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15 UNITED STATES DISTRICT COURT
 16 CENTRAL DISTRICT OF CALIFORNIA

17 DON HENLEY and MIKE
 CAMPBELL,

18 Plaintiffs,

19 v.

20 CHARLES S. DEVORE
 21 and JUSTIN HART,

22 Defendants.
 23
 24

Case No. SACV09-0481 JVS (RNBx)

Hon. James V. Selna

**MEMORANDUM OF POINTS
 AND AUTHORITIES IN
 OPPOSITION TO DEFENDANTS'
 MOTION TO DISMISS**

Date: June 29, 2009
 Time: 1:30 p.m.
 Courtroom: 10C

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INTRODUCTION

1
2 This action arises from the deliberate plan of Charles DeVore and Justin Hart
3 to exploit valuable copyrighted songs and to capitalize on the celebrity of a world-
4 famous recording artist to promote a political campaign. To generate publicity and
5 support for DeVore's ambition to win the Republican nomination to the U.S. Senate
6 in 2010, DeVore, with the assistance of Hart, copied "The Boys of Summer," a
7 Grammy-winning, instantly recognizable rock song about a summer romance
8 written by plaintiffs Don Henley and Mike Campbell, wrote new lyrics, and
9 incorporated the song into a campaign ad, which the two posted on YouTube and
10 elsewhere. When Henley objected to this exploitation of his copyrighted work by
11 sending a takedown notice to YouTube, as authorized by law, DeVore reposted the
12 video to another site and publicly vowed to use still other Henley works as part of
13 his ongoing publicity spree. Indeed, DeVore and Hart made good on this threat
14 when they fashioned a second video appropriating another widely-known song
15 recorded by Henley, "All She Wants to Do Is Dance."

16 Evidently, DeVore and Hart believe that labeling their efforts as "parody" or
17 "free speech" immunizes them from liability. But the law does not permit someone
18 to copy another's copyrighted musical work without permission, to add new lyrics,
19 or to exploit the work over the Internet in a promotional video. Nor does the law
20 permit one to promote his own goods or services by trading without permission on
21 the celebrity and goodwill of a popular artist. These rules apply to politicians no
22 less than to ordinary citizens. Indeed, in the political arena, such compelled speech,
23 forcing an artist to lend his or her creative work or identity to support a cause that
24 he or she does not wish to endorse, would violate the very "free speech" values
25 DeVore and Hart themselves purport to espouse.

26 This is not a case where a parodist has borrowed a few bars or phrases of a
27 song in order to comment upon or criticize it. The videos produced by DeVore and
28 Hart nowhere aim at, or spoof or ridicule, the original songs. Rather, made to

1 advance DeVore and Hart’s interests and agenda, the videos address the actions of
2 third parties, President Barack Obama and Senator Barbara Boxer. DeVore and
3 Hart took virtually the entire musical works, note for note, to provide soundtracks
4 for DeVore’s campaign ads. The videos are not parodies because – as the Supreme
5 Court put it in a case defining legal parody – they have “no critical bearing on the
6 substance or style” of the original songs, which songs were “merely use[d] to get
7 attention.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580 (1994).

8 Accordingly, Henley and Campbell have brought this action pursuant to the
9 Copyright Act, 17 U.S.C. § 101 *et seq.*, to halt further infringement of their
10 copyrighted musical work. In addition, Henley seeks relief under the Lanham Act,
11 15 U.S.C. § 1051 *et seq.*, and California Business & Professions Code, § 17200 *et*
12 *seq.*, to redress the misappropriation and misuse of his identity and reputation as a
13 world-famous recording artist.

14 **FACTUAL BACKGROUND**

15 As relevant here, plaintiffs allege the following facts in their Complaint:

16 Don Henley is a preeminent songwriter and recording artist. He is a
17 founding member and lead singer of the Eagles, the band credited with recording
18 the largest-selling album ever in the United States. (Compl. ¶ 18.) Henley co-
19 wrote all of the Eagles’ top ten hits and was the lead singer for many of them. (*Id.*)
20 In addition to his extraordinary success as a member of the Eagles, Henley has had
21 a remarkable solo career. His multi-platinum solo album *Building the Perfect*
22 *Beast*, released in 1984, included the hit song “The Boys of Summer,” in which the
23 singer reminisces about his love for a woman during summer days gone by. Henley
24 won a Grammy Award in 1985 for “The Boys of Summer.” (*Id.* ¶ 19.) This same
25 album also included Henley’s recorded performance of another hit song, “All She
26 Wants to Do Is Dance,” written by Henley’s colleague, Danny Kortchmar. (*Id.*
27 ¶ 37.)
28

1 Plaintiff Mike Campbell, also a prominent songwriter, recording artist, and
2 producer, is a founding member of the Grammy-winning rock band Tom Petty and
3 the Heartbreakers. (*Id.* ¶ 20.) In addition to his work with Henley and Tom Petty,
4 Campbell has co-written songs that have been recorded by other popular artists,
5 including Stevie Nicks and John Prine. (*Id.*) He has co-produced a series of top-
6 selling albums for Tom Petty and has also acted as a producer for Stevie Nicks, Roy
7 Orbison, and Del Shannon. (*Id.*)

8 Defendant Charles S. DeVore is a California State Assemblyman from
9 Irvine. (*Id.* ¶ 15.) DeVore is now campaigning for the Republican nomination for
10 the U.S. Senate seat currently held by Senator Boxer. (*Id.*) Defendant Justin Hart
11 is the Director of Internet Strategies and New Media for DeVore's campaign. (*Id.*
12 ¶ 16.)

13 In or about April 2009, DeVore, with support from Hart, devised a campaign
14 strategy revolving around Henley and Campbell's "The Boys of Summer." (*See id.*
15 ¶¶ 24-28.) In open disregard of Henley and Campbell's intellectual property rights,
16 DeVore and Hart copied almost all of Henley and Campbell's copyrighted work,
17 note for note, without permission. (*Id.* ¶¶ 1, 21, 25.) Substituting lyrics to suit their
18 purpose and using a recorded performance of the work to simulate the original
19 Henley recording, they produced and distributed a campaign advertising video
20 featuring the song (the "Boys of Summer Video"). (*Id.* ¶ 1.)

