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7 UNITED STATES DISTRICT COURT  
8 CENTRAL DISTRICT OF CALIFORNIA  
9 WESTERN DIVISION  
10

11 JACKSON BROWNE, an individual,  
12 Plaintiff,

13 v.

14 JOHN MCCAIN, an individual; THE  
REPUBLICAN NATIONAL  
15 COMMITTEE, a non-profit political  
organization; THE OHIO  
16 REPUBLICAN PARTY; a non-profit  
political organization,

17 Defendants.  
18

No. CV08-5334 RGK (Ex)

**DEFENDANT OHIO REPUBLICAN  
PARTY'S MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT OF MOTION TO DISMISS  
COMPLAINT PURSUANT TO FRCP  
12(b)(2), (3) & (6); OR TRANSFER  
PURSUANT TO §§ 28 U.S.C. 1404(a)  
& 1406(a)**

Date: December 8, 2008  
Time: 9:00 am  
Judge: Hon. R. Gary Klausner  
Place: Courtroom 850

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1 **I. INTRODUCTION**

2 Jackson Browne (“Browne”) seeks to silence constitutionally protected political  
3 speech in filing this federal action. This motion raises significant constitutional issues  
4 concerning personal jurisdiction and the rights of political parties to employ  
5 transformative uses of another’s copyright and trademark protected work to  
6 communicate a political message. Browne’s attempt to confer personal jurisdiction  
7 over the Ohio Republican Party (“ORP”) in California based upon a YouTube posting  
8 of a political message aimed at Ohio voters does not comport with due process.  
9 Moreover, the ORP’s transformative use of “Running on Empty” to convey a political  
10 message that criticized President-Elect Obama’s (“Obama”) energy policy is protected  
11 under the First Amendment and the fair use doctrine. Browne’s Complaint is subject  
12 to dismissal at the pleading stage because the affirmative defenses are established by  
13 the allegations in the Complaint and separately filed Request for Judicial Notice.

14 **II. STATEMENT OF FACTS**

15 **A. The Ohio Republican Party**

16 The ORP is a non-profit entity with its principal place of business in Columbus,  
17 Ohio. The ORP is organized as a “political party” as defined Ohio Rev. Code §  
18 3517.01(A)(1). As a political party, the ORP is an entity established by and regulated  
19 by Ohio law, particularly those provisions set forth in Ohio Rev. Code Title 35, as well  
20 as by its own constitution and bylaws. The ORP is required by Ohio Rev. Code §  
21 3517.02 to file with the Ohio Secretary of State a copy of its constitution and bylaws,  
22 also known as its Permanent Rules. *See* Mauk Decl. (“Mauk”) ¶3 & Exh. 4.

23 The ORP is required to, and does, file periodic campaign finance reports with  
24 the Ohio Secretary of State regarding its financial activities, pursuant to Ohio Rev.  
25 Code § 3517.10. The Ohio Secretary of State reviews and audits the ORP’s campaign  
26 finance reports. The Ohio Elections Commission also has authority to review and  
27 investigate the ORP’s advertisements in the event a complaint is filed with the Ohio  
28 Elections Commission regarding the truthfulness of those advertisements. Both the

1 Ohio Secretary of State and the Ohio Elections Commission are located in Columbus,  
2 Ohio. *See* Mauk ¶4.

3 The Republican State Central and Executive Committee of Ohio are elected by  
4 direct vote of Ohio's registered Republican voters at Ohio primary elections, pursuant  
5 to Ohio Rev. Code §§ 3517.02 and 3517.03. All of the members of the ORP's Central  
6 and Executive Committee are, and are required by Ohio Rev. Code § 3517.02 to be,  
7 registered Ohio voters who reside in the Ohio districts that they represent. *See* Mauk  
8 ¶¶5 & 7.

9 The ORP's purpose as stated in the Permanent Rules, Article 1, Section 4, is to  
10 "manage the affairs of the Republican Party in the State of Ohio; have responsibility  
11 for its day-to-day operations at the State level; direct the general policy of the party  
12 organization; direct and conduct campaign activities;" and create the Ohio Republican  
13 Finance Committee to assist in fundraising efforts. The ORP is also charged to  
14 "perform all duties prescribed by the Ohio Revised Code, federal election law," the  
15 Permanent Rules and/or "by custom required of it." *See* Mauk ¶6.

16 The Ohio Republican Party maintains a web site at [www.ohiogop.org](http://www.ohiogop.org) designed  
17 and hosted by Midnet Media, a company with offices in Columbus, Ohio, in Minster  
18 Ohio, and Chicago, Illinois. This web site provides information about the ORP,  
19 information about Ohio political structure, Ohio Republican Candidates, news updates,  
20 county by county contact information for the ORP, and a contribution page. The  
21 target audience of this web site is Ohio residents. While this is essentially a passive  
22 web site, people from outside of Ohio can send in contributions to the Ohio  
23 Republican Party. Nevertheless, the contributions received are for the purpose of  
24 promoting the goals of the ORP in the State of Ohio. *See* Mauk ¶8.

25 All ORP employees reside in Ohio. *See* Mauk ¶9. All meetings of the ORP's  
26 controlling committee or its standing committees are held in Ohio. *Id.* ¶10. The ORP  
27 does not sell any goods or products, and thus, does not engage in any marketing or  
28



1 distribution of goods or services to California. The ORP does not have any type of  
2 licensing or registration that would qualify it to do business in California. *Id.* ¶11.

