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9

10 UNITED STATES DISTRICT COURT  
 11 CENTRAL DISTRICT OF CALIFORNIA  
 12 WESTERN DIVISION

14 JACKSON BROWNE, an individual

15 Plaintiff,

16 vs.

17 JOHN MCCAIN, an individual; THE  
 18 REPUBLICAN NATIONAL  
 COMMITTEE, a non-profit political  
 organization; and THE OHIO  
 19 REPUBLICAN PARTY; a non-profit  
 political organization

20 Defendants.

CASE NO. CV 08-05334 RGK (Ex)

**PLAINTIFF JACKSON BROWNE'S  
 CONSOLIDATED OPPOSITION  
 TO DEFENDANTS' MOTIONS TO  
 DISMISS PURSUANT TO  
 FEDERAL RULE OF CIVIL  
 PROCEDURE 12(b)(6)<sup>1</sup>**

Date: February 2, 2009

Time: 9:00 a.m.

Courtroom: 850 (Roybal Bldg.)

Judge: Hon. R. Gary Klausner

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<sup>1</sup> This Opposition brief responds to the Motions to Dismiss of Defendants the Republican National Committee and Senator McCain (Docket Nos. 20 & 27.) This brief also responds to that portion of Defendant Ohio Republican Party's motion to dismiss (Docket No. 23) arguing that the Complaint fails to state a claim.

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1 **I. INTRODUCTION**

2 This case is about Defendants’ unlicensed and willful copying of Plaintiff  
 3 Jackson Browne’s copyrighted musical composition, *Running on Empty*, in a  
 4 political campaign commercial (the “Commercial”). As Defendants candidly admit,  
 5 they did not seek permission from anyone when they used the song. Rather, they  
 6 simply downloaded it from iTunes and then turned around and used it in the  
 7 Commercial (in blatant violation of the license from iTunes). Rather than answer the  
 8 Complaint and apologize for their unlicensed use, Defendants flood the Court with  
 9 paper and essentially argue that because they are politicians and political parties, they  
 10 have an unfettered right to use musical compositions in political campaign  
 11 commercials, and to associate themselves with any person they want to, with or  
 12 without consent. The law does not support these extreme arguments.

13 Defendants first argue that their willful copyright infringement is protected by  
 14 the First Amendment and the fair use doctrine. However, “[t]he fair use doctrine is  
 15 not a license for . . . theft, empowering a court to ignore a copyright whenever it  
 16 determines the underlying work contains material of possible public importance.”  
 17 *Harper & Row v. Nation Enterp.*, 471 U.S. 539, 558 (1985). Just as Defendants have  
 18 a right to speak freely, Plaintiff has a concomitant right not to speak against his will  
 19 and have his property conscripted as part of a political message, which his speech  
 20 and property have nothing to do with. “Freedom of thought and expression ‘includes  
 21 both the right to speak freely and the right to refrain from speaking at all.’” *Id.* at  
 22 559. Defendants’ vague and constant platitudes attempting to invoke First  
 23 Amendment doctrine regarding “political speech” and “matters of public concern”  
 24 are largely irrelevant to the analysis here. The Supreme Court has consistently held  
 25 that in copyright cases, federal courts should not look to First Amendment doctrines  
 26 created in the very different context of challenges to the constitutionality of state and  
 27 federal legislation. *Id.*; *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003). Rather, the  
 28 doctrines that vindicate First Amendment rights in copyright cases are organic to

1 copyright law itself: the idea/expression dichotomy and the traditional fair use  
 2 doctrine. *Id.* Copyright protects both Plaintiff’s and Defendants’ speech rights by  
 3 “confin[ing] fair use protection to works whose very subject is the original  
 4 composition and so necessitates some borrowing from it.” *Campbell v. Acuff-Rose*  
 5 *Music, Inc.*, 510 U.S. 569, 597 (1994) (Kennedy, J., concurring). Here, because  
 6 Defendants did not criticize or comment on *Running on Empty*, their use is not fair.

7 Defendants next argue that Plaintiff cannot complain of the false association  
 8 created by Defendants because “the Lanham Act . . . does not apply to political  
 9 speech.” Motion at 15:23-24 (citations to “Motion” are to Senator McCain’s Motion  
 10 to Dismiss (Docket No. 20)). This argument borders on frivolous. Defendants  
 11 themselves have obtained numerous registered federal trademarks – creations of the  
 12 Lanham Act – specifically for use as source identifiers in, for example, “television  
 13 programming . . . in the field of politics.” *See, e.g.* Steinsapir Decl., Exs. A, B.  
 14 Apparently, Defendants believe that they have the right to invoke the protections of  
 15 the Lanham Act against others in “television programming in the field of politics,”  
 16 but no one else can invoke the Act against them in the same field. Likewise,  
 17 Defendants’ attempt to make out a First Amendment “artistic relevance” test at this  
 18 stage of the litigation fails (and will fail on the merits as well).

19 Plaintiff respectfully requests that Defendants’ motions be denied.

## 20 **II. STATEMENT OF FACTS**

21 Plaintiff is a world renowned singer and songwriter. Defendants are Senator  
 22 John McCain of Arizona, the Republican National Committee (the “RNC”), and the  
 23 Ohio Republican Party (“ORP”). (Complaint (Docket No. 1) at ¶¶ 1-2.)

24 In order to promote Senator McCain’s candidacy for President, the ORP,  
 25 acting for the benefit of McCain and the RNC (*id.* at ¶ 16), created the Commercial  
 26 to promote Senator McCain’s candidacy and criticize President-elect Obama’s  
 27 energy policy. (*Id.* at ¶ 2.) Defendants placed the Commercial on the video-site,  
 28 YouTube. The Commercial also aired on MSNBC and was featured prominently on

1 the website, *The Huffington Post*. (*Id.* at ¶ 16.) During the Commercial, a sound  
 2 recording of Plaintiff performing one of his most famous musical compositions,  
 3 *Running On Empty*, plays in the background. Defendants did not seek or obtain  
 4 permission to use the song. (*Id.* at ¶ 2.) Rather, as Defendants proudly admit, they  
 5 simply downloaded the song from iTunes, copied it into their Commercial (in willful  
 6 violation of the license obtained from iTunes), and gave no thought whatsoever about  
 7 their blatant infringement. *See* McClelland Decl. at ¶ 10.

8 *Running On Empty* was released in 1977 on an album of the same name. That  
 9 album became Plaintiff’s best selling album ever, selling over seven-million copies.  
 10 The musical composition, *Running on Empty*, is famously associated with Plaintiff,  
 11 and Plaintiff owns a federally-registered copyright in it. (Complaint at ¶¶ 13-14.)

