

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

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

16 BRYAN PRINGLE, an individual,
 17 Plaintiff,
 18 v.
 19 WILLIAM ADAMS, JR.; STACY
 FERGUSON; ALLAN PINEDA; and
 20 JAIME GOMEZ, all individually and
 collectively as the music group The
 21 Black Eyed Peas, et al.,
 22 Defendants.

Case No. SACV 10-1656 JST(RZx)

**PLAINTIFF'S STATEMENT OF
 GENUINE DISPUTES IN
 OPPOSITION TO MOTION FOR
 SUMMARY JUDGMENT**

DATE: January 30, 2012
 TIME: 10:00 a.m.
 CTRM: 10A

26
 27
 28

1 Plaintiff Bryan Pringle, by and through his undersigned attorneys, submits the
 2 following statement of genuine issues pursuant to Rule 56 of the Federal Rules of
 3 Civil Procedure in response to Defendants’ Statement of Uncontroverted Facts and
 4 Conclusions of Law:

5 **I. STATEMENT OF UNCONTROVERTED FACTS**

	MOVING PARTIES’ ALLEGEDLY UNCONTROVERTED FACT	PLAINTIFF’S RESPONSE
Background Facts and Pringle’s Allegations		
9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24	1. Bryan Pringle is a real-estate developer from San Antonio, Texas.	Disputed. Plaintiff is a songwriter. See Declaration of Bryan Pringle (“Pringle Decl.”) ¶ 7. While Plaintiff has invested in real estate properties in Abilene Texas, Dickie Decl. Exhibit A, Deposition of Bryan Pringle (“Pringle Dep.”) at 11:16-11:22, Defendants’ citation to ¶ 9 of the original complaint (Doc. 1) for support for this proposition is disingenuous. First, the First Amended Complaint (Doc. 9) is the operative complaint in this action. Second, Plaintiff alleges in ¶ 9 of the First Amended Complaint (“FAC”) that he is a “songwriter that has been submitting music to Interscope Records, EMI, UMG Recordings and other major record labels on a regular basis, under various aliases since around the mid-1990’s.” He makes no reference to being a “real-estate developer” here or anywhere else in the FAC.

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

2.	In October 2010, seventeen months after “I Gotta Feeling” was released, Pringle filed suit against each of The Black Eyed Peas, Guetta, Riesterer and eleven (11) record labels and music publishing companies, claiming that “I Gotta Feeling” infringed the musical composition copyright in “Take a Dive” and the composition and sound recording copyright in “Take a Dive (Dance Version).	Undisputed.
3.	Pringle alleges that he created “Take a Dive” in 1998, and created “Take a Dive” (Dance Version) in 1999 by removing the vocals from “Take a Dive” and adding a repeating “guitar twang sequence.”	Disputed. Plaintiff refers to the referenced paragraphs of the FAC for an accurate recitation of the allegations. (Dck. No. 9)
4.	Pringle alleges that “Take a Dive” is substantially similar to “I Gotta Feeling” and that the recorded guitar twang sequence in “I Gotta Feeling” was “directly sampled” from “Take a Dive” (Dance Version).	Disputed. Plaintiff refers to the referenced paragraphs of the FAC for an accurate recitation of the allegations. (Dck. No. 9)
5.	Pringle states that the guitar twang sequence consists of four notes (D4, C4, B3 and G3), and also presents a transcription of the sequence that contains only three notes (D4, C4 and B3) and is in the key of G3.	Disputed. Plaintiff refers to the referenced paragraphs of the FAC for an accurate recitation of the allegations. (Dck. No. 9)

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

6.	Pringle asserts that, aside from removing the vocals and adding the guitar twang sequence, “Take a Dive” and “Take a Dive” (Dance Version) are exactly the same.	Disputed. Plaintiff replaced the vocals with a repeating eight-bar melody using a “guitar twang” instrument that he had previously recorded in 1997 for his song “Faith.” The derivative Dance Version had the exact same ambient sounds at the beginning of both versions, identical keyboard motifs at :09 seconds, identical bass parts, identical chord progression, identical sonic sweeps at similar points in time of both tracks, identical changes in the bass parts at similar points in each track, identical key, identical tempo, and identical timbre’s with regard to all of the aforementioned similarities. Pringle Decl. ¶ 133; See Declaration of Alex Norris (“Norris Decl.”) ¶ 6.
----	--	--

Pringle’s Alleged Creation of “Take a Dive” (Dance Version)

7.	Pringle does not recall how, specifically, he created “Take a Dive” (Dance Version).	Disputed. Pringle has described in painstaking detail his inspiration for the guitar twang sequence; how he created it, the equipment that he used, and the sequencing and arranging that he used. He has also provided evidence of same. Pringle. Dep. at 101:9 103-106:2; 202:19-206:24, 213:2-217:13, 218-238; Pringle Decl. ¶¶ 157, 160-161, 225-226; See Declaration of David T. Gallant (“Gallant Decl.”) ¶¶ 4, 9.
----	--	--