21 Titled "A Special Message from Chuck DeVore," the video consists of a
22 spoken introduction by Hart addressing potential supporters of the DeVore
23 campaign, followed by DeVore and Hart's rendition of Henley and Campbell's
24 song. (*Id.* ¶ 25.) The unauthorized use of Henley and Campbell's copyrighted
25 work is synchronized with a series of photographic images of DeVore, Hart, and
26 President Obama, among others. (*Id.*) At the conclusion of the Boys of Summer
27 Video, with the Henley and Campbell song still playing, a DeVore campaign ad
28 slogan appears: "Time for Chuck DeVore." (*Id.* ¶ 27.) Beneath the slogan, there is

1 a notice – “paid for by DeVore for California” – even though no payment has been
2 made to, nor permission sought from, Henley and Campbell for the music in the
3 video, to which they own the rights. (*Id.*)

4 Because such an extensive, promotional use of a musical work requires the
5 consent of the copyright owner, viewers accessing the Boys of Summer Video
6 through YouTube or other means could easily conclude that DeVore and Hart used
7 “The Boys of Summer” with permission, even though Henley and Campbell did
8 not, and in fact would not, authorize the use of their song for this purpose. (*Id.*
9 ¶ 29.) Viewers familiar with Henley and Campbell’s well-known song might also
10 conclude that Henley and Campbell are political supporters or sponsors of DeVore,
11 which they are not. (*Id.*)

12 DeVore and Hart’s avowed aim in producing the video was to build support
13 for DeVore’s campaign for the Republican nomination for the Senate. (*Id.* ¶¶ 1, 26-
14 27.) To this end, DeVore and Hart posted the infringing Boys of Summer Video on
15 the popular online video site YouTube and elsewhere, publicized their efforts
16 through multiple media outlets, and also encouraged others to make infringing
17 videos of Henley and Campbell’s work. (*Id.* ¶¶ 25, 28, 34.)

18 Henley, who carefully selects the causes he wishes to endorse and selectively
19 licenses his copyrights, did not authorize DeVore or Hart to use his copyrighted
20 song, does not endorse DeVore’s campaign, and does not wish his name, work, or
21 identity to be associated with DeVore or the DeVore campaign. (*Id.* ¶ 6.) Nor does
22 Campbell wish his copyrighted work to be used by or associated with DeVore or
23 DeVore’s campaign. (*Id.*)

24 When he became aware of the Boys of Summer Video, Henley arranged to
25 send a notice pursuant to the Digital Millennium Copyright Act, 17 U.S.C. § 512, to
26 YouTube requesting that the Boys of Summer Video be removed. (*Id.* ¶ 30.) The
27 video was taken down. (*Id.*) But, dismissive of Henley’s efforts to protect his
28 intellectual property rights, DeVore publicly responded in an article on an Internet

1 site: “And, it goes without saying that I’ll now be looking for every opportunity to
2 turn any Don Henley work I can into a parody of any left tilting politician who
3 deserves it” (*Id.* ¶ 33.) Further, DeVore provided a link to a different website
4 where his infringing Boys of Summer Video could continue to be accessed,
5 <http://www.chuck76.com/nov>. (*Id.* ¶ 34.) A user who clicked on this link and
6 attempted to navigate from the Boys of Summer Video to www.chuck76.com was
7 automatically redirected to a DeVore fundraising page captioned “SUPPORT
8 Chuck DeVore for US Senate,” at <http://tweetforchuck.com/tweet2>. (*Id.* ¶ 35.)

9 True to the promise made in DeVore’s Internet post, DeVore and Hart next
10 appropriated and exploited yet another song widely associated with Henley, “All
11 She Wants to Do Is Dance” (written by Danny Kortchmar and made famous by
12 Henley), which they fashioned into another promotional video, this one criticizing
13 Senator Boxer (the “Dance Video”). (*Id.* ¶¶ 4, 37.) Again, DeVore and Hart copied
14 virtually the entire musical composition note for note, substituting lyrics to convey
15 their campaign pitch, and using a recorded performance of the work to simulate the
16 original Henley recording. (*Id.* ¶ 4.)

17 As set forth in the Complaint, in making and distributing the videos, DeVore
18 and Hart have willfully and intentionally appropriated not just Henley’s exclusive
19 rights in a copyrighted work, but also his goodwill, identity, and persona by using
20 well-known songs associated with him, one almost immediately after another, in
21 campaign fundraising commercials. (*See id.* ¶ 5.) Such close identification of
22 Henley with DeVore’s fundraising efforts is an egregious, intentional, false
23 association that should be stopped. (*Id.*)

24 ARGUMENT

25 I. APPLICABLE LEGAL STANDARD

26 On a motion to dismiss, the plaintiff’s allegations “are taken as true and
27 construed in the light most favorable to the plaintiff.” *McGary v. City of Portland*,
28 386 F.3d 1259, 1261 (9th Cir. 2004). Dismissal of a claim is appropriate “only if it

1 appears beyond doubt that the claimant can prove no set of facts in support of the
2 claim which would entitle him to relief.” *ARC Ecology v. United States Dep’t of*
3 *the Air Force*, 411 F.3d 1092, 1096 (9th Cir. 2005); *see also Bell Atl. Corp. v.*
4 *Twombly*, 550 U.S. 544, 570 (2007).

5 **II. HENLEY’S LANHAM ACT CLAIM IS AMPLY SUPPORTED**
6 **BY THE FACTS AND THE LAW**

7 Henley’s false endorsement claim under the Lanham Act, 15 U.S.C.
8 § 1125(a), arising from the misuse of Henley’s goodwill and persona by DeVore
9 and Hart to promote DeVore’s campaign, certainly cannot be dismissed as “clutter,”
10 as DeVore and Hart suggest. (Defs.’ Mem. at 1.) As detailed above, in a blatant
11 quest to generate attention and raise funds for their campaign efforts, DeVore and
12 Hart focused on Henley as a world-famous recording artist and incorporated into
13 their campaign ads appealing, instantly recognizable songs that are uniquely
14 associated with Henley. In each case, the lyrics to the original song were rewritten,
15 while the soundtrack was closely imitated to simulate Henley’s well-known
16 performances and thus to suggest an association with Henley.

17 It is understood by the public that permission is required to use someone’s
18 song or performance for promotional purposes. Thus, a website visitor who
19 watched the Boys of Summer and Dance Videos and recognized Henley’s creative
20 work could easily believe that Henley granted such permission and therefore
21 endorses the videos and the messages therein, which Henley does not. (Compl.
22 ¶¶ 5, 29, 39.)

23 Indeed, such a mistaken impression of Henley’s association with DeVore and
24 Hart is all the more likely because the Boys of Summer and Dance Videos are *not*
25 parodies, as DeVore and Hart assert. The videos do not criticize or comment upon
26 the works they exploit. DeVore and Hart use the Henley-identified songs not to
27 ridicule Henley’s creative talents, but simply as vehicles to present campaign-
28 related subject matter. The lack of commentary on, or critical distance from,

1 Henley’s creative work not only negates DeVore and Hart’s “parody” defense, but
2 strongly reinforces the suggestion of Henley’s association with the videos.

