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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' RESPONSE TO PLAINTIFFS' STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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

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I. Plaintiffs' alleged undisputed facts

Plaintiffs' Alleged Undisputed Fact	Defendants' Position
1. Plaintiff Don Henley ("Henley") is a world-famous songwriter, recording artist, and performer.	Not disputed.
2. Henley is a founding member of the Eagles, the band credited with the best-selling rock album of all time in the United States.	Not disputed.
3. In addition to his success in the Eagles, Henley has enjoyed a remarkable solo career, winning a Grammy for his hit song "The Boys of Summer" ("Boys of Summer") in 1986.	Not disputed.
4. Plaintiff Mike Campbell is also a gifted and successful songwriter, recording artist and producer.	Not disputed.
5. Campbell is a founding member of the band Tom Petty and the Heartbreakers and has worked with such notable artists as Stevie Nicks, Roy Orbison and Del Shannon, in addition to Henley.	Not disputed.
6. Plaintiff Danny Kortchmar ("Kortchmar") is a renowned and sought-after songwriter, recording artist and producer.	Not disputed.

7. Kortchmar has worked with Don Henley, James Taylor, Jackson Browne, Billy Joel and others.	Not disputed.
8. As is common among songwriters, the Plaintiffs use fictitious business names in connection with their copyright interests.	Not disputed.
9. Henley uses the fictitious business names "Cass County Music" and "Woody Creek Music"; Campbell uses "Wild Gator Music"; and Kortchmar uses "Kortchmar Music." These are not legally distinct entities, but "d/b/as" of the Plaintiffs.	Not disputed.
10. Henley and Campbell receive significant royalty payments for licensed sales, performances and other authorized uses of the musical composition Boys of Summer, as does Kortchmar for "All She Wants to Do Is Dance."	Not disputed.
11. Plaintiffs strive to make their music appealing to a large universe of fans.	Not disputed.
12. Plaintiffs are careful in licensing their copyrighted songs because they wish to protect the value of their works; in particular, they do not permit the political use of their songs because such uses could alienate fans and be harmful to future licensing and sales of their music.	Not disputed.

13. Plaintiffs will consider licensing their copyrighted works for uses such as television, film and promotional purposes, including humorous treatment of their songs.	Disputed. Plaintiffs Don Henley and Mike Campbell testified in deposition that they do not license their songs for commercial purposes. Plaintiff Danny Kortchmar testified that he would be willing to license his songs but that he would not license his song at issue in this case – All She Wants to Do Is Dance – without Henley's permission. Arledge Decl., Exh. 1 at 9:4-13, 82:8-15; 91:1-9, 103:20 to 104:14, 120:22 to 121:4; Arledge Decl., Exh. 4 at 14:15 to 16:4 and 82:7 to 83:1; Arledge Decl., Exh. 5 at 52:8-18, 103:9-21, 110:19 to 111:14, 117:2 to 118:4, and 135:18-25; Supp. Arledge Decl., Exh. B at 46:16 to 47:5; Exh. C at 83:1 to 85:6, 91:1-9.
14. Campbell agreed to license a popular song that he co-authored, "Stop Draggin' My Heart Around," to Weird Al Yankovic, a singer known for his funny interpretations of popular songs, and Yankovic created a humorous remake of Campbell's song, titled "Stop Draggin' My Car Around."	Not disputed.
15. In 1984, Henley released his multi-platinum solo album *Building the Perfect Beast,* which includes the two songs at issue in this case: Boys of Summer, co-written by	Not disputed.

Henley and Campbell, and "All She Wants to Do Is Dance" ("Dance"), written by Kortchmar. Both songs were top- ten hits on the Billboard charts.	
16. Both Boys of Summer and Dance are registered with the U.S. Copyright Office.	Not disputed.
17. Henley and Campbell jointly own the copyright to the musical composition Boys of Summer.	Not disputed.
18. Kortchmar, who is entitled to collect royalties for Dance from his publisher, Warner/Chappell Music ("Warner/Chappell"), is the beneficial owner of the copyright in the musical composition Dance.	Not disputed.
19. 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 Campbell.	Not disputed.
20. Boys of Summer is a nostalgic love song in which the narrator reminisces about his romance with a young woman in a summer gone by, and, despite his desire not to "look back," cannot resist recalling her image and remembering the past.	Disputed in part. Defendants do not dispute that the song's primary theme is nostalgia. But the song also deals with political and social issues. DeVore Decl., ¶¶ 5-6. In Henley's own words, the second verse of the song—the one with the famous line

	about seeing "a Dead Head sticker on a Cadillac"—was about the essential failure of Sixties' politics: "I don't think we changed a damn thing, frankly…. After all our marching and shouting and screaming didn't work, we withdrew and became yuppies and got into the Me Decade." Arledge Decl., Exh. 3, Exh. 1 at 20:2 to 21:12 (The song has a "sociological component;" "it's a mediation on the 60's."). Moreover, the song's meaning is not limited to Henley's own, self-serving interpretation. Supp. Arledge Decl., Exh. F (Declaration of Mark Rose) at 50:19 to 51:7 ("As a professional literary scholar, I know that authors' comments about literary works change over time, that authors can be cute and purposely evasive about their own texts. And that's not a very good place to go for your first understanding, for your understanding.") And as Henley himself admits, his view of the meaning of his songs changes over time. Supp. Arledge Decl., Exh. C at 30:21 to 31:16 ("I say different things about songs every time I talk about them.").
21. The song includes a line about seeing	Not disputed.