### 12 III. STANDARDS GOVERNING RULE 12(b)(6) MOTIONS

13 “A court may dismiss a complaint [pursuant to Federal Rule of Civil Procedure  
 14 12(b)(6)] only if it is clear that no relief could be granted under any set of facts that  
 15 could be proved consistent with the allegations.” *Big Bear Lodging Ass’n v. Snow*  
 16 *Summit, Inc.*, 182 F.3d 1096, 1101 (9th Cir. 1999). There is “a powerful  
 17 presumption against rejecting pleadings for failure to state a claim.” *Gilligan v.*  
 18 *Jamco Develop.*, 108 F.3d 246, 249 (9th Cir. 1997). “In reviewing the sufficiency of  
 19 a complaint, ‘[t]he issue is not whether a plaintiff will ultimately prevail but whether  
 20 the claimant is entitled to offer evidence to support the claims.’” *Id.*

### 21 IV. ARGUMENT

#### 22 A. Defendants’ Exact Copying Was Not a Fair Use; And at the Very 23 Least, the Court Could Not So Find on the Pleadings Alone.

24 Defendants made an exact copy of Plaintiff’s copyrighted musical composition  
 25 in the Commercial. Plaintiff has therefore stated a *prima facie* case for copyright  
 26 infringement. Thus, Defendants must argue that they should be relieved from  
 27 answering Browne’s complaint because their copying is fair as a matter of law, and  
 28 no evidence could possibly show otherwise. Defendants are mistaken.

1 “Fair use is a mixed question of law and fact.” *Harper & Row*, 471 U.S. at  
 2 560. It is an affirmative defense upon which Defendants have the evidentiary  
 3 burden. *Perfect 10 v. Amazon.com*, 508 F.3d 1146, 1158 (9th Cir. 2007). As this is a  
 4 Rule 12(b)(6) motion, Defendants must also meet their heavy procedural burden of  
 5 showing that no evidence could possibly be presented showing that their copying is  
 6 not a fair use. *See Gilligan*, 108 F.3d at 249; *Four Navy Seals v. Associated Press*,  
 7 413 F. Supp. 2d 1136, 1148 (S.D. Cal. 2005) (fair use “is inappropriate for  
 8 determination in a 12(b)(6) motion, since fair use is an affirmative defense to an  
 9 infringement claim.”). Defendants cannot meet these burdens.

10 Section 107 of the Copyright Act of 1976 codifies the common law fair use  
 11 defense to copyright infringement, and instructs courts to look to four factors: (1) the  
 12 purpose and character of the use, including whether such use is of a commercial  
 13 nature or is for nonprofit educational purposes; (2) the nature of the copyrighted  
 14 work; (3) the amount and substantiality of the portion used in relation to the  
 15 copyrighted work as a whole; and (4) the effect of the use upon the potential market  
 16 for or value of the copyrighted work. 17 U.S.C. § 107. The four statutory factors are  
 17 non-exclusive, and are not to “be treated in isolation, one from another. All are to be  
 18 explored, and the results weighed together, in light of the purposes of copyright.”  
 19 *Campbell*, 510 U.S. at 578.<sup>2</sup>

### 20 1. The Purpose and Character of the Use.

21 Although their arguments are not entirely clear, Defendants appear to contend  
 22 that their exact copying of *Running on Empty* is a fair use for three reasons relating to  
 23 “the purpose and character of the use.” First, Defendants argue that their copying  
 24 relates to “political speech” on a “matter of public concern” and such copying weighs  
 25 \_\_\_\_\_

26 <sup>2</sup> Although McCain and the RNC apparently deny direct involvement in the copying,  
 27 they do not (and cannot) challenge the sufficiency of the Complaint’s allegations  
 28 against them in this respect. Furthermore, the two parties can be held secondarily  
 liable for infringement. *MGM v. Grokster*, 545 U.S. 913, 930 (2005).

1 in favor of fair use. Second, Defendants appear to argue that their copying was fair  
 2 use “commentary” or “parody.” Third, Defendants argue that their copying of  
 3 *Running on Empty* was a “transformative use.” These contentions have no merit.

4 (a) **Defendants’ “Political Speech”/“Matters of Public  
 5 Concern” Analysis is Inapposite.**

6 Neither Congress nor the Supreme Court has ever held that the fact that a  
 7 copyrighted work was copied as part of “political speech” or a “matter of public  
 8 concern” somehow makes a particular infringement a fair use. Rather, the Supreme  
 9 Court has specifically held to the contrary. In *Harper & Row*, 471 U.S. 539, the  
 10 Court held that *The Nation*’s copying of certain snippets of President Ford’s memoirs  
 11 regarding the events surrounding President Ford’s succession to the Presidency was  
 12 not a fair use. Undoubtedly, the copying related to “a matter of public concern.”  
 13 Nonetheless, the Court found “no warrant” to conduct a separate First Amendment  
 14 analysis “[i]n view of the First Amendment protections already embodied in the  
 15 Copyright Act’s distinction between copyrightable expression and uncopyrightable  
 16 facts and ideas, and the latitude for scholarship and comment traditionally afforded  
 17 by fair use.” *Id.* at 560. If anything, the fact that the copying was on a matter of  
 18 public concern weighed against fair use. “It is fundamentally at odds with the  
 19 scheme of copyright to accord lesser rights in those works that are of greatest  
 20 importance to the public.” *Id.* at 559.

21 Similarly, Defendants’ attempt to characterize their work as “noncommercial”  
 22 by distinguishing between “political speech” and “commercial speech” is utterly  
 23 misplaced. The distinction between “political speech” and “commercial speech” was  
 24 developed by the Supreme Court in the past few decades as a way to determine  
 25 which type of scrutiny (*i.e.*, strict scrutiny or intermediate scrutiny) courts are to  
 26 apply to adjudicate the validity of legislation against a First Amendment challenge.  
 27 *See generally, e.g., Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer*  
 28 *Council, Inc.*, 425 U.S. 748, 758-60 (1976). However, neither Congress nor the

