAN ALLEN J. DICKERSON AND
COMMISSIONERS SEAN J. COOKSEY AND JAMES E. “TREY” TRAINOR, III**

This matter concerns allegations that Hickenlooper for Colorado—John Hickenlooper’s principal campaign committee in Colorado’s 2020 U.S. Senate election—accepted and failed to report an unlawful in-kind contribution by including in one of its advertisements six seconds of video footage that had originally appeared in advertising for Hickenlooper’s 2014 campaign for governor of Colorado. We joined a unanimous vote to dismiss these allegations.¹ However, we disagreed with part of the Office of the General Counsel’s (“OGC”) analysis in recommending dismissal, and this statement explains our reasons for that vote.

I. FACTUAL BACKGROUND

In August 2019, Hickenlooper for Colorado released a 90-second online video advertisement, titled “Not Done Fighting,” to announce the launch of John Hickenlooper’s candidacy for U.S. Senate in the 2020 election.² “Not Done Fighting” included six seconds of footage from two television advertisements (the “Video Footage”) originally produced for Hickenlooper’s 2014 gubernatorial campaign in Colorado.³ Hickenlooper’s gubernatorial committee had previously paid Putnam Partners, LLC as an independent contractor to create the two TV ads on its behalf, and Putnam Partners retains the copyright ownership of those ads and the Video Footage at issue.⁴ After Hickenlooper’s 2014 gubernatorial campaign, Putnam Partners continued to make the two ads viewable on its public website.

The Complaint alleges that Hickenlooper for Colorado violated the Federal Election Campaign Act, as amended (the “Act”), and the Commission’s regulations by accepting a

¹ Certification (Sept. 28, 2022), MUR 7670 (Hickenlooper for Colorado, *et al.*).

² First General Counsel’s Report at 3 (Aug. 15, 2022), MUR 7670 (Hickenlooper for Colorado, *et al.*).

³ *Id.* at 3–4.

⁴ *Id.* at 6.

prohibited and unreported contribution, in the form of the transfer of the Video Footage from Hickenlooper’s gubernatorial campaign.⁵ It also alleges that Hickenlooper for Colorado did not disclose any disbursements to or in-kind contributions from either Hickenlooper’s gubernatorial committee or from Putnam Partners, in violation of the Act’s reporting requirements.⁶

The Respondents do not deny that “Not Done Fighting” included the Video Footage “as b-roll in the launch video.”⁷ However, they maintain that use of the Video Footage was permissible under the fair use doctrine of copyright law.⁸ Hickenlooper for Colorado’s Response argues that, because Putnam Partners made Hickenlooper’s gubernatorial campaign ads available to the general public through its website, “the snippets or clips have a fair market value of \$0, because they are available to all for free for ‘fair use.’”⁹ In its Response, Putnam Partners likewise notes that, consistent with the principles of fair use, its ordinary “business practice” is not to assert a copyright claim when either a client or any other person “uses a small portion of an advertisement it has made available on its website in another work.”¹⁰

Finally, the Respondents assert that, even if use of the Video Footage did amount to an in-kind contribution to Hickenlooper for Colorado, its value is negligible and warrants the Commission’s dismissal.¹¹ Respondents contend that the fair market value of the Video Footage in “Not Done Fighting” was, at most, *de minimis*, since it made up only six seconds of the 90-second advertisement, was more than five years old, and “was degraded in quality because it was pulled from an Internet copy.”¹²

II. LEGAL ANALYSIS

The Act defines a “contribution” as “any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office.”¹³ Pursuant to the Commission’s regulations, “anything of value” encompasses “all in-kind contributions,” including “the provision of any goods or services without charge or at a charge that is less than the usual and normal charge for such goods or services.”¹⁴ The Commission’s regulations also provide that “[t]ransfers of funds or assets from a candidate’s

⁵ Complaint at 2–4 (Dec. 13, 2019), MUR 7670 (Hickenlooper for Colorado, *et al.*).

⁶ *Id.*

⁷ Response of Hickenlooper for Colorado at 2 (Feb. 24, 2020), MUR 7670 (Hickenlooper for Colorado, *et al.*).

