

1 MORRISON & FOERSTER LLP  
 JACQUELINE C. CHARLESWORTH (*pro hac vice*)  
 2 JCharlesworth@mofo.com  
 CRAIG B. WHITNEY (CA SBN 217673)  
 3 CWhitney@mofo.com  
 TANIA MAGOON (*pro hac vice*)  
 4 TMagoon@mofo.com  
 1290 Avenue of the Americas  
 5 New York, New York 10104  
 Telephone: 212.468.8000  
 6 Facsimile: 212.468.7900

7 PAUL GOLDSTEIN (CA SBN 79613)  
 PGoldstein@mofo.com  
 8 559 Nathan Abbott Way  
 Stanford, California 94305-8610  
 9 Telephone: 650.723.0313  
 Facsimile: 650.327.0811

10 Attorneys for Plaintiffs  
 11 DON HENLEY, MIKE CAMPBELL and DANNY  
 KORTCHMAR

12  
 13 **UNITED STATES DISTRICT COURT**  
 14 **CENTRAL DISTRICT OF CALIFORNIA**

15  
 16 DON HENLEY, MIKE CAMPBELL  
 and DANNY KORTCHMAR,

Case No. SACV09-0481 JVS (RNBx)

17  
 18 Plaintiffs,

19 v.

20 CHARLES S. DEVORE and  
 21 JUSTIN HART,

22 Defendants.

**PLAINTIFFS' MEMORANDUM OF  
 POINTS AND AUTHORITIES IN  
 OPPOSITION TO DEFENDANTS'  
 MOTION FOR SUMMARY  
 JUDGMENT**

Date: June 1, 2010  
 Time: 10:00 A.M.  
 Ctrm: Hon. James V. Selna

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## DEFENDANTS' UNSUBSTANTIATED "FACTS"

1  
2 Defendants' statement of uncontroverted facts offers a series of legal statements  
3 and conclusory opinions in lieu of the material facts required to support their motion.  
4 Defendants' central claim on summary judgment is that their taking of Plaintiffs' songs  
5 constitutes a fair use under copyright law. Fair use is an affirmative defense as to which  
6 Defendants carry the evidentiary burden. *Dr. Seuss Enters., L.P. v. Penguin Books USA,*  
7 *Inc.*, 109 F.3d 1394, 1403 (9th Cir. 1997); *see also Columbia Pictures Indus., Inc. v.*  
8 *Miramax Films Corp.*, 11 F. Supp. 2d 1179, 1187 (C.D. Cal. 1998). Because Defendants  
9 fail to meet this burden, their motion should be denied. *See Shakur v. Schriro*, 514 F.3d  
10 878, 890 (9th Cir. 2008) (where moving party bears burden, it must provide "competent  
11 evidence" to prevail on summary judgment).

12 Moreover, such "facts" as do appear in Defendants' motion papers are largely  
13 unsubstantiated and, in some cases, simply manufactured. Much of the specious  
14 evidence upon which Defendants seek to rely is derived from a sworn declaration  
15 submitted by Defendant DeVore, in which DeVore ruminates on Henley and Henley's  
16 "friends in the entertainment industry." (Declaration of Charles S. DeVore ("DeVore  
17 Decl.") ¶ 3.) DeVore asserts that Henley is "proudly a member" of "the liberal,  
18 entertainment elite"; that Henley is one of a "group of celebrities who are associated in  
19 the public eye with Ms. Boxer, Mr. Obama, and other prominent liberal politicians"; that  
20 Henley has "vocally supported" Barbara Boxer; and that he "fought . . . hard" to elect  
21 Barack Obama. (DeVore Decl. ¶¶ 3, 6, 9, 10.) DeVore offers no support for these  
22 statements, for they are false. (*See Supplemental Declaration of Don Henley* ("Henley  
23 Supp. Decl.") ¶¶ 3, 4, 6.) As set forth in objections to evidence filed by Plaintiffs  
24 concurrently herewith, DeVore's baseless conjecture about Henley – like much of the  
25 rest of his declaration – is inadmissible and may not be credited. *See Block v. City of Los*  
26 *Angeles*, 253 F.3d 410, 419 (9th Cir. 2001); *Shakur*, 514 F.3d at 890 ("[C]onclusory  
27 affidavits that do not affirmatively show personal knowledge of specific facts are  
28 insufficient.").

**ARGUMENT**

**I. DEFENDANTS’ TAKINGS CANNOT BE JUSTIFIED UNDER ANY THEORY OF FAIR USE**

**A. The Hope and Tax Videos Are Not Parodies**

The hallmark of parody is the “joinder of reference and ridicule” to comment on an earlier work. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 583 (1994). This defining principle of parody – that in making use of a prior work it do so for the purpose of commenting on or criticizing it – has been reiterated by courts before and since *Campbell*. See, e.g., *Rogers v. Koons*, 960 F.2d 301, 310 (2d Cir. 1992); *Fisher v. Dees*, 794 F.2d 432, 436 (9th Cir. 1986); *Dr. Seuss Enters.*, 109 F.3d at 1400-01; *Mattel Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 802-03 (9th Cir. 2003).

Defendants concede, as they must, that in order to qualify as parodies, the Hope and Tax Videos must comment on or criticize Plaintiffs’ original works, and do so in a manner such that the “parodic character can reasonably be perceived.” (See Defs. Br. at 4); see also *Campbell*, 510 U.S. at 582. As demonstrated in Plaintiffs’ opening brief, Defendants’ claim of parody is negated by Defendants’ videos themselves: they are campaign ads for DeVore, and contain no discernible commentary on Plaintiffs’ songs. The videos, featuring lyrics critical of Barack Obama and Barbara Boxer – accompanied by images of Obama, Boxer, other political figures, and DeVore – conclude with written messages promoting DeVore’s political ambitions. (Plaintiffs’ Statement of Uncontroverted Facts and Conclusions of Law (“St.”) ¶¶ 55, 61, 68, 101, 116, 118.) From a musical perspective, there is no send-up of Henley’s music or musical style; the instrumental tracks used in the videos slavishly copy the original Henley recordings, which Hart does his best to mimic in his vocal performances of the substitute lyrics. (St. ¶¶ 59, 149.)

As was also shown in Plaintiffs’ earlier brief, Defendants’ attempt retrospectively to portray their campaign ads as parodies of Plaintiffs’ songs is belied by earlier, more candid, descriptions of their undertaking. Before they were sued, Defendants repeatedly

1 characterized their videos as “parodies” not of Plaintiffs’ works, but of, or as targeting,  
 2 Obama, Boxer, and their policies. (St. ¶ 74 (describing Hope lyrics as “Obama parody  
 3 lyrics set to Don Henley’s ‘Boys of Summer’”), ¶ 97 (Hope Video a “music video parody  
 4 of Barack Obama”), ¶ 98 (Hope Video a “parody using ‘The Boys of Summer’ to  
 5 lampoon President Obama”), ¶ 66 (Hope Video an “exposition on the financial crisis and  
 6 political realities of our day under President Barack Obama”), ¶ 138 (Tax lyrics as  
 7 “parody lyrics . . . critical of the cap-and-trade bill . . . as well as my opponent in the U.S.  
 8 Senate race, Sen. Barbara Boxer”), ¶¶ 119, 122 (Tax Video a “parody of Barbara Boxer”;  
 9 Tax Video as a “satire on Barbara Boxer”), ¶ 128 (Tax Video “takes on Sen. Boxer’s  
 10 penchant for raising taxes” ).) To add to this long list, upon receiving Henley’s notice of  
 11 infringement, DeVore promised to “look[] for every opportunity to turn any Don Henley  
 12 work I can” – *not* into a parody of the Henley work – but “into a parody of any left  
 13 tilting politician who deserves it.” (St. ¶ 98.) The uncontroverted facts demonstrate that,  
 14 until this lawsuit was brought, Defendants did not treat the Hope or Tax Videos as  
 15 parodies of Plaintiffs’ songs or of Henley, but understood them as what they are:  
 16 promotional campaign videos directed against Obama and Boxer.<sup>1</sup> When a defendant’s  
 17 claim of a critical purpose such as parody is belied by prior characterizations, this weighs  
 18 against a finding of fair use. *See Salinger v. Colting*, No. 09-2878-cv, 2010 U.S. App.  
 19 LEXIS 8956, at \*39-40 (2d Cir. Apr. 30, 2010) (“It is simply not credible for [defendant]  
 20 to assert now that his primary purpose was to critique . . . while he and his agents’  
 21 previous statements discuss no such critique, and in fact reference various other purposes  
 22 behind the book.”)