3 DeVore and Hart’s reliance on the Supreme Court’s decision in *Dastar*
4 *Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003), to seek dismissal
5 of Henley’s false endorsement claim is misplaced. *Dastar* was a “reverse passing
6 off” case – brought under the “origin of goods” provision of the Lanham Act – in
7 which the plaintiff claimed that it should have been acknowledged as the source of
8 “goods” when defendant included portions of plaintiff’s public domain television
9 series in defendant’s own production. *Id.* at 26-28. Here, Henley does not seek
10 attribution as the originator of DeVore and Hart’s campaign ads, but instead seeks
11 to enforce his right *not* to be falsely associated with them. Far from eliminating this
12 type of false endorsement claim, *Dastar* expressly recognized continued liability for
13 falsely implying sponsorship or approval of a creative work under the separate
14 “false association” branch of the Lanham Act. *Id.* at 36. Post-*Dastar* decisions
15 have followed suit, including Judge Klausner’s recent holding in *Browne v.*
16 *McCain*, No. CV 08-05334-RGK (Ex), 2009 U.S. Dist. LEXIS 18876, at *12 (C.D.
17 Cal. Feb. 20, 2009) (upholding singer Jackson Browne’s Lanham Act false
18 endorsement claim as well as his copyright infringement claim based on use of his
19 song in campaign ad).

20 DeVore and Hart also suggest that, notwithstanding their deliberate targeting
21 of Henley and his creative works in order to generate publicity, and the simulation
22 of Henley-identified works in their campaign materials, Henley has not adequately
23 pled his false endorsement claim because he has not alleged the invocation of his
24 name, image, or voice or other sufficiently “distinctive attribute” that could give
25 rise to a Lanham Act claim. (Defs.’ Mem. at 5.) At the same time, DeVore and
26 Hart admit that “use of a name or likeness is not specifically required” to assert a
27 false endorsement claim. (*Id.*)
28

1 Whether the unauthorized use in promotional campaign videos of works
2 identified with Henley, including the use of simulations of well-known Henley
3 recordings, would cause viewers to assume that Henley endorsed those videos – as
4 Henley alleges it would – is a question of fact. In any event, the law is not as
5 narrow as DeVore and Hart seek to portray it. Congress drafted the Lanham Act
6 expansively to prohibit misleading the public through any “word, term, name,
7 symbol, or device, or . . . combination thereof.” 15 U.S.C. § 1125(a)(1)(A).
8 Moreover, in a leading false endorsement case brought by the singer Tom Waits,
9 the Ninth Circuit explained that the term “device” is to be interpreted broadly and
10 includes, *inter alia*, “distinctive sounds” if such sounds might confuse consumers as
11 to a celebrity’s sponsorship or approval of a product. *Waits v. Frito-Lay, Inc.*,
12 978 F.2d 1093, 1107, 1110 (9th Cir. 1992).

13 Finally, DeVore and Hart attempt to carve a sweeping exception from the
14 Lanham Act that would exempt any type of politically motivated activity from its
15 reach on the ground that it is not “commercial.” But this Court and others have
16 flatly rejected such an approach in light of the history and purpose of the Lanham
17 Act, and the negative consequences that would flow from an inability to protect
18 against false endorsements in the political arena. *See, e.g., Browne*, 2009 U.S. Dist.
19 LEXIS 18876, at *12-13 (noting that courts have recognized that the Lanham Act
20 applies to noncommercial or political speech).

21 **A. *Dastar* Does Not Eliminate “False Endorsement” Claims**
22 **Under the Lanham Act**

23 In pertinent part, the Lanham Act imposes liability on
24 [a]ny person who, on or in connection with any goods or services . . .
25 uses in commerce any word, term, name, symbol, or device, or any
26 combination thereof, or any false designation of origin, false or
27 misleading description of fact, or false or misleading representation of
28 fact, which . . . is likely to cause confusion, or to cause mistake, or to

1 deceive as to the affiliation, connection or association of such person
2 with another person, or as to the origin, sponsorship, or approval of his
3 or her goods, services, or commercial activities by another person[.]
4 15 U.S.C. § 1125(a)(1)(A). To prevail on his Lanham Act claim, Henley must
5 show that, in posting the videos at issue, DeVore and Hart “created a likelihood of
6 confusion” concerning Henley’s association with the videos. *White v. Samsung*
7 *Elects. Am., Inc.*, 971 F.2d 1395, 1399-1400 (9th Cir. 1992). Henley has alleged
8 such likelihood of confusion in his complaint. (Compl. ¶¶ 29, 72.)

9 In invoking the Supreme Court’s decision in *Dastar*, DeVore and Hart
10 misapprehend the nature of Henley’s claim. Two distinct types of claims arise
11 under the provision of the Lanham Act set forth above: a claim that a defendant has
12 falsely represented the origin of its goods, and a claim that the defendant has falsely
13 suggested that the plaintiff endorses or is otherwise associated with the defendant’s
14 goods. *Dastar* addressed an “origin of goods” claim. 539 U.S. at 37. The present
15 case, by contrast, concerns a “false endorsement” claim. To read *Dastar* as do
16 DeVore and Hart would effectively eliminate the “false endorsement” cause of
17 action permitted under the Lanham Act. *Dastar* cannot be so interpreted.

18 In *Dastar*, the defendant incorporated substantial portions of the plaintiffs’
19 public domain television series into a new video production and sold DVDs of the
20 production as its own. *Id.* at 26-27. Invoking a “reverse passing off” theory, the
21 plaintiffs claimed that, as the producers of the earlier television series, they should
22 have received credit as the source of the “goods.” *Id.* at 27, 31. However,
23 construing “origin” as meaning the source of tangible goods such as DVDs, rather
24 than the “communicative works” that the goods embody, the Supreme Court ruled
25 that attribution of the plaintiffs’ creative work was not required. *Id.* at 37. Notably,
26 in reaching this conclusion, the Supreme Court expressly distinguished, and
27 acknowledged the possibility of, a Lanham Act claim for falsely implying a
28

1 creator's "sponsorship or approval" of a communicative work – *i.e.*, the object of
2 Henley's claim here. *See id.* at 36 (citing 15 U.S.C. § 1125(a)(1)(A)).