a "Deadhead sticker on a Cadillac" because this was something Henley in fact observed as he was driving and composing the lyrics.	
22. Kortchmar wrote both the music and lyrics to Dance and presented the song to Henley to record for the *Building the Perfect Beast* album.	Not disputed.
23. The lyrics to Dance - an upbeat song mainly understood by audiences as being about dancing - depict a couple who travel to an unspecified foreign country where, despite expressions of violence and unrest around them, all the woman wants to do "is dance," and "make romance."	Disputed in part. Plaintiffs' conclusions as to how the song is understood by audiences is speculative and lacks foundation. Moreover, Plaintiffs' description of the song is incomplete. By their use of the word "Yankee," the lyrics betray that (1) the "unspecified foreign country" is in Latin America, (2) the couple in question is American, and (3) the American couple is being given responsibility for the violence and social problems in the Latin American country. In addition, the music video for the song further clarifies that the song takes place in Latin America based on the décor, the Spanish language signs in the disco, and the Spanish subtitles. *See* Supp. Arledge Decl., ¶ 3. Finally, the soldiers in the video wear uniforms consistent with those worn by the Nicaraguan Contras, and the song was released in the mid 1980's when

	Reagan's support for the Contras was a volatile political issue. DeVore Decl., ¶¶ 7-9. Moreover, the song's meaning is not limited to Henley's own, self-serving interpretation. Supp. Arledge Decl., Exh. F (Declaration of Mark Rose) at 50:19 to 51:7 ("As a professional literary scholar, I know that authors' comments about literary works change over time, that authors can be cute and purposely evasive about their own texts. And that's not a very good place to go for your first understanding, for your understanding.") And as Henley himself admits, his view of the meaning of his songs changes over time. Supp. Arledge Decl., Exh. C at 30:21 to 31:16 ("I saw different things about songs every time I talk about them.").
24. Both Boys of Summer and Dance are hit songs that are instantly recognizable to a significant portion of the general public.	Disputed in part because the alleged fact is vague and ambiguous. Both songs were undoubtedly popular tracks when released and remain so today for some segment of the population. But there is no empirical evidence to establish the percentage of the general public for whom the songs are instantly recognizable.
25. Both Boys of Summer and Dance are	Not disputed.

closely associated in the public mind with Henley, who made them famous and continues to perform them at live shows.	
26. In the case of both Boys of Summer and Dance, Henley's audiences are able to recognize the song as soon as able to recognize the song as soon as the opening notes are played.	Disputed only in that the alleged fact lacks foundation and is speculative.
27. Henley has appeared in a number of authorized music videos in which he performs various songs, including videos which feature Boys of Summer and Dance. These videos are available on YouTube and elsewhere.	Not disputed.
28. Plaintiffs take action to enforce their copyrights, including by sending cease-and-desist letters and takedown notices in response to infringing uses.	Not disputed.
29. In 2008, Henley took action against a Democratic candidate for governor of North Carolina, Richard Moore, who had used the copyrighted Eagles song, "Life in the Fast Lane," in an Internet campaign ad without permission.	Not disputed.
30. After receiving Henley's cease and desist letter, candidate Moore voluntarily removed the ad.	Not disputed.

31. Henley has contributed money to a number of Republican candidates, as well as Democratic candidates.	Not disputed.
32. Defendant Charles DeVore ("DeVore") is a California state assemblyman who is seeking the Republican nomination to run against U.S. Senator Barbara Boxer.	Not disputed.
33. Defendant Justin Hart ("Hart") was hired by DeVore in late 2008 as director of Internet strategies and new media.	Not disputed.
34. Neither DeVore nor Hart is an attorney.	Not disputed.
35. In his capacity as director of Internet strategies and new media, Hart's "primary goal" is to conduct online based fundraising activities.	Not disputed.
36. A second objective of Hart's is to acquire "earned media" - publicity for which DeVore would otherwise have to pay - by "produc[ing] something and imply[ing] something that would catch the interest of the media and thus ... get free, or earned media."	Not disputed.
37. Defendants have placed the earned media value of the two videos at issue in this action – *i.e.,* the amount issue in this	Disputed. The interrogatory response simply does not say what Plaintiffs allege. Defendants would have been pleased to

action - *i.e.,* the amount voters "through traditional political advertising means" - at "tens of thousands, maybe hundreds of thousands, of dollars."	have received hundreds of thousands of dollars worth of publicity from the videos, but the videos were removed from the internet and were not allowed to reach all of their intended audiences. This is why the interrogatory response was claiming damages caused by the removal of the videos.
38. Hart's compensation is tied to the amount of funds he raises for DeVore, because he receives a percentage of the donations for which he is responsible.	Not disputed.
39. Hart produces video ads to promote DeVore's campaign.	Not disputed.
40. The videos produced by Hart are made available through chuckdevore.com (DeVore's campaign website), YouTube (which contains a link to DeVore's website), and elsewhere.	Not disputed.
41. DeVore's campaign website includes a facility for making online donations.	Not disputed.
42. As of the end of 2009, Hart had raised approximately $340,000 in online donations for DeVore, and in 2009 was paid between $120,000 to $140,000 by the DeVore campaign.	Not disputed.
43. DeVore and Hart understand the need	Not disputed.

