

1 Christopher W. Arledge (Bar No. 200767)  
carledge@onellp.com  
2 John Tehranian (Bar No. 211616)  
jtehranian@onellp.com

3 **ONE LLP**  
4000 MacArthur Boulevard  
4 West Tower, Suite 1100  
Newport Beach, California 92660  
5 Telephone: (949) 502-2870  
Facsimile: (949) 258-5081  
6

7 Attorneys for Defendants Charles S. DeVore and  
Justin Hart  
8

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

**DEFENDANTS' MEMORANDUM IN  
OPPOSITION TO PLAINTIFF'S  
MOTION FOR PARTIAL SUMMARY  
JUDGMENT**

Date: June 1, 2010  
Time: 10:00 a.m.  
Courtroom: 10C

18 AND RELATED COUNTERCLAIMS  
19  
20  
21  
22  
23  
24  
25

26 ///

27 ///

28 ///

16639.1

**DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL  
SUMMARY JUDGMENT**

TABLE OF CONTENTS

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

I. INTRODUCTION.....1

II. DEFENDANTS’ VIDEOS ARE PROTECTED BY THE FAIR USE DOCTRINE.....1

    A. The purpose of character of the use.....2

        1. Dr. Rose’s opinion is irredeemably flawed and inadmissible.....3

        2. Defendants’ videos are not commercial speech.....7

    B. The second fair use factor is largely irrelevant.....9

    C. The third fair use factor weighs in Defendants’ favor.....9

    D. The fourth fair use factor weighs in Defendants’ favor.....10

III. PLAINTIFFS LACK EVIDENCE OF WILLFUL INFRINGEMENT.....12

IV. HENLEY HAS NO EVIDENCE TO SUPPORT HIS LANHAM ACT CLAIM.....12

    A. Henley cannot prove the necessary elements of his claim.....12

    B. Henley cannot prevail without proving actual malice, and he has no evidence of actual malice.....16

    C. The *Sleekcraft* factors are irrelevant in these circumstances – but also harmful to Henley’s argument if applied.....17

        1. Henley has no evidence to support his application of the *Sleekcraft* factors.....17

        2. Henley’s alleged evidence of actual confusion is weak and disputed.....19

V. CONCLUSION .....24

TABLE OF AUTHORITIES

**Cases**

*Aguilar v. International Longshoremen’s Union Local No. 10*,  
 966 F.2d 443 (9<sup>th</sup> Cir. 1992) ..... 4

*AMF Inc. v. Sleekcraft Boats*,  
 599 F.2d 341 (9<sup>th</sup> Cir. 1979) ..... 17

*Browne v. McCain*,  
 612 F.Supp.2d 1125 (C.D.Cal.2009) ..... 7

*Burnett v. Twentieth Century Fox Film Corp.*,  
 491 F.Supp.2d 962 (C.D.Cal.2007) ..... 10

*Campbell v. Acuff-Rose Music*,  
 510 U.S. 569 (1994) ..... 2, 3, 9, 10

*Dastar Corp. v. Twentieth Century Fox Film Corp.*,  
 539 U.S. 23 (2003) ... ..... 15

*Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*,  
 109 F.3d 1394 (9<sup>th</sup> Cir. 1997) ..... 9

*Fisher v. Dees*,  
 794 F.2d 432 (9<sup>th</sup> Cir. 1986) ..... 10

*Florida Bar v. Went For It, Inc.*,  
 515 U.S. 618 (1995) ..... 9

*Hangarter v. Provident Life & Accident Ins. Co.*,  
 373 F.3d 998 (9<sup>th</sup> Cir. 2004) ..... 4

*Harper & Row, Publishers, Inc. v. Nation Enters.*,  
 471 U.S. 539 (1985) ..... 7, 8

*Hoffman v. Capital Cities/ABC, Inc.*,  
 255 F.3d 1180 (9<sup>th</sup> Cir. 2001) ..... 16

1 *Keep Thomson Governor Comm. v. Citizens For Gallen Comm.*,  
 2 457 F.Supp. 957 (D. N.H. 1978) ..... 8  
 3 *Kournikova v. General Media Comm., Inc.*,  
 4 2002 WL 3168027 (C.D.Cal.2002) ..... 16  
 5 *MasterCard Intern. Inc. v. Nader 2000 Primary Committee, Inc.*,  
 6 2004 WL 434404 (S.D.N.Y. 2004) ..... 8  
 7 *Mattel, Inc. v. Walking Mountain Prod.*,  
 8 353 F.3d 792 (9<sup>th</sup> Cir. 2004) ..... 3, 4, 5, 6  
 9 *Nationwide Transport Finance v. Cass Information Systems, Inc.*,  
 10 523 F.3d 1051 (9<sup>th</sup> Cir. 1999) ..... 4  
 11 *Oliveira v. Frito-Lay, Inc.*,  
 12 251 F.3d 56 (2d Cir. 2001) ..... 13, 14  
 13 *Princeton University Press v. Michigan Document Services, Inc.*,  
 14 99 F.3d 1381 (6<sup>th</sup> Cir. 1996) ..... 12  
 15 *Solano v. Playgirl, Inc.*,  
 16 292 F.3d 1078 (9<sup>th</sup> Cir. 2002) ..... 17  
 17 *U.S. v. Scholl*,  
 18 166 F.3d 964 (9<sup>th</sup> Cir. 1999) ..... 4  
 19 *Waits v. Frito-Lay, Inc.*,  
 20 978 F.2d 1093 (9<sup>th</sup> Cir. 1992) ..... 13  
 21  
 22  
 23  
 24  
 25  
 26  
 27  
 28

1 **I. INTRODUCTION**

2 Plaintiffs' motion asks this Court to rule that political speech by Chuck DeVore, a  
3 United States Senate candidate, which was delivered in the form of two music videos,  
4 willfully infringes their copyrights, and it asks this Court to rule that the same videos  
5 violate the Lanham Act by falsely implying that Don Henley endorses DeVore or DeVore's  
6 campaign. This Court must deny Plaintiffs' motion.

7 The fate of the copyright claims rests on a fair use analysis, and the key to that  
8 analysis is whether DeVore's videos were transformative. DeVore says they are, and he  
9 offers substantial evidence to show that his videos were parodic—that they commented, at  
10 least in part, on the original compositions. Plaintiffs offer nothing to the contrary other  
11 than the inadmissible opinion of a single expert witness. Plaintiffs cannot prevail on their  
12 copyright claims.

13 Henley's Lanham Act claim fails because he cannot prove the basic elements of his  
14 claim—that Defendants misappropriated a "distinctive attribute" or "distinguishing  
15 characteristic" of his—and because he has no evidence to prove that Defendants videos  
16 were made with actual malice, that is, with an intentional effort to confuse the public as to  
17 Henley's endorsement.

18 Because Plaintiffs' arguments are the inverse of the arguments Defendants presented  
19 in their pending summary judgment motion, Defendants hereby incorporate into this  
20 opposition the arguments in their earlier-filed Memorandum of Points and Authorities in  
21 Support of Summary Judgment ("Defendants' Memo").

