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12
 13 **UNITED STATES DISTRICT COURT**
 14 **CENTRAL DISTRICT OF CALIFORNIA**
 15

16 DON HENLEY, MIKE CAMPBELL
 17 and DANNY KORTCHMAR,

18 Plaintiffs,
 19

20 v.

21 CHARLES S. DEVORE and
 22 JUSTIN HART,

23 Defendants.

Case No. SACV09-0481 JVS (RNBx)

**PLAINTIFFS' RESPONSES TO
 DEFENDANTS' EVIDENTIARY
 OBJECTIONS**

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

1 Plaintiffs submit the following responses to Defendants' evidentiary objections,
2 dated May 3, 2010 ("Defs. Objections").

3 **I. DECLARATION OF JACQUELINE CHARLESWORTH**

4 Defendants seek to exclude Exhibits 1 through 11 and 21 through 54 to the
5 Declaration of Jacqueline Charlesworth, dated April 9, 2010 ("Ch. Decl.") on the
6 ground that she is "incompetent to authenticate and have introduced all of the exhibits
7 attached to her complaint." (Defs. Objections at 1.) Notably, Defendants cite no legal
8 support for their argument – for good reason, because the exhibits attached to the
9 Charlesworth Declaration are all plainly admissible. Notwithstanding the lack of legal
10 support for Defendants' three-sentence argument, Plaintiffs will clarify why every
11 exhibit to the Charlesworth Declaration is admissible, as further supported by the
12 Second Supplemental Declaration of Jacqueline Charlesworth ("Ch. 2d Supp. Decl.").

13 **A. Exhibits 1 through 5**

14 Defendants have no basis to object to the admissibility of Exhibits 1 through 5,
15 which are the very songs and videos at issue in this case. In fact, Exhibits 1 through 4
16 were included as Exhibits B, F, D, and H, respectively, to the Declaration of Charles
17 DeVore, dated April 8, 2010 ("DeVore Decl."). "Once evidence has been
18 authenticated by one party, it has been authenticated with regard to all parties."
19 *Barefield v. Bd. of Trs. of the Cal. State Univ.*, 500 F. Supp. 2d 1244, 1258 (E.D. Cal.
20 2007) (admonishing defendants' blanket objections to the plaintiffs' exhibits that they
21 themselves attached to their own declarations); *see also Commercial Data Servers, Inc.*
22 *v. Int'l Bus. Machs. Corp.*, 262 F. Supp. 2d 50, 59 (S.D.N.Y. 2003) (party's objections
23 to documents they also introduced "unnecessarily occup[ied] the Court's time").
24 Moreover, Exhibits 3 through 5 were authenticated by Defendant DeVore in his
25 deposition ("DeVore Dep."). (*See Ch. Decl., Ex. 15 at 374-75 (DeVore Dep. at*
26 *310:11-311:1).*)

1 **B. Exhibits 6 through 9**

2 Defendants’ objection to Exhibits 6 through 9 is baseless for two reasons. First,
3 as indicated in the Charlesworth Declaration, these exhibits are true and correct copies
4 of lyrics included at Appendix B in Mark Rose’s expert report, which Dr. Rose
5 authenticated in his declaration. (Ch. Decl. ¶¶ 7-10; Declaration of Mark Rose (“Rose
6 Decl.”) ¶ 3, Ex. 1 at 39-42.); *see also* Fed. R. Evid. 901(b)(1). Second, Defendants
7 themselves have included copies of these very documents as exhibits to the DeVore
8 Declaration. (DeVore Decl., Exs. C, E, G, I.); *Barefield*, 500 F. Supp. 2d at 1258;
9 *Commercial Data Servers, Inc.*, 262 F. Supp. 2d at 59.

10 **C. Exhibits 10, 11, 21, 38 and 52**

11 Exhibits 10 and 11 to the Charlesworth Declaration are copies of copyright
12 registration certificates for “Boys of Summer” and “All She Wants to Do Is Dance.”
13 Both documents bear the official seal of the United States Copyright Office and an
14 attesting signature, and are therefore self-authenticating. Fed. R. Evid. 902(1); *see also*
15 *Siegel v. Warner Bros. Entm’t, Inc.*, 542 F. Supp. 2d 1098, 1121 (C.D. Cal. 2008)
16 (copyright registration certificates are self-authenticating under Rule 902(1)). In
17 addition, Plaintiffs Henley, Campbell, and Kortchmar authenticated these documents
18 in their respective declarations. (Declaration of Don Henley (“Henley Decl.”) ¶ 5;
19 Declaration of Mike Campbell ¶ 5; and Declaration of Danny Kortchmar (“Kortchmar
20 Decl.”) ¶ 5.) *See* Fed. R. Evid. 901(b)(1). Tellingly, Defendants do not dispute
21 paragraph 16 of Plaintiffs’ Statement of Uncontroverted Facts, which relies on these
22 exhibits.

