

HAMPTONHOLLEY LLP
2101 East Coast Highway, Suite 260
Corona del Mar, California 92625

1 Dean A. Dickie (appearing *Pro Hac Vice*)
Dickie@MillerCanfield.com
2 Kathleen E. Koppenhoefer (appearing *Pro Hac Vice*)
Koppenhoefer@MillerCanfield.com
3 MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.
225 West Washington Street, Suite 2600
4 Chicago, IL 60606
Telephone: 312.460.4200
5 Facsimile: 312.460.4288

6 George L. Hampton IV (State Bar No. 144433)
ghampton@hamptonholley.com
7 Colin C. Holley (State Bar No. 191999)
cholley@hamptonholley.com
8 HAMPTONHOLLEY LLP
2101 East Coast Highway, Suite 260
9 Corona del Mar, California 92625
Telephone: 949.718.4550
10 Facsimile: 949.718.4580

11 Attorneys for Plaintiff
BRYAN PRINGLE

12
13 **UNITED STATES DISTRICT COURT**
14 **CENTRAL DISTRICT OF CALIFORNIA**
15 **SOUTHERN DIVISION**

16 BRYAN PRINGLE, an individual,) Case No. SAFV 10-1656 JST(RZx)
17 Plaintiff,)
18 v.) **PLAINTIFF’S OPPOSITION TO**
19 WILLIAM ADAMS, JR.; STACY) **DEFENDANTS’ MOTION FOR**
20 FERGUSON; ALLAN PINEDA; and) **SUMMARY JUDGMENT**
21 JAIME GOMEZ, all individually and) DATE: January 30, 2012
collectively as the music group The Black) TIME: 10:00 a.m.
Eyed Peas, *et al.*,) CTRM: 10A
22 Defendants.)

23
24
25
26
27
28

TABLE OF CONTENTS

	Page
INTRODUCTION	1
COUNTER STATEMENT OF MATERIAL FACTS	1
I. Pringle Composes “Take a Dive” And Its Derivative Dance Version.....	1
II. “Take a Dive” Dance Version Is Sent To Defendants	3
III. Black Eyed Peas Release “I Gotta Feeling”	3
IV. The Reason For The Similarity Becomes Clear.....	4
A. The “Guitar Twang Sequence” Eventually Used In “I Gotta Feeling” Appears In A Song Created By Garraud, Guetta and Riesterer.....	4
B. Riesterer And Guetta Use The “Guitar Twang Sequence” In An Instrumental Song That Became “I Gotta Feeling”	5
C. None of The Defendants Can Explain The Origin Of The “Guitar Twang Sequence”	6
V. Defendants Concoct Another Explanation.....	6
VI. Copyright Registration	8
ARGUMENT.....	9
I. Defendants Cannot Rely on Declarations of Witnesses They Never Disclosed.....	9
II. Plaintiff Owns a Valid Copyright in “Take a Dive” and “Take a Dive” (Dance Version)	10
A. Rejection of a Copyright Application does not Preclude Subject Matter Jurisdiction	10
B. “Take a Dive” (Dance Version) Is A Protected Derivative Work.....	11
C. Plaintiff Has Established Originality and Summary Judgment is Improper.....	12
1. Defendants’ Expert Analysis Is Not Only Disputed, It Calls Into Question Their Entire Theory.....	14
2. Whether Or Not “Take a Dive” Dance Version is an Original Work is a Question of Fact for the Jury	15
D. The Guitar Twang Sequence Is Copyrightable As A Musical Composition	16

TABLE OF CONTENTS
(continued)

	Page
E. Plaintiff Deposited A Bona Fide Copy of “Take a Dive” (Dance Version)	16
III. Defendants Had Access to Pringle’s Work	18
A. “Take a Dive” (Dance Version) and “I Gotta Feeling” Are Strikingly Similar, Rendering the Issue of Access Irrelevant	20
B. “Take a Dive” and “I Gotta Feeling” Are Substantially Similar	20
IV. Pringle Has Produced Evidence That Defendants Sampled His Recordings	21
V. Defendants’ Claims of Spoliation Are a Red Herring Argument	21
A. The .NRG file containing “Take a Dive” (Dance Version) Was Created in 1999	22
B. Spoliation Sanctions are Inappropriate Because Pringle was not Under a Duty to Preserve.....	23
C. Dispositive Sanctions are not Warranted	25
CONCLUSION.....	25

INDEX OF AUTHORITIES

Page(s)

CASES

1		
2		
3		
4	CASES	
5	<i>Arnstein v. Porter</i> ,	
6	154 F.2d 464 (2nd Cir. 1946)	19
7	<i>Baxter v. MCA, Inc.</i> ,	
8	812 F.2d 421 (9th Cir. 1987)	20
9	<i>Bethea v. Burnett</i> ,	
10	No. CV 04-7690JFWPLAX, 2005 WL 1720631 (C.D.Cal., Jun. 28, 2005)	19
11	<i>Cavalier v. Random House</i> ,	
12	Inc., 297 F.3d 815 (9th Cir. 2002)	20
13	<i>Coles v. Wonder</i> ,	
14	283 F.3d 798 (6th. Cir. 2002)	17
15	<i>Covington Indus., Inc. v. Nichols</i> ,	
16	2004 WL 784825 (S.D.N.Y. Apr. 12, 2004)	14
17	<i>Cox v. Abrams</i> ,	
18	1997 WL 251532 (S.D.N.Y, May 14, 1997.)	20
19	<i>Data East USA, Inc. v. Epyx, Inc.</i> ,	
20	862 F.2d 204 (9th Cir. 1988.)	18
21	<i>Dorn v. Burlington</i> ,	
22	397 F.3d 1183 (9th Cir. 2005)	22, 23
23	<i>Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.</i> ,	
24	499 U.S. 340 (1991)	12, 13
25	<i>Folio Impressions, Inc. v. Byer California</i> ,	
26	937 F.2d 759 (2d Cir. 1991)	12
27	<i>Gaste v. Kaiserman</i> ,	
28	863 F.2d 1061 (2d Cir. 1988)	12, 18
	<i>Goldman v. Standard Ins. Co.</i> ,	
	341 F.3d 1023 (9th 2003)	22

1	<i>Goodman v. Staples The Office Superstore, LLC</i> , 644 F.3d 817 (9th Cir. 2011)	10
2		
3	<i>Halaco Engineering Co. v. Costle</i> , 843 F.2d 376 (9th Cir. 1988.)	25
4		
5	<i>Harris v. U.S.</i> , 132 Fed. Appx. 183 (9th Cir. 2005)	9, 10
6		
7	<i>Jorgensen v. Careers BMG Music Pub.</i> , 2002 WL 1492123 (S.D.N.Y July 11, 2002.).....	20
8		
9	<i>Jorgensen v. Epic/Sony Records</i> , 351 F.3d 46 (2d Cir. 2003)	18
10		
11	<i>Knitwaves, Inc. v. Lollytogs Ltd.</i> , 71 F.3d 996 (2d Cir. 1995)	13, 14
12		
13	<i>Kodadek v. MTV Networks, Inc.</i> 152 F.3d 1209 (9th Cir. 1998)	17
14		
15	<i>Kouf v. Walt Disney Pictures & Television</i> , 16 F.3d 1042 (9th Cir. 1994)	20, 21
16		
17	<i>Kregos v. Assoc. Press</i> , 937 F.2d 700 (2d Cir. 1991)	15
18		
19	<i>Kronisch v. United States</i> , 150 F.3d 112 (2nd Cir. 1998)	23
20		
21	<i>L.A. Printex Industries, Inc v. Lia Lee, Inc.</i> , No. CV 08-1836, 2009 WL 789877 (C.D. Cal. 2009)	19
22		
23	<i>Leon v. IDX Systems, Corp.</i> , 2004 WL 5571412 (W.D. Wash. Sep. 30, 2004.)	23, 24
24		
25	<i>Leon v. IDX Systems, Corp.</i> , 464 F.3d 951 (9th Cir. 2006.)	24
26		
27	<i>Nicholls v. Tufenkian Import/Export Ventures, Inc.</i> , 2004 WL 1399187 (S.D.N.Y. June 23, 2004)	16
28		
	<i>Payne v. Exxon Corp.</i> , 121 F.3d 503 (9th Cir. 1997.)	25