22 **II. DEFENDANTS' VIDEOS ARE PROTECTED BY THE FAIR USE**  
23 **DOCTRINE**

24 Plaintiffs spill much ink on factual assertions that cannot possibly support a  
25 summary judgment order. Plaintiffs try to prove that Defendants did not intend to create  
26 parodies and invented parody as a *post hoc* justification. At best, that factual assertion is  
27 disputed (it really is just wrong), and therefore this Court could not find in Plaintiffs' favor  
28 on that issue at summary judgment. DeVore is clear that he at all times intended to create

1 parodies. Declaration of Charles DeVore filed with Defendants' Motion for Summary  
2 Judgment ("DeVore Decl."), ¶¶ 2-10. And the very documents Plaintiffs attach to their  
3 lawyers' declaration support his testimony. *See, e.g.*, Exhibit 22 to the Declaration of  
4 Jacqueline Charlesworth (DeVore referring to the Hope of November as a parody when he  
5 first released the lyrics publicly, long before any dispute between the parties). Thus, if  
6 Plaintiffs think it important to their motion to prove that Defendants did not intend to create  
7 parodies and are only now claiming otherwise—and they must believe that this assertion is  
8 critical to their motion, otherwise why spend so much time on it?—then this is an issue of  
9 disputed fact, and their summary judgment motion must be denied.

10 Likewise, Plaintiffs spend a lot of time trying to prove that Defendants wanted their  
11 parodies to attract attention to the campaign. Of course they did. If the parodies generated  
12 attention, more people would come to know and understand DeVore's political positions.  
13 But this fact in no way changes the legal analysis of the real issue before the Court:  
14 whether Defendants' use of Plaintiffs' copyrighted works was fair. Many parodists  
15 undoubtedly want the public to take note of their works, and the fair use doctrine does not  
16 only protect transformational works that are kept under lock and key in the author's  
17 basement. There is certainly no indication in *Campbell* that 2 Live Crew tried to keep their  
18 parody a secret; to the contrary, they released it publicly and no doubt hoped the entire  
19 world would purchase it. This means that much of Plaintiffs' brief is spent discussing  
20 irrelevant factual material. The real question for this Court is whether the fair use doctrine  
21 covers Defendants' works. It does, and the Court can make that determination on this  
22 factual record.

23 **A. The purpose of character of the use**

24 The heart of the fair use analysis—and, therefore, of the copyright claims—is the  
25 first fair use factor. Are Defendants' videos sufficiently transformative that the first fair  
26 use factor weighs in Defendants' favor? If they are—if, for example, the videos are  
27 parodies—then there is a strong argument for application of the fair use doctrine. In  
28 Defendants' Memo, they show why the videos are parodies, why they would be sufficiently

1 transformative to satisfy the first fair use factor even if deemed to be satires rather than  
2 parodies, and why they are core political speech and therefore entitled to special protection  
3 under the First Amendment. *See* Defendants' Memo at 2-10.

4 Plaintiffs rest their argument to the contrary on two principal contentions. First, they  
5 use expert testimony from Dr. Mark Rose to argue that the works are not parodies. Second,  
6 they assert that Defendants' videos are merely commercial speech and are entitled to no  
7 special protection. Neither argument is persuasive.

#### 8 **1. Dr. Rose's opinion is irredeemably flawed and inadmissible**

9 There are three basic flaws in Dr. Rose's opinion, and all three render his opinion not  
10 only suspect, but inadmissible. First, Dr. Rose purports to opine on improper subject  
11 matter. Though he is an experienced and well-regarded literature professor, Dr. Rose does  
12 not rely on that expertise here. (Nor could he for the reasons explained below.) Dr. Rose  
13 was not asked to determine, for example, whether Defendants' works constitute parodies  
14 under the definition of parody used by experts in English literature. Such an opinion would  
15 almost certainly be inadmissible for other reasons, but it would at least rest on Dr. Rose's  
16 special knowledge and expertise. But, instead, Dr. Rose was asked to determine whether  
17 Defendants' works fit the legal definition of parody as set forth in the *Campbell v. Acuff-*  
18 *Rose Music* case. (Supp. Arledge Decl., Exh. A (Deposition of Dr. Mark Rose) at 11:10-25  
19 ("I have adopted ... the definition used by the Supreme Court in *Acuff-Rose*.") and 21:14-  
20 19 (In Dr. Rose's report and deposition testimony, he "used the Supreme Court's definition  
21 of parody from *Acuff-Rose*.").

22 Dr. Rose, then, was asked to opine on a purely legal question: whether Defendants'  
23 works satisfy the legal definition of parody articulated by the Supreme Court. But this is  
24 not his role. The Ninth Circuit has been absolutely clear that this question—whether a  
25 defendant's work is a parody—is a question of law for the court. *Mattel, Inc. v. Walking*  
26 *Mountain Prod.*, 353 F.3d 792, 801 (9<sup>th</sup> Cir. 2004) ("The issue of whether a work is a  
27 parody is a question of law.... [E]very court to address the issue whether a defendant's  
28 work qualifies as a parody has treated this question as one of law to be decided by the

1 court.”). Dr. Rose is not qualified to opine on the law even if such a legal opinion were  
2 permissible. *See, e.g.*, Supp. Arledge Decl., Exh. A at 28:12 to 29:8 (“I’m not a lawyer and  
3 I am not qualified to provide you a fair use analysis.... “I can’t testify to that [what the  
4 Supreme Court meant in footnote 14 of its *Campbell* opinion when it referred to looser  
5 forms of parody], I’m not a lawyer.”).

6 More importantly, an expert witness is not permitted to testify as to a legal  
7 conclusion. *See Nationwide Transport Finance v. Cass Information Systems, Inc.*, 523  
8 F.3d 1051, 1058 (9<sup>th</sup> Cir. 2008) (“[A]n expert witness cannot give an opinion as to her *legal*  
9 *conclusion*, i.e., an opinion on an ultimate issue of law. Similarly, instructing the jury as to  
10 the applicable law is the distinct and exclusive province of the court.”) (citing *Hangarter v.*  
11 *Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1016 (9<sup>th</sup> Cir.2004); *U.S. v. Scholl*, 166  
12 F.3d 964, 973 (9<sup>th</sup> Cir. 1999) (“It is well settled that the judge instructs the jury in the law.  
13 Experts ‘interpret and analyze factual evidence. They do not testify about the law because  
14 the judge’s special legal knowledge is presumed to be sufficient, and it is the judge’s duty to  
15 inform the jury about the law that is relevant to their deliberations.”) (internal citation  
16 omitted); *Aguilar v. International Longshoremen’s Union Local No. 10*, 966 F.2d 443,  
17 447 (9<sup>th</sup> Cir. 1992) (“Expert testimony is admissible if ‘scientific, technical, or other  
18 specialized knowledge will assist the trier of fact to understand the evidence or determine a  
19 fact in issue....’ Fed.R.Evid. 702. Here, the reasonableness and foreseeability of the casual  
20 workers’ reliance were matters of law for the court’s determination. As such, they were  
21 inappropriate subjects for expert testimony.”) Simply put, it is this Court’s job to  
22 determine as a matter of law whether Defendants’ works are parodies. Dr. Rose’s opinion  
23 on that legal conclusion is not relevant, valuable or admissible.

