

O

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DON HENLEY, ET AL,
Plaintiff(s),
v.
CHARLES S. DEVORE, ET AL,
Defendant(s).

CASE NO:
SACV 09-481 JVS (RNBx)
ORDER RE MOTIONS FOR
SUMMARY JUDGMENT

Musician Don Henley (“Henley”) claims that politician Charles DeVore (“DeVore”) infringed the copyrighted songs “The Boys of Summer” and “All She Wants to Do Is Dance” with two political advertisements featuring the songs “The Hope of November” and “All She Wants to Do Is Tax.” DeVore claims fair use. The Court also considers whether DeVore’s songs falsely suggest endorsement by Henley.

I. BACKGROUND

1
2 Plaintiff Henley is a world-famous, Grammy-winning, multi-platinum-
3 album-selling songwriter and recording artist.¹ He is a founding member of the
4 Eagles, credited with one of the best-selling albums of all time. He has also
5 enjoyed a successful solo career, releasing the multi-platinum album Building the
6 Perfect Beast in 1984. Two of the songs on the album, “The Boys of Summer”
7 (“Summer”) and “All She Wants to Do Is Dance” (“Dance”), were top-ten hits at
8 the time.

9
10 “Summer” was written by Henley and Plaintiff Mike Campbell
11 (“Campbell”), a founding member of Tom Petty and the Heartbreakers, and the
12 two jointly own the copyright to the song. The main theme of the song is the
13 singer’s nostalgia for a past summer romance, though the Defendants contend that
14 the song has a political theme, noting the line where the singer “saw a
15 DEADHEAD² sticker on a Cadillac,” which they argue demonstrates nostalgia for
16 the liberal politics of the 1960’s. The lyrics to “Summer” are attached in Appendix
17 A.

18
19 “Dance” was written by Plaintiff Danny Kortchmar (“Kortchmar”), a
20 respected songwriter, producer, and recording artist. Kortchmar is the beneficial
21 owner of the copyright to “Dance.” The song depicts an American couple on a trip
22 to an unspecified foreign country in the midst of violence and unrest. The woman
23 is either oblivious to or ignores the tumult and simply wants to dance, party, and
24 “get down.” The Defendants interpret the song as being a comment on American

25 ¹ Unless otherwise noted, the recited facts are undisputed.

26 ² “Deadhead” refers to a fan of the Grateful Dead, a rock band popular during the 1960’s
27 and 70’s. See United States v. Washington, 106 F.3d 983, 1017 (D.C. Cir. 1997).

1 foreign policy in Latin America and the American public's apathy towards the
2 situation. The lyrics to "Dance" are attached in Appendix B.

3 DeVore is a California assemblyman currently seeking the Republican
4 nomination for one of California's U.S. Senate seats. Justin Hart ("Hart") is the
5 DeVore campaign's Director of Internet Strategies and New Media. His primary
6 duty is to conduct online-based fundraising activities and otherwise get publicity
7 for the DeVore campaign. He does this through various means, such as creating
8 videos to be posted on DeVore's website and on YouTube.³ Hart's compensation
9 is directly tied to the amount of funds he brings in.

10
11 This case arises from two online videos produced by DeVore and Hart for
12 DeVore's campaign. The first contains the song "The Hope of November"
13 ("November"), a play on "Summer." DeVore was inspired to create the song in
14 March 2009 after seeing a Barack Obama ("Obama") sticker on a Toyota Prius,
15 which reminded him of the "DEADHEAD sticker" lyric from "Summer." DeVore
16 proceeded to revise the lyrics of "Summer" to create a song that pokes fun at
17 Obama, House Speaker Nancy Pelosi ("Pelosi"), and Obama's supporters. The
18 lyrics to "November" are attached in Appendix A.

19 Hart and DeVore decided to produce a campaign video using "November."
20 Hart downloaded a karaoke version of "Summer" which simulates the song's
21 instrumental track. Hart supplied the vocals for "November," attempting to
22 emulate Henley's style. He then produced the video by compiling images of
23 Obama, Pelosi, and a few others, and synchronized the "November" track with the
24 video. This video was posted to YouTube and other online sites sometime in late
25

26 ³ YouTube is a website which hosts videos posted by third parties like the DeVore
27 campaign.

1 March 2009.

2 Once Henley got wind of the Defendants' online video in early April 2009,
3 he sent a notice to YouTube under the Digital Millennium Copyright Act
4 ("DMCA"), 17 U.S.C. § 512, requesting that the video be removed, and YouTube
5 promptly complied.⁴ A few days later, DeVore sent a DMCA counter notification
6 to YouTube requesting that the video be reposted on the grounds that it constituted
7 parody. Meanwhile, DeVore decided to use a second Henley song for his
8 campaign. This time, DeVore and Hart created a campaign video featuring the
9 song "All She Wants to Do is Tax" ("Tax"), their take on "Dance."

10
11 "Tax" was written by DeVore, who modified the lyrics of "Dance" to
12 lampoon Barbara Boxer ("Boxer"), one of California's U.S. Senators and
13 Democratic Senatorial Candidate, and to criticize cap-and-trade and global-
14 warming policies. The lyrics to "Tax" are attached in Appendix B. Just as with
15 "November," Hart used an instrumental-only track of "Dance," supplied his own
16 vocals using DeVore's lyrics, and paired the song with a video he created using a
17 variety of online images and videos of, among others, Boxer, Al Gore, and Disney
18 character Scrooge McDuck. The Defendants posted the video to YouTube on or
19 about April 14, 2009. On April 17, 2009, this action was filed by Henley,
20 Campbell, and Kortchmar, alleging copyright infringement and violation of the
21 Lanham Act.

22 ⁴ Under the DMCA, a "service provider," such as YouTube, is not liable for copyright
23 infringement for material posted on its website by others so long as it promptly removes the
24 material upon receiving a notification of infringement from the copyright holder. See 17 U.S.C.
25 § 512(c). However, to avoid liability to the person who originally posted the allegedly infringing
26 material, the service provider must replace the material upon receiving a counter notification
27 from the original poster. Id. § 512(g).

1 The parties have filed cross-motions for summary judgment, each seeking
2 relief on Plaintiffs' First through Sixth Claims for Relief for direct, vicarious, and
3 contributory copyright infringement of each song and Henley's Seventh Claim for
4 Relief for false endorsement under the Lanham Act.⁵

5 II. LEGAL STANDARD

6
7 Summary judgment is appropriate only where the record, read in the light
8 most favorable to the nonmoving party, indicates that "there is no genuine issue as
9 to any material fact and . . . the moving party is entitled to a judgment as a matter
10 of law." Fed. R. Civ. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317,
11 323-24 (1986). Summary adjudication, or partial summary judgment "upon all or
12 any part of a claim," is appropriate where there is no genuine issue of material fact
13 as to that portion of the claim. Fed. R. Civ. P. 56(a), (b); see also Lies v. Farrell
14 Lines, Inc., 641 F.2d 765, 769 n.3 (9th Cir. 1981) ("Rule 56 authorizes a summary
15 adjudication that will often fall short of a final determination, even of a single
16 claim . . .") (internal quotation marks omitted).

17
18 Material facts are those necessary to the proof or defense of a claim, and are
19 determined by reference to substantive law. Anderson v. Liberty Lobby, Inc., 477
20 U.S. 242, 248 (1986). "[A] complete failure of proof concerning an essential
21 element of the nonmoving party's case necessarily renders all other facts
22 immaterial." Celotex, 477 U.S. at 323. A fact issue is genuine "if the evidence is
23 such that a reasonable jury could return a verdict for the nonmoving party."

24 ⁵ Plaintiffs have voluntarily dismissed their Eighth Claim for Relief, alleging violation of
25 the California Unfair Competition Law, California Business and Professions Code section 17200
26 et seq. Defendants have, in turn, voluntarily dismissed each of their six counterclaims. (Defs.'
27 Mot. Br. 1 n.1.)

1 Anderson, 477 U.S. at 248. To demonstrate a genuine issue, the opposing party
2 “must do more than simply show that there is some metaphysical doubt as to the
3 material facts. . . . [T]he nonmoving party must come forward with specific facts
4 showing that there is a genuine issue for trial.” Matsushita Elec. Indus. Co., Ltd. v.
5 Zenith Radio Corp., 475 U.S. 574, 586-87 (1986) (internal quotation marks and
6 citations omitted). In deciding a motion for summary judgment, “[t]he evidence of
7 the nonmovant is to be believed, and all justifiable inferences are to be drawn in his
8 favor.” Anderson, 477 U.S. at 255. Nevertheless, inferences are not drawn out of
9 the air, and it is the opposing party’s obligation to produce a factual predicate from
10 which the inference may be drawn. See Richards v. Nielsen Freight Lines, 602 F.
11 Supp. 1224, 1244-45 (E.D. Cal. 1985), aff’d, 810 F.2d 898, 902 (9th Cir. 1987).

12 The burden initially is on the moving party to demonstrate an absence of a
13 genuine issue of material fact. Celotex, 477 U.S. at 323. If the moving party
14 meets its burden, then the nonmoving party must produce enough evidence to rebut
15 the moving party’s claim and create a genuine issue of material fact. See id. at
16 322-23. If the nonmoving party meets this burden, then the motion will be denied.
17 Nissan Fire & Marine Ins. Co. v. Fritz Co., Inc., 210 F.3d 1099, 1103 (9th Cir.
18 2000). Where the parties have made cross-motions for summary judgment, the
19 Court must consider each motion on its own merits. Fair Hous. Council of
20 Riverside County, Inc. v. Riverside Two, 249 F.3d 1132, 1136 (9th Cir. 2001).
21 The Court will consider each party’s evidentiary showing, regardless of which
22 motion the evidence was tendered under. See id. at 1137.

23 III. DISCUSSION

24 A. Copyright Infringement

1 To prevail on a claim of copyright infringement, Plaintiffs must show “(1)
2 ownership of a valid copyright, and (2) copying of constituent elements of the
3 work that are original.” Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340,
4 361 (1991). The parties do not dispute that the Plaintiffs own valid copyrights to
5 “Summer” and “Dance,” nor that “November” and “Tax” copy substantial portions
6 of the originals. The parties only dispute whether the Defendants’ use of the
7 originals constitutes fair use.