to obtain proper license authority for the use of copyrighted works - including music - in their campaign.	
44. DeVore stated that the use of music "is an endemic problem with campaigns. . . . And so, you know, I have ... both before and after this lawsuit, said [to Hart], hey, you know, you got the rights to this, right?"	Disputed only in that the statement, divorced from context, makes no sense and is irrelevant.
45. According to DeVore, while a "soundbite of 30 seconds or less that you might see on a news show" might be "fair use," appropriating a song "whole cloth" in a manner that "wasn't parody" would not.	Disputed only in that the statement is a legal conclusion from Chuck DeVore, who is not a lawyer, and divorced from context, the statement makes no sense and is irrelevant.
46. In an article he posted to an Internet site in 2008, Hart advised fellow political strategists concerning the avoidance of cease and desist letters for the online use of copyrighted images.	Not disputed.
47. In 2009, Defendants purchased a license for approximately $3,500 to reprint a *Wall Street Journal* article about DeVore's use of new media, so that the article could be utilized.	Not disputed.
48. In March 2009, DeVore noticed an Obama bumper sticker on a Prius car at a gas station.	Not disputed.
49. According to DeVore - who was	Not disputed.

familiar with Boys of Summer from listening to Henley's music in his youth - this caused him to recall a line from Boys of Summer, which mentions a "Deadhead" bumper sticker on a Cadillac.	
50. DeVore decided to "take [Henley's] work and to turn it for my purposes" by writing anti-Obama lyrics to Boys of Summer.	Disputed in part because Plaintiffs' description is incomplete and therefore misleading. DeVore undoubtedly took the original work and changed its original meaning in a way that commented on the original work, subverted the philosophy and purpose of the original work, poked fun at celebrity supporters of Obama like Henley, and criticized Obama's policies. DeVore Decl., ¶¶ 5-10.
51. DeVore displayed the Boys of Summer 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.	Not disputed.
52. According to DeVore, "unlike the 2 Live Crew case," he had no intent to "mock" Henley's style.	Not disputed.
53. DeVore copied the Henley/Campbell song "keeping the same cadence and rhyme."	Not disputed.

54. Some two-thirds of the lyrics from the original work remained unchanged, and the rhyme scheme and syntax were closely copied from the original.	Not disputed.
55. DeVore's lyrics, 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.	Disputed in part because Plaintiffs' description is incomplete and therefore misleading. DeVore took the original work and changed its original meaning in a way that commented on the original work, subverted the philosophy and purpose of the original work, poked fun at celebrity supporters of Obama like Henley, and criticized Obama's policies. DeVore Decl., ¶¶ 5-10.
56. At Hart's recommendation, Defendants decided to produce a campaign video based on the Henley/Campbell song, as modified by DeVore ("Hope Video").	Not disputed.
57. Defendants did not seek a license to use Boys of Summer in connection with the Hope Video.	Not disputed.
58. To make the Hope Video, Hart downloaded from Apple iTunes an instrumental-only, karaoke version of Boys of Summer, entitled "Boys of Summer (Instrumental Version - Karaoke in the style of Don Henley)," which simulates the	Not disputed.

instrumentals of the original Henley track.	
59. Hart attempted to "emulate" Henley's style of singing in making a recording of himself singing DeVore's Hope lyrics to the accompaniment of the Boys of Summer karaoke track.	Not disputed.
60. Hart searched online sources for images to illustrate DeVore's changed lyrics.	Not disputed.
61. The images selected by Hart for the Hope Video include images of Obama, Nancy Pelosi and others.	Not disputed.
62. 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.	Not disputed.
63. Hart synchronized the visual images he found to his audio recording to produce the Hope Video.	Not disputed.
64. The iTunes contractual terms, to which Hart had agreed, limited his use of the Boys of Summer karaoke track to "personal" uses, and excluded "promotional use rights."	Disputed. This alleged fact is actually an unsupported legal conclusion. The alleged user agreement is also irrelevant.
65. Except for shortening some instrumental-only segments, the Hope Video incorporates all of the music from Boys of Summer.	Not disputed.

66. Hart included the following introduction over the instrumental opening of the song in the Hope Video: "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."	Not disputed.
67. Hart superimposed text with the Hope lyrics throughout the Hope Video.	Not disputed.
68. At the conclusion of the Hope Video, with the karaoke track still playing, the following statement is included: "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."	Not disputed.
69. Defendants included the closing statement as "a summary of the campaign message" because of federal concerning campaign ads.	Not disputed.
70. Defendants posted the Hope Video to YouTube and other online sites.	Not disputed.

71. DeVore chose Boys of Summer as the "vehicle" for his Obama critique.	Not disputed.
72. Hart believes that "different songs" could have been used" to present the views in the Hope Video.	Not disputed.
73. Use of a popular song 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."	Disputed in that Plaintiffs' addition to the quote is misleading and inaccurate. Use of a parody of The Boys of Summer allowed Defendants to reach out effectively and make their political point. But the key to the process was the use of this particular song. Not just any popular song would have achieved this purpose. DeVore Decl., ¶¶ 5-10.
74. On April 1, 2009, DeVore included a link to the Hope Video in an article he contributed to the entertainment- related website "Big Hollywood." DeVore described the Hope lyrics in the Big Hollywood article as his "Obama parody lyrics set to Don Henley's 'Boys of Summer.'"	Not disputed.
75. DeVore stated that he posted the Hope lyrics "with apologies to Don Henley" because he was "taking [Henley's] work and ... using it for something else."	Not disputed.
76. DeVore's article also announced a	Not disputed.