24 Second, and not surprisingly in light of the Ninth Circuit’s conclusion that whether a  
25 work constitutes parody is a question of law for the court, Dr. Rose’s subjective opinion on  
26 this question is irrelevant. In *Walking Mountain*, the plaintiff sought to admit survey  
27 evidence to show that most members of the public do not perceive parodic character in the  
28 defendant’s works. The Ninth Circuit ruled that the survey evidence was inadmissible.



1 “The issue of whether a work is a parody is a question of law, not a matter of public  
2 majority opinion.” *Walking Mountain*, 353 F.3d at 801. The court found “no case law in  
3 support of [Mattel’s] contention that the parodic nature of a defendant’s work should be  
4 assessed using surveys and opinion testimony.” *Id.* Parody has “socially significant value  
5 as free speech under the First Amendment.” *Id.* And the “[u]se of surveys in assessing  
6 parody would allow majorities to determine the parodic nature of a work and possibly  
7 silence artistic creativity. Allowing majorities to determine whether a work is a parody  
8 would be greatly at odds with the purpose of the fair use exception and the Copyright Act.”  
9 *Id.*

10 Under *Walking Mountain*, there is no basis for admitting Dr. Rose’s opinion as to  
11 whether Defendants’ works are parodies. Dr. Rose’s declaration is, of course, opinion  
12 testimony, and the Ninth Circuit in *Walking Mountain* expressly disallowed the use of  
13 “surveys and opinion testimony” to determine whether a work is parodic. *Id.* No other  
14 conclusion makes sense of *Walking Mountain*. If it is inappropriate to allow a majority to  
15 determine whether a work is entitled to protection—and if courts must therefore exclude  
16 survey evidence—how much more problematic would it be to allow Dr. Rose to determine  
17 the question by himself? Dr. Rose is, by all accounts, a gifted academic and a very bright  
18 man. But none of this makes his subjective view of Plaintiffs’ songs or Defendants’  
19 parodies the standard by which to determine First Amendment rights. Dr. Rose conducted  
20 a “formal literary analysis” of Defendants’ works. Supp. Arledge Decl., Exh. A at 115:12  
21 to 118:23. This means that he simply read the works in question and offered his own  
22 personal interpretation, limiting his review to the four corners of the document in the  
23 process. *Id.*; *see also id.* at 50:6-12; *id.* at 111:12-23 (He was “trying to analyze simply the  
24 reading that comes from the words on the page of the poem here.”). Not only can Dr. Rose  
25 not tell us whether untrained professionals would analyze the works the same way, he has  
26 “no idea” even whether other professional literary scholars would. *Id.* at 72:4-13. It is  
27  
28

1 apparent from the opinions of Dr. Martin Zeilinger that many would not.<sup>1</sup> See Declaration  
2 of Dr. Martin Zeilinger.

3 In *Walking Mountain* the Ninth Circuit expressed concern about tyranny of the  
4 majority, concluding that it is inappropriate to have a majority determine whether a work  
5 merits protection. Surely tyranny of the minority (here, a minority of one) is no better. If  
6 the opinions of a majority should not decide whether the First Amendment offers its  
7 protection, should the subjective whim of a single individual? Dr. Rose's interpretation  
8 may be interesting, and it may have even some value for scholars who are interested in the  
9 literary analysis of pop songs and political advertisements. But it is irrelevant to the  
10 question before this Court, and it must be excluded.

11 Finally, even apart from the clear inadmissibility of his opinion, Dr. Rose's  
12 methodology was fatally flawed, because he ignored the Ninth Circuit's instructions on the  
13 importance of looking at a work in context. In *Walking Mountain*, the panel rejected  
14 Mattel's argument that the court must "ignore context—both the social context of  
15 Forsythe's work and the actual context in which Mattel's copyrighted works are placed in  
16 Forsythe's photographs." *Id.* at 802. The court was of the opposite opinion: "in parody, as  
17 in news reporting, context is everything." *Id.* (internal citation omitted).

18 Dr. Rose ignored these instructions and analyzed Defendants' works *apart from any*  
19 context. According to Dr. Rose, his "formal literary analysis" did not require "a large  
20 cultural context." Supp. Arledge Decl., Exh. A at 115:12 to 118:23. Instead, he focused  
21 only on the words on the page. *Id.* This means that Dr. Rose cannot tell us how Chuck  
22 DeVore's intended audience—or anybody else—would have understood the works. *Id.* at  
23 102:16 to 104:8 (Dr. Rose cannot tell us how Chuck DeVore's audience would have  
24 responded to the songs or what they would have understood them to mean. He cannot  
25

26 <sup>1</sup> Defendants do not believe that Dr. Zeilinger's opinion on this pure question of law is any  
27 more admissible than is Dr. Rose's. But if the Court disagrees and considers Dr. Rose's  
28 opinion, the Court should also take into account the opinions of Dr. Zeilinger, also a  
literary scholar, who has concluded that Defendants' videos are parodic.

1 testify as to “somebody else’s opinion and reaction”; he can only give you his  
2 understanding.).

3 In sum, Dr. Rose offered his subjective opinion as to a pure question of law. His  
4 opinion did not take into account the context in which Defendants’ works were written, and  
5 it does not even purport to speak to how any person other than Mark Rose would interpret  
6 or understand Defendants’ works. Dr. Rose is also not an expert on the law, and  
7 determining questions of law is a job for this Court, not an expert, in any event. Dr. Rose’s  
8 entire testimony is inadmissible.

9 Without Dr. Rose’s opinion, Plaintiffs have literally nothing admissible to support  
10 their argument under the first fair use factor. DeVore’s thorough analysis of the question,  
11 *see* Defendants’ Memo at 2-10 and DeVore Decl., ¶¶ 5-10, is uncontradicted and more than  
12 sufficient to establish that Defendants’ videos were transformative parodies.

## 13 2. Defendants’ videos are not commercial speech

14 Plaintiffs also argue that Defendants’ use of the songs was “commercial” and that the  
15 commercial nature of the use weighs against a finding of fair use. “Plaintiffs’ valuable  
16 songs were exploited to promote a product, the candidate Chuck DeVore...” Plaintiffs’  
17 Motion at 19. Plaintiffs’ support for this argument comes from *Harper & Row, Publishers,*  
18 *Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985) and *Browne v. McCain*, 612 F.Supp.2d  
19 1125, 1130 (C.D. Cal. 2009). The Court can dispense with the latter case quickly; its mere  
20 citation only confirms the paucity of support for Plaintiffs’ position. Simply put, the  
21 district court in *Browne* not only failed to address whether the use of copyrighted material  
22 in a campaign advertisement is “commercial” speech, the court actually refused to analyze  
23 fair use at all because it lacked a sufficient factual record at the motion to dismiss stage.  
24 *Browne*, 612 F.Supp.2d at 1130.

