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

16 DON HENLEY, MIKE CAMPBELL
 17 and DANNY KORTCHMAR,

18 Plaintiffs,

19 v.

20 CHARLES S. DEVORE and
 21 JUSTIN HART,

22 Defendants.

Case No. SACV09-0481 JVS (RNBx)

**PLAINTIFFS' OPPOSITION TO
 DEFENDANTS' EX PARTE
 APPLICATION FOR ORDER
 CERTIFYING THE COURT'S ORDER
 DATED JUNE 10, 2010 FOR
 INTERLOCUTORY REVIEW**

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19 **STATUTES**

20 28 U.S.C. § 1292(b)..... passim

21 Section 107 of the Copyright Act. 17 U.S.C. § 107 5

1 Plaintiffs oppose Defendants' *ex parte* request that the Court certify its Order
2 Granting in Part and Denying in Part Plaintiffs' Motion for Partial Summary Judgment
3 and Defendants' Motion for Summary Judgment or, in the Alternative, Partial
4 Summary Judgment ("Order") for interlocutory review under 28 U.S.C. § 1292(b).

5 **I. INTRODUCTION**

6 Ten days after entry of this Court's Order granting summary judgment to
7 Plaintiffs on the question of Defendants' liability for copyright infringement,
8 Defendants seek, on an expedited, *ex parte* basis, to have this Court certify three fact-
9 bound issues they have isolated from the Court's fair use analysis for immediate,
10 piecemeal review by the Ninth Circuit pursuant to 28 U.S.C. § 1292(b). Defendants'
11 application should be rejected.

12 Section 1292(b) is not a shortcut to appeal a loss on summary judgment.
13 Certification of an interlocutory appeal is appropriate only in exceptional
14 circumstances, where the benefits of immediate appellate review are so compelling
15 they outweigh the ordinary rule that appellate review should be postponed until the
16 entry of a final judgment at the trial level. No such exceptional circumstance is present
17 here. Indeed, to permit such an appeal would only pointlessly delay resolution of this
18 litigation. None of the supposed "questions of law" identified by Defendants is truly a
19 question of law, or dispositive of the question of fair use; and none can be reviewed by
20 an appellate court independent of the factual record in this case.

21 It is perhaps understandable that Defendants might view an appellate hiatus as
22 preferable to trial on the remaining issues of willfulness and damages in this case
23 (which trial is currently scheduled to commence on August 3, 2010). But there is
24 simply no basis for their application under Section 1292(b). Defendants should not be
25 permitted to invoke the interlocutory appeal process to avoid trial in this action.

26 **II. ARGUMENT**

27 "Section 1292(b) is a departure from the normal rule that only final judgments
28 are appealable, and therefore must be construed narrowly." *James v. Price Stern*

1 *Sloan*, 283 F.3d 1064, 1068 (9th Cir. 2002); accord *In re First American Corp. ERISA*
2 *Litig.*, No. SACV 07-01357, 2008 U.S. Dist. LEXIS 107676, at *2 (C.D. Cal. Sept. 12,
3 2008). Certification under Section 1292(b) is appropriate “only in extraordinary cases
4 where decision of an interlocutory appeal might avoid protracted and expensive
5 litigation.” *U. S. Rubber Co. v. Wright*, 359 F.2d 784, 785 (9th Cir. 1966). It is not
6 intended “merely to provide review of difficult rulings in hard cases.” *Id.* The burden
7 is on the party seeking certification to show “that exceptional circumstances justify a
8 departure from the ‘basic policy of postponing appellate review until after the entry of
9 a final judgment.’” *Fukuda v. County of L A.*, 630 F. Supp. 228, 229 (C.D. Cal. 1986)
10 (citing *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978)). Defendants make
11 no such showing here.

12 Three criteria must be met before a district court may certify an interlocutory
13 appeal pursuant to Section 1292(b). These requirements are “(1) that there be a
14 controlling question of law, (2) that there be substantial grounds for difference of
15 opinion, and (3) that an immediate appeal may materially advance the ultimate
16 termination of the litigation.” *In re Cement Antitrust Litigation*, 673 F.2d 1020, 1026
17 (9th Cir. 1982), *aff’d*, 459 U.S. 1190 (1983). Certification is only appropriate where
18 each of these conditions is satisfied. *Ahrenholz v. Bd. of Trs. of the Univ. of Ill.*, 219
19 F.3d 674, 676 (7th Cir. 2000) (“The criteria are conjunctive, not disjunctive.”).

