

**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA****PRIORITY SEND****CIVIL MINUTES -- GENERAL**Case No. **CV 10-8123-JFW (RZx)**

Date: February 8, 2011

Title: Ebony Latrice Batts, et al. -v- William Adams, Jr., et al.

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**PRESENT:****HONORABLE JOHN F. WALTER, UNITED STATES DISTRICT JUDGE****Shannon Reilly  
Courtroom Deputy****None Present  
Court Reporter****ATTORNEYS PRESENT FOR PLAINTIFFS:**

None

**ATTORNEYS PRESENT FOR DEFENDANTS:**

None

**PROCEEDINGS (IN CHAMBERS):****ORDER DENYING MOTION OF PLAINTIFFS FOR  
PRELIMINARY INJUNCTION [filed 1/10/11; Docket No.  
54]**

On January 10, 2011, Plaintiffs Ebony Latrice Batts a/k/a Phoenix Phenom and Manfred Mohr (collectively, "Plaintiffs") filed a Motion for Preliminary Injunction ("Motion"). On January 18, 2011, Defendants William Adams, Allan Pineda, and Jaime Gomez, all individually and collectively as the music group The Black Eyed Peas; Jaime Munson a/k/a Poet Name Life; will.i.am music, llc; Tab Magnetic Publishing; Cherry River Music Co.; Jeepney Music, Inc.; Stacy Ferguson p/k/a Fergie; Headphone Junkie Publishing, LLC; and EMI April Music Publishing, Inc. filed their Opposition. On January 18, 2011, Defendants UMG Recordings, Inc. and Interscope Records filed their Joinder to Opposition and Opposition. On January 18, 2011, Defendants Stacy Ferguson p/k/a Fergie; Headphone Junkie Publishing, LLC; and EMI April Music Publishing, Inc. filed their Joinder to Opposition filed by Defendants UMG Recordings, Inc. and Interscope Records. On January 24, 2011, Plaintiffs filed a Reply. Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court found the matter appropriate for submission on the papers without oral argument. The matter was, therefore, removed from the Court's February 7, 2011 hearing calendar and the parties were given advance notice. After considering the moving, opposing, and reply papers, and the arguments therein, the Court rules as follows:

**I. Factual and Procedural Background**

Plaintiffs wrote and recorded the song "Boom Dynamite," containing both music and vocals, in 2007. On April 10, 2009, a Certificate of Registration, Certification No. SR0000625557, for "Boom Dynamite" was issued to Plaintiffs by the United States Copyright Office. Plaintiffs have never sold, transferred, or otherwise disposed of their statutory copyrights in "Boom Dynamite."

On or about March 30, 2009, the Black Eyed Peas, a musical group consisting of Defendants William Adams, Allan Pineda, Jaime Gomez, and Stacy Ferguson, wrote, recorded and released "Boom Boom Pow" as the first single from their album *The E.N.D. (Energy Never Dies)*. "Boom Boom Pow" is the Black Eyed Peas' second best selling song to date, it was iTunes' highest selling song of 2009, it was selected as Song of the Year for 2009 by *Billboard Magazine*, and "Boom Boom Pow" was nominated for a Grammy for Best Dance Recording. "Boom Boom Pow" has also been licensed and used in several nationwide commercials, television shows, the 2009 movie *G Force*, and a re-mixed version of the song was licensed for use in the 2009 movie *G.I. Joe: The Rise of Cobra*.

Plaintiffs first heard Defendants' song "Boom Boom Pow" in March 2009. On January 26, 2010, ten months after they first heard "Boom Boom Pow," Plaintiffs filed a Complaint in the United States District Court for the Northern District of Illinois, alleging that "Boom Boom Pow" infringed the copyright in their song "Boom Dynamite." Although the Court heard multiple motions during the pendency of the action, Plaintiffs never sought injunctive relief in the Illinois action. On April 27, 2010, the District Court dismissed the action, and granted Plaintiffs nearly one month to re-file their Complaint in an appropriate forum. Plaintiffs decided not to re-file their Complaint, but, instead, approached the defendants about a potential settlement. After defense counsel concluded that settlement negotiations would not be productive and in an effort to end any further delay, defense counsel requested a final settlement demand. Plaintiffs' "final" demand letter was received on August 20, 2010, and it advised counsel that if the defendants did not agree to pay a certain amount of money within seven days, Plaintiffs would "proceed to file a lawsuit and seek a preliminary injunction." On August 27, 2010, defense counsel rejected Plaintiffs' settlement demand and invited Plaintiffs' counsel to contact him if he wanted to discuss the matter. Plaintiffs' counsel never contacted defense counsel and Plaintiffs never filed their threatened lawsuit until this action was filed on October 28, 2010. In their Complaint, Plaintiffs allege that the Black Eyed Peas, their record labels, and their publishers<sup>1</sup> (collectively, "Defendants") committed willful copyright infringement of Plaintiffs' song "Boom Dynamite" when the Black Eyed Peas wrote and recorded "Boom Boom Pow." On January 10, 2010, nearly two years after Plaintiffs first heard "Boom Boom Pow," Plaintiffs filed the instant Motion, asking the Court to enjoin Defendants from continuing to perform or distribute "Boom Boom Pow."