3 While the ORP uses services of California companies, like YouTube, this type  
4 of file-sharing internet service is utilized without leaving the State of Ohio. *See* Mauk  
5 ¶12. The ORP has no branch office or comparable facility in California, and has no  
6 telephone listing or mailing address in California. *Id.* ¶13. The ORP has no bank  
7 accounts or other tangible personal or real property in California. *Id.* ¶14. The ORP  
8 directs its promotional material to Ohio voters. The ORP does not direct any of its  
9 fund raising activities specifically toward California residents or any other state  
10 outside of Ohio, nor does it advertise in any publications that are directed primarily  
11 toward California residents. *Id.* ¶15.

12 Three members of the ORP travelled to Simi Valley, California for the  
13 Republican Presidential Debate on January 30, 2008. *See* Mauk ¶¶16-20; McClelland  
14 Decl. ("McCl.") ¶¶3-4. This trip has no relation to the instant litigation.

#### 15 **B. The Political Video**

16 Throughout the 2008 election campaign, the ORP utilized web videos to  
17 generate news coverage in Ohio. The ORP does not use the web videos as a  
18 fundraising tool. The targeted audience of these web videos is Ohio voters. *See*  
19 McCl. ¶5. The ORP maintains a link on its website called "Ohio GOP tv" that  
20 contains a link to YouTube postings specifically targeted at Ohio voters. *Id.* ¶7.

21 During the week of August 4, 2008, Obama was scheduled visit to Ohio. To  
22 prepare for the news coverage that would coincide with this event, the ORP started to  
23 work on a web video to provide criticism and commentary on Obama's energy  
24 strategy ("Political Video"). *See* McCl. ¶8 & Exh. 1. The Political Video used  
25 specific "sound bites" regarding Obama's suggestion to inflate tires in order to  
26 demonstrate that Obama's energy strategy was the same as no strategy at all. The  
27 song "Running on Empty" ("Song") conveyed this message in a humorous tone  
28 considering the rising price of gasoline described as the "Pain at the Pump" in the

1 video and the heightened concern about the United States' dependency on foreign oil.  
2 *Id.* ¶9.

3 The total length of the Political Video 1:20 minutes. The Political Video begins  
4 with an excerpt from a local Ohio news channel that discussed the "pain at the pump."  
5 After the reporter asked how to bring down gas prices "here in northeast Ohio and  
6 across the U.S.A.?", it cuts to a clip of Obama answering "making sure your tires are  
7 properly inflated" and flashes to a word "What!?" standing alone. Next, Obama's  
8 energy plan is compared with that of Senator McCain and McCain is shown speaking  
9 at a rally pointing out that it is low-income Americans that are being hurt because of  
10 our dependence on foreign oil and rising gas prices. Next, another stand alone  
11 question flashes asking "What's that Obama plan again?" Here, at approximately 50  
12 seconds into the Political Video, approximately 21 seconds of music without lyrics  
13 from the Song is played in the background while showing Obama saying "... we can  
14 save all the oil they're taking about getting off drilling if everyone was just inflating  
15 their tires." With only nine seconds remaining, the Song lyrics begin playing while a  
16 picture of Obama is shown with "Barack Obama: No Solutions" which changes to  
17 "Barack Obama: Not Ready to Lead." *See* McCl. ¶11 & Exh. 1

18 On August 4, 2008, McClelland posted the Political Video on the ORP user link  
19 on YouTube. McClelland then emailed a Press Release to Ohio residents and news  
20 organizations and people interested in Ohio politics that contained the link to the  
21 Political Video. *See* McCl. ¶12-23. Neither McClelland nor Mauk knew that Jackson  
22 Browne lived in California. *See* McCl. ¶10; Mauk ¶27. McClelland removed the  
23 Political Video from the ORP user link on August 6, 2008 immediately after the ORP  
24 received Browne's request for its removal. *Id.* ¶24.

25 The Political Video's use of the phrase "running on empty" to comment on the  
26 energy crisis was nothing new. Ample evidence establishes that the Democratic and  
27 Republican politicians were labeling the other's energy policies as "running on  
28 empty." *See, e.g.,* concurrently filed Declaration of Lincoln D. Bandlow ("LBD"),

1 Exhs. 5-11. Journalists and commentators also used “running on empty” to describe  
2 and comment upon the energy crisis. *See id.* Exhs. 12-20

3 Since Browne filed the Complaint, he has capitalized on the heightened  
4 publicity surrounding the presidential elections to promote his new album “Time the  
5 Conqueror.” Television hosts and interviewers have placed the controversy regarding  
6 the Political Video side-by-side with Browne’s new album. *See* LBD Exhs. 21 & 22.

### 7 **III. DISCUSSION**

#### 8 **A. This Court Lacks Personal Jurisdiction over the ORP Because the** 9 **ORP Does Not Have Sufficient Minimum Contacts with the State of California** 10 **and the Maintenance of the Suit in California Offends “Traditional Notions of** 11 **Fair Play and Substantial Justice.”**

12 The ORP contends that the assertion of personal jurisdiction over it by  
13 California violates the Due Process Clause. The ORP does not engage in any business  
14 in California to confer general jurisdiction. Nor can Browne establish specific  
15 jurisdiction based upon the relationship between the ORP’s forum contacts and his  
16 legal claims. The ORP did not purposefully direct its activities to California. The  
17 ORP’s contacts with California are unrelated to this litigation. Moreover, it is  
18 unreasonable for California to assert jurisdiction over the ORP under these  
19 circumstances.

