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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DON HENLEY, MIKE CAMPBELL and DANNY KORTCHMAR,

Plaintiffs,

v.

CHARLES S. DEVORE and JUSTIN HART,

Defendants.

Case No. SACV09-0481 JVS (RNBx)

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

Date: May 17, 2010
Time: 1:30 P.M.
Ctrm: Hon. James V. Selna

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INTRODUCTION

This case presents the question whether Defendants Charles DeVore and Justin Hart are entitled to take valuable, popular songs belonging to Plaintiffs Don Henley, Mike Campbell and Danny Kortchmar, change some words, and then use the songs as campaign advertisements. The answer is surely, "No." If the law were to sanction this conduct, any person could, by making minor changes, use another's copyrighted song without permission to promote any person, cause or thing.

Defendants' assertion that their Internet videos, which feature full-length renditions of Plaintiffs' songs targeting President Barack Obama and Senator Barbara Boxer for the purpose of promoting DeVore's senatorial ambitions, are fair use "parodies" of Plaintiffs' songs is an excuse manufactured after the fact. Defendants did not select Plaintiffs' popular musical compositions because they sought to mock, criticize or comment on them. Rather, Defendants took Plaintiffs' songs as instantly recognizable vehicles to broadcast their messages, which have no relation to Plaintiffs or their artistic works. Moreover, the record is filled with evidence that Defendants deliberately pursued their infringing conduct in the hope that Henley would take legal action, and thereby attract media attention to DeVore's campaign.

It was only after Defendants were served in the instant action – and sought legal counsel – that they tried to position their campaign videos as "parodies" of the two works they appropriated, Henley's well-known songs, "The Boys of Summer" and "All She Wants to Do Is Dance." But under the Supreme Court's test in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), to qualify as a parody for purposes of fair use, the newer work has to comment on or criticize the original. *Id.* at 580. Defendants' videos do no such thing.

Moreover, by incorporating Plaintiffs' songs into their promotional videos, Defendants have falsely suggested an association between Henley, the recording artist associated with those songs, and the DeVore campaign. This

misappropriation of Henley's public persona and celebrity to promote DeVore's political aspirations violates Henley's right to associate himself with only those causes that he may choose to support, as protected by the Lanham Act.

What this case is *not* about is Defendants' right to engage in political speech or criticism. Defendants are free to comment on Barack Obama, Barbara Boxer, Don Henley or whatever other subject they choose. But just as they are not allowed to erect Chuck DeVore billboards on other people's property without permission, so they are not entitled to affix their campaign messages to Plaintiffs' copyrighted songs.

Plaintiffs request that this Court grant partial summary judgment holding Defendants liable for the willful infringement of Plaintiffs' musical compositions, in violation of the Copyright Act, 17 U.S.C. § 101 *et seq.*, and for falsely suggesting an association with Henley in violation of the Lanham Act, 15 U.S.C. § 1125(a).[1]

STATEMENT OF FACTS

The following material facts are uncontroverted in this case:

The Parties and Copyrighted Works at Issue

This case concerns two valuable copyrighted musical compositions, "The Boys of Summer" ("Boys of Summer"), written by Plaintiffs Don Henley and Mike Campbell, and "All She Wants to Do Is Dance" ("Dance"), written by Plaintiff Danny Kortchmar.[2] Both of these songs appear on Henley's multi-platinum solo

[1] Following the parties' conference pursuant to Local Rule 7-3, Plaintiff Henley agreed to dismiss with prejudice his claim under California Business and Professions Code § 17200 (the Eighth Claim for Relief in the First Amended Complaint), and Defendants agreed to dismiss with prejudice all six causes of action asserted in their Counterclaims.

[2] A sound recording of a musical composition such as Boys of Summer or Dance embodies two distinct copyrights – one in the recorded performance of the song, typically owned by a record company, and the second in the underlying musical composition, typically owned by the songwriter and/or a music publisher.

album, *Building the Perfect Beast*, originally released in 1984, and both were top-ten hits on the Billboard charts. (Pls.' Statement of Uncontroverted Facts and Conclusions of Law ("St.") ¶ 15.)

Henley is a world-famous songwriter, recording artist, and performer. In addition to his extraordinary success as a founding member of the Eagles, the band credited with the best-selling rock album of all time, he has enjoyed a remarkable career as a solo artist, winning a Grammy Award for Boys of Summer in 1986. (St. ¶¶ 1-3.) Campbell, a member of Tom Petty and the Heartbreakers, is a gifted and successful songwriter, recording artist and producer who has worked with such notable artists as Stevie Nicks and Roy Orbison, in addition to Henley. (St. ¶¶ 4-5.) Likewise, Kortchmar is a renowned and sought-after songwriter, recording artist and producer, who, in addition to Henley, has collaborated with James Taylor, Jackson Browne, Billy Joel and others. (St. ¶¶ 6-7.)

Boys of Summer and Dance are registered with the U.S. Copyright Office. (St. ¶ 16.) Henley and Campbell jointly own the copyright in Boys of Summer, and Kortchmar is the beneficial copyright owner of Dance, within the meaning of 17 U.S.C. § 501(b). (St. ¶¶ 17-18.) Plaintiffs strive to make their music appealing to a large universe of fans. (St. ¶ 11.) They earn significant royalties from the licensed sales, performances and other authorized uses of Boys of Summer and Dance. (St. ¶ 10.) Plaintiffs are careful in licensing their songs because they want to protect the value of their works. They do not license their songs for political causes because it would alienate fans and purchasers of their music. (St. ¶ 12.)

Henley composed the vocal melody and lyrics to the Boys of Summer while driving down the 405 freeway in Los Angeles listening to a tape of the instrumental music for the song, which had been given to him by Mike Campbell. (St. ¶ 19.) As the lyrics indicate, Boys of Summer is a nostalgic love song, in which the narrator reminisces about a summer romance with a young woman. Despite his desire not to "look back," the singer cannot resist recalling her image and remembering the

past. (St. ¶ 20.) The song includes a line about seeing a "Deadhead sticker on a Cadillac" because this was something Henley in fact observed as he was driving. (St. ¶ 21.) The lyrics to Boys of Summer are set forth in Exhibit 6 to the Declaration of Jacqueline Charlesworth ("Charlesworth Declaration").