1	<i>Reed Elsevier, Inc. v. Muchnick,</i>	
2	130 S. Ct. 1237, 176 L. Ed. 2d 18 (2010)	11
3	<i>S.E.C. v. Todd,</i>	
4	642 F.3d 1207 (9th Cir. 2011)	22
5	<i>Shady Records, Inc. v. Source Enterprises, Inc.,</i>	
6	2005 WL 14920 (S.D.N.Y. January 3, 2005.)	11, 17
7	<i>Shaw v. Lindheim,</i>	
8	919 F.2d 1353 (9th Cir. 1990)	20
9	<i>Sid and Marty Krofft Television Productions, Inc. v. McDonald’s Corp.,</i>	
10	562 F.2d 1157 (9th Cir. 1977)	18
11	<i>Silvestri v. General Motors,</i>	
12	271 F.3d 583 (4th Cir. 2001)	23
13	<i>Smith v. Jackson,</i>	
14	84 F.3d 1213 (9th Cir. 1996.)	20, 21
15	<i>Stewart v. Abend,</i>	
16	495 U.S. 207 (1990)	11
17	<i>Straughter v. Raymond,</i>	
18	No. CV 08-2170 CAS CWX, 2011 WL 3651350 (C.D.Cal. Aug. 19, 2011)	19
19	<i>Sunham Home Fashions, LLC v. Pem-America, Inc.,</i>	
20	2002 WL 31834477 (S.D.N.Y. Dec. 17, 2002).....	14
21	<i>Three Boys Music Corp. v. Bolton,</i>	
22	212 F.3d 477 (9th Cir. 2000)	16, 17, 19
23	<i>United States v. Kitsap Physicians Serv.,</i>	
24	314 F.3d 995 (9th Cir. 2002)	24
25	<i>Vargas v. Pfizer, Inc.,</i>	
26	418 F.Supp.2d 369 (S.D.N.Y 2005)	15
27	<i>Yeti by Molly, Ltd. v. Deckers Outdoor Corp.,</i>	
28	259 F.3d 1101 (9th Cir. 2001)	9, 10
	STATUTES	
	17 U.S.C. § 101.....	11

1 17 U.S.C. § 106(2) 11
2 17 U.S.C.A. § 411(a)9, 11
3 **COURT RULES**
4 Fed. R. Civ. 26..... 1, 9, 10
5
6 Fed. R. Civ. P. 379
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

INTRODUCTION

Defendants have no valid defense of their copyright infringement given their own concession that “Take a Dive” (Dance Version) and “I Gotta Feeling” are strikingly similar if not identical. Even their own expert, Paul Geluso, concludes that the only two explanations are that Defendants stole “Take a Dive” (Dance Version) from Plaintiff, or Plaintiff stole it from Defendants. (Geluso Decl. at ¶ 31) Thus, they have concocted a theory that Plaintiff must have stolen “I Gotta Feeling” from Defendants. This theory is supported only by admitted speculation by their experts who concede that there is no evidence that Plaintiff tampered with the file containing “Take a Dive” (Dance Version), which was created in 1999, and who admit that there is sufficient evidence that the file was created in 1999 to submit the issue to a jury. Despite these glaring admissions that fact issues exist, Defendants have moved for summary judgment, causing Plaintiff to incur significant time and exhaust his resources to respond to the motion. Defendants also improperly rely heavily on several declarations of *never disclosed* witnesses, one of which was signed *five months ago*, and several of which are from witnesses outside of the United States. Thus, to avoid a jury trial, Defendants rely on unsupported and far fetched theories and violations of Rule 26. Significant questions of fact exist which render summary judgment inappropriate and Defendants’ motion should be denied.

COUNTER STATEMENT OF MATERIAL FACTS

I. Pringle Composes “Take a Dive” And Its Derivative Dance Version

Bryan Pringle has been writing contemporary popular music since 1986 and since that time written hundreds of songs. (SAF ¶ 113)¹ He has a substantial amount of experience with computer based musical composition. (SAF ¶ 114).

¹ “SAF” refers to Plaintiff’s Statement of Additional Facts in Opposition to Defendants’ Motion for Summary Judgment, filed concurrently herewith.

1 In 1998, Pringle wrote and recorded “Take a Dive”, a cathartic ode to a failed
2 relationship. (SAF ¶ 115). He created the song using a stand alone Ensoniq ASR-10
3 keyboard. (SAF ¶ 116). He registered a claim for “Take a Dive” and several other
4 original songs he wrote and recorded by submitting a CD entitled *Dead Beat Club:*
5 *1998* to the United States Copyright Office. (SAF ¶ 17). The Register of Copyrights
6 issued a Certificate of Registration for *Dead Beat Club: 1998* on April 29, 1998,
7 identified as SRu 387-433 (SAF ¶ 118). Mr. Pringle made several derivative
8 variations of “Take a Dive” including the “Dance Version” that is central to this case.
9 (SAF ¶ 119). He was not particularly enamored with the vocals in the original “Take
10 a Dive” so, for the Dance Version, he replaced the vocals with a repeating eight-bar
11 melody using a “guitar twang” instrument that he had previously recorded in 1997
12 for his song “Faith.” (SAF ¶ 120). Otherwise, the derivative Dance Version was
13 very much the same song. (SAF ¶ 122). It had the exact same ambient sounds at the
14 beginning of both versions, identical keyboard motifs at :09 seconds, identical bass
15 parts, identical chord progression, identical sonic sweeps at similar points in time of
16 both tracks, identical changes in the bass parts at similar points in each track,
17 identical key, identical tempo, and identical timbre’s with regard to all of the
18 aforementioned similarities. (SAF ¶ 123).

19 The Ensoniq ASR-10 used to create “Take a Dive” (Dance Version) and “Take
20 a Dive” is a complete digital music production studio that allows a user to upload
21 instruments, sounds, and other audio samples from external third-party sources into
22 the keyboard. (SAF ¶¶ 124, 125). These samples are then sequenced and arranged
23 by the user to create and record songs. (SAF ¶ 126). A song, its component parts,
24 and the sequencing and arrangement information can then be saved on an external
25 disc drive as a “creation file.” (SAF ¶ 127). In 1999, after Mr. Pringle created and
26 recorded “Take a Dive” Dance Version, he backed up his creation file onto an NRG
27 image file he titled “DISK05.NRG”2. (SAF ¶ 128).

28

1 **II. “Take a Dive” Dance Version Is Sent To Defendants**

2 Mr. Pringle promoted his music so that he could either sign on with a major
3 record label or sell his music to publishing companies and other artists. In 1999, he
4 began to regularly submit demo cd’s, including the “Take a Dive” Dance Version, to
5 record labels, artists, publishing companies and many others including Defendants
6 UMG, Interscope and EMI, as partially evidenced by the USPS postal receipts
7 produced during discovery. (SAF ¶ 129, 130). He also sent a copy to Gum
8 Productions. (SAF ¶ 131). Mr. Pringle distributed his demo cd’s in France at various
9 times in 1999 and between 2001-2003. (SAF ¶ 132). During that time, he enlisted
10 the help of his brother Jeffrey, a professional disc jockey. (SAF ¶ 132). Jeffrey
11 Pringle brought Mr. Pringle to several night clubs in France, including “Rex Club”,
12 “Le Queen” and “Le Palace”, where he distributed his demo cd to the local disc
13 jockeys. (SAF ¶ 133). Guetta and Riesterer were disc jockeys at these clubs at
14 various times during that time period.

15 Jeffrey Pringle also hosted radio and internet programs that were broadcast in
16 France. (SAF ¶ 134). He played “Take a Dive” Dance Version on these programs.
17 (SAF ¶ 134). Michael Scott Brown was also a professional and part time disc jockey
18 in Western Europe. (SAF ¶ 135). He and Jeffrey Pringle served in the U.S. military
19 together. Mr. Brown played Mr. Pringle’s music, including cuts from the
20 copyrighted *Dead Beat Club* album, regularly on the Armed Forces Network radio
21 and Dutch and German radio stations. (SAF ¶ 136). These stations broadcasted on
22 the internet and all over Western Europe, including in France. (SAF ¶ 136).

