

are thus not in the public domain as a matter of law, this means that the republisher would presumably have to obtain permission from the campaign to republish the campaign materials, raising issues of authorization or coordination. See 11 CFR 110.11.

Similarly, a commenter suggested an exception to permit the “fair use” of campaign materials, which would presumably permit the republication of campaign slogans and other limited portions of campaign materials for analysis and other uses provided under the legal tests developed with respect to intellectual property law. This commenter also argued that the “fair use” exception should be available to supporters of the candidate who originally produced the materials, as well as that candidate’s opponents.

The Commission, however, believes that a “fair use” exception could swallow the rule. Furthermore, the Commission notes that “fair use” is an exception in the intellectual property arena intended to protect literary, scholastic, and journalistic uses of material without infringing upon the intellectual property rights of those who created the material. The Commission declines to import this concept into the political arena where it would not serve to promote the same important purposes, and where the exceptions to the definitions of “contribution” and “expenditure” already address these concerns. See, e.g., 11 CFR 100.73 and 100.132 (exceptions to the definition of “contribution” and “expenditure,” respectively, for news stories, commentary, and editorials.) In the context of intellectual property law, the republication of another person’s work is generally viewed as undesirable by the original author, thus the “fair use” exception provides a limited exception to the general limitations on such republication. In contrast, Congress has addressed republication of campaign materials through 2 U.S.C.

441a(a)(7)(B)(iii) in a context where the candidate/author generally views the republication of his or her campaign materials, even in part, as a benefit. Given the different purpose served by intellectual property law and campaign finance law, a “fair use” exception would be inappropriate and unworkable in the campaign arena. Additionally, the Commission believes that such legitimate benefits as would flow from a fair use exception are met through application of 11 CFR 109.23(b)(4).

The Commission is including the exceptions proposed in 100.57(b) in its final rules at CFR 109.23(b). Under 11 CFR 109.23(b)(1), a candidate or political party committee is permitted to

disseminate, distribute, or republish its own materials without making a contribution. Paragraph (b)(2) exempts the use of material in a communication advocating the defeat of the candidate or party who prepared the material. For example, Person A does not make a contribution to Candidate B if Person A incorporates part of Candidate B’s campaign material into its own public communication that advocates the defeat of Candidate B. However, if the same public communication also urged the election of Candidate B’s opponent, Candidate C, and incorporated a picture or quote that had been prepared by Candidate C’s campaign, then the result does constitute a contribution to Candidate C.

A third exception, in paragraph (b)(3), makes it clear that campaign material may be republished as part of a *bona fide* news story as provided in 11 CFR 100.73 or 11 CFR 100.132. In paragraph (b)(4), the Commission allows limited use of candidate materials in communications to illustrate a candidate’s position on an issue.

Finally, in paragraph (b)(5), the Commission recognizes that a national, State, or subordinate committee of a political party makes a coordinated party expenditure rather than an in-kind contribution when it uses its coordinated party expenditure authority under 11 CFR 109.32 to pay for the dissemination, distribution, or republication of campaign material. This rule is based on former 11 CFR 109.1(d)(2), which provided that a State or subordinate party committee could engage in such dissemination, distribution, or republication as an agent designated by a national committee pursuant to former 11 CFR 110.7(a)(4), but is somewhat broader than former 11 CFR 109.1(d)(2).

#### **11 CFR Part 109, Subpart D—Special Provisions for Political Party Committees**

##### *11 CFR 109.30 How Are Political Party Committees Treated for Purposes of Coordinated and Independent Expenditures?*

A national, State, or subordinate committee of a political party may make expenditures up to prescribed limits in connection with the general election campaign of a Federal candidate that do not count against the committees’ contribution limits. See 2 U.S.C. 441a(d). These expenditures are commonly referred to as “coordinated party expenditures.” Political party committees, however, need not demonstrate actual coordination with their candidates to avail themselves of

this additional spending authority. Nor are political party committees restricted as to the nature of the expenditures they may make on behalf of a candidate that are treated as coordinated party expenditures. Political party committees may also make independent expenditures. See *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 518 U.S. 604 (1996) (“Colorado I”).

In BCRA, Congress set certain new restrictions on these “coordinated party expenditures” and related restrictions on political party committee independent expenditures. There are also certain new restrictions on transfers and assignments of coordinated party expenditure authorizations between party committees. 2 U.S.C. 441a(d)(4)(A) through (C).

Section 109.30 provides an introduction to subpart D of part 109 that states how political party committees are treated for purposes of coordinated and independent expenditures. This new section first clarifies that political party committees may make independent expenditures subject to the provisions of sections 109.35 and 109.36. (See discussion below.) Second, section 109.30 explains that political party committees may support candidates with coordinated party expenditures and states that these coordinated party expenditures are subject to limits that are separate from and in addition to the contribution limits at 11 CFR 110.1 and 110.2.

No comments were received on this section, and the final rule is unchanged from the proposed rule in the NPRM except that the reference to other 11 CFR part 109, subpart D provisions has been revised to exclude section 109.31.

##### *11 CFR 109.31 [Reserved]*

The Commission in the NPRM proposed rules at 11 CFR 109.30 to 109.37 regarding political party committees. The Commission is issuing final rules at 11 CFR 109.30 and 109.32 to 109.37, but not at 11 CFR 109.31. The reasons regarding proposed section 109.31 are set forth below.

Under FECA, certain political party committees have long been authorized to make what have come to be known as “coordinated party expenditures.” 2 U.S.C. 441a(d). Although this term is used extensively (see, e.g., the Commission’s Campaign Guides), it is not formally defined in the Commission’s regulations.

The Commission in the NPRM proposed a rule which would have defined “coordinated party expenditure” at 11 CFR 109.31. That proposed definition included payments