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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  
 16 HART,

17 Defendants.

Case No. SACV09-0481 JVS (RNBx)  
 Hon. James V. Selna

**MEMORANDUM OF POINTS AND  
 AUTHORITIES IN SUPPORT OF  
 DEFENDANTS' MOTION FOR  
 SUMMARY JUDGMENT OR, IN THE  
 ALTERNATIVE, PARTIAL  
 SUMMARY JUDGMENT AS TO  
 EACH CAUSE OF ACTION IN  
 PLAINTIFFS' FIRST AMENDED  
 COMPLAINT**

Date: May 17, 2010  
 Time: 1:30 p.m.  
 Courtroom: 10C

18 AND RELATED COUNTERCLAIMS  
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**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION FOR  
 SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT**

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1 **I. INTRODUCTION**

2 Chuck DeVore is a California Assemblyman and a candidate for the United States  
3 Senate. DeVore and Justin Hart, the campaign's Director of Internet Communications,  
4 created videos that added new lyrics to two well-known songs: "The Boys of Summer,"  
5 which was co-written by Plaintiffs Henley and Mike Campbell and performed by Henley,  
6 and "All She Wants to Do Is Dance," which was written by Plaintiff Danny Kortchmar and  
7 performed by Henley. Plaintiffs have sued DeVore and Hart for copyright infringement,  
8 and Henley has also sued both Defendants for false endorsement under the Lanham Act.<sup>1</sup>

9 Defendants are entitled to summary judgment on all claims. Defendants' use of the  
10 songs is fair use under the Copyright Act, and Henley's Lanham act claim fails both  
11 because he cannot show that Defendants misappropriated a unique attribute of his—a  
12 necessary element—and because he cannot show that Defendants' acts were done with  
13 actual malice.

14 **II. PLAINTIFFS' COPYRIGHT CLAIMS FAIL BECAUSE DEFENDANTS' USE**  
15 **OF THE SONGS IS FAIR**

16 "The fair use defense 'permits courts to avoid rigid application of the copyright  
17 statute when, on occasion, it would stifle the very creativity which that law is designed to  
18 foster.'" *Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1399 (9<sup>th</sup>  
19 Cir. 1997) (internal citation omitted). "Fair use is an 'equitable rule of reason,' requiring  
20 careful balancing of multiple factors "in light of the purposes of copyright." *Id.*

21 The Copyright Act provides four factors to be considered and weighed by the courts  
22 in determining if a fair use defense exists in a given case: (1) the purpose and character of  
23 defendant's use; (2) the nature of the copyrighted work; (3) the importance of the portion  
24 used in relation to the copyrighted work as a whole; and (4) the effect of defendant's use on  
25

26 <sup>1</sup>Following the parties' conference pursuant to L.R. 7-3, Plaintiff Henley agreed to dismiss  
27 with prejudice his claim under California Business and Professions Code §17200 (the  
28 Eighth Claim for Relief in the Amended Complaint) and Defendants agreed to dismiss with  
prejudice all six causes of action set forth in their Counterclaims.

1 the potential market for or value of the copyrighted work. *See* 17 U.S.C. § 107. “Congress  
2 viewed these four criteria as guidelines for ‘balancing the equities,’ not as ‘definitive or  
3 determinative’ tests.” *Dr. Seuss*, 109 F.3d at 1399 (internal citation omitted). “[S]ince the  
4 doctrine [of fair use] is an equitable rule of reason, no generally applicable definition is  
5 possible.” *Id.* Instead, “[t]he four fair use factors “are to be ... weighed together, in light of  
6 the objectives of copyright ‘to promote the progress of science and the useful arts.’” *Id.*

7 “[I]t is well established that a court can resolve the issue of fair use on a motion for  
8 summary judgment when no material facts are in dispute.” *Leadsinger, Inc. v. BMG Music*  
9 *Pub.*, 512 F.3d 522, 530 (9<sup>th</sup> Cir. 2008) (citing *Harper & Row Publishers, Inc. v. Nation*  
10 *Enters.*, 471 U.S. 539, 560 (1985) and *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d  
11 792, 799-800 (9th Cir. 2003)).

12 **1. The purpose and character of the use**

13 The first fair use factor concerns “the purpose and character of the use, including  
14 whether such use is of a commercial nature or is for nonprofit educational purposes.” The  
15 key issue under this factor is whether the allegedly infringing work is transformative. “The  
16 central purpose of this investigation is to see ... whether the new work merely  
17 ‘supersede[s] the objects’ of the original creation or instead adds something new, with a  
18 further purpose or different character, altering the first with new expression, meaning, or  
19 message: it asks, in other words, whether and to what extent the new work is  
20 ‘transformative.’” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (internal  
21 citations omitted).

22 Defendants assert their videos as parodies; Plaintiffs disagree. The question is  
23 important because the Supreme Court concluded in *Campbell* that a parody “has an obvious  
24 claim to transformative value.” *Id.* But the answer to this question is not necessarily  
25 determinative either, because the Court also made clear that a work can be transformative  
26 even if it is not parodic.

1           A.     **What is parody?**

2           “For purposes of copyright law, the nub of the definitions, and the heart of any  
3     parodist’s claim to quote from existing material, is the use of some elements of a prior  
4     author’s composition to create a new one that, at least in part, comments on that author’s  
5     works.” *Campbell*, 510 U.S. at 580. The Court distinguished parody from other uses of  
6     copyrighted works—such as satires—that have a diminished justification for borrowing  
7     original works. “If, on the contrary, the commentary has no critical bearing on the  
8     substance or style of the original composition, which the alleged infringer merely uses to  
9     get attention or to avoid the drudgery in working up something fresh, the claim to fairness  
10    in borrowing from another’s work diminishes accordingly (if it does not vanish), and other  
11    factors, like the extent of its commerciality, loom larger.” *Id.*

12           But the Court was clear that the extent to which the derivative work must comment  
13    on the original depends, in large part, on whether the derivative work threatens to usurp  
14    legitimate, copyright-protected demand for the original. “A parody that more loosely  
15    targets an original than the parody presented here may still be sufficiently aimed at an  
16    original work to come within our analysis of parody. If a parody whose wide dissemination  
17    in the market runs the risk of serving as a substitute for the original or licensed derivatives,  
18    it is more incumbent on one claiming fair use to establish the extent of transformation and  
19    the parody’s critical relationship to the original.” *Id.* at 580 n.14 (internal citation omitted).  
20    But where the derivative work is not a market substitute, very little comment on the  
21    original is required. **“By contrast, when there is little or no risk of market substitution  
22    ... taking parodic aim at an original is a less critical factor in the analysis, and looser  
23    forms of parody may be found to be fair use, as may satire with lesser justification for  
24    the borrowing than would otherwise be required.”** *Id.* (emphasis added).

