

1 KINSELLA WEITZMAN ISER KUMP & ALDISERT LLP
LAWRENCE Y. ISER (SBN 094611)
2 liser@kwikalaw.com
PATRICIA A. MILLETT (SBN 150756)
3 pmillett@kwikalaw.com
JONATHAN STEINSAPIR (SBN 226281)
4 jsteinsapir@kwikalaw.com
GREGORY S. GABRIEL (SBN 239902)
5 ggabriel@kwikalaw.com
808 Wilshire Boulevard, 3rd Floor
6 Santa Monica, California 90401
Telephone: 310.566.9800
7 Facsimile: 310.566.9850

8 Attorneys for Plaintiff Jackson Browne

9

10 **UNITED STATES DISTRICT COURT**
11 **CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**

12

13 JACKSON BROWNE, an individual

14 Plaintiff,

15 vs.

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

19 Defendants.

20

21

22

23

24

25

26

27

28

CASE NO. CV08-5334 RGK(Ex)

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

**[Supporting Declarations of Donald
Miller and Jonathan Noyes filed
concurrently herewith]**

Date: February 2, 2009
Time: 9:00 a.m.
Judge: Hon. R. Gary Klausner
Place: Courtroom 850

TABLE OF CONTENTS

1		
2		<u>Page</u>
3	I.	PRELIMINARY STATEMENT 1
4	II.	INTRODUCTION 1
5	III.	STATEMENT OF FACTS..... 2
6	A.	Plaintiff Jackson Browne 2
7	B.	The Infringing Commercial 3
8	C.	YouTube’s Terms Of Use 4
9	D.	Plaintiff’s Complaint..... 5
10	IV.	ARGUMENT 6
11	A.	The ORP Is Subject To Limited Personal Jurisdiction In California..... 6
12	1.	ORP Engaged In Purposeful Availment 7
13	(a)	ORP’s Use Of California-Based YouTube As Its Broadcast Network Constitutes Purposeful Availment 7
14	(b)	ORP Purposefully Directed The Commercial To California 8
15	2.	ORP Should Reasonably Have Expected To Be Haled Into A California Court 10
16	3.	Plaintiff’s Claims Arise Out Of ORP’s California Conduct..... 11
17	4.	Jurisdiction Is Reasonable..... 12
18	(a)	Extent of Purposeful Interjection..... 13
19	(b)	The Burden Of ORP Litigating In California Is No Greater Than The Burden Of Plaintiff Litigating In Ohio..... 13
20	(c)	Sovereignty Concerns/Forum State’s Interest 15
21	(d)	California Is The Most Efficient Forum 16
22	(e)	Importance Of The Forum/Existence Of An Alternative Forum ... 16
23	B.	Venue Is Proper In This District 17
24	C.	Plaintiff’s Choice Of Forum Should Not Be Disturbed..... 18
25	V.	CONCLUSION 20
26		
27		
28		

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

CASES

Advideo v. Kimel Broadcast Group
 727 F.Supp. 1337 (N.D. Cal. 1989) 17

Ballard v. Savage
 65 F.3d 1495 (9th Cir. 1995)..... 12

Bowen v. YouTube
 2008 WL 1757578 (W.D. Wash.) 16

Brand v. Menlove Dodge
 796 F.2d 1070 (9th Cir. 1986)..... 6

Bryant v. Mattel, Inc.
 573 F.Supp.2d 1254, 1270 (2007)..... 6, 11, 12

Calder v. Jones
 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984) 8, 12

CoreVent Corp. v. Nobel Industries
 11 F.3d 1482 (9th Cir. 1994)..... 13

Corporate Investment Business Brokers v. Melcher
 824 F.2d 786 (1987) 13

Doe v. Geller
 533 F.Supp.2d 996 (2008)..... 12, 14

Doe v. Unocal
 248 F.3d 915 (9th Cir. 2001)..... 11

Dole Food Co. v. Watts
 303 F.3d 1104 (9th Cir. 2002)..... 8

Florens Container v. Chao Yang Shipping
 245 F.Supp.2d 1086 (N.D. Cal. 2002) 18

Gordy v. Daily News, L.P.
 95 F.3d 829 (9th Cir. 1996)..... 12

Haisten v. Grass Valley Medical Reimbursement Fund
 784 F.2d 1392 (9th Cir. 1986)..... 7

Keeton v. Hustler Magazine, Inc.
 465 U.S. 770, 104 S.Ct. 1473, 79 L.Ed.2d 790 (1984) 7

Mattel, Inc. v. MCA Records, Inc.
 296 F.3d 894 (9th Cir. 2002)..... 7

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

CASES

Menken v. Emm
 503 F.3d 1050 (9th Cir. 2007)..... 12, 17

Ochoa v. J.B. Martin and Sons Farms, Inc.
 287 F.3d 1182 (9th Cir. 2002)..... 6

Panavision v. Toeppen
 141 F.3d 1316 (9th Cir. 1998)..... 12, 14, 15

Schwarzenegger v. Fred Martin Motor Company
 374 F.3d 797 (9th Cir. 2004)..... 7, 8, 9

Sher v. Johnson
 911 F.2d 1357 (9th Cir. 1990)..... 13

Sinatra v. National Enquirer
 854 F.2d 1191 (9th Cir. 1998)..... 10, 13, 15

Stomp v. Neat
 61 F.Supp.2d 1074 (1999)..... 9

World-Wide Volkswagen v. Woodson
 444 U.S. 286, 100 S.Ct. 559 (1980) 10

Yahoo! Inc. v. La Ligue Contre Le Racisme
 433 F.3d 1199 (2006) 12

STATUTES

28 U.S.C.
 § 1391(b) 17
 § 1404(a)..... 1

Federal Rules of Civil Procedure
 12(b) 1, 5
 12(h) 5
 45 19

TREATISES

Schwarzer, Tashima and Wagstaffe
Federal Civil Procedure Before Trial (The Rutter Group, Rev. #1
 2008) §3:143 at p. 3-58 13

