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17 **UNITED STATES DISTRICT COURT**
18 **CENTRAL DISTRICT OF CALIFORNIA**
19 **SOUTHERN DIVISION**

20 BRYAN PRINGLE, an individual,) Case No. SACV 10-1656 JST(RZx)
21 Plaintiff,)
22 v.) **MEMORANDUM OF POINTS**
23 WILLIAM ADAMS, JR.; STACY) **AND AUTHORITIES IN SUPPORT**
24 FERGUSON; ALLAN PINEDA; and) **OF PLAINTIFF'S EX PARTE**
25 JAIME GOMEZ, all individually and) **APPLICATION FOR**
collectively as the music group The Black) **TEMPORARY RESTRAINING**
26 Eyed Peas, *et al.*,) **ORDER AND ORDER TO SHOW**
Defendants.) **CAUSE RE PRELIMINARY**
INJUNCTION

27
28

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 This is a copyright infringement case brought by the Plaintiff, Bryan Pringle
4 (“Pringle”), an unknown singer/songwriter, against the members of the number-one
5 pop music group in the world, the Black Eyed Peas, as well as their record labels and
6 publishers. Pringle alleges, and the evidence will prove, that Defendants¹ committed
7 willful copyright infringement of both the sound recording and musical composition
8 of the derivative version of Pringle’s song “Take a Dive,” when they wrote and
9 recorded their Grammy award-winning, record-breaking, mega-hit single, “I Gotta
10 Feeling.”

11 The First Amended Complaint further maintains that this instance of copyright
12 infringement is part of a larger pattern and practice of unlawful and deceptive
13 behavior, and upon information and belief, a civil conspiracy, between Defendants
14 UMG Recordings, Inc. (“UMG”), Interscope Records (“Interscope”) and the Black
15 Eyed Peas, consisting of the willful copyright infringement of songs from
16 independent artists and songwriters who do not have the financial means to protect
17 their intellectual property.

18 Defendants’ willful copyright infringement continues despite notice to the
19 Defendants and their counsel to cease and desist their infringement based on
20 unequivocal proof given to them, and their own knowledge that “I Gotta Feeling”
21 infringes on Pringle’s copyrighted song. Pringle thus seeks a temporary restraining
22 order (“TRO”) and an order to show cause regarding issuance of a preliminary
23 injunction against Defendants to prohibit the continued sale and performance of the
24 infringing song, “I Gotta Feeling.” Since its release in 2009, Defendants have
25 unjustly reaped millions of dollars of profit from “I Gotta Feeling,” and Defendants

26 _____
27 ¹ Each of the Defendants, including UMG, Interscope, and EMI, have been defined
28 in Pringle’s First Amended Complaint.

1 will continue to injure Pringle and unjustly reap the rewards of his creativity, talent
2 and efforts unless restrained by this Court.

3 The Court should grant Pringle’s requested TRO for two reasons. **First**,
4 Pringle has established a substantial likelihood of success on the merits on his
5 copyright infringement claim by establishing the following:

- 6 (1) Pringle is the valid owner of the copyrights in both the musical
7 composition and sound recording for his original song, “Take a Dive,”
8 and in its derivative version;
- 9 (2) Defendants unlawfully copied and plagiarized the musical composition
10 of the derivative version of Pringle’s song “Take a Dive” when they
11 wrote and recorded their song “I Gotta Feeling,” as shown by the facts
12 that they had “access” to Pringle’s song, and the two songs are
13 “substantially similar” (in actuality, they are virtually identical);
- 14 (3) Defendants unlawfully copied and plagiarized the sound recording of
15 the derivative version of Pringle’s song “Take a Dive” by directly
16 sampling it (i.e. taking an audio segment from an original sound
17 recording and inserting it directly into a new sound recording) and
18 incorporating it into their sound recording for “I Gotta Feeling,” as
19 explained in further detail below; and
- 20 (4) Defendants violated, and intentionally continue to violate, Pringle’s
21 statutory copyrights in his original work and derivative work.

22 **Second**, Pringle has also established irreparable harm as, pursuant to relevant
23 case law discussed below, it is presumed upon a showing of substantial likelihood of
24 success on the merits of a copyright infringement claim.

25 Since the release of “I Gotta Feeling” in 2009, Defendants have been in
26 continuous and intentional violation of Pringle’s statutory copyrights. They have
27 reaped untold millions of dollars and world-wide publicity and fame from their
28 willful infringement of Pringle’s song. The equities weigh overwhelmingly in

1 Pringle’s favor, and the public interest and integrity of the music business will be
2 protected by the issuance of the TRO.

3 Pringle therefore requests, to prevent further abuse and infringement of his
4 copyrighted work, that the Court issue a TRO and an order requiring Defendants to
5 show cause why a preliminary injunction should not issue. Pringle further requests,
6 pursuant to Local Rule 65-1, that the Court set the hearing on the order to show cause
7 as early as the Court’s calendar will allow without regard to the twenty-eight days
8 notice of motion requirement of Local Rule 6-1.

9 **II. FACTS**

10 **A. Pringle Registered A Copyright In the Original Song “Take a Dive”**
11 **and the Derivative Version of the Song**

12 Pringle wrote and recorded the song “Take a Dive,” an original work, in 1998.
13 (*See* Declaration of Bryan Pringle filed concurrently herewith (“Pringle Decl.”) at ¶
14 3). It contained music and vocals. He duly registered a claim for “Take a Dive,”
15 along with several other original songs he wrote and recorded, by submitting a CD
16 entitled *Dead Beat Club: 1998*, which contained the original version of “Take a
17 Dive,” to the United States Copyright Office with a proper application. A Certificate
18 of Registration for the CD *Dead Beat Club: 1998*, and all its included songs, was
19 issued by the Register of Copyrights on April 29, 1998, identified as SRu 387–433
20 (*See* Exhibit C to Pringle Decl.)