25           Here, for the reasons explained below in reference to the fourth fair use factor, there  
26    is no evidence that Defendants’ videos pose any risk of market substitution. Therefore, for  
27    Defendants’ works to qualify as sufficiently transformative (as either parodies or satires),  
28    they must satisfy a relatively low threshold. They do.





1 generally, Mr. DeVore necessarily challenges the Hollywood and entertainment elite,  
2 which with only a handful of exceptions has been outspoken and financially generous in its  
3 support of liberal issues and Democratic politicians, like Ms. Boxer. *Id.* From the  
4 perspective of Mr. DeVore and many (probably most) of his supporters, the entertainment  
5 establishment is squarely behind the current Democratic administration and Ms. Boxer, and  
6 it will go to great lengths to defeat a conservative like him. *Id.*

7 Don Henley, while not the only entertainment celebrity to vocally support Ms. Boxer  
8 and other liberal politicians and causes, is one of the more prominent. *Id.*, ¶ 3. As he  
9 concedes, “[I]t’s well known I’m a Democrat.” Declaration of Christopher Arledge, Exh. 1  
10 (Deposition of Don Henley) at 59:8 to 62:2. It is indeed. Henley has given “a lot of money  
11 to Democratic politicians over the years”—about \$750,000 to liberal candidates, to be  
12 exact, and \$9,000 to Barbara Boxer—and is well known—at least in Southern California,  
13 DeVore’s political base—for his involvement in Democratic politics. *Id.* In fact, in a well-  
14 publicized incident a few years ago, an Orange County audience booed Henley for making  
15 liberal political statements during a concert. *Id.*; *see also* DeVore Decl., ¶ 3. Thus, Don  
16 Henley is, in the minds of Chuck DeVore, his supporters, and many California voters,  
17 inseparable from the Democratic political establishment. DeVore Decl., ¶ 3. He and his  
18 friends in the entertainment industry have spent huge sums of money and used the powerful  
19 platform that fame and celebrity have given them in order to help elect Democratic  
20 politicians, including President Obama and Senator Boxer. *Id.*

21 Therefore, Defendants’ decision to parody songs performed by Don Henley was not  
22 accidental nor arbitrary; Defendants did not, in the Supreme Court’s words, “merely use[  
23 Henley’s songs] to get attention or to avoid the drudgery in working up something fresh.”  
24 *Id.*, ¶ 4. Had that been Defendants’ goal, they could have chosen from literally thousands  
25 of songs as popular as the songs in question here, and frankly they could have chosen songs  
26 from an artist—a Lady Gaga, a Beyonce—who is more contemporary and who would have  
27 generated far more media coverage. *Id.* But there would have been no political point.

1 Not only was Don Henley carefully selected for the parodies, but so were the  
2 particular songs used. DeVore and Hart's first parody takes on Plaintiffs' "The Boys of  
3 Summer," which deals with important political themes. *Id.*, ¶ 5. The song's major theme is  
4 nostalgia. On the surface, it is a wistful look at an old romance, a fling between two kids,  
5 now grown, who have moved on with their lives. But the nostalgia is not just about an old  
6 romance. As Henley says, the second verse of the song—the one with the famous line  
7 about seeing "a Dead Head sticker on a Cadillac"—was about the essential failure of  
8 Sixties' politics: "I don't think we changed a damn thing, frankly.... After all our  
9 marching and shouting and screaming didn't work, we withdrew and became yuppies and  
10 got into the Me Decade." Arledge Decl., Exh. 3, Exh. 1 at 20:2 to 21:12 (The song has a  
11 "sociological component"; "it's a mediation on the 60's."). Thus, the song's nostalgia  
12 concerns not only the girl but also the leftist politics of the radical 60's, and the song's  
13 narrator bemoans how those efforts to create a better (more liberal) society have failed.

14 Defendants' parody video plays on these same themes and aims its mocking gaze at  
15 Henley and the other celebrities who fought to get Mr. Obama elected. DeVore Decl., ¶ 6.  
16 The parody substitutes Barack Obama for the girls as the narrator's love interest, and has  
17 Henley (and other outspoken liberal celebrities) dreaming wistfully of the time before  
18 President Obama's election: "We will never forget those nights/ We wonder if it was a  
19 dream/ Remember how you made us crazy?/ Remember how we made you beam." *Id.* The  
20 song asks whether the parties' naïve love affair can survive the circumstances since,  
21 particularly President Obama's broken promises and failure to deliver on his promised  
22 "hope." *Id.* And, as in the original, the narrator bemoans how the efforts to create a better  
23 (more liberal) society have failed. *Id.*

24 DeVore and Hart's second parody takes on "All She Wants To Do Is Dance," a song  
25 Henley performed and Kortchmar wrote. *Id.*, ¶ 7. "All She Wants To Do Is Dance" is  
26 about Americans' indifference to what Plaintiffs perceive to be the misconduct of the  
27 American government in a foreign, apparently Latin American, locale. *Id.* In conjunction  
28 with the timing of the song's release (the mid-80's) and the images selected for the video,

1 the criticism becomes plain: Plaintiffs were criticizing the Reagan administration's Central  
2 America policies. *Id.* In their not-so-subtle attack on the U.S. government's policies—  
3 policies that DeVore helped to implement during the Reagan administration—the song  
4 asserts that the American government was inserting itself into Central American politics  
5 and enriching itself through immoral policies that are causing or at least contributing to  
6 violence in that region while the people there simply demanded that America get out of  
7 their business. *Id.*, ¶¶ 7-8. And the American people—personified by the girl who ignores  
8 the tragedy unfolding around here and only wants to dance—are apathetic, showing no  
9 regard for their government's malicious conduct. *Id.*