1 **I. PRELIMINARY STATEMENT**

2 Plaintiff Jackson Browne hereby submits the following opposition to
3 Defendant Ohio Republican Party’s (“ORP”) motion to dismiss Plaintiff’s complaint
4 pursuant to Federal Rules of Civil Procedure 12(b)(2) and (3), or alternatively, to
5 transfer venue pursuant to 28 U.S.C. § 1404(a) (the “Jurisdictional Challenge”).
6 Plaintiff’s opposition to ORP’s motion to dismiss Plaintiff’s complaint pursuant to
7 FRCP 12(b)(6), which was filed in a single document with the Jurisdictional
8 Challenge, is set forth in Plaintiff’s separately filed Consolidated Oppositions to
9 Defendants’ Special Motions To Strike and to Dismiss.¹

10 **II. INTRODUCTION**

11 Defendant ORP purposefully availed itself of the privilege of conducting
12 activities in California by using YouTube -- which ORP expressly agreed was
13 deemed to be “solely based in California” -- as a free broadcast network to distribute
14 more than 130 videos, the majority of which related to Senator McCain’s
15 presidential campaign. ORP further engaged in purposeful availment by posting a
16 commercial that infringed the intellectual property and publicity rights of Plaintiff, a
17 California resident, on YouTube and thereafter sending an e-mail to at least 25
18 national media outlets directing them to the California website and infringing
19 commercial.

20 As a result of this conduct, ORP reasonably could have expected to be hailed
21 into this California court for claims arising out of its many YouTube postings. In
22 fact, ORP agreed and acknowledged that it was subject to suit in California and that
23 California law controlled disputes relating to its YouTube postings when it posted
24

25
26 ¹ The arguments made by ORP in support of its 12(b)(6) motion are substantively
27 identical to the arguments made by Defendants John McCain and the Republican
28 National Committee in their separately filed special motions to strike and to dismiss
pursuant to FRCP 12(b)(6). Consequently, Plaintiff is filing single consolidated
oppositions to the motions to strike and to dismiss.

1 content on the site, and thereby accepted YouTube's standard "Terms of Use." In
2 these circumstances, as explained more fully below, the assertion of personal
3 jurisdiction over ORP and venue in this California Court are proper, and comport
4 with fair play and substantial justice. This Court is also the most efficient place for
5 Plaintiff's claims to be tried. As explained below, Plaintiff has sued three
6 defendants, but only one, ORP, has challenged jurisdiction and venue. Thus,
7 Plaintiff's claims against the other Defendants (who waived any objections to
8 jurisdiction and venue by failing to challenge it) will be tried in this Court. It simply
9 makes no sense to require Plaintiff's claims against ORP to proceed in a separate
10 action in Ohio. ORP's motion should be denied.

11 **III. STATEMENT OF FACTS**²

12 **A. Plaintiff Jackson Browne**

13 Plaintiff Jackson Browne ("Plaintiff") is a world-famous singer who moved to
14 Los Angeles when he was three years old. Except for a brief period in the late
15 1960's when he lived in New York, Plaintiff has always lived in Southern
16 California. Plaintiff has never resided in Ohio.

17 In 1977, Plaintiff released his most commercially successful album entitled
18 *Running On Empty*, which included a song sharing the same name. Plaintiff
19 periodically licensed the song *Running On Empty* for use in motion pictures such as
20 *Forrest Gump*. Plaintiff, however, has never licensed *Running On Empty* for use in
21 a commercial or advertising. On those occasions when Plaintiff agreed to license
22 *Running On Empty* for use in motion pictures, the agreements were handled by
23 Plaintiff's California-based music publishing administrator. All of Plaintiff's
24 business representatives are located in the Central District of California.

25 _____
26 ² The facts set forth herein are those which have the most direct relevance to
27 ORP's jurisdictional challenge. More complete statements of the relevant facts are
28 contained in Plaintiff's concurrently-filed consolidated oppositions to Defendants'
motions to strike and to dismiss.

1 Specifically, Plaintiff’s personal managers Donald Miller and Cree Clover Miller
2 are based in Studio City, Plaintiff’s booking agent Carole Kinzel of Creative Artists
3 Agency is based in Century City, Plaintiff’s business manager Tina Fasbender is
4 based in Santa Monica and his transactional attorney Gary Gilbert is based in West
5 Los Angeles. The administration of Plaintiff’s music publishing is handled by
6 Calabasas based Wixen Music Publishing and his record company is Inside
7 Recordings, based in Studio City. Declaration of Donald Miller (“Miller Decl.”), ¶¶
8 1-7.

9 **B. The Infringing Commercial**

10 ORP is a political organization which supported Senator John McCain in the
11 recent presidential election. As part of its efforts to promote Senator McCain’s
12 candidacy, ORP created a commercial (the “Commercial”) featuring Plaintiff’s
13 performance of his hit song *Running On Empty*. During the Commercial, Plaintiff’s
14 distinctive and well-known voice can be heard singing the song’s familiar chorus,
15 which includes the phrase “running on empty.” Neither ORP nor any of the other
16 Defendants sought or obtained Plaintiff’s permission to use *Running On Empty* or
17 Plaintiff’s voice in the Commercial.