## II. Legal Standard

Injunctive relief is "an extraordinary remedy that may only be issued upon a clear showing that plaintiff is entitled to such relief." *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 129 S.Ct. 365, 376 (2008). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.*; see, also, *American Trucking Associations, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009). The Ninth Circuit recently confirmed that its "serious questions" approach survived *Winter* when applied as part of the four element *Winter* test. *Alliance for the Wild Rockies v. Cottrell*, \_\_\_ F.3d \_\_\_, 2011 WL 208360, \*7 (9th Cir. Jan. 25, 2011). In other words, "serious questions going to

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<sup>1</sup> The record labels and publishers include Defendants Jaime Munson a/k/a Poet Name Life; will.i.am music, llc; Tab Magnetic Publishing; Cherry River Music Co.; Jeepney Music, Inc.; Headphone Junkie Publishing, LLC; and EMI April Music Publishing, Inc.

the merits' and a balance of hardships that tips sharply towards the plaintiff can support issuance of an injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *Id.*

As explained below, Plaintiffs have failed to establish that any of these factors weigh in Plaintiffs' favor.

### **III. Discussion**

#### **A. Plaintiffs Have Failed to Demonstrate A Likelihood of Success on the Merits.**

A party seeking a preliminary injunction must make a clear showing of likelihood of success on the merits of its claim. *American Trucking Association*, 559 F.3d at 1052. In order to establish their copyright infringement claim, Plaintiffs must prove: (1) ownership of a valid copyright<sup>2</sup>, and (2) copying of constituent elements of the work that are original. *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340, 361 (1991); *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 481 (9th Cir. 2000); *Swirsky v. Carey*, 376 F.3d 841, 844 (9th Cir. 2004). The plaintiff bears the burden of proof as to both elements. As to the second element, Plaintiff must establish that the Black Eyed Peas copied protected elements of "Boom Dynamite" either through evidence of direct copying or through a showing that the Black Eyed Peas had access to Plaintiffs' copyrighted work and that the two works at issue are substantially similar. *Three Boys Music*, 212 F.3d at 481; *Murray Hill Publications, Inc. v. Twentieth Century Fox Film Corp.*, 361 F.3d 312, 316 (6th Cir. 2004).

In this case, Plaintiffs have failed to present any evidence of direct copying, and, instead, Plaintiffs argue that the Black Eyed Peas had access to "Boom Dynamite" through Defendant Interscope Records ("Interscope") and because "Boom Dynamite" was widely disseminated.

##### **1. Plaintiffs Have Failed to Establish Access to "Boom Dynamite."**

In order to prove access, the plaintiff must demonstrate that the defendant has a "reasonable opportunity" or "reasonable possibility" of viewing the plaintiff's work prior to the creation of the infringing work. *Three Boys Music*, 212 F.3d at 482. Reasonable access requires more than a "bare possibility" and "may not be inferred through mere speculation or conjecture." *Id.* "In order to support a claim of access, a plaintiff must offer 'significant affirmative and probative evidence.'" *Jorgensen v. Epic/Sony Records*, 351 F.3d 46, 52 (2d Cir. 2003) (affirming summary judgment against plaintiff on issue of access where plaintiff produced "no reasonable documentation that he actually mailed tapes of the allegedly infringed work").

Access is typically proven through circumstantial evidence "in one of two ways: (1) a particular chain of events is established between the plaintiff's work and the defendant's access to

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<sup>2</sup> While Defendants do not concede that Plaintiffs can demonstrate ownership of a valid copyright in the song "Boom Dynamite," they have not opposed the issuance of a preliminary injunction on that ground. Thus, the Court will assume, for purposes of this Motion only, that Plaintiffs do own a valid copyright in "Boom Dynamite."

that work (such as through deals with a publisher or record company), or (2) the plaintiff's work has been widely disseminated." *Three Boys Music*, 212 F.3d at 482.