10 It is not unusual to hear complaints by liberal politicians and commentators that the  
11 American government is enmeshing the country in foreign conflicts for illegitimate  
12 reasons; this has been a staple of American politics since at least Vietnam and has  
13 continued through Reagan's Central American policies and Bush's Mideast policies. *Id.*, ¶  
14 9. DeVore and Hart's parody turns this line of attack on its head and directly targets Don  
15 Henley's particular brand of politics. *Id.* The problem is not that the American  
16 government is inserting itself into foreign countries for illegitimate reasons; the problem,  
17 according to Defendants, is that the American government, through Barbara Boxer and her  
18 colleagues in Washington—and with the support of the liberal, entertainment elite  
19 (including, of course, Mr. Henley)—are inserting themselves into the American economy  
20 and enriching the government and certain special interests through immoral tax policies  
21 that are causing a decrease in the American standard of living. *Id.* Like the foreign citizens  
22 who seemingly demand that America get out of their affairs in Plaintiff's original  
23 composition, American citizens demand that the liberal politicians get out of their affairs in  
24 Defendants' parody. *Id.* And, like the woman in the original song who shows no regard  
25 for the problems around here and just wants to dance, Barbara Boxer shows no regard for  
26 the problems she and her colleagues have caused; she just wants to tax. *Id.*

27 Defendants' songs, then, are undeniably parodies. They comment, at least in part, on  
28 the original works, transforming those works and giving them new meaning.

1 But Defendants' works would be sufficiently transformative even if they were  
2 deemed satires rather than parodies. Where the defendant's purpose in using a copyrighted  
3 work is so different from the plaintiff's goals in creating the original work in the first place,  
4 courts are much more likely to find fair use even if the new work seems to contain far more  
5 satire than parody. Thus, in *Blanch v. Koons*, 467 F.3d 244, 247 (2d Cir. 2006), the Second  
6 Circuit found fair use where an artist used a portion of a photographer's image—which had  
7 originally been used in a commercial advertisement—in a new work of art. There, the  
8 artist took a picture of a woman's legs, a picture that had originally been used in an  
9 advertisement in a travel magazine, and combined it with other images to make a piece of  
10 fine art. The piece of art did not comment directly on the original artist or travel magazines  
11 or even travel in general. It was, by all accounts, a very loose form of parody if parody at  
12 all.

13 Nevertheless, the Second Circuit found that the first fair use factor weighed in the  
14 defendant's favor. "Koons asserts—and Blanch does not deny—that his purposes in using  
15 Blanch's image are sharply different from Blanch's goals in creating it. The sharply  
16 different objectives that Koons had in using, and Blanch had in creating, 'Silk Sandals'  
17 confirms the transformative nature of the use." *Id.* at 252 (internal citation omitted).  
18 Indeed, while it is true that Koons' work did not clearly and directly target Blanch's work  
19 to hold it up to ridicule, Koons "us[ed] Blanch's image as fodder for his commentary on the  
20 social and aesthetic consequences of mass media" and thus he used the existing image "in  
21 the creation of new information, new aesthetics, new insights and understandings." *Id.* at  
22 253. In fact, too close a focus on whether the work is parody or satire is not productive.  
23 "We have applied *Campbell* in too many non-parody cases to require citation for the  
24 proposition that the broad principles of *Campbell* are not limited to cases involving  
25 parody.... The question is whether Koons had a genuine creative rationale for borrowing  
26 Blanch's image, rather than using it merely 'to get attention or to avoid the drudgery in  
27 working up something fresh.'" *Id.* at 255.

1 Here, Defendants' parodies target Mr. Henley's songs much more directly than the  
2 artist in *Blanch* targeted the original photographer's work. By taking Mr. Henley's original  
3 songs—which were infused with political meaning—and giving them a very different  
4 political meaning, all while attacking the very politicians and policies that Mr. Henley is  
5 publicly identified with and has so vocally supported, Defendants' songs clearly transform  
6 the original works into something different. Indeed, the very decision to target Don Henley  
7 was a critical, creative decision. DeVore Decl., ¶ 10. If Defendants merely wanted to use a  
8 popular tune in order to avoid having to write their own composition, they could have  
9 chosen any number of compositions. *Id.* As Henley himself concedes, he has written 30-  
10 40 songs as popular as the two in question, and Defendants could have chosen from  
11 thousands of songs written over the last 25 years that were just as popular and famous.  
12 Arledge Decl., Exh. 1 at 139:13 to 141:21. They chose Henley's work because it was  
13 Henley and celebrities like him who are associated in the public eye with Ms. Boxer, Mr.  
14 Obama and other prominent liberal politicians. DeVore Decl., ¶ 10. Thus, Defendants had  
15 a "clear creative rationale" for using Plaintiff's compositions, and the first fair use factor  
16 weighs heavily in Defendants' favor.

17 **C. Defendants' works were pure political speech**

18 Finally, the first fair use factor weighs in Defendants' favor for an additional reason:  
19 Defendants' videos were pure political speech. The first fair use factor "concerns the  
20 purpose and character of the use, including whether such use is of a commercial nature or is  
21 for nonprofit educational purposes." 17 U.S.C. § 107. A fair use analysis does not involve  
22 bright-line tests, and a use can be "fair" even if it is a commercial use; likewise, a use can  
23 fall outside of the fair use doctrine even if it is educational or otherwise in the category of  
24 uses that are more likely to constitute fair use. "[T]he preamble to § 107 provides an  
25 illustrative, though not limitative, listing [of such uses] which includes 'criticisms,  
26 comment, news reporting, teaching (including multiple copies for classroom use),  
27 scholarship, or research.'"  
28

1 Even so, courts have concluded that political speech, like scholarship or news  
2 reporting, is noncommercial and a type of use that is more conducive to a finding of fair  
3 use. *See MasterCard Intern. Inc. v. Nader 2000 Primary Committee, Inc.*, 2004 WL  
4 434404, 12 (S.D.N.Y. 2004) (finding Ralph Nader’s use of Mastercard’s copyrighted  
5 material from its “priceless” line of advertisements to be noncommercial and parodic and  
6 therefore protected by the fair use doctrine); *Keep Thomson Governor Comm. v. Citizens*  
7 *For Gallen Comm.*, 457 F.Supp. 957, 961 (D. N.H. 1978) (The court held that defendant’s  
8 use of plaintiff’s copyrighted material was protected by the fair use doctrine. “The use by  
9 the defendant of a portion of the plaintiff’s political advertisement is clearly part of a  
10 political campaign message, non-commercial in nature, and First Amendment issues of  
11 freedom of expression in a political campaign are clearly implicated.”). Here, Defendants’  
12 videos were not sold or offered for sale. DeVore Decl., ¶ 11. Like the political  
13 advertisements in *MasterCard* and *Keep Thomson Governor*, they were pure political  
14 speech, used in a Senate campaign to reach voters with Mr. DeVore’s political message.  
15 *Id.* In fact, as Henley himself concedes, they were concise and effective efforts at making a  
16 political statement:

17 Q: “After finding out that Mr. DeVore had used these two songs in videos, did  
18 you make any effort to figure out what Mr. DeVore’s campaign stood for?”

