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

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

UNCONTOVERTED STATEMENT OF FACTS

Uncontroverted Fact & Supporting Evidence	Defendants' Position
1. Plaintiff Don Henley ("Henley") is a world-famous songwriter, recording artist, and performer. • Declaration of Don Henley in Support of Plaintiffs' Motion for Partial Summary Judgment ("Henley Decl.") ¶ 2	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. • Henley Decl. ¶ 2	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. • Henley Decl. ¶¶ 3-4	Not disputed.

Uncontroverted Fact & Supporting Evidence	Defendants' Position
4. Plaintiff Mike Campbell ("Campbell") is also a gifted and successful songwriter, recording artist and producer. • Declaration of Mike Campbell in Support of Plaintiffs' Motion for Partial Summary Judgment ("Campbell Decl.") ¶ 2	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. • Campbell Decl. ¶ 2	Not disputed.
6. Plaintiff Danny Kortchmar ("Kortchmar") is a renowned and sought-after songwriter, recording artist and producer. • Declaration of Danny Kortchmar in Support of Plaintiffs' Motion for Partial Summary Judgment ("Kortchmar Decl.") ¶ 2	Not disputed.

Uncontroverted Fact & Supporting Evidence	Defendants' Position
7. Kortchmar has worked with Don Henley, James Taylor, Jackson Browne, Billy Joel and others. • Kortchmar Decl. ¶ 2 • Declaration of Jacqueline Charlesworth in Support of Plaintiffs' Motion for Partial Summary Judgment ("Charlesworth Decl.") ¶ 15, Ex. 14 at 55 (Deposition Transcript of Danny Kortchmar, taken on January 6, 2010 ("Kortchmar Dep.") at 55:4-16)	Not disputed.

Uncontroverted Fact & Supporting Evidence	Defendants' Position
8. As is common among songwriters, the Plaintiffs use fictitious business names in connection with their copyright interests. • Henley Decl. ¶ 6 • Charlesworth Decl. ¶ 13, Ex. 12 at 36-37 (Deposition Transcript of Don Henley, taken on November 30, 2009 ("Henley Dep.") at 143:13-144:2) • Campbell Decl. ¶ 6 • Charlesworth Decl. ¶ 14, Ex. 13 at 50-51 (Deposition Transcript of Mike Campbell, taken on December 2, 2009 ("Campbell Dep.") at 80:17-81:3) • Kortchmar Decl. ¶ 4	Not disputed.

Uncontroverted Fact & Supporting Evidence	Defendants' Position
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. • Henley Decl. ¶ 6 • Charlesworth Decl. ¶ 13, Ex. 12 at 36-37 (Henley Dep. at 143:13-144:2) • Campbell Decl. ¶ 6 • Charlesworth Decl. ¶ 14, Ex. 13 at 50-51 (Campbell Dep. at 80:17-81:3) • Kortchmar Decl. ¶ 4	Not disputed.

Uncontroverted Fact & Supporting Evidence	Defendants' Position
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 Dance. • Henley Decl. ¶ 13 • Campbell Decl. ¶ 7 • Kortchmar Decl. ¶ 6	Not disputed.
11. Plaintiffs strive to make their music appealing to a large universe of fans. • Henley Decl. ¶ 15 • Charlesworth Decl. ¶ 14, Ex. 13 at 47-48 (Campbell Dep. at 56:23-57:7) • Kortchmar Decl. ¶ 9	Not disputed.

Uncontroverted Fact & Supporting Evidence	Defendants' Position
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. • Henley Decl. ¶ 16 • Campbell Decl. ¶¶ 8-9 • Kortchmar Decl. ¶¶ 9, 11 • Charlesworth Decl. ¶13, Ex. 12 at 33-34 (Henley Dep. at 107:22-108:15) • Charlesworth Decl. ¶ 14, Ex. 13 at 49 (Campbell Dep. at 71:6-20)	Not disputed.

Uncontroverted Fact & Supporting Evidence	Defendants' Position
13. Plaintiffs will consider licensing their copyrighted works for uses such as television, film and promotional purposes, including humorous treatment of their songs. • Henley Decl. ¶¶ 17-18 • Charlesworth Decl. ¶ 13, Ex. 12 at 32 (Henley Dep. at 76:7-19) • Campbell Decl. ¶ 9 • Kortchmar Decl. ¶¶ 10-11	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.
Plaintiffs' Reply: The evidence cited by Defendants does not controvert Plaintiffs' undisputed fact. The undisputed evidence confirms that Plaintiffs do in fact license their works, and thus any statements regarding Plaintiffs' selectiveness in their licensing practices does not create a genuine issue. (*See* Henley Decl. ¶ 17.) Further, Defendants' citations to Campbell's and Kortchmar's testimony do not support Defendants' statement above. Finally, whether or not Plaintiffs currently license their songs for commercial purposes is irrelevant to the fair use analysis, and therefore the facts, even if disputed, are not material.	

Uncontroverted Fact & Supporting Evidence	Defendants' Position
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." • Campbell Decl. ¶ 11	Not disputed.

Uncontroverted Fact & Supporting Evidence	Defendants' Position
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 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. • Charlesworth Decl. ¶ 2, Ex. 1 (Boys of Summer audio) • Charlesworth Decl. ¶ 3, Ex. 2 (Dance audio) • Henley Decl. ¶ 4 • Campbell Decl. ¶ 3 • Kortchmar Decl. ¶¶ 5-6	Not disputed.

Uncontroverted Fact & Supporting Evidence	Defendants' Position
16. Both Boys of Summer and Dance are registered with the U.S. Copyright Office. • Charlesworth Decl. ¶ 11, Ex. 10 at 19-20 • Charlesworth Decl. ¶ 12, Ex. 11 at 21-22 • Henley Decl. ¶ 5 • Campbell Decl. ¶ 5 • Kortchmar Decl. ¶ 5	Not disputed.
17. Henley and Campbell jointly own the copyright to the musical composition Boys of Summer. • Charlesworth Decl. ¶ 11, Ex. 10 at 19-20 • Henley Decl. ¶¶ 4-6 • Campbell Decl. ¶¶ 2, 5-6 • Charlesworth Decl. ¶ 14, Ex. 13 at 42-43 (Campbell Dep. at 6:22-7:8)	Not disputed.

Uncontroverted Fact & Supporting Evidence	Defendants' Position
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. • Charlesworth Decl. ¶ 12, Ex. 11 at 21-22 • Charlesworth Decl. ¶ 22, Ex. 21 at 776-809 • Kortchmar Decl. ¶¶ 4-5, 8	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. • Henley Decl. ¶ 7 • Charlesworth Decl. ¶ 13, Ex. 12 at 24-26 (Henley Dep. at 19:12-21:12) • Campbell Decl. ¶ 3	Not disputed.

Uncontroverted Fact & Supporting Evidence	Defendants' Position
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. • Henley Decl. ¶ 8 • Charlesworth Decl. ¶ 13, Ex. 12 at 24-26 (Henley Dep. at 19:12-21:12) • Campbell Decl. ¶ 4 • Charlesworth Decl. ¶ 14, Ex. 13 at 44-45 (Campbell Dep. at 34:7-35:8) • Charlesworth Decl. ¶ 7, Ex. 6 at 15 (Boys of Summer lyrics)	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 [sic] 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 [sic] 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

Uncontroverted Fact & Supporting Evidence	Defendants' Position
	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.").
Plaintiffs' Reply: Defendants do not create a genuine issue with regard to this fact. Defendants do not controvert Plaintiffs' stated fact regarding the meaning of Boys of Summer. In addition, Exhibit 3 of the Arledge Declaration is inadmissible, as set forth in Plaintiffs' objections to evidence, dated May 3, 2010.	
21. The song includes a line about seeing a "Deadhead sticker on a Cadillac" because this was something Henley in fact observed as he was driving and composing the lyrics. • Henley Decl. ¶ 9 • Charlesworth Decl. ¶ 13, Ex. 12 at 24-26 (Henley Dep. at 19:12-21:12) • Charlesworth Decl. ¶ 14, Ex. 13 at 44-45 (Campbell Dep. at 34:7-35:8) • Charlesworth Decl. ¶ 7, Ex. 6 at 15 (Boys of Summer lyrics)	Not disputed.