Both the music and lyrics to Dance were written by Kortchmar, who presented the song to Henley to record for the *Building the Perfect Beast* album. (St. ¶ 22.) The lyrics to Dance – an upbeat song mainly interpreted by audiences to be about dancing – depict a couple who travel to an unspecified foreign country. Despite expressions of violence and unrest around them, all the woman wants to do "is dance," and "make romance." (St. ¶ 23.) The lyrics to Dance are set forth in Exhibit 8 to the Charlesworth Declaration.

Both Boys of Summer and Dance are instantly recognizable to a significant portion of the general public, and are closely associated in the public mind with Henley, who made them famous and continues to perform them at live shows. (St. ¶ 25.) At live concerts, audiences recognize both songs as soon as the opening notes are played. (St. ¶ 26.) In addition to performing the songs live, Henley has appeared in authorized music videos featuring the Boys of Summer and Dance, which are available on YouTube and elsewhere. (St. ¶ 27.)

Defendant Charles DeVore is a California state assemblyman who is seeking the Republican nomination to run against U.S. Senator Barbara Boxer. (St. ¶ 32.) Defendant Justin Hart was hired by DeVore in late 2008 to be DeVore's director of Internet strategies and new media. (St. ¶ 33.) In this capacity, Hart's "primary goal" is to conduct online-based fundraising activities. (St. ¶ 35.) A second objective is to acquire "earned media" – publicity for which the campaign would otherwise have to pay – by "produc[ing] something and imply[ing] something that would catch the interest of the media." (St. ¶ 36.) Indeed, Defendants have placed the earned media value of the two videos at issue in this action – *i.e.*, the amount it would have cost to reach the same audience "through traditional political

advertising means" – at "tens of thousands, maybe hundreds of thousands, of dollars." (St. ¶ 37.)

In 2009, the *Wall Street Journal* ran an article about DeVore's use of new media in his campaign. Defendants purchased a license for approximately $3,500 to make reprints of the article for use by the campaign. (St. ¶ 47.)

Hart's compensation is directly tied to the amount of funds he raises for DeVore, because he receives a percentage of the donations for which he is responsible. (St. ¶ 38.) DeVore's campaign website includes a facility for making online donations. (St. ¶ 41.) Shortly after he was hired, Hart began producing a series of video ads to promote DeVore's campaign. (St. ¶ 39.) The videos are made available through chuckdevore.com (DeVore's campaign website), YouTube (which contains a link to DeVore's website), and other Internet sites. (St. ¶ 40.) As of the end of 2009, Hart had raised some $340,000 in online donations for DeVore, and in 2009 was paid between $120,000 to $140,000 by the DeVore campaign in connection with his online promotional activities. (St. ¶ 42.)

Defendants' Making and Exploitation of the Hope Video

In March 2009, DeVore noticed an Obama bumper sticker on a Prius car at a gas station. (St. ¶ 48.) According to DeVore – who was familiar with Boys of Summer from listening to Henley's music in his youth – this caused him to recall the line from Boys of Summer about seeing a "Deadhead" sticker on a Cadillac. (St. ¶ 49.) It then occurred to DeVore to "take [Henley's] work and to turn it for my purposes" by writing anti-Obama lyrics to the Boys of Summer. (St. ¶ 50.) To accomplish this, he displayed the Henley lyrics on his computer screen, and proceeded to revise the lyrics "line by line," resulting in a modified version of the lyrics that tracked the original song beginning, middle and end. (St. ¶ 51.) According to DeVore, "unlike the 2 Live Crew case," he had no intent to "mock" Henley's style. (St. ¶ 52.) Rather, DeVore was careful to copy the original song, "keeping the same cadence and rhyme." (St. ¶ 53.)

Perhaps unsurprisingly, given DeVore's process, most of the lyrics of the Henley/Campbell song remained unchanged, and were simply copied from the original into DeVore's version, as were the original rhyme scheme and syntax. (St. ¶ 54) DeVore's substitute lyrics to the Boys of Summer, titled "The Hope of November" ("Hope"), target President Obama, asserting that he has "broken promises," and questioning whether he is still worthy of the support he inspired at election time. (St. ¶ 55.) The Hope lyrics are set forth in Exhibit 7 to the Charlesworth Declaration.

At Hart's recommendation, Defendants decided to produce a campaign video based on the Henley/Campbell song, as modified by DeVore ("Hope Video"). (St. ¶ 56.) Defendants did not seek a license to use the song. (St. ¶ 57.) To make the video, Hart downloaded an instrumental-only, karaoke version of the Boys of Summer from Apple iTunes, entitled "Boys of Summer (Instrumental Version – Karaoke in the style of Don Henley)," which simulates the instrumentals of the original Henley track. (St. ¶ 58.) Next, Hart made a recording of himself singing DeVore's altered lyrics to the accompaniment of the karaoke track. Rather than depart from Henley's singing style, Hart did his best to mimic – or, to use Hart's word, "emulate" – Henley. (St. ¶ 59.)

As for the visual content of the video, Hart searched online sources for images to illustrate DeVore's changed lyrics. (St. ¶ 60.) The images selected by Hart included images of Obama, Nancy Pelosi and others. (St. ¶ 61.) Hart did not include any images of Henley or the other Plaintiffs, or any reference to the original song, in his selection of visual content. (St. ¶ 62.) Hart synchronized the visual images he found to his audio recording to produce the Hope Video. (St. ¶ 63.)