23 Despite all this, Defendants would now have us believe that they “carefully  
 24 selected” Boys of Summer – a nostalgic song about a summer romance – for their  
 25 parody, because of its “important political themes.” (Defs. Br. at 6.) According to

26 <sup>1</sup> Even now, Defendants, echoed by their own literary expert, readily acknowledge the  
 27 targets of their ads: “Our videos attack the policies of Barack Obama, Barbara Boxer, Al  
 28 Gore and others.” (DeVore Decl. ¶ 2; Defs. Br. at 4; St. ¶¶ 146-47 (citing to deposition of  
 Dr. Martin Zeilinger).)

1 Defendants, these “themes” arise from a single line in the original song that mentions a  
2 “Deadhead sticker on a Cadillac.” (Charlesworth Decl., Ex. 15 at 279 (Deposition of  
3 Charles DeVore (“DeVore Dep.”) at 215:8-20.) Seizing on the Deadhead reference,  
4 Defendants assert that DeVore’s altered lyrics somehow comment on the Sixties’ failure  
5 to create “a better (more liberal) society.” (DeVore Decl. ¶ 5.) Of course, DeVore’s  
6 lyrics do not comment on this at all, but rather conjecture disappointment by the current  
7 electorate with Obama. Even more revealing is that the entire rationale for Defendants’  
8 explanation is an (inadmissible) Henley quote from a *Rolling Stone* article that DeVore  
9 *denied having read* before he wrote his lyrics. (Defs. Br. at 6; Charlesworth Decl., Ex. 15  
10 at 272-74 (DeVore Dep. at 208:5-210:3).)

11 Defendants’ explication of Tax is equally implausible. Defendants assert that, like  
12 the dancing woman in the original song, Barbara Boxer has “no regard for the problems  
13 she and her colleagues have caused; she just wants to tax.” (Defs. Br. at 7.) It is unclear,  
14 however, how the substitution of Boxer for the dancing woman comments on – rather  
15 than simply takes from – the original song. Perhaps for this reason, Defendants resort to  
16 fiction. Drawing on DeVore’s declaration, Defendants assert that in Dance, “Plaintiffs  
17 were criticizing the Reagan administration’s Central America policies.” (Defs. Br. at 7  
18 (citing DeVore Decl. ¶¶ 7-8).) There is no reference to Central America or U.S. policy in  
19 the song, and Kortchmar, the author of the song, has expressly rejected this  
20 interpretation, as has Henley. (Declaration of Danny Kortchmar ¶ 7; Supplemental  
21 Declaration of Jacqueline Charlesworth (“Charlesworth Supp. Decl.”), Ex. 2 at 12-13  
22 (Deposition of Danny Kortchmar at 71:16-72:20); *see also* Declaration of Don Henley  
23 (“Henley Decl.”) ¶ 11; Henley Supp. Decl. ¶ 7; Charlesworth Supp. Decl., Ex. 1 at 3-4  
24 (Deposition of Don Henley (“Henley Dep.”) at 40:6-41:6).) Nonetheless, in DeVore’s  
25 imaginary account, Kortchmar wrote the song about “what Plaintiffs perceive to be the  
26 misconduct of the American government.” (DeVore Decl. ¶ 7.) DeVore continues on,  
27 claiming that images included in an unspecified “video” (not in evidence) make it “plain”  
28 that Plaintiffs are criticizing Reagan’s Central American policies because, in DeVore’s

1 mind, soldiers in the “video” were dressed “like Nicaraguan Contras.” (*Id.*) Against this  
2 backdrop – and ignoring the fact that Kortchmar, not Henley, is the author of Dance –  
3 DeVore posits that his video “turns this line of attack on its head and directly targets Don  
4 Henley’s particular brand of politics.” (*Id.* ¶ 9.)

5 That Defendants were not actually targeting Boys of Summer or Dance for parodic  
6 commentary is obvious from the modifications made by DeVore to the original song  
7 lyrics. DeVore’s substitutions are not directed at the underlying works, or at Henley (a  
8 matter discussed in more detail below), but instead focus on Obama, Boxer, and Boxer’s  
9 policies. For example, “Obama overload / Obama overreach” is substituted for “Nobody  
10 on the road / Nobody on the beach”; “All she wants to do is tax” is substituted for “All  
11 she wants to do is dance”; “They’re pickin’ up the taxpayers and puttin’ ’em in a jam” is  
12 substituted for “They’re pickin’ up the prisoners and puttin’ ’em in a pen”; and “Cap and  
13 trade program – from D.C. Inc.” is substituted for “Molotov cocktail – the local drink.”  
14 (*See Charlesworth Decl., Exs. 6-9.*)

15 Defendants’ use of Plaintiffs’ works in this case closely resembles – and is legally  
16 indistinguishable from – the use considered in *Dr. Seuss*. In *Dr. Seuss*, the work at issue  
17 was *The Cat NOT in the Hat!*, “a poetic account of the O.J. Simpson double murder trial”  
18 that mimicked *The Cat and the Hat* and other well-known works by Dr. Seuss. *Dr. Seuss*  
19 *Enters.*, 109 F.3d at 1396-1403. For example, for the Dr. Seuss line, “One fish / two fish  
20 / red fish / blue fish,” the defendants substituted “One Knife? / Two Knife? / Red Knife /  
21 Dead Wife,” referring to the Simpson trial. *Id.* at 1401. Because the new material was  
22 directed at the Simpson story, rather than Dr. Seuss’s works, defendants’ book was held  
23 to be unprotected satire, not parody. *Id.* at 1396-1403. The Ninth Circuit explained that  
24 defendants’ work “simply retell[s] the Simpson tale. Although *The Cat NOT in the Hat!*  
25 does broadly mimic Dr. Seuss’ characteristic style, it does not hold *his style* up to  
26 ridicule. The stanzas [from defendants’ work] have ‘no critical bearing on the substance  
27 or style of’ *The Cat in the Hat.*” *Id.* at 1401 (emphasis in original). In short, the Ninth  
28 Circuit concurred with the district court’s finding that defendants’ parody defense was

1 “pure shtick.” *Id.* at 1403.

## 2 **B. Defendants’ Alternative Theories Are Unavailing**

3 Defendants cannot succeed in their argument that the videos target Plaintiffs’  
4 works for criticism or commentary, as required under the law. *Campbell*, 510 U.S. at  
5 580; *Dr. Seuss*, 109 F.3d at 1400-01. Because their videos fail the defining test of  
6 parody, Defendants retreat to a series of fallback positions, none of which avails them.