8 1. Fair Use

9
10 Fair use is an exception to a copyright holder’s right to exclusive use of the
11 original work and its derivatives. It has been described as “a privilege in others
12 than the owner of the copyright to use the copyrighted material in a reasonable
13 manner without his consent.” Harper & Row, Publishers, Inc. v. Nation Enters.,
14 471 U.S. 539, 549 (1985) (quoting H. Ball, Law of Copyright & Literary Property
15 260 (1944)). The privilege reflects a recognition that some limited use of
16 copyrighted material is necessary to allow artists and authors to improve upon,
17 comment on, or criticize prior works. See id.; Campbell v. Acuff-Rose Music,
18 Inc., 510 U.S. 569, 575 (1994).

19 Section 107 of the Copyright Act codified the common law framework for
20 identifying fair use:

21
22 In determining whether the use made of a work in any particular case
23 is a fair use the factors to be considered shall include –

24
25 (1) the purpose and character of the use, including whether such
26 use is of a commercial nature or is for nonprofit educational
27

purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107. The analysis “permits and requires courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.” Campbell, 510 U.S. at 577 (quoting Stewart v. Abend, 495 U.S. 207, 236 (1990)) (internal brackets omitted). The factors are not winner-take-all categories to be tallied at the end to determine the prevailing party; they are intended to be carefully weighed case by case with an eye towards the policies underlying copyright protection. See id. “Nor may the four statutory factors be treated in isolation one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright.” Id. at 578; accord Dr. Seuss Enters., L.P. v. Penguin Books (“Dr. Seuss II”), 109 F.3d 1394, 1399 (9th Cir. 1997).

Application of the fair use doctrine is a mixed question of law and fact. Harper & Row, 471 U.S. at 560. Thus, where the material facts are not subject to dispute, summary judgment on the fair use question is appropriate. Fisher v. Dees, 794 F.2d 432, 436 (9th Cir. 1986). Because fair use is an affirmative defense to copyright infringement, the defendant bears the burden of proving fair use. Campbell, 510 U.S. at 590; Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146,

1158 (9th Cir. 2007).

1
2 Under the first factor, the “purpose and character of the use,” the Court
3 considers the extent to which the new work is “transformative.” Mattel, Inc. v.
4 Walking Mountain Prods., 353 F.3d 792, 800 (9th Cir. 2003). The new work must
5 add “something new, with a further purpose or different character, altering the first
6 with new expression, meaning, or message.” Id. (quoting Campbell, 510 U.S. at
7 579). The Court also considers whether the purpose of the new work was for- or
8 not-for-profit. Id.

9
10 The second factor, the “nature of the copyrighted work,” reflects a
11 recognition “that creative works are ‘closer to the core of intended copyright
12 protection’ than informational and functional works.” Id. at 803 (quoting Dr.
13 Seuss II, 109 F.3d at 1402).

14
15 The third factor “asks whether the amount and substantiality of the portion
16 used in relation to the copyrighted work as a whole, are reasonable in relation to
17 the purpose of copying.” Id. (quoting Dr. Seuss II, 109 F.3d at 1402) (internal
18 quotation marks omitted).

19 Under the fourth and final factor, the question is “whether actual market
20 harm resulted from the defendant’s use . . . and whether ‘unrestricted and
21 widespread conduct of the sort engaged by the defendant . . . would result in a
22 substantially adverse impact on the potential market’ for the original or its
23 derivatives.” Id. at 804 (quoting Campbell, 510 U.S. at 590). The relevant inquiry
24 is whether the new work tends to supplant or substitute for the potential market for
25 the original or its derivatives. Campbell, 510 U.S. at 592. Harm caused by
26 effective criticism or disparagement is not cognizable injury under the Copyright
27
28

Act. Id. at 591-92.

1
2 The Defendants' primary fair use argument is that their works constitute
3 parody. Parody is the use of some portion of a work in order to "hold[] it up to
4 ridicule," or otherwise comment or shed light on it. Dr. Seuss II, 109 F.3d at 1400-
5 01 (citation omitted). Courts have deemed parody worthy of protection within the
6 fair use framework. First, parody has been considered transformative because it
7 provides socially-valuable criticism or commentary of the subject work. Campbell,
8 510 U.S. at 579. Second, parodies are permitted to draw from the most creative
9 expressions because they "almost invariably copy publicly known, expressive
10 works." Id. at 586. Third, the parodist needs to use at least some portion of the
11 original because the effectiveness of parody depends on its ability to mimic or
12 "conjure up" the original. Id. at 580-81, 588. Finally, because the author is
13 unlikely to permit the use of his or her work to criticize or ridicule that work, a
14 parody is unlikely to supplant the market for the original or its derivatives. Id. at
15 592.

16
17 In the seminal case of Campbell v. Acuff-Rose Music, Inc., the Supreme
18 Court distinguished "between parody (in which the copyrighted work is the target)
19 and satire (in which the copyrighted work is merely a vehicle to poke fun at
20 another target)." Dr. Seuss II, 109 F.3d at 1400 (citing Campbell, 510 U.S. at 580).
21 The parodist is justified in using the original work because a parody's effectiveness
22 "necessarily springs from recognizable allusion to its object through distorted
23 imitation. Its art lies in the tension between a known original and its parodic twin."
24 Campbell, 510 U.S. at 588. The parodist has no alternative but to use the work.
25 See id. In contrast, the satirist who ridicules subjects unrelated to the work lacks
26 the same claim to use of the work, which the satirist "merely uses to get attention
27 or to avoid the drudgery in working up something fresh." Id. at 580. As the Court

put it:

1
2 Parody needs to mimic an original to make its point, and so has some
3 claim to use the creation of its victim's (or collective victims')
4 imagination, whereas satire can stand on its own two feet and so
5 requires justification for the very act of borrowing.

6
7 Id. at 580-81.

8
9 “The threshold question when fair use is raised in defense of a parody is
10 whether a parodic character may reasonably be perceived.” Id. at 582. This is not,
11 however, the end of the inquiry: “parody, like any other use, has to work its way
12 through the relevant factors and be judged case by case, in light of the ends of
13 copyright law.” Id. at 581. Indeed, the Supreme Court recognizes that parody is
14 not a binary question, but rather a matter of degree. See id. at 580 n.14. The
15 parodist that directly targets the original work has a greater justification for
16 appropriation than the parodist whose aim at the original is looser. See id. The
17 “loose” parodist has a greater burden of proving the necessity of the use and that
18 the parody does not risk superseding potential markets for the original. Id. at 580
19 n.14, 582 n.16.

20 Justice Kennedy, concurring in Campbell, cautioned courts to be wary of
21 post hoc rationalizations of parody. Id. at 600 (Kennedy, J., concurring). He held
22 the view that the defendant must demonstrate “[m]ore than arguable parodic
23 content,” and that “doubts about whether a given use is fair should not be resolved
24 in favor of the self-proclaimed parodist.” Id. at 599.

25
26 This case raises the somewhat novel issue of whether, under Campbell's
27

1 parody/satire distinction, criticism of the author of an original work falls on either
2 the parody or satire side of the line. In other words, is a work which appropriates
3 from the original to criticize the original's author — but does not directly criticize
4 the content of the original — validly classified as “parody”? The appellate courts
5 have yet to squarely address the issue,⁶ and the district courts that have are split.

6 In a recent case in the Southern District of New York, the district court flatly
7 rejected the argument that use of a work to criticize the work's author constitutes
8 parody under Campbell. See Salinger v. Colting (“Salinger I”), 641 F. Supp. 2d
9 250, 257 (S.D.N.Y. 2009), rev'd on other grounds, --- F.3d ----, No. 09-2878-cv,
10 2010 WL 1729126 (2d Cir. Apr. 30, 2010). In Salinger I, the defendant had
11 written a novel imagining the adventures of the character Holden Caulfield from
12 J.D. Salinger's Catcher in the Rye as a septuagenarian. Id. at 253-54, 258. The
13 defendant had included Salinger himself as a character in the novel, and in the
14 ensuing litigation argued that the novel was, in part, a parody of Salinger's
15 persona. Id. at 261. The court, at the preliminary injunction stage, held that a
16 work that only criticizes the author, and not the content, of the original does not
17 qualify as parody. Id. at 257, 261.

18 However, in another recent Southern District of New York case, the same
19 court seemingly accepted the “parody-of-the-author” fair use defense. See Bourne
20 Co. v. Twentieth Century Fox Film Corp., 602 F. Supp. 2d 499, 507 (S.D.N.Y.
21 2009). In Bourne, the defendants had written the song “I Need a Jew” with a tune
22 and lyrics similar to “When You Wish Upon a Star.” Id. at 501, 502. The
23

24 ⁶ The Second Circuit in Salinger v. Colting (“Salinger II”), --- F.3d ----, No. 09-2878-cv,
25 2010 WL 1729126 (2d Cir. Apr. 30, 2010), did note the lower court's rejection of a “parody-of-
26 the-author” fair use defense, but did not explicitly reject or endorse the lower court's holding on
27 that issue. See id. at *3, *12.

1 defendants argued that their song was intended in part to poke fun at Walt Disney’s
2 purported anti-Semitism. Id. at 507. Although Disney had not actually written the
3 song and did not own the copyright, but was merely associated with it, the court
4 accepted this argument as supporting a parodic character and granted summary
5 judgment for the defendant.⁷ Id. at 507-08, 511.

6 This split extends to southern California as well. In a case in the Central
7 District of California, the court found parody where the allegedly infringing work
8 targeted the artist rather than the art. See Burnett v. Twentieth Century Fox Film
9 Corp., 491 F. Supp. 2d 962, 968-69 (C.D. Cal. 2007). The defendants in Burnett
10 used an animated character in their television show resembling a character, the
11 Charwoman, played by Carol Burnett in a different show. Id. at 966. The
12 defendants argued that the use of Burnett’s character was intended to poke fun at
13 Burnett herself. Id. at 968. Upon the plaintiff’s objection that targeting Burnett
14 was not valid parody, the court found that “it is immaterial whether the target of
15 [the defendants’] ‘crude joke’ was Burnett, the Carol Burnett show, the
16 Charwoman, Carol’s Theme Music or all four.” Id. The court held that the
17 defendants’ use constituted parody because it put “Carol Burnett/the Charwoman
18 in an awkward, ridiculous, crude, and absurd situation in order to lampoon and
19 parody her as a public figure.” Id. at 969.

