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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DON HENLEY, MIKE CAMPBELL, and DANNY KORTCHMAR

Plaintiffs,

v.

CHARLES S. DEVORE and JUSTIN HART,

Defendants.

AND RELATED COUNTERCLAIMS

Case No. SACV09-0481 JVS (RNBx)

DEFENDANTS' NOTICE OF EX PARTE APPLICATION AND EX PARTE APPLICATION FOR ORDER CERTIFYING THE COURT'S ORDER DATED JUNE 10, 2010 FOR INTERLOCUTORY REVIEW PURSUANT TO 28 U.S.C. § 1292(b) OR, IN THE ALTERNATIVE, FOR A SHORTENED BRIEFING SCHEDULE ON THE MOTION

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TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD HEREIN:

Defendants Charles Devore and Justin Hart hereby apply ex parte to this Court for certification of its Order Granting in Part and Denying in Part Plaintiffs' Motion for Partial Summary Judgment and Defendants' Motion for Summary Judgment or, in the Alternative, Partial Summary Judgment ("Order") for interlocutory review under 28 U.S.C. § 1292(b). Defendants ask the Court to stay the trial-court litigation pending resolution of the appeal. In the alternative, Defendants request a shortened briefing schedule on the motion, which has been filed concurrently with this ex parte application and is set for hearing on July 19, 2010, two weeks from the scheduled jury trial.

This application is based on this Notice, the attached Memorandum, and any other pleadings filed in this case relevant to the issues in this application. Defendants' counsel met and conferred on this motion with Plaintiffs' counsel on June 21, 2010. Plaintiffs' counsel said they will oppose the motion.

This motion is appropriate on an *ex parte* basis because the motion seeks to spare the Court and the parties the time and expense of a jury trial on August 3, but if the motion is heard on the standard hearing schedule, the parties will have spent substantial time and effort preparing for trial and the motion will not have served its purpose.

Pursuant to Judge Selna's rules of procedure, Plaintiffs were served via Fax with this Notice and all moving papers, and given notice that they must file their opposition, if any, within 24 hours of service of this application.

Dated: June 21, 2010 **ONE LLP**

By: /s/ Christopher W. Arledge
Christopher W. Arledge
Attorneys for Defendants, Charles S. Devore and Justin Hart

MEMORANDUM

Defendants respectfully ask this Court to certify its Order Granting in Part and Denying in Part Plaintiffs' Motion for Partial Summary Judgment and Defendants' Motion for Summary Judgment or, in the Alternative, Partial Summary Judgment ("Order") for interlocutory review under 28 U.S.C. § 1292(b). Defendants also ask this Court to stay the trial-court litigation pending the appeal.

Under § 1292(b), where, as here, the district court issues an order that is not immediately appealable, then § 1292(b) relief is available where the order involves a "controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal may materially advance the termination of the litigation…" 28 U.S.C. § 1292(b). The procedure is particularly appropriate where a reversal on liability could spare time and expense on the question of damages. *See Steering Committee v. United States*, 6 F.3d 572 (9th Cir. 1993).

Here, there are three "controlling question[s] of law" that justify certification under § 1292(b).

A. Does a defendant engage in parody under *Campbell* where he appropriates the themes and characters of a copyrighted work in order to make political or social statements at odds with the known views of the author of that original work—including even views not raised in the original work—or does parody exist only where the defendant's work directly addresses the specific issues or themes raised in the original work?

One of the core issues in this case—maybe the core issue—is whether Defendants' works qualify as parodies under *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994). This Court issued a reasoned, extensive discussion of the issue, some nine, single-spaced pages in length. The Court first wrestled with the "somewhat novel" issue of whether under *Campbell* criticism of the author is parody or satire. The Court concluded that targeting the author can qualify as parody, but the Court also held that a work is not parody

if it does not criticize the author directly and instead criticizes the author's views. *See* Order at 12. Defendants do not fully understand the Court's purported distinction. What is clear, however, is that the Court's Order takes a much more narrow view than do other district courts to address the question. For example, in *Bourne Co. v. Twentieth Century Fox Film Corp.*, 602 F.Supp.2d 499, 507 (S.D.N.Y. 2009), a district court in the Second Circuit held that Family Guy's purported parody "I Need a Jew" satisfied *Campbell*'s definition of parody, in part, because it took aim at Walt Disney's alleged anti-Semitism. Thus, the defendants there clearly used a copyrighted work in order to take aim merely at the alleged views held by a person associated with the original song (and, in that case, not even the original author or performer).

Likewise, this Court's order found Defendants' works to be non-parodic because while "the Defendants evoked the same themes of the original" they did so "in order to attack an entirely separate subject. This is satire, not parody." *See* Order at 16. Other district courts disagree. In *Bourne*, for example, the defendants' purported parody attacked Walt Disney's alleged anti-Semitism by appropriating the famous Disney-associated song, "When You Wish Upon a Star." Needless to say, "When You Wish Upon a Star" does not discuss or even allude to anti-Semitism. Clearly the defendants in *Bourne* used "When You Wish Upon a Star" to attack "an entirely separate subject" that did not appeal in the original work. But whereas this Court found that such a practice constitutes satire, the district court in *Bourne* found that it constitutes parody.