18 ORP posted the Commercial on YouTube.com, where it could be viewed by
19 an international audience, including California residents. To ensure that the
20 Commercial reached as many viewers as possible, ORP sent a press release (the
21 “Press Release”) containing a link to the Commercial to 1448 recipients, including
22 25 national media outlets. *See* the Declaration of John McClelland submitted by
23 ORP (“McClelland Decl.”), ¶ 14. Critically, ORP has not identified the 25 national
24 media outlets, or any of the other recipients of the Press Release by name. The
25 Court should presume from this glaring omission that at least some (if not many) of
26 the national media and other recipients are found in California. In fact, the
27 Commercial was picked up by *The Huffington Post* and posted on its California
28 based website. Declaration of Jonathan Noyes (“Noyes Decl.”), ¶ 2. ORP’s posting

1 of the Commercial on YouTube was but one of many instances where ORP used the
2 service to distribute commercials promoting McCain’s candidacy and/or its other
3 activities. Currently (as of January 6, 2009), ORP has 138 postings on YouTube.
4 Noyes Decl., ¶6. These numerous postings make clear that ORP is using YouTube
5 as a free broadcast network to distribute its commercials and other videos. ORP’s
6 repeated use of YouTube as its broadcast network is also evidenced by the link
7 described on ORP’s website as “Ohio GOP tv,” which is in fact a link to ORP’s
8 YouTube postings. McClelland Decl., ¶ 7; Noyes Decl., ¶¶6-7.

9 **C. YouTube’s Terms Of Use**

10 The YouTube website where ORP posted the Commercial (and more than 100
11 other videos) is expressly subject to certain written Terms of Use which apply to all
12 persons who view or post content on the site. YouTube’s Terms of Use are divided
13 into fourteen separate sections and include the following provisions relevant to this
14 motion:

15 **1. Your Acceptance**

16 A. By using and/or visiting this website (collectively, including all
17 content and functionality available through the YouTube.com domain
18 name, the “YouTube Website,” or “Website”), you signify your
19 agreement to (1) these terms and conditions (the “Terms of Service”),
(2) YouTube’s privacy notice . . . and (3) YouTube’s Community
Guidelines . . . If you do not agree to any of these terms . . . please do
not use the YouTube Website. . . .

20 **2. YouTube Website**

21 A. These Terms of Service apply to all users of the YouTube
22 Website, including users who are also contributors of video content,
information, and other materials or services on the website. . . .

23 **4. General Use of the Website – Permissions and Restrictions**

24 YouTube hereby grants you permission to access and use the Website
25 as set forth in these Terms of Service . . .

26 **6. Your User Submissions and Conduct**

27 A. As a YouTube account holder you may submit video content . . .

28 D. In connection with User Submissions, you further agree that you
will not submit material that is copyrighted, protected by trade secret or

1 otherwise subject to third party proprietary rights, including privacy
2 and publicity rights, unless you are the owner of such rights or have
3 permission from their rightful owner to post the material and to grant
4 YouTube all of the license rights granted herein. . . .

5 **14. General**

6 You agree that: (1) the YouTube Website **shall be deemed solely**
7 **based in California**; and (ii) the YouTube Website shall be deemed a
8 passive website that does not give rise to personal jurisdiction over
9 YouTube, either specific or general, in jurisdictions other than
10 California. These Terms of Service shall be governed by the internal
11 substantive laws of the State of California, without respect to its
12 conflict of laws principles. Any claim or dispute between you and
13 YouTube that arises in whole or in part from the YouTube website
14 shall be decided exclusively by a court of competent jurisdiction
15 located in San Mateo County, California. . . . These Terms of Service,
16 together with the Privacy Notice . . . shall constitute the entire
17 agreement between you and YouTube concerning the YouTube
18 website. . . .

19 Ex. A to the Noyes Decl. (Emphasis added)

20 A party wishing post material on YouTube must first create a user account,
21 and in doing so must “click” a box affirming that the user has read and agrees to
22 each of YouTube’s Terms of Use. Noyes Decl., ¶ 3. Although Plaintiff has not yet
23 obtained discovery on this issue, ORP undoubtedly indicated its assent to all of
24 YouTube’s Terms of Use; otherwise, ORP would not have been able to post its
25 voluminous content on YouTube.

26 **D. Plaintiff’s Complaint**

27 Plaintiff filed his complaint in this action on August 14, 2008. Plaintiff’s
28 complaint alleges causes of action for copyright infringement, vicarious copyright
infringement, violation of the Lanham Act and violation of Plaintiff’s California
common law right of publicity against John McCain, the Republican National
Committee (“RNC”) and the Ohio Republican Party. All of the Defendants were
timely served and have responded to the complaint. Only ORP has challenged
jurisdiction and venue in this case. McCain and the RNC filed motions to dismiss
the complaint pursuant to FRCP 12(b)(6) and to strike it pursuant to California’s
“anti-SLAPP” statute. Neither McCain nor the RNC challenged jurisdiction or

1 venue in this District, and thus waived any objections thereto. FRCP 12(h).

2 **IV. ARGUMENT**

3 **A. The ORP Is Subject To Limited Personal Jurisdiction In California**

4 The Ninth Circuit has established a three factor test for determining when a
5 state may constitutionally exercise specific jurisdiction over a defendant: (1) the
6 non-resident defendant must do some act or consummate some transaction with the
7 forum state or perform some act by which it purposefully avails itself of the
8 privilege of conducting activities in the forum state; (2) the claim must arise out of
9 or result from the defendant’s forum related activity; and (3) the exercise of
10 jurisdiction must be reasonable. *Ochoa v. J.B. Martin and Sons Farms, Inc.*, 287
11 F.3d 1182, 1188-89 (9th Cir. 2002).

12 In applying this test, the Ninth Circuit uses a “flexible approach” such that
13 “[j]urisdiction may be established with a lesser showing of minimum contacts ‘if
14 conditions of reasonableness dictate.’” *Id.* at 1188, fn.2. Under this analysis, “there
15 will be cases in which the defendant has not purposefully directed its activities at the
16 forum state, but has created sufficient contacts to allow the state to exercise personal
17 jurisdiction if such exercise is sufficiently reasonable.” *Brand v. Menlove Dodge*,
18 796 F.2d 1070, 1074 (9th Cir. 1986).