23 **III. Black Eyed Peas Release “I Gotta Feeling”**

24 When Mr. Pringle first heard “I Gotta Feeling” he knew that “there was a
25 problem,” he knew that “there was intentional, willful infringement” of “Take a
26 Dive” Dance Version. (SAF ¶ 139). There were numerous and undeniable
27 similarities between the songs. (SAF ¶ 140).

28

1 **IV. The Reason For The Similarity Becomes Clear**

2 David Guetta and Joachim Garraud, the two recipients of Mr. Pringle’s
3 submission to Gum Production, collaborated with Defendant Riesterer in the
4 selection of the instrumental portion of “I Gotta Feeling.” (SAF ¶ 141). Garraud
5 first met Defendant Riesterer in 1989. (SAF ¶ 142). They worked together at a
6 French radio station called “Maximum”. (SAF ¶ 143). They shared an interest in
7 music, became close friends, and then “naturally” began to make music together in
8 the early 1990’s. (SAF ¶ 144). They would often exchange ideas and concepts,
9 exchange demo tapes, and “put them together” in a sound sequencer. (SAF ¶ 145).
10 When Riesterer left Maximum in 1993, he remained close with Garraud and they
11 continued to “talk all the time” about music. (SAF ¶ 146).

12 In 2001, Garraud, Guetta and Jean Charles Carre founded Gum Productions so
13 that they could “make music.” (SAF ¶ 147). Gum Productions recruited and signed
14 artists to perform on albums that it produced and it received submissions from
15 prospective artists as well. (SAF ¶ 148). Sometime between 2001 and 2003, Gum
16 Productions received Pringle’s demo cd that included the “Take a Dive” Dance
17 Version. (SAF ¶ 148). After receiving this cd, Gum Productions sent a letter to
18 Pringle in which Garraud and Guetta expressed their approval for Pringle’s music.
19 (SAF ¶ 149). They asked for and received additional tracks from Pringle, including
20 the settings instrumentation and sound effects for his songs, including “Take a Dive”
21 (Dance Version). (SAF ¶ 150).

22 **A. The “Guitar Twang Sequence” Eventually Used In “I Gotta**
23 **Feeling” Appears In A Song Created By Garraud, Guetta and**
24 **Riesterer**

25 In 2006, Garraud called Riesterer and asked him if he would be willing to
26 work on a music project with he and Guetta. (SAF ¶ 151). The three of them
27 worked together on a song called “Love is Gone” for David Guetta’s album. (SAF ¶
28 152). They constantly exchanged “sounds” and “advice” in order to have the “best

1 possible” song. (SAF ¶ 153). It was during this process that they came upon the
2 “guitar twang sequence” that Riesterer admitted in his November 2010 declaration
3 was eventually used in “I Gotta Feeling.” (SAF ¶154).²

4 **B. Riesterer And Guetta Use The “Guitar Twang Sequence” In An**
5 **Instrumental Song That Became “I Gotta Feeling”**

6 Riesterer and Guetta continued to work together after the release of “Love is
7 Gone.” (SAF ¶ 156). In October 2008, they began working in Riesterer’s studio on
8 an “instrumental” song called “David Pop GTR.” (SAF ¶ 157). They “wanted to
9 create a song with the same guitar as in “Love is Gone” and they worked tirelessly in
10 order to get it done. (SAF ¶ 158). Around the same time, Defendant Adams reached
11 out to Guetta because he “want[ed] him to produce a song for the Black Eyed Peas.”
12 (SAF ¶ 159). Adams specifically asked Guetta to “produce a song for the Black
13 Eyed Peas that [was] similar to [Love is Gone].” (SAF ¶ 161). Adams was attracted
14 to the “guitar twang” used in “Love is Gone.” (SAF ¶ 162). Guetta sent Adams a
15 sound file containing “David Pop GTR.” (SAF ¶ 163). Neither Guetta nor Adams
16 concerned themselves with determining whether the tracks being exchanged had
17 been copied or sampled from copyrighted work. (SAF ¶ 166). When Adams heard
18 “David Pop GTR,” he said “I love that song I want it on my album.” (SAF ¶ 167).
19 He thought that the song was “amazing” because of the guitar “chord progression.”
20 (SAF ¶ 167). And so, with added vocals and lyrics, “David Pop GTR” became “I
21 Gotta Feeling.” (SAF ¶ 168).

22
23
24
25 ² In “his” November 23, 2010 declaration, Riesterer also claimed that the entire
26 “guitar twang sequence” was recorded by Univers Sons and available in its library
27 under the name “Strat with SM57 Crunchy”. In his deposition, however, Riesterer
28 admitted that he had not reviewed this declaration and that that statement was
patently false. (SAF ¶ 155).

1 **C. None of The Defendants Can Explain The Origin Of The “Guitar**
2 **Twang Sequence”**

3 Adams could not account for the origin of the “guitar twang” sequence and he
4 was careful to specify that Guetta “represented” that he composed it himself. (SAF ¶
5 169). But Guetta claims that the guitar instrumentation “came from [Riesterer]” and
6 that Riesterer never told him where he got it from. (SAF ¶ 170).

7 Riesterer submitted contradictory claims regarding the “guitar twang
8 sequence.” He first claimed that the entire sequence used in “I Gotta Feeling” came
9 pre-packaged from a licensed Univers-Sons music library. (SAF ¶ 171). He later
10 claimed he took the guitar sequence from “Love is Gone” and changed the “preset”
11 and “processing effects” to make the sequence for “I Gotta Feeling.” (SAF ¶ 172).
12 He had no explanation for the origin of the sequence from “Love is Gone” because
13 he doesn’t “remember exactly” how he created it. (SAF ¶ 173). He had no
14 recollection or evidence of the “preset” and “processing effects” he allegedly used.
15 (SAF ¶ 174). Riesterer cannot produce the computer that he allegedly used to create
16 the sequence, claiming that he gave it to a “friend” whose name he can’t remember.
17 (SAF ¶ 175) The weaving of the web continues with the testimony of Defendants’
18 expert, Paul Geluso, who claims that the files that Riesterer’s counsel produced (files
19 1-9 and 30) constitute the original David Pop Guitar Creation files. (SAF ¶ 176)
20 This is a demonstrably false statement however, since several of these files were
21 created long after “I Gotta Feeling” was recorded and released. (SAF ¶ 177)

22 **V. Defendants Concoct Another Explanation**

23 Defendants now allege that Plaintiff reverse engineered “I Gotta Feeling”.
24 (SAF ¶ 179). Defendants have not presented a single piece of evidence that proves
25 or even suggests that Pringle engaged in such conduct. (SAF ¶ 180). Plaintiff, on
26 the other hand, has produced evidence that establishes that August 22, 1999 was the
27 last time that the creation file for “Take a Dive” Dance Version, containing the song,
28 its component parts and its sequencing and arrangement information, was modified.

1 (SAF ¶¶ 181, 182). Defendants’ theory is based on the following absurd
2 assumptions:

- 3 • That Mr. Pringle wanted to create a backdated .NRG file (SAF ¶ 183);
- 4 • That Mr. Pringle retained blank CD recording media for approximately
5 10 years and was also able to somehow determine the age of this media
6 to identify how old it was (SAF ¶ 184);
- 7 • That the CD recording media was stored in an environment with
8 sufficient protection from heat and damage that it would still be useable
9 after that time period (SAF ¶ 185);
- 10 • That Mr. Pringle somehow discovered a copy of the guitar twang from
11 an Internet source, that the guitar twang coincidentally matched a song
12 that Mr. Pringle wrote and copyrighted a decade before, and that Mr.
13 Pringle was able to integrate the guitar sequence somehow with the
14 music for “Take A Dive” that Mr. Pringle had already composed, in
15 order to create a new recording that he would then backdate (SAF
16 ¶ 186);
- 17 • That Mr. Pringle deliberately set the computer date back to 1999, so that
18 the files he wrote would have operating system dates from 1999 (SAF ¶
19 187); and
- 20 • That Mr. Pringle coincidentally kept at least 134 contemporaneous
21 photos, including photos of himself, whose external file dates and
22 internal metadata dates are from September 6th and 8th 1999 (SAF
23 ¶ 188).