23 Exhibit 21, an agreement between Kortchmar and Warner/Chappell Music, Inc.,
24 is authenticated by Kortchmar. (*See* Kortchmar Decl. ¶ 8.) *See also* Fed. R. Evid.
25 901(b)(1). Furthermore, Defendants do not dispute paragraph 18 of Plaintiffs’
26 Statement of Uncontroverted Facts, which relies on this exhibit.

27 Exhibit 38 is a letter sent on behalf of Don Henley and was authenticated by
28 Henley in his declaration. (*See* Henley Decl. ¶ 21.) *See also* Fed. R. Evid. 901(b)(1).

1 Again, Defendants do not dispute paragraph 29 of Plaintiffs' Statement of
2 Uncontroverted Facts, which relies on this exhibit.

3 Finally, Exhibit 52, which consists of documents reflecting licenses Henley has
4 approved, was authenticated by Henley in his declaration. (*See* Henley Decl. ¶ 17.)
5 *See also* Fed. R. Evid. 901(b)(1).

6 **D. Exhibits 27-37, 43-45, and 47-50**

7 Exhibits 27 through 37, 43 through 45 and 47 through 50 were all produced by
8 Defendants in this action. "Documents produced in response to discovery requests are
9 admissible on a motion for summary judgment since they are self-authenticating and
10 constitute the admissions of a party opponent." *Anand v. BP West Coast Prods. LLC*,
11 484 F. Supp. 2d 1086, 1092 n.11 (C.D. Cal. 2007); *see also Maljack Prods., Inc. v.*
12 *Goodtimes Home Video Corp.*, 81 F.3d 881, 889 n.12 (9th Cir. 1996) (documents
13 produced by party opponent deemed authentic). Charlesworth stated in her original
14 declaration, and again in her Second Supplemental Declaration, that Exhibits 27
15 through 37, 43 through 45, and 47 through 50, which are labeled with Defendants'
16 bates numbers, were produced by Defendants. (Ch. Decl. ¶¶ 28-38, 44-46, 48-51; Ch.
17 2d Supp. Decl. ¶ 11.) *See also Commercial Data Servers, Inc.*, 262 F. Supp. 2d at 60
18 ("It is disingenuous and wasteful for [a party] to object that its own documents are not
19 authenticated, and thus inadmissible . . . on summary judgment.").

20 **E. Exhibits 22-23, 25, 27-37, 43-50, and 54**

21 Exhibits 22, 23, 25, 27 through 37, 43 through 50, and 54 were all authenticated
22 by Defendants at their depositions, as set forth in the Charlesworth Declarations. (Ch.
23 ¶¶ 23-24, 26, 28-38, 44-51, and 55; Ch. 2d Supp. Decl. ¶¶ 8, 11, 14.) *See Anand*, 484
24 F. Supp. 2d at 1092 n.11 (document was authenticated during deposition).

25 **F. Exhibits 24, 26 and 51**

26 In her declaration, Charlesworth states that Exhibits 24, 26 and 51 are true and
27 correct copies of articles obtained from certain identified websites. (Ch. 2d Supp.
28 Decl. ¶¶ 9, 10, 15.) The declaration thus "establishes sufficient knowledge to attest

1 that the screenshots are an accurate representation of what [s]he encountered upon
2 visiting the website.” *kSolo, Inc. v. Catona*, Nos. 07-5213, c/w 08-1801, 2008 U.S.
3 Dist. LEXIS 95107, at *4-5 n.5 (C.D. Cal. Nov. 10, 2008) (citing Fed. R. Evid. 602).
4 Further, Defendants do not dispute paragraphs 87 and 145 of Plaintiffs’ Statement of
5 Uncontroverted Facts, which rely on Exhibits 24 and 26.