20 In their application, Defendants seek certification of the following three
21 questions:

22 1. Does a defendant engage in parody under *Campbell* where he appropriates
23 the themes and characters of a copyrighted work in order to make political or social
24 statements at odds with the known views of the author of that original work –
25 including even views not raised in the original work – or does parody exist only where
26 the defendant’s work directly addresses the specific issues or themes raised in the
27 original work?
28

1 2. Is the use of a copyrighted work in a campaign advertisement a
2 “commercial use” of the copyrighted work even where the campaign is not selling a
3 product or service?

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

11 **A. Defendants Are Not Seeking to Certify Controlling Questions of Law**

12 **1. Defendants’ “Questions of Law” Are Dependent on Facts**

13 Under Section 1292(b), a “question of law” means a “pure question of law” –
14 that is, “an abstract legal issue rather than an issue of whether summary judgment
15 should be granted.” *Ahrenholz*, 219 F.3d at 677. “The idea [of Congress] was that if a
16 case turned on a pure question of law, something the court of appeals could decide
17 quickly and cleanly without having to study the record, the court should be enabled to
18 do so without having to wait until the end of the case But to decide whether
19 summary judgment was properly granted requires hunting through the record compiled
20 in the summary judgment proceeding” *Id.*

21 In other words, to satisfy the first prong of Section 1292(b), “[t]he legal
22 question must be stated at a high enough level of abstraction to lift the question out of
23 the details of the evidence or facts of a particular case and give it general relevance to
24 other cases in the same area of law.”’ *Hightower v. Schwarzenegger*, No. 1:04-cv-
25 06028, 2009 U.S. Dist. LEXIS 109603, at *7 (E.D. Cal. Nov. 6, 2009) (quoting
26 *McFarlin v. Conesco Servs., LLC*, 381 F.3d 1251, 1259 (11th Cir. 2004)). Defendants’
27 questions are the antithesis of the type of issues that are appropriately certified for
28 interlocutory appeal, because they are inextricably tied to the factual record. Despite

1 Defendants’ attempt to disguise them as freestanding issues of “law,” as is apparent on
2 their face, Defendants’ questions are not “pure” or “abstract” legal concerns. They are
3 incapable of being addressed apart from the factual record in this case. Indeed, they
4 are incapable of being fully *understood* apart from the factual record in this case.

5 For example, with respect to the first question, how could the Court of Appeals
6 possibly make sense of such concepts as “themes or characters,” “political or social
7 statements” or the “known views of the author,” without an understanding of the
8 record on summary judgment? The second and third questions suffer from the same
9 deficiency. What kind of “campaign advertisement”? How was the copyrighted work
10 used in the advertisement? Did the defendants profit from the advertisement? What is
11 meant by “market transactions”? How do such “market transactions” relate to the
12 “future, hypothetical transactions”? What is the potential harm at issue?

13 Defendants’ questions are not questions that can be “lift[ed] . . . out of the details
14 of the evidence or facts” to be decided “quickly and cleanly,” as envisioned by Section
15 1292(b). Far from presenting “pure” issues of law, Defendants’ questions are nothing
16 more than artfully phrased objections to the fact-based determinations made by the
17 Court in evaluating Defendants’ claim of fair use on summary judgment. For this
18 reason alone, certification of any of these questions would be inappropriate.

19 **2. Defendants’ Questions Are Not Controlling**

20 Even assuming the questions put forth by Defendants did constitute answerable
21 questions of law, they would nonetheless be inappropriate for certification, because
22 they are not controlling of this case.

23 A controlling question of law is one that would “require reversal if decided
24 incorrectly or that could materially affect the course of litigation with resulting savings
25 of the court’s or the parties’ resources.” *APCC Servs., Inc. v. ESH AT&T Corp.*, 297
26 F. Supp. 2d 101, 105 (D.D.C. 2003) (quoting *Judicial Watch, Inc. v. Nat’l Energy*
27 *Policy Dev. Group*, 233 F. Supp. 2d 16, 19 (D.D.C. 2002)). Here, even if the Ninth
28 Circuit resolved one or more of Defendants’ questions in a manner favorable to

1 Defendants, this would not in itself be dispositive of the question of fair use, and thus
2 might have no material impact on the course of the litigation.