1	8.	Pringle is unable to explain how he allegedly created “Take a Dive” (Dance Version) and the guitar twang sequence, including: (i) the month, season or even the year in which he allegedly created the song (ii) how he recorded the guitar twang sound or the chords that comprise the guitar twang sequence, or (iii) how he allegedly added the guitar twang sequence into the original version of “Take a Dive.”	Disputed. Pringle has described in painstaking detail the inspiration for the guitar twang sequence, how he created it, the equipment that he used, and the sequencing and arrangement information. He has also provided evidence of same. Pringle. Dep. at 101:9 103-106:2; 202:19-206:24, 213:2-217:13, 218-238; Pringle Decl. ¶¶ 157, 160-161, 225-226; Gallant Decl. ¶¶ 4, 9.
9	9.	Pringle identifies no one who can corroborate his story about how he allegedly created “Take a Dive” (Dance Version).	Objection. Move to strike. Whether or not someone can corroborate precise details about Plaintiff’s creation of “Take a Dive” (Dance Version) is irrelevant to the issues in this case. Without waiving this objection, Pringle identified several individuals, including but not limited to Robert Dale Tindle, Jeffrey Pringle and Michael Scott Brown who can corroborate how and when he created “Take a Dive” Dance Version. Pringle. Dep. at 87:9-89:7, 205:2-9; See Declaration of Jeffrey Pringle (“Jeffrey Pringle Decl.”); Gallant Decl. ¶¶ 4, 9.
10	10.	Pringle testified that the guitar twang sequence was “just a sample” of a Fender Stratocaster guitar sound that Pringle obtained from a music sample disc named “Best Service.”	Disputed. Pringle testified that he created the guitar twang sequence. While he does play the guitar and may have recorded his own guitar sound for the sequence, he may have also used an already available guitar sound. Pringle. Dep. at 235:20-236:20.
11	11.	Pringle has never played a Stratocaster guitar.	Disputed. Pringle testified that he does play the guitar. At no time did he testify that he has never played a Stratocaster guitar. Pringle. Dep. at 235:20-236:20.
12			
13			
14			
15			
16			
17			
18			
19			
20			
21			
22			
23			
24			
25			
26			
27			
28			

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

12.	Pringle testified that the guitar twang sequence was “possibly from [a music sample disk named] Best Service or it’s from the other sample artists.”	Disputed. Pringle testified that he used a “real guitar sound” when he created the guitar twang sequence and that the sound was “possibly from Best Service or it’s from other sample artists. One of them is Steve Stevens. I can’t remember what the name of it was.” Pringle. Dep. at 235:20-236:20.
13.	The details Pringle has provided indicate that the guitar twang sequence was not his original work, but something he copied from another source.	Disputed. Pringle has described in painstaking detail how he created the guitar twang sequence, the equipment that he used, and the sequencing and arrangement information. He has also provided evidence of same. Dickie Decl. Exhibit A, Pringle. Dep. at 101:9 103-106:2; 202:19-206:24, 213:2-217:13, 218-238; Pringle Decl. ¶¶ 157, 160-161, 225-226; Gallant Decl. ¶¶ 4, 9.
Guetta and Riesterer’s Independent Creation of “I Gotta Feeling”		
14.	In 2008, William Adams, a member of The Black Eyed Peas, asked David Guetta to create the music for a song for The Black Eyed Peas’ new album.	Undisputed.

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

15.	To create the music, Guetta collaborated with Frederic Riesterer.	Disputed. Guetta testified that he worked with Riesterer on an instrumental song call “David Pop GTR.” When Adams called and asked for a song that was “similar” to “Love is Gone”, Guetta forwarded “David Pop GTR” to Adams without Riesterer’s permission. When Adams heard the song he thought that it was “amazing” because of the guitar “chord progression.” Guetta claimed that the guitar instrumentation “came from [Riesterer]” and that Riesterer never told him where he got it from. Riesterer has submitted wholly contradictory claims as to the origins of the guitar twang sequence. Dickie Decl. Exhibit C, Deposition of Frederic Riesterer(“Riesterer Dep.”) at 130:9-16, 194:14-22; Dickie Decl. Exhibit D, Deposition of David Guetta (“Guetta Dep.”) at 114:3-9, 115:20-24, 143:24- 144:6, 149:10-16; Dickie Decl. Exhibit E, Deposition of William Adams (“Adams Dep.”) at 79:18-80:11, 237:1-20.; Riesterer Declaration in Opposition to TRO Requests, dated November 23, 2010 (“Riesterer TRO Decl.”) at ¶¶ 5-6. (Dck. No. 22-3)
16.	Riesterer created a sequence of guitar sounds using an electronic guitar sound (or “pre-set”) he selected from “PlugSound: Fretted Instruments,” a French sound library.	Disputed. Riesterer first claimed that the entire guitar twang sequence came pre-packaged in a Univers-Sons music library. Riesterer TRO Decl. at ¶¶ 5-6. He later testified, after being challenged on the veracity of this claim, that he didn’t “remember exactly” how he created the guitar twang sequence. Riesterer Dep. at 130:9-16.