#### 20 ***1. The ORP’s contacts with California are not substantial,*** 21 ***continuous or systematic so as to confer general jurisdiction.***

22 To confer general jurisdiction, a defendant’s forum contacts must be so  
23 “substantial, continuous, and systematic that the defendant can be deemed to be  
24 ‘present’ in that forum for all purposes.” *Yahoo! Inc. v. La Ligue Contre Le Racisme*,  
25 433 F.3d 1199, 1205 (9th Cir. 2006). As set forth in the supporting declarations, the  
26 ORP has no offices or employees in California, it does not conduct business in  
27 California, and ORP officers and employees are residents of Ohio. Thus, the ORP’s  
28 contacts with California are insufficient to confer general jurisdiction.

2. ***The ORP does not have sufficient minimum contacts with California arising from or related to its creation of the Political Video to confer specific personal jurisdiction***

The Ninth Circuit utilizes a three-prong test to analyze specific jurisdiction:

(1) The non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws;

(2) the claims must be one which arises out of or relates to the defendant's forum-related activities; and

(3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable.

*Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004) (internal citations omitted). To confer jurisdiction, all three prongs must be met. Browne bears the burden of establishing that the first two prongs are satisfied. *Id.* If Browne carries this burden, then the burden shifts to the ORP to establish that the Court's assertion of jurisdiction is not reasonable. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476-78 (1985).

a. *Plaintiff cannot establish that the ORP expressly aimed the political video at California.*

The first prong, also known as the "purposeful availment" prong, includes both purposeful availment and purposeful direction. *Schwarzenegger* 374 F.3d at 802. Evidence of availment is usually satisfied when the alleged wrongful conduct occurs in the forum. *Id.* at 803. Here, like in *Schwarzenegger*, the alleged wrongful conduct took place in Ohio, not California, so Browne cannot establish purposeful availment. *See also Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1155 (9th Cir. 2006).

As there is no availment, the Court must determine whether ORP's foreign acts satisfy the *Calder* effects test. *See Bancroft & Masters, Inc. v. Augusta Nat'l Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000) (citing *Calder v. Jones*, 465 U.S. 783 (1984)). Under the *Calder* test, the defendant must have "(1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state." *Dole Food Co., Inc., v. Watts*, 303 F.3d 1104, 1111 (9th Cir. 2002).

1 In cases involving the use of the internet as creating the nexus between the  
2 foreign defendant and the forum state, the Ninth Circuit requires “‘something more’  
3 than mere foreseeability in order to justify the assertion of personal jurisdiction.”  
4 *Schwarzenegger*, 347 F.3d at 805 (citing *Bancroft*, 223 F.3d at 1087); *see also Pebble*  
5 *Beach*, 453 F.3d at 1156 (holding that a narrow focus on the “effects” test can be  
6 misleading and that “something more” beyond foreseeability is required). In *Bancroft*,  
7 the “something more” was Augusta National’s act in sending a letter to the official  
8 domain name registrar in Virginia that was expressly aimed at challenging the  
9 California company’s domain name registration and thereby targeting California. 223  
10 F.3d at 1088. Similarly, in *Panavision International, L.P. v. Toepfen*, 141 F.3d 1316,  
11 1318 (9th Cir. 1998), the “something more” supporting personal jurisdiction was the  
12 defendant’s scheme to extort money from a California company.

13 Unlike *Bancroft* and *Panavision*, this case lacks “something more”. The  
14 Political Video was targeted to and expressly aimed at Ohio, not California. The fact  
15 that California residents could access YouTube to the same extent as a resident of any  
16 other state does not establish the requisite focus on or targeting of California. Instead,  
17 the YouTube posting more closely resembles the type of passive website that the Ninth  
18 Circuit has consistently held insufficient to confer specific jurisdiction. *See, e.g.,*  
19 *Holland Am. Line, Inc. v. Wartsila N. Am., Inc.*, 485 F.3d 450, 460 (9th Cir. 2007)  
20 (holding that foreign defendant’s passive website and advertisements in various  
21 marine publications in Washington was insufficient to establish specific jurisdiction in  
22 Washington); *Pebble Beach Co.*, 453 F.3d at 1158 (holding that foreign defendant’s  
23 use of passive web site does not constitute conduct expressly aimed at California).  
24 Because Browne cannot establish “something more” than foreseeability, the  
25 jurisdictional inquiry ends and the Court need not evaluate the second and third  
26 prongs.

1                   b.     *The ORP's contacts with California are loosely related to*  
2                   *Browne's claim.*

3           If Browne can satisfy the first prong (which he cannot), then the Court considers  
4     “the extent of the defendant’s contacts with the forum and the degree to which the  
5     plaintiff’s suit is related to those contacts.” *Yahoo!*, 433 F.3d at 1210. In cases  
6     involving internet contacts, “the common thread . . . is that ‘the likelihood that  
7     personal jurisdiction can be constitutionally exercised is directly proportionate to the  
8     nature and quality of commercial activity that an entity conducts over the Internet.’”  
9     *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 419 (9th Cir. 1997). Here, the posting  
10    of the Political Video on YouTube from Ohio is too attenuated to satisfy personal  
11    jurisdiction in California.

12          The Political Video was created without leaving the State of Ohio. The acts  
13    constituting the alleged infringement all occurred in Columbus, Ohio. None of the  
14    causes of action in the Complaint are dependent upon an individual viewing the  
15    Political Video in California. Instead, the issues concerning whether or not the  
16    Political Video is protected by the First Amendment and constitutes permissible fair  
17    use or infringes upon Browne’s copyright, trademark, or right to publicity are based  
18    upon the acts that occurred in Ohio. Browne’s action is viable even if the Political  
19    Video was never seen in California. Thus, Browne cannot establish the necessary “but  
20    for” causation linking his claims against the ORP to the Political Video being viewed  
21    in California.