Except for shortening some instrumental-only segments, Hart incorporated all of the music from Boys of Summer into the Hope Video, including the famous instrumental opening of the song, over which Hart recorded a spoken introduction: "Hi, this is Justin Hart. I'm director of Internet strategies and new media for the

Chuck DeVore campaign. And we want to thank you, the thousands of supporters of Chuck DeVore, in his bid for the U.S. Senate. And to show you our appreciation, Chuck has prepared a very serious exposition on the financial crisis and political realities of our day under President Barack Obama." (St. ¶¶ 65-66.)

Throughout the video, Hart superimposed text displaying DeVore's altered lyrics. (St. ¶ 67.) In addition, at the conclusion of the video, with the karaoke track still playing, Hart added the written statement: "This was not what any of us bargained for is it? Time for real change in Washington. Time for Chuck DeVore. Paid for by DeVore for California." (St. ¶ 68.) This statement was included as "a summary of the campaign message" and because of federal guidelines concerning campaign ads. (St. ¶ 69.) Defendants posted the video to YouTube and other online sites. (St. ¶ 70.)

Although DeVore chose Boys of Summer as the "vehicle" for his Obama critique, as acknowledged by Hart, "different songs" could have been used to present the views expressed by Defendants in the Hope Video. (St. ¶¶ 71-72.) Use of a well-known popular song, however, was critical to success, because it allowed DeVore "to reach people in three minutes who would never read a position paper or a news release or listen to a 30 minute speech on the topic." (St. ¶ 73.)

On April 1, 2009, in an article he contributed to the entertainment-related website "Big Hollywood," DeVore included a link to the Hope Video – available on YouTube – accompanied by what DeVore described as "Obama parody lyrics set to Don Henley's 'Boys of Summer.'" (St. ¶ 74.) DeVore's lyrics were posted "with apologies to Don Henley" because, in DeVore's view, he was "taking [Henley's] work and . . . using it for something else." (St. ¶ 75.) DeVore's article also announced a contest, in which others were encouraged to make and submit "professional" versions of the video, with a winner to be selected by the campaign. (St. ¶ 76.)

Defendants' Response to Henley's Takedown Efforts

Upon becoming aware of the illegal and damaging use of his song by Defendants, Henley directed that a DMCA takedown notice be sent by legal counsel to YouTube on April 3, 2009, and YouTube complied with the notice by removing the Hope Video from its service. (St. ¶¶ 77-78.) At the time it was removed, the Hope Video had been viewed over 800 times in the United States and other countries. (St. ¶ 79.) Subsequently, Henley had to serve another DMCA notice to have the Hope Video removed from an additional site where it had been posted by the DeVore campaign. (St. ¶ 80.) During the period it was available online, the DeVore campaign received online donations. (St. ¶ 81.)

Upon learning from YouTube that the video had been removed at the request of Henley, DeVore "high-fiv[ed]" his communications director, Josh Treviño, because DeVore believed they "had struck a vein of gold in the campaign." (St. ¶ 82.) In Hart's words, "we laughed and we said that was exactly the effect we were hoping to parody here. This is great." (St. ¶ 83.) DeVore resolved to "make lemons into lemonade" by "try[ing] to make Henley the issue," thus hoping to gain "national recognition" and "earned media opportunities" based on Henley's celebrity. (St. ¶¶ 84-86.) In DeVore's view, if the Henley matter "became a national story," then the money might "come rolling in." (St. ¶ 87.) Excited by such a prospect, DeVore urged his staff to "[p]repare the press releases!" (St. ¶ 88.)

In moving ahead with his plan, DeVore was aware not only of the Supreme Court's *Campbell* decision, but also the Ninth Circuit's subsequent determination in *Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394 (9th Cir. 1997), that copying Dr. Seuss's work to comment on the O.J. Simpson trial did not constitute a parody. (St. ¶ 89.) As for Hart, he reported to DeVore that he had had dinner with an attorney friend who had indicated they could proceed with the counternotification. But Hart's friend – an in-house tax advisor, not a copyright lawyer – had not seen the video at the time of the dinner, consulted no legal

authority, and offered no opinion on fair use. (St. ¶ 90.) Instead, the friend had opined that it would be a "good" idea for Hart to hire an attorney. (St. ¶ 91.)

DeVore was also aware that, under the DMCA, his submission of the counternotification to YouTube would require Henley to file a lawsuit in order to prevent the Hope Video from being reposted. (St. ¶ 92.) "If Henley gets a legal injunction to restrain us, then better," DeVore emailed his staff. (St. ¶ 93.) This was because an injunction would "raise[] the stakes. It makes more attention on [sic] what would otherwise be a fairly anonymous legal action. And campaigns thrive on attention." (St. ¶ 94.) DeVore "made the calculation . . . that perhaps the earned media value [of the lawsuit] would outweigh the time and effort and diversion and campaign resources." (St. ¶ 95.)

DeVore drafted the April 7, 2009 counternotification to YouTube himself, and understood he was submitting it as a sworn statement under penalty of perjury, as required by the DMCA. (St. ¶ 96.) DeVore included the following characterization of the Hope Video as the basis of his counternotification: "'After the Hope of November is Gone' is an allowable music video parody of Barack Obama using Don Henley's 'The Boys of Summer' as a vehicle." (St. ¶ 97.)

On the same day he submitted his counternotification, DeVore posted another article on Big Hollywood, titled "Don Henley Strikes Back." In the article, DeVore took issue with YouTube's takedown of his "parody using 'The Boys of Summer' to lampoon President Obama," vowing to "look[] for every opportunity to turn any Don Henley work I can into a parody of any left tilting politician who deserves it." (St. ¶ 98.) DeVore also indicated he would arrange to have the Hope Video posted on another website, popmodal.com, and noted that the video was still available on one of his own websites, chuck76.com. (St. ¶ 99.) In an email to his staff, DeVore declared, "Let's rumble. I say we rifle through all of Mr. Henley's cateloge [sic] for material." (St. ¶ 100.)