In this case, Plaintiffs attempt to prove access by establishing a chain of events linking Plaintiffs' "Boom Dynamite" with the Black Eyed Peas. Specifically, Plaintiffs argue that the Black Eyed Peas had access to "Boom Dynamite" because a third-party sent Interscope President Jimmy Iovine "an e-blast flyer" informing its recipients of "Boom Dynamite," and providing a link to the YouTube music video of the song. Plaintiffs also argue that Black Eyed Peas had access to "Boom Dynamite" because Plaintiff Mohr submitted a copy of the song to Troy Marshall, a Vice-President at Interscope, as a result of Marshall's purported interest in one of Plaintiff Batts' other songs.

With respect to the e-blast flyer, Plaintiffs fail to submit any admissible evidence that the e-blast flyer was ever sent to Iovine or that Iovine ever received it. *Jorgensen*, 351 F.3d at 52 (rejecting plaintiff's claim that the mailing of tapes to a corporation could "be equated with access" where there was no evidence that the tapes were ever received); *Meta-Film*, 586 F.Supp. at 1357-58 (rejecting the "bare corporate receipt doctrine"). Even assuming that Plaintiffs could establish that the e-blast flyer was sent to and received by Iovine, they have failed to present any evidence that Iovine or anyone else at Interscope records forwarded "Boom Dynamite" to the Black Eyed Peas. *Tisi v. Patrick*, 97 F.Supp. 2d 539, 547 (S.D.N.Y. 2000) (holding that unsolicited submission to a record company does not establish access by a recording artist); *Dimmie v. Carey*, 88 F.Supp. 2d 142 (S.D.N.Y. 2000) (same). An inference of access "requires more than a mere allegation that someone known to the defendant possessed the work in question." *Herzog v. Castle Rock Entertainment*, 193 F.3d 1241, 1252 (11th Cir. 1999); *Towler v. Sayles*, 76 F.3d 579, 583 (4th Cir. 1996) (rejecting claim of access based upon a "tortious [sic] chain of hypothetical transmittals").

Similarly, Plaintiffs have failed to demonstrate that Marshall, whose job responsibilities do not include providing creative input to recording artists, was ever in a position to or did in fact provide "Boom Dynamite" to the Black Eyed Peas. Marshall explicitly states in his declaration that he does not recall ever receiving music from Plaintiff Mohr, does not recall listening to "Boom Dynamite," and that "[i]t is not [his] practice to send music directly to artists, and [he] is confident that [he has] never sent any music to will.i.am or anyone connected with the Black Eyed Peas." Marshall Declaration, ¶ 5.

Therefore, the Court concludes that Plaintiffs have failed to establish that they sent "Boom Dynamite" to either Iovine or Marshall at Interscope or that "Boom Dynamite" ever reached the Black Eyed Peas.

Plaintiffs have also failed to prove their alternative theory of access, which is based on their claim that Black Eyed Peas had access to "Boom Dynamite" because it was widely disseminated. In music cases, widespread dissemination has traditionally been demonstrated "through sales of sheet music, records, and radio performances." *Three Boys*, 212 F.3d at 482. For example, in *Three Boys*, the Ninth Circuit held that substantial evidence supported a jury's finding of access where the copyrighted song enjoyed significant radio airplay over 20 years. *Id.* at 483-85. However, in *Rice v. Fox Broadcasting Co.*, 330 F.3d 1170, 1178 (9th Cir. 2003), the Ninth Circuit held there was no evidence of widespread dissemination of a video even though 19,000 copies were sold over a 13-year period. See, also, *Art Attack Ink, LLC v. MGA Entertainment, Inc.*, 581

F.3d 1138, 1144 (9th Cir. 2009) (holding that no widespread dissemination existed, despite the fact that the tee-shirt design at issue in the case was available at a display booth, on individuals wearing the tee-shirt, and via the internet).

In support of their widespread dissemination theory of access, Plaintiffs presented evidence that “Boom Dynamite” was posted on YouTube, Amazon.com, and iTunes in approximately early January 2008; “Boom Dynamite” received regular radio play in Chicago, Illinois from approximately February until March 2008; and “Boom Dynamite” was licensed to Airplay Records for release in the French market. However, as Defendants point out, the posting of videos and/or songs on YouTube, Amazon.com, and iTunes by an unknown singer, the limited two months of radio play in a single city in the United States, and the limited licensing of the song in France “can only be described as the modern day equivalent of looking for a needle in a haystack – where the alleged seeker does not know the needle exists, and isn’t looking for it.” Opposition, 4:27-5:1. The Court concludes that such dissemination is hardly “widespread” and, in fact, is quite limited, and clearly insufficient to support a finding of access.

After reviewing the evidence offered by Plaintiffs, the Court concludes Plaintiffs have raised no more than a “bare possibility” that the Black Eyed Peas may have had access to “Boom Dynamite” under either of their theories of access, and “[i]n and of itself, such a bare possibility is insufficient to demonstrate access.” *Jason*, 526 F.Supp. at 776-77. Accordingly, Plaintiffs have failed to establish that the Black Eyed Peas had access to “Boom Dynamite.”