19 The party asserting the claim bears the burden of establishing the first two
20 prongs of the jurisdictional test. *Bryant v. Mattel, Inc.*, 573 F.Supp.2d 1254, 1270
21 (2007)³. Once the plaintiff does so, the burden shifts to the party resisting
22 jurisdiction to present a compelling case that the exercise of jurisdiction would not
23 be reasonable. *Id.* As explained below, the first two prongs of the jurisdictional test
24 are easily satisfied in this case and there is no compelling reason which makes the

25 _____
26 ³ To meet its burden, the plaintiff need only make a prima facie showing of
27 jurisdictional facts. Disputed facts are resolved in favor of the exercise of
28 jurisdiction. *Bryant v. Mattel*, 573 F.Supp.2d at 1270.

1 exercise of jurisdiction of unreasonable.

2 **1. ORP Engaged In Purposeful Availment**

3 The first prong of the jurisdictional test is satisfied by showing that the
4 defendant “either purposefully availed itself of the privilege of conducting activities
5 in California, or purposefully directed its activities toward California.”

6 *Schwarzenegger v. Fred Martin Motor Company*, 374 F.3d 797, 802 (9th Cir. 2004).

7 Indeed, when a defendant has taken deliberate action toward a forum state,
8 jurisdiction may be found even if the defendant lacks physical contacts with the
9 forum state. *Schwarzenegger v Fred Martin*, 374 F.3d at 803. *See also Haisten v.*
10 *Grass Valley Medical Reimbursement Fund*, 784 F.2d 1392, 1398 (9th Cir. 1986).

11 A showing of “purposeful availment” typically consists of evidence of the
12 defendant’s actions in the forum, such as executing or performing a contract there,
13 whereas a showing of “purposeful direction” usually consists of evidence of the
14 defendant’s actions outside the forum state that are directed to the forum, such as the
15 distribution in the forum state of goods originating elsewhere. *Id.* *See also Keeton*
16 *v. Hustler Magazine, Inc.*, 465 U.S. 770, 774-775, 104 S.Ct. 1473, 79 L.Ed.2d 790
17 (1984) (finding purposeful direction where the defendant published magazines in
18 Ohio and circulated them in the forum state) and *Mattel, Inc. v. MCA Records, Inc.*,
19 296 F.3d 894, 899 (9th Cir. 2002), cert. denied 537 U.S. 1171. (finding purposeful
20 direction where the defendant distributed European music albums in the forum
21 state). In this case, both purposeful availment and purposeful direction exist.⁴

22 **(a) ORP’s Use Of California-Based YouTube As Its**
23 **Broadcast Network Constitutes Purposeful Availment**

24 _____
25 ⁴ Plaintiff acknowledges that a “purposeful availment” analysis is most often used
26 in contract cases and that “purposeful direction” typically applies to tort causes of
27 action. There is, however, no hard and fast rule prohibiting the Court from finding
28 jurisdiction based on purposeful availment in tort cases. Thus, for example, in
Schwarzenegger, the Ninth Circuit considered both purposeful availment and
purposeful direction in rendering its decision. 374 F.3d. at 803.

1 As discussed above, ORP entered into an agreement with California-based
2 YouTube which expressly provides that the service is deemed to be based solely in
3 California. Thereafter, ORP used California-based YouTube as its free broadcast
4 network to distribute the Commercial and at least 130 other videos on what ORP
5 dubbed “OhioGOPtv.”⁵ ORP’s conduct in entering into a contract with YouTube
6 and thereafter using the benefits of YouTube’s service to broadcast its commercials
7 constitutes purposeful availment under Ninth Circuit law. *Schwarzenegger v Fred*
8 *Martin*, 374 F.3d at 802.⁶ *See also Haisten v. Grass Valley*, 784 F.2d at 1398 (“A
9 defendant who enters into an obligation which she knows will have effect in the
10 forum purposefully avails herself of the privilege of acting in the forum state.”)

11 (b) **ORP Purposefully Directed The Commercial To**
12 **California**

13 The Ninth Circuit evaluates “purposeful direction” under the three part
14 “effects” test set forth in *Calder v. Jones*, 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d
15 804 (1984). The *Calder* “effects” test requires that the defendant allegedly have (1)
16 committed an intentional act, (2) expressly aimed at the forum state, (3) causing
17 harm that defendant knew or should have known was likely to be suffered in the
18 forum state. *Dole Food Co. v. Watts*, 303 F.3d 1104, 1111 (9th Cir. 2002).

19 In this case, ORP unquestionably committed an intentional act aimed
20 expressly at California when it used Plaintiff’s famous song and voice in the
21 Commercial and posted it on California-based YouTube. *E.g., Schwarzenegger v.*

22 _____
23 ⁵ The videos posted by ORP on YouTube include one entitled “Los Angeles Video
24 Blog.” The commentary related to this posting states “The Ohio GOP Video Blog
25 goes on the road to California for the Republican and Democratic presidential
primary debates.” *See* Exs. C and D to the Noyes Decl.

26 ⁶ To be clear, Plaintiff does not contend that the forum selection clause in ORP’s
27 agreement with YouTube is binding in this case. Rather, Plaintiff contends that
28 ORP’s agreement with YouTube demonstrates that ORP purposefully availed itself
of the privilege of acting in California and that it should have reasonably expected to
be hailed into this California court.

1 *Fred Martin Motors*, 374 F.3d 797, 806 (9th Cir. 2004) (finding that the defendant
2 committed an intentional act when it placed an ad in an Ohio newspaper).

3 ORP’s agreement that YouTube is deemed to be based solely in California
4 distinguishes this case from the facts of *Schwarzenegger* and, consequently, requires
5 a different result than that reached in *Schwarzenegger*. In *Schwarzenegger*, the
6 offending ad was distributed only in Ohio via an Ohio newspaper. Here, by
7 contrast, the Commercial was distributed only via California-based YouTube and
8 was readily available for viewing in California.