22          Moreover, this type of political speech, as opposed to commercial activity over  
23    the internet, is so fleeting and insubstantial that it fails to meet the proportionality  
24    requirement for the imposition of specific personal jurisdiction. Thus, when  
25    evaluating the extent of the ORP’s slight contacts with California and the degree to  
26    which the plaintiff’s lawsuit is based upon those contacts, the showing is too weak at  
27    both ends of the spectrum to support specific jurisdiction.

1                   c.     *It would be unreasonable for California to exercise personal*  
2                   *jurisdiction over the ORP*

3           Even if Browne can meet his burden with respect to the first and second prong,  
4           specific jurisdiction will not be upheld if the ORP presents a compelling case that  
5           jurisdiction does not comport with fair play and substantial justice. *See*  
6           *Schwarzenegger*, 374 F.3d at 802. The Ninth Circuit reviews the following seven  
7           factors in determining whether it is reasonable to exercise personal jurisdiction in a  
8           particular case:

9                   (1) the extent of the defendants' purposeful interjection into the  
10                  forum state's affairs; (2) the burden on the defendant of defending in  
11                  the forum; (3) the extent of conflict with the sovereignty of the  
12                  defendants' state; (4) the forum state's interest in adjudicating the  
13                  dispute; (5) the most efficient judicial resolution of the controversy;  
14                  (6) the importance of the forum to the plaintiff's interest in  
15                  convenient and effective relief; and (7) the existence of an alternative  
16                  forum.

17           *Harris Rutsky & Co. Ins. Servs. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1132 (9th Cir.  
18           2003).

19           In *Doe v. Geller*, 533 F. Supp. 2d 996 (N.D. Cal. 2008), the district court held  
20           that a takedown notice sent to YouTube standing alone was insufficient to confer  
21           jurisdiction. The *Geller* Court found that the English defendants had made a  
22           compelling case under the Ninth Circuit's seven factor test that jurisdiction in  
23           California was unreasonable. *Id.* at 1007-1011.

24           A similar conclusion should be reached here. Like *Geller*, the ORP's degree of  
25           interjection into California is insubstantial and attenuated. *Id.* at 1007; *see also Core-*  
26           *Vent Corp. v. Nobel Industries AB*, 11 F.3d 1482, 1488 (9th Cir. 1993) (holding that  
27           defendant's libelous article circulated in California was too attenuated with California,  
28           even though the defendants allegedly intended their actions to cause harm in  
29           California). The Political Video was targeted at Ohio voters and reached California  
30           only as a result of the world-wide scope of the internet. Neither McClelland nor Mauk  
31           knew that Browne was from California. This factor weighs in favor of the ORP.

1 The second factor, the burden on defendants, also weighs in favor of the ORP.  
2 While modern technology has reduced the burden of litigating in another state, it is  
3 nonetheless a burden for the ORP to defend this action in California. The vast  
4 majority of witnesses and documentary evidence concerning the creation of the  
5 Political Video are all in Ohio.

6 While the Court should not “dwell” on sovereignty concerns represented by the  
7 third factor, here, Ohio has a strong interest in the regulation of its own political  
8 parties. The ORP is a political party created and regulated by Ohio state law.  
9 Moreover, the alleged wrongful conduct occurred in Ohio and the key witnesses are  
10 Ohio residents. *See Geller*, 533 F. Supp. 2d at 1008 (holding that England had a  
11 sovereign interest in litigating the claims of a British corporation and resident,  
12 especially where video clip at heart of dispute was filmed in England). Thus, while  
13 there is no conflict between the sovereignty of Ohio and California in resolving  
14 Browne’s claim, the strong interest that Ohio has in its political parties weighs against  
15 a finding of jurisdiction.

16 The ORP acknowledges that Browne’s status as a California resident, creates an  
17 interest in California in the case outcome, and thus, this fourth factor favors Browne.  
18 Nevertheless, the assertion of jurisdiction based upon the use of YouTube alone may  
19 lead to unreasonable consequences as described in *Geller*:

20 Plaintiff’s case for jurisdiction leads to unreasonable (even if  
21 unintended) consequences. If plaintiff’s theory of jurisdiction were  
22 upheld, then the Northern District of California could assert  
23 jurisdiction over every single takedown notice ever sent to YouTube  
24 or any other company in Silicon Valley. Citizens around the world -  
25 from Indonesia to Italy, Suriname to Siberia - could all be haled into  
26 court in the San Francisco Bay area, California, USA, for sending off  
27 a fax claiming that a video clip is infringing. Federal courts sitting in  
28 California could assert personal jurisdiction over foreign defendants  
in wholly foreign disputes. . . . Such broad jurisdiction, premised  
solely on the happenstance that many internet companies that are not  
even parties to § 512(f) litigation have offices in Silicon Valley, is  
unreasonable. The Northern District of California is not an  
international court of internet law.

533 F. Supp. 2d at 1009. While California does have an interest in resolving this



1 dispute because of Browne's residency, California does not have a general interest in  
2 resolving all dispute that arises out of a display of a video on YouTube.

3 As to the fifth factor, Ohio represents the most efficient forum for the judicial  
4 resolution of this controversy. The main witnesses and evidence are in Ohio. While  
5 California witnesses may be relevant to the issue of damages, these witnesses will only  
6 be relevant if Browne is able to overcome the defendants' affirmative defenses. While  
7 the convenience of the witnesses is no longer weighed heavily in determining personal  
8 jurisdiction, on balance, the location favors Ohio.