Defendants' Making and Exploitation of the Tax Video

DeVore soon made good on his threat. He next modified the lyrics to Dance – which, as noted above, was written by Kortchmar – to criticize Senator Barbara Boxer. (St. ¶ 101.) Taking the same approach as before, DeVore fashioned a verse and chorus to correspond with each original verse and chorus, producing "All She Wants to Do Is Tax" ("Tax"). (St. ¶ 102.) Once again, most of the original lyrics were simply copied into the DeVore's version, as were Kortchmar's original rhyme scheme and syntax. (St. ¶¶ 103-04.)

DeVore's altered lyrics, which, according to DeVore's characterization, target Boxer's "penchant for raising taxes," reference various contemporary policy concerns tied to DeVore's anti-taxation campaign platform, such as cap-and-trade legislation, the carbon trading "scam," and global warming. (St. ¶¶ 105-06.) The lyrics to Tax are set forth in Exhibit 9 to the Charlesworth Declaration. Although Defendants used Dance as the vehicle to convey DeVore's criticism of Boxer's tax policies, again, as acknowledged by Hart, they could have used another song to provide their message. (St. ¶ 107.)

Despite the outstanding infringement concern with respect to the Hope Video – and the fact that no lawyer had confirmed the validity of their claim of fair use – Hart quickly assembled a new video incorporating Kortchmar's song with DeVore's modified lyrics ("Tax Video"). (St. ¶¶ 108-09.) Again, Defendants sought no permission from the copyright owner to use the song. (St. ¶ 110.) This time working in a professional recording studio, Hart recorded the Tax lyrics – again using an iTunes karaoke track simulating the instrumentals of the original Henley version, and again using the entire song except for some instrumental-only segments that he shortened. (St. ¶¶ 111-12.)

Next, Hart searched for online images to illustrate and "complement" DeVore's lyrics. (St. ¶ 114.) These included photos of Barbara Boxer, Al Gore and the Disney character Scrooge McDuck, as well as stock video footage which

Hart licensed, and for which he paid a fee. (St. ¶¶ 115-16.) As before, Hart did not choose any image of Henley or the other Plaintiffs to include in the video, or any image referencing the original song. (St. ¶ 117.) At the end of the video, Hart added the written statement: "Visit chuckdevore.com. Paid for by DeVore for California." (St. ¶ 118.) The Tax Video "parody of Barbara Boxer" was then posted on YouTube and elsewhere. (St. ¶ 119.)

DeVore and Hart actively promoted the Tax Video. On April 14, 2009, Hart sent an email to a list of approximately 40 "eLeaders" associated with the DeVore campaign – people who had signed up to help DeVore with fundraising and other activities – with a link to the new video, urging the recipients to "view our new viral video satire on Barbara Boxer." (St. ¶¶ 120-22.) Hart also distributed an electronic newsletter to the campaign's email list, in which he included a snapshot image from the video, and a link to the YouTube posting. (St. ¶ 123.) The email contained a link to chuckdevore.com, as well as a link directly to DeVore's donation page: "Help beat Boxer – Contribute to Chuck's campaign." (St. ¶ 124.)

The Tax Video had "viral" qualities and proceeded to spread rapidly through the Internet. (St. ¶ 125.) Embedded by third parties, such as Fox News, on their own websites, in less than twenty-four hours it achieved the YouTube status of third rising "News & Political" video in the world. (St. ¶¶ 126-27.) DeVore advertised this fact in an email sent to press contacts, explaining: "Based on rocker Don Henley's 'All She Wants to do is Dance,' 'All She Wants to do is Tax,' takes on Sen. Boxer's penchant for raising taxes." (St. ¶ 128.)

Further Takedown Requests and Filing of Lawsuit

On April 16, 2009, Warner/Chappell Music, Kortchmar's music publisher, sent a DMCA notice to YouTube requesting removal of the Tax Video, and YouTube complied. (St. ¶¶ 129-30.) At the time it was taken down, the Tax Video had exceeded 20,000 views in the United States and abroad. (St. ¶ 131.) The

DeVore campaign received online donations throughout the period that the Tax Video was available online. (St. ¶ 132.)

On April 17, 2009, Plaintiffs Henley and Campbell filed the instant action, asserting claims for willful copyright infringement based on Defendants' unlawful use of the Boys of Summer in the Hope Video. (St. ¶ 133.) In addition, Henley asserted claims for false endorsement under the Lanham Act based on the likelihood that viewers of the Hope and Tax Videos who recognized his music would assume he endorsed or approved of DeVore or his campaign. (St. ¶ 134.)

Now facing a federal lawsuit, Defendants still considered whether to "ratchet up the heat by posting [one of their videos] in numerous places" or whether to "take it to the next level" by "do[ing] another PARODY of a Henley song (this time of Henley himself)." (St. ¶ 135.) It was only after they were served in the instant action that DeVore and Hart finally took the step of retaining an attorney in connection with Plaintiffs' infringement claims. (St. ¶ 136.)

On July 17, 2009, DeVore submitted a counternotification to YouTube with respect to the Tax Video, again under penalty of perjury, stating that his "parody lyrics are critical of the cap-and-trade bill being considered in the U.S. Senate at this time, as well as my opponent in the U.S. Senate race, Sen. Barbara Boxer. As a result, the lyrics I wrote are substantially different than 'All She Wants to Do is Dance,' a song that was critical of U.S. foreign policy in the 1980s." (St. ¶¶ 137-38.) The Tax Video was subsequently restored by YouTube. (St. ¶ 139.) The version that was restored now included a written disclaimer, added by DeVore, stating that "Don Henley did not approve this message. Don Henley not only didn't approve this message, he doesn't approve of Chuck DeVore or any of Chuck DeVore's message. The feeling is mutual." (St. ¶ 140.) According to DeVore, this disclaimer was added, in part, to make it clear that the video "was not approved by Mr. Henley." (St. ¶ 141.)