### 7 **1. The Campbell Footnote Merely Reiterates the Fair Use Balancing Test**

8 First, Defendants seek refuge in a footnote to the *Campbell* opinion, in which the  
9 Court noted that, in some cases, “[a] parody that more loosely targets an original than  
10 [did the 2 Live Crew parody of ‘Pretty Woman’] may still be sufficiently aimed at an  
11 original work to come within our analysis of parody.” *Id.* at 580 n.14. But this footnote  
12 does not help them. The *Campbell* Court did *not* say that a “looser” parody need not  
13 target the original, or, as Defendants hopefully suggest, that “very little comment on the  
14 original is required.” (Defs. Br. at 3.) Rather, in its very expression of the point, the  
15 Court made clear that even a “looser” parody must still “target[]” and be “sufficiently  
16 aimed at” the original from which it borrows. *Campbell*, 510 U.S. 580 n.14; *id.* at 597  
17 (“The parody must target the original, and not just its general style, the genre of art to  
18 which it belongs, or society as a whole.”) (Kennedy, J., concurring).

19 The correct reading of the *Campbell* footnote is *not* that the Court intended to  
20 contradict its own holding concerning what is properly considered a parody, but simply  
21 to note that it was not foreclosing the possibility that a “looser” parody, or even a satire –  
22 like any other type of use – might be fair if it satisfies the factors of Section 107 of the  
23 Copyright Act. In such a case, however, where commentary on the original is slight (or  
24 absent altogether), the intrinsic justification for borrowing under the first factor is  
25 lacking, so the other criteria of fair use “loom larger,” and become determinative.  
26 *Campbell*, 510 U.S. at 580. “Parody needs to mimic an original to make its point, and so  
27 has some claim to use the creation of its victim’s (or collective victims’) imagination,  
28 whereas satire can stand on its own two feet *and so requires justification for the very act*

1 of borrowing.” *Id.* at 580-81 (emphasis added); accord *Dr. Seuss Enters.*, 109 F.3d at  
 2 1400. Thus – in a portion of the footnote that Defendants omit – the Court explained  
 3 that, when the parody is “looser,” it is all the more incumbent upon the defendant to  
 4 establish little or no risk of market substitution, “*whether because of the large extent of*  
 5 *transformation of the earlier work, the new work’s minimal distribution in the market,*  
 6 *the small extent to which it borrows from an original, or other factors.*” *Id.* at 580 n.14  
 7 (emphasis added). That is, defendants must justify their taking under the other parts of  
 8 the test.

9 Here, even if Defendants could somehow demonstrate that their videos contain a  
 10 trace amount of commentary on Plaintiffs’ songs, such an insubstantial showing could  
 11 never overcome the other factors of Section 107. Defendants could never satisfy the fair  
 12 use criteria given the extensive takings of Plaintiffs’ songs, the verbatim copying of the  
 13 music and most of the lyrics, and the potentially limitless dissemination of the videos if  
 14 made available on the Internet.

## 15 **2. Targeting an Author Does Not Qualify as Parody**

16 Next, Defendants try to expand the definition of parody, suggesting – without  
 17 support – that it encompasses the targeting of an author, and not just the author’s works.  
 18 (Defs. Br. at 4 (misreading *Campbell*’s definition of “parody” to include “works that  
 19 target . . . the . . . author”), 6 (“Defendants’ parody video . . . aims its mocking gaze at  
 20 Henley.”).) In Defendants’ words, Henley was “carefully selected” as an object for their  
 21 parodies because of the “context” that “DeVore is a [Republican] candidate for the  
 22 United States Senate” who seeks to “challenge[] the Hollywood and entertainment elite,”  
 23 and “[Henley] and his friends in the entertainment industry have spent huge sums of  
 24 money and used the powerful platform that fame and celebrity have given them in order  
 25 to help elect Democratic politicians, including President Obama and Senator Boxer.”  
 26 (*Id.* at 4-6.)

27 Setting aside, for the moment, that Henley is not the author of one of the songs  
 28 (Dance), and that most statements about Henley in Defendants’ papers are false,

1 *Campbell* nowhere suggests that a parody can be aimed solely at an author, rather than  
2 the author's works. Rather, *Campbell* and its progeny are unequivocal that to qualify as  
3 a parody, the use of an author's works must "comment[] on that author's works."  
4 *Campbell*, 510 U.S. 580. Indeed, courts have expressly rejected the notion that simply  
5 targeting an author justifies the taking of that author's works. *See Salinger v. Colting*,  
6 2010 U.S. App. LEXIS 8956, at \*11-12, \*39-40 (2d Cir. Apr. 30, 2010) (agreeing with  
7 district court's conclusion that defendants were unlikely to prevail on fair use defense, in  
8 part because under *Campbell*, it is insufficient to target an author – "parody must critique  
9 or comment on the work itself"); *see also Dr. Seuss Enters., L.P. v. Penguin Books USA,*  
10 *Inc.*, 924 F. Supp. 1559, 1568 (S.D. Cal. 1996), *aff'd*, 109 F.3d 1394 (9th Cir. 1997)  
11 (satirist who "wishes to parody the copyrighted work itself" may take protected  
12 expression; "one intending to parody an author but not any particular work" may not).  
13 Accordingly, absent discernible commentary on Plaintiffs' original works, Defendants'  
14 videos – even if they did comment on Henley, which they do not – still would not qualify  
15 as parodies.

16 Failing to appreciate the legal point, Defendants proceed to rely upon the bountiful  
17 conjecture in DeVore's declaration to argue that the use of Henley's songs was  
18 legitimate. (*See* Defs. Br. at 5-7 (citing DeVore Decl.)) In his declaration, DeVore  
19 asserts that Henley is a "poster boy[]" for, and "proudly a member" of, the "liberal,  
20 entertainment elite"; that he is one of "a group of celebrities associated in the public eye  
21 with Ms. Boxer, Mr. Obama and other prominent liberal politicians"; that he has "vocally  
22 supported" and is "publicly identified" with Boxer and the other politicians and policies  
23 attacked in Defendants' videos; that Henley "fought . . . hard" to get Obama elected; that  
24 he was reportedly "booed" in Orange County for making "liberal political statements";  
25 and that he is supportive of efforts by Boxer and others to "insert[] themselves into the  
26 American economy and enrich[] the government and certain special interests." (DeVore  
27 Decl. ¶¶ 2-3, 6, 9-10.) Even if this litany of Henley's alleged "liberalism" were  
28 somehow relevant to the question of parody (which it is not), it is contradicted by the

1 record in this case: Henley testified that he does not consider himself a “liberal”; there is  
2 not a shred of evidence of any “vocal support” by Henley for Obama or Boxer, or for any  
3 particular policies of theirs; Henley has never campaigned for Obama or Boxer;  
4 Defendants’ assertions concerning the “booing” incident are inaccurate; and the only  
5 public statement attributable to Henley concerning a politician in the record is a  
6 statement that was supportive of Republican Senator John McCain. (Henley Decl. ¶ 22;  
7 Henley Supp. Decl. ¶¶ 3-6, 8-9; Charlesworth Supp. Decl., Ex. 1 at 5-7 (Henley Dep. at  
8 59:2-24, 61:2-62:2).)

9 Notwithstanding all of Defendants’ manufactured “evidence,” the fact of the  
10 matter is that the videos do *not* comment on Henley. They do not mention Henley, they  
11 do not describe Henley, they do not include any image of Henley. Indeed, as DeVore  
12 readily admits in his declaration: “[W]e did not use anything related to Henley’s persona.  
13 We did not use his voice, his picture, his image, his name, or anything else.” (DeVore  
14 Decl. ¶ 14.) If Defendants had actually intended to say something critical about Henley  
15 (rather than merely associating themselves with his songs) one would expect that they  
16 would have mentioned him at least once.

17 Lastly, Defendants make much of the fact that Henley is a registered Democrat  
18 who (based upon an unauthenticated Internet printout) has given money to Democratic  
19 politicians over the years (in addition to a number of Republicans, a fact overlooked by  
20 Defendants). (Henley Decl. ¶ 23; Henley Supp. Decl. ¶ 10.) Even if the list of donations  
21 were admissible, it is irrelevant to the question of whether Defendants’ videos comment  
22 on Plaintiffs’ works – the more so given that the videos make no mention of Henley.  
23 Although Henley’s contributions are apparently of great interest to Defendants, there is  
24 no evidence in the record to suggest that they are widely known to potential viewers of  
25 Defendants’ videos. Moreover, Defendants’ implication that one’s political affiliation  
26 and campaign contributions provide a justification for infringement is troubling. Henley  
27 should be able to exercise these basic rights of citizenship without fear that his  
28 intellectual property will be taken from him.