9 The fact that the Commercial was allegedly “targeted at Ohio voters” as ORP
10 claims does not negate the fact that the Commercial was intentionally distributed in
11 California through a California-based medium. In any event, ORP’s claim is
12 dubious at best as the presidential election was a matter of national significance and
13 ORP admittedly sent its press release containing the YouTube link to 225
14 representatives of the “National Media,” thereby indicating an intent to reach
15 beyond Ohio’s borders. McClelland Decl., ¶ 14. Even apart from its national press
16 release, ORP undoubtedly knew (or at a minimum should have expected) that
17 postings on YouTube reach viewers well beyond the Ohio borders, including
18 California. *E.g.*, *Stomp v. Neato*, 61 F.Supp.2d 1074, 1079 at fn. 9 (C.D. Cal. 1999)
19 (noting that “an entity which engages in electronic commerce over the Internet must
20 expect their activities to reach a large number of California residents.”)

21 Express aiming should also be found because of the nature of Plaintiff’s
22 wrongful conduct, and the situs of its effect. This is not a case where Defendants
23 are charged with untargeted negligence that merely happened to cause harm in
24 California. This is a situation where Defendants deliberately took Plaintiff’s famous
25 song and voice and incorporated it into the Commercial without permission.

26 Although ORP claims that its officers (specifically Mauk and McClelland)
27
28

1 were “not familiar” with Plaintiff’s music prior to receiving a letter from Plaintiff’s
2 counsel, and thus did not know that Plaintiff was a California resident,⁷ this claim
3 simply cannot be believed. Indeed, McClelland admits in paragraph 9 of his
4 declaration that *Running On Empty* “seemed to be a perfect fit” at the time he was
5 creating the Commercial. Manifestly, McClelland could not have thought this if he
6 had never heard of the song.

7 Moreover, Plaintiff is well-known to be a Southern California resident. For
8 example, Internet source Wikipedia describes Plaintiff as being “prominent in the
9 Southern California confessional singer-songwriter movement of the 1960s and
10 early 1970s” and as having “settled in California.” *See* Ex. B to the Noyes
11 Declaration. Thus, if McClelland merely stumbled upon Plaintiff’s song via an
12 Internet search (as he seems to suggest) he would have also undoubtedly stumbled
13 upon information revealing Plaintiff’s status as a California resident.

14 Regardless of ORP’s claimed ignorance regarding Plaintiff’s residency, there
15 can be no doubt that its conduct caused harm in California. As the Ninth Circuit
16 expressly held in *Sinatra v. National Enquirer*, 854 F.2d 1191, the use of a famous
17 California resident’s name without compensation “produces a situs of the injury in
18 California.” 854 F.2d at 1191.

19 **2. ORP Should Reasonably Have Expected To Be Haled Into A**
20 **California Court**

21 The “purposeful availment” requirement is intended to ensure that non-
22 resident defendants are aware that they are subject to suit in the forum state. *World-*
23 *Wide Volkswagen v. Woodson*, 444 U.S. 286, 297, 100 S.Ct. 559 (1980). Being
24 haled into court in California can come as no surprise to ORP because it expressly
25 agreed, by using YouTube as its broadcast network and accepting the Terms of Use,
26

27 _____
28 ⁷ *See* Mauk Decl., ¶ 27 and McClelland Decl., ¶ 10.

1 that (1) YouTube was “deemed solely based in California,” (2) the use of the
2 website is “governed by the internal substantive laws of the State of California and
3 (3) that any disputes with YouTube arising “in whole or in part from the YouTube
4 website” would be decided exclusively in a California court. Given this agreement,
5 ORP, at a minimum, should have expected that it could be called into a California
6 court to answer for claims arising out of its many YouTube postings.

7 **3. Plaintiff’s Claims Arise Out Of ORP’s California Conduct**

8 In determining whether the plaintiff’s claims arise out of or relate to the
9 forum-related activities, the Court employs a “but for” standard, *i.e.*, the Court
10 considers whether Plaintiff’s claims would have arisen but for the defendant’s forum
11 related conduct. *Doe v. Unocal*, 248 F.3d 915, 924 (9th Cir. 2001). *See also Bryant*
12 *v. Mattel*, 573 F.Supp.3d at 1272. This test is easily met in this case. Indeed, it is
13 obvious that Plaintiff’s claims would not have arisen but for Defendants’ conduct in
14 posting the Commercial on California-based YouTube because that is the only place
15 they distributed it. Declaration of John McClelland, ¶ 12.⁸ Manifestly, if ORP had
16 not distributed the Commercial, Plaintiff would not have been damaged by the
17 unlawful appropriation and use of his famous song and identity.

18 The fact that the Commercial may have been created in Ohio as ORP claims
19 does not negate the fact that ORP’s posting of the Commercial on a California
20 website is a “but for” cause of Plaintiff’s claims. The creation of the Commercial is
21 not the sole cause of Plaintiff’s harm, but is simply an additional “but for” factor
22 which gave rise to Plaintiff’s claims.

23 ORP’s motion acknowledges that the “but for” test applies, but then
24 misleadingly suggests that the Court must apply some “proportionality requirement”
25 to the second prong of the jurisdictional test. *See Motion* at p. 8:3-9. The cases

26 _____
27 ⁸ According to McClelland, he posted the Ad on YouTube and then e-mailed a
28 press release containing a link to the YouTube posting.

1 cited by ORP for this proposition, however, do not support it. Rather, the citations
2 in ORP’s brief discuss general jurisdictional requirements, not the “but for” test.
3 *E.g., Yahoo! Inc. v. La Ligue Contre Le Racisme*, 433 F.3d 1199, 1205-1210
4 (2006).⁹ Ninth Circuit cases which specifically discuss the but for test – *Bryant v.*
5 *Mattel* and *Doe v. Unocal* -- contain no proportionality requirement. *See also*
6 *Ballard v. Savage*, 65 F.3d 1495, 1500 (9th Cir. 1995) and *Panavision v. Toepfen*,
7 141 F.3d 1316, 1322 (9th Cir. 1998). ORP’s argument should therefore be rejected.