On September 30, 2009, Plaintiffs filed their First Amended Complaint, which added Kortchmar as a third Plaintiff, and additional claims of copyright infringement with respect to Dance. (St. ¶ 142.) In conjunction with the filing of his infringement claim, a new DMCA notice was submitted to YouTube on Kortchmar's behalf with respect to the Tax Video. (St. ¶ 143.) YouTube complied by removing the Tax Video. (St. ¶ 144.)

Uncontroverted Expert Findings

Plaintiffs have retained several experts in this matter: Dr. Mark Rose, a professor of literature; Dr. Lawrence Ferrara, a musicologist; Mr. Jon Albert, a consultant in the licensing of celebrity talent and music rights; and Mr. Hal Poret, a survey specialist who conducted a study of viewer perception of the Hope Video and Tax Video. The following significant findings of Plaintiffs' experts are uncontroverted in the record.

The Hope Video targets and criticizes Barack Obama. (St. ¶ 146.) The Tax Video targets and criticizes Barbara Boxer and her tax policies. (St. ¶ 147.) Neither video mentions Henley or the other Plaintiffs. Neither video contains an image of Henley or the other Plaintiffs. (St. ¶ 148)

The instrumental music and melodies in the Hope and Tax Videos are slavishly copied and virtually identical to the corresponding music and melodies in the original compositions. (St. ¶ 149.) Defendants took far more musical expression than was necessary to evoke the originals. (St. ¶ 150.) The music in Defendants' videos does not build upon or, or add new or independent expression to, the originals. (St. ¶ 151.) Some two-thirds of the lyrics in Hope (65%), and three-quarters of the lyrics in Tax (74.7%), are identical to the original compositions and, in addition, the lyrics of Hope and Tax both closely copy the rhyme and syntax of the originals. (St. ¶ 152.)

Defendants' use of Plaintiffs' songs not only assured a larger audience for Defendants' campaign ads, but also increased the likelihood that viewers would

listen and be receptive to DeVore's messages. (St. ¶ 153.) Defendants' use of Plaintiffs' songs in the Hope and Tax Videos was a promotional, commercial use by advertising industry standards. (St. ¶ 154.)

Advertisers avoid songs that are already associated with particular products or causes, or that have political or controversial associations. (St. ¶ 155.) Defendants' uses, if not halted, would be harmful to the market for Plaintiffs' songs, because they politicize the songs and could alienate fans. (St. ¶ 156.) This is true both with respect to the market for secondary, or derivative, uses of the songs by potential licensees and advertisers, and with respect to the market for the original sound recordings. (St. ¶ 157.) Additionally, if permitted to continue, Defendants' uses would limit potential endorsement opportunities for Henley. (St. ¶ 158.)

The minimum fee a licensee would expect to pay for the short-term, Internet-only promotional use of Boys of Summer, such as Defendants' use in the Hope Video, would be $500,000. (St. ¶ 159.) The minimum a licensee would expect to pay for a similar use of Dance, such as Defendants' use in the Tax Video, would be $200,000. (St. ¶ 160.) The minimum an advertiser would expect to pay for Henley to endorse a product or cause in a short-term, Internet-only campaign is $500,000. (St. ¶ 161.)

According to a survey conducted by Plaintiffs, close to half (48%) of viewers of the Hope and/or Tax Videos who believe Don Henley (or the Eagles) to be the artist whose music was used in the video(s) mistakenly believe Henley endorsed the video(s), or authorized or approved the use of his music in the video(s). (St. ¶ 162.)

ARGUMENT

I. SUMMARY JUDGMENT IS APPROPRIATE IN THIS CASE

The facts material to Plaintiffs' claims of willful copyright infringement based on Defendants' unauthorized use of their songs, and Henley's claim of false endorsement under the Lanham Act, are not in dispute. This Court may, therefore,

grant partial summary judgment to Plaintiffs on the question of liability with respect Plaintiffs' copyright and Lanham Act claims. Fed. R. Civ. P. 56(a), (d)(2); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986); *Thrifty Oil Co. v. Bank of Am. Nat'l Trust & Savings Ass'n*, 310 F.3d 1188, 1194 (9th Cir. 2002). In particular, when the relevant facts are not in dispute, a defense of fair use "is appropriately decided on summary judgment." *Mattel Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 800 (9th Cir. 2003).

II. PLAINTIFFS HAVE INDISPUTABLY ESTABLISHED THE ELEMENTS OF INFRINGEMENT

"To establish infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original." *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.,* 499 U.S. 340, 361 (1991).

Plaintiffs Henley and Campbell own the copyright in Boys of Summer, which is registered with the U.S. Copyright Office. Because he is entitled to receive royalty payments for Dance from his music publisher, Kortchmar is the beneficial copyright owner of Dance, also registered with Copyright Office, and, as the beneficial owner, is entitled to sue for infringement. *See* 17 U.S.C. § 501(b); *Love v. Mail on Sunday*, No. 05-7798 ABC (PJWx), 2006 U.S. Dist. LEXIS 95456, at *28 (C.D. Cal. Aug. 16, 2006) (author who parts legal title in exchange for royalties is a beneficial owner).

It is undisputed that Defendants appropriated virtually all of the music of Boys of Summer and Dance, and the majority of the lyrics of both songs. Plaintiffs have plainly established the elements of infringement with respect to each of the works at issue in this case.

III. DEFENDANTS' "PARODY" FAIR USE DEFENSE IS SPECIOUS AND LEGALLY UNSUPPORTABLE

In defense of their wholesale takings of Plaintiffs' copyrighted songs for use in their campaign ads, Defendants assert that the Hope and Tax Videos are fair use

"parodies" of Plaintiffs' works. (*See* Defs.' Answer to Am. Compl., Affirmative Defenses ¶ 8; *see also* Defs.' Countercls. ¶¶ 6-20.)