### 3. Defendants' Videos Are Not "Transformative"

Last but not least in their effort to overcome the problems with their parody defense, Defendants belatedly concede that their videos may not be parodies after all, but satires. (Defs. Br. at 8.) As explained above, because a satire does not comment on the original, it requires independent justification "for the very act of borrowing." *Campbell*, 510 U.S. at 580. Defendants' proposed justification is that their taking of Plaintiffs' songs is sufficiently "transformative" that it qualifies as fair use. (Defs. Br. at 8.) But the lone case cited by Defendants in support of this proposition, the Second Circuit's decision in *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006), offers no support, and *Campbell* and *Dr. Seuss* point in the opposite direction.

In *Blanch*, the artist Jeff Koons scanned a photo of a woman's legs and feet from a fashion magazine, stripped out the background, changed the color, added a heel to one of the feet, inverted the legs, and included the resulting image (among other fragmentary images) in a collage-like painting, which was exhibited at art shows. *Id.* at 247-48. The court determined that Koons had a "genuine creative rationale for [his] borrowing," because he had "used [the plaintiff's] work in a transformative manner to comment on her image's social and aesthetic meaning rather than to exploit its creative virtues." *Id.* at 255-57. This is a far cry from the conduct at issue here.

Defendants assert in their brief that they, too, had a "clear creative rationale" in taking Plaintiffs' works. (Defs. Br. at 9.) But, unlike in the case of Koons, there was in fact no particular creative purpose in choosing Henley's songs – as Hart acknowledged, other songs would have served Defendants' needs just as well. (St. ¶ 107.) The further claim that Defendants targeted Henley based on the (misguided) view that he is "associated in the public eye with Mrs. Boxer, Mr. Obama and other prominent liberal politicians" is hardly an aesthetic decision about the songs themselves, and certainly not a "creative rationale" for their use. (Defs. Br. at 9.) Nor, as Plaintiffs have amply demonstrated, did Defendants take Plaintiffs' songs to cast a critical eye upon them. In such circumstances, where the infringer has merely avoided "the drudgery in working

1 up something fresh,” courts have held the use to be nontransformative. *Dr. Seuss*, 109  
 2 F.3d at 1401 (quoting *Campbell*, 510 U.S. at 580); *see also Columbia Pictures Indus.*, 11  
 3 F. Supp. 2d at 1188 (incorporating elements of movie poster into new poster without  
 4 commenting on original not a transformative use).

5 Second, unlike Koons’s extensive, expressive alterations to the work he used,  
 6 Defendants changed only a small portion of the lyrics to Plaintiffs’ songs, which they  
 7 otherwise took whole cloth. Plaintiffs’ music was copied essentially verbatim from  
 8 beginning to end; no new or independent musical expression was added; and the music  
 9 was not in any way transformed. (St. ¶ 151; Declaration of Lawrence Ferrara (“Ferrara  
 10 Decl.”) ¶¶ 6(e), 9, Ex. 1 at 6-7, 13-14, 19-20.) Some two-thirds of the Boys of Summer  
 11 and three-quarters of the Dance lyrics were simply copied from the originals, and even in  
 12 those lyrics that were altered, Plaintiffs’ original syntax and rhyme were largely  
 13 preserved. (St. ¶ 152.) Defendants’ modest changes to Plaintiffs’ works are completely  
 14 overshadowed by the otherwise extensive, slavish copying of those works. Such a low  
 15 ratio of new expression to the amount appropriated is insufficient to support a finding  
 16 that Defendants’ use of Plaintiffs’ songs was transformative. As *Campbell* explained,  
 17 when “‘a substantial portion of the infringing work was copied verbatim’ from the  
 18 copyrighted work . . . it may reveal a dearth of transformative character or purpose . . . .”  
 19 *Campbell*, 510 U.S. at 587-88 (quoting court of appeals); *see also L.A. Times v. Free*  
 20 *Republic*, No. CV 98-7840, 2000 U.S. Dist. LEXIS 5669, at \*24 (C.D. Cal. Apr. 5, 2000)  
 21 (“There is little transformative about copying the entirety of large portions of a work  
 22 verbatim.”).

23 Defendants’ use of Plaintiffs’ works in this case mirrors that at issue in *Dr. Seuss*.  
 24 The *Dr. Seuss* court determined that the defendants’ use of Dr. Seuss’s works to  
 25 comment on an unrelated topic was not transformative. *Dr. Seuss*, 103 F.3d at 1401.  
 26 The same conclusion applies here.

### 27 **C. Defendants Profited from Their “Political” Use of Plaintiffs’ Works**

28 Citing two district court cases, *MasterCard Int’l Inc. v. Nader 2000 Primary*

1 *Comm., Inc.*, No. 00 Civ. 6068 (GBD), 2004 U.S. Dist. LEXIS 3644, at \*12 (S.D.N.Y.  
2 Mar. 8, 2004) and *Keep Thomson Governor Comm. v. Citizens for Gallen Comm.*, 457 F.  
3 Supp. 957, 961 (D.N.H. 1978), Defendants argue that because their videos included  
4 political content, their use of Plaintiffs' music was "consistent with [ ] fair use." (Defs.  
5 Br. at 10 (characterizing videos as "pure political speech"). Neither of these cases  
6 follows (or even considers) the guiding principle articulated by the Supreme Court in  
7 *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985), that the  
8 nonprofit/profit distinction relevant to the first fair use factor turns not on how the use is  
9 labeled (*e.g.*, "political"), but whether the defendant benefited from use of the  
10 copyrighted material by exploiting it for free. *See id.* at 562.

11 It is well established that First Amendment considerations in copyright cases are  
12 accommodated by, and subsumed within, the fair use analysis of Section 107. *See Elvis*  
13 *Presley Enters. v. Passport Video*, 349 F.3d 622, 626 (9th Cir. 2003); *Dr. Seuss*, 924 F.  
14 Supp. at 1575. This includes the use of copyrighted materials by political campaigns.  
15 *See, e.g., Browne v. McCain*, 612 F. Supp. 2d 1125, 1130 n.2 (C.D. Cal. 2009)  
16 ("[C]opyright claims based on use of a copyrighted work in a political campaign are not  
17 barred, as a matter of law, under the fair use doctrine."). Following *Harper & Row*, the  
18 Ninth Circuit has explained – in a case involving free distribution of copyrighted material  
19 by a church – that under Section 107, "[t]he crux of the profit/nonprofit distinction is not  
20 whether the sole motive of the use is monetary gain but whether the user stands to profit  
21 from exploitation of the copyrighted material without paying the customary price.... [In]  
22 weighing whether the purpose was for 'profit,' 'monetary gain is not the sole criterion ...  
23 particularly in [a] ... setting [where] profit is ill-measured in dollars.'" *Worldwide*  
24 *Church of God v. Philadelphia Church of God, Inc.*, 227 F.3d 1110, 1117 (9th Cir. 2000)  
25 (citing *Harper & Row*, 471 U.S. at 562, and quoting *Weissmann v. Freeman*, 868 F.2d  
26 1313, 1324 (2d Cir. 1989) (academic use was unfair taking)); *see also Elvis Presley*  
27 *Enters.*, 349 F.3d at 628 (finding commercial use where historical documentary sought to  
28 "profit at least in part from the inherent entertainment value" of unlicensed Elvis Presley

1 materials); *Marobie-FL, Inc. v. Nat'l Ass'n of Fire Equip. Distribs.*, 983 F. Supp. 1167,  
 2 1175 (N.D. Ill. 1997) (nonprofit group's unauthorized use of clip art to "enhance" its  
 3 website considered commercial under Section 107). Thus, in *Worldwide Church*, even if  
 4 the church did not use the materials to generate income, it "unquestionably profit[ed]"  
 5 from the free use of those materials, which attracted church members and donations, and  
 6 helped build the ministry. *Worldwide Church*, 227 F.3d at 1118.