24 “Take a Dive” (Dance Version) is a derivative of “Take a Dive,” along with
25 Plaintiff’s other song “Faith,” also on the copyrighted album “Dead Beat Club.”
26 (SAF ¶ 189). In addition to providing uncontroverted evidence that he created “Take
27 a Dive” Dance Version in 1999, Plaintiff took considerable steps to preserve this
28 evidence. (SAF ¶ 190). Plaintiff backed up the creation file for “Take a Dive”
Dance Version onto a small computer serial interface (SCSI) hard drive. (SAF ¶
191). He then connected the SCSI drive to a Windows 98 based computer and, using
Ensoniq Disk Manager (EDM) software, he created .NRG image files which he
burned on to a cd and titled “DISK05.NRG”2. (SAF ¶ 192). These steps preserved

1 the evidence of his creation of the “Take a Dive” Dance Version even after his hard
2 drives and audio equipment were stolen from a storage locker on October 19, 2000.
3 (Def. Fact. No. 67)

4 According to www.beatportal.com, the website from which the Defendants
5 claim Pringle downloaded samples, the tracks were only available from August 21 to
6 September 8, 2009. If Pringle had downloaded these tracks, the evidence would
7 have been on the hard drive that he upgraded in January 2010, at least a month before
8 he became aware of “I Gotta Feeling.” (SAF ¶ 195) His replacement hard drive, in
9 operation from January 2010 to January 2011, would not have had any data relating
10 to activities from 2009. (SAF ¶ 196). Furthermore, Beatportal would have records
11 evidencing Pringle’s alleged registration, downloading of tracks, and credit card
12 payment. (SAF ¶ 197). If Defendants had such evidence, given that they provided a
13 declaration from Clark Warner of beatport.com, surely they would have provided it.

14 When Plaintiff returned his defective hard drive to Western Digital for
15 warranty repair or replacement in the summer of 2011, it did not contain any remix
16 of “I Gotta Feeling.” (SAF ¶ 199). As of July 2011, Plaintiff had no reason to
17 believe that there was anything on his defective hard drive that had anything to do
18 with his case because he, in good faith, believed that all such materials were turned
19 over to David Gallant in 2010. (SAF ¶ 200). Before returning the hard drive,
20 Plaintiff backed up everything he could onto a DVD-Rom and provided it to Gallant,
21 who made it available to Defendants’ expert on August 8, 2011, who declined to
22 inspect the hard drive. (SAF ¶¶ 201 202).

23 **VI. Copyright Registration**

24 On November 15, 2010, Mr. Pringle submitted an application to the U.S.
25 Copyright Office for the registration of the derivative Dance Version of “Take a
26 Dive.” (SAF ¶ 203). The Copyright Office registered the sound recording in “Take a
27 Dive (Dance Version),” but refused to register the musical composition in the new
28 material added, stating that the “work does not contain enough original musical

1 authorship to be copyrightable.” (SAF ¶ 204). Plaintiff notified the Copyright
2 Office of the litigation pursuant to Section 411(a) of the Copyright Act. (SAF ¶
3 205).

4 5 ARGUMENT

6 I. Defendants Cannot Rely on Declarations of Witnesses They Never 7 Disclosed

8 Certain Declarations upon which Defendants rely must be stricken, including
9 the declarations of Clark Warner (dated **October 6, 2011**), Jean Charles Carre (dated
10 November 12, 2011), Alain Etchart (dated November 4, 2011), Gary Roth (dated
11 **July 5, 2011**), and Thibaud Fouet (dated **August 17, 2011**). Exhibit I to Dickie Decl.

12 Rule 26 requires a party to disclose all individuals “that the disclosing party
13 may use to support its claims or defenses” and to supplement “in a timely manner.”
14 Fed. R. Civ. P. 26. This is so that each party has an opportunity to depose the other
15 party’s witnesses. *See Harris v. U.S.*, 132 Fed. Appx. 183 (9th Cir. 2005). Rule 37
16 gives teeth to Rule 26’s requirements. *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*,
17 259 F.3d 1101, 1106 (9th Cir. 2001). It provides, “[i]f a party fails to provide
18 information or identify a witness as required by Rule 26(a) or (e), the party is not
19 allowed to use that information or witness to supply evidence on a motion, at a
20 hearing, or at a trial, unless the failure was substantially justified or is harmless.”
21 Fed. R. Civ. P. 37(c)(1). This sanction is self-executing unless the failure is
22 *substantially justified* or *harmless*. Fed. R. Civ. P. 37(c), Advisory Committee Notes
23 (1993); Fed. R. Civ. P. 37(c)(1); *see also Yeti*, 259 F.3d at 1106.

24 Defendants’ motion heavily relies on declarations of fact witnesses, never
25 disclosed to Plaintiff.³ The Defendants have had knowledge of the facts attested to

26
27 ³ Jean Charles Carre was disclosed in a Supplemental Initial Disclosure that (1) was
28 served at 5:00 p.m. the day discovery closed; and (2) identified him as only having
knowledge of Defendant Guetta’s “expenses deductible from any revenues

(Continued...)

1 by the declarants going back as far as *July 5, 2011*. Further, three of the five
2 declarants are located outside of the United States. Not only has Plaintiff had no
3 opportunity to depose any of the witnesses, but Plaintiff cannot compel any of them
4 to appear for a deposition, nor compel them to appear in court at a trial on the merits
5 to confront them with cross-examination to test the veracity of their statements and
6 their credibility. Defendants offer no justification, let alone a substantial
7 justification, for their nondisclosure. Moreover, the nondisclosure is not harmless.
8 “The burden to prove harmlessness is on the party seeking to avoid Rule 37’s
9 exclusionary sanction.” *Goodman v. Staples The Office Superstore, LLC*, 644 F.3d
10 817, 827 (9th Cir. 2011). Rule 26 requirements exist so that each party has time to
11 depose the other party’s witnesses. *Harris v. U.S.*, 132 Fed.Appx. 183 (9th Cir.
12 2005); *see also Yeti by Molly*, 259 F.3d 1101 Similarly, here, Mr. Pringle never had
13 the opportunity to know of or depose the declarants or subject their declarations to
14 any manner of cross-examination before this Court considers Defendants’ Motion for
15 Summary Judgment. These declarations were offered to bolster Defendants’ motion.
16 Their nondisclosure was intentional and tactical, and their admission would not be
17 harmless.

18 **II. Plaintiff Owns a Valid Copyright in “Take a Dive” and “Take a Dive”**
19 **(Dance Version).**

20 **A. Rejection of a Copyright Application does not Preclude Subject**
21 **Matter Jurisdiction.**

22 Plaintiff’s registration of “Take a Dive” is undisputed. (SAF ¶ 118)
23 Defendants’ argument that the Copyright Office’s rejection of Plaintiff’s application
24 _____

25 (...Continued)

26 attributable to “I Gotta Feeling.” Clark Warner, who signed his Declaration on
27 October 6, 2011, was disclosed for the first time on **November 23, 2011**, after
28 discovery closed, and after his Declaration was filed in connection with the summary
judgment motion. See Exhibit I to Dickie Decl.

1 for registration of “Take a Dive” Dance Version is dispositive runs contrary to
2 established law. The Supreme Court made clear in *Reed Elsevier, Inc. v. Muchnick*,
3 130 S. Ct. 1237, 176 L. Ed. 2d 18 (2010) that 17 U.S.C.A. § 411(a) “expressly allows
4 courts to adjudicate infringement actions...where the holder attempted to register the
5 work and registration was refused.” *Id.* at 1246. Defendants’ contention “run[s]
6 counter to the statutory scheme, which permits even rejected registration applications
7 to confer standing to sue.” *Shady Records, Inc. v. Source Enterprises, Inc.*, 2005 WL
8 14920, *8 (S.D.N.Y. January 3, 2005); citing 17 U.S.C. § 411(a).⁴

9 **B. “Take a Dive” (Dance Version) Is A Protected Derivative Work.**

10 The Copyright Act defines a derivative work as “based upon one or more
11 preexisting works, such as a translation, musical arrangement, dramatization,
12 fictionalization, motion picture version, sound recording, art reproduction,
13 abridgment, condensation, or any other form in which a work may be recast,
14 transformed, or adapted.” 17 U.S.C. § 101. The statutory rights include the exclusive
15 right “to prepare derivative works based upon the copyrighted work.” 17 U.S.C. §
16 106(2); *Stewart v. Abend*, 495 U.S. 207, 220 (1990) (“An author holds a bundle of
17 exclusive rights in the copyrighted work, among them the right to copy and the right
18 to incorporate the work into derivative works.”). Because Pringle holds a copyright
19 for his song “Take a Dive,” the derivative is eligible for protection as a derivative
20 work because it adds original pieces.