19 A: “Well, the videos made it pretty clear.”

20 Q: “Didn’t require much more in-depth research?”

21 A: “Not much more than that, no.”

22 Arledge Decl., Exh. 1 at 68:5-10. The videos here were non-commercial videos containing  
23 core political speech, where the First Amendment protections are at their greatest. Thus,  
24 the purpose and character of Defendants’ use of Plaintiffs’ music is consistent with the fair  
25 use doctrine.

26 **2. The nature of the copyrighted work**

27 The original musical compositions are close to the core of intended copyright  
28 protection, so this factor probably weighs in Plaintiffs’ favor. But this second factor also

1 means very little. In the Supreme Court's words, it "is not much help in this case, or ever  
2 likely to help much in separating the fair use sheep from the infringing goats in a parody  
3 case, since parodies almost invariably copy publicly known, expressive works." *Campbell*,  
4 510 U.S. at 586; *Dr. Seuss*, 109 F.3d at 1402 ("[T]his factor typically has not been terribly  
5 significant in the overall fair use balancing....").

6 **3. The amount and substantiality of the portion used in relation to the**  
7 **copyrighted work as a whole**

8 The third fair use factor is a strange amalgam of the first and fourth factors. Here,  
9 "attention turns to the persuasiveness of a parodist's justification for the particular copying  
10 done, and the enquiry will hearken back to the first of the statutory factors, for, as in prior  
11 cases, we recognize that the extent of permissible copying varies with the purpose and  
12 character of the use." *Campbell*, 510 U.S. at 586-87. The third factor also takes into  
13 account the fourth. "The facts bearing on this factor will also tend to address the fourth, by  
14 revealing the degree to which the parody may serve as a market substitute for the original  
15 or potentially licensed derivatives." *Id.* at 587.

16 Courts have recognized that in the case of parody, a substantial use of the original  
17 material is often necessary. "When parody takes aim at a particular original work, the  
18 parody must be able to 'conjure up' at least enough of that original to make the object of its  
19 critical wit recognizable." *Id.* at 588. And in the case of musical parody, substantial  
20 copying is almost always necessary. "Like a speech, a song is difficult to parody  
21 effectively without exact or near-exact copying. If the would-be parodist varies the music  
22 or meter of the original substantially, it simply will not be recognizable to the general  
23 audience. This 'special need for accuracy,' provides some license for 'closer' parody."  
24 *Fisher v. Dees*, 794 F.2d 432, 439 (9<sup>th</sup> Cir. 1986). Moreover, "there is no requirement that  
25 'parodists take the *bare minimum* amount of copyright material necessary to conjure up the  
26 original work." *Burnett v. Twentieth Century Fox Film Corp.*, 491 F.Supp.2d 962, 970  
27 (C.D. Cal. 2007).

1 Here, Defendants supplied new lyrics to the original musical compositions. DeVore  
2 Decl., ¶ 12. To parody the original works properly—that is, to express the political point  
3 Mr. DeVore was making and target Mr. Henley and his political allies—Defendants needed  
4 to use the underlying musical compositions. *Id.* Moreover, practically speaking it would  
5 not be possible to use only a portion of the song. Using only the first 30 seconds, for  
6 example, would have required Defendants either to switch in mid-song to a new musical  
7 composition entirely—which would have been confusing and would have diluted the  
8 parodic impact of the work—or they would have had to cut their parody short, which would  
9 not have allowed them to convey all of the political and parodic points they wished to  
10 make. *Id.* Thus, Defendants’ use of the songs was not excessive.

11 Also important to the third fair use factor is the extent to which the parody can or  
12 does serve as a market substitute for the original. Because this is the focus of the fourth  
13 fair use factor, we turn there directly.

14 **4. The effect of the use upon the potential market for or value of the**  
15 **copyrighted work**

16 This factor “requires courts to consider not only the extent of market harm caused by  
17 the particular actions of the alleged infringer, but also ‘whether unrestricted and widespread  
18 conduct of the sort engaged in by the defendant ... would result in a substantially adverse  
19 impact on the potential market’ for the original.” *Campbell*, 510 U.S. at 590. Of course,  
20 only a particular type of harm is at issue. While parody is capable of destroying the value  
21 of an underlying work by exposing it as foolish, fair use is not concerned with that type of  
22 market impact. “[T]he role of the courts is to distinguish between ‘biting criticism [that  
23 merely] suppresses demand [and] copyright infringement[, which] usurps it.’” *Id.* at 592.  
24 “[T]he economic effect of a parody with which we are concerned is not its potential impact  
25 to destroy or diminish the market for the original—a bad review can have that effect—but  
26 rather whether it *fulfills the demand* for the original. Biting criticism suppresses demand;  
27 copyright infringement usurps it. Thus, infringement occurs when a parody supplants the  
28



1 original in markets the original is aimed at, or in which the original is, or has reasonable  
2 potential to become, commercially valuable.” *Fisher*, 794 F.2d at 438.

3 This analysis applies whether the alleged harm is to the original work or the market  
4 for licenses to create derivative works. “[T]he only harm to derivatives that need concern  
5 us, as discussed above, is the harm of market substitution. The fact that a parody may  
6 impair the market for derivative uses by the very effectiveness of its critical commentary is  
7 no more relevant under copyright than the like threat to the original market.” *Campbell*,  
8 510 U.S. at 593.