7 The same analysis applies here. As demonstrated in Plaintiffs' opening brief,  
 8 Plaintiffs' songs were used to advance DeVore's career by garnering attention for his  
 9 campaign, encouraging donations, and, according to Defendants, generating "tens of  
 10 thousands, maybe hundreds of thousands, of dollars" in free advertising. (St. ¶ 37.)  
 11 Defendants unquestionably benefited from the exploitation of Plaintiffs' copyrighted  
 12 works. Their uses therefore fall on the profit-making, commercial side of the line.

13 Finally, as Defendants themselves acknowledge, "[t]he mere fact that a use is  
 14 educational and not for profit does not insulate it from a finding of infringement . . . ."  
 15 *Worldwide Church*, 227 F.3d at 1117 (quoting *Campbell*, 510 U.S. at 584); (*see also*  
 16 Defs. Br. at 9.) Even if Defendants' use of Plaintiffs' works were found to have some  
 17 nonprofit elements, such a finding would not outweigh the otherwise inexcusable nature  
 18 of their takings.

#### 19 **D. Defendants' Wholesale Copying Was Excessive and Inexcusable**

20 The third factor of the fair use test, concerning the amount and substantiality of the  
 21 portion of the original work used in relation to the whole, "reinforce[s] the principle that  
 22 courts should not accord fair use protection to profiteers who do no more than add a few  
 23 silly words to someone else's song." *Campbell*, 510 U.S. at 598 (Kennedy, J.  
 24 concurring). Plaintiffs are unaware of any case in which a court has found takings of  
 25 songs as extensive as the ones here to be justified even for purposes of parody, let alone  
 26 satire. Indeed, in *Campbell* – where the borrowing was considerably less than here, and  
 27 which involved a legitimate parody – the Supreme Court still questioned whether too  
 28 much musical expression had been appropriated. *Campbell*, 510 U.S. at 589 (remanding

1 for evaluation of musical takings); (Ferrara Decl., Ex. 1 at 8, 19-21 (demonstrating, from  
 2 a musicological perspective, that “[f]ar less of the musical and lyrical composition in 2  
 3 LIVE CREW was copied from ORBISON as compared with the slavish copying in  
 4 HOPE and TAX[ ]”).

5 Defendants’ contention that they needed to use Plaintiffs’ songs in their entirety  
 6 because “practically speaking it would not be possible to use only a portion of the song”  
 7 is not worthy of consideration. (Defs. Br. at 12.) Of course they could have taken less.  
 8 Even assuming a *bona fide* parodic purpose, Defendants were only permitted to take  
 9 what was required to “conjure up” the original work and make it the object of the parody.  
 10 *Dr. Seuss Enters.*, 109 F.3d at 1400. While, as Defendants note, this may be more than a  
 11 “bare minimum” in certain cases, it cannot be excessive in relation to what is reasonably  
 12 required to accomplish the parodic purpose. (Defs. Br. at 11); *Campbell*, 510 U.S. at 586  
 13 (question is whether the portion used is “reasonable in relation to the purpose of the  
 14 copying”); *Blanch*, 467 F.3d at 257 (same); *Chicago Bd. of Educ. v. Substance, Inc.*, 354  
 15 F.3d 624, 629 (7th Cir. 2003) (fair use copier can take “no more than is reasonably  
 16 necessary” to pursue aim that “law recognizes as proper”). Here, Defendants’ takings  
 17 (assuming they could be justified at all) were grossly disproportionate to any conceivable  
 18 legitimate aim. Boys of Summer and Dance are songs that are instantly recognizable  
 19 based on their opening notes, with melodies and music that repeat throughout the songs.  
 20 (St. ¶ 26 (audiences recognize songs immediately); ¶ 150 (Ferrara’s expert finding that  
 21 far more musical expression taken than necessary to evoke the originals); Charlesworth  
 22 Decl., Exs. 1-2). In the case of either song, a brief excerpt would have sufficed “to place  
 23 [it] firmly” in the minds of viewers of Defendant’s videos for purposes of a parody. *Cf.*  
 24 *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 757-58 (9th Cir. 1978) (rejecting claim  
 25 that extensive copying of cartoon characters was necessary to effectuate parody).<sup>2</sup>

26 \_\_\_\_\_  
 27 <sup>2</sup> The “near-exact” copying language Defendants quote from *Fisher* addresses the  
 28 closeness of copying, not the amount, as Defendants erroneously suggest. (Defs. Br. at  
 11.) *Fisher* in no way sanctions the copying of songs from beginning to end in the name  
 (Footnote continues on next page.)

1 **E. Defendants’ Videos Usurp the Market for Plaintiffs’ Works**

2 Section 107 asks courts to consider the impact of the challenged use on “the  
3 potential market for or value of the copyrighted work.” 17 U.S.C. § 107(4). As the  
4 Ninth Circuit has emphasized, this factor “is not limited to market effect” but also  
5 includes also “the effect on the *value* of the copyrighted work.” *Worldwide Church*, 227  
6 F.3d at 1119 (quoting 17 U.S.C. § 107(4)) (emphasis in original). Nor is this factor  
7 limited to the past or current effect of the uses; rather, courts are to “consider not only the  
8 extent of market harm caused by the particular actions of the alleged infringer, but also  
9 ‘*whether unrestricted and widespread conduct of the sort engaged in by the defendant . . .*  
10 *would result in a substantially adverse impact on the potential market*’ for the original.”  
11 *Campbell*, 510 at 590 (quoting *Nimmer* § 13.05[A][4], at 13.102.61) (emphasis added);  
12 (Def. Br. at 12). Harm may be established even if the defendant’s use was not for  
13 financial gain, because “‘even copying for noncommercial purposes may impair the  
14 copyright holder’s ability to obtain the rewards that Congress intended him to have.’”  
15 *Worldwide Church*, 227 F.3d at 1119 (quoting *Sony Corp. v. Universal City Studios, Inc.*,  
16 464 U.S. 417, 450 (1984)).

17 Because fair use is an affirmative defense, the burden is on the defendant to “bring  
18 forward favorable evidence” that potential markets for the works will not be adversely  
19 affected. *Dr. Seuss*, 109 F.3d at 1403. Mere “‘uncontroverted submissions that there [i]s  
20 no likely effect on the market for the original’” will not suffice. *Id.* (quoting *Campbell*,  
21 510 U.S. at 590); *Columbia Pictures Indus.*, 11 F. Supp. 2d at 1189 (rejecting fair use  
22 where defendant failed to provide “affirmative evidence” concerning impact on “relevant  
23 markets”). Here, even if Defendants’ works were found to have some slight parodic  
24 value, Defendants’ burden would be a heavy one, for a work with “little parodic content  
25 and much copying” is presumed far more likely to cause market harm than one “whose

26 \_\_\_\_\_  
(Footnote continued from previous page.)

27 of fair use. In fact, *Fisher* expressly relied upon the “brevity” of the defendant’s use (29  
28 seconds of a 40-minute album) in finding it fair. *Fisher*, 794 F.2d at 434, 439.

1 borrowing is slight in relation to its parody.” *Campbell*, 510 U.S. at 593 n.24.