3 Fair use is a mixed question of fact and law that is determined pursuant to the
4 four-factor test prescribed by Section 107 of the Copyright Act. 17 U.S.C. § 107; *see*
5 *also* Order at 6 (citing *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539,
6 560 (1985)). As this Court has explained, the fair use factors are not to be analyzed
7 “in isolation from one another.” Order at 6 (citing *Campbell v. Acuff-Rose Music,*
8 *Inc.*, 510 U.S. 569, 578 (1994)). “The factors are not winner-take-all categories to be
9 tallied at the end to determine the prevailing party; they are intended to be carefully
10 weighed case by case with an eye towards the policies underlying copyright
11 protection.” *Id.* at 6 (citing *Campbell*, 510 U.S. at 578). Thus, even if the Court of
12 Appeals rendered an opinion on one or more of Defendants’ questions, this Court, on
13 remand, would still need to consider that issue in the context of the complete factual
14 record and in relation to the other fair use factors, and could still reach the conclusion
15 that Defendants had failed to meet their burden of demonstrating fair use – which
16 could then be appealed *again* to the Ninth Circuit. Indeed, because the fair use factors
17 are factually dependent and intertwined, the question of fair use is particularly ill-
18 suited to piecemeal review of isolated issues, especially when those issues are divorced
19 from their factual context.

20 **B. There Are No Substantial Grounds for a Difference of Opinion**

21 “Substantial grounds for a difference of opinion” means more than mere
22 disagreement with a Court’s determination of a legal issue. *See Ass’n of Irrigated*
23 *Residents v. Fred Schakel Dairy*, 634 F. Supp. 2d 1081, 1091 (E.D. Cal. 2008) (“A
24 party’s strong disagreement with the court’s ruling is not sufficient for there to be a
25 ‘substantial ground for difference’; the proponent of an appeal must make some greater
26 showing.”) (citing *Hansen v. Shubert*, 459 F. Supp. 2d 973, 1000 (E.D. Cal. 2006));
27 *Judicial Watch, Inc.*, 233 F. Supp. 2d at 31 (“[D]efendants’ conviction of the
28 correctness of their position is insufficient to carry them over the high threshold posed

1 by the standard governing certification for interlocutory appeal.”)); *see also Env'tl.*
2 *Prot. Info. Ctr. v. Pac. Lumber Co.*, No. C 01-2821, 2004 U.S. Dist. LEXIS 6674, at
3 *14-16 (N.D. Cal. Apr. 19, 2004) (“A substantial ground for dispute [] exists where a
4 court’s challenged decision conflicts with decisions of several other courts.”) (citing
5 *APCC Servs.*, 297 F. Supp. 2d at 107). “[T]he mere presence of a disputed issue that
6 is a question of first impression, standing alone, is insufficient to demonstrate a
7 substantial ground for difference of opinion’ under § 1292(b).” *Lenz v. Universal*
8 *Music Corp.*, No. C 07-3783, 2008 U.S. Dist. LEXIS 91890, at *5 (N.D. Cal. Oct. 28,
9 2008) (quoting *In re Conseco Life Ins. Cost of Ins. Litig.*, No. Civ. 04-1610, 2005 U.S.
10 Dist. LEXIS 45538, at *7 (C.D. Cal. May 31, 2005)).

11 Defendants assert that there is a substantial ground for difference of opinion with
12 respect to each of the three questions they present. But the only issue in the Court’s
13 summary judgment order that even arguably qualifies as a question giving rise to a
14 substantial difference of opinion is the question of whether use of an author’s work to
15 criticize the author, rather than the work itself, qualifies as parody under *Campbell* –
16 and the Court resolved this question *in Defendants’ favor*. While characterizing the
17 issue as one that is undecided in the law, the Court nonetheless assumed “parody-of-
18 the-author” as a legitimate form of parody for purposes of its fair use analysis. *See*
19 *Order at 12.*

20 In so doing, the Court relied on a New York district court case, *Bourne Co. v.*
21 *Twentieth Century Fox Film Corp.*, 662 F. Supp. 499, 507 (S.D.N.Y. 2009), in which a
22 copyright owner challenged the use of its song “When You Wish Upon a Star” in an
23 episode of the *Family Guy* television show. In holding that the defendants’ taking
24 from the original song was parodic in nature, the *Bourne* court credited the defendants’
25 claim that they were seeking to parody the alleged anti-Semitism of Walt Disney. *Id.*
26 at 507. Significantly, however, the core holding of *Bourne* was that the defendants’
27 work commented on the original song, by “juxtaposing the ‘saccharin sweet’ song
28 ‘When You Wish Upon a Star’ with [the defendants’ song] ‘I Need a Jew’”. . . . ‘I

1 Need a Jew’ comments both on the original work’s fantasy of stardust and magic, as
2 well as [the *Family Guy* character] Peter’s fantasy of the ‘superiority’ of Jews.” *Id.* at
3 506. In so holding, the court expressly observed that “*Defendants do more than just*
4 *comment on racism and bigotry generally.*” *Id.* (emphasis added).