20 However, a court in the Southern District of California appears to have
21

22 ⁷ In Salinger I, the court distinguished its prior decision in Bourne on the grounds that
23 the targeting of Walt Disney in Bourne “reinforced and reiterated” the parodic purpose of
24 targeting the song itself because of the intimate association between Disney and the song. 641 F.
25 Supp. 2d at 261 n.4. Thus, under Salinger I’s reasoning, “parody-of-the-author” is not
26 sufficiently transformative on its own, but may serve to supplement or highlight a legitimate
27 parody targeting the original work.

1 reached the opposite conclusion. See Dr. Seuss Enters., L.P. v. Penguin Books
2 USA, Inc. (“Dr. Seuss I”), 924 F. Supp. 1559, 1568 (S.D. Cal. 1996). The
3 defendants in Dr. Seuss I mimicked the rhymes, illustrations, and packaging of
4 books by Theodor S. Geisel, better known as Dr. Seuss, to recount the O.J.
5 Simpson murder trial. Id. at 1561. The court, in its exposition on the parody/satire
6 distinction, made the following statement:

7 [T]he potential satirist has many alternatives to pilfering the protected
8 expression of a copyrighted work The satirist (or one intending to
9 parody an author but not any particular work) may freely evoke
10 another artist by using the artist’s general style. . . . Only when the
11 satirist wishes to parody the copyrighted work itself does the taking . .
12 . become permissible.

13 Id. at 1567-68 (emphasis added). This statement, however, appears to be dictum as
14 it relates to the “parody-of-the-author” issue because the defendants in the case did
15 not argue that they were targeting Geisel himself. See id. at 1569 (defendants
16 argued their book “suggest[ed] limits to the Seussian imagination,” i.e.,
17 “comment[ing] on the naivete of the original”).

18
19 The act of ridiculing and lampooning public figures is a rich part of our First
20 Amendment tradition and has been accorded special constitutional protections.
21 See, e.g., Hustler Magazine v. Falwell, 485 U.S. 46 (1988); N.Y. Times Co. v.
22 Sullivan, 376 U.S. 254 (1964). In the defamation context, for example, critics of
23 public figures have extra leeway to make charges against their targets. N.Y.
24 Times, 376 U.S. at 279-80 (public officials in a defamation action must prove that
25 defendants acted with “actual malice”). In granting this protection, the Court
26 recognized the social value of criticism of public figures and the dangers of
27

1 suppressing it. See id. at 269-70.

2 In many cases, the most effective tool of ridiculing a public figure — a time-
3 honored, First Amendment activity — is through that person’s own creations. This
4 is particularly true where a person’s fame derives from that person’s expressive
5 works, as the case often is with artists, musicians, authors, and the like. The First
6 Amendment demands that these public figures be open to ridicule, just as their
7 works should be. Yet without the ability to evoke their works — the very reason
8 these figures live in the public eye — a would-be parodist may lack an adequate
9 tool with which to lampoon. Cf. Smith v. Wal-Mart Stores, Inc., 537 F. Supp. 2d
10 1302, 1316 (N.D. Ga. 2008) (in trademark case, finding parody where the “Wal-
11 Mart” mark was used to evoke the company rather than the mark itself). In this
12 case, for example, the Defendants argue that they sought to poke fun at Henley, a
13 famous musician. The best, and perhaps only, way to conjure up Henley in a
14 manner recognizable to the public is through his music.

15 The courts in Salinger I and Dr. Seuss relied primarily on the phrasing of the
16 parody distinction in Campbell and its progeny in rejecting the “parody-of-the-
17 author” argument. Salinger I emphasized the Campbell definition of parody as
18 “the use of some elements of a prior author’s composition to create a new one that,
19 at least in part, comments on that author’s works.” 641 F. Supp. 2d at 257 (quoting
20 Campbell, 510 U.S. at 580) (emphasis added in Salinger I). However, Campbell’s
21 language does not necessarily preclude parodies targeting the author. In fact, the
22 Court recognized that parody resists a strict definition. See Campbell, 510 U.S. at
23 580 n.14. Under Campbell’s reasoning, rather than its precise phrasing, criticism
24 of the author via the author’s works may fit within the structure of protectable
25 parody.

1 First, such use may qualify as “transformative” under the “purpose” factor.
2 The purpose of an author-parodying work is to evoke the author in order to provide
3 socially-valuable criticism of the author, a public figure necessarily open to
4 ridicule.⁸ See id. at 580-81. Second, under the “nature of the copyrighted work”
5 factor, criticism of public figures through their work may require the use of well-
6 known creative expressions as a means to conjure up the figures in the public eye,
7 especially where a person’s fame arises from the work. See id. at 586. Third,
8 under the “amount used” factor, the necessity of referencing public figures through
9 their work may require the use of a least some portion of those works. See id. at
10 588. Finally, under the “effect on the market” factor, a parody lampooning the
11 author may be unlikely to supplant any potential market for the original or
12 derivatives thereof because of the unlikelihood that authors would license parodies
13 ridiculing themselves. See id. at 592 (“People ask . . . for criticism, but they only
14 want praise.” (citation omitted)); Fisher, 794 F.2d at 437 (“Self-esteem is seldom
15 strong enough to permit the granting of permission [for a parody] even in exchange
16 for a reasonable fee.”).

17 However, it is important to distinguish between a use which directly targets
18 the author for holding a particular view and a use which merely targets a view that
19 happens to be held by the author. See Bourne, 602 F. Supp. 2d at 507-08 (finding
20 parody where new work ridiculed Walt Disney for holding anti-Semitic views);
21 Burnett, 491 F. Supp. 2d at 968-69 (finding parody where use ridiculed Carol
22 Burnett’s wholesome image). The parodist targeting the author may be justified in
23 using the original work to conjure up the author, whereas the would-be parodist
24 who targets the author’s viewpoints generally is essentially creating satire and
25 therefore lacks the need to reference the author. Cf. Campbell, 510 U.S. at 580-81.

26 ⁸ The Court has no occasion to consider whether the same reasoning would apply if the
27 author was not a public figure.

1 Under this analysis, parody of the author would not be achieved merely by the
2 ironic use of the author's works to criticize the author's views (unless, of course,
3 those views are reflected in the work parodied). The would-be parodist that merely
4 criticizes the author's views (and not the author directly) simply lacks adequate
5 justification for using the author's work.

6 Ultimately, the Court need not determine on the facts of this case whether
7 any altered work that parodies the original's author would qualify as a
8 transformative parody under Campbell. Even assuming that "parody-of-the-
9 author" is a legitimate transformative purpose, the Defendants' songs do not satisfy
10 the fair use analysis, as discussed below. "Tax" does not target Henley at all, and
11 "November," which only implicitly targets Henley, appropriates too much from
12 "Summer" in relation to its slight jab at Henley and risks market substitution for
13 "Summer" or its derivatives.

14
15 On a related note, assuming that "parody-of-the-author" is legitimate fair
16 use, the parties debate whether it is necessary that the author actually hold that
17 attribute for which the author is being ridiculed. In this case, the Defendants assert
18 that they are poking fun at Henley because of his status as a member of the liberal
19 "Hollywood and entertainment elite." (Defs.' Mot. Br. 5; DeVore Decl. ¶ 5.)
20 Henley disputes that he is liberal and notes that he has donated to and supported
21 Republican candidates such as John McCain. (Pls.' Statement of Uncontroverted
22 Facts ("Pls.' SS") 31; Henley Decl. ¶¶ 22-23; Henley Supp. Decl. ¶ 9; Henley
23 Depo. at 59:15-24.) However, because the relevant question is whether "a parodic
24 character can reasonably be perceived," it does not matter whether Henley is liberal
25 or not. See Bourne, 602 F. Supp. 2d at 507-08 (finding that it did not matter
26 whether Walt Disney was actually anti-Semitic). The only inquiry under the
27 "parody-of-the-author" theory is whether an audience could reasonably perceive
28

1 the Defendants’ songs as poking fun at Henley for his supposed liberal views. Of
2 course, where a parodist’s charge is clearly false, this may demonstrate the lack of
3 actual parodic character and expose the parodist’s argument as a post hoc
4 rationalization.

5 With this framework in mind, and assuming that “parody-of-the-author” is a
6 legitimate transformative purpose, the Court now considers the four primary
7 elements of the fair use inquiry for each of the allegedly infringing songs.

8
9 i. *Purpose and Character of the Use*

10
11 It is under this factor where the Court considers whether “a parodic character
12 may reasonably be perceived.” Campbell, 510 U.S. at 582. The Court first tackles
13 “November,” the Defendants’ take on “Summer.”

14
15 “Summer” is, at least on the surface, a song about nostalgia for a lost
16 summer romance. The narrator laments the fact that summer is over and that his
17 love interest has gone. See Appendix A (“Nobody on the road / Nobody on the
18 beach / I feel it in the air / The summer’s out of reach”; “I never will forget those
19 nights / I wonder if it was a dream / . . . / Now I don’t understand / What happened
20 to our love.”). Yet the narrator can still picture his love interest and longs to
21 rekindle the romance. See id. (“But I can see you – / Your brown skin shinin’ in
22 the sun / . . . / And I can tell you my love for you will still be strong / After the
23 boys of summer have gone.”).

24 The Defendants acknowledge this general theme of nostalgia but argue that
25 the final verse contains a subtle political theme. The narrator states: “Out on the
26 road today, / I saw a DEADHEAD sticker on a Cadillac / A little voice inside my
27

1 head said, / ‘Don’t look back. You can never look back.’ / . . . / Those days are
2 gone forever / I should just them go.” Id. As the Defendants interpret the verse,
3 the narrator is bemoaning the failure of 1960’s liberal politics (symbolized by the
4 Deadhead sticker) to change the status quo (symbolized by the Cadillac). (Defs.’
5 Mot. Br. 6.) This interpretation finds support in an interview Henley gave to
6 Rolling Stone, explaining the last verse of “Summer”: “We raised all that hell in
7 the Sixties, and then what did we come up with in the Seventies? . . . After all our
8 marching and shouting and screaming didn’t work, we withdrew and became
9 yuppies and got into the Me Decade.” (Arledge Decl., Ex. 3.)⁹

10 The Defendants argue that “November” parodies the original by using its
11 themes of nostalgia and disillusionment to mock Henley and other Obama
12 supporters who, in “November,” look back wistfully at Obama’s campaign and
13 bemoan his failure to deliver on the promised “hope.” (Defs.’ Mot. Br. 6.) This,
14 however, does not comment on or criticize the content of “Summer” — the themes
15 of nostalgia and disillusionment in general, or on summer romances, Deadheads, or
16 Cadillacs in particular. Rather, “November” uses those themes and devices to
17 mock a separate subject entirely, namely Obama and his supporters. Even the
18 “Summer” narrator’s supposed disappointment with 1960’s politics is merely
19 echoed, rather than critiqued or ridiculed, by the “November” narrator’s
20 disappointment with Obama’s post-election performance. See Appendix A.