21 In 1999, approximately a year after its creation, Pringle created a slightly
22 different, derivative work of “Take a Dive.” (Pringle Decl. at ¶ 4). This consisted of
23 his having simply removed his own vocals from the original version, and adding
24 what can best be described as a repeating eight-bar melody, using a “guitar twang”
25 instrument, utilizing a total of four notes (D4, C4, B3 and G3), in the following
26 progression: D4-C4-B3-C4-B3-C4, in the key of G3 (the “guitar twang sequence”).
27
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1 *Id.* This “guitar twang sequence” of notes was modeled after “Take a Dive’s”
2 progression of notes in Pringle’s chorus vocals.² *Id.*

3 Prior to filing his First Amended Complaint in this action, Pringle submitted a
4 complete application to the U.S. Copyright Office for registration of the derivative
5 version of “Take a Dive.” Pringle is awaiting the certificate of registration, which he
6 expects to receive within the next 10 days.

7 Since 1998 Pringle has been— and still is— the owner and proprietor of the
8 statutory copyrights in the musical composition and sound recording for “Take a
9 Dive,” as well as the derivative version. *Id.* at ¶ 6. Since that time, he has possessed
10 all rights, title and interest in those copyrights, and has never sold, transferred or
11 otherwise disposed of those rights. *Id.* Pringle has complied with all of the laws
12 pertinent to his music composition and sound recording as a copyrighted work. *Id.*

13 **B. Pringle Submitted “Take a Dive” To Defendants UMG, Interscope,**
14 **and EMI – Direct Access**

15 From 1999 to 2008, Pringle regularly submitted demo CDs, all of which
16 contained the derivative version of “Take a Dive” along with several other original
17 songs, to Defendants UMG, Interscope, EMI and other major record labels, internet
18 music websites, TAXI (an independent Artist and Repertoire (“A&R”) company),
19 talent scouts, artist managers, production studios (including film, television and
20 music), famous songwriters, radio stations, booking agents, national and international
21 music contests, nightclubs and publishing companies. *Id.* at ¶ 7. He submitted his
22 music in the hopes of promoting his work, becoming signed as an artist to a major
23 label, or selling his songs to publishing companies and/or other already established
24

25 ² The derivative version of “Take a Dive” is the same as the original version, with the
26 exception that the lyrics were removed and the guitar twang sequence was added.
27 Therefore, when reference is made to the derivative version of “Take a Dive,” it is
28 also implicitly referring to the original version of “Take a Dive,” and all of its key
component parts (drum pattern, chord progression, structure, etc.), which still remain
in the derivative version, with the exception of the lyrics.

1 artists. *Id.* He also advertised his music on the internet via multiple music websites,
2 and had his music played internationally via radio and the internet. *Id.*

3 During this same time period (1999-2008), Pringle received responses,
4 including a handwritten letter, from different A&R representatives at Interscope,
5 UMG and EMI, acknowledging receipt of his demo CDs, all of which included the
6 derivative version of "Take a Dive," and informing him that while his music was of
7 good quality, the labels were not currently interested in signing him as an artist or
8 purchasing any of his music. *Id.* at ¶ 8.

9 One or more of the Black Eyed Peas Defendants, Defendant Guetta, and/or
10 Defendant Riesterer, accessed one or more of Pringle's demo CDs that included the
11 derivative version of "Take a Dive," listened to the song, and directly sampled the
12 guitar twang sequence out of Pringle's sound recording, and copied significant
13 additional portions of it when they wrote and recorded "I Gotta Feeling."

14 Pringle never authorized any of the Defendants to record, release, perform or
15 license "I Gotta Feeling," nor did the Defendants ever obtain a license to sample
16 Pringle's sound recording.

17 In addition to the individual members of the Black Eyed Peas, Guetta and
18 Riesterer, Defendants UMG and Interscope are, upon information and belief, also
19 direct infringers. This is due to their alleged conspiracy with the members of the
20 Black Eyed Peas to conduct an ongoing pattern and practice of intentional copyright
21 infringement. EMI, Headphone Junkie, Will.I.Am Music, Jeepney Music, Tab
22 Magnetic, Cherry River Music, Square Rivoli, Rister and SB&Co. are all
23 contributory or vicarious infringers. They all had some degree of supervisory control
24 over the release, performance, sale and distribution of the single "I Gotta Feeling,"
25 and the Black Eyed Peas' album, *The E.N.D.*, which contains the song "I Gotta
26 Feeling," and they all obtained direct financial benefits from doing so.

1 **C. The Black Eyed Peas Release the Infringing Song, “I Gotta Feeling”**

2 The Black Eyed Peas released “I Gotta Feeling” on or around June 16, 2009,
3 as the second single off of their album *The E.N.D.*

4 Since its release, “I Gotta Feeling” has achieved tremendous success and
5 worldwide acclaim. It is the Black Eyed Peas’ best selling song to date, with over 6
6 million digital downloads sold in the U.S. alone, helping make it the highest selling
7 digital download of all time, and playing a substantial role in helping *The E.N.D.*
8 album sell over 3 million copies in the U.S. (and over 7 million copies worldwide).
9 “I Gotta Feeling” spent fourteen weeks at the number one spot on the Billboard Hot
10 100 Chart, and was named fifth on the Billboard Hot 100 Songs of the Decade. It
11 was nominated for “Record of the Year” at the 52nd Grammy Awards and won the
12 Grammy for “Best Pop Performance by a Duo or Group with Vocals.” “I Gotta
13 Feeling” has been licensed in several nationwide commercials, television episodes,
14 and was featured in the 2009 movie *Alvin and the Chipmunks: The Squeakquel*.

15 Given the magnitude of the success of “I Gotta Feeling,” all of Defendants
16 have reaped tremendous profits from the song, and in terms of the equities, all off the
17 musical prowess, work and copyrights of Pringle.

18 **D. Similarities between “Take a Dive” and “I Gotta Feeling”**

19 After listening to both songs, and especially after focusing on the main
20 melodies of both, the first thing that comes to mind is that the songs sound strikingly
21 similar, and in parts sound identical. This is due to the fact that there are numerous
22 similarities between both songs, and the guitar twang sequence, which was directly
23 sampled from Pringle’s sound recording and placed into “I Gotta Feeling,” is
24 identical.