9 While the sixth factor, the importance of the forum to the plaintiff, favors  
10 Browne, it has little impact on the jurisdictional outcome as the plaintiff will always  
11 want to litigate the action in their home forum. *See Roth v. Garcia Marquez*, 942 F.2d  
12 617, 624 (9th Cir. 1991). Nevertheless, Browne is an internationally recognized rock  
13 star who has travelled throughout the world. Litigation in Ohio would not pose the  
14 same burdens to Browne as litigation in California creates for the ORP.

15 The seventh and final factor, the existence of an alternate forum, weighs against  
16 the exercise of jurisdiction. The plaintiff bears the burden of proving the  
17 unavailability of another forum. *Core-Vent* 11 F.3d at 1490. Ohio provides a suitable  
18 alternate forum, and under the venue analysis set forth below, the only proper venue to  
19 resolve this action.

20 On balance, the above factors weigh against jurisdiction. It is unreasonable and  
21 unfair for California to assert jurisdiction over the ORP for producing the Political  
22 Video targeted at Ohio voters. The Political Video's connection to California is  
23 remote at best. Ohio has a strong interest in regulating its political parties. Litigating  
24 in California would place an unfair burden on the ORP. Thus, the ORP has presented  
25 a compelling case that jurisdiction in California is unreasonable. As the ORP does not  
26 have sufficient minimum contacts to support personal jurisdiction, the Complaint as to  
27 the ORP should be dismissed pursuant to Rule 12(b)(2).  
28

1       **B. Because the ORP Does Not Have Sufficient Minimum Contacts with**  
2       **California or the Central District of California to Establish Personal Jurisdiction**  
3       **and the Substantial Part of the Events Constituting the Alleged Infringing Acts**  
4       **Occurred in Ohio, Venue is Improper in the Central District.**

5       The Complaint at paragraph 12 asserts that venue is proper under 28 U.S.C. §  
6       1391(b)(2) alleging that the “property” at issue is located in California. Plaintiff’s  
7       reliance on the general venue statute alone is misplaced where a specific venue statute,  
8       like that regarding copyright, is also applicable. Where separate claims are joined,  
9       venue must be proper as to each claim. *See Hoover Group, Inc. v. Custom Metalcraft,*  
10      *Inc.*, 84 F.3d 1408, 1410 (Fed. Cir. 1996).

11      Civil actions arising under federal copyright law may be brought “in the district  
12      in which the defendant or his agent resides or may be found.” 28 U.S.C. § 1400(a).  
13      The “may be found” language has been interpreted similarly to personal jurisdiction.  
14      *See, e.g., Milwaukee Concrete Studios, Ltd. v. Fjeld Mfg. Co., Inc.*, 8 F.3d 441, 445-  
15      447 (7th Cir. 1993); *Airola v. King*, 505 F. Supp. 30, 31 (D. Ariz. 1980). The plaintiff  
16      bears the burden of establishing that venue is proper in the Central District of  
17      California, not just California in general. *See Airola*, 505 F. Supp. 2d at 31.

18      As established above, the ORP does not have sufficient minimum contacts with  
19      California or the Central District of California to establish personal jurisdiction, and  
20      thus, venue is improper for the copyright cause of action.

21      Nor can the plaintiff establish proper venue in the Central District for trademark  
22      infringement under 28 U.S.C. § 1391(b). Venue is proper in the Southern District of  
23      Ohio because that is where a substantial part of the alleged infringing acts occurred.

24      “Substantiality is intended to preserve the element of fairness so that a  
25      defendant is not haled into a remote district having no real relationship to the dispute.”  
26      *Cottman Transmission Sys. v. Martino*, 36 F.3d 291, 294 (3d Cir. 1994). In *Cottman*,  
27      the Third Circuit addressed the proper venue for a trademark infringement action after  
28      the 1990 amendments to 28 U.S.C. § 1391. In finding that the “current statutory  
language still favors the defendant in a venue dispute”, the Court relied upon the

1 Supreme Court's decision in *LeRoy v. Great W. United Corp.*, 443 U.S. 173, 183-84  
2 (1979) (holding that "[i]n most instances, the purpose of statutorily specified venue is  
3 to protect the defendant against the risk that a plaintiff will select an unfair or  
4 inconvenient place of trial"). The Court concluded that venue for trademark  
5 infringement was proper in defendants' home state because that was where the  
6 substantial part of the acts constituting infringement occurred. *See Cottman*, 36 F.3d  
7 at 295-96.

8 The most critical witnesses in a trademark infringement action are "those  
9 officers and employees who were involved in the design, production, and sale of the  
10 [allegedly infringing] products." *AEC One Stop Group, Inc. v. CD Listening Bar, Inc.*,  
11 326 F. Supp. 2d 525, 529 (S.D.N.Y. 2004). Here, the Political Video was created in  
12 Ohio and the ORP employees involved in the creation of the Political Video all reside  
13 in Ohio. Any happenstance viewing of the Political Video in California generally, as  
14 opposed to the Central District, does not meet the substantiality test for venue.

15 Because venue is not proper in the Central District, transfer or dismissal is  
16 mandatory. *See* 28 U.S.C. § 1406(a). Personal jurisdiction and venue in the Southern  
17 District of Ohio are proper as to all defendants. If the Court is not inclined to dismiss  
18 the action against the ORP, the ORP requests that the Court transfer the action to the  
19 Southern District of Ohio, Eastern Division where the action could have originally  
20 been brought.