## **2. Plaintiffs Have Failed to Demonstrate Substantial Similarity Between “Boom Dynamite” and “Boom Boom Pow.”**

In addition to access, Plaintiffs must also demonstrate that the copyrighted work and the allegedly infringing work are substantially similar.<sup>3</sup> See *Three Boys Music*, 212 F.3d at 481. To determine whether two works are substantially similar, the Ninth Circuit applies a two-part test consisting of extrinsic and intrinsic components. *Rice*, 330 F.3d at 1178. The extrinsic test involves an objective comparison of the two works. The Court must consider “whether two works share a similarity of ideas and expression as measured by external, objective criteria.” *Swirsky*, 376 F.3d at 845. The extrinsic test requires an “analytical dissection” of the works, and is often aided by expert testimony. *Id.* The extrinsic test allows the fact finder to focus on elements that are copyright protected and away from elements that a copyright in a musical work does not protect. See, e.g., *Id.* The intrinsic component of the substantial similarity test is subjective and “depends solely on the response of the ordinary reasonable person.” *Berkic v. Crichton*, 761 F.2d 1289, 1292 (9th Cir. 1985). “To that extent, expert testimony or the comparison of individual features of the works is inappropriate in applying the intrinsic test.” *Id.* Instead, “the trier of fact ordinarily decides whether the ‘total concept and feel’ of the two works is substantially similar.”<sup>4</sup>

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<sup>3</sup> Because Plaintiffs are unable to establish access, the inverse ratio rule is inapplicable in this case. See, e.g., *Three Boys Music*, 212 F.3d at 485 (holding that the inverse ratio rule “require[s] a lower standard of proof of substantial similarity when a high degree of access is shown”).

<sup>4</sup> In deciding this Motion, the Court concludes that only the extrinsic test is important in determining whether Plaintiffs are likely to succeed on the merits. See, e.g., *Kroft*, 16 F.3d at 1045



*Id.*; *Kroft*, 16 F.3d at 1045.

The Ninth Circuit has identified a methodology to assist the Court in applying the extrinsic test to the works at issue in a particular case. Initially, it is the plaintiff's burden to identify the sources of the alleged similarity between the two works. See *Apple Computer*, 35 F.3d at 1443; see, also, *Three Boys Music*, 212 F.3d at 485. Once the plaintiff has identified the alleged similarities, "[u]sing analytic dissection, and, if necessary, expert testimony, the court must determine whether any of the allegedly similar features are protected by copyright." See *Apple Computer*, 35 F.3d at 1443. The typical objective features to be compared vary depending on the type of works at issue. *Idema v. Dreamworks, Inc.*, 162 F. Supp. 2d 1129, 1177-78 (C.D. Cal. 2001); see, also, *Swirsky*, 376 F.3d at 849 (holding that "music is comprised of a large array of elements, some combination of which is protectable by copyright."). When analyzing the similarity of musical compositions under the extrinsic test, a variety of compositional elements may be considered, including melody, harmony, rhythm, timbre, structure, instrumentation, meter, tempo, and lyrics. *Swirsky*, 376 F.3d at 849.

However, in comparing these elements, the Court must first filter out any "unprotectable elements." See, e.g., *Apple Computer*, 35 F.3d at 1443; see, also, *Mattel, Inc. v. MGA Entertainment, Inc.*, 616 F.3d 904, 913-14 (9th Cir. 2010); *Cavalier*, 297 F.3d at 822 ("when applying the extrinsic test, a court must filter out and disregard the non-protectable elements in making its substantial similarity determination."); *Swirsky*, 376 F.3d at 845 ("Because the requirement is one of substantial similarity to *protected* elements of the copyrighted work, it is essential to distinguish between the protected and unprotected material in a plaintiff's work") (emphasis in the original). Among the "unprotectable elements" which the court must "filter" out in its comparison of a copyrighted work and an allegedly infringing work are "'ideas,' as distinguished from the 'expression' of those ideas," and "other information over which no individual is entitled to claim a monopoly," including "elements borrowed from the public domain; instances in which a particular 'expression' at issue 'merges' with the 'idea' being expressed; and/or a similar instance in which the form of the 'expression' is so 'standard' in the treatment of a given 'idea' that it constitutes a *scenes a faire*, or a 'scene which must be done.'" *Idema*, 162 F. Supp. 2d at 1176-77 (internal citations omitted); see, also, *Intersong-USA v. CBS, Inc.*, 757 F.Supp. 274, 282 (S.D.N.Y. 1991) (dismissing claim where only alleged similarities were "found in many other well-known songs," and, thus, constituted "unoriginal" and "unprotectable expression").