21 In Salinger I, the court found that the defendant, who wrote an “unofficial
22

23 ⁹ The Plaintiffs object to the Rolling Stone article as hearsay. See Larez v. City of Los
24 Angeles, 946 F.2d 630, 642 (9th Cir. 1991) (a reporter’s transcriptions of a party’s statement is
25 hearsay). However, the Court declines to exclude this evidence for summary judgment purposes
26 in recognition that the Defendants may be able to make the reporter available for cross-
27 examination at trial.

1 sequel” to Catcher in the Rye, had failed to demonstrate a probability of success on
2 his parody defense because the sequel, rather than commenting on the character of
3 Holden Caulfield, merely repeated the elements of the character in a new setting.
4 See 641 F. Supp. 2d at 258-260 (“It is hardly parodic to repeat that same exercise
5 in contrast, just because society and the characters have aged.”). The defendant
6 had simply taken the Caulfield character, aged him sixty years, and placed him in a
7 modern environment, without giving legitimate commentary on the character. Id.

8 Similarly here, the Defendants’ song simply takes the narrator of “Summer,”
9 who is (supposedly) disappointed by the result of 1960’s politics and places him in
10 the current political environment, where he is disappointed by the result of
11 Obama’s election. (Compare “Out on the road today, / I saw a DEADHEAD
12 sticker on a Cadillac / A little voice inside my head said, / ‘Don’t look back. You
13 can never look back.’ / I thought I knew what love was / What did I know? / Those
14 days are gone forever / I should just let them go,” with “Out on the road today, / I
15 saw a [sic] OBAMA sticker on a Cadillac / A little voice inside my head said, /
16 ‘Don’t look back. You can never look back.’ / We thought we knew what love was
17 / What did we know? / Those days are gone forever / We should just let them go”).
18 “November” simply does not comment on or critique the disappointment expressed
19 in “Summer.”

20 The Defendants also argue that “November” pokes fun at Henley himself as
21 a supporter of Obama. According to the Defendants, Henley can be seen as the
22 narrator of “November” — given that he was the singer of “Summer” — who is
23 disappointed and disillusioned with Obama and nostalgic for the hopeful days of
24 Obama’s campaign. As discussed above, assuming that criticism of the author can
25 qualify as parody, it must target the author directly, as opposed to targeting the
26 author’s views generally. Here, “November” pokes fun at Obama and the naivete
27

1 and subsequent disappointment of his supporters, which includes Henley, the
2 song's narrator. Thus, assuming the validity of "parody-of-the-author," the Court
3 finds that the parodic theme — the lampooning of Henley himself — is reasonably
4 perceptible. It is, however, a relatively minor element of the main satirical purpose
5 of the song — targeting Obama and his supporters.

6 "Dance" contains more explicit social commentary than "Summer." The
7 song appears to recount an American couple's trip to a foreign country in the midst
8 of revolutionary unrest. See Appendix B ("They're pickin' up prisoners and
9 puttin' 'em in a pen / . . . / Rebels been rebels since I don't know when / . . . / Well,
10 we barely made the airport for the last plane out / As we taxied down the runway I
11 could hear the people shout / They said, 'Don't come back here Yankee!"). The
12 woman, however, ignores the unrest and simply wants to enjoy herself and dance.
13 See id. ("She can't feel the heat comin' off the street / She wants to party / She
14 wants to get down / All she wants to do is . . . dance.")

15
16 The Defendants argue that the song can be interpreted as a criticism of
17 American foreign policy in Latin America in the 1980's, when the song was
18 released, and the American public's indifference toward the situation.¹⁰ (Defs.'
19 Mot. Br. 6-7.) Even taking the Defendants' interpretation as true,¹¹ their song does
20 not comment on "Dance," but instead uses the same themes to comment on entirely
21 different subjects, namely Boxer, taxation, global warming, and the proposed cap-

22 ¹⁰ The Defendants rely in part on an online music video alleged to be Henley's. (See
23 Supp. Arledge Decl. ¶ 3.) Because this evidence was not produced during discovery pursuant to
24 the Plaintiffs' request, the Court declines to consider it. Fed. R. Civ. P. 37(c)(1); Yeti by Molly,
25 Ltd. v. Deckers Outdoor Corp., 259 F.3d 1101, 1106-07 (9th Cir. 2001).

26 ¹¹ Both Kotchmar, who wrote the song, and Henley, who performed it, dispute this
27 interpretation. (Kortchmar Decl. ¶ 7; Supp. Henley Decl. ¶ 7.)

1 and-trade program. In “Tax,” American taxpayers are upset with “back-breaking”
2 taxes and the cap-and-trade program, see Appendix B (“They’re pickin’ up the
3 taxpayers and puttin’ ‘em in a jam / . . . / Cap and trade program – from D.C. Inc. /
4 . . . / They push and pull us right over the brink / . . . / And we finished up the
5 campaign she could hear the people shout / They said, ‘Don’t come back here
6 Boxer!’”), but Boxer either ignores or is oblivious to the taxpayers’ unhappiness
7 and insists on more taxation, see id. (“She can’t feel the heat comin’ off the street /
8 She wants to party / She wants to get down / All she wants to do is . . . tax.”).
9 “Tax” makes no mention of American foreign policy, Latin America, or the apathy
10 of the American public. Instead, as with “November,” the Defendants evoked the
11 same themes of the original in order to attack an entirely separate subject. This is
12 satire, not parody.

13 Nor does “Tax” directly target either Henley or Kortchmar, the author of
14 “Dance.” Unlike “November,” which at least implicitly references Henley as the
15 song’s narrator, “Tax” makes no implicit or explicit reference to Henley or
16 Kortchmar, much less ridicule them. The song may mock political views that
17 Henley allegedly supports, but that is insufficient justification for appropriating
18 Henley’s works, as discussed above. The Defendants have innumerable
19 alternatives with which to mock Boxer and her policies.

20 The Defendants also argue that, even if their works are more satirical than
21 parodic, they may still constitute fair use, citing Blanch v. Koons, 467 F.3d 244,
22 247 (2d Cir. 2006). This is undoubtedly true; parody is not the only form of fair
23 use. However, as noted in Campbell, satire faces a higher bar for fair use because
24 it requires greater justification for appropriating the original work.

25
26 In Blanch, a painting by artist Jeff Koons incorporated part of the plaintiff’s
27
28

1 photograph. Id. at 247-48. Koons had scanned the photograph into a computer,
2 removed all but the legs and feet of a woman in the photograph, adjusted the
3 orientation of the legs, modified the coloring, and set it in a landscape painting
4 among three other sets of women’s legs hovered above images of confections. Id.
5 The court found that the use was fair, despite being mostly satire rather than
6 parody. Id. at 254-55, 259. The court noted the transformative nature of the work,
7 id. at 253, the fact that it copied only the most uncreative portions of the original,
8 id. at 257-58, and the plaintiff’s admissions that Koons’s work did not harm the
9 market for her work, id. at 258.

10 The Defendants’ songs are manifestly distinguishable from the work in
11 Blanch. Blanch involved an intense transformation of a fashion photograph to
12 create a museum piece. Here, the Defendants made minimal changes to the lyrics
13 of the Plaintiffs’ songs to make new songs about different subjects. This is hardly
14 transformative in the manner of Blanch. Moreover, as discussed below, the
15 Defendants have borrowed heavily from the creative aspects of “Summer” and
16 “Dance,” unlike Koons’s minor appropriation in Blanch.

17 The “purpose” factor also requires the Court to consider whether the
18 defendant’s use is commercial or noncommercial. See 17 U.S.C. § 107; Harper &
19 Row, 471 U.S. at 562. “The crux of the profit/nonprofit distinction is not whether
20 the sole motive of the use is monetary gain but whether the user stands to profit
21 from exploitation of the copyrighted material without paying the customary price.”
22 Id.

23
24 The Plaintiffs argue that use of the songs in campaign advertisements
25 qualifies as commercial use under the Harper & Row standard because DeVore
26 stands to get publicity for his campaign and openly hoped that his use of Henley’s
27

1 music would spur campaign donations. They note that each of the videos produced
2 by the Defendants contained a link to DeVore's campaign website, where one
3 could make online donations to the campaign, and that emails sent out by the
4 campaign to publicize the videos contained a link directly to DeVore's donation
5 webpage. (Pls.' SS 40-41, 120-124.)

6 District courts that have actually considered whether campaign
7 advertisements are commercial in the fair use context come down on the side of
8 noncommercial. See Mastercard Int'l Inc. v. Nader 2000 Primary Comm., No. 00
9 Civ.6068(GBD), 2004 WL 434404, at *12 (S.D.N.Y. Mar. 8, 2004); Keep
10 Thompson Governor Comm. v. Citizens for Gallen Comm., 457 F. Supp. 957, 961
11 (D.N.H. 1978). However, in the Ninth Circuit, "monetary gain is not the sole
12 criterion[,] particularly in a setting where profit is ill-measured in dollars."
13 Worldwide Church of God v. Phila. Church of God, Inc., 227 F.3d 1110, 1117 (9th
14 Cir. 2000) (quoting Weissman v. Freeman, 868 F.2d 1313, 1324 (2d Cir. 1989))
15 (internal alterations omitted).

16 In Worldwide Church, a church made verbatim copies of a religious text for
17 distribution among its members. Id. at 1113. The copyright owner sued for
18 infringement and the defendant church asserted fair use. Id. at 1114-15. On the
19 "profit/nonprofit" factor, the court noted that it did not matter whether the
20 defendant actually received monetary benefit:

21
22 [H]aving in mind that like academia, religion is generally regarded as
23 "not dollar dominated," [the] use unquestionably profits [the
24 defendant] by providing it at no cost with the core text essential to its
25 members' religious observance, by attracting through distribution of
26 [the text] new members who tithe ten percent of their income to [the
27

1 defendant], and by enabling the ministry’s growth. . . . It is beyond
2 dispute that [the defendant] “profited” from copying [the text] – it
3 gained an “advantage” or “benefit” from its distribution and use of
4 [the text] without having to account to the copyright holder.