9 Here, there is no evidence that consumers will see Defendants’ parody videos as  
10 substitutes for the original works. Being that the songs are not sold on CD’s, on iTunes or  
11 anywhere else, it would seem impossible for them to fulfill the market niche of the  
12 originals. DeVore Decl., ¶ 13. In addition, and probably more importantly, Defendants’  
13 versions are not intended to be and never will be Top 40 hits. Defendants used karaoke  
14 tracks and an amateur singer to make blunt, political statements. *Id.* Plaintiffs agree—as  
15 they must—that there is no reason to believe the public will hear Defendants’ videos and  
16 see them as viable alternatives for their recordings of “The Boys of Summer” and “All She  
17 Wants to Do Is Dance.” Indeed, Plaintiffs were unanimous in their disdain for the quality  
18 of the parody recordings. Arledge Decl., Exh. 1 at 9:4-13 (Henley didn’t think much of the  
19 quality of the recording, encourages Justin Hart to “keep his day job”) and 103:20 to  
20 104:14 (Henley is not concerned that somebody will mistake Defendants’ version for the  
21 originals nor is he concerned that somebody might prefer Defendants’ versions to his  
22 originals); Exh. 4 at 14:15 to 16:4 (According to Campbell, vocals were “pedestrian,  
23 amateur”) and 82:7 to 83:1 (background track “sounded cheaper and less good.”); Exh. 5 at  
24 103:9-11 (According to Kortchmar, Hart’s vocal performance was “terrible.”)

25 Nor do Plaintiffs have any evidence that Defendants’ parodies have actually  
26 decreased the sales of the original songs:

27 Q: “Do you believe that people are buying less of your music because of what  
28 Defendants did when making those videos?”

1 A: "I don't know."

2 Q: "Do you have any evidence that would lead you to believe that people are  
3 buying less of your music because of the defendants' videos?"

4 A: "Not at this point, no."

5 *Id.*, Exh. 1 at 120:22 to 121:4; *see also id.*, Exh. 5 at 52:8-18 (Kortchmar has no evidence  
6 he has lost money as a result of the videos) and 103:12-21 (He does not believe people will  
7 be interested in having Defendants' version of his song rather than Henley's version.).  
8 Also, Mr. Henley is clear that he does not license his songs for commercial purposes, so  
9 there is no risk that Defendants' works will somehow affect the market for licensing  
10 Henley's works. *Id.*, Exh. 1 at 82:8-15; 91:1-9.<sup>3</sup>

11 There is, then, no evidence that the parody videos are market substitutes for the  
12 originals, and the fourth fair use factor weighs heavily in Defendants' favor.

13 Because the fair use factors weigh heavily in Defendants' favor, and because there  
14 are no disputed issues of material fact, this Court can and should conclude that Defendants'  
15 videos are fair use under the Copyright Act.

16 **III. PLAINTIFFS HAVE NO ARGUMENT THAT THE ALLEGED**  
17 **INFRINGEMENT WAS WILLFUL**

18 For the reasons set forth above, this Court should conclude that, as a matter of law,  
19 Defendants' use of Plaintiffs' copyrighted works was fair and permissible under the  
20 Copyright Act. But even if this Court were to reach a different conclusion, it is clear that  
21 under the facts of this case, Plaintiffs have no evidence to support their argument that  
22 Defendants are liable for willful infringement and thus subject to enhanced statutory  
23 damages. For purposes of the Copyright Act, "the term 'willful' refers to conduct that  
24

25 <sup>3</sup> Plaintiff Kortchmar says he would like to license his songs, but Defendants' use has no  
26 effect on him because (1) although he has been interested in licensing his songs, in 25 years  
27 nobody has ever expressed any interest in licensing "All She Wants to Do Is Dance," and  
28 (2) he would ask Henley for permission first anyway, and Henley has already made clear  
his opposition to any such licensing opportunities. Arledge Decl., Exh. 5 (Kortchmar  
Deposition) at 110:19 to 111:14, 117:2 to 118:4, and 135:18-25.

1 occurs ‘with knowledge that the defendant's conduct constitutes copyright infringement.’”  
2 *Columbia Pictures Television v. Krypton Broad.*, 106 F.3d 284, 293 (9th Cir.1997). Here,  
3 in light of the compelling evidence that Defendants’ works are transformative works  
4 entitled to protection under the fair use doctrine, and in light of the uncontradicted evidence  
5 that Defendants believed their works were covered by the fair use doctrine, there is no basis  
6 for a factfinder to conclude that Defendants willfully infringed Plaintiffs’ copyrighted  
7 works. Thus, Defendants are entitled to partial summary judgment on this issue.

8 **IV. PLAINTIFFS’ CONTRIBUTORY AND VICARIOUS COPYRIGHT**  
9 **INFRINGEMENT CLAIMS ALSO FAIL**

10 Plaintiffs allege claims for contributory and vicarious copyright infringement in  
11 addition to direct infringement. Both vicarious and contributory copyright infringement  
12 require an act of direct infringement by someone and, in the case of contributory  
13 infringement, material contribution to the infringement by the defendant, or in the case of  
14 vicarious infringement, the defendant’s exercise of control over the direct infringer and a  
15 direct financial benefit to the defendant from the infringement. *See, e.g., MGM Studios,*  
16 *Inc. v. Grokster Ltd.*, 380 F.3d 1154, 1160 (9th Cir.2004) and *Perfect 10, Inc. v.*  
17 *Amazon.com, Inc.*, 487 F.3d 701, 729 (9th Cir.2007). Here, the only works that are alleged  
18 to have infringed are the videos produced by the DeVore campaign. Arledge Decl., ¶ 2.  
19 Because those works must be considered fair use under the Copyright Act, there is no direct  
20 infringement, and the vicarious and contributory claims also fail.