1 Court have ever held that courts should categorize copyright infringements as either  
 2 “political speech” or “commercial speech,” and that such categorization has any  
 3 bearing on the scope of a private right of action under the Copyright Act. Rather, as  
 4 the Court recently explained, “[t]he Copyright Clause and First Amendment were  
 5 adopted close in time. This proximity indicates that, in the Framers’ view,  
 6 copyright’s limited monopolies are compatible with free speech principles. Indeed,  
 7 copyright’s purpose is to promote the creation and publication of free expression.”  
 8 *Eldred*, 537 U.S. at 219. Thus, in *Eldred*, the Court refused outright to apply an  
 9 “intermediate scrutiny” analysis (or any other First Amendment scrutiny) to the  
 10 validity of Congress’s extension of existing copyright terms. *Id.* Rather, according  
 11 to the Court, copyright doctrine already includes “built-in” First Amendment  
 12 protections, including the idea/expression dichotomy and fair use. *Id.* at 219-20.<sup>3</sup>

13 Despite repeatedly trumpeting the broad reach of their own free speech rights,  
 14 Defendants fail to acknowledge that Plaintiff too has his own free speech rights. As  
 15 the Supreme Court explained in the context of rejecting a First Amendment defense  
 16 to the copying of portions of President Ford’s memoirs, “[f]reedom of thought and  
 17 expression ‘includes both the right to speak freely and the right to refrain from  
 18 speaking at all.’” *Harper & Row*, 471 U.S. at 559. Just as Defendants have the right  
 19 to broadly express their political views, Plaintiff has a right not to be forced to speak  
 20 against his will and have his property conscripted as part of a political message  
 21 which his speech and property have nothing to do with. Copyright law neatly  
 22 resolves the seeming tension between Browne’s rights and Defendants’ rights

23  
 24 <sup>3</sup> Defendants’ entire argument as to why their use is not “commercial” rests on their  
 25 inapposite argument that the Commercial is not “commercial speech” and not “for  
 26 profit.” But the Ninth Circuit has held that “in weighing whether the purpose was for  
 27 profit, monetary gain is not the sole criterion particularly in a setting where profit is  
 28 ill-measured in dollars.” *Worldwide Church of God v. Philadelphia Church of God*,  
 227 F.3d 1110, 1117 (9th Cir. 2000) (internal punctuation altered). Thus, in a case of  
 copyright infringement used to attract church members, the Court held that such  
 infringement was for “profit” because it “attract[ed] . . . new members” and  
 “enabl[ed] the ministry’s growth.” *Id.* at 1118.

1 through one key aspect of the fair use doctrine which Defendants curiously ignore:  
 2 the doctrine's limitation on fair use parody, criticism and comment to targeting of the  
 3 infringed work, *i.e.*, fair use permits broad comment regarding the author's own  
 4 speech. "This prerequisite confines fair use protection to works whose very subject  
 5 is the original composition and so necessitates some borrowing from it." *Campbell*,  
 6 510 U.S. at 597 (Kennedy, J., concurring). Fair use does not, however, protect the  
 7 misappropriation of an author's work to criticize or comment on a subject the author  
 8 and his work have nothing to do with. Here, because Defendants did not criticize or  
 9 comment on *Running on Empty*, their use is not fair.

10 **(b) Defendants' Exact Copying is Not a Fair Use Because it**  
 11 **Does Not Target the Original.**

12 The starting point for any analysis of whether the unauthorized use of a  
 13 musical composition is a fair use is the Supreme Court's decision in *Campbell v.*  
 14 *Acuff-Rose Music, Inc.*, 510 U.S. 469. There, the Supreme Court explained the scope  
 15 of fair use comment and parody:

16 For the purposes of copyright law, the nub of the definitions, and the  
 17 heart of any parodist's claim to quote from existing material, is the use  
 18 of some elements of a prior author's composition to create a new one  
 19 that, at least in part, comments on that author's works. If, on the  
 20 contrary, the commentary has no critical bearing on the substance or  
 21 style of the original composition, which the alleged infringer merely  
 22 uses to get attention or to avoid the drudgery in working up something  
 23 fresh, the claim to fairness in borrowing from another's work diminishes  
 24 accordingly (if it does not vanish) . . .

21 *Id.* at 580. Justice Kennedy further detailed the Court's definition of parody:

22 The parody must target the original, and not just its general style, the  
 23 genre of art to which it belongs, or society as a whole (although if it  
 24 targets the original, it may target those features as well). This  
 25 prerequisite confines fair use protection to works whose very subject is  
 26 the original composition and so necessitates some borrowing.

27 *Id.* at 597 (Kennedy, J., concurring) (emphasis added).

28 Thereafter, the Ninth Circuit applied the *Campbell* test in *Dr. Seuss Enterp.,*  
*L.P. v. Penguin Books USA*, 109 F.3d 1394 (9th Cir. 1997). In *Dr. Seuss*, infringers  
 copied protected expression from Dr. Seuss's famous *Cat in the Hat* series to create

1 their own book, *The Cat NOT in the Hat!* about the O.J. Simpson murder trial.  
 2 “Wickedly clever author ‘Dr. Juice’ gives the O.J. Simpson trial a very fresh new  
 3 look. From Brentwood to the Los Angeles County Courthouse to Marcia Clark and  
 4 the Dream Team.” *Id.* at 1397. There was no question, of course, that commentary  
 5 on the O.J. Simpson case was a “matter of public concern.” Nevertheless, the  
 6 paramount issue on appeal was whether *The Cat NOT in the Hat!* was a fair use  
 7 parody or a simple, and unprotected, “satire.” The Ninth Circuit affirmed the district  
 8 court’s finding that the work was not parody and not fair use:

9       These stanzas and the illustrations simply retell the Simpson tale.  
 10       Although *The Cat NOT in the Hat!* does broadly mimic Dr. Seuss’  
 11       characteristic style, it does not hold his style up to ridicule. The stanzas  
 12       have “no critical bearing on the substance or style of” *The Cat in the*  
 13       *Hat*. Katz and Wrinn merely use the Cat’s stove-pipe hat, the narrator  
 14       (“Dr. Juice”), and the title (*The Cat NOT in the Hat!*) “to get attention”  
 15       or maybe even “to avoid the drudgery in working up something fresh.”  
 16       [*Campbell*], 510 U.S. at 580. While Simpson is depicted 13 times in the  
 17       Cat’s distinctively scrunched and somewhat shabby red and white stove-  
 18       pipe hat, the substance and content of *The Cat in the Hat* is not conjured  
 19       up by the focus on the Brown-Goldman murders or the O.J. Simpson  
 20       trial.

21 *Id.* at 1401 (emphasis original).