6 **G. Exhibits 39-42 and 53**

7 Exhibits 39 through 42 and 53 are authenticated by Charlesworth because she
8 has personal knowledge of the documents; she either wrote the documents reflected in
9 the exhibits or was a direct recipient. *See* Fed. R. Evid. 901(b)(1) (authentication
10 through testimony from one with knowledge). Charlesworth was the author of
11 Exhibits 39, 41, and part of 53, and she was a recipient of Exhibits 40, 42, and 53. (Ch.
12 Decl. ¶¶ 40-43, 54; Ch. 2d Supp. Decl. ¶ 13.) Furthermore, Defendants do not dispute
13 paragraphs 77, 80, 129, 143, 144 of Plaintiffs’ Statement of Uncontroverted Facts,
14 which rely on these exhibits.

15 **II. DECLARATION OF MARK ROSE**

16 Defendants object to the testimony of Mark Rose on the grounds that Rose
17 opined on “improper subject matter,” “testif[ied] as to a legal conclusion,” offered
18 “subjective opinion,” and used a “flawed” methodology (Defs. Objections at 2-5.)
19 Defendants’ objections are meritless.¹ Federal Rule of Evidence 702 permits expert
20 testimony based on “specialized knowledge” if it will “assist the trier of fact to
21 understand the evidence or to determine a fact in issue,” and a court has ““broad
22 latitude”” to admit expert testimony when it is reliable and relevant. Fed. R. Evid. 702;
23 *Rivera v. Bio Engineered Supplements & Nutrition, Inc.*, No. SACV07-1306, 2008
24 U.S. Dist. LEXIS 95083, at *41 (C.D. Cal. Nov. 13, 2008) (quoting *Elsayed Mukhtar*

25 _____
26 ¹ Notably, Defendants do not challenge Rose’s qualifications to perform a literary
27 analysis of the works at issue, which are unassailable. (*See* Rose Decl. ¶ 2, Ex. 1 at 26-
28 38; Defs. Op. at 5 (“Dr. Rose is, by all accounts, a gifted academic and a very bright
man.”).)

1 v. *Cal. State Univ., Hayward*, 299 F.3d 1053, 1064 (9th Cir. 2002)). Courts routinely
2 accept testimony from literary and artistic experts on whether the use of an earlier
3 work constitutes a parody. The *Campbell* record itself includes expert testimony on
4 the question of parody, and many other courts have considered the opinions of literary
5 and other experts on this issue. See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S.
6 569, 589 n.19 (1994) (referencing expert affidavit); *Acuff-Rose Music, Inc. v.*
7 *Campbell*, 972 F.2d 1429, 1433, 1442, 1445 (6th Cir. 1992) (reviewing expert
8 testimony); *Mattel Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 797-98 (9th Cir.
9 2003) (noting several expert reports admitted by district court); *Salinger v. Colting*,
10 No. 09-2878, 2010 U.S. App. LEXIS 8956, at *9 (2d Cir. Apr. 30, 2010) (describing
11 testimony of “two literary experts” in support of fair use parody defense).

12 Defendants’ contention that Rose’s testimony is inadmissible because he opined
13 on a “purely legal question” is incorrect and simply mischaracterizes Rose’s testimony.
14 Indeed, Rose expressly *declined* to testify on questions of law during in his deposition.
15 (See Defs. Op. at 4 (quoting Rose’s testimony that he is “‘not a lawyer and . . . not
16 qualified to provide you a fair use analysis’” and “‘can’t testify to what [the Supreme
17 Court meant in footnote 14 of its *Campbell* opinion . . .], I’m not a lawyer.’”) Rather,
18 his report focuses on the literary qualities of Plaintiffs’ and Defendants’ songs – their
19 respective structures, stylistic devices, and literary interpretations – to reach the
20 conclusion that Defendants’ works do not mock or comment on Plaintiffs’ original
21 songs. In addition, he compares Defendants’ lyrics to another parody, “Father
22 William,” to illustrate, from a literary perspective, why Defendants’ works lack
23 parodic qualities. The type of analysis performed by Rose is clearly a product of
24 “specialized knowledge” and a wholly appropriate subject of expert testimony.