2 Defendants’ primary argument that their uses are not harmful is based on the  
3 (unfounded) opinion of DeVore that Defendants’ uses could not possibly harm the  
4 market for Plaintiffs’ original recordings. (*See* Defs. Br. at 13; DeVore Decl. ¶ 13.)  
5 This is exactly the kind of conclusory disclaimer rejected by the Supreme Court in  
6 *Campbell* and the Ninth Circuit in *Dr. Seuss*. In contrast to DeVore’s lay speculation,  
7 Plaintiffs submitted testimony from an experienced licensing consultant explaining  
8 how Defendants’ uses, if permitted to continue, would threaten the market for the  
9 original recordings by alienating fans. (St. ¶¶ 156-57; Declaration of Jon Albert (“Albert  
10 Decl.”) ¶ 11.) The fact that Henley and Kortchmar testified at their depositions that they  
11 were not then aware of lost sales based upon the brief availability of the Defendants’  
12 campaign ads before they were taken down is hardly dispositive of the issue. *See L.A.*  
13 *Times*, 2000 U.S. Dist. LEXIS 5669, at \*69-70 (evidence of lost revenue “not  
14 determinative” of market harm as “[a]ctual present harm need not be shown”) (quoting  
15 *Sony*, 464 U.S. at 451). The critical question is whether there *would* be harm if the  
16 videos were allowed to become “widespread” on the Internet. Defendants have offered  
17 no evidence that this would not be the case.

18 Nor have Defendants submitted any proof that their uses are not damaging to the  
19 highly valuable derivative licensing markets for Plaintiffs’ works. *See Castle Rock*  
20 *Entm’t, Inc. v. Carol Publ’g Group, Inc.*, 150 F.3d 132, 145 (2d Cir. 1998) (“The fourth  
21 factor must also ‘take account . . . of harm to the market for derivative works . . . .’”)  
22 (quoting *Campbell*, 510 U.S. at 592). Such markets include future uses of the songs for  
23 television, movies and advertising. Through their licensing expert, Plaintiffs established  
24 that Defendants’ use of the songs by the DeVore campaign, if permitted to continue,  
25 would deter future advertisers and other licensees, who tend to avoid songs that are  
26 already identified with a person or cause, as well as songs with politicized or  
27  
28

1 controversial associations.<sup>3</sup> (St. ¶¶ 156-57; Albert Decl. ¶¶ 8-12.) Defendants’ campaign  
 2 ads, by their nature, therefore usurp – and substitute for – potential licensing  
 3 opportunities. *See Castle Rock*, 150 F.3d at 145 (market harm occurs when a secondary  
 4 use “usurps or substitutes for the market of the original”). They thus diminish the value  
 5 of Plaintiffs’ copyrights.

6 Finally, the fact that Boys of Summer and Dance are not currently licensed for  
 7 commercial uses (or that Henley so far has not chosen to license his works for such a  
 8 purpose) is irrelevant. The licensing of popular songs for advertising purposes (as well  
 9 as for television and film) is a well-established derivative market that music copyright  
 10 owners in general “develop or license others to develop.” *See Campbell*, 510 U.S. at  
 11 592; *Castle Rock*, 150 F.3d at 145; St. ¶ 157. It is therefore a market for Plaintiffs’  
 12 works that is entitled to protection. As the Supreme Court has recognized, the freedom  
 13 of thought and expression protected by copyright law includes “the right to refrain from  
 14 speaking at all” – a principle especially pertinent here, where Plaintiffs’ works are being  
 15 exploited to promote the political views of others. *Harper & Row*, 471 U.S. at 559-60.  
 16 Thus, “[e]ven an author who ha[s] disavowed any intention to publish his work during  
 17 his lifetime [i]s entitled to protection of his copyright, first, because the relevant  
 18 consideration [i]s the ‘potential market’ and, second, because he has the right to change  
 19 his mind.” *Worldwide Church*, 227 F.3d at 1119 (citing *Salinger v. Random House, Inc.*,  
 20 811 F.2d 90, 99 (2d Cir. 1987)); *Castle Rock*, 150 F.3d at 145-46 (“although *Castle Rock*  
 21 has evidenced little if any interest in exploiting th[e] market for derivative works based  
 22 on *Seinfeld* . . . the copyright law must respect that creative and economic choice.”)

## 23 **II. DEFENDANTS ACTED WILLFULLY**

24 “To refute evidence of willful infringement, [the defendant] must not only  
 25 establish its good faith belief in the innocence of its conduct, it must also show that *it*

26 \_\_\_\_\_  
 27 <sup>3</sup> This is not a question of the market’s being suppressed by “biting criticism” of  
 28 Plaintiffs’ works; Defendants’ videos are devoid of any such commentary. *See*  
*Campbell*, 510 U.S. at 591-92.

1 was reasonable in holding such a belief.” *Peer Int’l Corp. v. Pausa Records, Inc.*, 909  
 2 F.2d 1332, 1336 (9th Cir. 1990) (emphasis added). Defendants cannot establish that their  
 3 conduct was reasonable here.

4 As Plaintiffs demonstrated in their opening brief, the record in this case is filled  
 5 with evidence that Defendants appropriated Plaintiffs’ songs with an understanding of  
 6 copyright law and, more specifically, with the knowledge that the use of popular music  
 7 requires a license. According to DeVore, the use of music “is an endemic problem with  
 8 campaigns,” which has caused him on “more than one occasion” to ask Hart, “Hey, you  
 9 know, you got the rights to this, right?” (St. ¶ 44.) Defendants paid the *Wall Street*  
 10 *Journal* some \$3,500 for a license to reprint an article for use in their campaign. (St.  
 11 ¶ 47.) Hart is himself a copyright owner who has licensed his works and advised others  
 12 how to avoid cease and desist letters for the use of online images. (St. ¶ 46;  
 13 Charlesworth Decl., Ex. 16 at 658 (Deposition of Justin Hart at 279:15-22).) But despite  
 14 the obvious signs that their use of Plaintiffs’ music was not lawful – the infringement  
 15 notice from Henley, DeVore’s familiarity with the *Dr. Seuss* case, and the warnings of  
 16 friends – they chose to persist in their infringing conduct, declining to seek legal  
 17 guidance on the question of fair use, and even welcoming the possibility of an injunction  
 18 because of the potential for free publicity. (St. ¶¶ 89-90, 93-95.) Such behavior is  
 19 willful within the meaning of the Copyright Act.

### 20 **III. PLAINTIFFS HAVE ESTABLISHED DIRECT, CONTRIBUTORY AND** 21 **VICARIOUS INFRINGEMENT**

22 As set forth in Plaintiffs’ opening brief, Plaintiffs have plainly established the  
 23 elements of direct copyright infringement with respect to both *Boys of Summer* and  
 24 *Dance*. They have also established Defendants’ contributory and vicarious infringement  
 25 of both works. The record shows that both DeVore and Hart knowingly and materially  
 26 contributed to the unauthorized use of Plaintiffs’ songs, and further, that they had the  
 27 right and ability to control the unauthorized uses, from which they derived direct  
 28 economic and financial benefit. *See Dream Games of Arizona, Inc. v. PC Onsite*, 561

1 F.3d 983, 995 (9th Cir. 2009) (setting forth standards for contributory and vicarious  
2 infringement).

3 **IV. DEFENDANTS CANNOT ESCAPE LIABILITY UNDER THE**  
4 **LANHAM ACT**

5 DeVore’s campaign ads present altered versions of well-known Henley songs,  
6 incorporating music that simulates the original Henley tracks, and mimicking Henley’s  
7 vocal performances. Henley’s songs are not used as background music or in an  
8 incidental way; rather, they are the featured content of both videos. The Henley-  
9 associated songs are used in an obviously promotional manner, including in conjunction  
10 with written campaign slogans, to broadcast Defendants’ campaign messages. The  
11 videos were posted on YouTube and other sites and, but for this lawsuit, would still be  
12 there – along with other videos featuring Henley songs, based on DeVore’s promise that  
13 he would “rifle through Henley’s cateloge [sic]” for other works to take. (St. ¶ 100.)  
14 Plaintiffs have demonstrated that by using Henley’s songs in this way, Defendants have  
15 caused confusion as to whether Henley is associated or affiliated with DeVore and/or his  
16 ads. (St. ¶ 162.) This violates the Lanham Act.