3 Post-*Dastar* decisions confirm the continued force of false endorsement
4 causes of action, including those involving copyrighted works. For example, in a
5 case currently pending in the Central District that bears a striking resemblance to
6 this one, well-known singer-songwriter Jackson Browne sued former presidential
7 candidate John McCain for the unauthorized use in a campaign commercial of
8 Browne's song "Running on Empty." *Browne*, 2009 U.S. Dist. LEXIS 11876, at
9 *1-2. Ruling on a motion to dismiss, the Court upheld not only Browne's copyright
10 claim, but also Browne's Lanham Act false endorsement claim based on the
11 assertion that viewers would be confused as to Browne's association with McCain.
12 *Id.* at *11, *18; *see also Butler v. Target Corp.*, 323 F. Supp. 2d 1052, 1059 (C.D.
13 Cal. 2004) (Lanham Act claim based on "distortion" of copyrighted song permitted
14 because it "differs from a copyright claim as it refers to possible consumer
15 confusion as to the plaintiffs' sponsorship or approval of the product"); *Microsoft v.*
16 *Evans*, No. 1:06-cv-01745-AWI-SMS, 2007 U.S. Dist. LEXIS 77088, at *25 (E.D.
17 Cal. Oct. 17, 2007) (damages can be recovered where "a single act" has violated
18 both the Lanham Act and the Copyright Act "because two separate wrongs have
19 been committed") (citing *Nintendo of Am., Inc. v. Dragon Pacific Int'l*, 40 F.3d
20 1007, 1010-11 (9th Cir. 1994), *cert. denied*, 515 U.S. 1107 (1995)).

21 **B. Henley Has More Than Adequately Alleged False**
22 **Endorsement**

23 The essence of a false endorsement claim by a famous plaintiff is the
24 defendant's invocation of some aspect of the celebrity's persona such that there is a
25 likelihood that the public will be confused as to whether the celebrity endorses or is
26 associated with defendant's product. *White*, 971 F.2d at 1399-1400; *see Wendt v.*
27 *Host Int'l, Inc.*, 125 F.3d 806, 812 (9th Cir. 1997).
28

1 The defendant need not employ any particular characteristic of the plaintiff,
2 for it is well recognized that “[t]he identities of the most popular celebrities are not
3 only the most attractive for advertisers, but also the easiest to evoke without
4 resorting to obvious means such as name, likeness or voice.” *White*, 971 F.2d at
5 1399. Rather, as provided in the Lanham Act, it is sufficient if the device chosen
6 by the defendant to evoke the celebrity’s image gives rise to a likelihood of
7 confusion as to the celebrity’s association with the defendant’s enterprise. *See, e.g.,*
8 *Butler v. Target*, 323 F. Supp. 2d at 1057-59 (distorted song lyrics); *Waits*, 978 F.2d
9 at 1107 (imitation of singer’s voice); *White*, 971 F.2d at 1399-1401 (depiction of
10 plaintiff as robot). As the Ninth Circuit has explained, the legislative history of the
11 amendments codifying false endorsement under the Lanham Act makes clear
12 that “Congress approved the broad judicial interpretation of” the terms symbol and
13 device in the Act and intended these terms to include “distinctive sounds.” *Waits*,
14 978 F.2d at 1107 (citing S. REP. NO. 10[0]-515, at 44 (1988)).

15 Whether there exists a likelihood of confusion, in turn, is a fact-bound
16 inquiry to be conducted in accordance with the Ninth Circuit’s well-established
17 eight-part test based on the *Sleekcraft* factors. *Wendt*, 125 F.3d at 812 (test applies
18 in “celebrity endorsement” cases) (citing *Newton v. Thomason*, 22 F.3d 1455, 1462
19 (9th Cir. 1994) and *AMF, Inc. v. Sleekcraft Boats*, 599 F.2d 341 (9th Cir. 1979)).
20 Following Ninth Circuit precedent, the ultimate question in this case is whether
21 “ordinary consumers” would be confused about Henley’s association with DeVore
22 or his campaign. *Waits*, 978 F.2d at 1111.

23 Henley has clearly alleged that a likelihood of confusion exists as a result of
24 DeVore and Hart’s promotional use of songs closely associated with him in their
25 campaign ads. (Compl. ¶¶ 5, 29, 72.) The close simulation – rhythmically,
26 sonically, stylistically – of Henley’s familiar instrumental backing tracks for “The
27 Boys of Summer” and “All She Wants to Do Is Dance” could easily be mistaken
28 for the original renditions and thus give rise to the inference that Henley licensed,

1 and therefore approved, the content and message of the Boys of Summer and Dance
2 Videos. (*See* Compl. ¶ 29); *cf. White*, 971 F.2d at 1399-1401 (noting likelihood of
3 consumer confusion due to assumption that game show hostess Vanna White must
4 have approved the ads in which she was represented as a robot); *Butler v. Target*,
5 323 F. Supp. 2d at 1059 (“distorted” use of elements of plaintiffs’ song may give
6 rise to consumer confusion). Further, DeVore and Hart’s labeling their efforts a
7 “parody” does not bar a finding of perceived endorsement. *See White*, 971 F.2d at
8 1400-01 (even if robot ad was intended as a “spoof,” defendants may have “also
9 intended to confuse consumers regarding endorsement”).

10 DeVore and Hart make much of the fact that Henley bases his false
11 endorsement claim on the use of creative works that are the subject of copyright
12 protection. According to DeVore and Hart, this should preclude Henley’s ability to
13 protect his image and reputation for fear of creating “a species of mutant copyright
14 law.” (Defs.’ Mem. 9.)¹ That the two claims under 17 U.S.C. § 101 *et seq.* and
15 15 U.S.C. § 1051 *et seq.* can coexist is confirmed by the Copyright Act itself, which
16 provides: “Nothing in this title annuls or limits any rights or remedies under any
17 other Federal statute.” 17 U.S.C. § 301(d); *see also Butler v. Target*, 323 F. Supp.
18 2d at 1058 (“[T]he federal Copyright Act does not preempt the federal Lanham Act,
19 or vice versa.”) (internal citation and quotation omitted). Moreover, DeVore and
20 Hart’s assertion is belied by this Court’s ruling in the *Browne* case, in which a
21 copyright and Lanham Act claims are proceeding together. *Browne*, 2009 U.S.
22 Dist. LEXIS 18876, at *18; *see also Dr. Seuss Enters. v. Penguin Books USA, Inc.*,
23 109 F.3d 1394, 1403, 1406 (9th Cir. 1997) (upholding injunction against claimed
24

25 ¹ DeVore and Hart compare Henley’s false endorsement claim to a claim brought
26 by Shakespeare based on a false association with Shakespeare’s public domain
27 works. (Defs.’ Mem. at 9.) In addition to the fact that the works at issue here are
28 not in the public domain, it is difficult to imagine that consumers would think that
Shakespeare was endorsing products from the grave.