21 **V. HENLEY’S LANHAM ACT CLAIM FAILS BECAUSE DEFENDANTS DID**  
22 **NOT MISAPPROPRIATE A DISTINCTIVE ATTRIBUTE OF HIS,**  
23 **BECAUSE HENLEY’S CLAIM IMPERMISSIBLY STRETCHES THE**  
24 **LANHAM ACT INTO THE REALM OF COPYRIGHT, AND BECAUSE**  
25 **HENLEY HAS NO EVIDENCE OF ACTUAL MALICE**

1           **A. Henley has no evidence that Defendants misappropriated a “distinctive**  
2           **attribute”**

3           Henley alleges that Defendants misappropriated his identity in their parody videos  
4 and thereby falsely implied that Henley endorsed the videos or Mr. DeVore’s campaign.  
5 To prevail on such a claim, Henley must prove that Defendants misappropriated a  
6 distinctive attribute of his. “[C]ourts have recognized false endorsement claims brought by  
7 plaintiffs, including celebrities, for the unauthorized imitation of their *distinctive attributes*,  
8 where those attributes amount to an unregistered commercial ‘trademark.’” *Waits v. Frito-*  
9 *Lay, Inc.*, 978 F.2d 1093, 1106 (9<sup>th</sup> Cir. 1992) (emphasis added). “A false endorsement  
10 claim based on the unauthorized use of a celebrity’s identity is a type of false association  
11 claim, for it alleges the misuse of a trademark, *i.e.*, a symbol or device such as a visual  
12 likeness, vocal imitation, *or other uniquely distinguishing characteristic*, which is likely  
13 to confuse consumers as to the plaintiff’s sponsorship or approval of the product.” *Id.* at  
14 1110 (emphasis added).

15           In Defendants’ Rule 12(b)(6) motion to dismiss, they argued that Henley had not  
16 alleged any misappropriation of a distinctive attribute—for example Henley’s name,  
17 likeness, voice, or an impersonation of his likeness or voice. Henley argued in opposition  
18 that Defendants misappropriated a particular style of playing the songs in question: “The  
19 close simulation – rhythmically, sonically, stylistically – of Henley’s familiar instrumental  
20 backing tracks for “The Boys of Summer” and “All She Wants to Do Is Dance” could  
21 easily be mistaken for the original renditions and thus give rise to the inference that Henley  
22 licensed, and therefore approved, the content and message of the Boys of Summer and  
23 Dance Videos.” *See* Henley’s Opposition to Defendants’ Motion to Dismiss at 11-12.

24           This Court denied the motion to dismiss, finding that Henley’s allegation in the  
25 complaint that Defendants’ video “mimics Henley’s recorded performance of ‘The Boys of  
26 Summer’ music” was just enough to survive at the pleading stage. *See* July 8, 2009 Order  
27 Denying Defendants’ Motion to Dismiss (“Order”) at 13. “[A]lthough it is a close  
28 question, the Court finds that the allegation of mimicking performance is sufficient for

1 purposes of pleading distinctive attributes in this case. For example, it may be that the  
2 videos mimic Henley's voice, as in Waits.... In other words, the Court finds that the  
3 question of whether the videos in fact imitate distinctive attributes is better resolved on a  
4 more detailed record." *Id.* at 14.

5 Henley's argument was weak at the pleading stage; it is untenable at summary  
6 judgment. Indeed, in a request for admission, Henley was forced to concede that his  
7 Lanham Act claim is *not* based on an allegation that Defendants misappropriated one of his  
8 distinctive attributes: "Plaintiff Henley admits that, as of the date of this response, Plaintiff  
9 Henley's Lanham Act false endorsement claim, as alleged in the First Amended Complaint  
10 and described in the Letter, is not based on an allegation that Defendants used a 'distinctive  
11 attribute' of Plaintiff Henley..." Arledge Decl., Exh. 2 (RFA No. 7).

12 Henley should have made this concession at the motion to dismiss stage, thus saving  
13 everybody's time and money, and he certainly has no choice but to make it now. There is  
14 simply no evidence whatsoever that Defendants used any distinctive attribute of his.  
15 DeVore Decl., ¶ 14. Henley agrees that there is no reason to believe someone would  
16 mistake Defendants' recordings for the originals, and he concedes Defendants did not try to  
17 mimic his voice. Arledge Decl., Exh. 1 at 104:2-5, 119:24 to 120:2. Henley cannot point  
18 to any other attribute of his that was taken. Because Henley has no evidence to prove that  
19 Defendants misappropriated a "distinctive attribute" of his, he has no false endorsement  
20 claim under the Lanham Act.

21 Henley has, therefore, resorted to arguing that he can prevail on his Lanham Act  
22 claim without such evidence. "Mr. Henley's false endorsement claim is that Defendants'  
23 use of well-known songs performed by, and widely associated with, Mr. Henley gives rise  
24 to confusion among the public as to whether Mr. Henley endorses or is somehow affiliated  
25 with Defendant DeVore or his campaign." Arledge Decl., Exh. 3. In other words, Henley  
26 asserts that Defendants are liable for false endorsement merely because they used songs  
27 associated with him, even though they do not use Henley or any of his distinctive attributes  
28 in any way. This is an untenable theory.

1           Indeed, the Second Circuit has squarely rejected a similar though much stronger  
2 case. In *Oliveira v. Frito-Lay, Inc.*, 251 F.3d 56 (2d Cir. 2001), Astrud Oliveira, known  
3 professionally as Astrud Gilberto, sued Frito-Lay for using her famous 1964 recording of  
4 “The Girl from Ipanema” in a television commercial. Although Gilberto apparently did not  
5 own the copyright in the recording—Frito-Lay procured a license to the recording from the  
6 copyright owner—Gilberto argues that she was closely identified with the song—so close,  
7 in fact, that she became known as “The Girl from Ipanema.” She claimed trademark rights  
8 in the recording and sued for false endorsement under the Lanham Act and for various state  
9 claims.

10           Note that Gilberto’s false endorsement claim was far stronger than Henley’s is here.  
11 Her association with the song was so strong that the title of the song became her nickname.  
12 (There is no evidence here that Mr. Henley is known as “The Boy of Summer.”) Most  
13 importantly, in Gilberto’s case the defendant actually used her recording. It was her voice,  
14 not someone else’s, that appeared in the commercial. By contrast, Defendants’ videos do  
15 not feature Mr. Henley’s voice, his musicianship, or anything else.