Uncontroverted Fact & Supporting Evidence	Defendants' Position
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. • Kortchmar Decl. ¶¶ 5-6 • Henley Decl. ¶ 10	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." • Kortchmar Decl. ¶ 7 • Henley Decl. ¶ 11 • Charlesworth Decl. ¶ 15, Ex. 14 at 57-61 (Kortchmar Dep. at 57:9-19, 71:16-72:20, 140:14-141:5) • Charlesworth Decl. ¶ 13, Ex. 12 at 27, 29-30 (Henley Dep. at 25:15-21, 40:6-41:6)	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

Uncontroverted Fact & Supporting Evidence	Defendants' Position
• Charlesworth Decl. ¶ 9, Ex. 8 at 17 (Dance lyrics)	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 [sic] different things about songs every time I talk about them.").
Plaintiffs' Reply: Defendants do not create a genuine issue with regard to this fact. Defendants' statements above are primarily attorney argument, not fact. The evidence cited by Defendants does not controvert Plaintiffs' stated fact regarding the meaning of All She Wants to Do Is Dance. In addition, Defendants citation to testimony from Christopher Arledge, Defendants' counsel, as a witness, is improper	

Uncontroverted Fact & Supporting Evidence	Defendants' Position
and inadmissible. Further, any reference to an unidentified video not in evidence is inadmissible.	
24. Both Boys of Summer and Dance are hit songs that are instantly recognizable to a significant portion of the general public. • Henley Decl. ¶ 12 • Charlesworth Decl. ¶ 13, Ex. 12 at 35 (Henley Dep. at 109:5-9)	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.
Plaintiffs' Reply: Defendants do not create a genuine issue with regard to this fact. Further, Defendants' response consists of argument, not facts. Defendants have elsewhere admitted that the songs appeared on a multi-platinum album, and that Henley's work is famous and remains "popular." (St. ¶¶ 15, 25; Charlesworth Decl., Ex. 33 at 833.)	

Uncontroverted Fact & Supporting Evidence	Defendants' Position
25. Both Boys of Summer and Dance are closely associated in the public mind with Henley, who made them famous and continues to perform them at live shows. • Henley Decl. ¶ 12 • Charlesworth Decl. ¶ 13, Ex. 12 at 34-35 (Henley Dep. at 108:16-109:4) • Charlesworth Decl. ¶ 14, Ex. 13 at 46 (Campbell Dep. at 47:6-10) • Charlesworth Decl. ¶ 15, Ex. 14 at 54 (Kortchmar Dep. at 49:15-21)	Not disputed.
26. In the case of both Boys of Summer and Dance, Henley's audiences are able to recognize the song as soon as the opening notes are played. • Henley Decl. ¶ 12 • Charlesworth Decl. ¶ 13, Ex. 12 at 35 (Henley Dep. at 109:5-9)	Disputed only in that the alleged fact lacks foundation and is speculative.

Uncontroverted Fact & Supporting Evidence	Defendants' Position
Plaintiffs' Reply: Defendants do not create a genuine issue with regard to this fact. Defendants' response consists entirely of legal argument. The evidence cited by Plaintiffs is based on personal knowledge of Henley, is admissible and fully supports the stated uncontroverted fact.	
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. • Henley Decl. ¶ 19	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. • Henley Decl. ¶ 20 • Campbell Decl. ¶ 10 • Kortchmar Decl. ¶ 12	Not disputed.

Uncontroverted Fact & Supporting Evidence	Defendants' Position
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. • Charlesworth Decl. ¶ 39, Ex. 38 at 839 • Henley Decl. ¶ 21	Not disputed.
30. After receiving Henley's cease and desist letter, candidate Moore voluntarily removed the ad. • Henley Decl. ¶ 21	Not disputed.
31. Henley has contributed money to a number of Republican candidates, as well as Democratic candidates. • Henley Decl. ¶ 23 • Charlesworth Decl. ¶ 13, Ex. 12 at 31 (Henley Dep. at 59:15-20)	Not disputed.

Uncontroverted Fact & Supporting Evidence	Defendants' Position
32. Defendant Charles DeVore ("DeVore") is a California state assemblyman who is seeking the Republican nomination to run against U.S. Senator Barbara Boxer. • Plaintiffs' First Amended Complaint, dated September 30, 2009 ("Am. Compl.") ¶ 20 • Defendants' Answer to First Amended Complaint, dated October 5, 2009 ("Answer") ¶ 20	Not disputed.
33. Defendant Justin Hart ("Hart") was hired by DeVore in late 2008 as director of Internet strategies and new media. • Charlesworth Decl. ¶ 46, Ex. 45 at 849-51 • Am. Compl. ¶ 21 • Answer ¶ 21	Not disputed.

Uncontroverted Fact & Supporting Evidence	Defendants' Position
34. Neither DeVore nor Hart is an attorney. • Charlesworth Decl. ¶ 16, Ex. 15 at 98 (Deposition Transcript of Charles DeVore, taken on December 4, 2009 ("DeVore Dep.") at 34:20-22) • Charlesworth Decl. ¶ 17, Ex. 16 at 405 (Deposition Transcript of Justin Hart, taken on January 5, 2010 ("Hart Dep.") at 26:21-23)	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. • Charlesworth Decl. ¶ 17, Ex. 16 at 423 (Hart Dep. at 44:6-19)	Not disputed.

Uncontroverted Fact & Supporting Evidence	Defendants' Position
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." • Charlesworth Decl. ¶ 17, Ex. 16 at 440-41 (Hart Dep. at 61:7-62:22) • Charlesworth Decl. ¶ 16, Ex. 15 at 101-03 (DeVore Dep. at 37:25-39:21)	Not disputed.

Uncontroverted Fact & Supporting Evidence	Defendants' Position
37. Defendants have placed the earned media value of the two videos at issue in this action – *i.e.*, the amount it would have cost to reach the same voters "through traditional political advertising means" – at "tens of thousands, maybe hundreds of thousands, of dollars." • Charlesworth Decl. ¶ 19, Ex.18 at 759 (Defendants' Response to Plaintiffs' Interrogatories, No. 11)	Disputed. The interrogatory response simply does not say what Plaintiffs allege. Defendants would have been pleased to 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.
Plaintiffs' Reply: Defendants do not cite any evidence to controvert Plaintiffs' stated fact; Defendants' response consists entirely of argument. The evidence cited by Plaintiffs in support of the uncontroverted fact fully supports the factual statement regarding the earned media value that the Defendants have placed on the two videos.	

Uncontroverted Fact & Supporting Evidence	Defendants' Position
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. • Charlesworth Decl. ¶ 46, Ex. 45 at 850 • Charlesworth Decl. ¶ 17, Ex. 16 at 433 (Hart Dep. at 54:14-25)	Not disputed.
39. Hart produces video ads to promote DeVore's campaign. • Charlesworth Decl. ¶ 17, Ex. 16 at 427-28, 523, 565 (Hart Dep. at 48:15-49:17, 144:6-23, 186:13-20)	Not disputed.

Uncontroverted Fact & Supporting Evidence	Defendants' Position
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. • Charlesworth Decl. ¶ 17, Ex. 16 at 427-28, 465-66, 468-69, 523, 565 (Hart Dep. at 48:15-49:17, 86:22-87:13, 89:16-90:9, 144:6-23, 186:13-20)	Not disputed.
41. DeVore's campaign website includes a facility for making online donations. • Charlesworth Decl. ¶ 17, Ex. 16 at 562-63 (Hart Dep. at 183:15-184:18) • Charlesworth Decl. ¶ 16, Ex. 15 at 250 (DeVore Dep. at 186:4-18)	Not disputed.

Uncontroverted Fact & Supporting Evidence	Defendants' Position
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. • Charlesworth Decl. ¶ 17, Ex. 16 at 432, 434 (Hart Dep. at 53:24-25, 55:8-13)	Not disputed.
43. DeVore and Hart understand the need to obtain proper license authority for the use of copyrighted works – including music – in their campaign. • Charlesworth Decl. ¶ 16, Ex. 15 at 235-37, 367-68 (DeVore Dep. at 171:22-173:16, 303:5-304:20) • Charlesworth Decl. ¶ 17, Ex. 16 at 418-20, 447-49, 633-34 (Hart Dep. at 39:13-41:19, 68:5-70:15, 254:18-255:11)	Not disputed.