1 CAT IN THE HAT “parody” after finding likelihood of success on both copyright and
2 Lanham Act claims).²

3 Henley’s copyright and Lanham Act claims rest on different operative facts:
4 the first arises from the reproduction, distribution, derivative use, and public
5 performance of “The Boys of Summer” as a copyrighted musical work, activities
6 that violate Henley and Campbell’s exclusive rights under the Copyright Act, *see*
7 17 U.S.C. § 106, whereas the Lanham Act claim stems from the factually distinct
8 conduct of repurposing Henley-identified works to promote DeVore’s political
9 aspirations. *Cf. Downing v. Abercrombie & Fitch*, 265 F.2d 994, 1003-05 (9th Cir.
10 2001) (distinguishing claim based on publication of copyrightable photograph
11 depicting plaintiffs from claim based on misuse of plaintiffs’ identities); *Butler v.*
12 *Target*, 323 F. Supp. 2d at 1057-58, 1059 (in contrast to licensed use of plaintiffs’
13 sound recording, “distortion” of copyrighted work for promotional purposes
14 supports Lanham Act claim). Significantly, the copyright claim would exist
15 regardless of whether the works used by DeVore and Hart had been exploited in a
16 misleading manner. But here, as is alleged in the Complaint, DeVore and Hart
17 “willfully and intentionally appropriated not just Henley’s exclusive right under the
18 Copyright Act, but also his goodwill, identity and persona.” (Compl. ¶ 5; *accord*
19 ¶ 33 (“And, it goes without saying that I’ll now be looking for every opportunity to
20 turn any Don Henley work I can into a parody of any left tilting politician who
21 deserves it”)) (quoting DeVore.)

22 Moreover, the copyright and Lanham Act claims address entirely different
23 harms: invasion of one’s intellectual property interest, on the one hand, versus
24

25 ² Indeed, it would be improvident to embrace a rule that would encourage bad
26 actors to shield themselves from false endorsement claims by using copyrighted
27 properties to evoke a celebrity’s image, as in many cases the injured party does not
28 control the copyright in the work with which he or she is associated, and thus would
be left without a remedy.

1 economic damage to one's public persona, on the other. Henley's Lanham Act
2 claim seeks not to halt the reproduction, distribution, derivative use or public
3 performance of his copyrighted work (as Henley's copyright infringement claim
4 does), but rather to enjoin "further conduct [by DeVore and Hart] that falsely
5 suggests an association between Henley and Campbell and their creative works, on
6 the one hand, and DeVore, Hart and the DeVore campaign, on the other." (Compl.
7 ¶ 42; *accord* Compl. Prayer for Relief (Fourth and Fifth Claims for Relief) ¶ 2.)
8 Such a false endorsement claim is plainly outside the province of copyright.

9 Rather than looking to the recent *Browne* decision or other leading precedent
10 under the Lanham Act, DeVore and Hart reach back to a dated common law case to
11 support their argument, *Sinatra v. Goodyear Tire & Rubber Co.*, 435 F.2d 711 (9th
12 Cir. 1970), *cert. denied*, 402 U.S. 906 (1971), in which plaintiff Nancy Sinatra, who
13 had recorded the song "These Boots Are Made for Walking," asserted an unfair
14 competition claim against Goodyear for the licensed use of a different recording of
15 that song for a commercial. The court, relying heavily on the Supreme Court's now
16 inapposite preemption decisions in *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S.
17 225 (1964), and *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964),³
18 held that Sinatra's claim was not viable. *Sinatra*, 435 F.2d at 717.

19 But even if *Sinatra* were still good law, a critical distinction between *Sinatra*
20 and Henley's case – aside from the fact that *Sinatra* predates the Lanham Act cause
21 of action at issue here – is that, in *Sinatra* the defendants had properly licensed the
22 use of the song. *Id.* at 716. In the court's view, Sinatra had the opportunity to
23 control further exploitation of the song via her contractual relationships, but failed
24

25 ³ In *Goldstein v. California*, 412 U.S. 546 (1973), the Supreme Court limited the
26 reach of *Sears* and *Compco*, *id.* at 567-70, and Congress subsequently introduced a
27 new test for federal copyright preemption with the passage of the 1976 Copyright
28 Act, *see* 17 U.S.C. § 301. *See also* *Waits*, 978 F.2d at 1099, 1100 (observing
Supreme Court's retreat from "broad pre-emptive principle" of *Sears* and *Compco*).

1 to do so. *Id.* Of course, such is not the case here, where DeVore and Hart do not
2 pretend to be relying on a license.

3 Finally, DeVore and Hart search for support in the Copyright Act's
4 compulsory license provision that permits "cover" recordings of musical works to
5 be made upon payment of a compulsory license fee, 17 U.S.C. § 115. In fact,
6 Section 115 only underlines the gravity of the misconduct at issue here. First,
7 contrary to DeVore and Hart's assertions, the Section 115 compulsory license is a
8 narrow exception to the exclusive rights otherwise conferred by the Copyright Act
9 on the copyright owner to control the use of his or her works. It applies only to
10 audio recordings of previously recorded works (not audiovisual recordings), and
11 only when such cover recordings are to be distributed to the public for *private* use
12 (not for public and commercial use). 17 U.S.C. § 115(a)(1). Section 115's
13 compulsory license does not encompass the creation of derivative works based
14 upon the licensed work (such as by substituting lyrics or producing a synchronized
15 audiovisual work, as here), and expressly provides that the licensee is precluded
16 from altering the "fundamental character of the work" (as DeVore and Hart did
17 here). 17 U.S.C. § 115(a)(2). In sum, Section 115 definitively protects copyright
18 owners *against* the very types of misuse of their works at issue in this case.

19 Although, as DeVore and Hart point out, cover recordings authorized under
20 Section 115 are common, and it is possible that "the public does not believe that a
21 re-make must have been endorsed by an earlier performer[.]" (Defs.' Mem. at 10-
22 11), the recordings here are neither "covers" nor authorized. DeVore and Hart did
23 not simply re-record the same songs, but instead altered and integrated them into
24 promotional videos. Such video exploitations bear no relationship to what the
25 public would perceive as ordinary, audio cover recordings intended for private
26 consumption, which is all that Section 115 allows. It is the fact that the
27 exploitations are so clearly *not* cover recordings that gives rise to the inference that
28 they were authorized by Henley.