1	17.	Riesterer then used sound processing software to modify the PlugSound guitar pre-set. The result was a “twangy” sound that was different from both the PlugSound guitar pre-set and the sound that he used in the song “Love is Gone.”	Disputed. Riesterer first claimed that the entire guitar twang sequence came pre-packaged in a Univers-Sons music library. Riesterer TRO Decl. at ¶¶ 5-6. He later testified, after being challenged on the veracity of this claim, that he didn’t “remember exactly” how he created the guitar twang sequence. Dickie Decl. Exhibit C, Riesterer Dep. at 130:9-16.
2			
3			
4			
5			
6			
7			
8	18.	Using this “twangy” sound, Riesterer composed a progression of guitar chords for use in the new song for the Black Eyed Peas.	Disputed. Riesterer first claimed that the entire guitar twang sequence came pre-packaged in a Univers-Sons music library. Riesterer TRO Decl. at ¶¶ 5-6. He later testified, after being challenged on the veracity of this claim, that he didn’t “remember exactly” how he created the guitar twang sequence. Dickie Decl. Exhibit C, Riesterer Dep. at 130:9-16.
9			
10			
11			
12			
13			
14			
15	19.	The result of Riesterer’s modification of the PlugSound pre-set and his chord progression composition was an original guitar “twang” sequence.	Disputed. Riesterer could not say how he created the original “twang” sequence. Dickie Decl. Exhibit C, Riesterer Dep. at 130:9-16; Pringle Decl. ¶¶ 17, 21, 23, 26, 28, 31, 32, 33, 56, 57, 77, 78, 79, 80, 81, 83, 84, 86, 87, 88, 89, 90, 91, 92
16			
17			
18			
19	20.	On December 20, 2008, Guetta sent Adams the music that he and Riesterer created, which they tentatively named “David Pop Guitar.”	Disputed because Guetta and Riesterer did not create the portions of the music that are attributable to Bryan Pringle. Dickie Decl. Exhibit A, Pringle. Dep. at 101:9 103-106:2; 202:19-206:24, 213:2-217:13, 218-238; Pringle Decl. ¶¶ 157, 160-161, 225-226; Gallant Decl. ¶¶ 4, 9.
20			
21			
22			
23			
24			
25	21.	Adams wrote lyrics to accompany “David Pop Guitar” but did not change any of the music.	Undisputed.
26			
27			
28			

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

22.	The combination of Guetta and Riesterer’s music with Adams’ lyrics became the song “I Gotta Feeling,” which The Black Eyed Peas released in 2009.	Disputed because Guetta and Riesterer did not create the music that became "I Gotta Feeling." Bryan Pringle did. Dickie Decl. Exhibit A, Pringle. Dep. at 101:9 103-106:2; 202:19-206:24, 213:2-217:13, 218-238; Pringle Decl. ¶¶ 157, 160-161, 225-226; Gallant Decl. ¶¶ 4, 9.
-----	---	---

“Remix” Contest for “I Gotta Feeling”

23.	In August and September 2009, The Black Eyed Peas and Guetta held a contest to see which DJ could create the best re-mix of “I Gotta Feeling.”	Objection. Move to strike. Even though his declaration was signed on October 6, 2011, Clark Warner was never disclosed as a witness pursuant to Fed.R.Civ.P.26(a) or (e) and Plaintiff has not had an opportunity to depose him. Defendants’ failure to disclose him is neither substantially justified nor harmless. Without waiving these objections, Disputed as to time frame. Undisputed that from August 21 to September 8, 2009 tracks were available from www.beatport.com in connection with a re-mix contest for "I Gotta Feeling." See the Declaration of Barbara Frederiksen-Cross (“Frederiksen-Cross Decl.”) at ¶ 36.
-----	--	---