In *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), the Supreme Court considered a rap group's borrowing of lyrics and musical riffs from Roy Orbison's song "Pretty Woman" to create a hip hop parody. The Court assessed the rap group's claim of fair use under the four-factor test prescribed by Section 107 of the Copyright Act, which considers: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion taken; and (4) the effect of the use upon the potential market for, or value of, the copyrighted work. *Id.* at 576-77; *accord Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1399 (9th Cir. 1997).

Not a single factor of the four-part fair use test favors Defendants in this case.

A. Defendants' Takings Were Not Parodies and Were of a Commercial Nature

Before being sued – and even in the counternotifications they sent to YouTube – Defendants repeatedly characterized the Hope Video and the Tax Video as "parodies" of "Barack Obama" and "Barbara Boxer" (or Boxer's tax policies), respectively. (St. ¶¶ 74, 97-98, 119, 138.) However, once confronted with the infringement lawsuit they sought – and once they finally retained legal counsel – they began claiming that their videos were fair use parodies of Plaintiffs' songs, or of Henley, instead. To quote the Ninth Circuit in rejecting a similar belated claim of parody, such a "post-hoc characterization" is "'completely unconvincing.'" *Dr. Seuss Enters.*, 109 F.3d at 1403 (9th Cir. 1997) (quoting district court).

The question of parody is addressed under the first factor of the four-part fair use test, which, as noted above, considers "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes." *Campbell*, 510 U.S. at 578-81 (citing 17 U.S.C. § 107(1)). The Supreme

Court held in *Campbell* that in order to qualify as a parody for purposes of copyright law, the newer work must comment on, or criticize, the original. *Id.* at 580 ("the heart of any parodist's claim to quote from existing material, is the use of some elements of a prior author's composition to create a new one that, at least in part, comments on that author's works"); *accord Dr. Seuss Enters.*, 109 F.3d at 1400-01 (for legal purposes, parody must target the original). As the Court explained, if the new work "has no critical bearing on the substance or style of the original composition, which the alleged infringer merely uses to get attention or to avoid the drudgery in working up something fresh, the claim to fairness in borrowing from another's work diminishes accordingly (if it does not vanish) . . . ." *Campbell*, 510 U.S. at 580. Elaborating on this concern in his oft-cited concurrence, Justice Kennedy, taking the example of music, warned against false claims of parody to justify infringing uses: "We should not make it easy for musicians to exploit existing works and then later claim that their rendition was a valuable commentary on the original. Almost any revamped modern version of a familiar composition can be construed as a 'comment on the naiveté of the original[]' . . . ." *Id.* at 599 (Kennedy, J. concurring).

This case illustrates the very point. There is no dispute that the Hope Video and the Tax Video target Barack Obama and Barbara Boxer, respectively. Even defendants' own literary expert, Dr. Martin Zeilinger, takes this view. (St. ¶¶ 55, 101.) In addition to Defendants' own descriptions of their productions (before they were sued), the plain meaning of Defendants' videos is underscored by the visual content of those videos, which (aside from images of DeVore and Hart in the Hope Video) is focused on Obama and Boxer, a few other political figures, and, in the case of Boxer, her tax policies. The videos do not include any images relating to the original songs, to Henley, or to the other Plaintiffs. Moreover, Defendants made no effort to comment on Plaintiffs' music or musical style – but instead simply copied the music they took, from beginning to end.

As an example, in the Hope Video, DeVore's altered lyrics – which open with the lines "Obama overload/ Obama overreach" and include the refrain "But we can see through - Your broken promises oh One" – reflect on the election of November 2008, asserting that President Obama has betrayed his supporters' hopes, and, therefore, is not worthy of the "love" he inspired at election time. (Declaration of Mark Rose, Ex. 1 at 14-15.) Such a message does not criticize or comment at all on the Henley/Campbell original, in which the song's narrator recalls a summer romance, and tries to resist the recurring memory of his summer girlfriend. (*Id.*, Ex. 1 at 12-19.) Applying the Supreme Court's definition in *Campbell*, Plaintiffs' literary expert, Dr. Mark Rose, found that DeVore's modifications did not satisfy the test for parody: While Devore's lyrics "introduce[] verbal substitutions [for some of the original lyrics] such as 'hope of November' for 'boys of summer' or 'Your broken promises oh One' for 'Your brown skin shinin' in the sun,'" the alterations "target President Obama" and do not "comment on or shed new light on The Boys of Summer either with respect to substance or style." (*Id.*, Ex. 1 at 18.) In short, mere substitution is not the same as parody.

Similarly, DeVore's altered version of Dance in the Tax Video sheds no critical light on Dance, but merely substitutes words in the original to comment on Boxer and her tax policies. (*Id.*, Ex. 1 at 23.) Kortchmar's lyrics juxtapose a dancing woman with images of rebellion in an unspecified foreign locale. (*Id.*, Ex. 1 at 19.) DeVore's revised lyrics focus on Boxer, her alleged desire to "tax," and current political issues, such as carbon trading and global warming. (*Id.*, Ex. 1 at 21.) The substitutions made by DeVore are not aimed at the original, but at Boxer. (*Id.*, Ex. 1 at 22-24.) Accordingly, DeVore's use of Dance in the Tax Video does not qualify as parody.

Finally, concerning the first fair use factor, Defendants used Plaintiffs' songs in their videos not for nonprofit, educational ends, but for profit-seeking, commercial purposes. *See* 17 U.S.C. § 107(1) (contrasting nonprofit educational

uses with commercial uses). "The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price." *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985); *see also Browne v. McCain*, 612 F. Supp. 2d 1125, 1130 (C.D. Cal. 2009) (recognizing copyright claim for unauthorized use of song by political campaign). Defendants' videos are advertisements that were produced and disseminated for the purpose of attracting attention and dollars to the DeVore campaign – for example, by distributing the Tax Video with a direct link to DeVore's campaign donation page. At the conclusion of each video, a written statement appears to promote DeVore's campaign. The economic motive for taking Plaintiffs' works is underscored by the fact that Hart's compensation was expressly tied to the funds he raised through promotional videos such as these. Indeed, Defendants openly admit that *they* believe the videos using Plaintiffs' songs represented tens, or even hundreds, of thousands of dollars' worth of free political advertising – that is, were a commercial use for which they did not pay "the customary price."