25 By contrast, *Harper & Row* at least discusses fair use and commerciality, but the  
26 case still is of little use to Plaintiffs. There, the plaintiff tried to draw a distinction between  
27 news reporting—which it argued should be entitled to fair use treatment—and the  
28 commercial use of copyrighted material, which is less likely to be fair use. The Supreme

1 Court rejected the distinction in that case, finding that the defendant's entire goal was to  
2 supplant for itself the economic value of plaintiff's work. "In evaluating character and  
3 purpose we cannot ignore The Nation's stated purpose of scooping the forthcoming  
4 hardcover and Time abstracts. The Nation's use had not merely the incidental effect but the  
5 *intended purpose* of supplanting the copyright holder's commercially valuable right of first  
6 publication." *Harper & Row*, 471 U.S. at 562 (emphasis in original).

7 In *Harper & Row*, then, a commercial enterprise—a for-profit magazine—  
8 intentionally usurped the first publication of a copyrighted work. It is hard to argue with  
9 the Supreme Court's conclusion that the use was a commercial use. It is even harder to  
10 understand what the case has to do with Defendants. Defendants did not usurp a first  
11 publication. Defendants did not and do not sell their videos. Defendants' videos do not  
12 even solicit donations. The videos undoubtedly try to convince voters that Chuck  
13 DeVore's political positions are right for America and that, therefore, DeVore is the best  
14 candidate for the United States Senate. To this extent, the videos promote Chuck DeVore.  
15 But by this definition, virtually all speeches by candidates or public officials promote the  
16 speaker, and Plaintiffs offer no legal authority to support their contention that such core  
17 political speech is somehow rendered mere commercial speech as a result.

18 There is, however, ample authority to the contrary. *See MasterCard Intern. Inc. v.*  
19 *Nader 2000 Primary Committee, Inc.*, 2004 WL 434404, 12 (S.D.N.Y. 2004) (finding  
20 Ralph Nader's use of Mastercard's copyrighted material from its "priceless" line of  
21 advertisements to be noncommercial and parodic and therefore protected by the fair use  
22 doctrine); *Keep Thomson Governor Comm. v. Citizens For Gallen Comm.*, 457 F.Supp.  
23 957, 961 (D. N.H. 1978) (The court held that defendant's use of plaintiff's copyrighted  
24 material was protected by the fair use doctrine. "The use by the defendant of a portion of  
25 the plaintiff's political advertisement is clearly part of a political campaign message, non-  
26 commercial in nature, and First Amendment issues of freedom of expression in a political  
27 campaign are clearly implicated.").

1 Adopting Plaintiffs' argument would set a dangerous precedent. Commercial speech  
2 enjoys less protection under the First Amendment than other types of "core" First  
3 Amendment expression. *See, e.g., Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995)  
4 ("We have always been careful to distinguish commercial speech from speech at the First  
5 Amendment's core. "[C]ommercial speech [enjoys] a limited measure of protection,  
6 commensurate with its subordinate position in the scale of First Amendment values,' and is  
7 subject to 'modes of regulation that might be impermissible in the realm of noncommercial  
8 expression.'") (internal citations omitted). This Court should not accept Plaintiffs'  
9 argument that the assertion of public policy positions by a candidate for office can be  
10 categorized as commercial speech—and, therefore, less deserving of First Amendment  
11 protection—merely because the speaker's goal in discussing the public policy issues was to  
12 further his campaign. Any such ruling would significantly and unjustifiably chip away at  
13 the Constitution's most-basic free speech protections. Defendants' videos are core political  
14 speech, deserving of the highest level of constitutional protection. This fact must weigh in  
15 favor of a fair use finding.

16 **B. The second fair use factor is largely irrelevant**

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

22 **C. The third fair use factor weighs in Defendants' favor**

23 Plaintiffs offer expert testimony to prove that Defendants closely tracked the  
24 underlying musical compositions and simply changed lyrics. It is not clear why they  
25 bothered. Defendants admit they used a karaoke track for the background music and  
26 changed the lyrics to change the songs' meanings. DeVore Decl., ¶ 12. Plaintiffs needed  
27 no expert to establish that fact, and that fact does not weigh against a finding of fair use.  
28

1 “Like a speech, a song is difficult to parody effectively without exact or near-exact  
2 copying. If the would-be parodist varies the music or meter of the original substantially, it  
3 simply will not be recognizable to the general audience. This ‘special need for accuracy,’  
4 provides some license for ‘closer’ parody.” *Fisher v. Dees*, 794 F.2d 432, 439 (9<sup>th</sup> Cir.  
5 1986). Moreover, “there is no requirement that ‘parodists take the *bare minimum* amount  
6 of copyright material necessary to conjure up the original work.” *Burnett v. Twentieth*  
7 *Century Fox Film Corp.*, 491 F.Supp.2d 962, 970 (C.D. Cal. 2007).

8 Here, Defendants supplied new lyrics to the original musical compositions. DeVore  
9 Decl., ¶ 12. To parody the original works properly—that is, to alter the songs’ original  
10 meanings and express DeVore’s political message—Defendants needed to use the  
11 underlying musical compositions. *Id.* Moreover, practically speaking it would not be  
12 possible to use only a portion of the song. Using only the first 30 seconds, for example,  
13 would have required Defendants either to switch in mid-song to a new musical composition  
14 entirely—which would have been confusing and would have diluted the parodic impact of  
15 the work—or they would have had to cut their parody short, which would not have allowed  
16 them to convey all of the political and parodic points they wished to make. *Id.* Thus,  
17 Defendants’ use of the songs was not excessive.

18 Also important to the third fair use factor is the extent to which the parody can or  
19 does serve as a market substitute for the original. *Campbell*, 510 U.S. at 587. As shown  
20 below, Defendants’ works do not constitute market substitutes for the originals, further  
21 supporting Defendants’ arguments under this third factor.

#### 22 **D. The fourth fair use factor weighs in Defendants’ favor**

23 The fourth fair use factor asks whether the allegedly infringing work usurps demand  
24 for the original. *Campbell*, 510 U.S. at 592. Here, Plaintiff offers expert testimony arguing  
25 that Defendants’ videos, “if allowed to continue, would harm the value of their copyrights  
26 and curtail future licensing opportunities.” Plaintiffs’ Brief at 20-21. Plaintiffs assert that  
27 their songs “have considerable value in the licensing marketplace.” *Id.* at 21. They express  
28 concern that Defendants’ videos will harm that value.