5 Thus, *Bourne* does *not* stand for the proposition that the targeting of an author or
6 an author’s views alone – without any commentary on the author’s work – qualifies as
7 parody under *Campbell*. Indeed, as noted by this Court, the *Bourne* court emphasized
8 this very point in a subsequent decision, *Salinger v. Colting*, No. 09 Civ. 5095, 2009
9 U.S. Dist. LEXIS 56012, at *24 n.4 (S.D.N.Y. July 1, 2009), *rev’d and remanded on*
10 *other grounds*, No. 09-2878, 2010 U.S. App. LEXIS 8956 (2d Cir. Apr. 30, 2010), in
11 which the court rejected the assertion that merely taking aim at an author qualifies as a
12 valid parody of the author’s work. *See Order* at 9 n.7.

13 In light of the Court’s treatment of *Bourne* as lending support to the Defendants’
14 “parody-of-the-author” defense, it is difficult to understand what Defendants seek to
15 challenge in question one. They appear to suggest that *Bourne* should be construed to
16 support an even *broader* definition of parody, pursuant to which one need not
17 comment on the original song or the author at all, but may address “an entirely
18 separate subject” that does not appear in the original work. (*See Defendants’ Ex Parte*
19 *Application* (“*Def. Ex Parte App.*”) at 4.) Of course, the Supreme Court in *Campbell*
20 was clear that this is satire, not parody. 510 U.S. at 581. But in any event, as
21 explained above, *Bourne* does not go so far, because in *Bourne*, the court concluded
22 that the defendants’ work commented on the original song. And, as noted above, the
23 *Bourne* court was careful to point out that the defendants’ parody did more than “just
24 comment” on the racist and bigoted views attributed to Disney.

25 Thus, contrary to Defendants’ assertions, *Bourne* – the lone case (aside from
26 *Campbell*) cited by Defendants in support of question one – provides no basis for
27 certification. Indeed, Plaintiffs are not aware of *any* case that suggests that a would-be
28 parodist may simply target the views of an author, rather than the author or work itself,

1 and come within the definition of *Campbell*. In sum, there is no basis for the
2 Defendants to claim “substantial grounds for difference of opinion” with respect to
3 question one.

4 Likewise, there are no grounds for a “difference of opinion” with respect to the
5 Court’s determination concerning “commercial use,” as suggested by Defendants in
6 question two. The Court applied the clear rule of the Ninth Circuit, as articulated in
7 *Worldwide Church of God v. Philadelphia Church of God, Inc.*, 227 F.3d 1110, 1117
8 (9th Cir. 2000), in turn based on the Supreme Court case *Harper & Row*, to the facts of
9 this case. *See also Elvis Presley Enters. v. Passport Video*, 349 F.3d 622, 626 (9th Cir.
10 2003) (historical documentary considered commercial under *Harper & Row*);
11 *Weissman v. Freeman*, 868 F.2d 1313, 1324 (2d Cir. 1989) (applying *Harper & Row* to
12 find for-profit use in academic context); *Marobie-FL, Inc. v. Nat’l Ass’n of Fire Equip.*
13 *Distrib.*, 983 F. Supp. 1167, 1175 (N.D. Ill. 1997) (nonprofit group’s use of clip art
14 commercial based on *Harper & Row*). Pursuant to such authority, the Court correctly
15 determined that the Defendants’ use was for-profit, rather than non-profit. *See Order*
16 *at 19*. In support of its holding that Defendants’ uses were for-profit for purposes of
17 the Copyright Act, the Court relied upon the fact that Defendants made and distributed
18 the videos to attract publicity and donations, and that Hart’s salary was tied to such
19 exploitations, among other factors. *Id.* Defendants may not like Court’s determination
20 of this issue, but the determination is based on an application of controlling precedent
21 to undisputed facts in the record. There is no basis to certify this question for
22 interlocutory review.