In addition to the works themselves and Plaintiffs' declarations, Plaintiffs offer the declarations of their expert musicologists, Mr. Kevin Byrnes and Dr. Alexander Stewart, in support of their claim that substantial similarities exist between protectable elements in the works. Although Plaintiffs' experts point out alleged similarities between the two works, they fail to note any relevant prior art, any differences between the two works, and neglect to filter out any of the unprotectable elements. Instead, Mr. Byrnes and Dr. Stewart merely offer a list of their perceived similarities between the two works without any discussion or analysis of whether these similarities

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(holding that a plaintiff that cannot satisfy the extrinsic test necessarily loses on summary judgment because a jury cannot find substantial similarity without evidence on both the extrinsic and intrinsic tests).

consist of protectable or unprotectable elements.<sup>5</sup> In fact, many of the similarities identified by Plaintiffs' experts consist of nothing more than standard treatments of common elements often present in popular music or prior art, and, thus, must be filtered out before applying the extrinsic test.<sup>6</sup> See, e.g., *McRae v. Smith*, 968 F.Supp. 559, 567 (D. Colo. 1997) ("Plaintiff's experts have failed to refute the evidence of dissimilarities in these nonprotectable areas and instead focus their analysis on areas that are common to songs of the country western genre and therefore must be filtered out before the comparison is made."). For example, some of the more generic elements found in popular music that Plaintiffs and their experts rely on as examples of similarities between the two works include: (1) use of 4/4 meter; (2) use of a tempo within the range of *moderato* to *allegro*; (3) a length of three to five minutes; (4) use of a structure that includes an introduction, verse, a repeating chorus that represents the hook of the work, a breakdown, and an outro; (5) use of drums in combination with electronic instruments and sounds; (6) drum beats characterized by the bass drum being heard on beat one, and the snare drum or hand claps being heard on beats two and/or four; and (7) use of the word "boom" in repetition three or more times and set to a

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<sup>5</sup> Defendants filed *Daubert* objections under Federal Rule of Evidence 702 to the declarations of Mr. Byrnes and Dr. Stewart. Defendants do not seriously challenge their qualifications and the Court concludes that Mr. Byrnes and Dr. Stewart are qualified to offer their opinions relating to the extrinsic component of the substantial similarity test. However, Defendants do challenge and object to their opinions primarily on the ground that under *Daubert* their proffered opinions are not reliable. After considering Defendants' objections, the Court concludes that with the exception of Mr. Byrnes and Dr. Stewart's opinions relating to the intrinsic component of the substantial similarity test and their legal opinions and conclusions which are inadmissible (*Swirsky*, 376 F.3d at 847; *Aguilar v. International Longshoremen's Union Local No. 10*, 966 F.2d 443, 447 (9th Cir. 1992)), Defendants' objections go to the weight of the evidence rather than its admissibility. Although Mr. Byrnes and Dr. Stewart's opinions relating to the extrinsic component of the substantial similarity test are admissible, the Court concludes that their opinions are entitled to very little weight because they are fundamentally flawed due to their failure to properly analyze the alleged similarities in accordance with relevant Ninth Circuit law as discussed above. Plaintiffs' declarations are similarly flawed and entitled to little if any weight. Plaintiffs also point out, but do not properly analyze, the alleged similarities between the two works in their declarations. In addition, they offer inadmissible conclusions that the Black Eyed Peas copied "Boom Dynamite."

<sup>6</sup> In addition, a number of the similarities listed in the declarations of Plaintiff Batts, Plaintiff Mohr, Dr. Stewart, and Mr. Byrnes contradict one another and/or are factually incorrect and cast doubt on the credibility of Plaintiffs' evidence. For example, Plaintiff Batts states that "Boom Dynamite" has a tempo of 110 beats per minute and "Boom Boom Pow" has a tempo of 120 beats per minute while Plaintiff Mohr, Dr. Stewart, and Mr. Byrnes state that "Boom Dynamite" has a tempo of 120 beats per minute and "Boom Boom Pow" has a tempo of 130 beats per minute. In addition, Plaintiff Batts, Plaintiff Mohr, and Mr. Byrnes describe the structure of both songs as: "a short instrumental introduction with back chatter, chorus, first verse, chorus, second verse, bridge with instrumental theme, breakdown, repeat of first verse, final chorus, and both songs end with a coda." However, Dr. Stewart describes the structure of the two songs as "intro, chorus, verse 1, verse 2, chorus, verse 3, breakdown, verse (repeat), chorus, and ending (fade)."

rhythm that includes syncopation.<sup>7</sup> See, e.g., *Tisi*, 97 F.Supp. 2d at 548-49 (holding that key center, tempo, common chord structure/harmonic progression, and stock rhythms are “not copyrightable as a matter of law”); *Intersong-USA*, 757 F.Supp. at 282 (holding that generic structure, patterns, harmonic progression, and rhythms as contained in composition were common musical elements and, thus, not copyrightable); *Johnson*, 409 F.3d at 20-24 (holding that common harmonic progressions and lyrics not protected).