contest, in which others were encouraged to make and submit "professional" versions of the Hope Video, with a winner to be selected by the campaign.	
77. Upon becoming aware of the Defendants' use of his song, Boys of Summer, Henley directed that a DMCA takedown notice be sent by legal counsel to YouTube on April 3, 2009.	Not disputed.
78. YouTube complied with the notice by removing the Hope Video from its service.	Not disputed.
79. At the time it was removed, the Hope Video had been viewed over 800 times in the United States and other countries.	Not disputed.
80. Henley had to serve an additional DMCA notice to have the Hope Video removed from an additional site where it was posted by the DeVore campaign.	Not disputed.
81. During the period the Hope Video was available online, the DeVore campaign received online donations.	Not disputed.
82. Upon receiving an email notification from YouTube that the Hope Video had been removed at the request of Henley, DeVore "high-fiv[ed]" his communications director, Josh Trevino. DeVore believed that they "had struck a vein of gold in the	Not disputed.

campaign."	
83. According to Hart, upon learning of the takedown notice, "we laughed and we said that was exactly the effect that we were hoping to parody here. This is great."	Not disputed.
84. As a result of Defendants' receiving the takedown notice, DeVore felt "we were given a lemon; let's try to make some lemonade" by "try[ing] to make Henley the issue."	Not disputed.
85. DeVore believed that "turning lemons into lemonade" meant gaining "national recognition" for his campaign.	Not disputed.
86. DeVore believed that his campaign would gain "earned media opportunities" because it was Henley who had directed the issuance of the takedown notice, as opposed to some "faceless international corporation."	Not disputed.
87. According to DeVore, if the Henley matter "became a national story," then the money "might have come rolling in," but it did not become a national story.	Not disputed.
88. After receiving the takedown notice, DeVore told his staff to "man the ramparts" and "[p]repare the press releases!"	Not disputed.
89. In moving ahead with his plan, DeVore was aware not only of the Supreme	Not disputed.

Court's *Campbell* v. *Acuff- Rose* decision, but also the Ninth Circuit's subsequent determination in *Dr. Seuss Enterprises, L.P.* v. *Penguin Books USA, Inc.,* that copying Dr. Seuss' s work to comment on the O.J. Simpson trial was not parody	
90. Hart reported to DeVore that he had had dinner with an attorney friend and that the friend had indicated they could proceed with the counternotification. However, Hart's attorney friend was an in- house tax advisor, not a copyright lawyer. He had not seen the video at the time of the dinner with Hart, consulted no legal authority, and offered no opinion on fair use.	Not disputed.
91. Hart's attorney friend told Hart that it would be a "good" idea for Hart to hire an attorney.	Not disputed.
92. DeVore was aware that by submitting the counternotification to YouTube under the DMCA, Henley would need to file a lawsuit in order to prevent the Hope Video from being reposted.	Not disputed.
93. DeVore emailed his staff, "[i]f Henley gets a legal injunction to restrain us, then better."	Not disputed.
94. In DeVore's view, this would "raise[]	Not disputed.

the stakes. It makes more attention on [sic] what would otherwise be a fairly anonymous legal action. And campaigns thrive on attention."	
95. DeVore "made the calculation ... that perhaps the earned media value [of the lawsuit] would outweigh the time and effort and diversion and campaign resources in fighting the fight."	Not disputed.
96. 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.	Not disputed.
97. 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."	Not disputed.
98. On April 7, 2009, DeVore posted an article on Big Hollywood, titled "Don Henley Strikes Back." In the April 7, 2009 article DeVore took issue with YouTube's takedown of his "parody using 'The Boys of Summer' to lampoon President Obama,"	Not disputed.

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 (I keep thinking 'All She Wants To Do Is Dance' would make a great transition into a Barbara Boxer parody)."	
99. In the same April 7, 2009 "Big Hollywood" article, DeVore 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.	Not disputed.
100. In an email to his staff, dated April 7, 2009, DeVore wrote, "Let's rumble. I say we rifle through all of Mr. Henley's cateloge [sic] for material."	Not disputed.
101. DeVore modified the lyrics to Dance to criticize Senator Barbara Boxer.	Disputed in part because Plaintiffs' description is incomplete and therefore misleading. DeVore undoubtedly took the original work and changed its meaning in a way that commented on the original work, subverted the philosophy and purpose of the original work, poked fun at celebrity supporters of Boxer like Henley, and criticized Boxer's policies. DeVore Decl., ¶¶ 5-10.
102. As he did with Boys of Summer and	Not disputed.

Hope, DeVore fashioned a verse and chorus to correspond with each original verse and chorus in Dance to produce "All She Wants to Do Is Tax" ("Tax").	
103. Three-quarters of the original lyrics in Dance were copied into the Tax lyrics.	Not disputed.
104. The original rhyme scheme and syntax in Dance was copied in Tax.	Not disputed.
105. According to DeVore, the Tax lyrics target Boxer's "penchant for raising taxes."	Disputed in part because Plaintiffs' description is incomplete and therefore misleading. DeVore undoubtedly took the original work and changed its meaning in a way that commented on the original work, subverted the philosophy and purpose of the original work, poked fun at celebrity supporters of Boxer like Henley, and criticized Boxer's policies. DeVore Decl., ¶¶ 5-10.
106. The Tax lyrics reference various policy concerns tied to DeVore's anti-taxation campaign platform, such as cap-and-trade legislation, the carbon trading "scam," and global warming.	Not disputed.
107. Hart believes that Defendants could have used another song to provide the message in Tax.	Not disputed.
108. Hart assembled a new video	Not disputed.