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

24.	Each of the separate instrumental tracks (known as music “stems”) of “I Gotta Feeling,” were made available for download on Beatport.com.	Objection. Move to strike. Even though his declaration was signed on October 6, 2011, Clark Warner was never disclosed as a witness pursuant to Fed.R.Civ.P.26(a) or (e) and Plaintiff has not had an opportunity to depose him. Defendants’ failure to disclose him is neither substantially justified nor harmless. Without waiving these objections, Disputed as to time frame. Undisputed that from August 21 to September 8, 2009 tracks were available from www.beatport.com in connection with a re-mix contest for “I Gotta Feeling.” Frederiksen-Cross Decl. at ¶ 36.
25.	The music stems made available on Beatport.com included the guitar twang sequence that Riesterer and Guetta had created, as well as The Black Eyed Peas’ lead and background vocal tracks for “I Gotta Feeling.”	Objection. Move to strike. Even though his declaration was signed on October 6, 2011, Clark Warner was never disclosed as a witness pursuant to Fed.R.Civ.P.26(a) or (e) and Plaintiff has not had an opportunity to depose him. Defendants’ failure to disclose him is neither substantially justified nor harmless. Without waiving these objections, Disputed because Riesterer and Guetta did not create the guitar twang sequence. Bryan Pringle did. Dickie Decl. Pringle. Dep. at 101:9 103-106:2; 202:19-206:24, 213:2-217:13, 218-238; Pringle Decl. ¶¶ 157, 160-161, 225-226; Gallant Decl. ¶¶ 4, 9.

1	26.	During the DJ contest, over 1,200 re-mixes of “I Gotta Feeling” were submitted and circulated on the Internet.	Objection. Move to strike. Even though his declaration was signed on October 6, 2011, Clark Warner was never disclosed as a witness pursuant to Fed.R.Civ.P.26(a) or (e) and Plaintiff has not had an opportunity to depose him. Defendants’ failure to disclose him is neither substantially justified nor harmless. Without waiving these objections, Undisputed.
2			
3			
4			
5			
6			
7			
8	27.	Many of these re-mixes contained the guitar twang sequence “soloed out” – <i>i.e.</i> , without any other sounds layered on top.	Disputed. Pringle never testified that any of the remixes available on Beatport contained the guitar twang sequence “soloed out.” He testified that a remix that he found on Amazon.com had the guitar twang sequence “soloed out.” Dickie Decl. Exhibit A, Pringle. Dep. at 185:10-16.
9			
10			
11			
12			
13	28.	These re-mix versions of “I Gotta Feeling” with the guitar twang sequence soloed out continue to be available on various Internet websites.	Disputed. Pringle never testified that any of the remixes available on Beatport contained the guitar twang sequence “soloed out.” He testified that a remix that he found on Amazon.com had the guitar twang sequence “soloed out.” Dickie Decl. Exhibit A, Pringle. Dep. at 185:10-16
14			
15			
16			
17			
18			

(b) Expert Analysis Confirms that Defendants Independently Created the Guitar Twang Sequence and That Pringle Sampled That Sequence From Another Source

Authority: *Art Attacks Ink, LLC v. MGA Entm’t, Inc.*, 581 F.3d 1138 (9th Cir. 2009); *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988); *Idema v. Dreamworks, Inc.*, 162 F. Supp. 2d 1129 (C.D. Cal. 2001).

26	UNCONTROVERTED MATERIAL	OPPOSING RESPONSE
27	FACT	

28

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

29. Riesterer’s and Guetta’s creation files of the music for “I Gotta Feeling” confirm their independent creation of both the sounds and underlying musical composition embodied in this work.

Disputed. In fact, the creation files produced by counsel for Riesterer and Guetta suggest that it is they who have engaged in nefarious conduct. First, Riesterer failed to produce the hard drive that he allegedly used to create “David Pop GTR” which became “I Gotta Feeling.” Second, several of the creation files allegedly used to create the original version of “I Gotta Feeling” have creation dates which show that they were created after the original version of “I Gotta Feeling” was already recorded and released. Third, the “David Pop GTR” song file that Riesterer claims he used to create “I Gotta Feeling” contains an entry in the document Data Logic File for an audio device allegedly used in the creation of “I Gotta Feeling” that wasn’t available in 2008 or 2009, when “I Gotta Feeling” was created. Fourth, one of the alleged creation files is titled “Disk 1 tb Litige (def) OK. David Pop Guitar: Audio Files. There is no reason why a file that was allegedly created in 2008 or 2009 would refer to “litigation” and be “ok.” Fifth, one of the alleged creation files, “0.6s_Snare Hall.SDIR”, has been produced twice by the defense and has had two different creation dates each time. Pringle Decl. at ¶¶ 234-244. Frederiksen-Cross Decl. ¶¶ 46-53.