5 Id. at 1118.

6
7 Like the church in Worldwide Church, which stood to gain parishioners
8 through the unlicensed use of the plaintiff’s copyrighted work, DeVore and Hart
9 stood to gain publicity and campaign donations from their use of Henley’s music.
10 In fact, the videos contained links directing viewers to the DeVore campaign
11 website, encouraging them to donate. Thus, under the reasoning of Worldwide
12 Church, the Defendants “profited” from their use by gaining an advantage without
13 having to pay customary licensing fees to the Plaintiffs.¹² Id. In fact, Hart himself
14 directly profited, as his compensation was tied to the amount of funds he raised.
15 (Pls.’ SS 38.)

16
17 Accordingly, both songs are used for commercial purposes under the fair use
18 analysis, which weighs against the Defendants. The fact that “Tax” does not
19 constitute parody also weighs against the Defendants. Assuming that “parody-of-
20 the-author” is legitimate transformation under Campbell, “November’s” implicit
21 targeting of Henley weighs slightly in the Defendants’ favor.

22 ii. *Nature of the Copyrighted Work*

23
24 There is no dispute that the Plaintiffs’ works are expressive and at the core
25

26 ¹² Significantly, the Defendants paid licensing fees for video footage used in the “Tax”
27 video, (Pls.’ SS 115), but paid no fee for the use of the Plaintiffs’ music.

1 of copyright protection. However, with respect to “November,” which may have
2 some parodic character, this factor does not weigh heavily in the overall analysis in
3 recognition that parodies “invariably copy publicly known, expressive works.”
4 Campbell, 510 U.S. at 586.

5 “Tax,” on the other hand, has little claim to parody, as discussed above.
6 Thus, the fact that “Tax” borrows from a musical composition, a highly expressive
7 work that is at the core of copyright, weighs against the Defendants in the fair use
8 balancing.

9
10 iii. *Amount and Substantiality of the Portion Used*

11
12 In the parody context, the third factor turns on “the persuasiveness of a
13 parodist’s justification for the particular copying done, . . . [;] the extent of
14 permissible copying varies with the purpose and character of the use.” Campbell,
15 510 U.S. at 586-87. The analysis of this factor will “also tend to address the
16 fourth, by revealing the degree to which the parody may serve as a market
17 substitute for the original or potentially licensed derivatives.” Id. at 587.

18
19 Because a parody must be able to conjure up the work commented on (or
20 possibly the work’s author), at least some copying of a work is permitted. Id. at
21 588. “[U]sing some characteristic features cannot be avoided.” Id. However, as
22 the Supreme Court stated:

23
24 Once enough has been taken to assure identification, how much more
25 is reasonable will depend, say, on the extent to which the song’s
26 overriding purpose and character is to parody the original or, in
27 contrast, the likelihood that the parody may serve as a market

substitute for the original.

1
2 Id.; accord Dr. Seuss II, 109 F.3d at 1400 (“[T]he parodist is permitted a fair use of
3 a copyrighted work if it takes no more than is necessary to ‘recall’ or ‘conjure up’
4 the object of his parody.”); but see Burnett, 491 F. Supp. 2d at 970 (“[T]here is no
5 requirement that ‘parodists take the bare minimum amount of copyright material
6 necessary to conjure up the original work.’” (citation omitted, emphasis in
7 original)). A parodist is generally permitted greater license to borrow when
8 parodying music: “Like a speech, a song is difficult to parody effectively without
9 exact or near-exact copying. . . . This ‘special need for accuracy,’ provides some
10 license for ‘closer’ parody.” Fisher, 794 F.2d at 439.

11
12 It is undisputed that both “November” and “Tax” borrow heavily from the
13 respective originals. The Defendants used karaoke tracks of each song as
14 background and Hart supplied vocals. (Pls.’ SS 58-59, 111.) The melodies remain
15 identical, as do the rhyme scheme and syntax. (Pls.’ SS 53-54, 104.) While the
16 Defendants changed some of the lyrics, 65% of the “Summer” lyrics and 74.7% of
17 the “Dance” lyrics were copied verbatim. (Pls.’ SS 152.) This factor turns on
18 whether such extensive copying was justified.

19
20 As discussed above with respect to the first factor, “Tax” is almost entirely
21 satirical in nature and contains little or no parodic character. It therefore lacks the
22 parody justification for appropriation. Otherwise, the transformation of the work is
23 minimal — while their alterations somewhat change the meaning, the Defendants
24 copied the music, rhyme scheme, and syntax almost entirely. The amount
25 borrowed is excessive in relation to the transformation.

26 With “November,” the question is much closer, assuming legitimate parodic
27
28

1 character. As discussed above, “November” may have some parodic element — it
2 implicitly pokes fun of Henley as a disillusioned Obama supporter. It may
3 therefore be justified in using at least some of “Summer” in order to evoke
4 Henley’s image. However, this does not necessarily justify the extent to which
5 “November” copies. In Campbell, the Court found that the defendant’s song
6 commented on the naivete of the original work. 510 U.S. at 583. The defendants’
7 song borrowed the opening riff and first line of the original, but substantially
8 changed the lyrics, added new musical elements, and altered the beat of the
9 original. Id. at 589. Nevertheless, the Court remanded the case for determination
10 of whether the amount taken — just the opening riff and the opening line — was
11 excessive in relation to the parodic element. Id.

12 The Defendants’ copying in “November” exceeds that in Campbell, where
13 the Court declined to decide the fair use question despite finding legitimate parodic
14 purpose. See id. at 589. Indeed, the amount of the Defendants’ copying goes far
15 beyond anything that has been found to be fair use in the parody context. See, e.g.,
16 Fisher, 794 F.2d at 438-39 (29-second recording); Bourne, 602 F. Supp. 2d at 509-
17 10 (new melody meant to evoke rather than copy original, with parodic lyrics);
18 Burnett, 491 F. Supp. 2d at 970 (18-second scene of Carol Burnett); Mastercard,
19 2004 WL 434404, at *14 (majority of parody involved original work by parodist);
20 Abilene Music, 320 F. Supp. 2d at 93 (only three lines from original, which were
21 altered in word, melody, and style); Elsmere Music, 482 F. Supp. at 744 (only four
22 notes and two words taken from 100-measure and 45-word song). Indeed, the
23 Defendants’ appropriation approaches or exceeds the amounts borrowed in many
24 cases where courts rejected the fair use defense. See, e.g., Dr. Seuss II, 109 F.3d at
25 1402-03 (defendants copied visual elements of main character and rhyme scheme
26 but substantially changed language); MCA, 677 F.2d at 185 (defendants merely
27 substituted dirty lyrics into song); Walt Disney Prods. v. Air Pirates, 581 F.2d 751,

1 757-58 (9th Cir. 1978) (defendants copied visual elements of animated characters
2 rather than evoking them); Columbia Pictures, 11 F. Supp. 2d at 1185-86
3 (defendants copied the “total ‘look and feel’” of plaintiff’s poster and merely
4 substituted character).

5 The Defendants’ only (potentially) legitimate justification for the extensive
6 copying of “Summer” is the necessity of evoking Henley. While this may allow
7 for some appropriation, the Court finds that the amount borrowed goes far beyond
8 that reasonably necessary to conjure up Henley. The Defendants did not take a
9 portion of the song or alter the melody — they took virtually everything. Many of
10 the “November” lyrics do not serve the purpose of ridiculing Henley and drift into
11 pure satire, targeting Obama and Nancy Pelosi. See Appendix A (“Obama
12 overload / Obama overreach / We feel it everywhere / Trillions in the breach /
13 Empty bank, empty Street / Dollar goes down alone / Pelosi’s in the House / So we
14 now all must atone.”). The Defendants argue that a lesser amount, a 30-second
15 snippet perhaps, would have diluted the parody’s impact and they would have been
16 unable to “convey all of the political and parodic points they wished to make.”
17 (Defs.’ Mot. Br. 12.) However, the parodic element, if any, of “November” is its
18 lampooning of Henley, not of Obama, Pelosi, or their supporters generally. Using
19 Henley’s music to make those political points is not justified under Campbell.

20 iv. *Effect of the Use on the Potential Market*

21
22 Under the “market effect” factor, the Court focuses on the extent to which
23 the Defendants’ works usurp the potential market for the originals or their
24 derivatives. Campbell, 510 U.S. at 592. It is not relevant that a use may damage
25 the original’s value through criticism. Id. at 591-92. “[T]he role of the courts is to
26 distinguish between ‘biting criticism that merely suppresses demand and copyright
27

1 infringement, which usurps it.” Id. at 592 (quoting Fisher, 794 F.2d at 438)
2 (internal brackets omitted).

3 This analysis requires consideration of more than just the market effect of
4 the particular infringement at issue. Courts are to consider “whether unrestricted
5 and widespread conduct of the sort engaged in by the defendant . . . would result in
6 a substantially adverse impact on the potential market’ for the original.” Id. at 590
7 (citation omitted). The burden is on the defendant to “bring forward favorable
8 evidence” that potential markets will not be harmed. Dr. Seuss II, 109 F.3d at
9 1403. “[U]ncontroverted submissions that there was no likely effect on the
10 market” do not suffice. See id. (quoting Campbell, 510 U.S. at 590).

11
12 With respect to market impact on the originals, the Defendants point out that
13 their songs were part of freely-available internet videos and were not sold in any
14 format. Moreover, they note Hart’s apparent lack of talent as a vocalist in
15 suggesting that their songs are unlikely to supplant the market for the original. The
16 Plaintiffs seem to agree that Hart’s musical stylings are unlikely to threaten
17 Henley’s. (Henley Depo. at 9:4-13, 103:20-104:14; Campbell Depo. at 14:15-
18 16:4; Kortchmar Depo. at 103:9-24.)

19 However, the Court does not find that the Defendants have made an
20 adequate showing on this factor. The question is not whether “November” and
21 “Tax” specifically threaten the market for the original; the question is whether
22 widespread dissemination of similar satirical spins on the Plaintiffs’ music will
23 harm the market for the originals. See Campbell, 510 U.S. at 590. Relevant to this
24 inquiry is the fact that the Defendants have taken the entire musical composition
25 and have changed a minimal amount of lyrics. The Court cannot say as a matter of
26 law that widespread use in a similar manner would not harm the market for the
27

1 originals.