17 **A. Defendants’ Recycled Legal Arguments Should Be Rejected**

18 The Lanham Act prohibits “[a]ny person” from using of “any word, term, name,  
19 symbol, or device, or any combination thereof” that is “likely to cause confusion, or to  
20 cause mistake, or to deceive as to the affiliation, connection, or association of such  
21 person with another person, or as to the origin, sponsorship, or approval of his or her  
22 goods, services, or commercial activities by another person.” 15 U.S.C. § 1125(a)(1)(A).  
23 Defendants seek to escape liability for their conduct by reprising an earlier argument  
24 from their unsuccessful motion to dismiss that this Court should set aside the broadly-  
25 worded standard set forth above and replace it with the undefined term “distinctive  
26 attribute” whenever a celebrity is involved. (Defs. Br. at 16-17, 21 (“False endorsement  
27 claims must be tethered to the use of the plaintiff’s personality—his or her distinctive  
28 characteristics . . .”).

1 This Court has previously declined Defendant’s invitation to rewrite the Lanham  
2 Act in this manner, and should do so again. In denying Defendants’ motion to dismiss,  
3 the Court explained that “‘Congress approved the broad judicial interpretation’” of the  
4 Lanham Act, noting that a false endorsement claim may arise from “‘distinctive attributes  
5 including uniforms, photographs, names, faces, and voices,” as well as “‘distinctive  
6 sounds and physical appearance.’” (July 8, 2009 Order Denying Defendants’ Motion to  
7 Dismiss (“Order”) at 13 (quoting *Waits v. Frito-Lay*, 978 F.2d 1093, 1106-07 (9th Cir.  
8 1992).) Thus, the Court held, in the instant case, the use of two Henley songs, “one right  
9 after the other,” and the mimicking of Henley’s original recordings, gives rise to an  
10 actionable claim under the Lanham Act. (*Id.* at 13-14)

11 Aside from the fact that “distinctive attribute” (like “distinguishing characteristic”)  
12 has no particular definition in the law (and in any event, is not limited to a personal  
13 physical trait, as Defendants seem to suggest), Defendants’ proposed judicial revision of  
14 the Lanham Act conflicts with the very face of the statute, which, by its terms, forbids a  
15 false association with “another person” based on “any word, term, name, symbol, or  
16 device, or any combination thereof.” 15 U.S.C. § 1125(a)(1)(A). There is no suggestion  
17 in the statutory language that the symbol or device be a “distinctive attribute” (however  
18 that is defined); indeed, the statute does not make use of the term at all. Nor does the one  
19 case relied upon by Defendants, *Waits v. Frito-Lay*, support what they are saying. *Waits*  
20 held that the use of a “distinctive attribute” or “distinguishing characteristic” of a  
21 celebrity in a confusing way *could* be the basis of a false endorsement claim – not that it  
22 is the *only* basis for such a claim. *See* 978 F.2d at 1107, 1110.

23 Courts have upheld Lanham Act claims by celebrities based on the evocation of  
24 the celebrity through a variety of devices; whether or not these devices are referred to as  
25 “distinctive attributes,” there is no requirement that a physical trait of the celebrity be  
26 used, or even closely imitated. *Waits*, of course, did involve imitation of a singer’s  
27 voice. But *White v. Samsung Electronics America, Inc.*, 971 F.2d 1395, 1399-1401 (9th  
28 Cir. 1992), upheld a claim based on a robot posed next to a game board to evoke the

1 game show hostess Vanna White – clearly, the robot was not White. In *Dallas Cowboy*  
2 *Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200, 204-05 (2d Cir. 1979), the  
3 court affirmed a finding that defendants’ imitation of plaintiffs’ cheerleading uniforms  
4 gave rise to confusion as to whether plaintiffs had sponsored or otherwise approved  
5 defendants’ movie. And, in a case closely on point, *Butler v. Target Corp.*, 323 F. Supp.  
6 2d 1052, 1058-59 (C.D. Cal. 2004), the court held that the use of an altered title and  
7 “distorted” lyrics from plaintiffs’ well-known song as part of an advertising campaign  
8 was actionable because it could cause consumer confusion as to the plaintiffs’  
9 association with the defendant corporation. In sum, even if a distinctive attribute must be  
10 shown, the case law indicates that distinctive attributes include “distinctive sounds,”  
11 “distorted song lyrics” and the simulation of a musical performance. Defendants thus  
12 used distinctive attributes of Henley’s here.

13 Defendants further argue that Henley “has no choice” but to give up his false  
14 endorsement claim, based on Henley’s response to a request for admission concerning  
15 the pleading of this claim. (Defs. Br. at 17.) Defendants’ treatment of Henley’s response  
16 is misleading. The request cited by Defendants’ asked Plaintiffs to “[a]dmit that your  
17 Lanham Act false endorsement claim is not based on an allegation that Defendants used  
18 a ‘distinctive attribute’ of yours.” (Declaration of Christopher Arledge (“Arledge  
19 Decl.”), Ex. 2 at 4.) Henley responded, subject to various objections, that his claim was  
20 not “based on an *allegation* that Defendants’ used a ‘distinctive attribute’ of Plaintiff  
21 Henley.” (*Id.* at 4-5 (emphasis added).) Henley did not include such an allegation in his  
22 complaint because there is no such requirement to plead false endorsement; in fact, at the  
23 time Henley furnished his response, this Court had already upheld the sufficiency of  
24 Henley’s pleading. (Order at 13-14); *see also* 5 J. THOMAS MCCARTHY, MCCARTHY ON  
25 TRADEMARKS AND UNFAIR COMPETITION § 27:13 (4th ed. 2010) (setting forth elements  
26 of claim under Section 43(a)(1)(A) of the Lanham Act). More importantly, in a material  
27 omission, Defendants fail to mention that in the two requests that followed, Henley was  
28 asked to admit – and expressly *denied* – that Defendants did not use a “distinctive

1 attribute” of his in the Hope and Tax Videos. (Arledge Decl., Ex. 2 at 5-6.)

2 Defendants next invoke a Second Circuit case, *Oliveira v. Frito-Lay, Inc.*, 251  
3 F.3d 56 (2d Cir. 2001), in a further effort to defeat Henley’s claim. *Oliveira* concerned  
4 the licensed use of the plaintiff Gilberto’s *own* recording of the song “The Girl from  
5 Ipanema” in a commercial. *Id.* at 57-58. There are several flaws in Defendants’ *Oliveira*  
6 argument. First, in *Oliveira*, the district court had determined that “no reasonable jury  
7 could find for plaintiff on her claim of implied endorsement.” *Id.* at 60 (citing district  
8 court). Based on this, the Second Circuit concluded that “*at least upon the showing*  
9 *made by Gilberto,*” there was no basis to hold that she had a trademark interest in “her  
10 own famous performance.” *Id.* at 62 (emphasis added). Here, by contrast, there is a  
11 clear record establishing that Defendants’ uses cause substantial confusion concerning  
12 Henley’s association with DeVore. (St. ¶ 162.) Second, unlike Gilberto, Henley is *not*  
13 claiming a trademark in an otherwise licensed use of his *own* performance, but rather,  
14 that two songs widely associated with him were used in unauthorized, simulated  
15 performances falsely to suggest an association between Henley and Defendants’ videos.  
16 This makes Henley’s claim like Waits’s, not Gilberto’s. Perhaps for this very reason, the  
17 Second Circuit took pains to distinguish *Waits*, *White*, and similar cases from the reach  
18 of its decision. *See Oliveira*, 251 F.3d at 62. Finally, *Oliveira* appears to depart from  
19 case law in this circuit, including *Butler*, which distinguished *Oliveira* in upholding  
20 plaintiffs’ Lanham Act claim based on misuse of a song, 323 F. Supp. 2d at 1059; and  
21 *Browne*, which upheld a false endorsement claim based upon the unauthorized use of the  
22 plaintiff’s own recording in a campaign ad, 612 F. Supp. 2d at 1128, 1133.