1	30.	It would have been physically impossible for the Defendants to have copied from Pringle.	Disputed. Pringle sent “Take a Dive” Dance Version and other derivative versions of “Take a Dive” which contained the guitar twang sequence soloed out to Guetta and Garraud. Pringle Dep. at 87:9-89:7; Pringle Decl. at ¶ 34; 121-145; 234-239.
2			
3			
4			
5			
6	31.	The notes within each chord of Pringle’s guitar twang sequence in his NRG disk are “fused” together, indicating that he sampled them from some other source.	Disputed. Pringle did not sample notes or chords from an external source. Pringle Decl. ¶¶ 121-145.
7			
8			
9	32.	The notes within each chord of the guitar twang sequence in Riesterer’s creation files are separate, indicating that he composed those chords on a keyboard, rather than copying them from some other source.	Disputed. Riesterer’s “creation” files were tampered with. Pringle Decl. ¶¶ 17-145; Frederiksen Cross Decl. ¶¶ 45-61
10			
11			
12			
13	33.	Riesterer’s creation files contain the unprocessed version of the guitar twang sequence, whereas Pringle’s NRG disc contains only a final, pre-processed version of the guitar twang sequence.	Disputed. Riesterer’s “creation” files were tampered with. Pringle Decl. ¶¶ 17-145; 234-239; Frederiksen Cross Decl. ¶¶ 45-61
14			
15			
16			
17	34.	It would have been technologically impossible for Defendants to have sampled from the mixed version of Pringle’s song that he claims to have distributed.	Dispute. Defendants reasonably could have sampled "Take a Dive" (Dance Version) from Pringle. Pringle Decl. ¶¶ 17-145
18			
19			

1. The Guitar Twang Sequence is Not Copyrightable as a Musical Composition

Authority: *Newton v. Diamond*, 204 F. Supp. 2d 1244 (C.D. Cal. 2002) (quoting *Gaste v. Kaiserman*, 863 F.2d 1061 (2d Cir. 1988)); *McDonald v. Multimedia Entertainment, Inc.*, 1991 WL 311921 (S.D.N.Y. July 19, 1991); *Batjac Productions Inc. v. GoodTimes Home Video Corp.*, 160 F.3d 1223 (9th Cir. 1998); *Southco, Inc. v. Kanebridge Corp.*, 390 F.3d 276 (3d Cir. 2004)

25	UNCONTROVERTED MATERIAL FACT	SUPPORTING EVIDENCE
26		

27
28

1	35.	Pringle’s November 15, 2010 copyright registration application for “Take a Dive” (Dance Version) sought registration for both the sound recording and the musical composition embodied in the guitar twang sequence (the only new material allegedly added to “Take a Dive” (Dance Version)).	Undisputed
2			
3			
4			
5	36.	The United States Copyright Office denied Pringle’s application to register a copyright in the musical composition of the guitar twang sequence “[b]ecause this work does not contain enough original musical authorship to be copyrightable.”	Undisputed.
6			
7			
8			
9	37.	Pringle’s copyright registration for “Take a Dive” (Dance Version) is limited to the sound recording of the guitar twang sequence, and does not include the underlying musical composition.	Disputed. Plaintiff has a valid copyright in “Take a Dive” Dance Version and it is copyrightable. See eg. <i>Reed Elsevier, Inc. v. Muchnick</i> , 130 S. Ct. 1237, 176 L. Ed. 2d 18 (2010); <i>Shady Records, Inc. v. Source Enterprises, Inc.</i> , 2005 WL 14920, *8 (S.D.N.Y. January 3, 2005. 17 U.S.C. § 411(a);
10			
11			
12			
13			
14			
15			
16			
17			
18			
19	B. Pringle Cannot Show That Any Defendant Copied “Take a Dive” (Dance Version)		
20			
21	1. There is No Evidence the Creators of “I Gotta Feeling” Had Access to “Take a Dive” (Dance Version)		
22			
23	Authority: <i>Art Attacks Ink, LLC v. MGA Entertainment Inc.</i> , 581 F.3d 1138 (9th Cir. 2009); <i>Idema v. Dreamworks, Inc.</i> , 162 F. Supp. 2d 1129 (C.D. Cal. 2001).		
24			
25	UNCONTROVERTED MATERIAL FACT		SUPPORTING EVIDENCE
26			
27			
28			

1	38.	Pringle claims that he “regularly” distributed his songs to virtually every entity in the music business, including Defendants UMG Recordings, Inc., Interscope Records (together the “UMG Defendants”) and EMI April Music, Inc. (“EMI”), and that he would send people in the music business multiple copies of his demos.	Undisputed.
2			
3			
4			
5			
6	39.	Pringle alleged that he received “numerous letters in response to his music submissions,” including responses from “multiple A&R representatives at Interscope, UMG and EMI.”	Undisputed.
7			
8			
9	40.	There is no evidence that Pringle sent “Take a Dive” (Dance Version) to any of the Defendants prior to the release of “I Gotta Feeling.”	Disputed. Pringle widely distributed provided copies of "Take a Dive" (Dance Version) and sent several copies of it and its derivative sound files to defendants. Pringle. Dep. at 87:9-89:7, 205:2-9; Pringle Decl. at ¶¶ 5, 216; Guetta Dep. at pp 20-22 Jeffrey Pringle Decl. ¶¶ 7, 9.
10			
11			
12			
13			
14			
15			
16			
17			
18			
19	41.	There is no evidence that Pringle sent “Take a Dive” (Dance Version) to anyone prior to the release of “I Gotta Feeling.”	Disputed. Pringle widely distributed provided copies of "Take a Dive" (Dance Version) and sent several copies of it and its derivative sound files to defendants. Pringle. Dep. at 87:9-89:7, 205:2-9; Pringle Decl. at ¶¶ 5, 216; Guetta Dep. at pp 20-22 Jeffrey Pringle Decl. ¶¶ 7, 9.
20			
21			
22			
23			
24			
25			
26			
27			
28			