22       Here, there can be no question that Defendants’ unauthorized and exact  
 23       copying of *Running on Empty* did not “target” *Running on Empty* or Plaintiff’s style  
 24       in any way whatsoever. Defendants concede this. In sworn declarations filed in  
 25       support of this Motion, Defendants admit that they were not familiar with Plaintiff or  
 26       his music when they used his work without authorization. *See* McClelland Decl. at ¶  
 27       10; Mauk Decl. at ¶ 27. Thus, they obviously could not have been targeting him or  
 28       his song when they copied *Running on Empty*. Defendants concede that they used  
 29       *Running on Empty* “to avoid the drudgery in working up something fresh.” *Dr.*  
 30       *Seuss*, 109 F.3d at 1401 (quoting *Campbell*, 510 U.S. at 580). As Defendants  
 31       candidly declare, they simply searched iTunes for a song to use in their Commercial,  
 32       downloaded the song, and copied it with no thought. McClelland Decl. at ¶ 10.

33       Once the appropriate inquiry is conducted, every single case Defendants cite is

1 not on point because those cases all deal with situations where the allegedly  
 2 infringing work used the original work for the purpose of targeting and criticizing the  
 3 original work.<sup>4</sup>

4 Defendants next argue that their exact copying is somehow a “transformative”  
 5 use. The argument cannot withstand serious scrutiny. In *Campbell*, the Supreme  
 6 Court defined a use as transformative if it “adds something new, with a further  
 7 purpose or different character, altering the first with new expression, meaning, or  
 8 message.” 510 U.S. at 579. The Court specifically distinguished a transformative

9  
 10 <sup>4</sup> Taking the cases in the order cited at pages 6 through 10 of Senator McCain’s  
 11 motion, *see Savage v. Council On American-Islamic Relations, Inc.*, 2008 WL  
 12 2951281, \*6 (N.D. Cal. 2008) (“the purpose and character of defendants’ use of the  
 13 limited excerpts from [plaintiff’s] radio show was to criticize publicly the anti-  
 14 Muslim message of those excerpts.”); *Hustler Magazine Inc. v. Moral Majority Inc.*,  
 15 796 F.2d 1148, 1153 (9th Cir. 1986) (plaintiff’s mock ad implying that defendant  
 16 Falwell had an incestuous relationship was used by Falwell “to rebut the personal  
 17 attack upon Falwell”; “an individual in rebutting a copyrighted work containing  
 18 derogatory information about himself may copy such parts of the work as are  
 19 necessary to permit understandable comment”); *Keep Thompson Governor*  
 20 *Committee v. Citizens for Gallen Committee*, 457 F. Supp. 957, 961 (D.N.H. 1978)  
 21 (defendant candidate-for-governor copied portion of song owned by plaintiff  
 22 opposing-candidate-for-governor; song was “used by the plaintiff in its political  
 23 advertisement . . . the recording which defendant has partially copied is itself in part  
 24 a political campaign message” of the plaintiff/copyright owner); *Phoenix Hill*  
 25 *Enterprises, Inc. v. Dickerson*, 1999 WL 33603127, \*1 (W.D. Ky. 1999) (copying of  
 26 personal ads with “the terms ‘boy toy,’ ‘boy nudist,’ and ‘baby dyke’ circled” from  
 27 plaintiff’s gay-themed newspaper was fair use where ads were used to “accus[e]  
 28 homosexuals [of] advertising for sex with children”); *Baraban v. Time Warner, Inc.*,  
 2000 WL 358375, \*3 (S.D.N.Y. 2000) (reprinting of ad for the U.S. Council for  
 Energy Awareness (“USCEA”) was fair use where reprinting was made “to criticize  
efforts by the power industry to promote a sunny view of nuclear energy in the public  
forum, and the USCEA ad including Mr. Baraban’s photograph provided a perfect  
illustration of those efforts”); *Lennon v. Premise Media*, 556 F. Supp. 2d 310, 322-23  
 (S.D.N.Y. 2008) (in defendants’ film advocating the teaching of Intelligent Design  
 and arguing that popular culture is anti-religion, it was a fair to copy a snippet of  
 John Lennon’s *Imagine* where Lennon sings about his ideal world where there is  
 “nothing to kill or die for / And no religion too”; snippet “appears immediately after  
 several scenes of speakers criticizing the role of religion in public life . . .  
connect[ing] these sentiments to the song by stating that they are merely ‘a page out  
of John Lennon’s songbook.”); *Burnett v. Twentieth Century Fox Film Corp.*, 491 F.  
 Supp. 2d 962, 967-68 (C.D. Cal. 2007) (cartoon parody of Carol Burnett and her  
 character “Charwoman” was fair use because it clearly targeted and made fun of  
 Burnett and her character); *MasterCard Intern. v. Nader 2000*, 70 U.S.P.Q.2d 1046,  
 1058 (S.D.N.Y. 2004) (Nader ad was parody of MasterCard ad because it targeted  
 “materialistic message [of ad’s] warm, sugar-coated imagery that purports to elevate  
 intangible values over the monetary values it in fact hawks.”).

1 use from a “straight reproduction.” *Id.* at 579 n.11. “Unlike a parody, a facsimile  
 2 recording of a copyrighted [musical] composition adds nothing new to the original  
 3 and accordingly has virtually no transformative value.” *Zomba Enterprises v.*  
 4 *Panorama Records*, 491 F.3d 574, 582 (6th Cir. 2007) (citation omitted). Thus,  
 5 courts have consistently rejected arguments that an exact reproduction of a  
 6 copyrighted work is “transformative” unless it comments on or targets the original.

7 Undeterred by this clear law, Defendants’ assert that their copying “transforms  
 8 the Song from a mood evoking soft rock composition about the lifestyle of a musician  
 9 into a biting commentary on aspects of a Presidential candidate’s proposed energy  
 10 plan.” Motion at 10:27-11:2. This argument is contrary to law, and if accepted would  
 11 essentially transform any use into a “transformative” one. For example, the same  
 12 “analysis” would have fit perfectly to the facts of *Dr. Seuss*. There, “Dr. Juice”  
 13 transformed *The Cat in the Hat* “from a mood evoking [children’s book] about” an  
 14 adventurous and mischievous Cat “into a biting commentary on aspects of a” heavily  
 15 publicized and politically-charged murder trial. But of course, the Ninth Circuit  
 16 specifically rejected that *The Cat NOT in the Hat!* was a “transformative” use of *The*  
 17 *Cat in the Hat*. *Dr. Seuss*, 109 F.3d at 1401. Rather, as Defendants’ cases recognize,  
 18 in order for an exact copy to be “transformative,” it must at least comment on or  
 19 concern the original. *Lennon*, 556 F. Supp. 2d at 323 (use of Lennon’s composition  
 20 was transformative because it “criticize[d] what the filmmakers see as the naïveté of  
 21 John Lennon’s views” of religion); *Bill Graham Archives v. Dorling Kindersley*, 448  
 22 F.3d 605, 609-10 (2d Cir. 2006) (use of images of concert posters in book about The  
 23 Grateful Dead is transformative, where they were used “as historical artifacts  
 24 graphically representing the fact of significant Grateful Dead concert events”).