Uncontroverted Fact & Supporting Evidence	Defendants' Position
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?" • Charlesworth Decl. ¶ 16, Ex. 15 at 368 (DeVore Dep. at 304:6-15)	Disputed only in that the statement, divorced from context, makes no sense and is irrelevant.
Plaintiffs' Reply: Defendants cite no evidence to controvert this fact; Defendants' response is entirely argumentative.	
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. • Charlesworth Decl. ¶ 16, Ex. 15 at 104-05, 230:4-17, 303 (DeVore Dep. at 40:22-41:13, 230:4-17, 239:2-15)	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.
Plaintiffs' Reply: Defendants cite no evidence to controvert this fact; Defendants' response is entirely argumentative.	

Uncontroverted Fact & Supporting Evidence	Defendants' Position
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. • Charlesworth Decl. ¶ 47, Ex. 46 at 852 • Charlesworth Decl. ¶ 17, Ex. 16 at 418-21, 633-34 (Hart Dep. at 39:13-41:19, 42:15-21, 254:18-255:20)	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. • Charlesworth Decl. ¶ 16, Ex. 15 at 235-37 (DeVore Dep. at 171:22-173:16) • Charlesworth Decl. ¶ 17, Ex. 16 at 447-49 (Hart Dep. at 68:5-70:15)	Not disputed.

Uncontroverted Fact & Supporting Evidence	Defendants' Position
48. In March 2009, DeVore noticed an Obama bumper sticker on a Prius car at a gas station. • Charlesworth Decl. ¶ 16, Ex. 15 at 122-23, 125 (DeVore Dep. at 58:19-59:4, 61:16-20)	Not disputed.
49. According to DeVore – who was 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. • Charlesworth Decl. ¶ 16, Ex. 15 at 149-50 (DeVore Dep. at 85:7-86:8)	Not disputed.

Uncontroverted Fact & Supporting Evidence	Defendants' Position
50. DeVore decided to "take [Henley's] work and to turn it for my purposes" by writing anti-Obama lyrics to Boys of Summer. • Charlesworth Decl. ¶ 16, Ex. 15 at 149 (DeVore Dep. at 85:14-18) • Charlesworth Decl. ¶ 8, Ex. 7 at 16 (Hope lyrics)	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.
Plaintiffs' Reply: Defendants do not create a genuine issue with regard to this fact; Defendants' response is argumentative and non-responsive. Further, the evidence cited by Defendants does not controvert Plaintiffs' stated fact. As Defendants concede in their response, they do not dispute that Defendants' lyrics "criticized Obama's policies."	

Uncontroverted Fact & Supporting Evidence	Defendants' Position
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. • Charlesworth Decl. ¶ 16, Ex. 15 at 297-301 (DeVore Dep. at 233:16-234:8, 235:3-16, 236:23-237:23) • Charlesworth Decl. ¶ 7, Ex. 6 at 15 (Boys of Summer lyrics) • Charlesworth Decl. ¶ 8, Ex. 7 at 16 (Hope lyrics)	Not disputed.
52. According to DeVore, "unlike the 2 Live Crew case," he had no intent to "mock" Henley's style. • Charlesworth Decl. ¶ 16, Ex. 15 at 330-31 (DeVore Dep. at 266:22-267:3)	Not disputed.

Uncontroverted Fact & Supporting Evidence	Defendants' Position
53. DeVore copied the Henley/Campbell song "keeping the same cadence and rhyme." • Charlesworth Decl. ¶ 16, Ex. 15 at 299 (DeVore Dep. at 235:3-16)	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. • Declaration of Lawrence Ferrara in Support of Plaintiffs' Motion for Partial Summary Judgment ("Ferrara Decl.") ¶ 6(d), Ex. 1 at 7, 14-15, 19-20 (Ferrara Report) • Charlesworth Decl. ¶ 7, Ex. 6 at 15 (Boys of Summer lyrics) • Charlesworth Decl. ¶ 8, Ex. 7 at 16 (Hope lyrics)	Not disputed.

Uncontroverted Fact & Supporting Evidence	Defendants' Position
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. • Charlesworth Decl. ¶ 8, Ex. 7 at 16 (Hope lyrics) • Declaration of Mark Rose in Support of Plaintiffs' Motion for Partial Summary Judgment ("Rose Decl.") ¶ 6, Ex. 1 at 14-15 (Rose Report) • Charlesworth Decl. ¶ 18, Ex. 17 at 748-49 (Deposition Transcript of Martin Zeilinger, taken on March 29, 2010 ("Zeilinger Dep.") at 130:22-131:21)	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.
Plaintiffs' Reply: Defendants do not create a genuine issue with regard to this fact; Defendants' response is argumentative and non-responsive. Further, the evidence cited by Defendants does not controvert Plaintiffs' stated fact. As Defendants concede in their response, they do not dispute that Defendants' lyrics "criticized Obama's policies."	

Uncontroverted Fact & Supporting Evidence	Defendants' Position
56. At Hart's recommendation, Defendants decided to produce a campaign video based on the Henley/Campbell song, as modified by DeVore ("Hope Video"). • Charlesworth Decl. ¶ 4, Ex. 3 (Hope Video) • Charlesworth Decl. ¶ 17, Ex. 16 at 631 (Hart Dep. at 252:7-9)	Not disputed.
57. Defendants did not seek a license to use Boys of Summer in connection with the Hope Video. • Charlesworth Decl. ¶ 20, Ex. 19 at 766 (Plaintiffs' Request for Admission ("RFA") No. 5) • Charlesworth Decl. ¶ 21, Ex. 20 at 771 (Defendants' Response to Plaintiffs' Request for Admission ("Defendants' RFA Response") No. 5) • Charlesworth Decl. ¶ 16, Ex. 15 at 310 (DeVore Dep. at 246:8-10)	Not disputed.

Uncontroverted Fact & Supporting Evidence	Defendants' Position
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 instrumentals of the original Henley track. • Charlesworth Decl. ¶ 17, Ex. 16 at 512-13, 573-75 (Hart Dep. at 133:10-134:14, 194:23-196:14) • Charlesworth Decl. ¶ 38, Ex. 37 at 838	Not disputed.
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. • Charlesworth Decl. ¶ 17, Ex. 16 at 498-99, 573-74 (Hart Dep. at 119:6-120:18, 194:17-195:7)	Not disputed.

Uncontroverted Fact & Supporting Evidence	Defendants' Position
60. Hart searched online sources for images to illustrate DeVore's changed lyrics. • Charlesworth Decl. ¶ 17, Ex. 16 at 632, 675-76 (Hart Dep. at 253:7-23, 296:22-297:9)	Not disputed.
61. The images selected by Hart for the Hope Video include images of Obama, Nancy Pelosi and others. • Charlesworth Decl. ¶ 48, Ex. 47 at 853-78 • Charlesworth Decl. ¶ 17, Ex. 16 at 673-74 (Hart Dep. at 294:7-295:8) • Charlesworth Decl. ¶ 16, Ex. 15 at 350 (DeVore Dep. at 286:3-19) • Charlesworth Decl. ¶ 4, Ex. 3 (Hope Video)	Not disputed.

Uncontroverted Fact & Supporting Evidence	Defendants' Position
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. • Charlesworth Decl. ¶ 17, Ex. 16 at 676 (Hart Dep. at 297:7-9) • Charlesworth Decl. ¶ 48, Ex. 47 at 853-78 • Charlesworth Decl. ¶ 4, Ex. 3 (Hope Video) • Rose Decl., Ex. 1 at 24 (Rose Report)	Not disputed.
63. Hart synchronized the visual images he found to his audio recording to produce the Hope Video. • Charlesworth Decl. ¶ 17, Ex. 16 at 631-32 (Hart Dep. at 253:9-17)	Not disputed.

Uncontroverted Fact & Supporting Evidence	Defendants' Position
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." • Charlesworth Decl. ¶ 52, Ex. 51 at 955-56 • Charlesworth Decl. ¶ 17, Ex. 16 at 645-47 (Hart Dep. at 266:15-268:6)	Disputed. This alleged fact is actually an unsupported legal conclusion. The alleged user agreement is also irrelevant.
Plaintiffs' Reply: Defendants do not create a genuine issue with regard to this fact; Defendants' response consists entirely of legal argument. Further, Defendants cite no evidence to controvert Plaintiffs' stated fact. The iTunes user agreement is relevant because it demonstrates Hart's indifference to legal restrictions on the use of Boys of Summer and Dance.	
65. Except for shortening some instrumental-only segments, the Hope Video incorporates all of the music from Boys of Summer. • Charlesworth Decl. ¶ 4, Ex. 3 (Hope Video) • Ferrara Decl. ¶¶ 6, 7, Ex. 1 at 10-11 (Ferrara Report)	Not disputed.