1	42.	Pringle admits that he has never had any direct contact with Guetta or Riesterer.	Disputed. Pringle provided copies of "Take a Dive" (Dance Version) to defendants and corresponded with them thereafter regarding same. .
2			
3			
4			
5			
6	43.	Both Pringle's October 28, 2010 Complaint and his November 18, 2010 First Amended Complaint alleged that Guetta and Riesterer were residents of Los Angeles, California.	Objection. Plaintiff objects and moves to strike as irrelevant.
7			
8			
9	44.	After Riesterer submitted a declaration on November 23, 2010 (Doc. 22-3) setting forth the circumstances of his and Guetta's creation of the music for "I Gotta Feeling" in France, Pringle asserted that he had distributed his music in France.	Objection. Plaintiff objects and moves to strike as irrelevant. Without waiving this objection, Plaintiff states that he has never denied that he distributed his music in France.
10			
11			
12			
13			
14			
15	45.	Although Pringle claims that he sent a demo CD to Adams c/o of Interscope, Pringle does not have a copy of the demo CD or any letter to Adams.	Disputed because Pringle sent a demo cd to Adams c/o Interscope. Pringle Dep. at 64:4-65:8. Plaintiff further contends that he cannot possess something that he sent to Adams in 2006.
16			
17			
18			
19			
20			
21	46.	William Adams does not accept submissions of unsolicited music.	Disputed. Adams has admitted under oath that he is an A&R for Interscope and his counsel is well aware of this fact.
22			
23			
24			
25	47.	Pringle did not mention Joachim Garraud in his Complaint, First Amended Complaint, application for Temporary Restraining Order, or Motion for Preliminary Injunction.	Objection and move to strike as irrelevant.
26			
27			
28			

1	48.	Pringle testified that sometime between 2001 and 2004 Guetta's former co-producer, Joachim Garraud, wrote to Pringle asking Pringle for specific songs, and that Pringle later sent "Take a Dive" (Dance Version) to Garraud in France.	Undisputed.
2			
3			
4			
5	49.	Pringle does not have a copy of either the alleged letter from Garraud or of the alleged letter and demo that Pringle allegedly sent to Garraud.	It is undisputed that Plaintiff did not retain a letter that he received 8 years before he knew that Garraud would infringe his copyright. Defendant Riesterer testified that he did not retain any records of the many demo tapes that he sent to companies when he was trying to get discovered either. Riesterer Dep. 106:9-107:3.
6			
7			
8			
9			
10			
11			
12			
13			
14			
15	50.	Pringle does not recall (i) what the alleged letter from Garraud said, (ii) whether it included a specific request for music, (iii) who signed the letter, (iv) whether the letter was typed or handwritten, or (v) what language the letter was written in.	It is undisputed that Plaintiff did not retain a letter that he received 8 years before he knew that Garraud would infringe his copyright. Defendant Riesterer testified that he did not retain any records of the many demo tapes that he sent to companies when he was trying to get discovered either. Riesterer Dep. 106:9-107:3.
16			
17			
18			
19			
20			
21			
22			
23			
24			
25			
26			
27			
28			

1	51.	Pringle has no evidence of the alleged written correspondence with Garraud.	Disputed. Pringle received the correspondence from Garraud and responded by sending the additionally requested tracks. Pringle. Dep. at 87:9-89:7, 205:2-9; Pringle Decl. at ¶¶ 5, 216.
2			
3			
4			
5			
6			
7			
8	52.	Pringle has never met Joachim Garraud.	Disputed. Pringle testified that he had contact with Garraud when he was in France and that he received correspondence from Garraud requesting additional tracks. Pringle. Dep. at 87:9-89:7, 205:2-9; Pringle Decl. at ¶¶ 5, 216.
9			
10			
11			
12			
13			
14			
15			
16	53.	Garraud never had access to Pringle's songs; never received music from Pringle; never heard of either "Take a Dive" or "Take a Dive" (Dance Version); and never gave any of Pringle's music to Guetta or Riesterer.	Disputed. Pringle testified that he had contact with Garraud when he was in France and that he received correspondence from Garraud requesting additional tracks. Pringle. Dep. at 87:9-89:7, 205:2-9; Pringle Decl. at ¶¶ 5, 216.
17			
18			
19			
20			
21			
22			
23			
24	54.	Pringle claims to have sent "thousands of demo CDs for over a decade" to various persons and entities in the music industry, but has no copies of any of these demo CDs or of any cover letters that he claims to have sent with those demo CDs.	Undisputed.
25			
26			
27			
28			