25 Pringle has filed concurrently herewith a declaration from musicologist Dr.
26 Alexander Stewart (hereinafter the “Stewart Decl.”). In his Declaration, Dr. Stewart
27 recites the following non-exhaustive list of similarities between the songs:
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(a) In terms of their overall sound, “I Gotta Feeling” and “Take a Dive” share the following fundamental compositional elements:

Summary of General Characteristics

	<u>“I Gotta Feeling”</u>	<u>“Take a Dive”</u>
Genre	Contemporary Dance	Contemporary Dance
Style	Techno	Techno
Key	G Major	G Major
Meter	4/4	4/4
Tempo	128	130
Structure	Repeating 8 bar cycle	Repeating 8 bar cycle
Instrumentation	Guitar sound, bass, synthesized string & other techno sounds	Guitar sound, bass, synthesized string & other techno sounds

Stewart Decl. at ¶ 5(a).

(b) Both “I Gotta Feeling” and “Take a Dive” are nearly the same length: 4:49 and 4:39 respectively. Except for the first seventeen seconds of “Dive,” they are constructed entirely from a repeating eight measure pattern. *Id.* at ¶ 5(b).

(c) Both songs contain an identical “twangy” guitar figuration that is absolutely identical in pitches, rhythm, range, and sound (timbre or tone color, attack, decay, etc.). The metric placement is identical – one chord on each of the measure’s beats (1–2–3–4), which yields a steady pulsing or throbbing effect. This figuration forms the core of each song, occurring seventeen times in “Take a Dive” and fifteen times in “I Gotta Feeling.” This theme forms the core of each song, occurring seventeen times in “Take a Dive” and fifteen times in “I Gotta Feeling.” The passage is approximately fifteen seconds long in each song. In “Take a Dive” the theme is heard 4:15 of 4:39 (255 of 279 seconds) or 92% of the time. In “I Gotta Feeling” the theme is sounded during 3:45 of 4:49 (225 of 289 seconds) or 78% of the song. *Id.* at ¶ 5(c).

1 (d) The bass line in both songs consists of four repeated notes that last for
2 two measures each as follows:

3	Measures	1-2	3-4	5-6	7-8
4	“Feeling”	G	C	E	C
5	“Dive”	G	F	A	C

6 As can be seen, in four of the eight measures (measures 1, 2, 7, 8) the
7 repeated bass note is the same. Later in the song in “Take a Dive”
8 Pringle introduces a somewhat different bass cycle at 2:30; 3:40; 3:58;
9 and 4:13.

10	Measures	1-2	3-4	5-6	7-8
11	“Feeling”	G	C	E	C
12	“Dive”	E	C	E	C

13 These pitches are sustained using a low string sound much like the
14 beginning of “I Gotta Feeling.” Here the pitches match in measures 3,
15 4, 5, 6, 7, and 8 (all except measures 1 and 2). Throughout much of the
16 song, then, at least 50% of the pitches in the bass part match and during
17 part of the song the congruence in the bass reaches 75%. Though the
18 rhythms are somewhat different, the number of repeated notes in each
19 measure of the bass part is almost the same (seven in “Take a Dive” and
20 eight in “I Gotta Feeling”). But, most important, all of the bass pitches
21 heard in the eight-measure cycle in “I Gotta Feeling” can be found in
22 the same position of the cycle somewhere in “Take a Dive.” *Id.* at ¶
23 5(d).

24 (e) The harmony used in both songs is substantially similar due to the many
25 common notes in the main theme and the bass part. One of the few
26 differences is the F–natural that is played in the bass in measures 3 and
27 4 of the cycle in “Take a Dive.” But this F–natural is also heard in “I
28 Gotta Feeling” during a significant portion of the song. *Id.* at ¶ 5(e).

1 (f) Both songs contain many of the same sounds, electronic effects, musical
2 devices, and other details. *Id.* at ¶ 5(f).

3 In further support of the factual similarities between the two songs, Pringle has
4 filed concurrently herewith a declaration from musicologist Kevin Byrnes (“Byrnes
5 Decl.”). He recites in his Declaration the following list of similarities between the
6 songs, all of which are consistent with Dr. Stewart’s statements above:

7 (a) Both songs have an almost identical tempo — “Take a Dive” is 130
8 beats per minute (“bpm”), while “I Gotta Feeling” is 128 bpm. Byrnes
9 Decl. at ¶ 6(a).

10 (b) Both songs use almost identical “dance” style bass drums; the bass drum
11 as a traditional 4/4 dance beat with the bass hitting on the 4 down beats
12 and a electronic dance style snare, with both an eighth note and a
13 sixteenth note hi hat cymbal, and half step open hi hat. *Id.*

14 (c) Both songs use a repeating 8-measure module that repeats 16 (“Take a
15 Dive”) or 17 (“I Gotta Feeling”) times from the beginning to the
16 conclusion. In both songs, each module has the same pattern of chord
17 changes in the same key of G major, the same tempo, the same meter,
18 and the same guitar-chord pattern with identical voicing. The only
19 minor difference in this structure is that “Take a Dive” has a brief
20 introduction before starting the 8-measure pattern. Each song elaborates
21 the structure by gradually adding a stronger bass and drum presence, as
22 well as higher pitched synthesized string sounds, as each song
23 progresses. Each song ends by fading out. In both “Take a Dive” and
24 “I Gotta Feeling,” the same 8-measure repeating pattern provides a
25 constant harmonic and metrical template for the underlying dance beat.
26 *Id.* at ¶ 6(b).

27 (d) In both songs, the same 8-measure repeating pattern provides a constant
28 harmonic and metrical template for the underlying dance beat. *Id.*

1 (e) The harmonic pattern and 8-measure repeating pattern in “Take a Dive”
 2 and “I Gotta Feeling” have an identical basic pattern of chord changes:

Measure	1	2	3	4	5	6	7	8
Harmony	G	G	C	C	Em	Em	C	C

5 *Id.* at ¶ 6(c).