25 Finally, Rose’s report demonstrates that Defendants’ objection that he used a
26 “flawed” methodology by not considering their works “in context” is baseless. (Defs.
27 Objections at 5.) Rose’s report itself demonstrates that he examined the works “in
28 context.” (See generally Rose Decl., Ex. 1 at 12-24 (describing Wayfarers as

1 “particular brand of sunglasses”; observing “Grateful Dead sticker” as an “incongruous
2 detail” on a Cadillac; explaining that “Empty bank, empty Street” references
3 “impoverished financial institutions”).) Far from ignoring “social context,” as
4 Defendants assert, Rose expressly relied upon it in presenting his literary analysis of
5 the works at issue. (*See* Ch. 2d Supp. Decl., Ex. C at 26-27 (Deposition of Mark Rose
6 at 125:14-126:9) (“[S]ince I am a part of American culture, there are many things
7 about this song that are simply obvious to me as a part of American culture . . .”).)

8 **III. DECLARATION OF LAWRENCE FERRARA**

9 Defendants cite no legal authority to justify excluding portions of Lawrence
10 Ferrara’s Declaration (“Ferrara Decl.”) on the assertion that Dr. Ferrara’s testimony is
11 “a pure legal conclusion” and lacks foundation. (Def. Objections at 6.) Ferrara’s
12 conclusions in paragraphs 6(b) and 7 that Defendants works “slavishly cop[y]” the
13 original and “take far more expression than necessary to evoke the corresponding
14 original compositions” are plainly admissible. (Ferrara Decl. ¶¶ 6(b), 7.) *See Dyer v.*
15 *Napier*, No. 04-0408, 2006 U.S. Dist. LEXIS 68990, at *9-12 (D. Az. Sept. 25, 2006)
16 (expert opinion testimony admissible on the issue of copyright infringement).

17 First, Defendants object to the use of the term “slavish” as a legal conclusion,
18 but in his report, Ferrara cites to the dictionary definition of the term, which means
19 “blindly dependent or imitative.” (*See* Ferrara Decl., Ex. 1 at 6 n.3.) Second, Ferrara’s
20 conclusion that the Defendants’ works take “far more expression than necessary to
21 evoke the corresponding original compositions” is admissible expert witness opinion
22 testimony. Expert testimony of musicologists is frequently relied upon by courts. *See,*
23 *e.g., Newton v. Diamond*, 204 F. Supp. 2d 1244, 1254 (C.D. Cal. 2002) (accepting
24 Ferrara’s expert testimony); *Bridgeport Music, Inc. v. UMG Recordings, Inc.*, 585 F.3d
25 267, 273, 275-76 (6th Cir. 2009) (considering expert testimony regarding originality of
26 composition); *see also* Fed. R. Evid. 702 (expert testimony admissible where it “will
27 assist the trier of fact to understand the evidence”). Here, Ferrara is clearly opining,
28 from a musicological perspective, that Plaintiffs’ songs are recognizable from much

1 smaller takings than Defendants’. He is not stating a conclusion on the ultimate issue
2 of how much would be permissible as a matter of fair use. Third, Defendants’
3 argument that Ferrara’s opinion on these issues lacks foundation because he “does not
4 describe what the purpose of Defendants’ videos is” ignores his report, which sets
5 forth the basis for his opinions in detail. (Defs. Objections at 6.) Defendants’
6 suggestion that the “purpose of Defendants’ videos” is somehow relevant to Ferrara’s
7 musicological analysis of the works is completely baseless.

8 Finally, Ferrara’s opinion in paragraphs 6(f) and 10 of his declaration that
9 Defendants’ works contain no parodic musical expression is by no means a legal
10 conclusion merely because of his use of the word “parodic.” As noted by Ferrara, the
11 term “parody” is also used in music, which is how it is used in Ferrara’s report. (*See*
12 Ferrara Decl. ¶¶ 6(f), 10, Ex. 1 at 16 (citing to *The New Grove Dictionary of Music*
13 *and Musicians*)). Ferrara’s testimony on whether there is any parodic musical
14 expression in Defendants’ videos is admissible expert testimony to assist the Court’s
15 evaluation of the evidence. *See* Fed. R. Evid. 702.