8 **4. Jurisdiction Is Reasonable**

9 As discussed above, the burden is on ORP to present a compelling case that
10 the exercise of jurisdiction would be unreasonable. *Menken v. Emm*, 503 F.3d 1050
11 (9th Cir. 2007). In other words, ORP must show that the exercise of jurisdiction
12 would not comport with fair play and substantial justice. *Doe v. Geller*, 533
13 F.Supp.2d 996, 1006 (2008). ORP must also “show that any asserted unfairness
14 could not be alleviated by less restrictive means such as conflict of law rules or an
15 accommodating venue transfer.” *Id.*

16 Under applicable law, jurisdiction is reasonable if, under the totality of the
17 circumstances, the defendant could reasonably anticipate being called upon to
18 present a defense in a distant forum. *Id.* Thus, local jurisdiction is presumably not
19 unreasonable when a non-resident intentionally causes injuries within the forum
20 state. *Calder v. Jones*, 465 U.S. 783, 790, 104 S.Ct. 1482 (1984); *Gordy v. Daily*
21 *News, L.P.*, 95 F.3d 829, 834 (9th Cir. 1996).

22 The Ninth Circuit weighs seven factors in evaluating the reasonableness of
23 jurisdiction in a particular case: (1) the extent of the defendant’s purposeful
24 injection, (2) the burden on defendant in defending in the forum, (3) the extent of
25 _____

26 ⁹ Significantly, the *Yahoo!* court expressly noted that the first prong of the
27 jurisdictional test (not the second) was the determinative factor in its decision. *Id.* at
28 1206 (“The first prong is determinative in this case. We have sometimes referred to
it, in shorthand fashion, as the ‘purposeful availment’ prong.”)

1 the conflict with the sovereignty of the defendant's state, (4) the forum state's
2 interest in adjudicating the dispute, (5) the most efficient judicial resolution of the
3 controversy, (6) the importance of the forum to the plaintiff's interest in convenient
4 and effective relief, and (7) the existence of an alternative forum. *CoreVent Corp. v.*
5 *Nobel Industries*, 11 F.3d 1482, 1486-87 (9th Cir. 1994). No one factor is
6 dispositive. Rather, the court must balance all seven factors. *Id.* Thus, mere
7 inconvenience is not enough:

8 Litigation locally must be so gravely difficult that it puts the defendant
9 to a severe disadvantage in comparison to his or her opponent.
10 Requiring the non-resident to defend locally is not constitutionally
11 unreasonable "in this era of fax machines and discount air travel."

11 Schwarzer, Tashima and Wagstaffe, *Federal Civil Procedure Before Trial* (The
12 Rutter Group, Rev. #1 2008) §3:143 at p. 3-58, citing *Sher v. Johnson*, 911 F.2d
13 1357, 1365 (9th Cir. 1990). Analysis of the relevant factors demonstrates that this is
14 not a case where a compelling showing of unreasonableness can be made.

15 **(a) Extent of Purposeful Interjection**

16 The factor of purposeful interjection is analogous to the purposeful direction
17 analysis discussed above. Consequently, "Ninth Circuit cases give the 'purposeful
18 interjection' factor no weight once it is shown that the defendant purposefully
19 directed its activities to the forum state." *Sinatra v. National Enquirer*, 854 F.2d
20 1191, 1199 (9th Cir. 1998), quoting *Corporate Investment Business Brokers v.*
21 *Melcher*, 824 F.2d 786 (1987). Thus, the first factor should be given no weight
22 based on Plaintiff's showing of purposeful avilment discussed above.

23 **(b) The Burden Of ORP Litigating In California Is No**
24 **Greater Than The Burden Of Plaintiff Litigating In**
25 **Ohio**

26 The second factor (the burden on defendant) likewise cannot tip the scale of
27 reasonableness in ORP's favor because it would be at least as much of a burden for
28 Plaintiff, who resides in California, to litigate in Ohio as for ORP to litigate in

1 California. Moreover, ORP has failed to meet its burden to establish that the
2 inconvenience of litigating in California is so great as to constitute a deprivation of
3 due process. *Panavision v. Toeppen*, 141 F.3d at 1323. In fact, ORP’s motion cites
4 no evidence whatsoever with respect to the second factor. Rather, ORP merely
5 asserts without explanation that “[t]he vast majority of witnesses and documentary
6 evidence concerning the creation of the Political Video are all in Ohio.” Motion at
7 p. 10:3-5. ORP’s bald statement, which does not even identify the witnesses or
8 documents by name, does not prove anything, much less establish great
9 inconvenience. “And in any event, the convenience of witnesses is ‘no longer
10 weighed heavily given the modern advances in communication and transportation.’”
11 *Doe v. Geller*, 533 F.Supp.2d 996, 1010 (2008).

