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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.

AND RELATED COUNTERCLAIMS

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

DEFENDANTS' EVIDENTIARY OBJECTIONS IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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

1. Declaration of Jacqueline Charlesworth

Charlesworth is Plaintiffs' attorney. She does not claim to have and in fact does not possess any personal knowledge of the underlying dispute. Thus, she is incompetent to authenticate and have introduced all of the exhibits attached to her complaint, with the exception of the deposition transcripts attached as Exhibits 12 through 17 and the discovery responses attached as Exhibits 18 through 20. Because she lacks personal knowledge to

authenticate the remaining exhibits, they should all be excluded for purposes of the summary judgment motions.

2. Declaration of Mark Rose

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

Dr. Rose, then, was asked to opine on a purely legal question: whether Defendants' works satisfy the legal definition of parody articulated by the Supreme Court. But this is not his role. The Ninth Circuit has been absolutely clear that this question—whether a defendant's work is a parody—is a question of law for the court. *Mattel, Inc. v. Walking Mountain Prod.*, 353 F.3d 792, 801 (9th Cir. 2004) ("The issue of whether a work is a parody is a question of law.... [E]very court to address the issue whether a defendant's work qualifies as a parody has treated this question as one of law to be decided by the court."). Dr. Rose is not qualified to opine on the law even if such a legal opinion were permissible. *See, e.g.,* Supp. Arledge Decl., Exh. A at 28:12 to 29:8 ("I'm not a lawyer and I am not qualified to provide you a fair use analysis.... "I can't testify to that [what the

Supreme Court meant in footnote 14 of its *Campbell* opinion when it referred to looser forms of parody], I'm not a lawyer.").

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

Second, and not surprisingly in light of the Ninth Circuit's conclusion that whether a work constitutes parody is a question of law for the court, Dr. Rose's subjective opinion on this question is irrelevant. In *Walking Mountain*, the plaintiff sought to admit survey evidence to show that most members of the public do not perceive parodic character in the defendant's works. The Ninth Circuit ruled that the survey evidence was inadmissible. "The issue of whether a work is a parody is a question of law, not a matter of public majority opinion." *Walking Mountain*, 353 F.3d at 801. The court found "no case law in support of [Mattel's] contention that the parodic nature of a defendant's work should be

assessed using surveys and opinion testimony." *Id.* Parody has "socially significant value as free speech under the First Amendment." *Id.* And the "[u]se of surveys in assessing parody would allow majorities to determine the parodic nature of a work and possibly silence artistic creativity. Allowing majorities to determine whether a work is a parody would be greatly at odds with the purpose of the fair use exception and the Copyright Act." *Id.*

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

In *Walking Mountain* the Ninth Circuit expressed concern about tyranny of the majority, concluding that it is inappropriate to have a majority determine whether a work merits protection. Surely tyranny of the minority (here, a minority of one) is no better. If the opinions of a majority should not decide whether the First Amendment offers its

protection, should the subjective whim of a single individual? Dr. Rose's interpretation may be interesting, and it may have even some value for scholars who are interested in the literary analysis of pop songs and political advertisements. But it is irrelevant to the question before this Court, and it must be excluded.

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

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

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

3. Declaration of Lawrence Ferrara

Lawrence Ferrara is an expert witness retained by Plaintiffs. Two of the conclusions he recites in his declaration and in the attached expert report are inadmissible. In paragraph 6(b) and again in paragraph 7, Ferrara concludes that Defendants' videos "slavish cop[y]" the original works and "take far more expression than necessary to evoke the corresponding original compositions." This conclusion is inadmissible for two reasons. First, it is a pure legal conclusion and thus inadmissible for the reasons discussed above with regard to Mark Rose's declaration. Second, there is no foundation for the opinion. Ferrara does not describe what the purpose of Defendants' videos is—making it difficult if not impossible to describe how much of the songs it is "necessary" to use in order to accomplish Defendants' objective—and he does not describe how Defendants' objective could have been achieved differently.

Also, in paragraph 6(f) and again in paragraph 10, Ferrara concludes that Defendants' videos contain no parodic musical expression. But whether a work constitutes a parody under the relevant legal definition is a pure question of law for the Court. So, for the reasons discussed above with regard to Mark Rose's declaration, this conclusion is inadmissible.

4. Declaration of Hal Poret

Hal Poret is an expert witness retained by Plaintiffs. Poret's expert opinion is based on a consumer confusion survey he oversaw. That survey is tainted because of the poor methodology used, as is set forth in the Declaration of Suzanne Shu. In addition, the conclusions Poret draws from the survey data are conclusions that are not tied to the evidence and are not based on sound scientific procedures and process, as is set forth in Suzanne Shu's declaration and Defendants' Opposition to Plaintiff's Motion for Partial Summary Judgment. Under *Daubert*, this Court should exclude Poret's survey, report, and declaration.

5. Declaration of Don Henley

Paragraphs 8, 9 and 11 are irrelevant and therefore inadmissible. Don Henley's view of the meaning of the original songs is irrelevant. The legal question is whether the purported parody "'reasonably could be perceived as commenting on the original or criticizing it, to some degree.'" *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 801 (9th Cir. 2003) (quoting *Campbell*). Thus, the question is not whether Henley believes the parodies miss the true meaning of the original song; the question is whether an objective third party could reasonably perceive the parodies to be commenting on the original. And this is a pure question of law for this Court. *Walking Mountain*, 353 F.3d at 801.