Defendants offer the declaration and report of their expert musicologist, Dr. Lawrence Ferrara, which contain a persuasive comparative analysis of similarities and differences between the protectable elements of the two works and a comparative analysis of the two works in relation to prior art. Dr. Ferrara concludes that the two works do not share any significant structural, harmonic, rhythmic, melodic, or lyrical similarities, and to the extent there are any relevant similarities, those similarities are not significant, are not original to “Boom Dynamite,” and are heard within the context of many differences. Some of the fundamental differences between the two works that Dr. Ferrara discusses in his report include: (1) differences in the metric placement, grouping, and duration of the “boom” lyrics in the choruses; (2) harmonic structure; (3) instrumentation; (4) arrangement and spatial organization of instruments; (5) specific motives employed in accompanying material, vocals, lyrics, and electronic effects used.<sup>8</sup>

The Court concludes based on the musicologists’ testimony and its own review of the songs that Plaintiffs have failed to produce sufficient evidence that would support a finding that they are likely to succeed in proving that “Boom Dynamite” and “Boom Boom Pow” are substantially similar.<sup>9</sup> Plaintiffs have simply failed to properly identify any shared similarities of protected

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<sup>7</sup> Plaintiffs correctly argue that a combination of unprotectable elements may qualify for copyright protection. *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1446 (9th Cir. 1994). However, “a combination of unprotectable elements is eligible for copyright protection only if those elements are numerous enough and their selection and arrangement original enough that their combination constitutes original work of authorship.” *Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003). In this case, Plaintiffs have failed to demonstrate that the unprotectable elements in “Boom Dynamite” are numerous enough or original enough in their selection and arrangement to qualify for copyright protection.

<sup>8</sup> Plaintiffs understandably decided not to object to Dr. Ferrara’s declaration and report. In contrast to Plaintiffs’ experts, the Court found that Dr. Ferrara’s declaration fully complied with the methodology identified by the Ninth Circuit and that he reliably and persuasively applied that methodology to the facts of this case. The Court also found Dr. Ferrara’s detailed report, especially the visual exhibits, extremely helpful to the Court in applying the extrinsic test for substantial similarity to the works in the case. Perhaps cross-examination will expose some weakness in Dr. Ferrara’s opinions, but based on this record, the Court gave significant weight to Dr. Ferrara’s opinions in reaching its conclusions on the issue of substantial similarity.

<sup>9</sup> Although Dr. Stewart submitted a rebuttal declaration with Plaintiffs’ Reply, Dr. Stewart’s rebuttal declaration consists mostly of complaints about Dr. Ferrara’s opinions which were largely designed to defend his opinions and did not add in any significant way to the analysis of the substantial similarity of the works. For example, when confronted with Dr. Ferrara’s extensive analysis of prior art, Dr. Stewart simply dismisses Dr. Ferrara’s testimony by stating that he did



elements and have also failed to explain why the significant differences between the two works should be overlooked.

**B. Plaintiffs Have Failed to Demonstrate Irreparable Injury.**

The party seeking preliminary injunctive relief is required to “establish that he is likely to suffer irreparable harm in absence of preliminary relief.” *Winter*, 555 U.S. 7, 129 S.Ct. at 374.

Until recently, a plaintiff alleging copyright infringement has been entitled to a presumption of irreparable harm. *Sun Microsystems, Inc. v. Microsoft Corp.*, 188 F.3d 1115, 1119 (9th Cir. 1999); *Cadence Design Sys., Inc. v. Avanti! Corp.*, 125 F.3d 824, 826–27 (9th Cir. 1997) (holding that a presumption of irreparable harm arises where the plaintiff is able to show a likelihood of success on the merits of its copyright infringement claim). Although the Ninth Circuit has not yet settled the debate on the viability of the presumption of irreparable harm in intellectual property cases, a district court in a recent decision extensively analyzed the continued viability of the presumption of irreparable injury in light of *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 129 S.Ct. 365 (2008), and *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006), and concluded that there can be no presumption of irreparable harm in assessing the need for preliminary relief in a copyright case. *Aurora World, Inc. v. Ty Inc.*, 719 F.Supp. 2d 1115, 1166-69 (C.D. Cal. Dec. 15, 2009).