6 (f) The guitar chord accompaniment in both songs follows the same pattern
 7 (the superscripts refer to the pitch level, based on Middle C =c4):

Measure	1	2	3	4	5	6	7	8
Top note	d4 d4	c4 c4	c4 c4	c4 c4	b3 b3	b3 b3	c4 c4	c4 c4
	d4 d4	b3 b3	c4 c4	c4 c4	b3 b3	b3 b3	c4 c4	c4 c4

11 *Id.* at ¶ 6(d).

12 (g) The orchestration in “I Gotta Feeling” is substantially similar to the
 13 orchestration in “Take a Dive” — for their respective instrumental
 14 portions, each song has essentially three layers, not all of which are
 15 active throughout the song. The lowest layer is the bass, which in each
 16 song includes a synthesized string bass and bass drum sound, with the
 17 bass drum playing on each quarter note beat, and the string sound
 18 appearing variously as a legato expression or a faster alternation of
 19 eighth notes up and down an octave. The middle layer includes
 20 synthesized drum sounds with back beats (beats two and four) covered
 21 mostly by a snare sound, with some admixture of cymbals (open, closed,
 22 and half-open), along with the guitar chord accompaniment described
 23 above. The high layer includes synthesized string sounds with delays
 24 and other synthesized artifacts.

25 *Id.* at ¶ 6(e).

26 (h) The hook in “I Gotta Feeling” is substantially similar (identical) to the
 27 hook in “Take a Dive” — for both “Take a Dive” and “I Gotta Feeling,”
 28 the most prominent “hook” element is the guitar chord accompaniment,

1 which is the same in each song—the same chords, in the same key, at
2 almost exactly the same speed, played the same way. This is the
3 element that, if played alone, would allow a listener who was otherwise
4 familiar with either song to say, upon hearing it, “That is ‘Take a
5 Dive’/‘I Gotta Feeling’.” Because it is identical to each song, a listener
6 hearing only that guitar chord accompaniment would not know which
7 song it was from.

8 *Id.* at ¶ 6(f).

9 In addition to Mr. Byrnes’ and Dr. Stewart’s declarations, Pringle has
10 submitted a declaration reciting his own views as to the musical similarities between
11 the two songs. As an experienced musician and songwriter, Pringle is capable of
12 providing more than simple lay testimony with respect to the similarities between the
13 two songs, and his analysis is consistent with Dr. Stewart’s and Mr. Byrnes’ analyses
14 set forth above. *See* Pringle Decl. at ¶ 11(a)-(l). Pringle’s consistent analysis is not
15 set forth here to avoid redundancy, but is incorporated by this reference.

16 **III. LEGAL STANDARD FOR ENTRY OF A TEMPORARY**
17 **RESTRAINING ORDER**

18 Section 502(a) of the Copyright Act specifically allows for entry of temporary
19 restraining orders, providing courts with the power to “grant temporary and final
20 injunctions on such terms as it may deem reasonable to prevent or restrain
21 infringement of a copyright.” 17 U.S.C. § 502(a); *see also Poparic v. European*
22 *Music and Video Store*, No. CV 08-2081(KAM)(JO), 2009 WL 6318212 at *7
23 (E.D.N.Y. December 16, 2009); *Microsoft Corp. v. ATS Computers, Inc.*, No. CV 93-
24 1273, 1993 WL 13580935 at *1 (S.D. Cal. Oct. 29, 1993). The Federal Rules of
25 Civil Procedure also provide for the entry of injunctive relief and restraining orders.
26 *See* Fed. R. Civ. P. 65(b). Courts apply the same standard to entry of a temporary
27 restraining order as they would to entry of a preliminary injunction. *Cal. Indep. Sys.*
28

1 *Operator Corp. v. Reliant Energy Servs., Inc.*, 181 F. Supp. 2d 1111, 1126 (E.D. Cal.
2 2001).

3 Pringle may obtain injunctive relief upon showing either (1) a combination of
4 probable success on the merits and the possibility of irreparable harm or (2) that
5 serious questions exist and the balance of hardships tips in his favor. *Grocery Outlet*
6 *Inc. v. Albertson's Inc.*, 497 F.3d 949, 951 (9th Cir. 2007); *A&M Records, Inc. v.*
7 *Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2001) (affirming entry of preliminary
8 injunction in online copyright claim); *see also LGS Architects, Inc. v. Concordia*
9 *Homes of Nevada*, 434 F.3d 1150, 1155-58 (9th Cir. 2006) (directing district court to
10 enter preliminary injunction in copyright claim). These are not two separate tests,
11 but the standards are the extremes of a single continuum. *Grocery Outlet Inc.*, 497
12 F.3d. at 951. The critical element in determining which end of the spectrum to
13 analyze is the relative hardship to the parties. If the balance of hardships tips
14 towards the plaintiff, the plaintiff need not make a strong showing regarding the
15 likelihood of success on the merits. *Benda v. Grand Lodge of the Int'l Ass'n of*
16 *Machinists & Aerospace Workers*, 58 F.2d 308, 315 (9th Cir. 1978). A "serious"
17 question is one as to which the moving party has a "fair chance of success on the
18 merits." *Sierra On-Line Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1421 (9th
19 Cir. 1984) (quoting *Benda*, 58 F.2d at 315).

20 To determine whether a party is likely to succeed on the merits, the court need
21 not decide whether the movant ultimately *will* succeed on its claim. *Glenwood*
22 *Bridge, Inc. v. City of Minneapolis*, 940 F.2d 367, 371 (8th Cir. 1991). A showing of
23 likelihood of success on the merits requires simply that the moving party find support
24 for its position in the governing law. *Baker Elec. Co-op. Inc. v. Chaske*, 28 F. 3d
25 1466, 1473-74 (8th Cir. 1994).