12 To Plaintiff’s knowledge, there is no real dispute regarding the contents of the
13 Commercial or the fact that its creators did not seek or obtain a license to use
14 Plaintiff’s famous song or voice. Accordingly, it is unclear whether the
15 circumstances under which the Commercial was created will be significant to the
16 ultimate disposition of this case. It is clear, however, that Plaintiff’s damages will
17 be a significant issue at trial. The relevant evidence/witnesses on this issue,
18 including Plaintiff and all of his professional representatives are located in the
19 Central District of California, not Ohio. Miller Decl., ¶ 7. The entertainment
20 industry, from which relevant information and experts regarding the value of
21 Plaintiff’s famous song and publicity rights will undoubtedly be drawn, is also based
22 in California. For these reasons, the second factor favors Plaintiff, not ORP.¹⁰

23 _____
24 ¹⁰ While it is true that Plaintiff’s career requires him to travel from time to time, the
25 evidence before the Court demonstrates that ORP’s agents have traveled to
26 California. According to the Declaration of ORP Executive Director Jason Mauk,
27 he, along with ORP Deputy Chairman Kevin DeWine and Communications Director
28 John McClelland (who apparently was responsible for creating the Commercial),
traveled to California in January 2008 as part of ORP’s efforts to promote Senator
McCain’s candidacy. Specifically, Mauk, DeWine and McClelland came to
California at the invitation of CNN to watch the presidential debate held in Simi
(footnote continued)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

(c) **Sovereignty Concerns/Forum State’s Interest**

ORP concedes that “there is no conflict between the sovereignty of Ohio and California in resolving Browne’s claims,” but nonetheless argues that the third factor tips in its favor because of Ohio’s allegedly strong interest in regulating its own political parties. Motion, p. 10:6-15. This case, however, is not about regulating the conduct of Ohio’s political parties. Rather, this case is about the unauthorized use of a recording artist’s intellectual property and publicity rights. As the well-recognized home of the entertainment industry, California, without question, has a strong interest in protecting the intellectual property and publicity rights of recording artists, especially those who are domiciled in the state.

California also has a strong interest in resolving this dispute based on Plaintiff’s residency, a fact which even ORP concedes. This strong interest supports the reasonableness of an exercise of jurisdiction in this case. *Sinatra v. National Enquirer*, 854 F.2d 1191, 1200 (1988). *See also Panavision*, 141 F.3d at 1323.

Doe v. Geller, cited by ORP, is factually distinguishable because the defendants in *Geller* were not the parties who posted content on YouTube. Thus, unlike ORP in this case, the *Geller* defendants did not accept YouTube’s terms and conditions, or agree that the website was deemed to be based solely in California. This critical fact moots the reasonableness concerns discussed in *Geller*, including those quoted on page 10 of ORP’s motion. While it may be unreasonable to impose jurisdiction on parties around the world who do no more than send a letter to YouTube demanding that it take down infringing content (which is all that the defendants in *Geller* were alleged to have done), it is certainly not unreasonable to

Valley, ostensibly for the purpose of preparing for a similar debate in Ohio (which in fact never took place). Mauk Decl., ¶ 16-19. ORP also created a “Los Angeles Video Blog” touting the fact that it went “on the road” to Los Angeles. Noyes Decl., ¶ 5 and Exs. C and D thereto. This evidence proves that ORP’s agents have no problem traveling to California, even for something which is merely a prospective opportunity, and negates any claim for undue burden.

1 impose jurisdiction on parties who are major suppliers of content for distribution via
2 YouTube. Indeed, as the Terms of YouTube expressly state, by posting content on
3 the site, parties automatically consent to jurisdiction in California.¹¹

4 **(d) California Is The Most Efficient Forum**

5 Plaintiff’s Fourth Cause of Action seeks to recover for violations of Plaintiff’s
6 California common law rights of publicity. California is obviously the most
7 efficient forum in which to adjudicate rights based on California common law.
8 California federal courts, where many entertainment-related disputes are resolved,
9 are undoubtedly far more familiar with the relevant law than Ohio courts.

10 The fact that none of the other Defendants have challenged jurisdiction or
11 venue (and thus have consented to it) further tips the efficiency factor in favor of
12 California. It simply makes no sense to require Plaintiff to litigate his claims in two
13 separate forums. Moreover, as discussed above, the critical documents and
14 witnesses on the issue of damages (which is likely to be one of the most significant
15 issues at trial) are located in California. For these reasons, efficiency concerns
16 weigh in favor of jurisdiction in California. *E.g., Sinatra v. National Enquirer*, 854
17 F.2d at 1200.

18 **(e) Importance Of The Forum/Existence Of An**
19 **Alternative Forum**

20 ORP concedes that the sixth factor, the importance of the forum to the
21

22 ¹¹ Notably, in *Bowen v. YouTube*, 2008 WL 1757578 (W.D. Wash.), the court
found YouTube’s forum selection clause to be valid and enforceable, stating:

23 Forum selection clauses “should control absent a strong showing that
24 [they] should be set aside.” . . . As one court notice, “While new
25 commerce on the Internet has exposed courts to many new situations, it
26 has not fundamentally changed the principles of contract.” . . . Thus,
27 “when a benefit is offered subject to stated conditions, and the offeree
makes a decision to take the benefit with knowledge of the terms of the
offer, the taking constitutes an acceptance of the terms, which
28 accordingly become binding on the offeree.” . . . The Court concludes
that the forum selection clause here is valid and enforceable. . . .”

1 plaintiff, favors Plaintiff. Motion, p. 11:9-11. ORP attempts, however, to discount
2 the impact of this factor by arguing that Plaintiff is “an internationally recognized
3 rock star who has traveled throughout the world.” [CITE] The fact that Plaintiff
4 travels in his career does not in any way minimize Plaintiff’s strong interest in
5 having his claims adjudicated in his home state where the entertainment industry is
6 centered, and where the courts have vast experience in dealing with claims similar to
7 those asserted by Plaintiff. Regardless, because the sixth factor admittedly does not
8 favor ORP, it cannot support a finding that ORP has made a compelling case that the
9 exercise of jurisdiction in California would be unreasonable.

10 With respect to the final factor (the existence of an alternative forum),
11 Plaintiff acknowledges that his claims could be brought against ORP in an Ohio
12 court. However, Ohio courts are not likely to be familiar with California’s right of
13 publicity law. Moreover, knowledgeable experts on key issues such as the value of
14 Plaintiff’s famous song and publicity rights are unlikely to be found in Ohio.