Uncontroverted Fact & Supporting Evidence	Defendants' Position
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." • Charlesworth Decl. ¶ 17, Ex. 16 at 671-72 (Hart Dep. at 292:22-293:17) • Charlesworth Decl. ¶ 4, Ex. 3 (Hope Video)	Not disputed.

Uncontroverted Fact & Supporting Evidence	Defendants' Position
67. Hart superimposed text with the Hope lyrics throughout the Hope Video. • Charlesworth Decl. ¶ 4, Ex. 3 (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." • Charlesworth Decl. ¶ 4, Ex. 3 (Hope Video)	Not disputed.

Uncontroverted Fact & Supporting Evidence	Defendants' Position
69. Defendants included the closing statement as "a summary of the campaign message" because of federal concerning campaign ads. • Charlesworth Decl. ¶ 16, Ex. 15 at 350-51 (DeVore Dep. at 286:20-287:22) • Charlesworth Decl. ¶ 17, Ex. 16 at 689 (Hart Dep. at 310:5-20)	Not disputed.
70. Defendants posted the Hope Video to YouTube and other online sites. • Charlesworth Decl. ¶ 17, Ex. 16 at 465-66 (Hart Dep. at 86:22-87:13)	Not disputed.

Uncontroverted Fact & Supporting Evidence	Defendants' Position
71. DeVore chose Boys of Summer as the "vehicle" for his Obama critique. • Charlesworth Decl. ¶ 44, Ex. 43 at 847 • Charlesworth Decl. ¶ 16, Ex. 15 at 189-90 (DeVore Dep. at 125:23-126:22) • Charlesworth Decl. ¶ 17, Ex. 16 at 499 (Hart Dep. at 120:19-23)	Not disputed.
72. Hart believes that "different songs" could have been used to present the views in the Hope Video. • Charlesworth Decl. ¶ 17, Ex. 16 at 711-12 (Hart Dep. at 332:18-333:7)	Not disputed.

Uncontroverted Fact & Supporting Evidence	Defendants' Position
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." • Charlesworth Decl. ¶ 34, Ex. 33 at 833 • Charlesworth Decl. ¶ 16, Ex. 15 at 246-47 (DeVore Dep. at 182:7-20, 183:15-18)	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.
Plaintiffs' Reply: Defendants do not create a genuine issue with regard to this fact. The evidence cited by Defendants is non-responsive and does not controvert Plaintiffs' stated fact. Moreover, the evidence cited by Plaintiffs supports the stated fact. DeVore stated that his video was "based on a popular song [that] allow[ed] the message 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." (Charlesworth Decl. ¶ 34, Ex. 33 at 833.)	

Uncontroverted Fact & Supporting Evidence	Defendants' Position
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.'" • Charlesworth Decl. ¶ 23, Ex. 22 at 810 • Charlesworth Decl. ¶ 16, Ex. 15 at 251-52 (DeVore Dep. at 187:18-188:13)	Not disputed.

Uncontroverted Fact & Supporting Evidence	Defendants' Position
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." • Charlesworth Decl. ¶ 16, Ex. 15 at 254-55 (DeVore Dep. at 190:23-191:4) • Charlesworth Decl. ¶ 23, Ex. 22 at 810	Not disputed.
76. DeVore's article also announced a 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. • Charlesworth Decl. ¶ 23, Ex. 22 at 810	Not disputed.

Uncontroverted Fact & Supporting Evidence	Defendants' Position
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. • Henley Decl. ¶ 24 • Charlesworth Decl. ¶ 54, Ex. 53 at 995-999	Not disputed.
78. YouTube complied with the notice by removing the Hope Video from its service. • Am. Compl. ¶ 38 • Answer ¶ 38	Not disputed.

Uncontroverted Fact & Supporting Evidence	Defendants' Position
79. At the time it was removed, the Hope Video had been viewed over 800 times in the United States and other countries. • Charlesworth Decl. ¶ 49, Ex. 48 at 879 • Charlesworth Decl. ¶ 50, Ex. 49 at 882 • Charlesworth Decl. ¶ 17, Ex. 16 at 551-52, 558-60 (Hart Dep. at 172:24-173:14, 179:20-181:8)	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. • Charlesworth Decl. ¶ 40, Ex. 39 at 840-41 • Henley Decl. ¶ 25	Not disputed.

Uncontroverted Fact & Supporting Evidence	Defendants' Position
81. During the period the Hope Video was available online, the DeVore campaign received online donations. • Charlesworth Decl. ¶ 51, Ex. 50 at 926 • Charlesworth Decl. ¶ 17, Ex. 16 at 561-62, 185:4-11 (Hart Dep. at 182:9-183:23, 185:4-11)	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 Treviño. DeVore believed that they "had struck a vein of gold in the campaign." • Charlesworth Decl. ¶ 16, Ex. 15 at 162-64 (DeVore Dep. at 98:17-99:5, 100:5-11)	Not disputed.

Uncontroverted Fact & Supporting Evidence	Defendants' Position
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." • Charlesworth Decl. ¶ 17, Ex. 16 at 484 (Hart Dep. at 105:13-23)	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." • Charlesworth Decl. ¶ 16, Ex. 15 at 101-02 (DeVore Dep. at 37:6-38:17)	Not disputed.
85. DeVore believed that "turning lemons into lemonade" meant gaining "national recognition" for his campaign. • Charlesworth Decl. ¶ 16, Ex. 15 at 217-18 (DeVore Dep. at 153:24-154:4)	Not disputed.

Uncontroverted Fact & Supporting Evidence	Defendants' Position
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." • Charlesworth Decl. ¶ 16, Ex. 15 at 162-64 (DeVore Dep. at 98:17-100:2)	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. • Charlesworth Decl. ¶ 25, Ex. 24 at 816 • Charlesworth Decl. ¶ 16, Ex. 15 at 209-11, 214-15 (DeVore Dep. at 145:18-147:21, 150:22-151:12)	Not disputed.

Uncontroverted Fact & Supporting Evidence	Defendants' Position
88. After receiving the takedown notice, DeVore told his staff to "man the ramparts" and "[p]repare the press releases!" • Charlesworth Decl. ¶ 29, Ex. 28 at 825 • Charlesworth Decl. ¶ 16, Ex. 15 at 101 (DeVore Dep. at 37:3-20)	Not disputed.
89. In moving ahead with his plan, DeVore was aware not only of the Supreme 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. • Charlesworth Decl. ¶ 16, Ex. 15 at 108-11, 114-16 (DeVore Dep. at 44:23-45:13, 46:2-4, 47:5-9, 50:6-51:7, 52:16-24)	Not disputed.

Uncontroverted Fact & Supporting Evidence	Defendants' Position
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. • Charlesworth Decl. ¶ 17, Ex. 16 at 489-92, 730-36 (Hart Dep. at 110:6-23, 111:9-14, 112:19-113:14, 351:11-357:25) • Charlesworth Decl. ¶ 16, Ex. 15 at 157-58 (DeVore Dep. at 93:23-94:19) • Charlesworth Decl. ¶ 31, Ex. 30 at 828	Not disputed.

Uncontroverted Fact & Supporting Evidence	Defendants' Position
91. Hart's attorney friend told Hart that it would be a "good" idea for Hart to hire an attorney. • Charlesworth Decl. ¶ 17, Ex. 16 at 735-36 (Hart Dep. at 356:2-357:14)	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. • Charlesworth Decl. ¶ 16, Ex. 15 at 95-96 (DeVore Dep. at 31:10-32:14)	Not disputed.
93. DeVore emailed his staff, "[i]f Henley gets a legal injunction to restrain us, then better." • Charlesworth Decl. ¶ 31, Ex. 30 at 828 • Charlesworth Decl. ¶ 16, Ex. 15 at 164 (DeVore Dep. at 100:15-24)	Not disputed.