⁸ *See* Response of Hickenlooper for Colorado at 2–3 (Feb. 24, 2020), MUR 7670 (Hickenlooper for Colorado, *et al.*); Response of Putnam Partners at 2–3 (Feb. 24, 2020), MUR 7670 (Hickenlooper for Colorado, *et al.*).

⁹ Response of Hickenlooper for Colorado at 3 (Feb. 24, 2020), MUR 7670 (Hickenlooper for Colorado, *et al.*).

¹⁰ Response of Putnam Partners at 3 (Feb. 24, 2020), MUR 7670 (Hickenlooper for Colorado, *et al.*).

¹¹ Response of Hickenlooper for Colorado at 4 (Feb. 24, 2020), MUR 7670 (Hickenlooper for Colorado, *et al.*); Response of Putnam Partners at 4 (Feb. 24, 2020), MUR 7670 (Hickenlooper for Colorado, *et al.*).

¹² Response of Hickenlooper for Colorado at 4 (Feb. 24, 2020), MUR 7670 (Hickenlooper for Colorado, *et al.*).

¹³ 52 U.S.C. § 30101(8)(A)(i); *see also* 11 C.F.R. § 100.52(a).

¹⁴ 11 C.F.R. § 100.52(d)(1). *See also* 11 C.F.R. § 100.52(d)(2) (defining the “usual and normal charge” for goods and services).

campaign or account for a nonfederal election to his or her principal campaign committee or other authorized committee for a federal election are prohibited,”¹⁵ though the Commission has clarified in guidance materials that the transfer of a state committee’s assets to a federal campaign committee is not prohibited if the federal committee pays fair market value, or the “usual and normal charge,” for use of the assets.¹⁶

While the copyright doctrine of fair use is not explicitly part of the Act or Commission regulations, the Commission has recognized comparable principles in connection with the use of free, publicly available online materials created by third parties. For instance, in a series of advisory opinions, the Commission has determined that corporate entities may provide candidates and political committees access to various free (or discounted) digital services, so long as the corporation’s service is offered “in the ordinary course of its business and on the same terms and conditions on which it was offered to all similarly situated persons in the general public.”¹⁷ These advisory opinions have clarified that if the “usual and normal charge” for a particular service “is always zero,” an in-kind contribution does not result when that service is also provided at no cost to federal candidates or committees.¹⁸

In this matter, the record before the Commission supports that the Video Footage had no more than *de minimis* fair market value—indeed, it likely had no value at all. The evidence indicates that Hickenlooper for Colorado obtained the Video Footage at no cost from Putnam Partners’ public website, and that Putnam Partners’ business practice is not to charge a fee or to assert its copyright when another person “uses a small portion of an advertisement it has made available on its website in another work.”¹⁹ Thus, Putnam Partners effectively ascribed no monetary value to the Video Footage featured in “Not Done Fighting,” and Hickenlooper for Colorado’s use of the Video Footage occurred “on the same terms and conditions on which it was offered to all similarly situated persons in the general public”—that is, for no cost.²⁰ Moreover, the Respondents point out that the Video Footage was more than five years-old at the time it appeared in “Not Done Fighting,” and that its quality was “degraded,” further minimizing its

¹⁵ 11 C.F.R. § 110.3(d).

¹⁶ *See* Transfers of Funds from State to Federal Campaigns, 57 Fed. Reg. 36,344, 36,345 (Aug. 12, 1992).

¹⁷ Advisory Op. 2022-14 (Google) at 6. *See* Advisory Op. 2018-11 (Microsoft) at 3 (“A corporation may provide goods and services to political committees without being considered to have made an in-kind contribution so long as it does so ‘on the same terms and conditions available to all similarly situated persons in the general public.’”); Advisory Op. 2004-06 (Meetup) at 3 (concluding that corporation could provide federal candidates and political committees access to free online service for arranging local gatherings without making in-kind contribution because the service “is always provided without charge to every person”); Advisory Op. 2019-12 (Area 1 Security, Inc. II) at 2 (concluding that corporation could offer anti-phishing services to federal candidates and committees under its low or no-cost pricing tier “because doing so would be in the ordinary course of [its] business and on terms and conditions that apply to similarly situated non-political clients.”).