Defendants' use was hardly "nonprofit," and is far removed from the case where a copyrighted work is quoted or performed merely for critical or informational purposes. It is a commercial use by advertising industry standards – or any standards. Plaintiffs' valuable songs were exploited to promote a product, the candidate Chuck DeVore; to attract donations to DeVore's campaign; and to reap thousands of dollars' worth of free advertising.

B. The Additional Fair Use Factors Also Strongly Favor Plaintiffs

The second factor of the fair use test concerns "'the nature of the copyrighted work.'" *Campbell*, 510 U.S. at 586 (citing 17 U.S.C. § 107(2)). There is no doubt here that Plaintiffs' works are highly expressive, creative works at "the core of intended copyright protection," so this factor favors Plaintiffs. *Id.* at 586; *Dr. Seuss Enters.*, 109 F.3d at 1402.

The third factor of the fair use test considers the "'amount and substantiality of the portion used in relation to the copyrighted work as a whole.'" *Campbell*, 510 U.S. at 586 (citing 17 U.S.C. § 107(3)). The uncontroverted findings of Plaintiffs' musicologist, Dr. Lawrence Ferrara, demonstrate that Defendants copied Plaintiffs' songs almost in their entirety, changing only a small portion of the lyrics. (St. ¶¶ 149-152; Declaration of Lawrence Ferrara ("Ferrara Decl.") ¶¶ 6-7.) The copying of the instrumentals and melodies of Boys of Summer and Dance – from the beginning to end of each song – was virtually verbatim, and did not build upon or add new expression to the original. (St. ¶¶ 149, 151; Ferrara Decl. ¶¶ 6, 9.) As for the lyrics, some two-thirds of Boys of Summer and three-quarters of Dance were also copied verbatim by Defendants, and even those that were changed still adhered to Plaintiffs' rhyme scheme and syntax. (St. ¶ 152; Ferrara Decl. ¶ 6(d).)

Even assuming, for the sake of argument, that Defendants' videos in fact targeted Plaintiffs' works, such wholesale takings could never be justified, for they go far beyond what is required to "conjure up" the originals for purposes of parody. *Dr. Seuss Enters.*, 109 F.3d at 1400 ("[T]he parodist is permitted a fair use of a copyrighted work if it takes no more than is necessary to 'recall' or 'conjure up' the object of his parody."). Both Boys of Summer and Dance are easily recognizable after only a few notes or bars; as Dr. Ferrara found, far more expression was taken than was necessary to evoke the original compositions. (St. ¶ 150; Ferrara Decl. ¶¶ 6(b), 7.) Even if Defendants' true aim had been to comment on Plaintiffs' songs, there was certainly no need to copy the songs verse by verse, from beginning to end, to achieve that purpose.

Section 107's fourth factor inquires into "'the effect of the use upon the potential market for or value of the copyrighted work.'" *Campbell*, 510 at 590 (citing 17 U.S.C. § 107(4)). The uncontroverted evidence in this case demonstrates that Defendants' use of Plaintiffs' songs in Defendants' campaign ads, if allowed to continue, would harm the value of their copyrights and curtail future licensing

opportunities. Indeed, such damage would only continue to grow if the videos proliferated throughout the Internet in a "viral" fashion, as Defendants hoped – and as the Tax Video had begun to do before it was removed.

As explained by Mr. Jon Albert, a leading consultant in the licensing of celebrity talent and music rights, Plaintiffs' songs have considerable value in the licensing marketplace. Plaintiffs could expect to receive hundreds of thousands of dollars for the use of Boys of Summer or Dance in a short-term Internet advertising campaign such as DeVore's. (St. ¶¶ 159-60; Declaration of Jon Albert ("Albert Decl.") ¶¶ 15-17.) The association of Plaintiffs' works with a particular candidate and political views, however, harms the market for those works. (St. ¶¶ 156-57; Albert Decl. ¶¶ 8-12.) In addition to avoiding songs that are already associated with a product or cause, licensees and advertisers do not like to use songs that have been politicized in the manner that Defendants have done here. (St. ¶ 155; Albert Decl. ¶ 9.) Moreover, fans and purchasers of Plaintiffs' music could be alienated by such associations, which would negatively impact sales of Plaintiffs' recordings. (St. ¶ 156; Albert Decl. ¶ 11.)

In sum, Defendants' conduct is harmful to, and reduces the market for, Plaintiffs' valuable copyrighted songs.

C. Defendants' Infringement Was Willful

Defendants had an understanding of copyright infringement when they decided to appropriate Plaintiffs' copyrighted works, and to continue to exploit them after receiving Henley's takedown notice. They knew, for example, that they could not simply take and copy a *Wall Street Journal* article for use in their campaign without a license, and so they obtained and paid for one. Also, DeVore was familiar with the *Dr. Seuss* case, in which a parody claim much like his had been rejected by the Ninth Circuit.

Even after receiving Henley's notice, Defendants declined to consult an attorney to confirm the validity of their assertion of fair use. Instead, paying no

heed to the infringement claim, they resolved to continue their conduct by "rifl[ing] through . . . Henley's catelogue[sic]" for other songs to take, and proceeded to make another video using Dance. They made sure the Hope Video was available on other websites when it was removed by YouTube. And, even with the knowledge that Plaintiffs would have to sue to stop them, Defendants not only welcomed the possibility of an injunction, but made a calculated and cynical determination that the "earned media value" of the publicity they would receive from such a lawsuit would outweigh the costs and burden of litigation – because donations might come "rolling in."