21 **C. The Court Should Transfer This Action to the United States District**  
22 **Court for the Southern District of Ohio, Eastern Division, Pursuant to 28 U.S.C. §**  
23 **1404(A) Based Upon the Convenience of the Parties, Witnesses, and in The**  
24 **Interest Of Justice.**

25 In the alternative, if the Court finds that venue is proper, the Court has the  
26 discretion to transfer the action to the Southern District of Ohio based upon the  
27 convenience of the parties, witnesses and in the interests of justice. 28 U.S.C. §  
28 1404(a). The ORP recognizes that ordinarily, if jurisdiction and venue are proper, a  
plaintiff's choice of forum is given significant weight and it will not be disturbed

1 unless the factors of convenience and justice tip strongly in favor of transfer. *See*  
2 *Florens Container v. Cho Yang Shipping*, 245 F. Supp. 2d 1086, 1088 (N.D. Cal.  
3 2002). It is within the discretion of the district court to determine on a case-by-case  
4 basis whether convenience and justice favor transfer. *See Jones v. GNC Franchising,*  
5 *Inc.*, 211 F.3d 495, 498-499 (9th Cir. 2000) (listing seven factors to be weighed in  
6 deciding whether to transfer venue).

7 As set forth above, the ORP's contacts with California are slight and attenuated.  
8 The Southern District of Ohio provides the proper forum to resolve the plaintiff's  
9 claims. Moreover, the access to proof with respect to the witnesses and documents  
10 favors Ohio. All of the documentary evidence relating to the development and  
11 distribution of the Political Video are located in Ohio. Should any non-party witness  
12 testimony regarding those who received the email Press Release be necessary,  
13 compulsory process would be available in Ohio and not in California. On balance,  
14 convenience and justice strongly favor resolving this action in Ohio despite plaintiff's  
15 choice of a California forum.

16 **D. Browne's First and Third Claims Fail as a Matter Of Law**

17 The face of the Complaint establishes that the Political Video is political  
18 expression entitled to the highest protection under law. *See, e.g., Buckley v. Valeo*,  
19 424 U.S. 1, 14-15 (1976). "In a republic where the people are sovereign, the ability of  
20 the citizenry to make informed choices among candidates for office is essential, for the  
21 identities of those who are elected will inevitably shape the course that we follow as a  
22 nation." *Id.* Because it is undisputed that the Political Video is fully protected  
23 political speech, it is proper for the Court to determine whether the affirmative  
24 defenses of fair use and the First Amendment bar Browne's copyright and trademark  
25 claims at the pleading stage. *See, e.g., Burnett v. Twentieth Century Fox Film Corp.*,  
26 491 F. Supp. 2d 962, 969 (C.D. Cal. 2007) (resolving copyright and trademark claims  
on Rule 12(b)(6) motion to dismiss based upon affirmative defenses).

27 ///

28 ///

1                   ***1. Browne's claim for copyright infringement fails to state a claim***  
2                   ***upon which relief can be granted because it is barred by the fair use doctrine.***

3           Fair use is defined as the use of a copyrighted work “for purposes such as  
4 criticism, comment, news reporting, teaching . . . , scholarship, or research.” 17 U.S.C.  
5 § 107. “The defense encourages and allows the development of new ideas that build  
6 on earlier ones, thus providing a necessary counterbalance to the copyright law's goal  
7 of protecting creators' work product.” *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d  
8 1146, 1163 (9th Cir. Cal. 2007). The application of the fair use analysis to Browne's  
9 copyright infringement claim overwhelmingly supports the conclusion that it is barred  
10 by the fair use doctrine. *See, e.g., Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569,  
11 575 (1994) (holding that fair use doctrine “permits and requires courts to avoid rigid  
12 application of the copyright statute, when, on occasion, it would stifle the very  
13 creativity which the law is designed to foster”).

14           The first factor, the purpose and character of the use, strongly favors the ORP.  
15 The Political Video's significant contribution to public matters of national import is  
16 beyond dispute. *See* Comp. ¶2 & McCl. Exh. 1. Because the Political Video  
17 contributes to the national debate concerning the qualifications of the 2008 presidential  
18 candidates, it is entitled to more protection under the fair use analysis. *National Rifle*  
19 *Ass'n of Am. v. Handgun Control Fed'n*, 15 F.3d 559, 562 (6th Cir. Ohio 1994) (“The  
20 scope of the fair use doctrine is wider when the use relates to issues of public  
21 concern.”).

22           Courts applying the first factor in the context of political speech have  
23 overwhelmingly found that the fair use doctrine applies. *See, e.g., Hustler Magazine,*  
24 *Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1152-53 (9th Cir. 1986) (holding Moral  
25 Majority's copying of Hustler's entire work was protected by fair use because of its  
26 anti-pornography political message); *Keep Thompson Governor Committee v. Citizens*  
27 *for Gallen Committee*, 457 F. Supp. 957, 961 (D.N.H. 1978) (holding 15 second use of  
28 plaintiff's song in political ad entitled to fair use protection noting strong First

1 Amendment protections attaching to political speech); *Mastercard Int'l Inc. v. Nader*  
2 *2000 Primary Comm., Inc.*, 70 U.S.P.Q.2d (BNA) 1046 (S.D.N.Y. 2004) (holding that  
3 fair use provided a complete defense to Nadar's use of MasterCard's Priceless  
4 Advertisements in political ad).