1	55.	Pringle has no evidence that “Take a Dive” or “Take a Dive” (Dance Version) was ever received by anyone after the release of “I Gotta Feeling.”	Disputed. The existence of "I Gotta Feeling" is proof that Defendants received "Take a Dive" (Dance Version).
2			
3			
4			
5	56.	Pringle testified that he would routinely send out CDs that did not contain all of the songs listed on the liner notes, and that he would send out CDs that contained no songs at all.	Disputed. Defendants’ characterization of the testimony can’t even be reconciled with the actual testimony. At no point does he testify that he routinely sent out cd’s that did not contain all of the songs listed on the liner notes or that he would send out cd’s that contained no songs at all. Defendants counsel attempted to trick Plaintiff during his deposition. Plaintiff caught on and Defendants did not get the answer they hoped for. The relevant exchange can be found at Dickie Decl. Ex. A, Pringle Dep. at 350:11-351:22.
6			
7			
8			
9			
10			
11			
12			
13			
14			
15			
16			
17			
18			
19			
20			
21			
22	57.	Pringle subpoenaed documents from TAXI Music, the music promotion company Pringle worked with, and TAXI produced documents that make no mention whatsoever of “Take a Dive” or “Take a Dive” (Dance Version).	Objection and move to strike as irrelevant.
23			
24			
25			

2. There is No Evidence That “Take a Dive” (Dance Version) Received Widespread Distribution

1 **Authority:** *Mestre v. Vivendi Universal U.S. Holding Co.*, No. CV 04-442,
 2 2005 WL 1959295, at *4 (D. Or. Aug. 15, 2005); *Art Attacks Ink, LLC v.*
 3 *MGA Entertainment Inc.*, 581 F.3d 1138, 1144 (9th Cir. 2009).

	UNCONTROVERTED MATERIAL FACT	OPPOSING RESPONSE
58.	There is no evidence supporting Pringle’s claims that his music was played on radio stations in the U.S. or in France.	Disputed. Jeffrey Pringle and Michael Scott Brown performed "Take a Dive" (Dance Version) in Europe and on the internet. J Pringle Decl. ¶¶ 3-7. .
59.	Pringle claims that “Take a Dive” (Dance Version) was played on Armed Forces Radio in France.	Undisputed.
60.	The last time an Armed Forces Radio station operated in France was 1967.	Disputed. J Pringle Decl. ¶ 6.
61.	There is no evidence that “Take a Dive” was ever publicly performed in the United States, France or in any European territory in which SACEM operates.	Disputed. Jeffrey Pringle and Michael Scott Brown performed "Take a Dive" (Dance Version) in Europe and on the internet. J Pringle Decl. ¶¶ 3-7. .

<p>1 2 3 4 5 6 7 8 9 10 11 12</p>	<p>62. Pringle claims that “Take a Dive” and/or “Take a Dive” (Dance Version) was released on an album by a now-defunct record company, but Pringle does not know how many copies of that album were allegedly sold, and has no evidence that might corroborate his assertion that either version of “Take a Dive” was actually released to the public.</p>	<p>Disputed that Pringle has no evidence that “Take a Dive” was released to the public. He testified that one could purchase “Take a Dive” Dance Version on www.mp3.com, www.gemm.com, and, he believed, on www.broadjam.com. He further testified that he bought a copy of his cd from www.gemm.com. Dickie Decl. Exhibit A, Pringle. Dep. at 135:5 to 136:19.</p>
<p>13 14 15 16 17 18 19 20</p>	<p>63. Pringle claims that “Take a Dive” (Dance Version) was sold on various Internet websites, but does not recall which websites or how many copies they sold, nor does he have any records reflecting any of those alleged sales.</p>	<p>Disputed. Pringle testified that one could purchase “Take a Dive” Dance Version on www.mp3.com, www.gemm.com, and, he believed, on www.broadjam.com. Dickie Decl. Exhibit A, Pringle. Dep. at 135:5 to 136:19.</p>
<p>21 22 23 24 25 26 27 28</p>		