incorporating the Kortchmar song with DeVore's modified lyrics ("Tax Video").	
109. No lawyer had confirmed the validity of Defendants' claim of fair use before they posted the Tax Video on the Internet.	Disputed in that the alleged fact is vague and ambiguous. It is not clear what Plaintiffs mean by a lawyer did not "confirm" a fair use defense.
110. Defendants did not seek permission from the copyright owner of Dance to use the song in the Tax Video.	Not disputed.
111. Using an iTunes karaoke track simulating the instrumentals of the original Henley version of Dance, Hart recorded the Tax lyrics in a professional recording studio.	Not disputed.
112. Hart used the entire karaoke track of Dance except for some instrumental- only segments that he shortened.	Not disputed.
113. Hart re-recorded the audio for the Hope video while working in the professional studio on the Tax Video.	Not disputed.
114. Hart located online images to illustrate and "complement" DeVore's Tax lyrics.	Not disputed.
115. Hart licensed stock video footage for the Tax Video from an online source for a fee.	Not disputed.
116. The images Hart selected for the Tax Video include photos of Barbara Boxer, Al	Not disputed.

Gore and the Disney character Scrooge McDuck.	
117. Hart did not choose any image of Henley or the other Plaintiffs to include in the Tax Video, or any image referencing the original song.	Not disputed.
118. At the end of the Tax Video, Hart added the written statement: "Visit chuckdevore.com. Paid for by DeVore for California."	Not disputed.
119. Hart posted what he described as the "All She Wants to Do is Tax Music video parody of Barbara Boxer" on YouTube and other sites.	Not disputed.
120. On April 14, 2009, Hart sent an email to a list of approximately 40 "eLeaders" associated with the DeVore campaign with a link to the new Tax Video.	Not disputed.
121. DeVore's "eLeaders" are persons who had signed up to help DeVore with fundraising and other activities.	Not disputed.
122. DeVore's April 14,2009 email requested the "eLeaders" to "view our new viral video satire on Barbara Boxer."	Not disputed.
123. On April 14,2009, Hart distributed an electronic newsletter to the campaign's entire email list that included a snapshot	Not disputed.

image of the Tax Video and a link to the YouTube posting.	
124. Hart's April 14, 2009, email contained a link to chuckdevore.com, as well as a link to DeVore's donation page: "Help beat Boxer - Contribute to Chuck's campaign."	Not disputed.
125. The Tax Video had "viral" qualities, meaning that it proceeded to spread rapidly through the Internet.	Not disputed.
126. The Tax Video was embedded by third parties, such as Fox News, on their own websites.	Not disputed.
127. The Tax Video achieved the YouTube status of third rising News & Politics video in the world in less than twenty-four hours.	Not disputed.
128. On April 15, 2009, DeVore sent an email to press contacts noting that the video was the third rising "News & Political" video on YouTube, and 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."	Not disputed.
129. On April 16, 2009, Warner/Chappell, Kortchmar's music publisher, sent a DMCA notice to YouTube requesting removal of the Tax Video.	Not disputed.

130. YouTube complied with Warner/Chappell's notice by removing the Tax Video from its service.	Not disputed.
131. At the time it was taken down, the Tax Video had exceeded 20,000 views in the United States and abroad.	Not disputed.
132. The DeVore campaign received online donations throughout the period that the Tax Video was available.	Not disputed.
133. On April 17, 2009, Plaintiffs Henley and Campbell filed the instant action, asserting claims for copyright infringement based on Defendants' unlawful use of Boys of Summer in the Hope Video.	Not disputed.
134. In the Complaint, 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.	Not disputed.
135. After the filing of the Complaint, Defendants considered whether to "ratchet up the heat by posting [one of their videos] in numerous places" or "take it to the next level" by "do[ing] another PARODY of a Henley song (this time of Henley himself)."	Not disputed.

136. After they were served with the Complaint in this action, DeVore and Hart retained an attorney in connection with Plaintiffs' infringement claims.	Not disputed.
137. On July 17, 2009, DeVore submitted a counternotification to YouTube with respect to the Tax Video, under penalty of perjury.	Not disputed.
138. In the counternotification, DeVore stated 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."	Not disputed.
139. After DeVore sent his counternotification, the Tax Video was restored by YouTube.	Not disputed.
140. The version of the Tax Video restored by YouTube 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	Not disputed.

mutual."	
141. According to DeVore, the disclaimer was added to the reposted version of Tax to make it clear that the video "was not approved by Mr. Henley."	Disputed only in that the quote is taken out of context and is therefore misleading. Defendants already believed that Henley had no Lanham Act claim related to the videos. But Defendants' motion to dismiss that claim had been denied, and at this time the only claim that stopped the video from being shown on the internet was the Lanham Act claim. Defendants added the disclaimer because it would so undercut Henley's Lanham Act claim that it could not possibly survive even at the pleading stage and would thus not stand in the way of the video being shown, and because the disclaimer allowed DeVore to engage with Henley in a tongue-in-cheek fashion that viewers might find humorous. Supp. Arledge Decl., ¶ 2.
142. 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.	Not disputed.
143. In conjunction with the filing of Kortchmar's infringement claim, a new DMCA notice was submitted to YouTube	Not disputed.