1 **C. False Endorsement Applies to “Noncommercial” and**
2 **“Political” Speech**

3 In their attempt to distance their conduct from the reach of the Lanham Act,
4 DeVore and Hart repeatedly misread and conflate different causes of action
5 provided under the Act. As shown above, Henley’s false endorsement claim arises
6 under 15 U.S.C. § 1125(a), which imposes liability on a defendant who “on or in
7 connection with any goods or services . . . uses in commerce any word, term, name,
8 symbol, or device” so as to falsely suggest a plaintiff’s association with the
9 defendant or the defendant’s goods or services. 15 U.S.C. § 1125(a)(1)(A). Unlike
10 a case brought under a different provision of the Lanham Act, such as the Federal
11 Trademark Dilution Act (“FTDA”), 15 U.S.C. § 1125(c) – which expressly
12 exempts “noncommercial use of a mark,” 15 U.S.C. § 1125(c)(3)(C) – there is no
13 exception for “noncommercial speech” in the false endorsement context. *See*
14 15 U.S.C. § 1125(a). Thus, even if it is assumed that DeVore and Hart’s videos
15 could be characterized as “noncommercial” or “political” speech, this would not
16 suffice to immunize DeVore and Hart from Henley’s false endorsement claim.

17 Indeed, one of the cases relied upon by DeVore and Hart, *MasterCard Int’l*
18 *Inc. v. Nader 2000 Primary Comm., Inc.*, No. 00 Civ. 6068 (GBD), 2004 U.S. Dist.
19 LEXIS 3644 (S.D.N.Y. Mar. 8, 2004), drew such a distinction in the course of
20 construing the FTDA’s “noncommercial” exemption. *See id.* at *25-26 & *26 n.2.
21 As that court explained, unlike the FTDA, the different Lanham Act provision at
22 issue in the *United We Stand America, Inc.* case (based on use of a trademark in
23 connection with “goods and services”) “does not have a commercial activity
24 requirement, nor does it exempt from liability noncommercial use of a mark.” *Id.* at
25 *25. Consequently, the *MasterCard* court declined to apply a “commercial
26 activity” requirement in reviewing the plaintiff’s claims under 15 U.S.C. § 1125(a).
27 *Compare id.* at *5-14 (assessing question of consumer confusion for purposes of
28

1 15 U.S.C. § 1125(a) claim) *with id.* at *18-30 (analysis of FTDA claim). DeVore
2 and Hart simply overlook this critical point. (*See* Defs.’ Mem. at 12-13.)

3 Moreover, courts agree that the more general reference to use “in commerce”
4 that appears in 15 U.S.C. § 1125(a) and elsewhere in the Lanham Act is
5 jurisdictional, rather than substantive, in nature: “The history and text of the
6 Lanham Act show that ‘use in commerce’ reflects Congress’s intent to legislate to
7 the limits of its authority under the Commerce Clause, rather than to limit the
8 Lanham Act to profit-seeking uses of a trademark.” *United We Stand America,*
9 *Inc. v. United We Stand, America New York, Inc.*, 128 F.3d 86, 92 (2d Cir. 1997);
10 *accord Bosley Med. Inst. v. Kremer*, 403 F.3d 672, 677 (9th Cir. 2005) (“‘Use in
11 commerce’ is simply a jurisdictional predicate to any law passed by Congress under
12 the Commerce Clause.”) (internal citations omitted).

13 Similarly, DeVore and Hart’s reliance on *Tax Cap Comm. v. Save Our*
14 *Everglades, Inc.*, 933 F. Supp. 1077 (S.D. Fla. 1996), is misplaced. In that case, in
15 which the plaintiff alleged confusion arising from defendant’s use of similarly
16 designed petition forms for Florida ballot initiatives, the protected activity was
17 confined to the solicitation of signatures on paper petitions. Indeed, the court
18 emphasized that the defendant “solicit[ed] no funds, no volunteers, and no
19 supporters” and that defendant’s acts were confined to the State of Florida. *Id.* at
20 1081 (distinguishing contrary holding in *Brach Van Houten Holding, Inc. v. Save*
21 *Brach’s Coal. for Chicago*, 856 F. Supp. 472 (N.D. Ill. 1994), on ground that *Brach*
22 defendant was “engaged in soliciting donations, preparing press releases, holding
23 public meetings and press conferences, etc.”) Here, DeVore and Hart produced
24 promotional videos and posted them to the Internet as part of a full-fledged
25 publicity campaign for DeVore, which was tied to the solicitation of supporters and
26 donations. (Compl. ¶¶ 5, 23, 35.) Even if *Tax Cap* constituted authoritative
27 precedent in this Circuit – which it does not – it is easily distinguishable based on
28 the conduct alleged here.

1 Finally, DeVore and Hart’s attempt to find support in *Bosley Medical*
2 *Institute* fails, for *Bosley* concerned whether the defendant was a competitor of the
3 plaintiff, as is required for standing to bring a false advertising – not a false
4 endorsement – claim under the Lanham Act. 403 F.3d at 677, 679. Nor does this
5 case bear any resemblance to *New.Net, Inc. v. Lavasoft*, 356 F. Supp. 2d 1090 (C.D.
6 Cal. 2004), also a false advertising case, which turned on whether the plaintiff
7 software company was a competitor of the defendant. *Id.* at 1116-17. *Rice v. Fox*
8 *Broad. Co.*, 330 F.3d 1170 (9th Cir. 2003), yet another false advertising case, is
9 also irrelevant, because it concerned the question of whether the defendant was
10 actually engaged in advertising. *Id.* at 1181.

11 In marked contrast to the inapposite authority cited by DeVore and Hart
12 stands this Court’s recent ruling in the *Browne* case, in which the Court rejected the
13 very same “political speech” argument in response to Browne’s claim of false
14 endorsement arising out of the infringing use of Browne’s song in a commercial:

15 [C]ontrary to [defendant’s] assertions, courts have recognized that the
16 Lanham Act applies to noncommercial (i.e. political) *and* commercial
17 speech. . . . Indeed, the Act’s purpose of reducing consumer confusion
18 supports application of the Act to political speech, where the
19 consequences of widespread confusion as to the source of such speech
20 could be dire.

21 2009 U.S. Dist. LEXIS 18876, at *12-13 (emphasis in original) (internal citations
22 omitted). In reaching this conclusion, the Court acknowledged the Second Circuit’s
23 influential holding in *United We Stand*, in which that Court held that the activities
24 of a political organization in support of a presidential candidate constituted
25 “services” within the meaning of the Lanham Act. *Id.* at *11-15 (citing *United We*
26 *Stand America, Inc.*, 128 F.3d at 89-92). As the Second Circuit explained, “[t]he
27 suggestion that the performance of such functions is not within the scope of
28 ‘services in commerce’ seems to us to be not only wrong but extraordinarily

1 impractical for the functioning of our political system.” 128 F.3d at 90 (internal
2 citations omitted). That is to say, if it is permissible to take others’ identities at will
3 to further the cause of one’s choice, no one will know what is actually supported by
4 whom. Indeed, this is Henley’s very concern here.