23 Lastly, Defendants resurrect their *Dastar* argument, which was fully aired and  
24 disposed of in connection with Defendants’ motion to dismiss. (*See Order* at 9-11.) This  
25 Court correctly determined that Defendants’ reliance on *Dastar Corp. v. Twentieth*  
26 *Century Fox Film Corp.*, 539 U.S. 23 (2003), was misplaced because in *Dastar*, the  
27 Supreme Court “makes it clear that its concern lies with extending protection for  
28 uncopyrighted or expired works and not with a cause of action under false association or

1 endorsement claim.” (Order at 11.)

2 To the extent there is any new matter here, it appears to be Defendants’  
3 speculation concerning a hypothetical false endorsement claim Henley might make based  
4 on Kortchmar’s licensing of the copyrighted musical composition Dance for the  
5 television show *American Idol*. To be clear, Henley has never made, and is not making,  
6 any such claim, so the Court need not address this figment of Defendants’ imagination.  
7 But regardless, Defendants’ suggestion that there is no conceivable circumstance where  
8 the licensed use of a musical composition could or should ever be held to violate the  
9 Lanham Act is directly contradicted by this Court’s earlier ruling that Henley’s false  
10 endorsement claim is not preempted by the Copyright Act. (*See* Defs. Br. at 20; Order at  
11 14.) It also runs straight into *Waits*, which stands for the proposition that even the  
12 authorized use of song can violate the Lanham Act if the use is confusing. *Waits*, 978  
13 F.2d at 1097 (use held actionable even where song was specifically written for  
14 commercial).

15 **B. The Facts Clearly Demonstrate Defendants’ Actual Malice**

16 Citing *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180 (9th Cir. 2001), and  
17 *Kournikova v. General Media Communications, Inc.*, No. CV 02-3747 GAF (AJWx),  
18 2002 U.S. Dist. LEXIS 25810 (C.D. Cal. Aug. 9, 2002), Defendants assert that Henley  
19 must demonstrate that “Defendants’ videos were made with actual malice.” (Defs. Br. at  
20 21.) It is true that Henley is a public figure. This case, however, which involves  
21 freestanding video advertisements, stands in marked contrast to those relied upon by  
22 Defendants, which involved editorial content in magazines. Moreover, Defendants are  
23 not media organizations, and the application of the actual malice standard to a nonmedia  
24 defendant has not been established. *See Underwager v. Channel 9 Australia*, 69 F.3d  
25 361, 368 n.9 (9th Cir. 1995) (declining to address application of actual malice to a  
26 nonmedia defendant); *cf. Hoffman*, 255 F.3d at 1186 (characterizing magazine defendant  
27 as type of “media organization” that requires a showing of actual malice).

28 As Plaintiffs have demonstrated, Defendants’ use of their songs is a commercial

1 one for purposes of the fair use test under copyright law. While a somewhat different  
2 standard applies under the First Amendment, the dividing line between commercial and  
3 noncommercial speech is, nonetheless, not “clearly delineated.” *Hoffman*, 255 F.3d at  
4 1184-85. Certainly, Defendants’ uses, which are promotional in nature, do not constitute  
5 the type of noncommercial, “editorial opinion” at issue in *Hoffman* or *Kournikova*. See  
6 *Hoffman*, 255 F.3d at 1184-85 (actual malice doesn’t apply where celebrity is used to  
7 “sell[] a product”); *Kournikova*, 2002 U.S. Dist. LEXIS 25810, at \*24 (distinguishing  
8 “simple advertisements”). And, under the First Amendment, “[f]alse or misleading  
9 commercial speech is not protected.” *Hoffman*, 255 F.3d at 1184.

10 Even assuming the Court were to apply the actual malice standard to Defendants’  
11 advertising uses, it is plainly satisfied in this case. Actual malice requires a showing, by  
12 clear and convincing evidence, that the defendant made a false statement “with  
13 knowledge that the statement was false or with reckless disregard as to whether or not it  
14 was true.” *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988). Significantly,  
15 Defendants’ actual malice argument misstates the relevant inquiry in this case. The  
16 question is not properly characterized as whether Defendants “intended to confuse the  
17 public into believing Henley actually sponsored or endorsed the videos.” (Defs. Br. at  
18 22.) False speech under section 43(a) the Lanham Act is speech that causes confusion as  
19 to the “affiliation, connection, or association of such person with another person” or as to  
20 “the origin, sponsorship, or approval of his or her goods, services, or commercial  
21 activities by another person.” 15 U.S.C. § 1125(a)(1)(A). Thus, the inquiry needs to  
22 encompass whether Defendants acted with knowledge of, or reckless disregard for, the  
23 fact that their use of Henley’s music in the videos would falsely suggest *an affiliation,*  
24 *connection or association with Henley.*

25 It is clear from the record that they did. The videos themselves – in which  
26 Defendants’ grafted their campaign messages onto not just one, but two popular Henley  
27 songs – demonstrate that Defendants directly and intentionally associated their videos  
28 with Henley. DeVore chose to use Henley’s popular songs because they would allow

1 him to “reach people in three minutes” who would never read a position paper or listen to  
 2 a speech. (St. ¶ 73.) He admits to using Henley’s work as a “vehicle” for his campaign  
 3 messages; in posting the Hope lyrics to the Internet, he did so with “apologies to Don  
 4 Henley” because he understood that he was “taking [Henley’s work] and . . . using it for  
 5 something else.” (St. ¶¶ 75, 97.) Tellingly, in reposting the Tax Video several months  
 6 after this lawsuit was filed, Defendants felt obliged to include a written disclaimer that  
 7 “Don Henley did not approve this message”; according to DeVore, this was to make it  
 8 clear that the videos were “not approved by Mr. Henley.” (St. ¶¶ 140-41.) *Cf. Eastwood*  
 9 *v. National Enquirer, Inc.*, 123 F.3d 1249, 1253, 1256 (9th Cir. 1997) (confirming jury’s  
 10 finding of actual malice based upon the totality of “circumstantial evidence” concerning  
 11 editors’ presentation of interview in magazine); *Solano v. Playgirl, Inc.*, 292 F.3d 1078,  
 12 1084-87, 1090 (9th Cir. 2002) (reversing grant of summary judgment to permit jury to  
 13 consider issue of actual malice based upon “appropriate inferences” from the evidence).

14 In sum, Defendants’ conduct in seeking falsely to associate DeVore’s videos and  
 15 campaign with Henley’s songs and Henley himself was knowing, deliberate and reckless,  
 16 and with a clear understanding that Henley had never approved the use of his songs in  
 17 their videos, and was in no way affiliated with the DeVore campaign.

#### 18 CONCLUSION

19 For the reasons set forth above, Plaintiffs respectfully request that this Court deny  
 20 Defendants’ motion for summary judgment on Plaintiffs’ copyright and Lanham Act  
 21 claims, and grant Plaintiffs’ corresponding cross-motion on these issues.

22 Dated: May 3, 2010

MORRISON & FOERSTER LLP  
 Jacqueline C. Charlesworth  
 Craig B. Whitney  
 Tania Magoon  
 Paul Goldstein

26 By: /s/ Jacqueline C. Charlesworth  
 Jacqueline C. Charlesworth

28 *Attorneys for Plaintiffs*