26 In copyright cases, courts presume irreparable harm where the moving party
27 establishes a likelihood of success on the merits of the copyright claim. *Summit*
28 *Entertainment, LLC v. Beckett Media, LLC*, No. CV 09-8161 PSG (MANx), 2010

1 WL 147958 at *4 (C.D. Cal. Jan. 12, 2010) (the Plaintiff need only establish a
2 likelihood of success on the merits of its copyright claim to support the requested
3 injunction); *see also Micro Star v. Formgen Inc.*, 154 F.3d 1107, 1109 (9th Cir.
4 1998).

5 Additionally, the Court may consider the impact of the injunction on the
6 public interest in determining whether injunctive relief is proper. *Ticketmaster LLC*
7 *v. RMG Techsl, Inc.*, 507 F. Supp. 2d 1096, 1104 (C.D. Cal. 2007).

8 **IV. ARGUMENT**

9 The evidence submitted in support of Pringle's application makes a showing
10 far more than sufficient to meet the standard for the entry of a temporary restraining
11 order and preliminary injunction. Pringle is likely to succeed on the merits of his
12 claim and will continue to suffer irreparable harm to his copyrighted work if
13 Defendants are not restrained by this Court. As set forth below, the balance of
14 hardships does not just tip, but rather weighs heavily, in favor of Pringle and against
15 Defendants, and granting Pringle's application will further the public interest in
16 protecting intellectual property.

17 **A. Pringle Has Established A Likelihood of Success on the Merits of** 18 **His Copyright Infringement Claim**

19 Pringle has established a likelihood of success on the merits on his copyright
20 claim for both musical composition and sound recording.

21 **1. Defendants' Infringement of Plaintiff's Musical Composition**

22 To establish a claim for copyright infringement of a musical composition, two
23 elements must be proven: (1) ownership of a valid copyright, and (2) copying of
24 constituent elements of the work that are original. *Feist Publications Inc. v. Rural*
25 *Telephone Service Co., Inc.*, 499 U.S. 340, 361, 111 S. Ct. 1282, 113 L. Ed. 2d 358
26 (1991); *Metcalf v. Bochco*, 294 F.3d 1069, 1072 (9th Cir. 2002); *Napster*, 239 F.3d at
27 1013. The evidence submitted in support of Pringle's application establishes a
28 likelihood of success of each of these elements.

1 **a. Pringle’s Valid Ownership of the Copyright to “Take a**
2 **Dive”**

3 Pringle owns a valid copyright for both the musical composition and the sound
4 recording of “Take a Dive,” as shown by the Certificate of Registration for his CD
5 entitled, *Dead Beat Club: 1998*, which included the original version of “Take a
6 Dive.” (See Exhibit A to Pringle Decl.). Pringle’s copyright registration certificate
7 constitutes evidence of the validity of the copyrights and his ownership in the
8 copyrights. 17 U.S.C. § 410(c); *Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768
9 F.2d 1001, 1019 (9th Cir. 1985) (“[R]egistration by the Copyright Office is prima
10 facie evidence of copyrightability.”); *Wildlife Express Corp. v. Carol Wright Sales,*
11 *Inc.*, 18 F.3d 502, 507 (7th Cir. 1994); *Donald Frederick Evans & Assoc., Inc. v.*
12 *Continental Homes, Inc.*, 785 F.2d 897, 903 (11th Cir. 1986).

13 Pringle has registered the derivative version of “Take a Dive” with the U.S.
14 Copyright Office, on an expedited basis, and is awaiting the certificate of
15 registration. Pringle Decl. at ¶ 4 & Exh. D. The U.S. Copyright Office has received
16 Pringle’s complete application for registration of the derivative version of “Take a
17 Dive.” *Id.* Pringle has thus satisfied the registration requirement of 17 U.S.C. §
18 411(a). See *Cosmetic Ideas, Inc. v. IAC/InteractiveCorp*, 606 F.3d 612, 621 (9th Cir.
19 2010).

20 As the owner of the copyright, Pringle alone has the exclusive right to
21 reproduce and distribute copies of “Take a Dive” and to publically perform it via
22 digital transmission. See 17 U.S.C. § 106(1), (3), (4), and (6).

23 **b. Defendants’ Copying of “Take a Dive”**

24 Defendants copied “Take a Dive” when they wrote “I Gotta Feeling.” A
25 plaintiff may prove copying by demonstrating that (1) the defendants had access to
26 the copyrighted work and (2) the works are substantially similar. *Herzog v. Castle*
27 *Rock Entm’t*, 193 F.3d 1241, 1248 (11th Cir. 1999). Both can be shown by
28

1 circumstantial evidence. *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435,
2 1442 (9th Cir. 1994).

3 The second element, “substantial similarity,” is comprised of two specific tests
4 – an extrinsic and intrinsic test. *Metcalf*, 294 F.3d at 1073. The objective extrinsic
5 test considers whether there are substantial similarities in idea and expression and
6 relies on specific criteria that can be listed and analyzed, in order to determine if the
7 works are in fact sufficiently similar to support a conclusion that one was actually
8 copied from the other. *Dr. Seuss Enterprises, L.P. v. Penguin, USA, Inc.*, 109 F.3d
9 1394, 1398 (9th Cir. 1997). An expert may be used to consider whether there are
10 substantial similarities in idea and expression. *Sid & Marty Krofft Television Prod.,*
11 *Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1164 (9th Cir. 1977). The subjective
12 intrinsic test asks whether an ordinary reasonable person would perceive a substantial
13 similarity. *Dr. Seuss Enterprises*, 109 F.3d at 1399. More specifically, whether the
14 defendant took from the plaintiff’s works so much of what is pleasing to the ears of
15 lay listeners, who comprise the audience for whom such popular music is composed,
16 that the defendant wrongfully appropriated something which belongs to the plaintiff.
17 *Arstein v. Porter*, 154 F.2d 464, 473 (2d Cir. 1946). Both tests are met here.