5 **III. HENLEY’S UCL CLAIM IS SOUND**

6 DeVore and Hart readily acknowledge that it is permissible to pursue a cause
7 of action under California’s unfair competition law, Business & Professions Code
8 § 17200 (“UCL”), in tandem with a Lanham Act claim. (Defs.’ Mem. at 14); *see*
9 *also Golden Door, Inc. v. Odisho*, 646 F.2d 347, 352 (9th Cir. 1980) (California
10 law extends “greater protection” than is available under the Lanham Act);
11 *Conversive, Inc. v. Conversagent, Inc.*, 433 F. Supp. 2d 1079, 1093-94 (C.D. Cal.
12 2006) (same). And, as discussed below, a UCL claim can accompany a copyright
13 claim. *See Aagard v. Palomar Builders, Inc.*, 344 F. Supp. 2d 1211, 1217 (E.D.
14 Cal. 2004). In an effort to overcome Henley’s UCL claim, however, DeVore and
15 Hart resort to the argument that Henley lacks standing to pursue it as a result of
16 Proposition 64.

17 Henley is not suing on behalf of the public, however, to prevent a generalized
18 harm. Rather, he has brought his UCL claim as an individual to protect his identity
19 and property interests from further injury at the hands of DeVore and Hart.
20 Because the UCL authorizes injunctive relief to halt such harm to Henley and his
21 property, there is no question that Henley has standing to bring the state law claim.

22 In addition to their standing argument, DeVore and Hart suggest – but do not
23 quite assert – that Henley’s claim could be preempted by the Copyright Act.
24 (Defs.’ Mem. at 14.) So that there is no doubt on this score, claims such as
25 Henley’s, involving the misuse of a copyrighted work that also constitutes an unfair
26 business practice, have been held not to be preempted because they include
27 elements not encompassed by federal law.
28

1 **A. Henley Has Standing Under the UCL as Amended by**
2 **Proposition 64**

3 The heart of Devore and Hart’s challenge to Henley’s UCL claim is their
4 contention that Proposition 64, passed by California voters in 2004, deprives
5 Henley of standing. Although DeVore and Hart baldly assert that Henley has failed
6 to plead a loss of money or property as required under the amended UCL, they
7 utterly fail to explain why the diminution of Henley’s property rights in his
8 valuable creative works and public persona is not actionable.

9 In pertinent part, the UCL prohibits “unlawful, unfair or fraudulent business
10 act[s] or practice[s].” Cal. Bus. & Prof. Code § 17200; *see also Korea Supply*
11 *Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1143, 131 Cal. Rptr. 2d 29, 37
12 (2003). The UCL covers “a wide range of conduct,” embracing “anything that can
13 properly be called a business practice and that at the same time is forbidden by
14 law.” *Korea Supply Co.*, 29 Cal. 4th at 1143, 131 Cal. Rptr. 2d at 37 (internal
15 quotation omitted). Pursuant to Proposition 64, members of the general public are
16 no longer able to sue for violations of the UCL; rather, a plaintiff must have
17 ““suffered injury in fact and [have] lost money or property as a result of . . . unfair
18 competition.”” *Butler v. Adoption Media, LLC*, 486 F. Supp. 2d 1022, 1061 (N.D.
19 Cal. 2007) (citing Cal. Bus. & Prof. Code § 17203, as amended by Prop. 64 § 2; *id.*
20 § 17204, as amended by Prop. 64 § 3).

21 On the face of the complaint, Henley clearly meets the requirements for a
22 cause of action under the UCL. He alleges that he has “suffered substantial injury
23 as a result of DeVore and Hart’s wrongful acts,” (Compl. ¶ 80), which include the
24 unlawful appropriation of Henley’s identity and persona, as well as the taking and
25 misuse of Henley’s copyrighted property, to create the false impression that Henley
26 is associated with Devore’s campaign. (*E.g.*, Compl. ¶¶ 5, 42). Such conduct is
27 specifically alleged to have devalued Henley’s property interests as a co-copyright
28 owner of “The Boys of Summer” and the performing artist of “All She Wants to Do

1 is Dance” because Henley derives “substantial income and economic value from
2 licensed uses” of those works, and “[t]he association . . . with DeVore’s campaign
3 and views will make these works less attractive to be licensed for other legitimate,
4 income-producing purposes, such as for film, television and commercials.” (*Id.*
5 ¶ 41.)

6 In addition to Henley’s property interests in his creative works,⁴ the law
7 recognizes that Henley has a personal property right in his celebrity persona. *Waits*,
8 978 F.2d at 1100 (singer Tom Waits’ state law claim for misuse of his identity in a
9 commercial was an invasion of his “personal property right”); *see also Midler v.*
10 *Ford Motor Co.*, 849 F.2d 460, 463 (9th Cir. 1988) (common law rights in
11 celebrity’s identity are “property rights”). Henley has plainly alleged harm to his
12 identity as a result of DeVore and Hart’s unlawful acts, including injury to
13 “[himself], his reputation and goodwill.” (*Id.* ¶ 80.)

14 In sum, Henley has alleged injury in fact, including the loss of property and
15 income, as a result of DeVore and Hart’s tortious conduct. Henley seeks injunctive
16 relief to restore his property interests. (*Id.* ¶ 7.) These allegations more than suffice
17 to give him standing to sue under the UCL.

18 Contrary to what DeVore and Hart appear to contend, it is clear that standing
19 under the UCL does not require that the property in question be either tangible or
20 reduced to a “sum certain.” For example, in *Overstock.com Inc. v. Gradient*
21 *Analytics, Inc.*, 151 Cal. App. 4th 688, 61 Cal. Rptr. 3d 29 (Cal. Ct. App. 2007), a
22 case involving defendant’s manipulation of stock prices through false statements,
23 the court held that the plaintiff had standing to sue based on the “diminution in
24 value of [its] assets and decline in its market capitalization[.]” 151 Cal. App. 4th at

25
26 ⁴ “Copyright, of course, is a federal grant of a property interest in the production,
27 replication, publication, and distribution of certain classes of ‘original works of
28 authorship fixed in any tangible medium of expression.’” *Davis v. Blige*, 505 F.3d
90, 98 (2d Cir. 2007) (citing 17 U.S.C. § 102(a)).

1 716, 61 Cal. Rptr. 3d at 51. Similarly, in *White v. Trans Union, LLC*, 462 F. Supp.
2 2d 1079 (C.D. Cal. 2006), the court upheld plaintiffs' UCL claim based on their
3 allegation that they suffered loss of money or property due to defendants' faulty
4 credit reporting practices.⁵ *Id.* at 1083-84.

