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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DON HENLEY, MIKE CAMPBELL and DANNY KORTCHMAR,

Plaintiffs,

v.

CHARLES S. DEVORE and JUSTIN HART,

Defendants.

Case No. SACV09-0481 JVS (RNBx)

PLAINTIFFS' STATEMENT OF GENUINE ISSUES OF MATERIAL FACT IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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

Plaintiffs Don Henley, Mike Campbell and Danny Kortchmar (collectively, "Plaintiffs") respectfully submit this Statement of Genuine Issues of Material Fact in Opposition to Defendants' Motion for Summary Judgment, pursuant to Federal Rule of Civil Procedure 56 and Local Rule 56-2:

Defendants' Uncontroverted Fact and Supporting Evidence	**Plaintiffs' Response and 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). Supporting Evidence 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.	1. Defendants' statement consists entirely of legal conclusions rather than a statement of material fact, as required under Local Rule 56-1, to which Plaintiffs can appropriately respond. To the extent a response can be provided, Plaintiffs do not dispute that the Plaintiffs' original songs and lyrics are contained in Exhibits B, C, F and G to the DeVore Declaration, and that the Defendants' videos and lyrics are contained in Exhibits D, E, H and I to the DeVore Declaration. Plaintiffs dispute Defendants' characterization of their videos as "parody videos" and "parodies," which is not a statement of fact, but a legal conclusion. Plaintiffs dispute Defendants' conclusory statement that the "proper context for the parodies" is contained in the DeVore

Defendants' Uncontroverted Fact and Supporting Evidence	Plaintiffs' Response and Supporting Evidence
	Declaration. (Supplemental Declaration of Don Henley ¶¶ 2-10.)
2. Defendants' videos constitute political speech. Supporting Evidence DeVore Decl., ¶¶ 2-11; Arledge Decl. Exh. 1 (Henley Deposition) at 68:5-10.	2. Defendants' statement consists entirely of a legal conclusion rather than a statement of material fact, as required under Local Rule 56-1, to which Plaintiffs can appropriately respond. To the extent a response can be provided, while Defendants' videos have some political content, it is uncontroverted that they are campaign ads used to advance DeVore's career by garnering attention for his campaign, encouraging donations, and, according to Defendants, generating "tens of thousands, maybe hundreds of thousands, of dollars" in free advertising. Defendants profited considerably from the exploitation of Plaintiffs' copyrighted works. Defendants' uses are therefore profit-making and commercial. (Plaintiffs' Statement of Uncontroverted Facts and Conclusions of Law in Support of Motion for Summary Judgment ("St.") ¶¶ 37, 56, 68-69, 118, 154; Declaration of Jacqueline

Defendants' Uncontroverted Fact and Supporting Evidence	Plaintiffs' Response and Supporting Evidence
	Charlesworth in Support of Plaintiffs' Motion for Partial Summary Judgment ("Charlesworth Decl."), Exs. 3-4); Declaration of Jon Albert in Support of Plaintiffs' Motion for Partial Summary Judgment ("Albert Decl.") ¶ 7.)
3. Not applicable.	3. Defendants have not set forth a fact to which Plaintiffs can respond.
4. Defendants needed to use full-length versions of the songs in order to make all of their political points and make them intelligibly. Supporting Evidence DeVore Decl., ¶ 12.	4. Plaintiffs dispute this statement, which is entirely conclusory, without foundation, and (except for DeVore's conclusory statement) without support in the record. It is uncontroverted that The Boys of Summer and All She Wants to Do Is Dance are songs that are instantly recognizable based on their opening notes, with melodies and music that repeat throughout the songs. It is also uncontroverted that Defendants' videos took far more musical expression than was necessary to evoke Plaintiffs' underlying songs. (St. ¶¶ 26, 150; Charlesworth Decl., Exs. 1-2; Declaration of Lawrence Ferrara in Support of Plaintiffs' Motion for Partial