1 It is important to understand that Plaintiffs' offer no evidence that Defendants'  
2 videos have usurped the market for the songs in question, and there is no reasonable basis  
3 for concluding that they could. Defendants' Memo at 13-14. Thus, Plaintiffs' entire  
4 argument hinges on damage to purely hypothetical licensing opportunities. Plaintiffs argue  
5 that Defendants' videos could "curtail future licensing opportunities." But there is  
6 something far more likely to curtail Plaintiffs' licensing opportunities, and Plaintiffs' don't  
7 bother to mention it: *Henley refuses to license his songs*. Henley does not and never has  
8 licensed his songs for commercial purposes. Supp. Arledge Decl., Exh. C at 91:1-9.  
9 Neither does Campbell. Supp. Arledge Decl., Exh. B at 47:3-5 ("I don't want the song  
10 [Boys of Summer] used for anything..."). For them, it is a matter of principle. Supp.  
11 Arledge Decl., Exh. C at 83:1 to 85:6 (Henley's explanation for passing on licensing  
12 opportunities). Thus, although it is entirely possible that there *could* be a market for these  
13 songs, Plaintiffs have made a conscious decision not to *permit* a market for the songs.  
14 Supp. Arledge Decl., Exh. B at 46:16 to 47:5 (Campbell explaining that he and Henley  
15 have never tested the market for licensing Boys of Summer and that he doesn't want the  
16 song used for anything). (Defendant Kortchmar is the lone defendant who does not oppose  
17 licensing his music, but he also says he would not license a song without Henley's  
18 permission, *see* Defendants' Memo at 14 n.3, and Henley is opposed to all commercial  
19 licensing opportunities. Moreover, Kortchmar says that he has not been approached with a  
20 commercial licensing opportunity in 25 years anyway, *see id.*, so any harm would be truly  
21 hypothetical at best.) Hence, Plaintiffs' fundamental problem: Defendants have not  
22 affected demand for the songs themselves, and Defendants clearly cannot affect demand in  
23 a market—the commercial licensing of the songs—that Plaintiffs insist does not and will  
24 not exist. Thus, Plaintiffs must resort to pure speculation by their expert witness, who tries  
25 to construct a theory of harm apart from any empirical data or even a comparable  
26 transaction with which to compare this case. (*See* Defendants' Objections to Plaintiffs'  
27 Evidence.)

28 The fourth fair use factor also weighs in Defendants' favor.

1 The fair use factors overwhelmingly weigh in Defendants' favor, especially the first  
 2 factor. This Court should, therefore, grant summary judgment to Defendants' on all of  
 3 Plaintiffs' copyright claims.

### 4 **III. PLAINTIFFS LACK EVIDENCE OF WILLFUL INFRINGEMENT**

5 Defendants believed and continue to believe that their videos were protected by the  
 6 fair use doctrine. The videos are parodic; they are core First Amendment expression; and  
 7 they do not harm the economic value of Plaintiffs' copyrighted works. Under these facts,  
 8 Plaintiffs cannot prove willful infringement. "In other contexts ['willfulness'] might simply  
 9 mean an intent to copy, without necessarily an intent to infringe. It seems clear that as here  
 10 used, "[W]illfully' means with knowledge that the defendant's conduct constitutes  
 11 copyright infringement.... [Thus,] one who has been notified that his conduct constitutes  
 12 copyright infringement, but who reasonably and in good faith believes the contrary, is not  
 13 'willful' for these purposes." *Princeton University Press v. Michigan Document Services,*  
 14 *Inc.*, 99 F.3d 1381, 1392 (6<sup>th</sup> Cir. 1996) (quoting Melville B. Nimmer & David Nimmer, 3  
 15 *Nimmer on Copyright* § 14.04 [B] [3] (1996)). Thus, if Defendants reasonably believed  
 16 their videos were protected by the fair use doctrine—and they did—they cannot be deemed  
 17 to have acted willfully. "[T]he issue is whether the copyright law supported the plaintiffs'  
 18 position so clearly that the defendants must be deemed as a matter of law to have exhibited  
 19 a reckless disregard of the plaintiffs' property rights." *Princeton University Press*, 99 F.3d  
 20 at 1392. Here, Defendants' fair use arguments are strong enough that Defendants should  
 21 prevail; they must, then, be strong enough that Defendants could reasonably believe their  
 22 videos constituted fair use. Any decision to the contrary would unnecessarily deter would-  
 23 be parodists and would chill constitutionally permissible speech in this area.

### 24 **IV. HENLEY HAS NO EVIDENCE TO SUPPORT HIS LANHAM ACT CLAIM**

#### 25 **A. Henley cannot prove the necessary elements of his claim**

26 Henley seems to believe that the only thing he must prove to prevail on his Lanham  
 27 Act false endorsement claim is likelihood of confusion. That is the entire focus of his  
 28 briefing. But likelihood of confusion is important only if Henley has first established the



1 elements of his claim. And as is set forth more completely in Defendants' Memo, Henley  
2 has no evidence to support the most basic element of his claim: that Defendants used his  
3 "mark."

4 To prevail, Henley must prove that Defendants misappropriated one of his  
5 "distinctive attributes." Henley tries to sidestep this issue; he notably fails to cite the clear  
6 language from the seminal case articulating this requirement, and he simply asserts that  
7 "there is no requirement that the name, likeness or any *particular* attribute of the celebrity  
8 be used...." Plaintiffs' Motion at 23 (emphasis added). That is technically correct. There  
9 is no requirement that any *particular* attribute be used; but it is absolutely necessary to  
10 show that *some* "distinctive attribute" be used. It is the "distinctive attribute" that  
11 constitutes the plaintiff's "mark" for purposes of the Lanham Act. *See Waits v. Frito-Lay,*  
12 *Inc.*, 978 F.2d 1093, 1106 (9<sup>th</sup> Cir. 1992) ("[C]ourts have recognized false endorsement  
13 claims brought by plaintiffs, including celebrities, **for the unauthorized imitation of their**  
14 ***distinctive attributes, where those attributes amount to an unregistered commercial***  
15 **"trademark."**) (emphasis added); *see also id.* at 1106 ("A false endorsement claim based  
16 on the unauthorized use of a celebrity's identity is a type of false association claim, for **it**  
17 **alleges the misuse of a trademark, i.e., a symbol or device such as a visual likeness,**  
18 **vocal imitation, or other uniquely *distinguishing characteristic***, which is likely to  
19 confuse consumers as to the plaintiff's sponsorship or approval of the product.") (emphasis  
20 added); *see also id.* at 1110 (holding that "a celebrity whose endorsement of a product is  
21 implied through **the imitation of a *distinctive attribute of the celebrity's identity***" can  
22 sue) (emphasis added).

23 At no point in this litigation has Henley identified the "distinctive attribute" that he  
24 believes Defendants have misappropriated—not in his opposition to Defendants' motion to  
25 dismiss, not in discovery, and not in his summary judgment motion. That alone defeats  
26 Henley's claim.

27 Henley seems to want to stretch the law to allow for recovery apart from the  
28 misappropriation of a distinctive attribute. That is, he wants this Court to conclude that the

1 mere use of a song associated with Henley without Henley's permission constitutes a  
2 Lanham Act violation. But no court has ever endorsed such an argument, and no court  
3 should.

4 The Second Circuit squarely rejected it already, in *Oliveira v. Frito-Lay, Inc.*, 251  
5 F.3d 56 (2d Cir. 2001). There, as Defendants describe in their Memo, Astrud Oliveira  
6 (known as Astrud Gilberto) sued Frito-Lay for using her famous 1964 recording of "The  
7 Girl from Ipanema" in a television commercial. Gilberto did not own the copyright in the  
8 recording, and Frito-Lay had procured a license from the copyright owner. Even so,  
9 Gilberto argued that she was closely identified with the song—as, indeed, she was—and  
10 therefore that use of the song without her permission would imply her endorsement, and  
11 therefore constituted a false endorsement for purposes of the Lanham Act.