2 The parties also dispute the effect on the market for derivative works. The
3 Defendants' primary argument is that there is no market for licensed use of the
4 works because the Plaintiffs refuse to license their works. (Pls.' SS 13; Henley
5 Depo. at 90:25-91:9.) This is disputed, as the Plaintiffs have licensed their works
6 for satirical or other commercial uses in the past and intend to consider licensing
7 their works in the future.¹³ (Pls.' SS 10, 13, 14; Henley Depo. at 91:10-14.)
8 Moreover, whether the Plaintiffs have actually permitted licensing is irrelevant
9 because the copyright laws protect the "potential market" for derivatives. Castle
10 Rock Entm't, Inc. v. Carol Publ'g Group, Inc., 150 F.3d 132, 145-46 (2d Cir.
11 1998) ("Although [plaintiff] has evidenced little if any interest in exploiting this
12 market for derivative works . . . , the copyright law must respect that creative and
13 economic choice."). "Even an author who had disavowed any intention to publish
14 his work during his lifetime was entitled to protection of his copyright, first,
15 because the relevant consideration was the 'potential market' and, second, because
16 he has the right to change his mind." Worldwide Church, 227 F.3d at 1119 (citing
17 Salinger v. Random House, Inc., 811 F.2d 90, 99 (2d Cir. 1987)); accord Salinger
18 I, 641 F. Supp. 2d at 268. The Defendants offer no evidence demonstrating that
19 their songs would not usurp the potential licensing market for remakes or remixes
20 of the Plaintiffs' songs, should they choose to license them.

21 Indeed, the Plaintiffs have shown evidence that the Defendants' use does
22 supplant the market for derivatives of "Summer" and "Dance." The Plaintiffs'
23 expert testifies that licensees and advertisers do not like to use songs that are
24

25 ¹³ Campbell once licensed the song "Stop Draggin' My Heart Around," performed by
26 Stevie Nicks, to Weird Al Yankovic for his satirical remake, "Stop Draggin' My Car Around."
27 (Pls.' SS 14.)

1 already associated with a particular product or cause. (Pls.’ SS 155-58.) The
2 Defendants argue that this sort of harm is not market-substitution. The Court
3 disagrees. The advertisers would be deterred from using the Plaintiffs’ music
4 because it has been used before, not because of the particular association with
5 DeVore’s message (though that may impact the valuation as well). (Pls.’ SS 155-
6 58.) This injury is the very essence of market substitution.

7 Therefore, with respect to “Tax,” which does not have significant parodic
8 character, the Defendants fail to meet their burden of demonstrating the absence of
9 harm to the potential market for “Dance” or its derivatives.

10
11 However, with respect to “November,” the analysis is a bit different because
12 “November” does target Henley in part, which, as discussed above, may be a
13 legitimate parodic purpose. Because Henley would be unlikely to license use of
14 his song to ridicule himself, such a song serves a different market than the original
15 or its derivatives. See Fisher, 794 F.2d at 438. On the other hand, the alleged
16 parodic element of “November” is slight in comparison to its main satirical thrust
17 at Obama and his supporters generally. It may thus have some effect on the market
18 for satirical versions of “Summer.” Indeed, the substantial amount of material
19 borrowed from “Summer” heightens the likelihood of market substitution even if
20 there is some parodic element. See Campbell, 510 U.S. at 593 n.24. Because
21 “Summer” and “November” are so similar in style and form, the Court cannot
22 presume that there would be no derivative market usurpation, and the Defendants
23 present no affirmative evidence of its absence.

24 Though it is a closer question than with regard to “Tax” — assuming
25 legitimate parody — the Court finds that the Defendants have not demonstrated a
26 lack of potential market harm by “November.”

v. *Aggregate Assessment*

1
2 The fair use analysis involves a delicate balancing of the four factors with an
3 eye towards the purposes of copyright. “The doctrine has been said to be ‘so
4 flexible as virtually to defy definition.’” Princeton Univ. Press v. Mich. Document
5 Servs., Inc., 99 F.3d 1381, 1392 (6th Cir. 1996) (quoting Time Inc. v. Bernard Geis
6 Assocs., 293 F. Supp. 130, 144 (S.D.N.Y. 1968)). The case-by-case analysis
7 resists bright-line determinations and the resulting decisions inevitably represent a
8 sort of rough justice.

9
10 That said, the Defendants’ song “Tax” does not present a difficult question.
11 The song is pure satire which fails to take aim at the original or its author. It
12 therefore lacks justification to borrow from “Dance,” which, as a musical
13 composition, lies at the core of copyright protection. And it does far more than
14 borrow from “Dance” — it appropriates the entire melody, rhyme scheme, syntax,
15 and a majority of the lyrics. The Defendants have also failed to show that
16 widespread use of this and similar satirical songs would not affect either the market
17 for the original or potential derivatives. “Tax” is clearly not fair use.

18
19 “November,” on the other hand, presents a closer question, assuming that
20 targeting the author is a legitimate parodic purpose. Although it primarily targets
21 Obama, it does, in part, lampoon Henley as an Obama supporter. It may thus
22 contain some parodic element and would be justified in appropriating some of
23 “Summer.” However, “November” goes far beyond what is necessary to conjure
24 up Henley to hold him up to ridicule. As with “Tax,” “November” copies the
25 melody, rhyme, syntax, and most of the lyrics, and the lyrics are mostly satirical in
26 nature. Given the extent of the copying, the Defendants have not met their burden
27 of demonstrating the absence of market impact. Although the Court finds this to

1 be a closer question than “Tax,” the Defendants have not met their burden of
2 demonstrating that “November” constitutes fair use.

3 As noted above, the parties do not dispute that the Plaintiffs own a copyright
4 to “Summer” and “Dance,” or that the Defendants’ songs “November” and “Tax”
5 copy substantial portions of those songs. Because the Defendants have failed to
6 meet their burden of establishing a fair use defense, the Plaintiffs are entitled to
7 summary judgment on their direct copyright infringement claim.

8
9 2. Vicarious and Contributory Infringement

10
11 The parties each moved for summary judgment on the Plaintiffs’ claims for
12 vicarious and contributory infringement. “[C]ontributory infringement requires
13 proof that a defendant ‘(1) has knowledge of a third party’s infringing activity, and
14 (2) induces, causes, or materially contributes to the infringing conduct.’” Dream
15 Games of Ariz., Inc. v. PC Onsite, 561 F.3d 983, 995 (9th Cir. 2009) (quoting
16 Perfect 10, Inc. v. Visa Int’l Serv. Ass’n, 494 F.3d 788, 795 (9th Cir. 2007)).
17 “Vicarious infringement requires proof that ‘that the defendant exercises the
18 requisite control over the direct infringer and that the defendant derives a direct
19 financial benefit from the direct infringement.’” Id. (quoting Amazon.com, 487
20 F.3d at 729).

21 With respect to DeVore, the undisputed facts compel the grant of summary
22 judgment to the Plaintiffs on the contributory and vicarious infringement claims. It
23 is undisputed that DeVore knew that Hart made and distributed the infringing
24 videos and in fact had materially contributed to the creations by writing the songs.
25 (Pls.’ SS 51, 56.) DeVore also had supervisory control over Hart, one of his
26 campaign managers, and directly benefitted from the infringement, as discussed
27

1 above in Part III.A.1.i. (Pls.’ SS 33.)

2 The undisputed evidence also shows that Hart suggested making the internet
3 videos, thereby inducing DeVore’s acts of infringement. (Pls.’ SS 56.) He is
4 therefore liable for contributory infringement. However, because Hart did not
5 exercise any supervisory control over DeVore, he is not vicariously liable. (Pls.’
6 SS 33.)

7
8 3. Willful Infringement

9
10 Infringement of a copyright is willful where the defendant either knowingly
11 infringes or acts in reckless disregard as to infringement. In re Barboza, 545 F.3d
12 702, 707-08 (9th Cir. 2008). “[O]ne who has been notified that his conduct
13 constitutes copyright infringement, but who reasonably and in good faith believes
14 the contrary, is not ‘willful’ for these purposes.” Princeton, 99 F.3d at 1392
15 (quoting Melville B. Nimmer & David Nimmer, 3 Nimmer on Copyright §
16 14.04[B][3] (1996)). Thus, in the face of evidence indicating willfulness, the
17 defendant “must not only establish its good faith belief in the innocence of its
18 conduct, it must also show that it was reasonable in holding such a belief.” Peer
19 Int’l Corp. v. Pausa Records, Inc., 909 F.2d 1332, 1336 (9th Cir. 1990).

20 The undisputed evidence indicates that DeVore and Hart were aware that
21 their use of the music would infringe but for their alleged belief that the use was
22 fair. DeVore was aware of the problems campaigns have had licensing music and
23 asked Hart before and after the lawsuit, “hey, you know, you got the rights to this,
24 right?” (Pls.’ SS 43, 44.) The Defendants paid the Wall Street Journal
25 approximately \$3,500 for the use of a copyrighted article, (Pls.’ SS 47), and paid
26 licensing fees for certain video footage used in the “Tax” video, (Pls.’ SS 115).

1 Hart himself licensed his own images and advised others on how to avoid cease-
2 and-desist letters for the online use of copyrighted images. (Pls.’ SS 46; Hart
3 Depo. at 278:11-279:22.)

4 Therefore, the willfulness issue turns on whether the Defendants had a good
5 faith belief that their use constituted fair use and whether that belief was
6 reasonable. The Plaintiffs have presented substantial evidence that the Defendants
7 did not have good faith belief that their songs constituted fair use. Upon receiving
8 notice that Henley had requested that YouTube take down the “November” video,
9 DeVore “high-fiv[ed]” one of his staff, believing that his campaign “had struck a
10 vein of gold.” (Pls.’ SS 82.) DeVore hoped that the dispute would get nationwide
11 media attention and spur campaign donations. (Pls.’ SS 86-87.) DeVore decided
12 to counter notify YouTube under the DMCA to get the video reposted and did so
13 without consulting with a copyright attorney.¹⁴ (Pls.’ SS 90-91, 96-97.) He also
14 arranged to have the videos hosted on other servers. (Pls.’ SS 99.) He testified
15 that he “made the calculation . . . that perhaps the earned media value would
16 outweigh the time and effort and diversion and campaign resources in fighting the
17 fight.” (Pls.’ SS 95.)