16 **IV. DECLARATION OF HAL PORET**

17 Defendants’ attempt to exclude Hal Poret’s declaration, report and survey
18 simply by making a passing reference to *Daubert* lacks credible justification. To begin
19 with, Poret has created, supervised and implemented nearly 300 consumer surveys
20 concerning consumer perception, opinion and behavior, over 150 of which involved
21 issues related to the Lanham Act – and none of which has been excluded by a court.
22 (Declaration of Hal Poret (“Poret Decl.”) ¶ 2; Supplemental Declaration of Hal Poret
23 (“Poret Supp. Decl.”) ¶ 2.) He has spoken extensively at various conferences on the
24 topic of designing surveys and been accepted as an expert in survey research by
25 several U.S. district courts. (Poret Decl., Ex. 1 at 8.) Poret designed the survey in this
26 case based on a highly regarded survey technique, known as an “*Eveready*” survey.
27 *See* 5 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION
28 § 32:174 (4th ed. 2010) (*Eveready* format is a “now-standard survey format”). As

1 further described in Plaintiffs’ Reply Memorandum and Poret’s Supplemental
2 Declaration, Poret’s survey tracked the *Eveready* format, which is considered the “gold
3 standard” in determining consumer confusion. *See id.* § 32:173.50 (citation omitted).
4 (*See also* Pls. Reply Mem. at 22; Poret Supp. Decl. ¶ 3.)

5 Notwithstanding the clear admissibility of Poret’s survey and expert opinion, it
6 is well settled in the Ninth Circuit that any criticism of a survey’s technical
7 unreliability goes to the *weight* of the evidence, not its admissibility. *See E. & J. Gallo*
8 *Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1292 (9th Cir. 1992) (alleged flaws in
9 survey design did not impact survey admissibility); *Prudential Ins. Co. v. Gibraltar*
10 *Fin. Corp.*, 694 F.2d 1150, 1156 (9th Cir. 1982) (“[t]echnical unreliability goes to the
11 weight accorded a survey, not its admissibility”); *Nike, Inc. v. Nikepal Int’l, Inc.*, No.
12 2:05-cv-1468, 2007 U.S. Dist. LEXIS 16966, at *10-15 (E.D. Cal. Feb. 27, 2007)
13 (parties’ criticisms of survey evidence go to weight, not admissibility). Therefore,
14 Poret’s survey and conclusions are admissible.

15 **V. DECLARATIONS OF DON HENLEY, MIKE CAMPBELL AND DANNY**
16 **KORTCHMAR**

17 Defendants’ first objection regarding Henley’s, Campbell’s and Kortchmar’s
18 testimony is that Plaintiffs’ opinions regarding the meanings of their works are
19 “irrelevant.” (Defs. Objections at 7-8.) Not only does Defendants’ objection
20 undermine DeVore’s own testimony regarding the meaning of Defendants’ videos, it is
21 simply incorrect. Plaintiffs’ testimony regarding the meaning of the songs they wrote
22 is relevant to the question of whether Defendants’ works comment on the originals.
23 *See, e.g., Campbell*, 510 U.S. at 582 (analyzing the meaning of the original in
24 assessing whether the defendant’s work was a parody).

25 Defendants next object – without legal support – to Henley and Kortchmar’s
26 statements regarding the harm caused by Defendants’ works on the market for
27 Plaintiffs’ originals. (Defs. Objections at 7-8.) Defendants, however, fail to point out
28 the specific statements to which they object. Regardless, it is undisputed that market

1 harm is a relevant inquiry, and Henley and Kortchmar can certainly testify from their
2 personal knowledge as to the value of their works. (Henley Decl. ¶ 13; Kortchmar
3 Decl. ¶ 6.) *See also Campbell*, 510 U.S. at 590 (citing 17 U.S.C. § 107(4)); Fed. R.
4 Evid. 401, 402.

5 Finally, Defendants object that Henley has no foundation for opining on the
6 integrity of his works or his reputation. (Defs. Objections at 7.) Henley’s declaration,
7 however, fully sets forth the basis for his statements. (Henley Decl. ¶¶ 13-14, 16, 26-
8 28.) Given that he is a highly successful songwriter and recording artist and given his
9 experience in the music industry, Henley can competently testify about harm to the
10 integrity of his works and his artistic reputation. (Henley Decl. ¶¶ 28-29.)

11 **VI. DECLARATION OF JON ALBERT**

12 Defendants contend, again without legal support, that Albert’s testimony
13 regarding market harm is irrelevant. As an initial matter, it should be noted that courts
14 routinely consider expert testimony in analyzing effect of a defendant’s use on the
15 potential market for, or value of, the original work. *See, e.g., A&M Records, Inc. v.*
16 *Napster, Inc.*, 239 F.3d 1004, 1016-17 (9th Cir. 2001) (noting the district court’s
17 evaluation of expert reports on the issue of market harm); *Sony BMG Music Entm’t v.*
18 *Tenenbaum*, 672 F. Supp. 2d 217, 231 (D. Mass. 2009) (considering plaintiffs’ expert
19 report on market harm); *Rogers v. Koons*, 751 F. Supp. 474, 480 (S.D.N.Y. 1990)
20 (considering plaintiff’s expert affidavit on value of the potential market for the
21 original).