18 Defendants had access to both the original and the derivative version of “Take
19 a Dive.” As stated in his declaration, Pringle repeatedly submitted multiple
20 derivative versions of “Take a Dive” to Defendants Interscope, UMG, and EMI over
21 the course of approximately ten years. In response, Pringle received rejection letters
22 from the above Defendants, acknowledging that they received his work, but
23 declining to purchase it or sign him as an artist. (Pringle Decl. at ¶¶ 7, 8). In
24 addition, as set forth in detail below, Defendants directly sampled the sound
25 recording of the derivative version of “Take a Dive.” Sampling cannot be performed
26 unless one is in possession of the sound recording. Therefore, the fact that the Black
27 Eyed Peas sampled the derivative version of “Take a Dive” circumstantially proves
28 that they had access to the sound recording of the song.

1 Even if Pringle could not establish direct access, he could still fulfill the
2 elements of a copyright infringement claim due to the “inverse ratio rule.”
3 Substantial similarity is inextricably linked to the issue of access. Pursuant to the
4 “inverse ratio rule,” the higher the level of access, the lower the standard of proof for
5 substantial similarity, and vice versa. *See Three Boys Music v. Michael Bolton*, 212
6 F.3d 477, 485 (9th Cir. 2000). Therefore, a copyright plaintiff can still make out a
7 case of infringement by showing that the songs were “strikingly similar” – a standard
8 higher than that of substantial similarity – even in the absence of any proof of access.
9 *Id.* As stated above, “Take a Dive” and “I Gotta Feeling” are “striking similar” – in
10 fact, they are virtually identical. A simple listening of the two songs makes this
11 clear.

12 The extrinsic test for substantial similarity is met by review and consideration
13 of the opinions set forth in the declarations of expert musicologists, Dr. Stewart and
14 Mr. Byrnes, and the consistent opinions set forth in Pringle’s declaration, which are
15 discussed above in Section II(C) of this Memorandum. These opinions are the
16 technical and forensic reasons for the songs sounding the same, and which lead both
17 experts to independently conclude that the songs are “substantially similar,” and that
18 the Black Eyed Peas could not have independently written “I Gotta Feeling” without
19 copying substantial portions from the derivative version of “Take a Dive.” (*See*
20 *Stewart Decl.* at ¶ 4; *Byrnes Decl.* at ¶¶ 4, 5).

21 Pursuant to the intrinsic test for substantial similarity, “I Gotta Feeling” is
22 substantially similar to the derivative version of “Take a Dive.” This is clear from
23 applying the “ordinary listener test.” The plain fact is that any person, whether a
24 person off the street or a trained musician, who listens to the relevant portions of
25 both songs will say that they sound the same. It is just that obvious to the ear. It is
26 so similar, in fact, that if you then listen to the derivative version of “Take a Dive,”
27 and overlay it with the vocals from “I Gotta Feeling,” you think you are actually
28

1 listening to “I Gotta Feeling.” There is a reason for this, as stated by Pringle’s
2 musicologist, Dr. Stewart, in his declaration:

3 [The guitar twang sequence] heard in both “[I Gotta] Feeling” and
4 “[Take a] Dive” is the central theme of both songs. In addition to
5 being sounded almost continuously, it is one of the loudest and most
6 prominent sounds in the mix. Moreover, the theme is especially
7 exposed at the beginning and ending of each work, making both the
8 first and the last impression on the listener. As the most recognizable
9 element, it enables a listener to instantly identify the song... [This]
10 eight-measure passage in both songs is unquestionably the most
11 memorable and valuable part of the instrumental tracks.

12 (Stewart Decl. at ¶ 6).

13 **c. Creation Date of the Derivative Version of “Take a**
14 **Dive”**

15 As stated above, the derivative version of “Take a Dive” contains a guitar
16 twang sequence that is identical to the song “I Gotta Feeling,” which was not
17 contained in the original version of “Take a Dive” copyrighted in 1998. Since the
18 identity of the guitar twang sequence in both songs, virtually by itself, establishes
19 Defendants’ copying of Pringle’s song, the only question that remains to be answered
20 is whether Pringle created the derivative version of “Take a Dive,” and thus the
21 guitar twang sequence, prior to when the Black Eyed Peas wrote “I Gotta Feeling.”
22 The evidence shows beyond any doubt that he did.

23 Pringle wrote the derivative version of “Take a Dive,” which contains the
24 guitar twang sequence, on or before June 14, 1999, approximately ten years prior to
25 the Black Eyed Peas’ creation of “I Gotta Feeling.”

26 Pringle has filed concurrently herewith a declaration from a computer
27 forensics expert, David Gallant (“Gallant Decl.”), who dated the creation of the
28 computer file containing the derivative version of “Take a Dive,” entitled

1 “Disk05.NRG,” as well as the date that Pringle burned the computer file to a CD-
2 ROM. Mr. Gallant concluded that the creation date and last modified date of the
3 “Disk05.NRG” file are both June 14, 1999, that the CD-ROM containing the NRG
4 Image File was burned on May 17, 2001, and that these files could not have been
5 modified after those dates (i.e., Pringle could not have gone back after he heard “I
6 Gotta Feeling” in 2009 and added the guitar twang sequence to “Disk05.NRG” or the
7 CD-ROM). (See Gallant Decl. at ¶¶ 5–9).

8 The Black Eyed Peas wrote and recorded “I Gotta Feeling” sometime in early
9 2009 (See Certificate of Copyright Registration for the Black Eyed Peas’ song, “I
10 Gotta Feeling,” a copy of which is attached as Exhibit E to the Declaration of Bryan
11 Pringle, and of which the Court may take judicial notice). Therefore, Pringle wrote
12 the derivative version of “Take a Dive,” and thus the guitar twang sequence,
13 approximately ten years before the Black Eyed Peas created “I Gotta Feeling.”