Uncontroverted Fact & Supporting Evidence	Defendants' Position
94. In DeVore's view, this would "raise[] the stakes. It makes more attention on [sic] what would otherwise be a fairly anonymous legal action. And campaigns thrive on attention." • Charlesworth Decl. ¶ 16, Ex. 15 at 164-65 (DeVore Dep. at 100:25-101:5)	Not disputed.
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." • Charlesworth Decl. ¶ 16, Ex. 15 at 218 (DeVore Dep. at 154:5-154:14)	Not disputed.

Uncontroverted Fact & Supporting Evidence	Defendants' Position
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. • Charlesworth Decl. ¶ 44, Ex. 43 at 847 • Charlesworth Decl. ¶ 16, Ex. 15 at 189-91 (DeVore Dep. at 125:24-127:8)	Not disputed.

Uncontroverted Fact & Supporting Evidence	Defendants' Position
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." • Charlesworth Decl. ¶ 44, Ex. 43 at 847 • Charlesworth Decl. ¶ 16, Ex. 15 at 190 (DeVore Dep. at 126:18-22)	Not disputed.

Uncontroverted Fact & Supporting Evidence	Defendants' Position
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," 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)." • Charlesworth Decl. ¶ 24, Ex. 23 at 812 • Charlesworth Decl. ¶ 16, Ex. 15 at 174-76 (DeVore Dep. at 110:24-112:6)	Not disputed.

Uncontroverted Fact & Supporting Evidence	Defendants' Position
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. • Charlesworth Decl. ¶ 24, Ex. 23 at 812	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." • Charlesworth Decl. ¶ 30, Ex. 29 at 826 • Charlesworth Decl. ¶ 16, Ex. 15 at 172-73 (DeVore Dep. at 108:6-109:5)	Not disputed.

Uncontroverted Fact & Supporting Evidence	Defendants' Position
101. DeVore modified the lyrics to Dance to criticize Senator Barbara Boxer. • Charlesworth Decl. ¶ 26, Ex. 25 at 820 • Charlesworth Decl. ¶ 16, Ex. 15 at 276-77 (DeVore Dep. at 212:22-213:3) • Charlesworth Decl. ¶ 10, Ex. 9 at 18 (Tax lyrics) • Rose Decl. ¶ 7, Ex. 1 at 9, 21, 23-24 (Rose Report) • Charlesworth Decl. ¶ 18, Ex. 17 at 750-51 (Zeilinger Dep. at 136:10-137:10)	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.
Plaintiffs' Reply: Defendants do not create a genuine issue with regard to this fact; Defendants' response is argumentative and non-responsive. Further, the evidence cited by Defendants does not controvert Plaintiffs' stated fact. As Defendants concede in their response, they do not dispute that their modified lyrics to Dance "criticized Boxer's policies."	

Uncontroverted Fact & Supporting Evidence	Defendants' Position
102. As he did with Boys of Summer and 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"). • Charlesworth Decl. ¶ 16, Ex. 15 at 301-02, 318 (DeVore Dep. at 237:24-238:10, 254:8-22) • Charlesworth Decl. ¶ 9, Ex. 8 at 17 (Dance lyrics) • Charlesworth Decl. ¶ 10, Ex. 9 at 18 (Tax lyrics)	Not disputed.
103. Three-quarters of the original lyrics in Dance were copied into the Tax lyrics. • Charlesworth Decl. ¶ 9, Ex. 8 at 17 (Dance lyrics) • Charlesworth Decl. ¶ 10, Ex. 9 at 18 (Tax lyrics) • Ferrara Decl. ¶¶ 6(d), 7, Ex. 1 at 7, 15, 19-20 (Ferrara Report)	Not disputed.

Uncontroverted Fact & Supporting Evidence	Defendants' Position
104. The original rhyme scheme and syntax in Dance was copied in Tax. • Ferrara Decl. ¶ 6(d), Ex. 1 at 7, 15 (Ferrara Report)	Not disputed.
105. According to DeVore, the Tax lyrics target Boxer's "penchant for raising taxes." • Charlesworth Decl. ¶ 35, Ex. 34 at 835 • Charlesworth Decl. ¶ 16, Ex. 15 at 363-64 (DeVore Dep. at 299:1-300:1)	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.
Plaintiffs' Reply: Defendants do not create a genuine issue with regard to this fact; Defendants' response is argumentative and non-responsive. Further, the evidence cited by Defendants does not controvert Plaintiffs' stated fact. As Defendants concede in their response, they do not dispute that the Tax lyrics "criticized Boxer's policies."	

Uncontroverted Fact & Supporting Evidence	Defendants' Position
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. • Charlesworth Decl. ¶ 10, Ex. 9 at 18 (Tax lyrics) • Charlesworth Decl. ¶ 26, Ex. 25 at 820 • Charlesworth Decl. ¶ 16, Ex. 15 at 278-79 (DeVore Dep. at 214:4-215:4)	Not disputed.
107. Hart believes that Defendants could have used another song to provide the message in Tax. • Charlesworth Decl. ¶ 17, Ex. 16 at 711 (Hart Dep. at 332:4-15)	Not disputed.

Uncontroverted Fact & Supporting Evidence	Defendants' Position
108. Hart assembled a new video incorporating the Kortchmar song with DeVore's modified lyrics ("Tax Video"). • Charlesworth Decl. ¶ 17, Ex. 16 at 663-64, 681-83, 689-90 (Hart Dep. at 284:5-285:8, 302:18-304:12, 310:5-20, 311:10-14) • Charlesworth Decl. ¶ 5, Ex. 4 (Tax Video)	Not disputed.
109. No lawyer had confirmed the validity of Defendants' claim of fair use before they posted the Tax Video on the Internet. • Charlesworth Decl. ¶ 16, Ex. 15 at 157-58, 353 (DeVore Dep. at 93:19-94:19, 289:19-22) • Charlesworth Decl. ¶ 17, Ex. 16 at 520, 730, 733-39 (Hart Dep. at 141:9-17, 351:11-24, 354:4-18, 355:3-360:14)	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.
Plaintiffs' Reply: Defendants do not create a genuine issue with regard to this fact; Defendants' response mischaracterizes the fact as stated by Plaintiffs, consists entirely of legal argument, and cites no evidence to controvert Plaintiffs' stated fact.	

Uncontroverted Fact & Supporting Evidence	Defendants' Position
110. Defendants did not seek permission from the copyright owner of Dance to use the song in the Tax Video. • Charlesworth Decl. ¶ 16, Ex. 15 at 310 (DeVore Dep. at 246:8-14) • Charlesworth Decl. ¶ 20, Ex. 19 at 766 (RFA No. 6) • Charlesworth Decl. ¶ 20, Ex. 20 at 771 (Defendants' RFA Response No. 6)	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. • Charlesworth Decl. ¶ 17, Ex. 16 at 513, 574-75, 663-34, 695 (Hart Dep. at 134:6-16, 195:8-196:14, 284:5-285:8, 316:20-23)	Not disputed.

Uncontroverted Fact & Supporting Evidence	Defendants' Position
112. Hart used the entire karaoke track of Dance except for some instrumental-only segments that he shortened. • Ferrara Decl. ¶ 6(a), Ex. 1 at 12-13 (Ferrara Report)	Not disputed.
113. Hart re-recorded the audio for the Hope video while working in the professional studio on the Tax Video. • Charlesworth Decl. ¶ 17, Ex. 16 at 665-66 (Hart Dep. at 286:17-287:25)	Not disputed.
114. Hart located online images to illustrate and "complement" DeVore's Tax lyrics. • Charlesworth Decl. ¶ 17, Ex. 16 at 681-83 (Hart Dep. at 302:18-304:12)	Not disputed.
115. Hart licensed stock video footage for the Tax Video from an online source for a fee. • Charlesworth Decl. ¶ 17, Ex. 16 at 681-83, 690 (Hart Dep. at 302:18-304:12, 311:10-14)	Not disputed.

Uncontroverted Fact & Supporting Evidence	Defendants' Position
116. The images Hart selected for the Tax Video include photos of Barbara Boxer, Al Gore and the Disney character Scrooge McDuck. • Charlesworth Decl. ¶ 5, Ex. 4 (Tax Video) • Charlesworth Decl. ¶ 16, Ex. 15 at 350 (DeVore Dep. at 286:3-12)	Not disputed.
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. • Charlesworth Decl. ¶ 5, Ex. 4 (Tax Video) • Charlesworth Decl. ¶ 17, Ex. 16 at 682 (Hart Dep. at 303:13-15) • Rose Decl., Ex. 1 at 24 (Rose Report)	Not disputed.