5 The Political Video's use of the Song was also transformative. A district court  
6 in New York recently held that a movie's use of 15 seconds of the song "Imagine" was  
7 protected under the fair use doctrine because it was transformative. *Lennon v. Premise*  
8 *Media Corp., L.P.*, 556 F. Supp. 2d 310, 322-23 (S.D.N.Y. 2008) (holding that the use  
9 was transformative "because the movie incorporates an excerpt of 'Imagine' for  
10 purposes of criticism and commentary"). The nine second use of the Song lyrics in the  
11 Political Video was to provide criticism and commentary on Obama's energy policy,  
12 and thus, transformative.

13 Further, the Political Video "mocks" or makes a parody of Obama's energy  
14 policy. *See, e.g., Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 801 (9th Cir.  
15 Cal. 2003) ("The original work need not be the sole subject of the parody; the parody  
16 "may loosely target an original" as long as the parody "reasonably could be perceived  
17 as commenting on the original or criticizing it, to some degree"); *Mastercard*, 70  
18 U.S.P.Q.2d (BNA) 1046 (finding Nadar's ad a parody even though it was directed at  
19 criticizing his non-inclusion in the presidential debates and not Mastercard alone).  
20 "[O]nce a work is determined to be a parody, the second third, and fourth factors are  
21 unlikely to militate against a finding of fair use." *Abilene Music, Inc. v. Sony Music*  
22 *Entertainment, Inc.*, 320 F. Supp. 2d 84, 89 (S.D.N.Y. 2003). The first factor  
23 overwhelmingly favors the ORP.

24 The second factor, or nature of the copyrighted work, is not "terribly"  
25 significant. *See, e.g., Walking Mountain*, 353 F.3d at 803 (holding that the second  
26 factor is usually not "terribly" significant in the overall fair use inquiry). Here, while  
27 the Song as a whole is creative, other factors weigh against a finding that the copied  
28 portion of the work is creative. First, the Song was published in 1977. Second, only a

1 small portion used of the lyrics was used. Third, “running on empty” is a phrase  
2 commonly used by politicians and others to critique a competing policy. Thus, the  
3 second factor favors the ORP.

4 The third factor evaluates the qualitative and quantitative use of the Song. The  
5 Political Video engaged in a limited use of the Song lyrics to describe Obama’s energy  
6 policy as literally “running on empty.” In *Lennon*, the district court found that both  
7 the quantitative and qualitative factors favored the defendant because only 15 seconds  
8 of the song were used and that it was necessary to use that amount to convey its  
9 message. 566 F. Supp. 2d at 325-326. Here, the ORP’s use of the Song was  
10 reasonable in light of its purpose in “mocking” Obama’s energy policy. The third  
11 factor strongly supports a finding of fair use.

12 The fourth factor weighs the effect of the use on the potential market for  
13 plaintiff’s work. Here, the Political Video has not displaced the market for Browne’s  
14 Song. In *Lennon*, the court rejected the plaintiffs’ argument that a 15 second use of  
15 the song “Imagine” in a transformative work “will usurp the market for licensing the  
16 song for traditional uses.” *Lennon*, 566 F. Supp. 2d at 327. A similar conclusion is  
17 warranted here; the Political Video has not usurped the Song’s market.

18 In sum, all four fair use factors support the conclusion that Browne’s copyright  
19 claim is barred by the fair use doctrine, and therefore, dismissal of the copyright claim,  
20 with prejudice, is proper under Rule 12(b)(6).

21 **2. *Browne’s claim for trademark infringement fails to state a claim***  
22 ***upon which relief can be granted because the Political Video is non-***  
***commercial speech protected by the First Amendment.***

23 Browne’s Lanham Act claim also fails as a matter of law because the Political  
24 Video is non-commercial speech protected by the First Amendment. To state a claim  
25 under the Lanham Act, the speech must be commercial. *Rice v. Fox Broad. Co.*, 330  
26 F.3d 1170, 1181 (9th Cir. 2003) (describing “commercial speech” as the first element  
27 of a Lanham Act claim). The Political Video, as a matter of law, is non-commercial  
28 speech. See *American Family Life Insurance Co. v. Hagan* (“AFLAC”), 266 F. Supp.

1 2d 682, 697 (N.D. Ohio 2002) (holding that a political solicitation “is properly  
2 classified not as a commercial transaction at all, but completely noncommercial,  
3 political speech”); *Griffith v. Fenrick*, 486 F. Supp. 2d 848, 853 (W.D. Wisc. 2007)  
4 (holding that the use of Andy Griffith’s name in political solicitation was entirely  
5 “non-commercial”).

6 Browne’s trademark claim is also defeated by the First Amendment “artistic  
7 relevance” defense. When the First Amendment is implicated in a trademark claim,  
8 the Ninth Circuit applies a two factor “artistic relevance” test to determine its viability.  
9 *See E.S.S. Entertainment 2000 v. Rock Star Videos*, No. 06-56237, slip op. 15143 (9th  
10 Cir. November 5, 2008). The First Amendment defeats a trademark claim if the  
11 mark’s use is relevant to the free expression embodied in the underlying work and  
12 there is no attempt to explicitly mislead the public about the source of the work. *See*  
13 *E.S.S.*, slip op. at 15151. Here, Browne admits that the Political Video’s use of the  
14 Song is relevant to the criticism of Obama’s energy policy. *See* Compl. ¶2; *see also*  
15 *E.S.S.*, slip op. at 15153 (holding that “the level of relevance merely must be above  
16 zero”). Additionally, the song is not misleading as to the sponsorship or endorsement  
17 since the Political Video references its sponsorship by the ORP. *See* McCl. ¶11 &  
18 Exh. 1. The Ninth Circuit has cautioned that “the mere use of a trademark alone  
19 cannot suffice to make such use explicitly misleading.” *E.S.S.*, slip op. at 15153; *see*  
20 *also Walking Mountain* (holding that the defendant did not “explicitly mislead as to  
21 Mattel’s sponsorship of the works”); *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894,  
22 901-02 (9th Cir. 2002) (“*MCA*”) (holding that the Barbi song did not “explicitly or  
23 otherwise, suggest that it was produced by Mattel”). As the Political Video falls under  
24 both prongs of the “artistic relevance” test, the First Amendment bars Browne’s  
25 trademark claim and it should be dismissed with prejudice.