The reality is that there is very little law on how to apply the parody/satire distinction in this context, and those cases that address the subject have been all over the map. If this Court had applied the logic of the *Bourne* court, Defendants would have won. It chose to apply a narrower standard based on its read of other authorities, so Defendants lost. The question itself is still undecided and needs to be resolved by an appellate court. If the Ninth Circuit were to resolve the question now, the court's resolution could obviate the need for the substantial time and expense that will otherwise go into a jury trial. And even if the

appellate court affirms this Court's Order, in doing so it will articulate clear legal standards that will be useful when instructing the jury on the issue of willfulness.

B. Is the use of a copyrighted work in a campaign advertisement a "commercial use" of the copyrighted work even where the campaign is not selling a product or service?

This Court's Order noted that "[c]ourts that have actually considered whether campaign advertisements are commercial in the fair use context come down on the side of noncommercial." *See* Order at 18. Yet the Court's Order holds that Defendants' use of Plaintiffs' songs in campaign advertisements was commercial because under *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110, 1117 (9th Cir. 2000), a commercial use is one where a defendant "profits" from the use—even if not monetarily—without paying the customary license fee. *See* Order at 19. Defendants believe the Court's Order is a novel extension of *Worldwide Church*—no other court has applied its holding to a campaign advertisement—and is a particularly dangerous one at that.

First, the *Worldwide Church* holding as this Court characterizes effectively swallows the entire commercial/noncommercial distinction. Practically every would-be parodist benefits from his or her use of the original work; there would be no point in using the original work if it provided no benefit. And the second half of the test this Court articulates is circular: there is no "customary license fee" for works covered by the fair use doctrine; only uses not covered by the fair use doctrine must pay license fees. Thus, the test that is used to determine whether a work is fair use depends completely upon the conclusion that the court reaches with regard to whether the work is fair use.

It is also dangerous and unnecessary for this Court to conclude that a campaign advertisement—normally the epitome of core, First Amendment-protected speech—is a "commercial" use merely because the defendant aimed to benefit non-monetarily. This is an important issue, one that has not been resolved in the same fashion as the Order by other courts, and one that cries out for appellate review. This is a question that needs to be resolved by a higher court. And, once again, if the Ninth Circuit reverses on this point, the

Court and parties will be spared substantial unnecessary time and expense. Certification is appropriate.

C. Does the fourth fair use factor weigh in a plaintiff's favor where the plaintiff has no evidence of actual monetary losses, no evidence of actual monetary benefits to the defendant, and no evidence that the plaintiff even attempts to engage in market transactions concerning the copyrighted work – merely because the plaintiff asserts that he may at some future time engage in market transactions with the copyrighted work and he believes defendant's use of the copyrighted work could harm those future, hypothetical transactions?

Plaintiffs here argue that the fourth fair use factor weighs in their favor because Defendants' use of the original copyrighted works could harm future licensing opportunities for the songs—even though Plaintiffs can point to no actual harm to date, are apparently not engaged in efforts to license the songs commercially at this time, and have not engaged in commercial licensing opportunities in the past. While other courts have concluded that future licensing opportunities need to be taken into account under the fourth fair use factor, Defendants believe the specific issue they raise has not been decided in any published order by any court. Thus, the issue is unsettled. It is also significant, in that the fourth fair use factor is not only important as one of only four fair use factors, but it has added significance because it affects the first fair use factor (where there is no threat of market substitution looser forms of parody will be deemed fair use, *Campbell*, 510 U.S. at 580 n.14) and the third factor (the extent to which a work is a market substitute impacts how much of the original work can be used). Thus, an appellate court should resolve the extent to which a purely hypothetical harm can overcome the lack of any actual harm when weighing the fourth fair use factor. This determination, if in Defendants' favor, can change the outcome of this case and obviate the need for time and expense on a trial on damages.

For all of the reasons set forth above, this Court's Order contains numerous "controlling question[s] of law as to which there is a substantial ground for difference of opinion and … an immediate appeal may materially advance the termination of the litigation…" 28 U.S.C. § 1292(b). Therefore, Defendants ask that this Court grant certification under § 1292(b). Defendants also ask that this Court stay the trial-court litigation pending appeal. It would be wasteful and inefficient to conduct a jury trial while these dispositive issues are before the Ninth Circuit. In the alternative, Defendants ask this court for a shortened briefing schedule on the motion, which is currently set for hearing on July 19, 2010. The hearing date is only two weeks before the trial date, so if the Court does not decide this issue on a shortened schedule, the parties will have expended substantial resources preparing for trial, and the motion will not have served one of its primary purposes.

Dated: June 21, 2010 **ONE LLP**

By: /s/ Christopher W. Arledge
Christopher W. Arledge
Attorneys for Defendants, Charles S. Devore and Justin Hart

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 4000 MacArthur Boulevard, West Tower, Suite 1100, Newport Beach, California 92660.

On June 21, 2010 I served the document (s) described as **DEFENDANTS' EX PARTE APPLICATION FOR COURT TO CERTIFY ORDER FOR INTERLOCUTORY REVIEW** in this action by placing the true copies thereof enclosed in sealed envelopes addressed as follows:

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[ ] (BY FAX) I transmitted, pursuant to Rules 2001 et seq., the above-described document by facsimile machine (which complied with Rule 2003 (3), to the above-listed fax number (s). The transmission originated from facsimile phone number (949) 258-5081 and was reported as complete and without error. The facsimile machine properly issued a transmission report, a copy of which is attached hereto.

Executed on June 21, 2010 at Newport Beach, California.

[X] (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

/s/ Lauren Thomas
Lauren Thomas