5 Seeking to bolster their argument, DeVore and Hart further assert that, after
6 Proposition 64, standing under the UCL is strictly limited to claims for which the
7 remedy is "restoration of . . . money or property under Section 17203 [of the
8 UCL]." (Defs.' Mem. 16.) This is an erroneous view of the statute. As the
9 California Supreme Court recently confirmed in *In re Tobacco II Cases*, 46 Cal. 4th
10 298, 93 Cal. Rptr. 3d 559 (2009), Proposition 64 did *not* limit the remedies
11 provision of the UCL, which provides that "[t]he court may make such orders or
12 judgments . . . as may be necessary to prevent the use or employment by any person
13 of any practice which constitutes unfair competition, as defined in this chapter, *or*
14 as may be necessary to restore to any person in interest any money or property, real
15 or personal, which may have been acquired by means of such unfair competition.
16 17 U.S.C. § 17203 (emphasis added); *In re Tobacco Cases II*, 46 Cal. 4th at 319, 93
17 Cal. Rptr. 3d at 575 ("T]he primary form of relief available under the UCL to
18 protect consumers from unfair business practices is an injunction, along with
19 ancillary relief in the form of . . . restitution.").

20 Because the statute permits parties to sue for both injunctive relief and
21 restitution, the narrow reading of the UCL advanced by DeVore and Hart has been
22 rejected by this Court and others. For example, in *G&C Auto Body Inc. v. Geico*
23 *Gen. Ins. Co.*, No. C06-04898 MJJ, 2007 U.S. Dist. LEXIS 91327 (N.D. Cal. Dec.
24

25 ⁵ Similarly, other UCL cases have found standing based on intangible vested
26 interests. *E.g.*, *Cortez v. Purolator Air Filtration Pds. Co.*, 23 Cal. 4th 163, 177-
27 78, 96 Cal. Rptr. 518, 528-29 (2000) (standing based on vested interest in withheld
28 overtime pay); *Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718, 733-34 (9th
Cir. 2007) (standing based on vested interest in free mobile phone minutes).

1 12, 2007), in which it was asserted that insurers' low reimbursement rates harmed
2 auto repair shops, the court permitted plaintiffs to proceed on the basis of their
3 claim for injunctive relief to halt the insurers' practices. *Id.* at *5, *14. The court
4 found "no basis to presume that the People of California, when adopting
5 Proposition 64, meant for the new Section 17204 standing requirements to track the
6 requirements established for obtaining restitution under Section 17203." *Id.* at *13.
7 Moreover, in the court's view, an interpretation of the UCL limiting standing to
8 those who seek restitution would be untenable because it would mean that a
9 plaintiff would "lack standing to seek . . . injunctive relief." *Id.* at *12. Likewise, in
10 *White v. Trans Union, LLC*, a case challenging the defendant's credit reporting
11 practices, this Court, too, held that the plaintiffs could proceed based on a claim for
12 nonmonetary injunctive relief; they were not required to show that defendant "took
13 money directly from them" or that "the losses in question were the product of the
14 defendant's wrongful acquisition of the plaintiffs [sic] property." *Id.* at 1083-84.

15 The sole federal decision relied upon by DeVore and Hart in support of their
16 strained reading of the UCL, *Butler v. Adoption Media LLC*, is easily distinguished
17 from this case, because the *Butler* plaintiffs had not "previously identified any loss
18 of money or property in connection with their [UCL] claims, and cannot now
19 attempt to establish such a loss." 486 F. Supp. 2d at 1062. Similarly, in *Buckland v.*
20 *Threshold Enters., Ltd.*, 155 Cal. App. 4th 798, 66 Cal Rptr. 3d 543 (2007), in
21 which the plaintiff attempted to manufacture standing by purchasing defendant's
22 skin cream, the court's dismissal was based on plaintiff's failure to allege "lost
23 money or property" as required under the statute. 486 F. Supp. 2d at 815-16, 818,
24 66 Cal. Rptr. 3d at 555-56, 558. Finally, in *Center for Biological Diversity, Inc. v.*
25 *FPL Group, Inc.*, No. RG04-183113, 2006 WL 3542514 (Cal. Super. Ct. Oct. 12,
26 2006), the court concluded that plaintiff lacked standing to bring a claim based on
27 the killing of wildlife, an "abstract interest owned commonly by all members of the
28 public" rather than "individually" by the plaintiff. *Id.* Clearly, none of these

1 holdings applies here, for Henley has alleged the loss of protectable, personal
2 property. In any event, to the extent these cases suggest that standing under the
3 UCL is limited to those who assert claims for specific types of restitution, they are
4 in conflict with language of the statute as well as a recent decision of the California
5 Supreme Court.⁶

6 **B. Henley’s UCL Claim is Not Preempted by Copyright Law**

7 Finally, Henley’s UCL claim is not preempted by copyright law, as DeVore
8 and Hart appear to suggest in passing. (Defs.’ Mem. at 14.) That is because a state
9 law claim is not preempted when it requires proof of an “extra element” not
10 required by federal law. *Summit Mach. Tool Mfg. Corp. v. Victor CNC Sys., Inc.*,
11 7 F.3d 1434, 1439-40 (9th Cir. 1993); *see also* 17 U.S.C. § 301(b) (preserving state
12 law claims involving rights not equivalent to those covered by the Copyright Act).
13 As discussed above, *supra* § II.B, such additional elements are plainly present here,
14 where Henley’s UCL claim arises not only from the misappropriation of exclusive
15 rights under the Copyright Act, but from the alteration and misuse of works closely
16 associated with Henley improperly to suggest that Henley endorses DeVore.

17 Courts have declined to find preemption in circumstances such as these. For
18 example, in *Butler v. Target*, plaintiffs alleged, *inter alia*, that the defendant
19 distorted the lyrics of plaintiffs’ song and used the distorted lyrics in an advertising
20 campaign. 323 F. Supp. 2d at 1057. This Court held this UCL claim was not
21 preempted because it alleged an “extra element”: that the altered lyrics led
22 consumers mistakenly to believe that plaintiffs endorsed defendant’s products. *Id.*
23 (noting that Section 301 of Copyright Act “is not intended to preempt common law

24
25 ⁶ In *Korea Supply Co.*, discussed at length by DeVore and Hart, the California
26 Supreme Court held that “nonrestitutionary disgorgement of profits is not an
27 available remedy in an individual action under the UCL.” 29 Cal. 4th at 1152, 131
28 Cal. Rptr. 2d at 44. But that case involved the type of restitution available under
the UCL, not standing. In any event, Henley is not seeking disgorgement here.