The Court agrees with *Aurora* and concludes that following *Winters* and *eBay*, irreparable injury cannot be presumed in copyright infringement cases. Rather, it is the plaintiff's burden to prove that he is likely to suffer irreparable harm in the absence of preliminary relief.<sup>10</sup> Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 14.06 (2011) (“No longer applicable is the presumption of irreparable harm.”); *Hologic, Inc. v. Senorx, Inc.*, 2008 WL 1860035, \*15 (N.D.Cal. Apr. 25, 2008) (holding that it is “doubtful that the Supreme Court intended for the presumption to survive for purposes of preliminary injunctions”); *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 518 F. Supp.2d 1197, 1214 (C.D.Cal. 2007) (“The *eBay* Court held that it is Plaintiffs who ‘must demonstrate’ (meaning, have the burden of proof) that the traditional factors favor a

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consider prior art but did not include any discussion in his initial declaration because he did not find the prior art to be similar to “Boom Dynamite.” Of course, Dr. Stewart conveniently forgot to mention the results of his work or that he even did such work in his initial declaration. Until the parties have the opportunity to develop additional evidence and Plaintiffs' experts have an opportunity to develop and perhaps refine their opinions, nothing contained in Dr. Stewart's rebuttal declaration detracts from the persuasiveness of Dr. Ferrara's opinions.

<sup>10</sup> *Aurora* distinguished *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 877 (9th Cir. 2009), by noting that the Ninth Circuit appeared to apply *Winter* and did not consider the impact of the Supreme Court's decision in *eBay*. See, *Aurora World*, 719 F.Supp. 2d at 1169, fn. 112. Plaintiffs' reliance on *Summit Entertainment, LLC v. Beckett Media, LLC*, 2010 WL 147958 (C.D. Cal. Jan. 12, 2010), is not helpful to their argument. The Court agrees with Defendants that *Summit Entertainment* simply noted the case law describing this presumption and then made a factual determination that the plaintiffs had “in fact, demonstrated that irreparable harm was likely.” Joinder to Opposition and Opposition, p. 7, fn. 4; see, also, *Summit Entertainment*, 2010 WL 147958, at \*4.

permanent injunction.”).

Plaintiffs erroneously argue that this Court can infer irreparable harm if they establish likelihood of success on their claim.<sup>11</sup> Plaintiffs rely on pre-*Winter* case law and appear to misunderstand the applicable standard for preliminary injunctive relief. As a result, Plaintiffs merely rely on unpersuasive argument instead of evidence to support their position that they will suffer irreparable harm in the absence of preliminary relief. Plaintiffs’ showing is clearly insufficient to meet their burden of demonstrating irreparable injury, especially in light of Plaintiffs’ unreasonable delay and the adequacy of monetary damages.

Plaintiffs’ delay in seeking injunctive relief weighs heavily against granting a preliminary injunction in this case. See *Oakland Tribune, Inc. v. Chronicle Publ’g Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985) (“Plaintiff’s long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm”); *Lydo Enters., Inc. v. City of Las Vegas*, 745 F.2d 1211, 1213 (9th Cir. 1984) (“A delay in seeking a preliminary injunction is a factor to be considered in weighing the propriety of relief”); *Hi-Rise Technology, Inc. v. Amateurindex.com*, 2007 WL 1847249, at \* 4 (W.D. Wash. June 27, 2007) (“Such a long delay in seeking relief weighs against granting a temporary restraining order or a preliminary injunction.”). In this case, although Plaintiffs had many opportunities, Plaintiffs waited twenty-two months – *nearly two years* – from the time they first heard “Boom Boom Pow” before they sought any form of injunctive relief. The Court finds that the delay in this case was clearly unreasonable, and that Plaintiffs’ delay further demonstrates a lack of urgency and irreparable harm. See, e.g., *Protech Diamond Tools Incorporation v. Liao*, No. C 08-3684 SBA, 2009 WL 1626587, \*6 (N.D. Cal. June 8, 2009) (“delay alone . . . [is] sufficient to undermine the Plaintiff’s claim of immediate, irreparable harm”); see, also, *Playboy Enterprises v. Netscape Communications Corp.*, 55 F.Supp. 2d 1070, 1080 (C.D. Cal. 1999) (finding that a five month delay demonstrated lack of irreparable harm), *aff’d*, 202 F.3d 278 (9th Cir. 1999); *Metro-Media Broadcasting Corp. v. MGM/UA Entertainment Co.*, 611 F.Supp. 415, 427 (C.D. Cal. 1985) (denying motion for preliminary injunction where plaintiff delayed four months in seeking injunction); *High-Tech Medical Instrumentation, Inc. v. New Image Indus., Inc.*, 49 F.3d 1551, 1556-57 (Fed. Cir. 1995) (holding that a 17 month delay “militates against the issuance of a preliminary injunction”).