12 Gilberto's claim, of course, was far stronger than Henley's. The song in question  
13 was, practically speaking, the only reason for her notoriety, which is why it was also the  
14 source of her nickname, the Girl from Ipanema. Moreover, Frito-Lay did not make or  
15 procure a new recording of the song; it simply used Gilberto's signature recording, which  
16 included, of course, her voice.

17 Even so, the Second Circuit rejected her claim and pointed out that no court had ever  
18 accepted such an argument. "[W]e conclude that, at least upon the showing made by  
19 Gilberto, the law does not accord her trademark rights in the recording of her signature  
20 performance. *Plaintiff has not cited a single precedent throughout the history of*  
21 *trademark supporting the notion that a performing artist acquires a trademark or service*  
22 *mark signifying herself in a recording of her own famous performance."* *Id.* at 62  
23 (emphasis added). The song was undoubtedly identified with Gilberto, but many famous  
24 artists throughout history have been identified with their famous recordings. "Yet in no  
25 instance was such a performer held to own a protected mark in that recording." *Id.* Simply  
26 put, "[t]he use of her recorded song has not taken her persona, and the district court  
27 properly concluded that she could sustain no claim of implied endorsement." *Id.*

1 Finally, not only has no court ever adopted Henley's argument, no court should.  
2 Indeed, a district court could do so only by ignoring the United States Supreme Court's  
3 instructions in *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003). It  
4 is critical to understand that accepting Henley's *Lanham Act* argument would  
5 fundamentally change *copyright* law. Henley's position is that he has the right to preclude  
6 the use of a musical composition—not his particular recording of the song, the composition  
7 itself—if the public associates him with the song. If he is right, he can preclude the use of  
8 a work even if it is in the public domain, and he can preclude the use of a copyrighted work  
9 even if the copyright owner has granted a license.

10 This would be a disaster for copyright law, because it would effectively remove the  
11 clarity the law seeks to establish. It would no longer be necessary merely to get a license  
12 from the copyright owner, for example, which would make licensing transactions more  
13 difficult, more costly, and therefore less likely. Practically, Henley's legal position takes  
14 away rights that Congress currently gives to copyright owners alone and disburses them  
15 more broadly, most particularly to artists. This might or might not be good policy, but it is  
16 not the policy determination Congress has made. Henley would have this Court undercut  
17 the balancing determinations that Congress has made in the Copyright Act when it sought  
18 to balance the rights of the public, copyright owners, and artists. And that would violate  
19 the principles the Supreme Court articulated in *Dastar*, where the Court warned against  
20 "creat[ing] a species of mutant copyright law." *Id.* at 34. There, the Court was concerned  
21 with creating a mutant species of copyright law that would "limit[] the public's 'federal  
22 right to 'copy and to use' expired copyrights'" and would therefore create "a species of  
23 perpetual ... copyright." *Id.* at 34, 37. Henley's legal theory would allow for precisely that  
24 result, by allowing an artist who is identified with a work to preclude its use even if the  
25 work is in the public domain. It would also allow people in Henley's position to trample  
26 on the rights of copyright owners by overruling their licensing decisions. And while this is  
27 not the specific concern raised by the *Dastar* court, it is clearly related to the Court's  
28 concern with upsetting Congress' balancing act under the Copyright Act.

1 Henley's legal theory is inconsistent with *all* of the case law and would require this  
2 Court to usurp Congress' policy making role and flatly ignore Supreme Court precedent.  
3 The Court should decline Henley's invitation to take that path.

4 **B. Henley cannot prevail without proving actual malice, and he has no**  
5 **evidence of actual malice**

6 A public figure, like Henley, cannot prevail on a false endorsement claim that  
7 involves noncommercial speech, like Defendants' videos, without proving actual malice.  
8 Because Henley has no evidence of actual malice, his false endorsement claim fails.

9 Don Henley is undeniably a public figure. So the only issue here is whether  
10 Defendants' videos are noncommercial speech. They clearly are. "Commercial speech'  
11 has special meaning in the First Amendment context. Although the boundary between  
12 commercial and noncommercial speech has yet to be clearly delineated, the 'core notion of  
13 commercial speech' is that it 'does no more than propose a commercial transaction.'" *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1184 (9<sup>th</sup> Cir. 2001). Clearly,  
14 Defendants' videos do more than simply propose a commercial transaction. They discuss  
15 political issues in the midst of a political campaign; indeed, Henley himself found them  
16 most informative in fleshing out DeVore's political message. Arledge Decl., Exh. 1 at  
17 68:5-10 (Henley agreeing that the videos made the message of DeVore's political campaign  
18 very clear); DeVore Decl., ¶¶ 2-10.

19 Because Henley is a public figure and Defendants' videos are noncommercial  
20 speech, Henley bears the burden of proving actual malice by clear and convincing  
21 evidence. *Hoffman*, 255 F.3d at 1184-85; *Kournikova v. General Media Comm., Inc.*, 2002  
22 WL 31628027 \*6 (C.D. Cal. 2002). This means Henley must prove by clear and  
23 convincing evidence that Defendants **intended to confuse the public** into believing that  
24 Henley actually sponsored or endorsed the videos. "Mere negligence is not enough to  
25 demonstrate actual malice. '[S]ubjective or actual intent is required ... and there is no  
26 actual malice where [defendants] unknowingly mislead the public." *Id.* at 1187 (internal  
27 citations omitted); *see also Kournikova*, 2002 WL 31628027 at \*9 ("The relevant inquiry  
28

1 for Plaintiff's false endorsement claim is whether Plaintiff established, by clear and  
 2 convincing evidence, that Defendant intended to confuse consumers into believing that  
 3 Kournikova actually endorsed Penthouse (i.e., voluntarily posed for the photographs, or  
 4 otherwise approved Penthouse's use of her identity."); *see also Solano v. Playgirl, Inc.*,  
 5 292 F.3d 1078, 1084-85 (9<sup>th</sup> Cir. 2002). Henley offers *no* evidence to carry his burden.  
 6 The undisputed evidence comes from DeVore: he had no desire for the public to believe  
 7 that Henley endorsed or sponsored him or his campaign. DeVore Decl., ¶¶ 10-12, 15.  
 8 Indeed, any such perceived endorsement would be harmful to him and he would seek to  
 9 avoid it. *Id.* This undisputed evidence effectively ends Henley's claim.

10 **C. The *Sleekcraft* factors are irrelevant in these circumstances – but also**  
 11 **harmful to Henley's argument if applied**

12 **1. Henley has no evidence to support his application of the *Sleekcraft***  
 13 **factors**

14 Because Henley cannot make out the most-basic element of his claim—the existence  
 15 of a “mark”—and because he has no evidence of actual malice, this Court must deny  
 16 Henley's summary judgment motion, and it need not examine the *Sleekcraft* factors.