25 Because Defendants’ exact copying of Plaintiff’s work “has no critical bearing  
 26 on the substance or style of [*Running on Empty*], which [Defendants] merely use[d]  
 27 to get attention or to avoid the drudgery in working up something fresh,  
 28 [Defendants’] claim to fairness in borrowing from [Plaintiff] diminishes accordingly

1 (if it does not vanish).” *Campbell*, 510 U.S. at 580.

## 2                   2.       **The Nature of the Copyrighted Work.**

3           The second of the fair use factors, the nature of the copyrighted work, “calls  
4 for recognition that some works are closer to the core of intended copyright  
5 protection than others” and are entitled to stronger protection. *Campbell*, 510 U.S. at  
6 586. “Like the musical composition in *Campbell* (Roy Orbison’s ‘Oh, Pretty  
7 Woman’), the composition[ ] of [a] pop song[ ] here at issue ‘fall[s] within the core  
8 of the copyright’s protective purposes. Accordingly, this factor militates against a  
9 finding of fair use.” *Zomba*, 491 F.3d at 583. Furthermore, Defendants are not  
10 correct when they assert that their use was not a “first use.” Of course, *Running on*  
11 *Empty* was first published long ago for certain uses. However, Defendants’ use was  
12 the first publication of *Running on Empty* in a commercial. Thus, Defendants  
13 deprived Plaintiff of his right to control the first publication of *Running on Empty* in  
14 an entire medium. *Harper & Row*, 471 U.S. at 564 (“The right of first publication  
15 encompasses not only the choice whether to publish at all, but also the choices of  
16 when, where, and in what form first to publish a work.”).

## 17                   3.       **The Amount and Substantiality of the Portion Used.**

18           Defendants attempt to play down this factor by repeatedly noting that they  
19 only used 30 seconds of *Running on Empty*. Defendants also appear to attach  
20 relevance to the fact that they only used 9 seconds of the song’s lyrics. The latter  
21 point, of course, is simply irrelevant – the entire musical composition (including the  
22 melody and the lyrics) is entitled to the full protection of the copyright laws. What  
23 defendants gloss over is that the appropriate inquiry here is “whether ‘the heart’ of  
24 the copyrighted work is taken – in other words, whether the portion taken is the  
25 ‘most likely to be newsworthy and important in licensing serialization.’” *Elvis*  
26 *Presley Enterp. v. Passport Video*, 349 F.3d 622, 625, 630 (9th Cir. 2003) (no fair  
27 use: third factor weighed in plaintiff’s favor where defendants song clips “rang[ing]  
28 from only a few seconds in length to portions running as long as 30 seconds”); *Los*

1 *Angeles News Service v. KCAL-TV*, 108 F.3d 1119, 1122 (9th Cir. 1997) (no fair use:  
 2 “While a small amount of the entire Videotape was used, it was all that mattered.”).  
 3 The portion of the song that Defendants copied, the famous chorus of *Running on*  
 4 *Empty*, was the most important, valuable and recognized section of the song. The  
 5 chorus is clearly the “heart” of the song (and the evidence will so show in discovery)  
 6 – it is the most “important [part of the song] in licensing serialization.”

7 **4. The Effect of the Use Upon the Potential Market for or Value**  
 8 **of the Copyrighted Work.**

9 The fourth factor, “the effect of the use upon the potential market for or value  
 10 of the copyrighted work” favors Plaintiff as a matter of law. Specifically, as the  
 11 Ninth Circuit explained in *Dr. Seuss*, “[s]ince fair use is an affirmative defense,  
 12 [Defendants] must bring forward favorable evidence about relevant markets.” *Dr.*  
 13 *Seuss*, 109 F.3d at 1403 (emphasis added). Defendants have offered nothing other  
 14 than their own unsupported speculation that their unlicensed copying of *Running on*  
 15 *Empty* has helped the market for the song (which is utterly inaccurate and supported  
 16 by nothing). Thus, as the Ninth Circuit has clearly held, “it is impossible to deal with  
 17 the fourth factor except by recognizing that a silent record on an important factor  
 18 bearing on fair use disentitle[s] the proponent of the defense.” *Id.* at 1403 (quoting  
 19 *Campbell*, 510 U.S. at 594). Plaintiff will present strong and compelling evidence  
 20 during discovery that the value for the use of his most-famous musical compositions  
 21 in advertising is, at least, in the high six-figures.

22 **5. Conclusion re the Fair Use Factors.**

23 The fair use factors all support Plaintiff. At the very least, however, the record  
 24 is not sufficiently developed to dispose of the issue at this embryonic stage of the  
 25 litigation. At bottom, the fair use doctrine is an “equitable rule of reason” not  
 26 amenable to a “rigid, bright-line approach.” *Harper & Row*, 471 U.S. at 588. What  
 27 Defendants claim, however, is that the fair use doctrine grants politicians and  
 28 political advocacy groups blanket immunity from suit for infringement where the

1 copyrighted work is used in a political campaign commercial. To be sure,  
 2 Defendants couch their analysis in familiar buzzwords of the fair use factors and First  
 3 Amendment doctrine. But it is impossible to conceive of a use of a musical  
 4 composition in a political advertisement not being a “fair use” under Defendants’  
 5 thin and superficial analysis. Thus, under Defendants’ view of the law, political  
 6 advocacy groups have *carte blanche* to use copyrighted songs in campaign  
 7 commercials, and the federal courts are obliged to immediately dismiss any actions  
 8 complaining of such unauthorized uses without giving the copyright holder an  
 9 opportunity to conduct discovery or, frankly, to be heard at all. This is not the law.  
 10 And Defendants simply ignore the most apposite doctrines – such as the parody/  
 11 satire distinction – in favor of meaningless platitudes. The Court should not endorse  
 12 Defendants’ unprecedented and distorted view of the law.