Uncontroverted Fact & Supporting Evidence	Defendants' Position
118. At the end of the Tax Video, Hart added the written statement: "Visit chuckdevore.com. Paid for by DeVore for California." • Charlesworth Decl. ¶ 17, Ex. 16 at 689 (Hart Dep. at 310:5-20) • Charlesworth Decl. ¶ 5, Ex. 4 (Tax Video)	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. • Charlesworth Decl. ¶ 55, Ex. 54 at 1000 • Charlesworth Decl. ¶ 17, Ex. 16 at 466 (Hart Dep. at 87:4-13)	Not disputed.

Uncontroverted Fact & Supporting Evidence	Defendants' Position
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. • Charlesworth Decl. ¶ 28, Ex. 27 at 824 • Charlesworth Decl. ¶ 17, Ex. 16 at 531-32 (Hart Dep. at 152:3-153:6)	Not disputed.
121. DeVore's "eLeaders" are persons who had signed up to help DeVore with fundraising and other activities. • Charlesworth Decl. ¶ 17, Ex. 16 at 531-32 (Hart Dep. at 152:18-153:4)	Not disputed.
122. DeVore's April 14, 2009 email requested the "eLeaders" to "view our new viral video satire on Barbara Boxer." • Charlesworth Decl. ¶ 28, Ex. 27 at 824	Not disputed.

Uncontroverted Fact & Supporting Evidence	Defendants' Position
123. On April 14, 2009, Hart distributed an electronic newsletter to the campaign's entire email list that included a snapshot image of the Tax Video and a link to the YouTube posting. • Charlesworth Decl. ¶ 32, Ex. 31 at 829 • Charlesworth Decl. ¶ 17, Ex. 16 at 493-94 (Hart Dep. at 114:8-115:25) • Charlesworth Decl. ¶ 16, Ex. 15 at 248-49 (DeVore Dep. at 184:8-185:23)	Not disputed.

Uncontroverted Fact & Supporting Evidence	Defendants' Position
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." • Charlesworth Decl. ¶ 32, Ex. 31 at 829 • Charlesworth Decl. ¶ 17, Ex. 16 at 495-96 (Hart Dep. at 116:16-117:2) • Charlesworth Decl. ¶ 16, Ex. 15 at 249-50 (DeVore Dep. at 185:24-186:20)	Not disputed.
125. The Tax Video had "viral" qualities, meaning that it proceeded to spread rapidly through the Internet. • Charlesworth Decl. ¶ 16, Ex. 15 at 242-43 (DeVore Dep. at 178:9-179:3) • Charlesworth Decl. ¶ 17, Ex. 16 at 539-40 (Hart Dep. at 160:6-161:6)	Not disputed.

Uncontroverted Fact & Supporting Evidence	Defendants' Position
126. The Tax Video was embedded by third parties, such as Fox News, on their own websites. • Charlesworth Decl. ¶ 16, Ex. 15 at 365 (DeVore Dep. at 301:5-22) • Charlesworth Decl. ¶ 36, Ex. 35 at 836 • Charlesworth Decl. ¶ 17, Ex. 16 at 533-34 (Hart Dep. at 154:7-155:3) • Charlesworth Decl. ¶ 33, Ex. 32 at 832	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. • Charlesworth Decl. ¶ 35, Ex. 34 at 835 • Charlesworth Decl. ¶ 16, Ex. 15 at 362-64 (DeVore Dep. at 298:21-300:25)	Not disputed.

Uncontroverted Fact & Supporting Evidence	Defendants' Position
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." • Charlesworth Decl. ¶ 35, Ex. 34 at 835 • Charlesworth Decl. ¶ 16, Ex. 15 at 363-64 (DeVore Dep. at 299:10-300:25)	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. • Charlesworth Decl. ¶ 41, Ex. 40 at 842-43 • Kortchmar Decl. ¶¶ 8, 14	Not disputed.

Uncontroverted Fact & Supporting Evidence	Defendants' Position
130. YouTube complied with Warner/Chappell's notice by removing the Tax Video from its service. • Am. Compl. ¶ 50 • Answer ¶ 50	Not disputed.
131. At the time it was taken down, the Tax Video had exceeded 20,000 views in the United States and abroad. • Charlesworth Decl. ¶ 49, Ex. 48 at 879 • Charlesworth Decl. ¶ 50, Ex. 49 at 883-87 • Charlesworth Decl. ¶ 17, Ex. 16 at 540, 550-553, 558-60 (Hart Dep. at 161:7-18, 171:13-174:17, 179:20-181:8)	Not disputed.

Uncontroverted Fact & Supporting Evidence	Defendants' Position
132. The DeVore campaign received online donations throughout the period that the Tax Video was available. • Charlesworth Decl. ¶ 51, Ex. 50 at 926 • Charlesworth Decl. ¶ 17, Ex. 16 at 561-62, 564 (Hart Dep. at 182:9-183:23, 185:4-11)	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. • Plaintiffs' Original Complaint, dated April 17, 2009 ("Compl.") ¶¶ 43-67 • Am. Compl. ¶¶ 61-85	Not disputed.

Uncontroverted Fact & Supporting Evidence	Defendants' Position
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. • Compl. ¶¶ 68-76 • Am. Compl. ¶¶ 111-19	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)." • Charlesworth Decl. ¶ 37, Ex. 36 at 837 • Charlesworth Decl. ¶ 17, Ex. 16 at 611-14 (Hart Dep. at 232:6-235:19)	Not disputed.

Uncontroverted Fact & Supporting Evidence	Defendants' Position
136. After they were served with the Complaint in this action, DeVore and Hart retained an attorney in connection with Plaintiffs' infringement claims. • Charlesworth Decl. ¶ 16, Ex. 15 at 198 (DeVore Dep. at 134:7-24) • Charlesworth Decl. ¶ 17, Ex. 16 at 616 (Hart Dep. at 237:6-16)	Not disputed.
137. On July 17, 2009, DeVore submitted a counternotification to YouTube with respect to the Tax Video, under penalty of perjury. • Charlesworth Decl. ¶ 45, Ex. 44 at 848 • Charlesworth Decl. ¶ 16, Ex. 15 at 193-94 (DeVore Dep. at 129:6-130:2)	Not disputed.

Uncontroverted Fact & Supporting Evidence	Defendants' Position
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." • Charlesworth Decl. ¶ 45, Ex. 44 at 848 • Charlesworth Decl. ¶ 16, Ex. 15 at 193-94 (DeVore Dep. at 129:6-130:2)	Not disputed.
139. After DeVore sent his counternotification, the Tax Video was restored by YouTube. • Am. Compl. ¶ 53 • Answer ¶ 53	Not disputed.

Uncontroverted Fact & Supporting Evidence	Defendants' Position
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 mutual." • Charlesworth Decl. ¶ 6, Ex. 5 (Tax Video with disclaimer) • Charlesworth Decl. ¶ 16, Ex. 15 at 352-53 (DeVore Dep. at 288:12-289:1)	Not disputed.

Uncontroverted Fact & Supporting Evidence	Defendants' Position
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." • Charlesworth Decl. ¶ 16, Ex. 15 at 352-53 (DeVore Dep. at 288:12-289:1)	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.
Plaintiffs' Reply: Defendants do not create a genuine issue with regard to this fact; Defendants' response consists entirely of attorney argument, and the evidence cited by Defendants does not controvert Plaintiffs' stated fact. Indeed, it merely corroborates DeVore's testimony that a disclaimer was necessary to make it clear that Henley did not approve the video. Moreover, Defendants improperly rely upon the testimony from Defendants' counsel, Christopher Arledge, which improperly places Arledge in the role of a witness, and raises an advice of counsel defense, on which	

Uncontroverted Fact & Supporting Evidence	Defendants' Position
Plaintiffs were precluded from taking discovery because of an assertion of attorney-client privilege by Defendants.	
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. • Am. Compl. ¶¶ 86-110	Not disputed.
143. In conjunction with the filing of Kortchmar's infringement claim, a new DMCA notice was submitted to YouTube with respect to the Tax Video. • Charlesworth Decl. ¶ 42, Ex. 41 at 844-45 • Kortchmar Decl. ¶ 16	Not disputed.