17 But even if Henley could overcome the fatal obstacles discussed above, he would  
 18 still need to show a likelihood of confusion under *Sleekcraft*. *See AMF Inc. v. Sleekcraft*  
 19 *Boats*, 599 F.2d 341, 348-49 (9<sup>th</sup> Cir.1979) (1. strength of the mark; 2. proximity of the  
 20 goods; 3. similarity of the marks; 4. evidence of actual confusion; 5. marketing channels  
 21 used; 6. type of goods and the degree of care likely to be exercised by the purchaser; 7.  
 22 defendant's intent in selecting the mark; and 8. likelihood of expansion of the product  
 23 lines.). Hence, it would ordinarily be more than a little odd that Henley chooses to gloss  
 24 over the *Sleekcraft* factors quickly, with little analysis and even less factual support. But,  
 25 here, Henley really had very little choice. It is not just that the factors do not help his case.  
 26 Worse, the very process of focusing on the specific factors only highlights Defendants'  
 27 point about Henley's inability to make out the most basic element of his claim: a “mark.”  
 28

1 For example, the first *Sleekcraft* factor concerns the “strength of the mark.” So what,  
2 exactly, is Henley’s “mark” for purposes of this case? In *Waits*, the seminal and  
3 controlling case, the Ninth Circuit made clear that the “mark” for purposes of a Lanham  
4 Act false endorsement claim is a “distinctive attribute” or “distinguishing characteristic” of  
5 the plaintiff. *See, e.g., Waits*, 978 F.2d at 1106 (“[C]ourts have recognized false  
6 endorsement claims ... **for the unauthorized imitation of their distinctive attributes,**  
7 **where those attributes amount to an unregistered commercial “trademark.”**)  
8 (emphasis added).

9 Without an identifiable “mark,” this Court cannot even apply, much less find in  
10 Henley’s favor on, the first, third or seventh *Sleekcraft* factors, all of which hinge on an  
11 analysis of a “mark.”

12 In addition, with one exception, Henley also offers no evidence to support his  
13 position on the other *Sleekcraft* factors. Henley argues—without evidence—that the  
14 second factor (proximity of the goods) weighs in his favor because Henley performs in  
15 videos on YouTube and other internet sites, and thus “there is considerable overlap  
16 between Henley’s goods and Defendant’s [sic] videos.” But Henley’s “goods” are the  
17 professional recordings of a gifted, world-famous musician. Defendants’ works are  
18 political works by amateur musicians and are, in everybody’s estimation, poorly done.  
19 Defendants’ Memo at 13-14. Henley himself has said that he is not in the least concerned  
20 that somebody might mistake Defendants’ recordings for the originals or even that they  
21 might prefer Defendants’ recordings. *Id.* The only “proximity” between these two sets of  
22 works is that they both resided at one time on the internet. But make no mistake: they have  
23 always lived in very different neighborhoods.

24 Henley’s argument on the fifth factor—marketing channels used—is unpersuasive  
25 and, again, unsupported by any evidence. Henley relies on the fact that Defendants’ works  
26 and Henley’s works were on the internet. But Henley’s works are clearly marketed more  
27 broadly and differently than Defendants’. Henley is a world-famous musician and the  
28 works were produced by an international record label. Henley sells his works in retail

1 outlets, on internet download sites like iTunes, and he markets them in sold-out concerts all  
2 over the world. Henley undoubtedly has material on sites like YouTube, but that is because  
3 his reach is so broad, his presence so ubiquitous. Defendants, by contrast, placed their  
4 videos only on free internet sites. They do not sell the videos in stores, advertise them in  
5 Rolling Stone, or promote them with a North American concert tour.

6 Finally, Henley offers no evidence to support his argument on the sixth factor, the  
7 type of goods and the degree of care likely to be exercised by the purchaser. There is, of  
8 course, no such thing as a “purchaser” of Defendants’ videos; the videos are not and never  
9 have been for sale. As for what kind of care a person would show in distinguishing  
10 between Henley’s products and Defendants’ videos, it is hard to imagine that much care  
11 would be required to separate a Grammy-winning, professional recording from—in  
12 Plaintiffs’ words—a “terrible” and “amateur” recording. Defendants’ Memo at 13. But to  
13 the extent this factor is important and to the extent it could weigh in Henley’s favor, Henley  
14 has provided no evidence from which this Court can draw a conclusion in his favor.<sup>2</sup>

## 15 2. Henley’s alleged evidence of actual confusion is weak and disputed

16 The only factor Henley spends any time discussing with what purports to be  
17 evidence is the fourth factor—evidence of actual confusion. But even here, Henley’s  
18 evidence is weak and contradicted.

19 Henley’s only evidence of actual confusion comes from Hal Poret’s expert  
20 declaration. Poret’s testimony is badly flawed. His alleged core finding is that “[c]lose to  
21 half of the respondents (48%) who identified Henley indicated that they believed Henley  
22 endorsed the video(s), or authorized or approved the use of his music in the video(s).”  
23 Plaintiffs’ Motion at 24. This statement is patently and provably inaccurate, but the issue  
24 requires some unpacking. (The Declaration of Suzanne Shu, which is submitted with this  
25 brief, tracks much of the analysis below.)

26  
27  
28 <sup>2</sup> Henley rightly ignores the eighth factor as being inapplicable in this case.

1 Poret gave his survey to 572 people. He excluded from his results any answers by  
2 respondents who did not identify Don Henley (or the Eagles, though that answer is  
3 technically inaccurate) as the performers of the songs in question. This led to the exclusion  
4 of the vast majority (about 80%) of the total respondents. Poret then focused his analysis  
5 on the remaining 114 respondents. He arrives at his 48% figure for this group by first  
6 interpreting and then aggregating responses from three different questions or sets of  
7 questions. The first set, questions 1 through 4, are based around an open-ended question  
8 designed to identify which respondents believe Henley endorsed or approved Defendants'  
9 videos. The second set, questions 5 through 8, are based around an open-ended question  
10 designed to identify which respondents believe Henley permitted or authorized the videos.  
11 And the final set, question 9, is a close-ended question designed to determine whether  
12 respondents believe Henley gave permission or approval for the use of the music in  
13 Defendants' videos.

14 It is important to understand that the three sets of questions are not entitled to equal  
15 weight. Poret conceded that if no respondents had identified Henley in response to the two  
16 sets of open ended questions, the survey results would counsel strongly against a  
17 conclusion that the respondents were confused as to Henley's endorsement, sponsorship or  
18 approval. In Poret's words: "[T]he open-ended questions are integral to my evaluation of  
19 what's going on in the analysis ... [b]ecause the best indication of what people truly believe  
20 is what they give in response to these open-ended questions before anything specific is  
21 suggested to them. And there's a long, clear tradition of interpreting responses to surveys  
22 like this. And if nobody is mentioning an idea or a specific type of confusion on their own,  
23 then you would not accept that there's a meaningful amount of confusion going on based  
24 just on a question like Question 9." Supp. Arledge Decl., Exh. D at 185:19 to 187:17.  
25 Thus, based solely on Poret's own view, a trier of fact would be justified in rejecting  
26 Poret's conclusion unless the open-ended questions support him.