18 After the Plaintiffs’ infringement notification, DeVore also posted an online
19 article promising to “look[] for every opportunity to turn any Don Henley work I
20 can into a parody of any left tilting politician who deserves it.” (Pls.’ SS 98.) He
21 told his staff to “rifle through all of Mr. Henley’s cateloge [sic] for material.”
22 (Pls.’ SS 100.) DeVore subsequently wrote “Tax” and Hart created the video.
23 (Pls.’ SS 101, 108.) Neither of them consulted an attorney before posting the
24

25 ¹⁴ Hart did discuss the video with a friend who was a tax attorney. (Pls.’ SS 90.) The
26 friend did not advise him about fair use and told him that he should hire an attorney. (Pls.’ SS
27 91.)

1 “Tax” video to the internet. (Pls.’ SS 109.) It was only after the Plaintiffs filed
2 this action that the Defendants retained an attorney. (Pls.’ SS 136.)

3 The Defendants, however, have also presented evidence that they had a
4 subjective good faith belief that their use was fair. DeVore testified that Henley’s
5 songs were chosen to poke fun at Henley “because of his status as a liberal,
6 entertainment icon.” (See DeVore Decl. ¶¶ 4-5.) DeVore also testified that he
7 used “Summer” and “Dance” because of their (purported) political messages and
8 that his campaign videos commented on those messages. (Id. ¶¶ 5-10.) Moreover,
9 in counter notifying YouTube to repost the videos, DeVore was required to state,
10 under penalty of perjury, that he had a good faith belief that the removal was
11 improper, i.e., that the videos were fair use. See 17 U.S.C. § 512(g)(3). At the
12 summary judgment stage, the Court may not disregard DeVore’s declarations
13 regarding his subjective belief of fair use. See Anderson, 477 U.S. at 255.

14
15 Nevertheless, Plaintiffs argue that the Defendants’ belief was not in good
16 faith because they were reckless with regard to that belief. To demonstrate a good-
17 faith belief in fair use, a defendant must take “reasonable steps to assure fair use
18 before infringement.” Bridgeport Music, Inc. v. UMG Recordings, Inc., 585 F.3d
19 267, 279 (6th Cir. 2009). The Plaintiffs point out that neither DeVore nor Hart
20 ever consulted with a copyright attorney regarding their use of Henley’s songs,
21 even after notification from Henley that the songs were infringing. In Bridgeport,
22 the Sixth Circuit upheld a jury finding of willfulness where the defendants never
23 investigated whether their use was fair by, for example, consulting an attorney or
24 researching the law. See id. That case, however, only establishes that failure to
25 take such measures is probative of recklessness but not necessarily determinative.
26 The Court declines to hold that an infringer must, as a matter of law, consult an
27 attorney or investigate complicated fair use doctrine to avoid a finding of
28

1 willfulness. Whether the Defendants “took reasonable steps to assure fair use” is a
2 matter for the jury.

3 Finally, assuming a good faith belief of fair use, the Court cannot say on the
4 present record that the belief was not objectively reasonable. Whether a belief is
5 objectively reasonable is a question of law. Princeton, 99 F.3d at 1392. Given the
6 uncertainty of the fair use doctrine in general and the disagreement between courts
7 on the issue of parody targeting an author, the Court finds that a lack of
8 reasonableness of the asserted belief is not apparent. See id.

9
10 Accordingly, the Court finds that summary adjudication for either party on
11 the willfulness issue is not appropriate.

12
13 B. Lanham Act

14
15 Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), prohibits the use of
16 false designations of origin, false descriptions, and false representations in the
17 advertising and sale of goods and services. Waits v. Frito-Lay, Inc., 978 F.2d
18 1093, 1106 (9th Cir. 1992). The Ninth Circuit has recognized a false endorsement
19 claim under the Lanham Act “for the unauthorized imitation of [an individual’s]
20 distinctive attributes, where those attributes amount to an unregistered commercial
21 ‘trademark.’” Id. at 1106-07.

22 The Defendants argue that Henley’s musical compositions do not constitute
23 protectable trademarks as they are not “distinctive attributes” of Henley. Under the
24 Lanham Act, a “trademark” includes “any word, name, symbol, or device, or any
25 combination thereof used by a person . . . to identify and distinguish his or her
26 goods . . . from those manufactured or sold by others and to indicate the source of
27

1 the goods.” 15 U.S.C. § 1127. In a false endorsement case involving a celebrity,
2 the “mark” is the celebrity’s “persona.” White v. Samsung Elecs. Am., Inc., 971
3 F.2d 1395, 1400 (9th Cir. 1992).

4 In Waits v. Frito-Lay, Inc., singer Tom Waits asserted a false endorsement
5 claim under the Lanham Act against a party who had imitated Waits’s distinctive
6 voice in a parody song promoting the defendant’s product. 978 F.2d at 1106. The
7 Ninth Circuit recognized a cognizable Lanham Act claim for a vocal imitation of
8 an individual. Id. at 1107. The plaintiff would have to prove a likelihood that
9 consumers would be confused as to whether the individual actually sang in the
10 advertisement. Id. at 1111.

11
12 However, in Oliveira v. Frito-Lay, Inc., 251 F.3d 56 (2d Cir. 2001), the
13 Second Circuit questioned whether a musician could ever assert a false
14 endorsement claim based on the use of that musician’s performance of a song. See
15 id. at 62. In that case, musician Astrud Gilberto sued the defendant for using the
16 recording of her performance of “The Girl from Ipanema” in an advertisement. Id.
17 at 57-58. She argued that, as a result of the success of the song, she became
18 closely associated with the song, even becoming known as The Girl from Ipanema.
19 Id. at 59. The district court dismissed the claim on summary judgment and the
20 Second Circuit affirmed. Id. at 60, 62.

21 While recognizing that musical compositions in general are worthy of
22 trademark protection, as they could become associated with a particular product,
23 the court noted the absence of any precedent permitting a performer to hold a
24 trademark in his or her own musical performance:

25
26 Plaintiff has not cited a single precedent throughout the history of
27
28

1 trademark supporting the notion that a performing artist acquires a
2 trademark or service mark signifying herself in a recording of her own
3 famous performance. The “signature performance” that a widespread
4 audience associates with the performing artist is not unique to
5 Gilberto. Many famous artists have recorded such signature
6 performances that their audiences identify with the performer. Yet in
7 no instance was such a performer held to own a protected mark in that
8 recording.

9 Id. at 62; cf. EMI Catalogue P’ship v. Hill, Holliday, Connors, Cosmopulos Inc.,
10 228 F.3d 56, 64 (2d Cir. 2000) (holding that a musical composition could not serve
11 as a trademark for itself). The court also noted the widespread reasonable
12 commercial expectations regarding music licensing and the potential disruption if
13 performers were allowed to sue under a trademark theory. Id. at 63. The court
14 distinguished Waits and other cases involving the use of look-alikes and sound-
15 alikes, finding that the use of Gilberto’s performance did not borrow her
16 “persona,” as in those cases. Id. at 62.

17 Thus, the distinction between Waits and Oliveira is that in Waits, the
18 defendants imitated Waits’s voice in a manner leading consumers to believe that
19 Waits was actually singing and endorsing their product, whereas in Oliveira, the
20 defendants simply used a recording of a prior musical performance. Where an
21 advertisement mimics a celebrity’s voice to endorse a product, a customer may be
22 understandably confused as to whether the celebrity is actually endorsing the
23 product. However, the mere use of the celebrity’s prior performance does not
24 present the same sort of confusion.

25
26 Recognizing this distinction, a district court in the Central District of
27
28

1 California dismissed a Lanham Act claim based on the use of a musical recording,
2 but permitted a claim based on the use of the title and some lyrics from the song in
3 a print and sign campaign. Butler v. Target Corp., 323 F. Supp. 2d 1052, 1059
4 (C.D. Cal. 2004).

5 This Court considered this issue on the Defendants' motion to dismiss,
6 which was denied. First, the Court noted that the Defendants had used two of
7 Henley's songs, thereby lending "an extra element beyond the mere copying of the
8 underlying song." (Docket No. 22 at 14.) Second, the Court noted the allegation
9 that Hart had mimicked Henley's voice, which would support a viable claim under
10 Waits. (Id.) Thus, the Court permitted the Lanham Act claim, though noting it
11 was a "close question." (Id.)

12
13 As to the first issue, the Court did not consider the impact of Oliveira at the
14 pleading stage. Oliveira holds that a performer cannot hold a trademark in her
15 performance of a musical composition. Id. at 62-63. Therefore, it does matter how
16 many performances a defendant uses; the use of a performance does not violate
17 any trademark right of the performer. See id. The Plaintiffs cannot rest their case
18 on the fact that the Defendants used two, rather than one, of their songs.

19 The Plaintiffs attempt to distinguish Oliveira on several grounds. First, they
20 argue that in Oliveira, the record on summary judgment did not support Gilberto's
21 claim of implied endorsement, whereas the evidence here indicates actual
22 confusion as to whether Henley endorsed DeVore. This, however, was not the
23 reasoning of Oliveira. The Second Circuit decided that she did not have a
24 trademark in her performance, despite the assumption that she was closely
25 associated with it. See id. at 62. The court noted that many artists are closely
26 associated with their works, yet are not afforded trademark protection. Id. Thus,
27
28

1 despite the Plaintiffs' evidence of a close association between Henley and his
2 music, under Oliveira, he does not enjoy trademark protection of his performance.

3 Second, the Plaintiffs note that the Defendants in this case did not use
4 Henley's actual performance of "Summer" and "Dance," but created their own
5 versions, which simulated his musical and vocal performances in promoting their
6 message. Thus, the Plaintiffs argue, this case is more like Waits than Oliveira.
7 The Plaintiffs are correct that this fact may take this case outside of Oliveira.
8 However, the cause of action under Waits turns on the likelihood that consumers
9 will believe that the musician was actually performing on the charged
10 advertisement, see 978 F.2d at 1106, which the Court addresses below.

11
12 Finally, the Plaintiffs suggest that Oliveira is in conflict with the law of this
13 circuit, citing Butler. However, Butler actually applied Oliveira (and EMI) in
14 dismissing on the pleadings a Lanham Act claim based on the use of a music
15 recording. Butler, 323 F. Supp. 2d at 1059. The Court recognizes that Oliveira is
16 not binding here, but finds the decision persuasive. Oliveira notes the absence of
17 any precedent granting a performer trademark protection for their performances
18 and the resulting reasonable expectation of licensees who wish to use copyrighted
19 works. 251 F.3d at 63; cf. Sinatra v. Goodyear Tire & Rubber Co., 435 F.2d 711,
20 716-18 (9th Cir. 1970) (affirming summary judgment against Nancy Sinatra on her
21 state law "passing-off" claim where defendants used an imitation of her song
22 because such a claim would impinge on copyrights). This Court also recognizes
23 this absence of authority for the Plaintiffs' theory and declines to create a new
24 trademark right that "would be profoundly disruptive to commerce." See Oliveira,
25 251 F.3d at 63.