22 In objecting to Albert’s testimony, Defendants misstate the type of harm
23 implicated by the fourth fair use factor. The harm is not, as Defendants state, limited
24 to “market usurpation.” Rather, the inquiry pertains to ““the effect of the use upon the
25 *potential market for or value of the copyrighted work.*”” *Campbell*, 510 U.S. at 590
26 (quoting 17 U.S.C. § 107(4)) (emphasis added); *Worldwide Church of God v.*
27 *Philadelphia Church of God, Inc.*, 227 F.3d 1110, 1119 (9th Cir. 2000) (relevant
28

1 consideration is not current licensing activity, but “potential market”) (citation
2 omitted).

3 Albert is an independent consultant with over 30 years of experience licensing
4 popular music and celebrity talent for promotional purposes. (Albert Decl. ¶ 2, Ex. 1
5 at 6, 14.) He regularly negotiates contracts for such uses and seeks license fee quotes,
6 typically 700 to 800 per year. (*Id.*) Albert has previously served as an expert witness,
7 acting on behalf of both plaintiffs and defendants. (Albert Decl., Ex. 1 at 15.) *See*
8 *Yeager v. Cingular Wireless LLC*, No. 2:07-cv-02517 FCD GGH, 2009 U.S. Dist.
9 LEXIS 113313 (E.D. Cal. Dec. 7, 2009) (citing Albert’s testimony to hold that
10 defendant’s use of plaintiff’s name and identity “enhanced marketability of
11 defendant’s service”).

12 In his declaration and expert report, Albert described in detail the foundation for
13 his opinions, which are based on his relevant knowledge and experience. (Albert Decl.
14 ¶¶ 6-18, Ex. A at 7-13.) For instance, with respect to promotional uses, Albert
15 explained, based on his knowledge and experience, that advertisers are selective in
16 their use of music in advertising campaigns. (Albert Decl. ¶¶ 8-9, Ex. 1 at 12.) They
17 often investigate, typically through Internet searches, how an artist is perceived by the
18 public, including the involvement of the artist and the artist’s music in other
19 advertising campaigns or endorsements. (*Id.* ¶ 8.) Advertisers avoid songs that are
20 already associated with other products or causes, especially ones that are politically
21 polarizing. (*Id.* ¶¶ 9-10, Ex. 1 at 12.) Thus, Defendants’ attempt to dismiss Albert’s
22 conclusion as “lack[ing] foundation” and “pure speculation” is no more than a protest
23 that Albert has offered an opinion on the question of market harm, which he is clearly
24 entitled to do, as someone with knowledge of the market for the commercial use of
25 songs. Fed. R. Evid. 702.

26 Defendants further object to Albert’s expert opinion that their use of Plaintiffs’
27 works ““was a promotional, commercial use under advertising standards.”” (Defs.
28 Objections at 9.) Albert makes clear that he is giving an opinion based on the

1 standards of advertising, of which he has specialized knowledge. Albert's opinion can
2 therefore assist the court "to understand the evidence" in evaluating the parties'
3 arguments. Fed. R. Evid. 702.

4 Finally, Albert's conclusions regarding the fair market value of the songs and
5 Henley do not lack foundation. Albert describes his analysis in reaching the fair
6 market value in his declaration and report. (Albert Decl. ¶¶ 15-18, Ex. 1 at 10-13.)
7 For the songs, he explains that he relied upon personal knowledge of historical fee
8 quotes for both. (*Id.* ¶¶ 16-17.) From these quotes, based on his knowledge and
9 experience licensing popular music, he derived the fair market value of Defendants'
10 uses for the purpose of a short-term Internet advertising campaign. (*Id.*) With respect
11 to his valuation of an endorsement by Henley, Albert drew upon his extensive
12 experience in licensing celebrity talent to determine the fair market value to have
13 Henley endorse a product or cause in a short term Internet-based campaign. (*Id.* ¶ 18,
14 Ex. 1 at 12-13.)

15 Dated: May 17, 2010

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