¹⁸ Advisory Op. 2022-14 (Google) at 6 (quoting Advisory Opinion 2004-06 (Meetup) at 4).

¹⁹ *See* Response of Putnam Partners at 3 (Feb. 24, 2020), MUR 7670 (Hickenlooper for Colorado, *et al.*).

²⁰ Advisory Op. 2022-14 (Google) at 6 (quoting Advisory Opinion 2004-06 (Meetup) at 4).

value.²¹ Simply put, “this small clip of free and previously used footage likely could not command much of a purchase price, if any.”²²

In addition, Hickenlooper for Colorado’s incorporation of the Video Footage into a new, “wholly different” advertisement announcing John Hickenlooper’s 2020 run for U.S. Senate was “incidental to the advertisement as a whole.”²³ The Video Footage made up just six seconds of b-roll in the 90-second-long “Not Done Fighting” video, which “add[ed] its own text, graphics, audio, and narration to create its own message” about the launch of John Hickenlooper’s campaign for a different office (U.S. Senate), in a different election cycle (2020).²⁴

Although OGC recommended that the Commission exercise its prosecutorial discretion and dismiss this matter, the First General Counsel’s Report (“FGCR”) did not fully engage with the evidence or arguments that the Video Footage had little or no appreciable fair market value. In counseling the Commission to dismiss the allegations, OGC observed that “an investigation would be necessary” to determine, among other issues, “the appropriate valuation of the Video Footage.”²⁵ Yet, as we have already discussed, it is readily apparent from the existing record in this case that the Video Footage had no more than *de minimis* value, given Putnam Partners’ standard practice of permitting the public’s free use of small portions of videos available on its website, as well as the Video Footage’s brief and “incidental” inclusion in the “Not Done Fighting” video, which conveyed a distinct message from the original 2014 gubernatorial ads. In light of these facts, an investigation by OGC would be unlikely to uncover any additional information that might lead us to the conclusion that the Video Footage did have a significant value.

Similarly, the FGCR elided the Respondents’ invocation of the fair use doctrine as a potential defense against the Complaint without duly considering the relevance of that doctrine to the market value of the Video Footage and whether it constituted an in-kind contribution.²⁶ We believe the Commission’s precedents regarding the provision of corporate services offered at no charge in the ordinary course of business and on the same terms and conditions as to the general public are dispositive in the outcome of this matter, for the reasons set forth above.

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²¹ Response of Hickenlooper for Colorado at 4 (Feb. 24, 2020), MUR 7670 (Hickenlooper for Colorado, *et al.*).

²² Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioner Caroline C. Hunter at 1 (Aug. 30, 2019), MUR 6792 (Sean Eldridge, *et al.*).

²³ Statement of Reasons of Chair Caroline C. Hunter and Commissioners Donald F. McGahn II and Matthew S. Petersen at 4 (Feb. 22, 2012), MUR 6357 (American Crossroads, *et al.*).

²⁴ *Id.* See also Response of Hickenlooper for Colorado at 2 (Feb. 24, 2020), MUR 7670 (Hickenlooper for Colorado, *et al.*) (noting that Hickenlooper’s “Senate Campaign used clips from Putnam Partners’ publicly available website and edited the images, altering the framing of the clips so that they could serve as b-roll in the launch video.”).

²⁵ First General Counsel’s Report at 12 (Aug. 15, 2022), MUR 7670 (Hickenlooper for Colorado, *et al.*).

²⁶ See *id.* at 11 (“[N]othing in the Act or Commission regulations recognizes an exception to the definition of contribution based on the fair use doctrine that would apply here, nor does there appear to be any relevant Commission precedent creating such an exception.”).

We agreed with OGC's recommended outcome for this matter, but not its reasoning. Because we concluded that it was unlikely that any contribution occurred at all, we voted to dismiss.



Allen Dickerson
Chairman

November 1, 2022

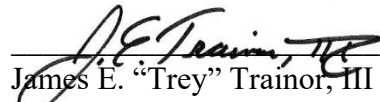
Date



Sean J. Cooksey
Commissioner

November 1, 2022

Date



James E. "Trey" Trainor, III
Commissioner

November 1, 2022

Date