Henley's statement that Defendants' use of the songs harms their value in the marketplace lacks foundation. Henley gives no evidence from which the Court can conclude that Henley knows the market value of the songs or knows the market value of the songs after Defendants' parodies. In fact, there is no indication that Henley's statement is based on anything other than pure conjecture rather than any reasoned, empirical analysis.

Henley's statement that viewers will mistakenly believe he approved Defendants' use of the songs in the videos lacks foundation. Henley is merely speculating as to what viewers might believe. He gives no facts to support his analysis.

Henley's statements in paragraphs 28 and 29 are speculative; he gives away his lack of personal knowledge in the first clause of each paragraph. In addition, his assertion that his artistic reputation and the integrity and value of the original songs would be harmed if the videos had continued to be available on the internet lacks foundation. There is no indication that Henley's statement is based on anything other than pure conjecture rather than any reasoned, empirical analysis.

6. Declaration of Danny Kortchmar

Kortchmar's statements in paragraph 7 regarding his view of the meaning of "All She Wants to Do Is Dance" is irrelevant and inadmissible. The legal question is whether

the purported parody "'reasonably could be perceived as commenting on the original or criticizing it, to some degree.'" *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 801 (9th Cir. 2003) (quoting *Campbell*). Thus, the question is not whether Kortchmar believes the parodies miss the true meaning of the original song; the question is whether an objective third party could reasonably perceive the parodies to be commenting on the original. And this is a pure question of law for this Court. *Walking Mountain*, 353 F.3d at 801.

Kortchmar's statement in paragraph 15 that Defendants' videos harmed the value of his song lacks foundation. Kortchmar gives no evidence from which the Court can conclude that Kortchmar knows the market value of the songs or knows the market value of the songs after Defendants' parodies. In fact, there is no indication that Kortchmar's statement is based on anything other than pure conjecture rather than any reasoned, empirical analysis.

7. Declaration of Mike Campbell

Campbell's statements in paragraph 7 regarding his view of the meaning of "All She Wants to Do Is Dance" is irrelevant and inadmissible. The legal question is whether the purported parody "'reasonably could be perceived as commenting on the original or criticizing it, to some degree.'" *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 801 (9th Cir. 2003) (quoting *Campbell*). Thus, the question is not whether Campbell believes the parodies miss the true meaning of the original song; the question is whether an objective third party could reasonably perceive the parodies to be commenting on the original. And this is a pure question of law for this Court. *Walking Mountain*, 353 F.3d at 801. Moreover, it is clear that Campbell's testimony is pure speculation as to the meaning Henley ascribes to the lyrics.

8. Declaration of Jon Albert

Albert is an expert retained by Plaintiffs. In paragraph 7 of his declaration, Albert concludes that Defendants' use of the copyrighted songs "was a promotional, commercial use under advertising standards." This conclusion is irrelevant, since the meaning of a commercial use is judged by legal—especially constitutional—standards, not advertising standards. And as set forth in Defendants' opposition brief, Defendants' use of the songs here was clearly not a "commercial" use for purposes of the Copyright Act or the First Amendment.

In paragraphs 9 through 12, Albert concludes that Defendants' use of the songs harms their value. The conclusion is irrelevant, since the fair use doctrine only considers a particular type of harm—market usurpation—and Albert does not state that this is the type of harm with which he is concerned. Indeed, he implies the opposite. It is undoubtedly true that 2 Live Crew's parodic use of "Pretty Woman" would make Roy Orbison's original less attractive to advertisers; after all, the parody was crude and offensive to many. But this association with something distasteful was not the type of harm with which copyright law is concerned. Thus, Albert's argument is irrelevant and inadmissible.

Albert's conclusions in those paragraphs also lacks foundation and appears to be pure speculation. Albert merely assumes, for example, that Defendants' use of the songs will cause an unwanted association in the minds of the public between the songs and political controversy. But Albert offers no facts to support his assumption that such an association would be created. Likewise, he offers no evidence whatsoever that fans of Don Henley will refuse to buy the songs in the future because they have been alienated by Henley's supposed endorsement of a politically polarizing figure. And being that the songs are a quarter century old, at least a shred of empirical support really is necessary to support the idea that Defendants' videos could harm future record sales to Henley's fans.

The same concerns render Albert's conclusions in paragraph 13 about future harm to Henley speculative, lacking in foundation, and inadmissible.

Albert's conclusions about the market value of the songs and Henley himself in paragraphs 15 through 18 are likewise lacking in foundation and speculative. Albert offers his opinion as to the fair market value of a transaction between Plaintiffs and Defendants—in other words, on what terms would a willing buyer and a willing seller in their positions do a deal. He determines the rate is hundreds of thousands of dollars. But this is pure speculation, because Albert (1) has never done a transaction involving Henley, (2) has never even heard of Henley agreeing to a commercial licensing transaction, (3) cannot think of a comparable transaction to the hypothetical one in question (paying many hundreds of thousands of dollars for an internet only use), and (4) has never even heard of a transaction in which a political campaign paid hundreds of thousands of dollars to license a song. *See* Supp. Arledge Decl., Exh. E at 16:3-22, 139:19 to 140:12, 142:25 to 143:13. Thus, Albert has nothing—not a single date point—on which to base his alleged valuation. His conclusion lacks foundation and is inadmissible.

Dated: May 3, 2010

ONE LLP

By: /s/ Christopher W. Arledge
Christopher W. Arledge
Attorneys for Defendants, Charles S. Devore and Justin Hart