In proceeding as they did, Defendants acted knowingly, deliberately and with a disregard for Plaintiffs' rights. Defendants' conduct was willful within the meaning of the Copyright Act. *See Microsoft Corp. v. E&M Internet Bookstore, Inc.*, No. C 06-06707 WHA, 2008 U.S. Dist. LEXIS 4381, at *7 (N.D. Cal. Jan. 22, 2008) ("[I]nfringement is willful where the defendant knowingly infringed or acted with reckless disregard concerning the copyright holder's rights.")

IV. DEFENDANTS' VIDEOS FALSELY IMPLY AN ASSOCIATION WITH HENLEY IN VIOLATION OF THE LANHAM ACT

Defendants' prominent use of two Henley-associated songs as the basis of their videos – including instrumental tracks simulating Henley's highly recognizable original recordings in essentially full-length form – is likely to confuse viewers of those videos, who understandably believe that this could not have been done without Henley's permission.

The Lanham Act protects celebrities such as Henley against the misuse of their public persona to suggest a false association with a person or product. Section 43(a) of the Lanham Act prohibits the use of "any word, term, name, symbol, or device, or any combination thereof" that is "likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her

goods, services, or commercial activities by another person." 15 U.S.C. § 1125(a)(1)(A). In the case of a false endorsement claim by a celebrity, there is no requirement that the name, likeness or any particular attribute of the celebrity be used; rather, the question is whether "*any* . . . device" – including "distinctive sounds" – has been used to invoke the celebrity such that consumers might be confused. 15 U.S.C. § 1125(a)(1)(A) (emphasis added); *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1106-07 (9th Cir. 1992) (upholding Lanham Act claim based on imitation of singer's voice); *see also Butler v. Target Corp.*, 323 F. Supp. 2d 1052, 1057-59 (C.D. Cal. 2004) (use of altered song lyrics); *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1399-1401 (9th Cir. 1992) (robot suggestive of plaintiff); *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200, 205 (2d Cir. 1979) (distinctive cheerleading uniforms).

In evaluating a claim of false endorsement under the Lanham Act, the "determinative issue" is likelihood of confusion. *Yeager v. Cingular Wireless LLC*, No. 2:07-cv-02517 FCD GGH, 2009 U.S. Dist. LEXIS 113313, at *26-27 (C.D. Cal. Dec. 7, 2009). To assess likelihood of confusion, courts in the Ninth Circuit turn to the eight-factor test found in *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341 (9th Cir. 1979), adjusting the factors as appropriate to fit the circumstances of a celebrity case: (1) strength of the plaintiff's mark; (2) relatedness of the goods; (3) similarity of the marks; (4) evidence of actual confusion; (5) marketing channels used; (6) likely degree of purchaser care; (7) defendant's intent in selecting the mark; and (8) likelihood of expansion of the product lines. *Yeager*, 2009 U.S. Dist. LEXIS, at *28; *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1007 (9th Cir. 2001).

Plaintiffs retained a qualified survey expert, Mr. Hal Poret, to conduct an Internet-based survey to assess whether viewers of Defendants' videos were confused as to whether Henley was affiliated or associated with the videos. (Declaration of Hal Poret ("Poret Decl.") ¶¶ 2, 4.) In the survey, respondents were

shown either the Hope Video, the Tax Video, or both. (*Id.* ¶ 10.) Mr. Poret's survey identified a pool of 114 of respondents (from a larger group of 572) who understood Henley (or in some cases, his band, the Eagles) to be the artist whose music was used in the video(s). (*Id.* ¶ 7, Ex. 1 at 16.) Close to half of the respondents (48%) who identified Henley indicated that they believed Henley endorsed the video(s), or authorized or approved the use of his music in the video(s). (St. ¶ 162; Poret Decl. ¶ 7.) In addition to documenting actual confusion among viewers of Defendants' videos – as contemplated by *Sleekcraft* factor (4) – the Plaintiffs' survey evidence confirms the ultimate fact at issue: that it is likely that viewers of Defendants' videos will be confused as to Henley's association with the videos. *See Thane Int'l, Inc. v. Trek Bicycle Corp.*, 305 F.3d 894, 902 (9th Cir. 2002) ("Survey evidence may establish actual confusion.").

The remaining *Sleekcraft* factors also weigh in favor of a likelihood of confusion in this case. With respect to factor (1), it is undisputed that Henley enjoys worldwide recognition as a recording artist and that the strength of his "mark" is great. With respect to factor (3), it is undisputed that the two songs used by Defendants, Boys of Summer and Dance, are closely associated with Henley, and that they were used in a manner that simulates and mimics Henley's famous recordings. Concerning factors (2) and (5), since it is undisputed that Henley performs in authorized music videos, and that those videos also appear on YouTube and other Internet sites, there is considerable overlap between Henley's "goods" and Defendant's videos, as well as the marketing channels through which they are distributed. Concerning factor (6), based on the uncontroverted fact that both Henley's and Defendants' videos are made available for free on the Internet through YouTube and other channels, the degree of "purchaser" care in viewing videos is necessarily low, as no investment (other than time) is required. As for factor (7), the uncontroverted facts demonstrate that Defendants deliberately chose Henley-recorded songs to include in their videos because they were popular and

would attract attention, and that Defendants also hoped to capitalize on Henley's celebrity by continuing to exploit his songs once he asserted his copyright claim. (Factor (8) is generally considered not to apply in celebrity endorsement cases. *See White*, 971 F.2d at 1401.)

Defendants have offered no contrary survey evidence to counter Mr. Poret's unequivocal finding that viewers of Defendants' videos are likely to be confused as to Henley's affiliation or association with the videos. (Poret Decl. ¶ 8.) Each of the *Sleekcraft* factors relevant here supports the same conclusion. Accordingly, Henley is entitled to summary judgment on his Lanham Act false endorsement claim.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that this Court grant partial summary judgment holding Defendants liable for the willful infringement of Plaintiffs' musical compositions, in violation of the Copyright Act, 17 U.S.C. § 101 *et seq.*, and for falsely suggesting an association with Henley in violation of the Lanham Act, 15 U.S.C. § 1125(a).

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