13 **B. The Complaint States a Viable Claim for Relief Under Section**  
 14 **43(a)(1)(A) of the Lanham Act.**

15 Browne’ third claim for relief is for false association under section 43(a)(1)(A)  
 16 of the Lanham Act, 15 U.S.C. § 1125(a)(1)(A), which prohibits the use,

17 in commerce [of] any word, term, name, symbol, or device, or any  
 18 combination thereof, or any false designation of origin, false or  
 19 misleading description of fact, or false or misleading representation of  
 20 fact, which is likely to cause confusion, or to cause mistake, or to  
 21 deceive as to the affiliation, connection, or association of such person  
 22 with another person, or as to the origin, sponsorship, or approval of his  
 23 or her goods, services, or commercial activities by another person.

24 15 U.S.C. § 1125(a)(1)(A).

25 In the Ninth Circuit, like all other federal courts, a “false endorsement claim  
 26 based on the unauthorized use of a celebrity’s identity is a type of false association  
 27 claim [under § 43(a)(1)(A)], for it alleges the misuse of a trademark, *i.e.*, a symbol or  
 28 device such as a visual likeness, vocal imitation, or other uniquely distinguishing  
 characteristic, which is likely to confuse consumers as to the plaintiff’s sponsorship  
 or approval.” *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1110 (9th Cir. 1992). The  
 Ninth Circuit has further distinguished such false association claims under §

1 43(a)(1)(A) from false advertising claims under § 43(a)(1)(B). Contrary to  
 2 Defendants’ erroneous and misleading contention in their briefs that Plaintiff must  
 3 prove “commercial competition” (Motion at 16:16), the Ninth Circuit unequivocally  
 4 holds that a false endorsement claim does “not require ‘actual competition’ in the  
 5 traditional sense; it extends to a purported endorser who has an economic interest  
 6 akin to that of a trademark holder in controlling the commercial exploitation of his or  
 7 her identity.” *Id.* In so holding, the *Waits* court specifically distinguished false  
 8 advertising cases (cited by Defendants) that do require actual competition. *Id.*

9 Plaintiff’s claim here is not a false advertising claim under section 43(a)(1)(B)  
 10 and Plaintiff’s claim is not a trademark dilution claim under section 43(c).

### 11 1. The Lanham Act Applies To The Conduct At Issue.

12 Defendants’ broad contention that “the Lanham Act . . . does not apply to  
 13 political speech” (Motion at 15:23-24) borders on frivolous. Indeed, Defendants  
 14 themselves have prosecuted and obtained numerous registered federal trademarks –  
 15 creations of the Lanham Act – specifically for use as source identifiers “in the field  
 16 of politics.” *See, e.g.* Steinsapir Decl., Exs. A-D. For example, Senator McCain  
 17 obtained marks for use in the areas of “political campaign services, namely  
 18 fundraising in the field of politics” (*id.*, Ex. C), and for use “in the field of national  
 19 policy and matters of interest to the national electorate.” *Id.*, Ex. D. Likewise, the  
 20 RNC has sought over a hundred federal marks (*id.* at ¶ 2), including marks for use in  
 21 “television programming . . . in the field of politics,” (*id.*, Exs. A-B), and for  
 22 “political booklets and posters.” *Id.*, Ex. A. Apparently, Defendants believe that they  
 23 have the right to invoke the protections of the Lanham Act against others in  
 24 “television programming in the field of politics,” but no one else can invoke the Act  
 25 against them in the same field. Basic notions of fairness and estoppel compel the  
 26 conclusion that Defendants should not be permitted to continually obtain the  
 27 protections of the Lanham Act before the Patent & Trademark Office and then turn  
 28 around and argue in federal court that the Lanham Act does not apply to them.

1           Regardless, the authority from the federal courts is crystal clear that the  
 2 provisions of the Lanham Act at issue here apply to “political speech.” For example,  
 3 in *MGM-Pathe Commns. Co. v. Pink Panther Patrol*, 774 F. Supp. 869, 877  
 4 (S.D.N.Y. 1991) (Leval, J.), a gay rights group used the “Pink Panther” mark,  
 5 without authorization, in connection with political advocacy. *Id.* at 871. In  
 6 attempting to defend its infringement, the gay rights group argued “that because [it]  
 7 is engaged in political speech, it is less subject to the trademark laws.” *Id.* at 877.  
 8 The district court rejected the argument out-of-hand: “There is no legal support for  
 9 this position. The seriousness and virtue of a cause do not confer any right to the use  
 10 of the trademark of another.” *Id.* (emphasis added). The Court then enjoined the  
 11 further unauthorized use of the Pink Panther mark. *Id.*

12           The Second Circuit also addressed the issue in-depth in *United We Stand*  
 13 *America, Inc. v. United We Stand, America New York, Inc.*, 128 F.3d 86 (2d Cir.  
 14 1997). The case dealt with the phrase, “United We Stand America,” which was first  
 15 used in commerce in connection with Ross Perot’s 1992 campaign for President. *Id.*  
 16 at 88. After unauthorized use of the mark by defendant, plaintiff sued. Defendant  
 17 argued, however, that the Lanham Act did not apply to “political activities.” *Id.* at  
 18 89. The Court first looked to the language of the statute – which Defendants here  
 19 simply ignore – prohibiting the unauthorized use of a mark “in commerce . . . in  
 20 connection with the sale, offering for sale, distribution, or advertising of any goods or  
 21 services [if] ... such use is likely to cause confusion.” *Id.* (quoting 15 U.S.C. §  
 22 1114(1)(a)) (emphasis original). The Court then held that political activities are a  
 23 “service” within the meaning of the plain meaning of the statute:

24           If different organizations were permitted to employ the same trade name  
 25 in endorsing candidates, voters would be unable to derive any  
 26 significance from an endorsement, as they would not know whether the  
 27 endorsement came from the organization whose objectives they shared  
 28 or from another organization using the same name. Any group trading in  
 political ideas would be free to distribute publicity statements,  
 endorsements, and position papers in the name of the “Republican  
 Party,” the “Democratic Party,” or any other. The resulting confusion  
 would be catastrophic; voters would have no way of understanding the

1 significance of an endorsement or position taken by parties of  
 2 recognized major names. The suggestion that the performance of such  
 3 functions is not within the scope of “services in commerce” seem to us  
to be not only wrong but extraordinarily impractical for the functioning  
of our political system.

4 *Id.* at 91 (emphasis added).<sup>5</sup>

5 The Court went on to explain that the Lanham Act’s use of the phrase “in  
 6 commerce” did not exempt political activities from the statute. “The history and text  
 7 of the Lanham Act show that ‘use in commerce’ reflects Congress’s intent to legislate  
 8 to the limits of its authority under the Commerce Clause, rather than to limit the  
 9 Lanham Act to profit-seeking uses of a trademark.” *Id.* at 92.