Uncontroverted Fact & Supporting Evidence	Defendants' Position
144. YouTube complied by with the new DMCA notice by removing the Tax Video. • Charlesworth Decl. ¶ 43, Ex. 42 at 846 • Kortchmar Decl. ¶ 16	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." • Charlesworth Decl. ¶ 27, Ex. 26 at 822-23	Not disputed.

Uncontroverted Fact & Supporting Evidence	Defendants' Position
146. The Hope Video targets and criticizes Barack Obama. • Rose Decl. ¶ 6, Ex. 1 at 8, 14-16, 18-19, 25 (Rose Report) • Charlesworth Decl. ¶ 18, Ex. 17 at 748-49 (Zeilinger Dep. at 130:22-131:21)	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.
Plaintiffs' Reply: Defendants do not create a genuine issue with regard to this fact; Defendants' response is argumentative and non-responsive. Further, the evidence cited by Defendants does not controvert Plaintiffs' stated fact. As Defendants concede in their response, they do not dispute that the Hope Video "criticized Obama's policies."	
147. The Tax Video targets and criticizes Barbara Boxer and her tax policies. • Rose Decl. ¶ 7, Ex. 1 at 9, 21, 23-25 (Rose Report) • Charlesworth Decl. ¶ 18, Ex. 17 at 750-51 (Zeilinger Dep. at 136:5-137:10)	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.

Uncontroverted Fact & Supporting Evidence	Defendants' Position
Plaintiffs' Reply: Defendants do not create a genuine issue with regard to this fact; Defendants' response is argumentative and non-responsive. Further, the evidence cited by Defendants does not controvert Plaintiffs' stated fact. As Defendants concede in their response, they do not dispute that the Tax Video "criticized Boxer's policies."	
148. Neither video mentions Henley or the other Plaintiffs or contains an image of Henley or the other Plaintiffs. • Rose Decl. ¶ 9, Ex. 1 at 24 (Rose Report) • Charlesworth Decl. ¶ 4, Ex. 3 (Hope Video) • Charlesworth Decl. ¶ 5, Ex. 4 (Tax Video)	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.
Plaintiffs' Reply: The evidence cited by Defendants does not create a genuine issue with regard to this fact. DeVore's conclusory statement cited by Defendants does not create a genuine issue as to whether the narrators of the videos are "Henley and the other [unnamed] supporters of Obama and Boxer." The Hope Video does not ever reference Boxer, nor do Defendants present an example of how Henley "appears" in the Tax Video. Moreover, Henley has never vocally supported or campaigned for Obama or Boxer. (Henley Supp. Decl. ¶ 3.) In addition, Defendants' fair use defense requires that Defendants' videos target the underlying work, not the authors, and so this fact is not material.	

Uncontroverted Fact & Supporting Evidence	Defendants' Position
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. • Ferrara Decl. ¶¶ 6(a), 6(b), 7, Ex. 1 at 6, 13-15, 19-20 (Ferrara Report)	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.").
Plaintiffs' Reply: Defendants do not create a genuine issue with regard to this fact; Defendants' response is argumentative and non-responsive. Defendants' response also ignores Plaintiffs' citation to the report of Dr. Lawrence Ferrara, in which he defines the term "slavish." (Ferrara Decl., Ex. 1 at 6 n.3 (Ferrara Report at 3 n.3).)	
150. Defendants took far more musical expression than was necessary to evoke the originals. • Ferrara Decl. ¶¶ 6(b), 7, Ex. 1 at 6, 13-15, 19-20 (Ferrara Report)	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.
Plaintiffs' Reply: Defendants' response is argumentative and non-responsive. Further, the conclusory statement of DeVore cited by Defendants does not raise a genuine issue as to Plaintiffs' stated fact. The evidence cited by Plaintiffs in support of this fact consists of reliable and relevant expert witness testimony and is plainly admissible.	

Uncontroverted Fact & Supporting Evidence	Defendants' Position
151. The music in Defendants' videos does not build upon, or add new or independent expression to, the music in the originals. • Ferrara Decl. ¶¶ 6(e), 9, Ex. at 6-7, 13, 14, 19-20 (Ferrara Report)	Disputed. If the statement is limited only to the background musical tracks, then it is 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.
Plaintiffs' Reply: Defendants do not create a genuine issue with regard to this fact. The evidence cited by Defendants does not controvert Plaintiffs' stated fact. The stated fact is clear that it is referring to the "music in Defendants' videos." Defendants' response concedes that Defendants "did not seek to create anything novel with the instrumentation." Moreover, Defendants' statement regarding the meaning of their lyrics is non-responsive.	

Uncontroverted Fact & Supporting Evidence	Defendants' Position
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. • Ferrara Decl. ¶¶ 6(d), 7, Ex. at 7, 14-15, 20 (Ferrara Report)	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. • Declaration of Jon Albert in Support of Plaintiffs' Motion for Partial Summary Judgment ("Albert Decl.") ¶ 7, Ex. 1 at 9 (Albert Report)	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.
Plaintiffs' Reply: Defendants do not create a genuine issue with regard to this fact; Defendants' response is argumentative and non-responsive. Further, Plaintiffs' Uncontroverted Fact No. 79 cited by Defendants in no way controverts Plaintiffs'	

Uncontroverted Fact & Supporting Evidence	Defendants' Position
stated fact.	
154. Defendants' use of Plaintiffs' songs in the Hope and Tax Videos was a promotional, commercial use by advertising industry standards. • Albert Decl. ¶ 7, Ex. 1 at 9 (Albert Report)	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.
Plaintiffs' Reply: Defendants do not create a genuine issue with regard to this fact; Defendants' response is argumentative and non-responsive. Defendants cite no evidence to controvert this fact.	
155. Advertisers avoid songs that are already associated with particular products or causes, or that have political or controversial associations. • Albert Decl. ¶ 9, Ex. at 12 (Albert Report)	Disputed only in that the alleged fact is overbroad.
Plaintiffs' Reply: Defendants do not create a genuine issue with regard to this fact. Defendants cite no evidence to controvert this fact, and it is not clear what is meant by "overbroad."	
156. Defendants' uses, if not halted, would be harmful to the market for Plaintiffs' songs, because	Disputed. The alleged fact lacks foundation and is speculative. In reality, there is no evidence that the videos harmed the market

Uncontroverted Fact & Supporting Evidence	Defendants' Position
they politicize the songs and could alienate fans. • Albert Decl. ¶¶ 8-12, Ex. 1 at 12 (Albert Report)	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*

Uncontroverted Fact & Supporting Evidence	Defendants' Position
	Supp. Arledge Decl., Exh. E at 16:3-22, 139:19 to 140:12, 142:25 to 143:13.
Plaintiffs' Reply: Defendants do not create a genuine issue with regard to this fact. The stated fact refers to potential harm to the market for Plaintiffs' songs, not to harm that occurred in the past. The evidence cited by Defendants does not controvert this fact, and Defendants' statements are primarily argument and are non-responsive. Albert has obtained quotes for commercial use of Henley's (and Kortchmar's) songs. (Albert Decl. ¶ 16.) Further, Defendants' statements consist of objections to the opinions and conclusions of Plaintiffs' expert witness, rather than specific facts showing that there is a genuine issue for trial. Pursuant to Federal Rule of Evidence 702, Albert is entitled to state his expert opinion, and the Court may take that opinion into consideration.	
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. • Albert Decl. ¶¶ 10-12, Ex. 1 at 12 (Albert Report)	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.