21 The Dance Version is undeniably a derivative work. It is based upon “Take a
22 Dive.” It has the exact same ambient sounds at the beginning of both versions,
23 identical keyboard motifs at :09 seconds, identical bass parts, identical chord
24 progression, identical sonic sweeps at similar points in time of both tracks, identical
25 changes in the bass parts at similar points in each track, identical key, identical

26 _____
27 ⁴ Plaintiff has likewise given notice to the Copyright Office of the lawsuit. See
28 Exhibit K to Declaration of Dean Dickie.

1 tempo, and identical timbre’s with regard to all of the aforementioned similarities.
2 Norris Decl. ¶ 6. At the same time, as explained more fully below, it adds a
3 substantial amount of new and original material. Pringle changed the whole feel of
4 the song to a contemporary Dance/Pop feel by adding a drum beat with a bass drum
5 pattern of four quarter-notes per measure and, more importantly, by creating a
6 “central guitar hook” that he created by playing a repeating eight-bar melody using a
7 “guitar twang” instrument. Norris Decl. 4. Pringle’s addition of the “central guitar
8 hook” forms the “core” and “central theme” of the Dance Version. Stewart
9 Declaration 15, 17. In addition to being sounded almost continuously (through
10 75.3% of the song), it is one of the loudest and most prominent sounds in the mix.
11 Stewart Decl. ¶ 17. It enables a listener to “instantly identify” the song. *Id.*

12 **C. Plaintiff Has Established Originality and Summary Judgment is**
13 **Improper.**

14 To establish a copyright infringement claim, a plaintiff must also prove: (1)
15 ownership of a valid copyright and (2) “copying of constituent elements of the work
16 that are original” by defendants. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499
17 U.S. 340, 361 (1991). “The sine qua non of copyright is originality. To qualify for
18 copyright protection, a work must be original to the author. “Original,” as the term is
19 used in copyright, means only that the work was independently created by the author
20 (as opposed to copied from other works), and that it possesses at least some minimal
21 degree of creativity.” *Id.* Originality means the work was independently created by
22 its author, and not copied from someone else’s work. The level of originality and
23 creativity that must be shown is minimal, only an ‘unmistakable dash of originality
24 need be demonstrated, high standards of uniqueness in creativity are dispensed with.
25 *Folio Impressions, Inc. v. Byer California*, 937 F.2d 759, 764-65 (2d Cir. 1991)
26 (quoting *Weissmann v. Freeman*, 868 F.2d 1313, 1321 (2d Cir. 1989)); *see also*
27 *Gaste v. Kaiserman*, 863 F.2d 1061, 1066 (2d Cir. 1988) (the requirement of
28

1 originality is “little more than a prohibition of actual copying.”) The Supreme Court
2 has stated:

3 “To be sure, the requisite level of creativity is extremely
4 low; even a slight amount will suffice. The vast majority of
5 works make the grade quite easily, as they possess some
6 creative spark, no matter how crude, humble or obvious it
7 might be. Originality does not signify novelty; a work may
8 be original even though it closely resembles other works so
9 long as the similarity is fortuitous, not the result of
10 copying. To illustrate, assume that two poets, each ignorant
11 of the other, compose identical poems. Neither work is
12 novel, yet both are original and, hence, copyrightable.”

13 *Feist*, 499 U.S. at 345-346 (1991) (internal quotations and citations omitted). “A
14 work may be copyrightable even though it is entirely a compilation of unprotectible
15 elements.” *Knitwaves, Inc. v. Lollytogs Ltd.*, 71 F.3d 996, 1003-1004 (2d Cir. 1995).

16 In the case of a derivative work, the standard is even lower. “[T]he standard
17 for originality of a ... derivative work is ‘minimal’ and of ‘a low threshold,’ and is
18 ‘modest at best.’” *Harvester v. Rule Joy Trammell + Rubio, LLC*, 716 F. Supp. 2d
19 428, 439 (E.D. Va. 2010) quoting *Kramer Mfg. Co., Inc. v. Andrews*, 783 F.2d 421,
20 438 (4th Cir. 1986) (internal citations omitted). “The originality requirement is
21 satisfied if the new material or expression has ... a faint trace of originality and if it
22 provides a distinguishable variation.” *Id.* (internal citations and quotation marks
23 omitted). “In other words, a derivative work is usually sufficiently original to qualify
24 for copyright protection if the derivative work contains a nontrivial variation from
25 the preexisting work sufficient to render the derivative work distinguishable from
26 [the] prior work in any meaningful manner.” *Id.*; quoting *Kramer Mfg*, 783 F.2d 421;
27 Nimmer on Copyright § 3.03[A], at 3-10. (internal quotations omitted).

28 Pringle has produced ample undisputed evidence that he independently created
the “guitar twang sequence.” He has produced evidence that he recorded a “guitar
twang” sound instrument. (SAF ¶ 120) He then created an eight-bar melody using

1 that instrument by playing a total of four notes (D4, C4, B3 AND G3), in the
2 following progression: D4-C4-B3-C4-B3-C4, and in the key of G3. (SAF ¶ 121) He
3 used an Ensoniq ASR-10 keyboard to create this sequence and then saved all of the
4 component parts, sequencing and arrangement information on an external disc drive.
5 (SAF ¶ 24). All of this information was produced to Defendants and their experts
6 have been unable to refute the evidence.

7 Defendants' contention that that Plaintiff cannot obtain copyright protection
8 because the individual sounds were obtained from a music sample library is wholly
9 without merit. If a court were to follow this suggestion, then the Court "might have
10 to decide that there can be no originality in a painting because all colors of paint have
11 been used somewhere in the past." *Knitwaves*, 71 F.3d at 1003 (internal quotation
12 marks omitted); *see also Covington Indus., Inc. v. Nichols*, 2004 WL 784825, *3
13 (S.D.N.Y. Apr. 12, 2004); *Sunham Home Fashions, LLC v. Pem-America, Inc.*, 2002
14 WL 31834477, *5 (S.D.N.Y. Dec. 17, 2002) ("Although the idea of a plaid or floral
15 pattern may not of its own be original, the patterns' sizes, shapes, arrangements and
16 colors taken together are original and copyrightable.").

17 **1. Defendants' Expert Analysis Is Not Only Disputed, It Calls**
18 **Into Question Their Entire Theory**

19 Professor Geluso's analysis and conclusions raise more issues than they
20 attempt to resolve. First, several of the alleged "creation files" analyzed by Professor
21 Geluso have creation dates which show that they were created after "I Gotta Feeling"
22 was recorded and released. Resp. to Fact No. 29. Second, the song file that Riesterer
23 claims he used to create "I Gotta Feeling" contains an entry for a device that did not
24 exist when "I Gotta Feeling" was allegedly recorded and released. *Id.* Third, one of
25 the alleged creation files is titled "Disk 1 tb Litige (def) OK. David Pop Guitar:
26 Audio Files." There is no reason why a file that was allegedly created in 2008 or
27 2009 would refer to "litigation" and be "ok." Pringle Decl. ¶ 243. Fourth, one of the
28 alleged creation files, "0.6s_Snare Hall.SDIR", has been produced twice by the

1 defense and has had two different creation dates. Pringle Decl. ¶ 244. It is curious
2 that this file that was allegedly used to create “I Gotta Feeling” would at one time
3 have a creation date of “9/4/2004” and another time have a creation date of
4 “3/22/2007,” contradicting Riesterer’s testimony about when the sequence was
5 created. Further, other issues exist. It would be impossible to remove some of the
6 “low notes” that are embedded in the sequence in “I Gotta Feeling” and not present
7 in “Take a Dive” Dance Version, Pringle Decl. ¶¶ 120-125. Further, “I Gotta
8 Feeling” has layering that “Take a Dive” Dance Version doesn’t. Pringle Decl. ¶¶
9 126-240.

