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9 **UNITED STATES DISTRICT COURT**
 10 **CENTRAL DISTRICT OF CALIFORNIA**

11 DON HENLEY, MIKE CAMPBELL, and
 12 DANNY KORTCHMAR

13 Plaintiffs,

14 v.

15 CHARLES S. DEVORE and JUSTIN
 HART,

16 Defendants.
 17

Case No. SACV09-0481 JVS (RNBx)

**DEFENDANTS' OPPOSITION TO
 PLAINTIFFS' MOTION IN LIMINE
 NO. 3**

18 AND RELATED COUNTERCLAIMS
 19

20
 21 Plaintiffs' third motion in limine seeks to preclude Defendants from "offering
 22 argument or eliciting evidence seeking to challenge undisputed facts in the record and/or
 23 the Court's determination of Defendants' liability for copyright infringement."

24 **A. Challenging Undisputed Facts in the Record**

25 As to challenging "undisputed facts in the record," it is not clear what Plaintiffs
 26 want. Defendants are unsure what facts Plaintiffs wish Defendants to be unable to
 27 challenge at trial—they haven't told us—so Defendants do not know whether the parties
 28

1 have a meaningful dispute here or not. Nevertheless, it is clear that Plaintiffs have no legal
2 support for their position.

3 Plaintiffs seem to argue that Defendants cannot challenge any facts that Plaintiffs
4 asserted on summary judgment that Defendants did not oppose. The legal theory for the
5 position is unclear. They cite a case discussing how parties cannot present evidence
6 inconsistent with a prior *stipulation* of the parties. See Motion at 4. But this rule clearly
7 does not apply, *because the parties never stipulated to any facts*. Thus, what they seem to
8 be arguing—albeit without authority or (we believe) any basis in logic—is that the mere
9 failure to dispute an allegedly material fact at summary judgment means that the party is
10 precluded under judicial estoppel principles from offering contrary evidence at trial. They
11 offer no authority for that position. Defendants have found no authority for that position.
12 But the traditional elements of judicial estoppel clearly stand in Plaintiffs’ way.

13 “[S]everal factors typically inform the decision whether to apply the doctrine in a
14 particular case: First, a party's later position must be “clearly inconsistent” with its earlier
15 position. Second, courts regularly inquire whether the party has succeeded in persuading a
16 court to accept that party's earlier position, so that judicial acceptance of an inconsistent
17 position in a later proceeding would create ‘the perception that either the first or the second
18 court was misled.’ Absent success in a prior proceeding, a party's later inconsistent
19 position introduces no ‘risk of inconsistent court determinations,’ and thus no threat to
20 judicial integrity. A third consideration is whether the party seeking to assert an
21 inconsistent position would derive an unfair advantage or impose an unfair detriment on the
22 opposing party if not estopped.” *Hamilton v. State Firm Fire & Casualty Co.*, 270 F.3d
23 778, 783-84 (9th Cir. 2001) (internal citations omitted). In addition, “this court has
24 restricted the application of judicial estoppel to cases where the court relied on, or
25 “accepted,” the party's previous inconsistent position.” *Id.*

26 None of these factors applies here. Where Defendants fail to dispute an alleged
27 material fact at summary judgment, they have not taken a position; they have failed to take
28 a position. A party can fail to dispute a fact because it agrees with the fact or because it

1 simply does not matter to the party’s argument at summary judgment. Second, by failing to
2 dispute an alleged material fact, a party does not succeed in persuading a court to accept its
3 position. Failing to take a position is not equivalent to pushing the court to adopt one.
4 Finally, Plaintiffs cannot show that it gives opposing party an unfair benefit or imposes on
5 them an unfair detriment where a party disputes a fact at trial that it did not believe it
6 needed to dispute at summary judgment. The judicial estoppel factors simply do not line
7 up in Plaintiffs’ favor. This portion of the motion in limine must be denied.

8 **B. Precluding Evidence Related to Liability**

9 Plaintiffs next ask that Defendants be precluded from, in essence, asking the jury to
10 overrule this Court’s decision on liability. Defendants, of course, will ask the jury to do no
11 such thing. Defendants disagree with the ruling and intend to raise the issue on appeal.
12 But Defendants will not ask the jury to reach an adverse finding. (Nor is it clear how the
13 jury would do so; what verdict form would even allow it?)

14 But Plaintiffs take the argument a step further and ask this Court to preclude
15 Defendants from arguing “that ‘reasonable minds can differ’” on infringement or “that the
16 issue of liability was a ‘close’ one.” Motion at 2. Whether this request has merit depends
17 on what this Court allows Plaintiffs to argue when it comes to willfulness. Ninth Circuit
18 Model Civil Jury Instruction 17.27 says “[a]n infringement is considered willful when the
19 plaintiff has proved both of the following elements by a preponderance of the evidence: 1.
20 the defendant engaged in acts that infringed the copyright; and 2. the defendant knew that
21 those acts infringed the copyright.” This is a purely subjective standard; the question is
22 solely whether Defendants believed they had the right to make and display the videos when
23 they did so. So if the Court gives the model Ninth Circuit instruction, then arguments as to
24 what other people—this Court included—believed are not relevant, unless they served as
25 the basis for Defendants’ subjective beliefs at the time of the infringement.

26 But Plaintiffs asked this Court at summary judgment to apply a second, objective
27 standard as well, arguing that Defendants acted willfully if they were objectively reckless
28 in believing fair use protected their works. That is, even if they subjectively believed they

1 had the right to make the videos, they could still be acting “willfully” if their view is
2 deemed reckless under an objective standard. The Model Instruction does not permit such
3 an argument to the jury, and for good reason. Once the Court asks the jury to determine
4 whether a reasonable person could agree with Defendants’ conclusion as to fair use, the
5 opinions of other reasonable decision-makers on that same question become critical. When
6 this Court concludes that it is a “close question” whether the “Hope of November” video is
7 protected by the fair use doctrine, the Court is necessarily making a statement about
8 whether a reasonable person could reach a contrary conclusion. So if the jury is tasked
9 with determining how a reasonable person could weigh the fair use factors, the Court’s
10 view is highly relevant. Indeed, the views of other courts and commentators to look at the
11 issue also become relevant. For example, if other district judges find fair use on facts
12 similar to our facts, that is persuasive evidence that a reasonable person could reach the
13 same conclusion as Defendants and they were not objectively reckless in reaching their
14 conclusion as to whether the videos were lawful.

15 Thus, the merit of this portion of Plaintiffs’ motion in limine depends on what the
16 jury will be asked to decide. If Plaintiffs concede that the Model Instruction is appropriate
17 here, Defendants concede that they can only discuss their subjective bases for believing that
18 the videos were lawful, and this Court’s subsequent order is irrelevant. If, on the other
19 hand, Plaintiffs are permitted to argue that the jury can apply an objective standard in its
20 willfulness determination, then the motion must be denied.

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22 Dated: July 2, 2010

ONE LLP

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25 By: /s/ Christopher W. Arledge
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28 Justin Hart