16           But despite those helpful facts—facts that make Gilberto’s claim much better than  
17 Henley’s—the Second Circuit rejected Gilberto’s false endorsement claim: “[W]e  
18 conclude that, at least upon the showing made by Gilberto, the law does not accord her  
19 trademark rights in the recording of her signature performance. *Plaintiff has not cited a*  
20 *single precedent throughout the history of trademark supporting the notion that a*  
21 *performing artist acquires a trademark or service mark signifying herself in a recording*  
22 *of her own famous performance.”* *Id.* at 62 (emphasis added). The song was undoubtedly  
23 identified with Gilberto, but many famous artists throughout history have been identified  
24 with their famous recordings. “Yet in no instance was such a performer held to own a  
25 protected mark in that recording.” *Id.* Simply put, “[t]he use of her recorded song has not  
26 taken her persona, and the district court properly concluded that she could sustain no claim  
27 of implied endorsement.” *Id.*

1 Henley makes the same claim as Gilberto, his (even weaker) argument is equally  
2 devoid of any authority, and the same conclusion must apply. Put simply, it appears no  
3 court has ever done what Henley asks this Court to do, and the Second Circuit rightly and  
4 squarely refused to be the first. Indeed, Henley's argument would be a stretch even if  
5 Gilberto had won before the Second Circuit. Even if courts are willing to accept that a  
6 famous musician's signature performance is a "trademark" worthy of protection, that rule  
7 would not help Mr. Henley. He is not alleging that Defendants used his signature  
8 performance. They did not use his performance at all. He is claiming trademark protection  
9 in sheet music; he is asserting—when it comes to the "All She Wants to Do Is Dance"  
10 song—the right to preclude others from using a song in which he does not even own the  
11 copyright. His argument is radical, unsupported, and untenable.

12 Finally, this Court could adopt Henley's argument only by ignoring the United States  
13 Supreme Court's warning in *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S.  
14 23 (2003). In this Court's earlier Order, it distinguished *Dastar* by noting that it was a  
15 "reverse passing off" case, not a false endorsement case, and the Court rightly pointed out  
16 that *Dastar* clearly envisioned the continuing viability of false endorsement claims. Order  
17 at 10. Defendants do not contend otherwise. But this Court also noted that *Dastar's*  
18 "concern lies with extending protection for uncopyrighted or expired works...." Order at  
19 11. This Court is right that *Dastar* expressed those concerns, though it would probably be  
20 more accurate to say that *Dastar* was more generally concerned with using the Lanham Act  
21 to destabilize Congress' determinations as to the scope of copyright law and what copyright  
22 owners are permitted to do with their property. And Henley's proposed extension of the  
23 Lanham Act risks doing exactly what *Dastar* sought to avoid.

24 As the Supreme Court has made clear on many occasions, "unless an intellectual  
25 property right such as a patent or copyright protects an item, it will be subject to copying."  
26 *Dastar*, 539 U.S. at 33. Indeed, it is critical that copyright and patent protections not be  
27 extended beyond the statutes that set forth those rights. "The rights of a patentee or  
28 copyright holder are part of a 'carefully crafted bargain,' under which, once the patent or

1 copyright monopoly has expired, the public may use the invention or work at will and  
2 without attribution. Thus, in construing the Lanham Act, we have been ‘careful to caution  
3 against misuse or overextension’ of trademark and related protections into areas  
4 traditionally occupied by patent or copyright.” *Id.* at 33-34 (internal citations omitted).

5 For this reason, the Court rejected Fox’s Lanham Act claim in *Dastar*. “[A]llowing  
6 a cause of action under § 43(a) for th[e] representation [that *Dastar* originated the creative  
7 work conveyed by the videos] would create a species of mutant copyright law that limits  
8 the public’s ‘federal right to ‘copy and to use’ expired copyrights.” *Id.* at 34. And  
9 extending quasi-copyright or quasi-patent protection under the Lanham Act would “create[]  
10 a species of perpetual patent and copyright, which Congress may not do.” *Id.* at 37.

11 If adopted by the courts, Henley’s theory would also upset Congress’ careful  
12 balancing determinations in the Copyright Act and would risk creating a species of mutant  
13 copyright law. Henley’s Lanham Act claim is not tied to any characteristic of his, such as  
14 his voice, name, image, etc. It is based solely on the allegation that the public associates  
15 Henley with two songs. If the Court adopts this theory, Henley can preclude others from  
16 using the songs—not his voice or his recordings; the songs themselves—in order to avoid  
17 alleged consumer confusion. This would allow Henley or others in his position to preclude  
18 third parties from using songs even if the song has no copyright protection—precisely the  
19 harm that *Dastar* sought to avoid. It would also allow him and others like him to preclude  
20 third parties from using songs even if the copyright owner has granted a license, effectively  
21 undercutting the rights granted by the Copyright Act. This also is the very type of harm  
22 that *Dastar* sought to avoid.

23 Indeed, there is evidence in this case that Plaintiff Kortchmar licensed “All She  
24 Wants to Do Is Dance” to the television show “American Idol,” without Henley’s  
25 permission and despite Henley’s disapproval. *See Arledge Decl.*, Exh. 1 at 90:25 to 91:20.  
26 As the owner of the copyright in that song, Kortchmar obviously had the right under the  
27 Copyright Act to do so. But if Henley’s Lanham Act theory prevails here, Kortchmar  
28 would, for all practical purposes, lose his rights under the Copyright Act. This is true



1 because while Kortchmar may own the copyright in the song, Henley could successfully  
2 argue that he recorded the most famous version of the song, that the song is associated with  
3 him, and that people may therefore believe that he somehow sponsored or endorsed  
4 American Idol. “American Idol” would therefore be precluded from using the song despite  
5 the fact that the copyright owner is ready, willing and otherwise able to license it. This is  
6 the very type of meddling in copyright law that *Dastar* warned courts not to countenance.  
7 False endorsement claims must be tethered to the use of the plaintiff’s personality—his or  
8 her distinctive characteristics—otherwise it devolves into little more than a new, court-  
9 created species of copyright protection. This Court must reject Henley’s Lanham Act  
10 claim.

11 **B. Henley has no evidence to prove actual malice**

12 Because Don Henley is a public figure and Defendants’ videos were noncommercial  
13 speech, Henley can only prevail on his Lanham Act claim by proving with clear and  
14 convincing evidence that Defendants’ videos were made with actual malice. *Hoffman v.*  
15 *Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1184-85 (9<sup>th</sup> Cir. 2001); *Kournikova v. General*  
16 *Media Comm., Inc.*, 2002 WL 31628027 \*6 (C.D. Cal. 2002).