with respect to the Tax Video.	
144. YouTube complied by with the new DMCA notice by removing the Tax Video.	Not disputed.
145. Shortly before the filing of this motion, DeVore posted an article to the "Big Hollywood" website stating: "Had I known a year ago where we would be today would I have still written the parodies and drawn Henley's lawsuit? Absolutely."	Not disputed.
146. The Hope Video targets and criticizes Barack Obama.	Disputed in part because Plaintiffs' description is incomplete and therefore misleading. DeVore took the original work and changed its meaning in a way that commented on the original work, subverted the philosophy and purpose of the original work, poked fun at celebrity supporters of Obama like Henley, and criticized Obama's policies. DeVore Decl., ¶¶ 5-10.
147. The Tax Video targets and criticizes Barbara Boxer and her tax policies.	Disputed in part because Plaintiffs' description is incomplete and therefore misleading. DeVore undoubtedly took the original work and changed its meaning in a way that commented on the original work, subverted the philosophy and purpose of the original work, poked fun at celebrity supporters of Boxer like Henley, and criticized Boxer's policies. DeVore Decl.,

	¶¶ 5-10.
148. Neither video mentions Henley or the other Plaintiffs or contains an image of Henley or the other Plaintiffs.	Undisputed in part. Neither video contains an image of Henley. But Henley and other celebrity supporters of Obama and Boxer do appear in the lyrics of the parodies. For example, Henley and the other supporters of Obama and Boxer are the narrators of The Hope of November and refer to themselves in the first person, plural in that work. DeVore Decl., ¶¶ 5-10.
149. 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.	Disputed. It is not clear what Plaintiffs mean by "slavishly copied." Defendants used karaoke tracks for the background music. Plaintiffs describe these karaoke tracks as "amateur" and poor quality simulations of the originals; they were not "virtually identical" tracks. Arledge Decl., Exh. 4 at 82:7 to 83:1 (background track "sounded cheaper and less good.").
150. Defendants took far more musical expression than was necessary to evoke the originals.	Disputed. This conclusion from Plaintiffs' expert is pure legal conclusion and is inadmissible. Moreover, Defendants had important and justifiable reasons for using the portion of the songs that they used. DeVore Decl., ¶ 12.
151. The music in Defendants' videos does not build upon, or add new or independent	Disputed. If the statement is limited only to the background musical tracks, then it is

expression to, the music in the originals.	undisputed. Defendants used a karaoke track; they did not seek to create anything novel with the instrumentation. If the statement is meant to include the lyrics also, the statement is disputed. DeVore took the original works and changed their meanings in a way that commented on the original works, subverted the philosophy and purpose of the original works, poked fun at celebrity supporters of Obama and Boxer like Henley, and criticized Obama's and Boxer's policies. DeVore Decl., ¶¶ 5-10.
152. Some two-thirds of the lyrics in Hope (65%) and three-quarters of the lyrics in Tax (74.7%) are simply copied from the original compositions, and, in addition, the lyrics of Hope and Tax both closely copy the rhyme and syntax of the originals.	Not disputed.
153. Defendants' use of Plaintiffs' songs not only assured a larger audience for Defendants' campaign ads, but also increased the likelihood that an audience would listen and be receptive to DeVore's messages.	Disputed. Use of the songs did not assure a larger audience. Indeed, few people saw The Hope of November parody. *See* Plaintiffs' Uncontroverted Fact No. 79 (video had only been seen 800 times when it was removed). But Defendants agree that parodies of Plaintiffs' songs should have been a particularly effective means of making their political points.

154. Defendants' use of Plaintiffs' songs in the Hope and Tax Videos was a promotional, commercial use by advertising industry standards.	Disputed. Albert's view of what commercial means according to advertising standards is irrelevant. Defendants' videos were not commercial speech under the Copyright Act or the First Amendment.
155. Advertisers avoid songs that are already associated with particular products or causes, or that have political or controversial associations.	Disputed only in that the alleged fact is overbroad.
156. Defendants' uses, if not halted, would be harmful to the market for Plaintiffs' songs, because they politicize the songs and could alienate fans.	Disputed. The alleged fact lacks foundation and is speculative. In reality, there is no evidence that the videos harmed the market for the songs, and Plaintiffs have never put the songs into the market for commercial licensing. The alleged harm, then, is purely speculative harm in a purely speculative market. Arledge Decl., Exh. 1 at 9:4-13, 82:8-15; 91:1-9, 103:20 to 104:14, 120:22 to 121:4; Arledge Decl., Exh. 4 at 14:15 to 16:4 and 82:7 to 83:1; Arledge Decl., Exh. 5 at 52:8-18, 103:9-21, 110:19 to 111:14, 117:2 to 118:4, and 135:18-25; Supp. Arledge Decl., Exh. B at 46:16 to 47:5; Exh. C at 83:1 to 85:6, 91:1-9. Indeed, Plaintiffs' basis for this alleged harm, Jon Albert's testimony, is speculative because of the lack of a single valid comparable transaction.

	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.
157. Defendants' conduct is harmful 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.	Disputed. The alleged fact lacks foundation and is speculative. In reality, there is no evidence that the videos harmed the market for the songs, and Plaintiffs have never put the songs into the market for commercial licensing. The alleged harm, then, is purely speculative harm in a purely speculative market. Arledge Decl., Exh. 1 at 9:4-13, 82:8-15; 91:1-9, 103:20 to 104:14, 120:22 to 121:4; Arledge Decl., Exh. 4 at 14:15 to 16:4 and 82:7 to 83:1; Arledge Decl., Exh. 5 at 52:8-18, 103:9-21, 110:19 to 111:14, 117:2 to 118:4, and 135:18-25; Supp. Arledge Decl., Exh. B at 46:16 to 47:5; Exh.