23 Finally, in question three, Defendants appear to be complaining about the rule
24 set forth in *Campbell* and other cases, both within and outside the Ninth Circuit, that
25 requires a court to look to potential harm to the copyright owner in considering the
26 question of market harm. *See Campbell*, 510 U.S. at 590 (courts must consider
27 “whether unrestricted and widespread conduct of the sort engaged in by the defendant .
28 . . . would result in a substantially adverse impact”); *Worldwide Church*, 227 F.3d at

1 1119 (the “relevant consideration” is harm to the “potential market”). Courts have
2 expressly and repeatedly rejected the assertion that Defendants make here, that a
3 showing of actual harm is required. *See, e.g., Harper & Row*, 471 U.S. at 559
4 (absence of exploitation of particular market by copyright holder does not preclude
5 finding of market harm because the copyright holder has the “right to change his
6 mind”); *Castle Rock Entm’t, Inc. v. Carol Publ’g Group, Inc.*, 150 F.3d 132, 145-46
7 (2d Cir. 1998) (same); *Worldwide Church*, 227 F.3d at 1119 (same); *Salinger v.*
8 *Random House, Inc.*, 811 F.2d 90, 99 (2d Cir. 1987) (same). Again, the Defendants
9 may not like the outcome of the Court’s analysis, but that does not give rise to a
10 substantial difference of opinion justifying certification.

11 **C. Interlocutory Appeal Will Not Materially Advance the Ultimate**
12 **Termination of the Litigation**

13 Defendants’ *ex parte* application, rather than seeking to avoid protracted
14 litigation, seeks to ensure that this case is prolonged indefinitely. Under Section
15 1292(b), Defendants must demonstrate that an interlocutory appeal will “materially
16 advance the ultimate termination of the litigation.” Here, interlocutory review would
17 have the opposite effect.

18 Defendants do not explain how granting their underlying application seeking
19 piecemeal, interlocutory review of certain aspects of the Court’s Order – when
20 liability has been decided and all that remains of this case is a trial on the limited
21 questions of willfulness and damages – will spare the parties or the courts time or
22 expense. Defendants, through their application, would have this Court stay a case that
23 has been litigated for over a year and is expected to be completed within the next two
24 to three months. If the Court were to grant Defendants’ request – and the Ninth Circuit
25 agreed to hear the interlocutory appeal – the case would stayed pending resolution of
26 the appeal, only to be continued in this Court a year or more in the future. Not only
27 that, as discussed above, the question of fair use might have to be re-evaluated at the
28 district court level based on the partial appellate review, and would potentially be

1 subject to a second appeal. One can hardly imagine a less efficient course for this
2 litigation.

3 Notably, Defendants cite only one case in support of their contention that “[t]he
4 [interlocutory appeal] procedure is particularly appropriate where a reversal on liability
5 could spare time and expense on the question of damages.” (Defs. *Ex Parte* App. at 3.)
6 Rather than support Defendants’ argument, that case, *Steering Committee v. United*
7 *States*, 6 F.3d 572 (9th Cir. 1993), exposes the weakness of their application. In
8 *Steering Committee*, the district court certified – and the Ninth Circuit permitted –
9 issues of liability to be determined on interlocutory appeal explicitly because it was a
10 “multidistrict,” “multiparty case” involving an airplane crash that killed 82 people. *Id.*
11 at 574-75. In certifying and permitting the interlocutory appeal of this complex case,
12 the district and circuit courts relied on the logic of *In re Air Crash Disaster at John F.*
13 *Kennedy International Airport on June 24, 1975* (“*Air Crash Disaster*”), 479 F. Supp.
14 1118 (E.D.N.Y. 1978), recognizing that that the determination of liability in such
15 “unusual cases” is analogous to “the intermission which marks the conclusion of Act I
16 of a two-act play.” *Steering Committee*, 6 F.3d at 575 (quoting *Air Crash Disaster*,
17 479 F. Supp. at 1126). The “unusual case” of multidistrict, multiparty litigation is a far
18 cry from the two-defendant statutory damages trial at issue here.

19 Defendants’ *ex parte* application does not come close to satisfying any of the
20 three requirements for interlocutory appeal and appears to be nothing more than a
21 transparent attempt to avoid facing damages for their infringing conduct. Defendants’
22 application should be denied. This is not an “extraordinary case[] where decision of
23 interlocutory appeal might avoid protracted and expensive litigation.” *U.S. Rubber*
24 *Co.*, 359 F.2d at 785. “[S]ince the only issue remaining is the determination of the
25 quantum of damages to be awarded plaintiffs, which apparently will not involve
26 expensive and protracted litigation, there is little reason to believe that permitting an
27 appeal from this Court’s decision will ‘materially advance the ultimate termination of
28 the litigation.’” *Laverne v. Corning*, 316 F. Supp. 629, 639 (S.D.N.Y. 1970) (emphasis

1 in original). It is simply a case where the Defendants are unhappy with the Court's
2 decision on summary judgment.

3 **III. CONCLUSION**

4 For the foregoing reasons, Defendants' *ex parte* application seeking certification
5 of questions for interlocutory appeal, and related motion seeking same, should be
6 denied.

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8 Dated: June 22, 2010

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