#### 26 **E. Browne’s Fourth Cause of Action Fails as a Matter of Law**

27 Browne’s Fourth Cause of Action (“Publicity Claim”) should be stricken under  
28 the Statute and dismissed under Rule 12(b)(6). The Statute is applicable to pendent



1 state law claims brought in federal court. *See, e.g., U.S. ex rel Newsham v. Lockheed*  
2 *Missiles & Space Co., Inc.*, 190 F.2d 963, 970-73 (9th Cir. 1999). The Statute  
3 provides a remedy to dispose of lawsuits that seek to chill the valid exercise of  
4 constitutional rights. *See, e.g., Briggs v. Eden Council for Hope and Opportunity*, 19  
5 Cal. 4th 1106, 1109, n. 1 (1999).

6 The evaluation of a motion to strike under the Statute requires a two-step  
7 process. First, the court must decide if the defendant has made a threshold showing  
8 that the challenged cause of action is one arising from a protected activity as defined in  
9 the Statute. *Rusheen v. Cohen*, 37 Cal. 4th 1048, 1056 (2006). Second, if the Court  
10 finds such a showing has been made, it then determines whether the plaintiff has  
11 demonstrated a probability of prevailing on the claim. *Id.* The plaintiff “must  
12 demonstrate that the complaint is both legally sufficient and supported by a sufficient  
13 prima facie showing of facts to sustain a favorable judgment.” *Wilson v. Parker,*  
14 *Covert & Chidester*, 28 Cal. 4th 811, 821 (2002).

15 ***1. Browne’s common law right of publicity claim is based on the***  
16 ***ORP’s speech in connection with a public issue, the presidential elections,***  
17 ***and therefore, is subject to the protections set forth in the Statute.***

18 The ORP easily satisfies its threshold burden of establishing that Browne’s  
19 Publicity Claim is based upon political speech that is clearly protected under the  
20 Statute. *See, e.g., Rosenaur v. Scherer*, 88 Cal. App. 4th 260, 274-75 (2001) (holding  
21 that the Statute “applies to actions arising from statements made in political campaigns  
22 by politicians and their supporters”). The use of Browne’s voice is for the purpose of  
23 criticizing and commenting upon Obama’s energy policy in connection with the 2008  
24 presidential elections, and thus, is protected political expression.

25 ***2. Browne cannot establish a probability of prevailing on the merits***  
26 ***because the Political Video is non-commercial speech concerning matters of***  
27 ***public interest and the use of Browne’s voice is transformative***

28 Browne will not be able to prevail upon his Publicity Claim. Under California  
law, a common law publicity claim must have a “commercial purpose”. *See, e.g.,*  
*Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387, 396 (2001).  
Here, the Political Video was solely used to generate news coverage about the  
differences in McCain’s and Obama’s energy policy. But even if it had been used for

1 fundraising that would not convert this political expression into commercial speech.  
2 *See, e.g., AFLAC*, 266 F. Supp. 2d at 697 (holding that a political solicitation is  
3 “completely noncommercial, political speech”); *Griffith*, 486 F. Supp. 2d 848, 853  
4 (holding that political solicitation was entirely “non-commercial”). The fact that the  
5 Political Video is speech made in connection with a highly public and newsworthy  
6 issue provides a complete defense to Browne’s Publicity Claim. *See New Kids on the*  
7 *Block v. News America Publ’g, Inc.*, 971 F.2d 302, 309-10 (9th Cir. 1992).

8 The transformative use of Browne’s voice also provides a complete defense to  
9 Browne’s Publicity Claim. The California Supreme Court has recognized that a  
10 celebrity’s work, like that of Browne’s, becomes part of our culture and can play an  
11 important role in the discourse regarding public issues. *See Comedy III* 25 Cal. 4th at  
12 396. A transformative use of that celebrity’s work or identity is fully protected under  
13 the First Amendment and bars a claim for common law publicity. *Id.* at 408-409. The  
14 Political Video transforms the Song into a critique of Obama’s energy policy. This  
15 type of free expression is a centerpiece of our democracy.


16 Browne’s Publicity Claim fails as a matter of law and should be stricken under  
17 the Statute. Should the ORP prevail, it will file a separate motion to recover its  
18 attorney’s fees and costs. C.C.P. § 425.16(c).

#### 19 **IV. CONCLUSION**

20 The ORP respectfully requests that the Court dismiss the ORP based upon the  
21 absence of personal jurisdiction and improper venue, dismiss Browne’s Complaint  
22 with prejudice, or transfer this action to the Southern District of Ohio, Eastern  
23 Division.

24 DATED: November 17, 2008

GRUNSKY, EBEY, FARRAR & HOWELL

25  
26 By   
27 Rebecca Connolly, Attorneys for Defendant  
28 The Ohio Republican Party