14 2. Defendants’ Infringement of Plaintiff’s Sound Recording

15 There is a very high probability that the Black Eyed Peas sampled the sound
16 recording of the derivative version of “Take a Dive,” by directly taking the guitar
17 twang sequence from Pringle’s recording and inserting into “I Gotta Feeling.” This
18 also implicitly establishes that the Black Eyed Peas had access to the derivative
19 version of “Take a Dive,” as one cannot sample a sound recording unless they are in
20 possession of it, and that their copying of the song was willful.

21 As previously stated in Section IV(A)(1)(a) above, Pringle owns a valid
22 copyright in the sound recording for the derivative version of “Take a Dive.”

23 The analysis that is appropriate for determining infringement of a sound
24 recording copyright is different than that of determining infringement of a musical
25 composition. Unlike a musical composition, where one has to prove that *substantial*
26 original elements were copied, *any* unauthorized use of a sound recording, regardless
27 of how *de minimis* the portion of the sound recording that is used, constitutes
28 copyright infringement. See *Bridgeport Music v. Dimension Films*, 410 F. 3d 792

1 (6th Cir. 2005) (holding that the defendant’s sampling of three notes was sufficient to
2 constitute copyright infringement of the plaintiff’s sound recording). For the sound
3 recording copyright holder, it is not the “song” but the sounds that are fixed in the
4 medium of his choice. When those sounds are sampled they are taken directly from
5 that fixed medium. It is a physical taking rather than an intellectual one. *Id.*

6 Pringle has filed concurrently herewith a declaration from a sound engineer,
7 Mark Rubel (“Rubel Decl.”), who Pringle retained to analyze the guitar twang
8 sequences in both the derivative version of “Take a Dive” and “I Gotta Feeling,” in
9 order to determine whether the Black Eyed Peas directly sampled Pringle’s sound
10 recording. Mr. Rubel concluded that, in addition to the guitar twang sequence in
11 both the derivative version of “Take a Dive” and “I Gotta Feeling” sounding
12 identical, the wave files for both sequences are visibly identical when compared side
13 by side. (*See* Rubel Decl. at ¶¶ 8–10). This definitively establishes that sound used
14 to create the guitar twang sequence in “I Gotta Feeling” came from the same source
15 as the sound for the guitar twang sequence in the derivative version of “Take a
16 Dive.”³ *Id.* at ¶ 10. This leads Mr. Rubel to the professional opinion that “I Gotta
17 Feeling” by the Black Eyed Peas includes a repeated sample from Pringle’s sound
18 recording for “Take a Dive.” Rubel Decl. at ¶ 3.⁴

19
20

21 ³ If, in the alternative, the Black Eyed Peas had found a similar instrument and
22 recreated the guitar twang sequence note for note in their studio, not only would this
23 most likely be distinguishable to the ear, but there would also be minute differences
24 in the wave files that would be visibly distinguishable to the eye as well. That was
25 not the case here.

26 ⁴ Mr. Rubel does state, that without access to the multi-track masters of “I Gotta
27 Feeling,” which are the original studio files that the Black Eyed Peas used to create
28 their song, he cannot definitively determine whether Pringle’s sound recording was
directly sampled and placed into “I Gotta Feeling.” However, the synchronization
and correlation of the two wave files are so strong that it led him to the professional
opinion that the Black Eyed Peas did sample Pringle’s sound recording. Rubel Decl.
at ¶ 10.

1 The portion of the sound recording taken from the derivative version of “Take
2 a Dive” by the Black Eyed Peas and inserted directly into “I Gotta Feeling” is not *de*
3 *minimis*, which by itself would still constitute infringement of Pringle’s sound
4 recording. On the contrary, the Black Eyed Peas directly sampled the driving
5 melody behind both songs, which, as stated above, “is unquestionably the most
6 memorable and valuable part of the instrumental tracks.” Stewart Decl. at ¶ 6.

7 Based on the above, there is overwhelming evidence, with none so compelling
8 as listening to the two songs side by side, to determine that Pringle has a substantial
9 likelihood of success on the merits of his claim for copyright infringement against
10 Defendants.

11 **B. Pringle Will Suffer Irreparable Harm Unless Injunctive Relief is**
12 **Granted Immediately**

13 Pringle has established a likelihood of success on the merits and therefore
14 irreparable harm is presumed. *Summit Entertainment, LLC*, 2010 WL 147958 at *4.

15 Even so, the evidence shows that Defendants’ ongoing infringement in
16 copying, distributing, and performing “I Gotta Feeling” has caused, and will continue
17 to cause, irreparable harm to Pringle. The Black Eyed Peas are at the end of a world
18 tour and are performing “I Gotta Feeling” on a regular basis. On information and
19 belief, they will be performing the song in the near future as well. “I Gotta Feeling”
20 is still constantly played on the radio and at sporting events, and available for
21 purchase via the internet and physical distribution. Each time the song is played or
22 sold, Pringle is denied his exclusive right to copy, distribute, and perform the song,
23 including his right to control how, by whom, and in what manner his recording is
24 used. *Taylor Corp. v. Four Seasons Greetings, LLC*, 403 F.3d 958, 968 (8th Cir.
25 2005) (plaintiff “certainly has the right to control the use of its copyrighted materials
26 and irreparable harm inescapably flows from the denial of that right”); *Napster*, 239
27 F.3d at 1029 (without an injunction, “plaintiffs would lose the power to control their
28 intellectual property”).

1 **C. A Temporary Restraining Order and Preliminary Injunction Serves**
2 **the Public Interest**

3 Once a copyright owner establishes a likelihood of success on the merits,
4 whether injunctive relief is appropriate as a public policy matter is rarely an issue.
5 *Concrete Machinery Co. Inc. v. Classic Lawn Ornaments, Inc.*, 843 F.2d 600, 612
6 (1st Cir. 1988). There is a public interest in upholding intellectual property rights
7 such as copyright protections. *Autoskill Inc. v. Nat'l Education Support System, Inc.*,
8 994 F.2d 1476, 1499 (10th Cir. 1993); *Apple Computer, Inc. v. Franklin Computer*
9 *Corp.*, 714 F.2d 1240, 1255 (3d Cir. 1983).