	C at 83:1 to 85:6, 91:1-9. Indeed, Plaintiffs' basis for this alleged harm, Jon Albert's testimony, is speculative because of the lack of a single valid comparable transaction. 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.
158. If permitted to continue, Defendants' uses would limit potential endorsement opportunities for Henley.	Disputed. The alleged fact lacks foundation and is speculative. In reality, there is no evidence that the videos harmed the market for the songs, and Plaintiffs have never put the songs into the market for commercial licensing. The alleged harm, then, is purely speculative harm in a purely speculative market. Arledge Decl., Exh. 1 at 9:4-13, 82:8-15; 91:1-9, 103:20 to 104:14, 120:22 to 121:4; Arledge Decl., Exh. 4 at 14:15 to

	16:4 and 82:7 to 83:1; Arledge Decl., Exh. 5 at 52:8-18, 103:9-21, 110:19 to 111:14, 117:2 to 118:4, and 135:18-25; Supp. Arledge Decl., Exh. B at 46:16 to 47:5; Exh. C at 83:1 to 85:6, 91:1-9. Indeed, Plaintiffs' basis for this alleged harm, Jon Albert's testimony, is speculative because of the lack of a single valid comparable transaction. 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.
159. The minimum license 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.	Disputed. The statement is purely speculative. There is no comparable transaction from which to derive this conclusion. Plaintiffs have not permitted the song to be licensed for commercial uses, there is no evidence that anybody has

	licensed a song for internet-only use for that kind of money, and there is no evidence that any political campaign has ever spent that kind of money to license a song. Plaintiffs' allegation of fair market value for the song is pure speculation. Arledge Decl., Exh. 1 at 9:4-13, 82:8-15; 91:1-9, 103:20 to 104:14, 120:22 to 121:4; Arledge Decl., Exh. 4 at 14:15 to 16:4 and 82:7 to 83:1; Arledge Decl., Exh. 5 at 52:8-18, 103:9-21, 110:19 to 111:14, 117:2 to 118:4, and 135:18-25; Supp. Arledge Decl., Exh. B at 46:16 to 47:5; Exh. C at 83:1 to 85:6, 91:1-9. Indeed, Plaintiffs' basis for this alleged harm, Jon Albert's testimony, is speculative because of the lack of a single valid comparable transaction. 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.
160. The minimum a licensee would expect to pay for the short-term Internet-only promotional use of Dance, such as Defendants' use in the Tax Video, would be $200,000.	Disputed. The statement is purely speculative. There is no comparable transaction from which to derive this conclusion. Plaintiffs have not permitted the song to be licensed for commercial uses, there is no evidence that anybody has licensed a song for internet-only use for that kind of money, and there is no evidence that any political campaign has ever spent that kind of money to license a song. Plaintiffs' allegation of fair market value for the song is pure speculation. Arledge Decl., Exh. 1 at 9:4-13, 82:8-15; 91:1-9, 103:20 to 104:14, 120:22 to 121:4; Arledge Decl., Exh. 4 at 14:15 to 16:4 and 82:7 to 83:1; Arledge Decl., Exh. 5 at 52:8-18, 103:9-21, 110:19 to 111:14, 117:2 to 118:4, and 135:18-25; Supp. Arledge Decl., Exh. B at 46:16 to 47:5; Exh. C at 83:1 to 85:6, 91:1-9. Indeed, Plaintiffs' basis for this alleged harm, Jon Albert's testimony, is speculative because of the lack of a single valid comparable transaction. 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.
161. 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.	Disputed. The statement is purely speculative. There is no comparable transaction from which to derive this conclusion. Henley has not permitted an advertiser to use him as an endorser, there is no evidence that anybody would pay that kind of money for Henley's endorsement in an internet-only advertising campaign, and there is no evidence that any political campaign has ever spent that kind of money to license a song. Plaintiffs' allegation of fair market value is pure speculation. Indeed, Plaintiffs' basis for this alleged harm, Jon Albert's testimony, concedes the points. 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.
162. According to a survey conducted by Plaintiffs, close to half (48%) of viewers of the Hope and/or Tax Video mistakenly believe Henley endorsed the video(s), or authorized or approved the use of his music in the video(s).	Disputed. The survey is flawed methodologically and the data it yielded cannot support this conclusion.

II. Other facts precluding summary judgment:

A. First Fair Use Factor

UNCONTROVERTED FACTS	**SUPPORTING EVIDENCE**
1. Not applicable. Whether a work is transformative parody is a question of law. *Mattel, Inc. v. Walking Mountain Productions*, 353 F.3d 792 (9th Cir. 2004).	The original songs and lyrics are Exhibits B, C, F, and G. The parody videos and Defendants' lyrics are Exhibits D, E, H, and I. For the proper context for the parodies, see DeVore Declaration ("DeVore Decl.") at ¶¶ 2-10.
2. Defendants' videos constitute	DeVore Decl., ¶ 2-11; Arledge Decl. Exh. 1

political speech.	(Henley Deposition) at 68:5-10.

B. Second Fair Use Factor

UNCONTROVERTED FACTS	SUPPORTING EVIDENCE
3. Not applicable.	

C. Third Fair Use Factor

UNCONTROVERTED FACTS	SUPPORTING EVIDENCE
4. Defendants needed to use full-length versions of the songs in order to make all of their political points and make them intelligibly.	DeVore Decl., ¶ 12.