10 Defendants have produced no evidence that Pringle sampled the “guitar twang
11 sequence” from another source. They have produced no evidence whatsoever that
12 Plaintiff downloaded tracks from www.beatportal.com, a website that requires
13 registration and maintains payment information. Frederiksen Decl. at ¶ 38.
14 Plaintiff’s expert, Barbara Frederiksen Cross provides a detailed analysis of the
15 flawed (and baseless) assumptions that would have to be made to give credence to
16 Defendants’ theory. Frederiksen Decl. at ¶ 21. She also provides a detailed analysis
17 of the metadata issues that prove Defendants’ theory false. Frederiksen Decl. at ¶¶
18 14-28. Similarly, Plaintiff’s expert David Gallant has produced irrefutable evidence
19 that the “creation file containing the derivative version of Pringle’s song “Take a
20 Dive” has a creation date of 8-22-1999 with a last modified time of 12:54 p.m.
21 Pringle could not have sampled “I Gotta Feeling” in 1999 10 years prior to its release
22 date. Defendants’ rank speculation to the contrary is baseless and cannot be used to
23 obtain summary judgment.

24 **2. Whether Or Not “Take a Dive” Dance Version is an Original**
25 **Work is a Question of Fact for the Jury**

26 While it should be clear from the discussion above that Pringle’s work is
27 original, even if there were some question as to originality, these are issues which
28 must be left for the trier of fact to resolve at trial. *See Vargas v. Pfizer, Inc.*, 418

1 F.Supp.2d 369, 372-373 (S.D.N.Y. 2005) (“Typically, ‘[w]hen the originality of a
2 copyrighted work is at issue, it becomes a question of fact for the jury to resolve.’”);
3 quoting *Tin Pan Apple, Inc. v. Miller Brewing Co.*, 1994 WL 62360, *4 (S.D.N.Y.
4 Feb. 24, 1994); *see also Kregos v. Assoc. Press*, 937 F.2d 700, 709 (2d Cir. 1991);
5 *Nicholls v. Tufenkian Import/Export Ventures, Inc.*, 2004 WL 1399187, *2 (S.D.N.Y.
6 June 23, 2004) (“Defendants’ argument that the ‘Prado’ design lacks originality
7 raises factual issues that are best left for trial.”).

8 **D. The Guitar Twang Sequence Is Copyrightable As A Musical** 9 **Composition**

10 Defendants’ contention that the “guitar twang sequence” is a “merely trivial”
11 variation or somehow consists of “only a few notes or chords” is flawed. Perhaps the
12 reason they give it short shrift in their brief is that, given their expert’s admission that
13 “Take a Dive” Dance Version and “I Gotta Feeling” are identical, a “merely trivial”
14 sequence means that “I Gotta Feeling” and the original “Take a Dive” are also
15 substantially similar. Nonetheless, as noted above the derivative works adds a
16 substantial amount of new and original material. Pringle changed the whole feel of
17 the song to a contemporary Dance/Pop feel by adding a drum beat with a bass drum
18 pattern of four quarter-notes per measure and, more importantly, by creating a
19 “central guitar hook” that he created by playing a repeating eight-bar melody using a
20 “guitar twang” instrument. Norris Decl. ¶ 4. Pringle’s addition of the “central guitar
21 hook” forms the “core” and “central theme” of the Dance Version. Stewart Decl. ¶¶
22 15, 17. In addition to being sounded almost continuously (through 75.3% of the
23 song), it is one of the loudest and most prominent sounds. Stewart Decl. ¶ 17. It
24 enables a listener to “instantly identify” the song. *Id.*

25 **E. Plaintiff Deposited A Bona Fide Copy of “Take a Dive” (Dance** 26 **Version)**

27 Defendants next argue that Plaintiff failed to submit a *bona fide* copy of “Take
28 a Dive” (Dance Version) to the Copyright Office. This argument twists the facts and

1 is incorrect. The requirement that a copyright application include a copy of the work
2 is applied in a flexible and practical way. *See e.g. Three Boys Music Corp. v. Bolton*,
3 212 F.3d 477, 486 (9th Cir. 2000). The definition of a “complete copy” is broad and
4 deferential and “[a]bsent intent to defraud and prejudice, inaccuracies in copyright
5 registrations do not bar actions for infringement.” *Id.* quoting *Harris v. Emus*
6 *Records Corp.*, 734 F.2d 1329, 1335 (9th Cir. 1984). There is no requirement that a
7 bona fide copy can only be made by referring to the original. *Shady Records, Inc. v.*
8 *Source Enterprises, Inc.*, 2005 WL 14920, *14 (S.D.N.Y. January 3, 2005.) “[B]ona
9 fide copies may be made through a variety of means, not always involving, in the
10 case of sound recordings, direct copying of the original recording.” *Id.*

11 Defendants rely on *Coles v. Wonder*, 283 F.3d 798 (6th. Cir. 2002) yet *Coles*
12 actually supports Plaintiff’s claims. In *Coles*, the plaintiff deposited a reconstruction
13 of his original work several years later and the reconstruction did not refer to the
14 original work. *Id.* at 802. The Court determined that the reconstruction from
15 memory was not sufficient.⁵ However, the Court did not say that all reconstructions
16 were invalid. In fact, the *Coles* court stated, “had he made his 1990 recording after
17 reviewing a tear sheet or other written summary that dated from 1982, he could have
18 satisfied the deposit requirement.” *Id.* at 802. Thus, the court recognized that an
19 author can meet the bona fide copy requirement without actually having a copy of
20 the original work and even by recreating the original work from scratch. In
21 *Kodadek*, the court noted that even a meticulous redrawing of an original made by
22 referring to the original would suffice. 152 F.3d at 1212.

23 Here, Plaintiff satisfies the deposit requirement because what was submitted to
24 the Copyright Office was indeed a true copy made from the original audio files
25

26 ⁵ *Kodadek v. MTV Networks, Inc.* 152 F.3d 1209 (9th Cir. 1998) is also
27 distinguishable because the plaintiff in that case, like the plaintiff in *Coles*,
28 reconstructed his allegedly infringed drawing from memory.

1 copied and stored onto the DISK05.NRG. He did not recreate anything from
2 memory. The “DISK05.NRG” file contained the components of “Take a Dive”
3 (Dance Version), which Plaintiff uploaded and burned to a cd. Specifically, Plaintiff
4 loaded the following from the DISK05.NRG onto the Ensoniq ASR-10: (1) the song
5 file for “Take a Dive” (Dance Version), located in “Dir 7,” on the “DISK05.NRG,” (2)
6 the instrument files, located in “Dir 7,” on the “DISK05.NRG,” and the “stock” sound
7 effects. Once the components of the song were loaded from the DISK05.NRG onto the
8 Ensoniq ASR-10, he burned them to a CD which was submitted to the Copyright Office.
9 (Pringle Decl. at ¶¶ 163, 164). He used the original digital song file components which
10 played the song on the Ensoniq ASR-10 and then saved these files on a cd.

11 **III. Defendants Had Access to Pringle’s Work.**

12 Access requires “an opportunity to view or to copy plaintiff’s work.” *Sid and*
13 *Marty Krofft Television Productions, Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1172
14 (9th Cir. 1977) (superseded on other grounds). 4 Melville B. Nimmer & David
15 Nimmer, *Nimmer on Copyright*, § 13.02[A], at 13-19 (1999). Because direct
16 evidence of access is rarely available, access to copyrighted material may be shown
17 by circumstantial evidence. *Data East USA, Inc. v. Epyx, Inc.*, 862 F.2d 204, 206
18 (9th Cir. 1988.) ““A court may infer that the alleged infringer had a reasonable
19 possibility of access if the author sent the copyrighted work to a third party
20 intermediary who has a close relationship with the infringer.”” *Jorgensen v.*
21 *Epic/Sony Records*, 351 F.3d 46, 53 (2d Cir. 2003) (emphasis omitted), quoting
22 *Towler v. Sayles*, 76 F.3d 579, 583 (4th Cir. 1996); *see also Gaste v. Kaiserman*, 863
23 F.2d 1061, 1067 (2d Cir. 1988) (“Access through third parties connected to both a
24 plaintiff and a defendant may be sufficient to prove a defendant’s access to a
25 plaintiff’s work.”).