10 This instance of Defendants infringing upon copyrighted musical works is not
11 an isolated incident, but rather part of an ongoing pattern and practice of willful
12 copyright infringement with respect to other artists, and, upon information and belief,
13 a civil conspiracy among Defendants UMG, Interscope and the Black Eyed Peas.
14 This will be proven at trial, after discovery.

15 There is an important need and public benefit for the legal rights and music of
16 copyright owners to be protected. This can be especially true for unknown artists
17 and songwriters, such as Pringle, who are financially vulnerable to instances where
18 there is a callous disregard of their rights by famous and wealthy artists and major
19 record labels. Granting the requested TRO, and thereby enjoining Defendants from
20 further infringing on Pringle's copyrighted work and unjustly reaping substantial
21 profits off of an intentionally plagiarized song, in response to the facts and
22 circumstances alleged, will serve to help maintain and further the integrity of the
23 music industry and the interests of music consumers at large, and deter major record
24 labels and super-star artists from engaging in similar conduct.

1 **D. Pringle Has, In the Alternative, Raised Serious Questions Regarding**
2 **the Merits and the Balance of Hardships Weighs In favor of**
3 **Entering Injunctive Relief**

4 In the alternative, the Court may grant injunctive relief upon a showing that
5 serious questions exist and the balance of hardships weighs in Pringle’s favor.
6 *Napster*, 239 F.3d at 1013. Here, Pringle is a struggling musician litigating against
7 those who are among the most powerful people and entities in the music business,
8 including the biggest record label conglomerate in the world (UMG), one of the most
9 successful record labels in the world (Interscope) and one of the most successful,
10 well-known pop groups in the world, all with vastly superior financial capabilities
11 and resources than those of Pringle – the balance of hardships does not just tip in
12 Pringle’s favor but overwhelmingly weighs the scale down in his favor.

13 The above being said, given that Pringle has already demonstrated success on
14 the merits, any hardship to Defendants is irrelevant to this inquiry. *Ticketmaster*
15 *LLC*, 507 F. Supp. 2d at 1115.

16 **E. The Requested Relief Is Reasonable**

17 The Copyright Act requires that infringing conduct be remedied
18 “expeditiously.” *See* 17 U.S.C. § 512(c)(1)(A)(iii) (upon receiving notice of
19 infringement, infringer must act “expeditiously to remove or disable access to the
20 [infringing] material”). Pringle seeks an injunction to prohibit all of the Defendants
21 from infringing on his copyrighted song, “Take a Dive.” *See Canopy Music, Inc. v.*
22 *Harbor Cities Broad Inc.*, 950 F. Supp. 913, 916 (E.D. Wisc. 1997) (issuing
23 injunction against radio station that infringed on musical composition copyrights and
24 prohibiting performance by the defendants of any of the copyrighted songs).
25 Defendants are fully capable of complying with Pringle’s requested relief as they
26 collectively control the use, distribution, and performance of the infringing song “I
27 Gotta Feeling.” Further, the balance of hardships again weighs in favor of Pringle
28 here and against Defendants.

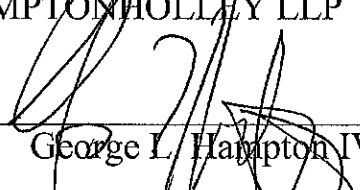
1 **V. CONCLUSION**

2 For each of the reasons set forth in this Memorandum, plaintiff Bryan Pringle
3 requests that the Court issue a TRO prohibiting the continued sale and performance
4 of the infringing song, "I Gotta Feeling," issue an order requiring Defendants to
5 show cause why the Court should not issue a preliminary injunction, and grant such
6 other and further relief as the Court deems proper. Pringle further requests, pursuant
7 to Local Rule 65-1, that the hearing on the order to show cause be set as early as the
8 Court's calendar will allow without regard to the twenty-eight days notice of motion
9 requirement of Local Rule 6-1.

10 Dated: November 22, 2010 Dean A. Dickie (*Pro Hac Vice application pending*)
11 MILLER, CANFIELD, PADDOCK AND STONE,
P.L.C.

12 Ira Gould (*Pro Hac Vice to be filed*)
13 Ryan L. Greely (*Pro Hac Vice to be filed*)
GOULD LAW GROUP

14 George L. Hampton IV (State Bar No. 144433)
15 Colin C. Holley (State Bar No. 191999)
HAMPTONHOLLEY LLP

16
17 By: 
George L. Hampton IV
18 Attorneys for Plaintiff
19 BRYAN PRINGLE

1 **PROOF OF SERVICE**

2 I am employed in the County of Orange, State of California. I am over the age of 18 and
3 not a party to the within action. My business address is 2101 East Coast Highway, Suite 260,
4 Corona del Mar, California 92625. On November 22, 2010, I served the within document(s)
5 described as:

6 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S EX**
7 **PARTE APPLICATION FOR TEMPORARY RESTRAINING ORDER AND ORDER TO**
8 **SHOW CAUSE RE PRELIMINARY INJUNCTION**

9 on the interested parties in this action as stated below:

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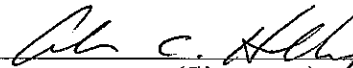
19 (BY ELECTRONIC MAIL) I electronically mailed a true copy of the foregoing document
20 to the email address as noted above; AND.

21 (BY OVERNIGHT DELIVERY) I deposited in a box or other facility regularly
22 maintained by Federal Express, an express service carrier, or delivered to a courier or driver
23 authorized by said express service carrier to receive documents, a true copy of the foregoing
24 document(s) in a sealed envelope or package designated by the express service carrier,
25 addressed as set forth above, with fees for overnight delivery paid or provided for.

26 I declare under penalty of perjury under the laws of the United States that the foregoing is
27 true and correct.

28 Executed on November 22, 2010, at Corona del Mar, California.

Colin C. Holley
(Type or print name)


(Signature)

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