Uncontroverted Fact & Supporting Evidence	Defendants' Position
	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
Plaintiffs' Reply: Defendants do not create a genuine issue with regard to this fact. The stated fact refers to potential harm to the market for Plaintiffs' songs, not to harm that occurred in the past. The evidence cited by Defendants does not controvert this fact, and Defendants' statements are primarily argument and are non-responsive. Albert has obtained quotes for commercial use of Henley's (and Kortchmar's) songs. (Albert Decl. ¶ 16.) Further, Defendants' statements consist of objections to the opinions and conclusions of Plaintiffs' expert witness, rather than specific facts	

Uncontroverted Fact & Supporting Evidence	Defendants' Position
showing that there is a genuine issue for trial. Pursuant to Federal Rule of Evidence 702, Albert is entitled to state his expert opinion, and the Court may take that opinion into consideration.	
158. If permitted to continue, Defendants' uses would limit potential endorsement opportunities for Henley. • Albert Decl. ¶ 13, Ex. 1 at 12 (Albert Report)	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)

Uncontroverted Fact & Supporting Evidence	Defendants' Position
	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.
Plaintiffs' Reply: Defendants do not create a genuine issue with regard to this fact. The stated fact refers to potential harm, not harm that occurred in the past. The evidence cited by Defendants does not controvert this fact, and Defendants' statements are primarily argument and are non-responsive. Further, Defendants' statements consist of objections to the opinions and conclusions of Plaintiffs' expert witness, rather than specific facts showing that there is a genuine issue for trial. Pursuant to Federal Rule of Evidence 702, Albert is entitled to state his expert opinion, and the Court may take that opinion into consideration.	
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. • Albert Decl. ¶¶ 15-16, Ex. 1 at 10-	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

Uncontroverted Fact & Supporting Evidence	Defendants' Position
11 (Albert Report)	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, 103:20 104:14, 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.,

Uncontroverted Fact & Supporting Evidence	Defendants' Position
	Exh. E at 16:3-22, 139:19 to 140:12, 142:25 to 143:13
Plaintiffs' Reply: Defendants do not create a genuine issue with regard to this fact. The evidence cited by Defendants does not controvert this fact, and Defendants' statements are primarily argument and are non-responsive. Albert has obtained quotes for commercial use of Henley's (and Kortchmar's) songs. (Albert Decl. ¶ 16.) Further, Defendants' statements consist of objections to the opinions and conclusions of Plaintiffs' expert witness, rather than specific facts showing that there is a genuine issue for trial. Pursuant to Federal Rule of Evidence 702, Albert is entitled to state his expert opinion, and the Court may take that opinion into consideration.	
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. • Albert Decl. ¶¶ 15, 17, Ex. 1 at 10-12 (Albert Report)	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

Uncontroverted Fact & Supporting Evidence	Defendants' Position
	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.

Uncontroverted Fact & Supporting Evidence	Defendants' Position
Plaintiffs' Reply: Defendants do not create a genuine issue with regard to this fact. The evidence cited by Defendants does not controvert this fact, and Defendants' statements are primarily argument and are non-responsive. Albert has obtained quotes for commercial use of Henley's (and Kortchmar's) songs. (Albert Decl. ¶ 16.) Further, Defendants' statements consist of objections to the opinions and conclusions of Plaintiffs' expert witness, rather than specific facts showing that there is a genuine issue for trial. Pursuant to Federal Rule of Evidence 702, Albert is entitled to state his expert opinion, and the Court may take that opinion into consideration.	
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. • Albert Decl. ¶ 18, Ex. 1 at 12-13 (Albert Report)	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

Uncontroverted Fact & Supporting Evidence	Defendants' Position
	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.
Plaintiffs' Reply: Defendants do not create a genuine issue with regard to this fact. The evidence cited by Defendants does not controvert this fact, and Defendants' statements are primarily argument and are non-responsive. Further, Defendants' statements consist of objections to the opinions and conclusions of Plaintiffs' expert witness, rather than specific facts showing that there is a genuine issue for trial. Pursuant to Federal Rule of Evidence 702, Albert is entitled to state his expert opinion, and the Court may take that opinion into consideration. Moreover, Defendants provide no support for their conclusory statements that "Henley has not permitted an advertiser to use him as an endorser" and that nobody "would pay that kind of money for Henley's endorsement in an internet-only advertising campaign."	

Uncontroverted Fact & Supporting Evidence	Defendants' Position
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). • Poret Decl. ¶ 7, Ex. 1 at 16 (Poret Report)	Disputed. The survey is flawed methodologically and the data it yielded cannot support this conclusion.
Plaintiffs' Reply: Defendants do not create a genuine issue with regard to this fact. Defendants cite no evidence to controvert this fact, and Defendants' statements are entirely argumentative. Further, Defendants' statements consist of objections to the opinions and conclusions of Plaintiffs' expert witness, rather than specific facts showing that there is a genuine issue for trial.	

RESPONSES TO ADDITIONAL FACTS PUT FORTH BY DEFENDANTS IN OPPOSITION TO SUMMARY JUDGMENT

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).	Defendants' statement consists entirely of legal conclusions rather than a statement of material fact, as required under Local Rule 56-2, to which Plaintiffs can appropriately respond.

Defendants' Uncontroverted Fact and Supporting Evidence	Plaintiffs' Response and Supporting Evidence
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.	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 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.	Defendants' statement consists entirely of a legal conclusion rather than a statement of material fact, as required under Local Rule 56-2, to which Plaintiffs can appropriately respond. To the extent a response can be provided, while Defendants' videos have some

Defendants' Uncontroverted Fact and Supporting Evidence	Plaintiffs' Response and Supporting Evidence
	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 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.	Defendants have not set forth a fact to which Plaintiffs can respond.
4. Defendants needed to use full-	Plaintiffs dispute this statement, which is

Defendants' Uncontroverted Fact and Supporting Evidence	Plaintiffs' Response and Supporting Evidence
length versions of the songs in order to make all of their political points and make them intelligibly. Supporting Evidence DeVore Decl., ¶ 12.	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 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,	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

Defendants' Uncontroverted Fact and Supporting Evidence	Plaintiffs' Response and Supporting Evidence
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.	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 parodies. Supporting Evidence *See* Nos. 1 through 5 above.	Defendants' statement consists entirely of legal conclusions rather than a statement of material fact, as required under Local Rule 56-2, to which Plaintiffs 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	Plaintiffs dispute this statement, which is entirely conclusory and (except for DeVore's conclusory statement) without support in the record. It is uncontroverted

Defendants' Uncontroverted Fact and Supporting Evidence	Plaintiffs' Response and Supporting Evidence
Supporting Evidence DeVore Decl., ¶¶ 4-12.	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 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).)

Defendants' Uncontroverted Fact and Supporting Evidence	Plaintiffs' Response and Supporting Evidence
8. The only allegedly infringing works in this case are the two parody videos produced by Defendants Supporting Evidence Arledge Decl., ¶ 2.	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.
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.	Defendants' statement consists entirely of a legal conclusion rather than a statement of material fact, as required under Local Rule 56-2, to which Plaintiffs can appropriately respond. To the extent a response can be provided, Plaintiffs incorporate their responses to Nos. 1 through 8, above.

Defendants' Uncontroverted Fact and Supporting Evidence	Plaintiffs' Response and Supporting Evidence
10. Defendants have not misappropriated a distinctive attribute of Henley's. Supporting Evidence Arledge Decl., Exh. 1 at 104:2-5, 119:24 to 120:2; Arledge Decl., Exh. 2; DeVore Decl., ¶ 14.	Defendants' statement consists entirely of a legal conclusion rather than a statement of material fact, as required under Local Rule 56-2, 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 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' Uncontroverted Fact and Supporting Evidence	Plaintiffs' Response and Supporting Evidence
	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.	Defendants' statement consists entirely of legal conclusions rather than a statement of material fact, as required under Local Rule 56-2, to which Plaintiffs can appropriately respond. Plaintiffs do not otherwise dispute this statement.
12. Defendants' videos are non-commercial speech. Supporting Evidence DeVore Decl., ¶¶ 2-11; Arledge Decl.	Defendants' statement consists entirely of a legal conclusion rather than a statement of material fact, as required under Local Rule 56-2, to which Plaintiffs can appropriately respond. To the extent a response can be provided,

Defendants' Uncontroverted Fact and Supporting Evidence	Plaintiffs' Response and Supporting Evidence
Exh. 1 (Henley Deposition) at 68:5-10.	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 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	Defendants' statement consists entirely of a legal conclusion rather than a statement of material fact, as required under Local Rule 56-2, 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

Defendants' Uncontroverted Fact and Supporting Evidence	Plaintiffs' Response and Supporting Evidence
65:1.	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 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

Defendants' Uncontroverted Fact and Supporting Evidence	Plaintiffs' Response and Supporting Evidence
	the DeVore campaign. (St. ¶¶ 73, 75, 97, 140-41, 162.)

Dated: May 17, 2010

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