17 Don Henley is undeniably a public figure. He is a “preeminent songwriter and  
18 recording artist, [and] is a founding member and lead singer of the Eagles, the band  
19 credited with recording the largest-selling album ever in the United States.” First Amended  
20 Complaint (“FAC”) at ¶ 25. Henley has also had “a remarkable solo career,” with multi-  
21 platinum albums and Grammy awards. *Id.* ¶ 26. Because Henley is a public figure, if  
22 Defendants’ parody videos are noncommercial speech, Henley must prove actual malice by  
23 clear and convincing evidence to prevail on his Lanham Act claim.

24 Defendants’ videos are noncommercial speech. “‘Commercial speech’ has special  
25 meaning in the First Amendment context. Although the boundary between commercial and  
26 noncommercial speech has yet to be clearly delineated, the ‘core notion of commercial  
27 speech’ is that it ‘does no more than propose a commercial transaction.’” *Hoffman*, 255  
28 F.3d at 1184. Here, it is undeniable that Defendants’ videos do more than simply propose a

1 commercial transaction; they are core political speech. DeVore Decl., ¶11. The videos  
2 were created and publicized by a candidate for the United States Senate and contain the  
3 candidate's criticisms of the policies of his opponent and the President of the United States.  
4 *Id.*, ¶¶ 1-2. Under the law in this circuit, those facts are more than enough to qualify the  
5 videos as noncommercial speech. *See, e.g., Hoffman*, 255 F.3d at 1185-86 (The use of  
6 Dustin Hoffman's image in a for-profit magazine was noncommercial speech because it  
7 was not used "in a traditional advertisement printed merely for the purpose of selling a  
8 particular product.... Viewed in context, the article [in which Hoffman's image appeared]  
9 as a whole is a combination of fashion photography, humor, and visual and verbal editorial  
10 comment on classic films and famous actors. Any commercial aspects are 'inextricably  
11 intertwined' with expressive elements, so they cannot be separated out 'from the fully  
12 protected whole.'").<sup>4</sup>

13 Because Mr. Henley is a public figure, and because the videos in question are  
14 noncommercial speech, Mr. Henley must prove actual malice by clear and convincing  
15 evidence in order to prevail on his false endorsement claim. This means that it is not  
16 enough for Mr. Henley to provide evidence of consumer confusion; it is not enough for him  
17 to show that it is likely that some members of the public could have believed he sponsored  
18 or endorsed the videos. Instead, Mr. Henley must prove by clear and convincing evidence  
19 that Defendants **intended to confuse the public** into believing that Henley actually  
20 sponsored or endorsed the videos. "Mere negligence is not enough to demonstrate actual  
21 malice. '[S]ubjective or actual intent is required ... and there is no actual malice where  
22 [defendants] unknowingly mislead the public.'" *Id.* at 1187 (internal citations omitted); *see*  
23 *also Kournikova*, 2002 WL 31628027 at \*9 ("The relevant inquiry for Plaintiff's false  
24 endorsement claim is whether Plaintiff established, by clear and convincing evidence, that  
25

26 <sup>4</sup> Indeed, the *Hoffman* court noted that the issue of actual malice does not arise in most right  
27 of publicity cases (and false endorsement cases), "because the challenged use of the  
28 celebrity's identity occurs in an advertisement that 'does no more than propose a  
commercial transaction' and is clearly commercial speech." *Id.* at 1185 (citing *Waits* and  
other cases for this proposition).

1 Defendant intended to confuse consumers into believing that Kournikova actually endorsed  
2 Penthouse (i.e., voluntarily posed for the photographs, or otherwise approved Penthouse's  
3 use of her identity."); *see also Solano v. Playgirl, Inc.*, 292 F.3d 1078, 1084-85 (9<sup>th</sup> Cir.  
4 2002).

5 Here, Henley has no evidence that Defendants actually intended to mislead the  
6 public into believing that Henley sponsored or endorsed the videos. Defendants'  
7 undisputed testimony is that they wanted to mock Henley, not claim his support. DeVore  
8 Decl., ¶¶ 10-12, 15. And clearly this must be right. Chuck DeVore is a conservative  
9 Republican candidate running in a Republican primary. *Id.* The principal focus of his  
10 campaign is showing that he is the one true conservative in the race. *Id.* And, as Henley  
11 himself concedes, Henley is a well-known Democrat whose involvement in Democratic  
12 causes is well known in Southern California. *Id.*; *see also Arledge Decl.*, Exh. 1 at 59:8 to  
13 62:2. In fact, Henley himself concedes that he doubts his endorsement would help a  
14 conservative candidate in Orange County. *Arledge Decl.*, Exh. 1 at 64:19 to 65:1. Simply  
15 put, not only does Henley lack evidence that Defendants intentionally tried to leave the  
16 impression that Henley supported DeVore's campaign, the very idea is preposterous.

17 The undisputed evidence is that Defendants targeted Henley for their parodies  
18 precisely because he is a well-known, outspoken liberal who promotes candidates and  
19 policies very different from Mr. DeVore's. The goal was to transform Henley's original,  
20 politically infused works to mock Mr. Henley and the politicians he supports, not convince  
21 the public that Henley is promoting DeVore's candidacy. (Indeed, little could be worse for  
22 Mr. DeVore's candidacy before a GOP primary than convincing voters that Mr. Henley is  
23 on his side.) Mr. Henley does not come close to offering evidence that would prove actual  
24 malice by clear and convincing evidence.

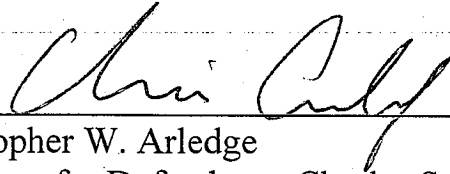
## 25 VI. CONCLUSION

26 For all of the foregoing reasons, Defendants are entitled to summary judgment on all  
27 of Plaintiffs' claims. In the alternative, Defendants seek partial summary judgment as to  
28 any of the claims on which this Court believes Defendants are entitled to judgment.

1 Dated: April 9, 2010

ONE LLP

2  
3  
4 By:



Christopher W. Arledge

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