15 Taken together, the foregoing factors demonstrate that the exercise of
16 jurisdiction over ORP is reasonable. Even if the Court finds that certain factors
17 weigh in ORP’s favor, on balance, ORP has not made the required “compelling
18 showing” that the exercise of jurisdiction would be unreasonable. *Menken v. Emm*,
19 503 F.3d 1050. Consequently, ORP’s motion must be denied.

20 **B. Venue Is Proper In This District**

21 Pursuant to 28 U.S.C. § 1400(a), an action alleging claims for copyright
22 infringement may be brought in any district in which the defendant or his agent
23 resides or may be found. For purposes of copyright litigation, a defendant “may be
24 found” wherever that person is amenable to personal jurisdiction. *Advideo v. Kimel*
25 *Broadcast Group*, 727 F.Supp. 1337 (N.D. Cal. 1989). As discussed above, ORP is
26 subject to personal jurisdiction in this Court. Consequently, ORP may be “found” in
27 this District and venue is proper.

28 Venue is also proper in this district under 28 U.S.C. § 1391(b). Pursuant to

1 28 U.S.C. § 1391(b), a civil action wherein jurisdiction is not founded solely on
2 diversity of citizenship may be brought in (1) a judicial district where any defendant
3 resides, if all defendants reside in the same state, (2) a judicial district in which a
4 substantial part of the events or omissions giving rise to the claim occurred, or a
5 substantial part of property that is subject of the action is situated, or (3) a judicial
6 district in which any defendant may be found, if there is no district in which the
7 action may otherwise be brought.

8 The property which is the subject of this action (Plaintiff’s intellectual
9 property and publicity rights) is situated in California where Plaintiff resides.
10 *Paolino v. Channel Home Centers*, 668 F.2d 721, 724 n. 2 (3rd Cir. 1981). A
11 substantial part of the events giving rise to the claim, including the distribution of
12 the infringing Commercial and the harm to Plaintiff, also occurred here.

13 **C. Plaintiff’s Choice Of Forum Should Not Be Disturbed**

14 As even ORP acknowledges, if jurisdiction and venue are proper, a plaintiff’s
15 choice of forum is given significant weight and should not be disturbed unless the
16 factors of convenience and justice tip strongly in favor of transfer. *See* Motion at
17 pp. 13:27-14:2. *See also Florens Container v. Chao Yang Shipping*, 245 F.Supp.2d
18 1086 (N.D. Cal. 2002). As discussed above, jurisdiction and venue are proper in
19 this California court. Consequently, Plaintiff’s choice of forum should be respected
20 unless the factors of convenience and justice tip strongly in favor of a transfer.

21 As the party seeking a transfer, ORP bears the burden to prove that a transfer
22 to Ohio would better serve the interests of justice and allow the case to proceed
23 more conveniently. *Id.* at 1088. To meet its burden, ORP cannot rely upon vague
24 generalizations as to the convenience factors. Rather, ORP “is obligated to identify
25 the key witnesses to be called and to present a generalized statement of what their
26 testimony would include.” *Id.* at 1093. ORP has not done so.

27 Like its jurisdictional argument, ORP’s argument with respect to venue
28 identifies no specific facts or witnesses. Instead, ORP again baldly asserts, without

1 evidentiary citations or backup, that “[a]ll of the documentary evidence relating to
2 the development and distribution of the Political Video are located in Ohio.” This
3 bald assertion cannot sustain ORP’s evidentiary burden. *Id.* Indeed, given the
4 admitted fact that the Commercial was created and distributed digitally on a
5 computer, it is hard to imagine that any substantial number of relevant documents
6 even exist.¹² To the extent they do, however, they are not all located in Ohio. As
7 ORP admits, the medium through which the Commercial was distributed – YouTube
8 -- is based in California. Thus, documentary evidence relating to the distribution of
9 the Commercial and the number of “hits” undoubtedly exists in California. ORP’s
10 unsupported claim to the contrary should be rejected.

11 ORP’s vague claim that “compulsory process would be available in Ohio and
12 not in California” should likewise be rejected. This Court, of course, has authority
13 to compel the testimony of witnesses and the production of documents in this forum.
14 The Court also has the authority under the Federal Rules of Civil Procedure to issue
15 subpoenas compelling deposition testimony and the production of documents in
16 Ohio. FRCP 45. For these reasons, ORP has not established that the factors of
17 justice and convenience tip strongly in favor of a transfer and its motion must
18 accordingly be denied.

19 Because ORP has not met its evidentiary burden, the Court need look no
20 further into the issues of justice and convenience. It must be noted, however, that
21 justice will be far better served by having Plaintiff’s claims against all Defendants
22 tried in a single California court, rather than splitting the case such that the claims
23 against ORP are tried in Ohio, while claims against the other Defendants (who have
24 not challenged jurisdiction or venue and thus have waived any objections) are tried

25 _____
26 ¹² As set forth in the McClelland Decl., ORP downloaded Plaintiff’s song from
27 iTunes and used software programs “Final Cut Express” and “imovie” to upload the
28 Commercial to YouTube. McClelland Decl., ¶¶ 7, 10.

1 in California. Having two actions rather than one simply makes no sense. It is
2 inefficient and will consume unnecessary judicial resources. Three of the four
3 parties to this lawsuit (Plaintiff, McCain and the RNC) all agree that this case should
4 proceed in the Central District of California. The case should be tried here.

5 **V. CONCLUSION**

6 For the foregoing reasons, Plaintiff respectfully requests that ORP's
7 Jurisdictional Challenge be denied in its entirety. This case should be tried on the
8 merits in this California court.

9
10 DATED: January 7, 2009

KINSELLA WEITZMAN ISER KUMP &
ALDISERT LLP

11
12
13
14 By: _____ /s/
15 Lawrence Y. Iser
16 Attorneys for Plaintiff Jackson Browne
17
18
19
20
21
22
23
24
25
26
27
28