26 Plaintiff sent copies of his demo cd to Defendants UMG, Interscope, and EMI
27 and he retained copies of his receipts. (SAF ¶131). He sent a copy of his demo to
28 Gum Productions, the music production company co-owned by Guetta and Garraud.

1 (SAF ¶ 132). After receiving the demo cd, Gum Productions sent a letter to Pringle
2 in which they expressed their approval for his music and asked him to send
3 additional tracks, which he did, including the settings, instrumentation and sound
4 effects for “Take a Dive” Dance Version (SAF ¶¶ 149, 150).

5 There is also evidence of access through the widespread dissemination of
6 Plaintiff’s song on the radio airwaves and in clubs in France, especially given the fact
7 that Riesterer, Guetta and Garraud performed as dj’s in those clubs and for radio
8 stations. (SAF ¶¶ 132-137) Defendants have produced no admissible evidence to
9 refute these facts. Even if they had, courts do not weigh testimony in these
10 circumstances at the summary judgment stage. *See Arnstein v. Porter*, 154 F.2d
11 464, 469 (2nd Cir. 1946) (“The judge characterized plaintiff’s story as fantastic...
12 [but] plaintiff’s credibility, even as to those improbabilities, should be left to the
13 jury... sometimes truth is stranger than fiction.”) The Court in *Three Boys*
14 confirmed this approach:

15 [T]his Court is not in a position to find that the only
16 conclusion that a reasonable jury could have reached is that
17 Defendants did not have access to Plaintiff’s song. One
18 must remember that the issue this Court must address is not
19 whether Plaintiff has proven access by a preponderance of
20 evidence, but whether reasonable minds could find that
21 Defendants had a reasonable opportunity to have heard
22 Plaintiff’s song before they created their own song.

23 Defendants are wrong when they claim that Plaintiff’s case should be
24 dismissed because he didn’t retain records of the recipients of his music from 10
25 years before he knew that they would infringe his copyright.⁶ Documentary evidence
is not necessary to establish access where the Plaintiff testifies that he submitted his

26 ⁶ Especially when Defendant Riesterer testified that he did not retain any records of
27 the many demo tapes that he sent to companies when he was trying to get discovered
28 either. Resp. to Fact 49.

1 work to the Defendants. *See, e.g., Bethea v. Burnett*, No. CV 04-7690JFWPLAX,
2 2005 WL 1720631 (C.D.Cal., Jun. 28, 2005) (finding a genuine issue of material fact
3 existed on the issue of copying when plaintiff offered only declaration that he made a
4 PowerPoint presentation to intermediary); *L.A. Printex Industries, Inc. v. Lia Lee,*
5 *Inc.*, No. CV 08-1836, 2009 WL 789877 (C.D. Cal. 2009) (finding plaintiff’s
6 declaration and affidavit of financial officer were sufficient evidence to withstand
7 summary judgment on access); *Straughter v. Raymond*, No. CV 08-2170 CAS CWX,
8 2011 WL 3651350 (C.D.Cal. Aug. 19, 2011) (rejecting defendants’ argument that
9 evidence based on a “self serving” declaration alone is insufficient and finding that
10 plaintiff’s declaration was sufficient to withstand summary judgment on the issue of
11 access even where plaintiff offered no documentary evidence demonstrating
12 corporate receipt of the copyrighted song).

13 **A. “Take a Dive” (Dance Version) and “I Gotta Feeling” Are**
14 **Strikingly Similar, Rendering the Issue of Access Irrelevant.**

15 Even if this Court were to believe Defendants that there is no evidence of
16 access, which is not the case here, infringement can still be found because the songs
17 are “strikingly similar.” *See Smith v. Jackson*, 84 F.3d 1213, 1220 (9th Cir. 1996);
18 *Baxter v. MCA, Inc.*, 812 F.2d 421, 423, 424 n. 2 (9th Cir. 1987). When two songs
19 “are so strikingly similar as to preclude the possibility of independent creation,”
20 summary judgment is improper. *Jorgensen v. Careers BMG Music Pub.*, 2002 WL
21 1492123, * 5 (S.D.N.Y July 11, 2002.) (internal quotations omitted). “Striking
22 similarity exists when two works are so nearly alike that the only reasonable
23 explanation for such a great degree of similarity is that the later ... was copied from
24 the first.” *Cox v. Abrams*, 1997 WL 251532, *5 (S.D.N.Y, May 14, 1997.)

25 **B. “Take a Dive” and “I Gotta Feeling” Are Substantially Similar.**

26 Additionally, “Take a Dive” and “I Gotta Feeling” are substantially similar.
27 “When the issue is whether two works are substantially similar, summary judgment
28 is appropriate if no reasonable juror could find substantial similarity of ideas and

1 expression.” *Kouf v. Walt Disney Pictures & Television*, 16 F.3d 1042, 1045 (9th Cir.
2 1994)) “The Ninth Circuit employs a two-part test for determining whether one
3 work is substantially similar to another.” *Shaw v. Lindheim*, 919 F.2d 1353, 1356
4 (9th Cir. 1990). The first part of the test, the extrinsic test, “is an objective
5 comparison of specific expressive elements.” *Cavalier v. Random House, Inc.*, 297
6 F.3d 815, 822 (9th Cir. 2002). “The extrinsic test is an objective test based on
7 specific expressive elements: the test focuses on articulable similarities between the
8 plot, themes, dialogue, mood, setting, pace, characters, and sequence of events in two
9 works.” *Kouf*, 16 F.3d at 1045 (quotation omitted).

10 “For summary judgment, only the extrinsic test is important.” *Id.* “If plaintiff
11 satisfies the extrinsic test, the intrinsic test’s subjective inquiry must be left to the
12 jury and summary judgment must be denied.” *Smith*, 84 F.3d at 1218; citing *Kouf*,
13 16 F.3d at 1045.

14 **IV. Pringle Has Produced Evidence That Defendants Sampled His Recordings**

15 Professor Geluso’s baseless contention that it would have been
16 “technologically impossible” for the Defendants to sample his music has been flatly
17 contradicted by Pringle and his experts. (Pringle Decl. ¶¶ 142-144) Indeed, the
18 presence of “low notes” and “layering” in “I Gotta Feeling” makes it impossible for
19 Pringle to have sampled Defendants’ work. Pringle and his experts have presented
20 ample evidence that proves that it would have been impossible for him to have
21 sampled “I Gotta Feeling.” Geluso’s conclusion that either Plaintiff copied from
22 Defendants or Defendants copied from Plaintiff hamstrings Defendants in this
23 regard. (Geluso Decl. ¶ 30). Pringle has presented ample evidence that Defendants
24 copied his work. Their rank speculation to the contrary is not enough to create an
25 issue fact. At the very least, there are issues of fact here.

26 **V. Defendants’ Claims of Spoliation Are a Red Herring Argument.**

27 Defendants speculate that Plaintiff spoiled evidence because he disposed of a
28 hard drive after litigation commenced. This is a red herring. Plaintiff wrote and

1 recorded “Take a Dive” and “Take a Dive” (Dance Version) in 1998. In 1999,
2 Plaintiff converted “Take a Dive” (Dance Version) to an .NRG file, which was saved
3 to disc and a hard drive. He provided the file to Gallant with a proper chain of
4 custody. Defendants’ expert received a copy it, along with a copy of a hard drive
5 used by Mr. Pringle in 2011, in August 2011. Defendants allege that (1) Mr. Pringle
6 backdated the files on the .NRG file to make them appear to be from 1999; and
7 (2) Mr. Pringle downloaded a version of “I Gotta Feeling” and reverse engineered
8 “Take a Dive” (Dance Version) from that song. Defendants’ argument is a smoke
9 screen. Defendants’ own expert concedes that there is *no* evidence that Mr. Pringle
10 back-dated the .NRG file. Second, Plaintiff’s forensic experts have confirmed that
11 there is no evidence of backdating.