The Court also concludes that monetary relief can adequately and completely compensate Plaintiffs for their alleged injuries, and, therefore, it is extremely unlikely that Plaintiffs will suffer irreparable injury if injunctive relief is denied.<sup>12</sup> Irreparable injury does not exist where monetary damages would provide an adequate remedy. See *California Pharmacists Association v. Maxwell-Jolly*, 563 F.3d 847, 851 (2009) (“monetary harm does not constitute irreparable harm”); *Los*

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<sup>11</sup> Even if Plaintiffs are correct, irreparable injury cannot be presumed in this case because the Court concludes that Plaintiffs have not established a likelihood of success on the merits.

<sup>12</sup> In fact, Plaintiffs themselves tacitly admit that their alleged injuries can be compensated with monetary relief. Plaintiffs ask that, as part of any injunction, all profits from sales of “Boom Boom Pow” be placed in an escrow account pending the outcome of the litigation. Moreover, Plaintiffs’ ADR Program Questionnaire, filed on January 28, 2011 (Docket No. 94), confirms that the real remedy Plaintiffs seek in this action is an award of money damages. Specifically, in the ADR Program Questionnaire, they state that “Plaintiffs seek actual damages, including lost profits and disgorgement of Defendants’ profits, and songwriting credit for the infringing song, ‘Boom Boom Pow,’ in turn entitling them to future revenue from the song.”

*Angeles Memorial Coliseum Commission v. National Football League*, 634 F.2d 1197, 1202 (9th Cir. 1980) (quoting *Sampson v. Murray*, 415 U.S. 61, 90 (1974) (“Mere injuries, however substantial, in terms of money, time and energy necessarily expended . . . are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.”)); *Cotter v. Desert Palace, Inc.*, 880 F.2d 1142, 1145 (9th Cir. 1989) (injuries compensable by money damages are not usually deemed irreparable); *Abend v. MCA, Inc.*, 863 F.2d 1465, 1479 (9th Cir. 1988) (declining to enjoin distribution of “Rear Window” because plaintiff could “be compensated adequately for the infringement by monetary compensation”). Therefore, Plaintiffs have not established that they are likely to suffer irreparable injury in absence of preliminary relief.

### **C. The Balance of Hardships Weighs in Favor of Defendants.**

An injunction may not issue unless the balance of hardships tips sharply in favor of the moving party. *International Jensen, Inc. v. Metrosound U.S.A., Inc.*, 4 F.3d 819, 822 (9th Cir. 1993). In this case, the Court finds Plaintiffs have failed to demonstrate that the balance of hardships tips sharply in their favor. The record is devoid of any evidence that the Plaintiffs will suffer irreparable injury if the injunction is denied. By contrast, Defendants will suffer significant financial damage and damage to their reputations if the Court issues an injunction preventing them from exploiting their work through sales, performances, and with current and potential licensees. Balanced against the absence of any showing of irreparable harm to Plaintiffs, the substantial harm to Defendants strongly weighs against the issuance of an injunction. See, e.g., *LucasFilm Ltd. v. Media Market Group, Ltd.*, 182 F.Supp. 2d 897, 901 (N.D. Cal. 2002) (denying preliminary injunction where balance of hardships did not tip sharply in plaintiff’s favor because issuance of injunction would cause the defendant “significant financial hardship” and threaten its First Amendment rights); see, also, *Chase-Riboud v. Dreamworks, Inc.*, 987 F.Supp. 1222, 1233 (C.D. Cal. 1997) (holding that balance of hardships did not tip sharply in plaintiff’s favor where plaintiff was seeking to enjoin release of “Amistad” after defendants had invested approximately \$70-75 million in the movie).

### **D. The Public Interest Does Not Support the Issuance of a Preliminary Injunction.**

In this case, Plaintiffs argue that an injunction would serve the “public interest in upholding intellectual property rights such as copyright protections” by maintaining “the integrity of the music industry” and “deter[ring] major labels and super-star artists from engaging in similar conduct.”

Although Plaintiffs overstate what is at stake in this case, the Court agrees that, in viable claims of copyright infringement of a musical work, the issuance of an injunction serves the public interest by upholding intellectual property rights and helping to deter others from engaging in infringing activities. However, given the lack of evidence demonstrating that their song, “Boom Dynamite,” has been infringed by Defendants, the issuance of an injunction in this case would not be in the public interest.

## **IV. Conclusion**

For all the foregoing reasons, Plaintiffs' Motion is **DENIED**.

IT IS SO ORDERED.

**Hellwig, Elaine**

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## UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA

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