Defendants' Uncontroverted Fact and Supporting Evidence	Plaintiffs' Response and Supporting Evidence
	Summary Judgment ¶¶ 6(b), 7.)
5. Defendants' videos had no effect upon the potential market for or value of Plaintiffs' copyrighted works. Supporting Evidence 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.	5. Plaintiffs dispute this statement, which is not supported by the record. The uncontroverted record shows that Defendants' uses of Plaintiffs' copyrighted works, if permitted to continue, would alienate fans and threaten the market for the original recordings. Defendants' uses would also deter future advertisers and other licensees, who tend to avoid songs already identified with a person or cause, as well as songs with politicized or controversial associations. Defendants' campaign ads, by their nature, usurp – and substitute for – potential licensing opportunities for Plaintiffs' copyrighted works. They thus diminish the value of Plaintiffs' copyrights. (St. ¶¶ 155-57; Albert Decl. ¶¶ 8-12.)
6. Defendants' works are protected by the fair use doctrine, and even if this Court concludes otherwise, a reasonable person could believe Defendants' works are transformative	6. Defendants' statement consists entirely of legal conclusions rather than a statement of material fact, as required under Local Rule 56-1, to which Plaintiffs

Defendants' Uncontroverted Fact and Supporting Evidence	Plaintiffs' Response and Supporting Evidence
parodies. Supporting Evidence *See* Nos. 1 through 5 above.	can appropriately respond. To the extent a response can be provided, Plaintiffs incorporate their responses to Nos. 1 through 5, above.
7. Defendants intended to create parodies of Plaintiffs' original works Supporting Evidence DeVore Decl., ¶¶ 4-12.	7. Plaintiffs dispute this statement, which is entirely conclusory and (except for DeVore's conclusory statement) without support in the record. It is uncontroverted that before they were sued, Defendants repeatedly characterized their videos as parodies not of Plaintiffs' works, but of, or as targeting, Obama, Boxer, and their policies. In addition, upon receiving Henley's notice of infringement, DeVore promised to "look[] for every opportunity to turn any Don Henley work I can into a parody of any left tilting politician who deserves it." The uncontroverted facts demonstrate that, until this lawsuit, Defendants did not treat the Hope or Tax Videos as parodies of Plaintiffs' songs or of Henley, but understood them as what they are: promotional campaign videos directed against Obama and Boxer. Even now,

Defendants' Uncontroverted Fact and Supporting Evidence	Plaintiffs' Response and Supporting Evidence
	Defendants readily acknowledge the targets of their ads: "Our videos attack the policies of Barack Obama, Barbara Boxer, Al Gore and others." ((St. ¶¶ 66, 74, 97-98, 119, 122, 128, 138, 146-147; DeVore Decl. ¶ 2; Charlesworth Decl., Ex. 17 at 748-51 (Deposition of Martin Zeilinger at 130:22-131:21, 136:10-137:10).)
8. The only allegedly infringing works in this case are the two parody videos produced by Defendants Supporting Evidence Arledge Decl., ¶ 2.	8. Plaintiffs do not dispute that Defendants' two videos (including all versions and copies thereof) are the only works alleged in this case to be infringing. However, DeVore has promised to "look[] for every opportunity to turn any Don Henley work I can into a parody of any left tilting politician who deserves it," thus raising concerns about additional infringements of Plaintiffs' work. (St. ¶ 98.) Plaintiffs dispute Defendants' characterization of their videos as "parody videos," which is not a statement of fact, but a legal conclusion.

Defendants' Uncontroverted Fact and Supporting Evidence	Plaintiffs' Response and Supporting Evidence
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.	9. Defendants' statement consists entirely of a legal conclusion rather than a statement of material fact, as required under Local Rule 56-1, to which Plaintiffs can appropriately respond. To the extent a response can be provided, Plaintiffs incorporate their responses to Nos. 1 through 8, above.
10. Defendants have not misappropriated a distinctive attribute of Henley's. <u>Supporting Evidence</u> Arledge Decl., Exh. 1 at 104:2-5, 119:24 to 120:2; Arledge Decl., Exh. 2; DeVore Decl., ¶ 14.	10. Defendants' statement consists entirely of a legal conclusion rather than a statement of material fact, as required under Local Rule 56-1, to which Plaintiffs can appropriately respond. To the extent a response can be provided, Plaintiffs dispute this statement. The evidence cited by Defendants does not support the statement that "Defendants have not misappropriated a distinctive attribute of Henley's." Exhibit 2 to the Arledge Declaration contains Plaintiff Don Henley's Responses and Objections to Defendants and Counterclaimants' Request for Admissions, Set Two, in which Plaintiff