27 They don't.



1 The answers to the first open-ended set was striking, but not in a way helpful to Poret  
2 or Henley. Only about 3% of the respondents said that they believed Henley endorsed or  
3 approved Defendants' videos. If this sounds like a very low percentage, it is. Poret himself  
4 says so. Indeed, one of the ways he tested for "noise" in the survey was to measure how  
5 many people in response to the first open-ended set of questions identified Barack Obama,  
6 Al Gore, and others. His theory was that "[a]s the videos are critical of these figures, one  
7 would expect only a very low percentage of viewers to believe that any of these figures  
8 endorsed or gave authorization for any aspect of the videos." See Poret Report, Appendix  
9 C. Thus, if a small percentage of respondents named figures like Barack Obama and Al  
10 Gore, the results would show "that the survey design and questions caused only a minimal  
11 tendency for respondents to guess or to express beliefs that would be unlikely to be held by  
12 real world viewers." *Id.* What Poret found is that about 3% of respondents named Barack  
13 Obama as someone who endorsed or approved Defendants' videos. And to Poret, this was  
14 good news. This three percent response rate was "a very low response rate," "within the  
15 statistical error rate" of seven to eight percent, and therefore "basically equivalent to zero."  
16 Supp. Arledge Decl., Exh. D at 47:21 to 48:7 and 50:11 to 52:8.

17 Based on Poret's own testimony, then, the percentage of people who responded that  
18 *Henley* endorsed or approved Defendants' videos in response to the first open-ended set of  
19 questions (also about 3%) was "a very low response rate," "within the statistical error rate,"  
20 and "basically equivalent to zero." Clearly, a trier of fact could reasonably conclude that  
21 the first set of open-ended questions does not support Poret's conclusion that people are  
22 likely confused as to Henley's sponsorship or endorsement of the videos.

23 Thus, Poret's entire conclusion rests on the second open-ended set, questions 5  
24 through 8. Question 5 asks respondents whether they believe that "the politician who put  
25 out the videos got permission or authorization for any particular aspect or aspects of either  
26 or both of the videos." Poret Report at 7. Those respondents who said "yes"—a decided  
27 minority—were asked in question in question 7b, "Who do you think gave permission or  
28 authorization...?" *Id.* at 8. Poret concludes that 20 people identified Henley in response to

1 this second open-ended set. (Poret report at 18 and Appendix D). Poret's conclusion is  
2 provably false.

3 Below is a chart showing the answers to Question 7b given by the 20 respondents  
4 who Poret claims "answered that Henley gave authorization for his music to be used in the  
5 video(s)" (Poret Report at 18):

6 Respondent	Code Number	Answer(s) to question 7b
7 11	25	don't know
8 50	221	1. I would believe that it would have to be the 2. The news agency or photographer agency or 3. photographer who owns the rights to the pictures.
9 85	350	Don Henley or his recording company
10 96	417	[No response]
11 97	418	the person who owns the song
11 110	468	whoever holds the copyright...writers I assume
12 126	595	The music artists
12 162	885	1. him 2. the producer and writer
13 196	1025	The song writer/performer
14 205	1063	1. Both parties (video clips/songs) 2. The recording company or current owner to the 3. rights of those songs
15 265	1342	record company/whoever owns the rights
16 285	1718	[No Response]
16 291	1741	1. whoever handles the royalties for the artist 2. don't know
17 391	2290	1. I am not sure if Don Henly owns the rights or not 2. already answered 3. already answered
18 417	2458	1. writer of the song or the person that holds the 2. music rights to it 3. photographer/photographer's employer
19 424	2487	1. Composer 2. Owner
20 459	2673	The person/people owning the music.
21 488	2782	Who every controls the rights for that particular song
22 552	3235	The artist who made the song or whoever has the 3. rights to the music
23 556	3254	1. obama 2. gore 3. The original groups that recorded the music.

26 What is striking about the list is that only two of the respondents actually identified  
27 Henley, despite the fact that all of these respondents identified Henley as the performer of  
28

1 the original songs. Needless to say, the percentage of people who actually identified  
2 Henley in response to question 7b (two) is, in Poret's own words, "very low," "within the  
3 statistical error rate," and "basically equivalent to zero." And even including the people  
4 who gave responses such as "the songwriter" or "performer" still results in a small  
5 percentage of the total respondents in this pool. So how does Poret arrive at his conclusion  
6 that all 20 of the people in the above chart identified Henley as someone who endorsed or  
7 gave authorization for the videos? By ignoring the actual results and "interpreting" the  
8 responses in a way favorable to Henley.

9 For example, respondent No. 97 (who was assigned code number 418) is one of the  
10 people Poret identifies as believing Henley endorsed or gave authorization for the videos.  
11 That respondent did not identify Henley in response to the first open-ended set. Supp.  
12 Arledge Decl., Exh. D at 97:2-21. In response to question 7b, the person also did not  
13 identify Henley. *Id.* The respondent clearly know Henley's name, of course, because he or  
14 she identified Henley as the artist "whose music was used in the videos" in response to  
15 question 10. *Id.* at 98:22 to 99:5. But when asked to identify who they believe gave  
16 permission or authorization for the videos, respondent No. 97 said, "The person who owns  
17 the song." *Id.* at 97:2-21.

18 These responses do not support Poret's contention that the person believed Henley  
19 gave permission. Indeed, a reasonable trier of fact could, and probably should, conclude  
20 that the person is unsure whether Henley was involved or not. If the respondent believed  
21 Henley gave permission or authorization, he or she could have said so clearly; we know the  
22 respondent knew Henley's name. The response, then, betrays that the person is unsure who  
23 granted permission. In fact, Poret seems to admit as much: "We don't know who they  
24 think is actually the one giving the authorization...." *Id.* at 99:21-22. But despite the fact  
25 that this respondent did not identify Henley as a person who gave permission or  
26 authorization for the videos, and despite the fact that Poret must concede that nobody  
27 knows who the respondent believes gave permission or authorization, Poret still counts this  
28

1 particular respondent (No. 97 or code number 418) as a respondent who “believed Henley  
2 approved or authorized the use of his music in the videos.” Poret Decl., ¶ 7.

3 This is a recurring pattern with Poret. Having not received actual responses helpful  
4 to his position, he simply asserted that the responses support him, as if turning bad  
5 responses into good responses is merely an act of will. *See also* Supp. Arledge Decl., Exh.  
6 D at 89:24 to 96:15 (Poret again concluding that the respondent answered that Henley  
7 approved or authorized the use of the music in Defendants’ videos even though the  
8 respondent actually answered that he didn’t know who gave permission or authorization).  
9 The trier of fact can—and, Defendants believe, absolutely will—reject Poret’s conclusion.  
10 Poret’s report cannot support Henley’s summary judgment motion.

11 This Court need not reach the *Sleekcraft* factors because of the other, fatal flaws in  
12 Henley’s false endorsement claim. But if the Court applies the *Sleekcraft* factors, it must  
13 conclude that those factors do not support Henley’s argument. Henley is not entitled to  
14 summary judgment on his Lanham Act claim.

15 **V. CONCLUSION**

16 For the foregoing reasons, this Court must deny Plaintiffs’ motion for partial  
17 summary judgment in its entirety.

18  
19 Dated: May 3, 2010

**ONE LLP**

20  
21  
22 By:                   /s/ Christopher W. Arledge                    
23 Christopher W. Arledge  
24 Attorneys for Defendants, Charles S. Devore and  
25 Justin Hart  
26  
27  
28