10 The cases and the specific language cherry-picked from those cases on which  
 11 Defendants rely all deal with sections of the Lanham Act that are not at issue in this  
 12 case. For example, Defendants rely upon and quote heavily from the Ninth Circuit’s  
 13 decision in *Rice v. Fox Broadcasting Co.*, 330 F.3d 1170, 1181 (9th Cir. 2003), to  
 14 argue that the Infringing Advertisement does not “constitute commercial advertising  
 15 or promotion under the Lanham Act.” Motion at 16:7-18 (emphasis added).  
 16 However, a cursory read of *Rice* reveals that it was addressing “a claim for false  
 17 advertising under the Lanham Act, 15 U.S.C. § 1125(a)(1)(B),” not a claim for false  
 18 endorsement. *Rice*, 330 F.3d at 1181. And indeed, that subsection specifically  
 19 requires “commercial advertising or promotion.” 15 U.S.C. § 1125(a)(1)(B). False  
 20 endorsement claims, however, arise under 15 U.S.C. § 1125(a)(1)(A) (§ 43(a)(1)(A)),  
 21 and specifically do not contain any language referring to “commercial advertising or  
 22 promotion.” *See* 15 U.S.C. § 1125(a)(1)(A); *Planned Parenthood Federation of*  
 23 *America, Inc. v. Bucci*, 1997 WL 133313, \*4-7 (S.D.N.Y. 1997) (rejecting argument  
 24 that political “services” are not subject to §§ 32 and 43(a)(1)(A) of the Lanham Act:

25 \_\_\_\_\_  
 26 <sup>5</sup> While *United We Stand* dealt with a registered mark under § 32 of the Lanham Act,  
 27 15 U.S.C. § 1114, this case deals with an unregistered “trademark” under § 43(a), 15  
 28 U.S.C. 1125(a). However, the two sections use almost identical language, and the  
 Ninth Circuit holds that courts should employ the same analyses to both sections.  
*See GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1204 n.3 (9th Cir. 2000).

1 those provisions “contain[ ] no commercial activity requirement” and specifically  
 2 distinguishing dilution claims and false advertising claims on that basis). The other  
 3 cases Defendants rely upon are also all false advertising or trademark dilution cases.<sup>6</sup>

4 For all these reasons, the Court should reject Defendants’ argument that  
 5 Plaintiff’s claim is not cognizable under the Lanham Act.

## 6 2. Plaintiff’s Claim Under § 43(a) of the Lanham Act is Not 7 Barred by the Artistic Relevance Test

8 The artistic relevance test is not applicable here, and the court certainly could  
 9 not so find on the complaint alone. Defendants do not any case where a court was  
 10 able to apply the artistic relevance test in the context of a Rule 12(b)(6) motion.

11 The two “Barbie” cases are not remotely on point and are easily disposed of. In

12 \_\_\_\_\_  
 13 <sup>6</sup> See *New.Net, Inc. v. Lavasoft*, 356 F. Supp. 2d 1090, 1117 (C.D. Cal. 2004)  
 14 (addressing false advertising claim, and quoting materials from Congressional  
 15 debates regarding amendment to false advertising portion of Lanham Act);  
 16 *MasterCard*, 70 U.S.P.Q.2d at 1053 (dealing with trademark dilution claim, and  
 17 distinguishing *United We Stand*, discussed above, because *United We Stand* dealt  
 18 with a portion of the Lanham Act that “does not have a commercial activity  
 19 requirement, nor does it exempt from liability noncommercial use of a mark”);  
 20 *American Family Life Ins. Co. v. Hagan*, 266 F. Supp. 2d 682, 696-97 (N.D. Oh.  
 21 2002) (political advertising did not create cognizable trademark dilution claim,  
 22 because it expressly fell in the statutory exemption for “noncommercial use” found in  
 23 § 43(c), but not present in § 43(a)); *Oxycal Laboratories, Inc. v. Jeffers*, 909 F. Supp.  
 24 719, 723 (S.D. Cal. 1995) (addressing whether speech at issue was “commercial  
 25 advertising and promotion,” *i.e.*, whether it met the requirement found for false  
 26 advertising claims, but not false designation claims under § 43(a)).

27 The two possible exceptions are the decisions in *Procter & Gamble Co. v. Amway*  
 28 *Corp.*, 242 F.3d 539 (5th Cir. 2001) and *Wojnarowicz v. American Family Ass’n*, 745  
 F. Supp. 130 (S.D.N.Y. 1990). The Fifth Circuit’s decision in *Procter & Gamble* is  
 simply unclear as to which prong of § 43(a) it is analyzing and it never connects its  
 “commercial speech” analysis to any statutory language. As justification for its  
 “commercial speech” analysis, however, it simply cited a prior decision, *Seven-Up*  
*Co. v. Coca-Cola Co.*, 86 F.3d 1379 (5th Cir. 1996), that expressly analyzed the  
 language regarding ““commercial advertising or promotion” under § 43(a)(1)(B).”  
*Id.* at 1384 (emphasis added). As noted, false designation, under § 43(a)(1)(A), does  
 not require “commercial advertising or promotion.” The Southern District of New  
 York in *Wojnarowicz* held that a false designation of origin claim required that the  
 parties be in competition with each other. *Wojnarowicz*, 745 F. Supp. at 141.  
 However, the Ninth Circuit has clearly and unequivocally rejected the theory that  
 false designation claims require that the parties be competitors. *Waits*, 978 F.2d at  
 1110. To the extent that the case could be read to mean that the Lanham Act does  
 not apply to political speech, it has now been rejected by the very Circuit in which it  
 sits. *United We Stand*, 128 F.3d at 91.

1 *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894 (9th Cir. 2002), the Court relied on  
 2 the fact that the song at issue – *Barbie Girl* – “pokes fun at Barbie and the values that  
 3 [defendant] contends she represents.” *Id.* at 901. The Court stressed that the “song  
 4 does not rely on the Barbie mark to poke fun at another subject but targets Barbie  
 5 herself” to specifically distinguish the Court’s earlier decision in *Dr. Seuss*  
 6 (discussed above), where the Ninth Circuit held that the Lanham Act precluded the  
 7 authors of *The Cat NOT in the Hat!* from use of the Dr. Seuss marks: “The  
 8 defendant’s use of the Dr. Seuss trademarks . . . had ‘no critical bearing on the  
 9 substance or style of’ *The Cat in the Hat!*, and therefore could not claim First  
 10 Amendment protection. *Id.*; see also *Mattel, Inc. v. Walking Mountain Prods.*, 353  
 11 F.3d 792, 807 (9th Cir. 2003) (finding use of Barbie dolls in photographs were  
 12 parody and not subject to Lanham Act, because the photographs “depict Barbie and  
 13 target the doll with Forsythe’s parodic message.”) (emphasis added). As noted  
 14 above, it is clear that Defendants did not use *Running on Empty* “to target” the song  
 15 or Plaintiff. Thus, *Dr. Seuss* controls. *Dr. Seuss*, 109 F.3d at 1406.