12 **A. The .NRG file containing “Take a Dive” (Dance Version) Was**
13 **Created in 1999.**

14 The competing opinions from Plaintiff’s and Defendants’ respective experts
15 regarding (1) the substantial similarities of the “Take a Dive” and “I Gotta Feeling”
16 and (2) the creation date of the file containing “Take a Dive” (Dance Version) create
17 a question of fact rendering summary judgment improper. While assessing evidence
18 in consideration of a motion for summary judgment, “a court’s role is not to ‘weigh
19 evidence [or] determine the truth of the matter, but to determine whether there is a
20 genuine issue for trial.’” *Goldman v. Standard Ins. Co.*, 341 F.3d 1023, 1034 (9th
21 2003) (citing *Suzuki Motor Corp. v. Consumers Union of U.S., Inc.*, 330 F.3d 1110,
22 1140 (9th Cir. 2003). “The ‘[a]uthority to determine the victor in such a ‘battle of
23 expert witnesses’ is properly reposed in the jury.” *Dorn v. Burlington*, 397 F.3d
24 1183, 1196 (9th Cir. 2005) (citing *Humetrix, Inc. v. Gemplus S.C.A.*, 268 F.3d 910,
25 919 (9th Cir. 2001)); *see also Goldman v. Standard Ins. Co.*, 341 F.3d at 1036 (“Who
26 is correct in [the] battle of experts is not for us to decide.”); *S.E.C. v. Todd*, 642 F.3d
27
28

1 1207 (9th Cir. 2011) (“Assessing expert witness credibility is within the province of
2 the jury.”).⁷ If, as in the present case, “two contradictory expert witnesses can offer
3 testimony that is reliable and helpful, both are admissible and it is the function of the
4 finder of fact, not the trial court, to determine which is the more trustworthy and
5 credible.” *Dorn v. Burlington*, 397 F.3d at 1196. Here, Plaintiff’s retained forensic
6 computer analyst, David Gallant, performed a forensic analysis of the DISK05.NRG
7 file received by Plaintiff through a chain of custody form. After analyzing the data,
8 Mr. Gallant concluded that the creation date of DISK05.NRG is August 22, 1999.
9 The CD-ROM was burned on September 9, 1999. No data on the CD-ROM,
10 including DISK05.NRG was modified after September 9, 1999. Mr. Gallant also
11 concluded that Plaintiff could not have later added the guitar twang sequence to the
12 DISK05.NRG file. Mr. Gallant found no evidence to support any other conclusion.
13 Given the conclusion that “Take a Dive” (Dance Version) was copied to a CD-ROM
14 in 1999, the claim that Mr. Pringle reverse engineered “I Gotta Feeling” in 2010 and
15 then disposed of the evidence is a red herring argument that should be rejected by the
16 Court.

17 **B. Spoliation Sanctions are Inappropriate Because Pringle was not**
18 **Under a Duty to Preserve.**

19 Defendants’ contention that Pringle disposed of his hard drive after he
20 reasonably anticipated litigation is simply not true and unsupportable by record
21 evidence. Incredibly, they make this argument despite the fact that Defendant
22 Riesterer admits to recently disposing of the computer containing his creation files
23 for “I Gotta Feeling” to some friend he could not identify. (SAF ¶ 175).

25 ⁷ Even so, the opinion of Defendants’ expert, Paul Geluso, is based entirely on an
26 invalid syllogism. According to Geluso, the David Pop GTR music file contains the
27 guitar twang sequence. Geluso was able to recreate the guitar twang sequence.
28 Therefore, Plaintiff re-created the guitar twang sequence from David Pop GTR. But
all Geluso proved was that Geluso recreated the guitar twang sequence.

1 While Defendants are correct that the duty to preserve evidence can trigger
2 before litigation commences, the duty does not relate back forever. Courts have held
3 that when the duty does trigger before litigation, it commences when litigation is
4 reasonable anticipated or contemplated. *See Silvestri v. General Motors*, 271 F.3d
5 583, 590 (4th Cir. 2001); *Kronisch v. United States*, 150 F.3d 112, 126 (2nd Cir.
6 1998). However, anticipation or contemplation of litigation is not an absolute trigger
7 of the duty to preserve. In *Leon*, a case relied upon by Defendants, the Court
8 determined that, while litigation was threatened by the plaintiff in September of
9 2002, the plaintiff's duty to preserve evidence did not commence until April of 2003
10 when he was put on notice by the defendants to maintain his computer. *Leon v. IDX*
11 *Systems, Corp.*, 2004 WL 5571412, *3 (W.D. Wash. Sep. 30, 2004.); *see also Leon*
12 *v. IDX Systems, Corp.*, 464 F.3d 951 (9th. Cir. 2006.) Such a result is understandable
13 because the duty does not trigger unless a party has some notice that the evidence is
14 potentially relevant to litigation. *See United States v. Kitsap Physicians Serv.*, 314
15 F.3d 995, 1001 (9th Cir. 2002). Because Defendants cannot show that Pringle was
16 under a duty to preserve the hard drives, its request for spoliation sanctions must fail.

17 The evidence currently before this Court establishes that Pringle replaced his
18 2009 hard drive before he contemplated litigation and before Defendants sent notice
19 to preserve the drive. As noted in *Leon*, it is as of this date that Pringle's duty to
20 preserve triggered. Additionally, the only evidence before this Court is that the 2011
21 hard drive did not contain a copy of "I Gotta Feeling." Because "I Gotta Feeling"
22 was not present on the 2011 hard drive, Pringle did not have "some notice that the
23 [hard drive was] potentially relevant to the litigation before [it was] destroyed." *See*
24 *United States v. Kitsap Physicians Serv.*, 314 F.3d 995, 1001 (9th Cir. 2002). If the
25 2011 hard drive was not potentially relevant, spoliation could not occur and,
26 consequently, Defendants could not have been harmed by Pringle's replacement of
27 the 2011 drive.

28

CERTIFICATE OF SERVICE

1 On December 19, 2011, I electronically filed the foregoing PLAINTIFF'S
2 OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT
3 using the CM/ECF system which will send notification of such filing to the following
4 registered CM/ECF Users:

5
6 Barry I. Slotnick bslotnick@loeb.com
7 Donald A. Miller dmiller@loeb.com, vmanssourian@loeb.com
8 Ira P. Gould gould@igouldlaw.com
9 Tal Efram Dickstein tdickstein@loeb.com
10 Linda M. Burrow wilson@caldwell-leslie.com, burrow@caldwell-leslie.com,
11 popescu@caldwell-leslie.com, robinson@caldwell-leslie.com
12 Ryan Christopher Williams williamsr@millercanfield.com
13 Kara E. F. Cenar kara.cenar@bryancave.com
14 Ryan L. Greely rgreely@igouldlaw.com
15 Robert C. Levels levels@millercanfield.com
16 Kathleen E. Koppenhoefer koppenhoefer@millercanfield.com
17 Rachel Aleeza Rappaport rrappaport@loeb.com
18 Jonathan S. Pink jonathan.pink@bryancave.com, elaine.hellwig@bryancave.com
19 Dean A. Dickie dickie@millercanfield.com, frye@millercanfield.com,
20 deuel@millercanfield.com, smithkaa@millercanfield.com,
21 seaton@millercanfield.com, williamsr@millercanfield.com
22 Edwin F. McPherson emcpherson@mcphersonrane.com,
23 astephan@mcphersonrane.com
24 Joseph G. Vernon vernon@millercanfield.com
25 Justin Michael Righettini justin.righettini@bryancave.com
26 Tracy B. Rane trane@mcphersonrane.com

27 I am unaware of any attorneys of record in this action who are not registered
28 for the CM/ECF system or who did not consent to electronic service.

 I certify under penalty of perjury under the laws of the United States of
America that the foregoing statements are true and correct.

Dated: December 19, 2011 /s/Colin C. Holley

George L. Hampton IV (State Bar No. 144433)
Colin C. Holley (State Bar No. 191999)
HAMPTONHOLLEY LLP
2101 East Coast Highway, Suite 260
Corona del Mar, California 92625
Telephone: 949.718.4550
Facsimile: 949.718.4580