D. Fourth Fair Use Factor

UNCONTROVERTED FACTS	SUPPORTING EVIDENCE
5. Defendants' videos had no effect upon the potential market for or value of Plaintiffs' copyrighted works	DeVore Decl., ¶ 13; Arledge Decl., Exh. 1 at 9:4-13, 82:8-15; 91:1-9, 103:20 to 104:14, 120:22 to 121:4; Arledge Decl., Exh. 4 at 14:15 to 16:4 and 82:7 to 83:1; Arledge Decl., Exh. 5 at 52:8-18, 103:9-21, 110:19 to 111:14, 117:2 to 118:4, and 135:18-25.

UNCONTROVERTED FACTS	SUPPORTING EVIDENCE
6. Defendants' works are protected by the fair use doctrine, and even if this Court concludes otherwise, a reasonable person	*See* Nos. 1 through 5 above

could believe Defendants' works are transformative parodies	
7. Defendants intended to create parodies of Plaintiffs' original works.	DeVore Decl., ¶¶ 4-12.
8. The only allegedly infringing works in this case are the two parody videos produced by Defendants	Arledge Decl., ¶ 2.
9. The same facts supporting the fair use factors described above apply equally to, and are therefore incorporated into, this section	*See* Nos. 1 through 5 above
10. Defendants have not misappropriated a distinctive attribute of Henley's.	Arledge Decl., Exh. 1 at 104:2-5, 119:24 to 120:2; Arledge Decl., Exh. 2; DeVore Decl., ¶ 14.
11. Henley is a public figure.	First Amended Complaint, ¶¶ 25, 26.
12. Defendants' videos are non-commercial speech.	DeVore Decl., ¶ 2-11; Arledge Decl. Exh. 1 (Henley Deposition) at 68:5-10.
13. Defendants did not intend to cause (or were not recklessly indifferent to their causing) public confusion as to Henley's sponsorship, endorsement or affiliation with Chuck DeVore or his campaign	DeVore Decl., ¶ 10-12, 15; Arledge Decl., Exh. 1 at 59:8 to 62:2, 64:19 to 65:1.

III. Response to Plaintiffs' Conclusions of Law

Defendants dispute the following conclusions of law:

Plaintiffs' Conclusion of Law	Defendants' Position
9. Under the first fair use factor, 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).	*Harper & Row* concerns a commercial enterprise—a for-profit magazine—intentionally usurping the first publication of a copyrighted work. That case has no application here. The more applicable legal rules is found in *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1184 (9th Cir. 2001): "Although the boundary between commercial and noncommercial speech has yet to be clearly delineated, the 'core notion of commercial speech' is that it 'does no more than propose a commercial transaction.'"
12. To qualify as fair use, a parody may take no more of a copyrighted work than is necessary to recall or "conjure up" the object of the parody. *Dr. Seuss Enters.*, 109 F.3d at 1400.	"Like a speech, a song is difficult to parody effectively without exact or near-exact copying. If the would-be parodist varies the music or meter of the original substantially, it simply will not be recognizable to the general audience. This 'special need for accuracy,' provides some license for 'closer' parody." *Fisher v. Dees*, 794 F.2d 432, 439 (9th Cir. 1986). Moreover, "there

	is no requirement that 'parodists take the *bare minimum* amount of copyright material necessary to conjure up the original work." *Burnett v. Twentieth Century Fox Film Corp.*, 491 F.Supp.2d 962, 970 (C.D. Cal. 2007).
16. 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, any device can be used to invoke the celebrity such that consumers might be confused.	There is no requirement that any *particular* attribute be used; but it is absolutely necessary to show that *some* "distinctive attribute" be used. It is the "distinctive attribute" that constitutes the plaintiff's "mark" for purposes of the Lanham Act. *See Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1106 (9th Cir. 1992) ("[C]ourts have recognized false endorsement claims brought by plaintiffs, including celebrities, **for the unauthorized imitation of their *distinctive attributes*, where those attributes amount to an unregistered commercial "trademark."**) (emphasis added); *see also id.* at 1106 ("A false endorsement claim based on the unauthorized use of a celebrity's identity is a type of false association claim, for **it alleges the misuse of a trademark, *i.e.,* a symbol or device such as a visual likeness, vocal**

	imitation, or other uniquely *distinguishing characteristic*, which is likely to confuse consumers as to the plaintiff's sponsorship or approval of the product.") (emphasis added); *see also id.* at 1110 (holding that "a celebrity whose endorsement of a product is implied through **the imitation of a *distinctive* attribute of the celebrity's identity**" can sue) (emphasis added).
17. The use of distinctive sounds can be the basis of a false endorsement claim under the Lanham Act.	Plaintiff must show the use of a "distinctive attribute" of his for it is that "distinctive attribute" that constitutes the plaintiff's "mark" for purposes of the Lanham Act. *See Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1106 (9th Cir. 1992). Moreover, a performer has no trademark right in his sound recording. *See Oliveira v. Frito-Lay, Inc.*, 251 F.3d 56 (2d Cir. 2001).
18. The use of altered song lyrics can be the basis for a false endorsement claim under the Lanham Act.	The right to alter song lyrics is a right granted or withheld under the Copyright Act, not the Lanham Act. *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003). Moreover, for a false endorsement claim, the plaintiff must show the use of a "distinctive attribute" of his for it is that "distinctive attribute" that

	constitutes the plaintiff's "mark" for purposes of the Lanham Act. *See Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1106 (9th Cir. 1992). And a performer has no trademark right in his sound recording. *See Oliveira v. Frito-Lay, Inc.*, 251 F.3d 56 (2d Cir. 2001).

Dated: May 3, 2010 **ONE LLP**

By: /s/ Christopher W. Arledge
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