Defendants' Uncontroverted Fact and Supporting Evidence	Plaintiffs' Response and Supporting Evidence
	Henley responded, subject to various objections, that his claim was not "based on an *allegation* that Defendants used a 'distinctive attribute'" of his. Nowhere in those responses and objections, however, does Henley state that Defendants have not misappropriated a distinctive attribute of his. In fact, Henley's responses to Request for Admission Nos. 8 and 9 expressly deny Defendants' statement that Defendants have not used a "distinctive attribute" of Henley's in their videos. (Arledge Decl., Ex. 2 at 4-6.) Because "distinctive attribute" is understood to include "distinctive sounds," "distorted song lyrics," and mimicking of a performance, Defendants have used distinctive attributes of Henley's. (St. ¶ 59; Charlesworth Decl., Exs. 3-4.)
11. Henley is a public figure. Supporting Evidence First Amended Complaint, ¶¶ 25, 26.	11. Defendants' statement consists entirely of legal conclusions rather than a statement of material fact, as required under Local Rule 56-1, to which Plaintiffs can appropriately respond.

Defendants' Uncontroverted Fact and Supporting Evidence	Plaintiffs' Response and Supporting Evidence
	Plaintiffs do not otherwise dispute this statement.
12. Defendants' videos are non-commercial speech. Supporting Evidence DeVore Decl., ¶¶ 2-11; Arledge Decl. Exh. 1 (Henley Deposition) at 68:5-10.	12. Defendants' statement consists entirely of a legal conclusion rather than a statement of material fact, as required under Local Rule 56-1, to which Plaintiffs can appropriately respond. To the extent a response can be provided, while Defendants' videos have some political content, it is uncontroverted that they are campaign ads used to advance DeVore's career by garnering attention for his campaign, encouraging donations, and, according to Defendants, generating "tens of thousands, maybe hundreds of thousands, of dollars" in free advertising. Defendants profited considerably from the exploitation of Plaintiffs' copyrighted works. Defendants' uses are therefore profit-making and commercial. (St. ¶¶ 37, 56, 68-69, 118, 154; Charlesworth Decl., Exs. 3-4; Albert Decl. ¶ 7.)
13. Defendants did not intend to	13. Defendants' statement consists

Defendants' Uncontroverted Fact and Supporting Evidence	Plaintiffs' Response and Supporting Evidence
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. Supporting Evidence DeVore Decl., ¶¶ 10-12, 15; Arledge Decl., Exh. 1 at 59:8 to 62:2, 64:19 to 65:1.	entirely of a legal conclusion rather than a statement of material fact, as required under Local Rule 56-1, to which Plaintiffs can appropriately respond. To the extent a response can be provided, Plaintiffs dispute this statement. The Defendants used not one, but two popular Henley songs in their videos. The videos themselves demonstrate that Defendants directly and intentionally associated their videos with Henley. DeVore chose to use Henley's songs because they would allow him to "reach people in three minutes" who would never read a position paper or listen to a speech. He admits to using Henley's work as a "vehicle" for his campaign messages; in posting the Hope lyrics to the Internet, he did so with "apologies to Don Henley" because he understood that he was "taking [Henley's work] and . . . using it for something else." Tellingly, in reposting the Tax Video several months after this lawsuit was filed, Defendants included a written disclaimer that "Don Henley did not

Defendants' Uncontroverted Fact and Supporting Evidence	Plaintiffs' Response and Supporting Evidence
	approve this message"; according to DeVore, this was to make it clear that the videos were "not approved by Mr. Henley." Defendants' conduct in seeking falsely to associate DeVore's videos and campaign with Henley's songs and Henley was knowing, deliberate and reckless, and with a clear understanding that Henley had never approved the use of his songs in their videos, and was in no way affiliated with the DeVore campaign. (St. ¶¶ 73, 75, 97, 140-41, 162.)

PLAINTIFFS' AMENDMENT TO STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW

Plaintiffs hereby amend paragraph 162 of their Statement of Uncontroverted Facts and Conclusions of Law, dated April 9, 2010, as follows:

Uncontroverted Fact	Supporting Evidence
162. According to a survey conducted by Plaintiffs, close to half (48%) of viewers of the Hope and/or Tax Video who recognize the music as Henley's mistakenly believe Henley endorsed the video(s), or authorized or approved the use of his music in the video(s).	• Poret Decl. ¶ 7, Ex. 1 at 16 (Poret Report)

Dated: May 3, 2010

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

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