16 Likewise, the recent decision in *E.S.S. Entertainment 2000 v. Rock Star*  
 17 *Videos*, 547 F.3d 1095 (9th Cir. 2008), is also not on point. First, the use of *Running*  
 18 *on Empty* has no “artistic relevance” to the Commercial. In *E.S.S.*, defendant’s  
 19 video-game included a strip club called *The Pig Pen*, which was loosely based on a  
 20 real strip club in East Los Angeles called *The Play Pen*. *Id.* at 1097-98. The setting  
 21 of the game was intended “to develop a cartoon-style parody of East Los Angeles.”  
 22 *Id.* at 1100. Thus, using a setting reminiscent of an actual business in East Los  
 23 Angeles was “relevant to [plaintiff’s] artistic goal.” *Id.* Here, the use of Browne’s  
 24 composition was not relevant to the “goal” of the Commercial, *i.e.* to criticize  
 25 President-elect Obama’s energy policy. *Running on Empty* has nothing to do with  
 26 energy policy. And although Defendants argue that the phrase “running on empty”  
 27 has been invoked in the energy debate, that is a red-herring. This case is not about  
 28 the phrase, “running on empty.” This case is about the unauthorized use of a musical

1 composition that is famously associated with Plaintiff. Moreover, none of these  
 2 issues can be resolved on the pleadings. In *E.S.S.*, as in every other artistic relevance  
 3 case, there was full discovery exploring the “artistic motivations” of the parties. *See*,  
 4 *e.g.*, *E.S.S.*, 444 F. Supp. 2d 1012, 1041 (C.D. Cal. 2007) (citing voluminous  
 5 summary judgment record regarding artistic motivation in creation of *Pig Pen*).

6 Second, as *E.S.S.* makes clear, the use of a mark must not only be “relevant to  
 7 plaintiff’s artistic goal,” but Defendants must also show that the Commercial does  
 8 not “explicitly mislead[ ] as to the source or the content of the work.” *E.S.S.*, 547  
 9 F.3d at 1099. Here, Defendants used an exact copy of Plaintiff’s sound recording. In  
 10 *E.S.S.* “[t]he relevant question . . . [was] whether the Game would confuse its players  
 11 into thinking that the *Play Pen* is somehow behind the *Pig Pen*.” *Id.* at 1100. Here,  
 12 “the relevant question” is whether viewers of the Commercial would be confused  
 13 “into thinking that [Plaintiff] is behind [*Running on Empty*].” Of course viewers of  
 14 the Commercial would be misled into thinking that the source of Defendants’ use  
 15 was Plaintiff for the obvious reason that the source of the composition was Plaintiff.  
 16 And again, this analysis simply cannot be done on a Rule 12(b)(6) motion. In *E.S.S.*,  
 17 the court relied on extensive evidence, including expert testimony, before it fully  
 18 analyzed the issue. *E.S.S.*, 444 F. Supp. 2d at 1044-48.

19 The Court should reject Defendants’ argument that the artistic relevance test  
 20 precludes Plaintiff’s claims or make clear that the issue cannot be resolved now.

### 21 3. Browne Can Show a Likelihood of Confusion.

22 Finally, Defendants argue in cursory fashion that Browne cannot show a  
 23 likelihood of confusion as a matter of law. “The Lanham Act’s likelihood of  
 24 confusion standard is predominantly factual.” *Wendt v. Host Int’l, Inc.*, 125 F.3d  
 25 806, 812 (9th Cir. 1997). As the Court is aware, to determine whether a likelihood of  
 26 confusion exists in this Circuit, juries must analyze and weigh at least eight different  
 27 factors commonly referred to as the *Sleekcraft* factors. *See AMF, Inc. v. Sleekcraft*  
 28 *Boats*, 599 F.2d 341, 348-49 (9th Cir. 1979). In *Downing v. Abercrombie & Fitch*,

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1 265 F.3d 994 (9th Cir. 2001), the Ninth Circuit restated the *Sleekcraft* factors for  
2 better application in their “celebrity” line of Lanham Act cases. *Id.* at 1007-08.

3 Here, Defendants have not even made a cursory attempt to analyze likelihood  
4 of confusion in the context of the eight varied *Sleekcraft/Downing* factors.  
5 Apparently, Defendants expect the Court to conduct this analysis *sua sponte* with no  
6 guidance. On this basis, and given the high burden on this motion, the Court should  
7 reject the conclusory argument that Plaintiff can show no likelihood of confusion.

8 The sole argument that Defendants do make – which is unmoored to the legal  
9 standard and is thus essentially irrelevant – misses the mark. Defendants argue that  
10 there is no likelihood of confusion because Plaintiff associates himself with liberal  
11 causes. This proves nothing with respect to any of the *Sleekcraft/Downing* factors.  
12 For those familiar with Plaintiff and his politics, some may conclude that he just  
13 “sold out” or that he changed his politics. Plaintiff has a right under the Lanham Act  
14 not to have his voice associated with Defendants or anyone else with whom he does  
15 not want to be associated. The Court should reject Defendants’ argument.<sup>7</sup>

16 **V. CONCLUSION**

17 For the reasons stated, Plaintiff respectfully requests that the Court deny each  
18 of the motions to dismiss. Should the Court sustain any of the motions, Plaintiff  
19 requests leave to amend to cure any purported defects in the complaint.

20 DATED: January 7, 2008 KINSELLA WEITZMAN ISER KUMP &  
21 ALDISERT LLP

22  
23 By: /s/ Lawrence Y. Iser  
24 Lawrence Y. Iser  
25 Attorneys for Plaintiff Jackson Browne

26  
27 <sup>7</sup> Defendants challenge the viability of the Publicity claim by incorporating by  
28 reference the various and concurrently filed anti-SLAPP motions directed solely to  
that claim. Thus, Plaintiff simply refers to his papers opposing those motions.