26 Accordingly, the Court finds that the Plaintiffs cannot maintain a Lanham
27

Act claim based purely on the use of Henley’s songs.

1
2 As to the second theory of Lanham Act liability, the Court finds that no
3 reasonable jury could find a likelihood that viewers would be confused as to
4 whether Henley actually performed “November” and “Tax.” See Waits, 978 F.2d
5 at 1111. Having listened to Hart’s less-than-angelic voice in comparison with
6 Henley’s more soothing vocals, the Court finds that a reasonable jury could not
7 find a likelihood of confusion.¹⁵ (See Charlesworth Decl., Exs. 1-4.) This is
8 backed up by testimony from each Plaintiff that Hart’s singing was unlikely to be
9 confused for Henley’s. (Henley Depo. at 9:4-13, 103:20-104:14; Campbell Depo.
10 at 14:15-16:4; Kortchmar Depo. at 103:9-24.) Plaintiffs have submitted no
11 evidence that an audience is likely to believe that Henley actually performed the
12 songs.

13
14 The Plaintiffs have submitted evidence that an audience might believe that
15 Henley approved the Defendants’ use of the Plaintiffs’ songs. They submitted an
16 expert report by Hal Poret (“Poret”) who conducted a survey to see if an audience
17 “would mistakenly believe that plaintiff Don Henley endorsed or approved or is
18 otherwise affiliated with or associated with the videos.” (Poret Decl., Ex. 1 at 1.)
19 Poret found that, of the survey respondents who knew that the videos used
20 Henley’s music, 48% thought that Henley either “endorsed the video(s) or
21 authorized or approved the use of his music in the video(s).” (Id. at 10.) This is
22 not, however, probative of whether people would reasonably think that Henley
23 actually performed the music in the videos, which is the relevant question under
24 Waits. To the extent that Poret’s report indicates a likelihood that Henley’s
25 endorsement was based purely on the use of his music, this is not a cognizable

26 ¹⁵ At best, Hart’s performance is a poor and unconvincing imitation unlikely to fool
27 anyone.

injury under Oliveira.

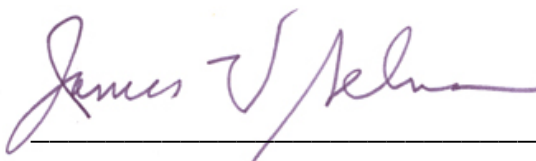
1
2 Because Oliveira bars Henley's Lanham Act claim based on the
3 appropriation of Henley's music, and the undisputed facts do not create a triable
4 issue as to whether a reasonable audience might be misled to believe that Henley
5 actually performed the music, the Defendants are entitled to summary judgment on
6 Henley's Lanham Act claim.

7
8 IV. CONCLUSION

9
10 For the foregoing reasons, the Court GRANTS summary judgment in favor
11 of the Plaintiffs and against the Defendants on the issue of copyright infringement
12 of both "Summer" and "Dance." The Court DENIES summary adjudication to
13 both parties on the issue of whether the infringement was willful. The Court
14 GRANTS summary judgment in favor of the Defendants and against the Plaintiffs
15 on Henley's Lanham Act claim.

16 IT IS SO ORDERED.

17
18 DATED: June 10, 2010

19
20 

21 JAMES V. SELNA
22 UNITED STATES DISTRICT JUDGE
23
24
25
26
27
28

APPENDIX A

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

“The Boys of Summer”	“The Hope of November”
Nobody on the road	Obama overload
Nobody on the beach	Obama overreach
I feel it in the air	We feel it everywhere
The summer’s out of reach	Trillions in the breach
Empty lake, empty streets	Empty bank, empty Street
The sun goes down alone	Dollar goes down alone
I’m drivin’ by your house	Pelosi’s in the House
Though I know you’re not home	So we now all must atone
But I can see you –	But we can see through –
Your brown skin shinin’ in the sun	Your broken promises oh One
<i>You got your hair combed back and</i>	<i>You got your head cocked back and</i>
<i>your sunglasses on, baby</i>	<i>your teleprompter on, maybe</i>
And I can tell you my love for you	And can we tell you our love for you
will still be strong	will still be strong
After the boys of summer have gone	After the hope of November’s gone?
I never will forget those nights	We never will forget those nights
I wonder if it was a dream	We wonder if it was a dream
Remember how you made me crazy?	Remember how you made us crazy?
Remember how I made you scream	Remember how I made you beam
Now I don’t understand	Now we do understand
What happened to our love.	What happened to our love.
But babe, I’m gonna get you back	Barack, we’re gonna cut no slack
I’m gonna show you what I’m	We’re gonna show you what we’re

1 made of

2 I can see you –

3 Your brown skin shinin’ in the sun

4 *I see you walkin’ real slow and*

5 *you’re smilin’ at everyone*

6 I can tell you my love for you will

7 still be strong

8 After the boys of summer have gone

9
10 Out on the road today,

11 I saw a DEADHEAD sticker on a

12 Cadillac

13 A little voice inside my head said,

14 “Don’t look back. You can never look

15 back.”

16 I thought I knew what love was

17 What did I know?

18 Those days are gone forever

19 I should just let them go but –

20
21 I can see you –

22 Your brown skin shinin’ in the sun

23 *You got that top pulled down and*

24 *that radio on, baby*

25 And I can tell you my love for you

26 will still be strong

27 After the boys of summer have gone

made of

We can see through –

Your broken promises oh One

We see you talkin’ real slow and

you’re smilin’ at everyone

Can we tell you our love for you will

still be strong

After the hope of November’s gone?

Out on the road today,

I saw a OBAMA sticker on a

Cadillac

A little voice inside my head said,

“Don’t look back. You can never look

back.”

We thought we knew what love was

What did we know?

Those days are gone forever

We should just let them go but –

20
21 We can see through –

22 Your broken promises oh One

23 *You got that Rush pulled down and*

24 *talk radio gone, maybe*

25 And can we tell you our love for you

26 will still be strong

27 After the hope of November’s gone?

1 I can see you –

2 Your brown skin shinin' in the sun

3 *You got that hair slicked back and*
4 *those Wayfarers on, baby*

5 I can tell you my love for you will
6 still be strong

7 After the boys of summer have gone

8 (Charlesworth Decl., Ex. 6; DeVore
9 Decl., Ex. C.)

We can see through –

Your broken promises oh One

You got your head cocked back and
your teleprompter on, maybe

Can we tell you our love for you will
still be strong

After the hope of November's gone?

(Charlesworth Decl., Ex. 7; DeVore
Decl., Ex. E.)

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

APPENDIX B

“All She Wants to Do Is Dance”	“All She Wants to Do Is Tax”
They’re pickin’ up the prisoners and puttin’ ‘em in a pen	They’re pickin’ up the taxpayers and puttin’ ‘em in a jam
<i>And all she wants to do is dance, dance</i>	<i>And all she wants to do is tax, tax</i>
Rebels been rebels since I don’t know when	Liberals been liberals since I don’t know when
<i>And all she wants to do is dance</i>	<i>And all she wants to do is tax</i>
Molotov cocktail – the local drink	Cap and trade program – from D.C. Inc.
<i>And all she wants to do is dance, dance</i>	<i>And all she wants to do is tax, tax</i>
They mix ‘em up right in the kitchen sink	They pull and push us right over the brink
<i>And all she wants to do is dance</i>	<i>And all she wants to do is tax</i>
Crazy people walkin’ around with blood in their eyes	Barbara Boxer talkin’ round – control in her sight
<i>And all she wants to do is dance, dance</i>	<i>And all she wants to do is tax, tax</i>
Wild-eyed pistol wavers who ain’t afraid to die	Wild-eyed global warmers who ain’t afraid to lie
<i>And all she wants to do is –</i>	<i>And all she wants to do is –</i>
<i>All she wants to do is dance and make romance</i>	<i>All she wants to do is tax and break our backs</i>
She can’t feel the heat comin’ off the	She can’t feel the heat comin’ off the

street

She wants to party

She wants to get down

All she wants to do is –

All she wants to do is dance

Well, the government bugged the

men's room in the local disco lounge

And all she wants to do is dance,

dance

To keep the boys from sellin' all the

weapons they could scrounge

And all she wants to do is dance

But that don't keep the boys from

makin' a buck or two

And all she wants to do is dance,

dance

They still can sell the army all the

drugs they can do

And all she wants to do is –

All she wants to do is dance and make

romance

Well, we barely made the airport for

the last plane out

As we taxied down the runway I

could hear the people shout

They said, "Don't come back here

street

She wants to party

She wants to get down

All she wants to do is –

All she wants to do is tax

Well, the government rigged the

market in the carbon trading scam

And all she wants to do is tax,

tax

To keep the boys a sellin' all the

credits they could, ma'am

And all she wants to do is tax

But that don't keep the boys from

makin' a buck or two

And all she wants to do is tax,

tax

They still can sell the public on the

good that they can do

And all she wants to do is –

All she wants to do is tax and break

our backs

Well, we barely made twenty ten, the

vote was in doubt

And we finished up the campaign she

could hear the people shout

They said, "Don't come back here

1 Yankee!”

2 But if I ever do – I’ll bring more
3 money

4 *‘Cause all she wants to do is dance
5 and make romance*

6 Never mind the heat comin’ off the
7 street

8 She wants to party

9 She wants to get down

10 *All she wants to do is –*

11 *All she wants to do is dance*

12 *All she wants to do is dance and make
13 romance*

14 *All she wants to do is dance*

15
16 (Charlesworth Decl., Ex. 8; DeVore
17 Decl., Ex. G.)

Boxer!”

But if she ever does – we’ll bring more
money

*‘Cause all she wants to do is tax
and break our backs*

Never mind the heat comin’ off the
street

She wants to party

She wants to get down

10 *All she wants to do is –*

11 *All she wants to do is tax*

12 *All she wants to do is tax and break
13 our backs*

14 *All she wants to do is tax*

15
16 (Charlesworth Decl., Ex. 9; DeVore
17 Decl., Ex. I.)