1	64.	There is no evidence that any of the Defendants ever purchased or listened to Pringle’s song on CD or the Internet.	Disputed. The existence of "I Gotta Feeling" is proof that Defendants listened to "Take a Dive" (Dance Version). Furthermore, Pringle distributed “Take a Dive” Dance Version to several defendants, received correspondence from Garraud expressing approval for the music and requesting additional tracks, and sent the additional tracks. Pringle. Dep. at 87:9-89:7, 205:2-9; Pringle Decl. at ¶¶ 5, 216.
2			
3			
4			
5			
6			
7			
8			
9			
10			
11			
12			
13			
14			
15	65.	Pringle testified to having earned only “[b]eer money” from the sale of his music.	Undisputed.
16	2. Pringle Cannot Prove that Any Defendant Sampled from the “Take a Dive” (Dance Version) Sound Recording		
17			
18	Authority: <i>Midler v. Ford Motor Co.</i> , 849 F.2d 460 (9th Cir. 1988); <i>Art Attacks Ink, LLC v. MGA Entm’t, Inc.</i> , 581 F.3d 1138 (9th Cir. 2009); 17 U.S.C. § 114(b).		
19			
20			
21		UNCONTROVERTED MATERIAL FACT	OPPOSING RESPONSE
22	66.	Pringle has no evidence supporting his alleged creation of “Take a Dive” (Dance Version) or the guitar twang sequence.	Disputed. Pringle Decl. ¶ 54, 127-136, 146; Exhibit M to Dickie Decl.; Norris Decl. ¶ 6; Gallant Decl. ¶ 9;
23			
24			
25	67.	Pringle claims that the music equipment he used to create “Take a Dive” (Dance Version), including an ASR10 sampling keyboard, and his computer hard drives, were stolen in late 2000.	Undisputed.
26			
27			
28			

1	68.	Pringle offers an “NRG” disc image file, which contains a series of separate sound files for each of the individual instruments that appear in “Take a Dive” (Dance Version).	Undisputed.
2			
3			
4	69.	Pringle’s NRG file is not a mixed sound recording of “Take a Dive” (Dance Version).	Disputed. The NRG contains "Take a Dive" (Dance Version) broken into its constituent parts. Pringle Decl. ¶¶ 156-166.
5			
6			
7			
8	70.	Pringle’s NRG file cannot be played on a CD player or a computer.	Disputed as to the implication that it should be able to be played on a CD player. Pringle Decl. ¶¶ 156-166.
9			
10			
11			
12	71.	Pringle’s NRG file does not qualify as a “best copy” to be deposited in the Copyright Office.	Objection and move to strike as argument and not a fact. Subject to and without waiving any objections, disputed. "Take a Dive" (Dance Version) is contained on the NRG file and is a best copy. Pringle Decl. ¶¶ 156-166.
13			
14			
15			
16			
17			
18			
19	72.	Pringle’s NRG file is not a sound recording of “Take a Dive (Dance Version)” or of the eight-bar guitar twang sequence.	Disputed. Pringle Decl. ¶¶ 156-166.
20			
21	73.	Pringle’s NRG file contains separate files of each of the three individual chords that make up the guitar twang sequence.	Undisputed.
22			
23			
24			
25			
26			
27			
28			

1	74.	The only way to re-create the complete “Take a Dive” (Dance Version) sound recording from Pringle’s NRG file is to manually load each instrument file into an ASR10 sampling keyboard, and instruct the ASR10 to play the individual tracks together in a particular rhythmic way.	Disputed. Contrary to this assertion, there is no requirement that the individual tracks be played together in a “particular rhythmic way.” Pringle Decl. ¶¶ 156-166.
2			
3			
4			
5			
6	75.	In order to re-create the complete “Take a Dive” (Dance Version) sound recording from the NRG file, it is necessary to manipulate the various instrument files to create a completed musical work.	Disputed. The files simply must be loaded and played. Pringle Decl. ¶¶ 156-166.
7			
8			
9	76.	There is no evidence that Pringle created “Take a Dive” (Dance Version) and the guitar twang sequence prior to release of “I Gotta Feeling.”	Disputed. Pringle Decl. ¶ 54, 127-136, 146; Exhibit M to Dickie Decl.; Norris Decl. ¶ 6; Gallant Decl. ¶ 9;
10			
11			
12			
13	77.	The creation and last modified dates on an NRG file (including the NRG file referenced above) can be backdated by simply changing the clock on the computer and then re-saving the file and burning it to a CD.	Disputed. Although such dates theoretically could be modified, there is no evidence that occurred here and defendants’ own expert admits as such. Gallant Decl. ¶ 9; Frederiksen-Cross Decl. at ¶¶ 9, 10, 14-44 Laykin Dep at 82:4-83:5.
14			
15			
16			
17			
18			
19			
20			
21	78.	Evidence either supporting or refuting Pringle’s contentions regarding “Take a Dive” and “Take a Dive” (Dance Version) would likely have been found on the computer that Pringle used to create the NRG file.	Disputed. Pringle Decl. Norris Decl. Gallant Decl. ¶ 9; Norris Decl. ¶ 6; Frederiksen-Cross Decl. at ¶¶ 14-44
22			
23			
24	79.	During this litigation, Pringle disposed of the computer hard drives that he used from 2009 to 2011.	Disputed. Pringle Decl. 246-261, Gallant Decl. Frederiksen-Cross Decl. at ¶¶ 14-44
25			
26			
27			
28			

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

80.	Pringle has identified two separate NRG files as containing "Take a Dive" (Dance Version). In his November 2010 TRO application, Pringle swore that he saved the NRG file from his ASR10 sampling keyboard to his computer on June 14, 1999 and that he then burned it to a CD in May 2001.	Objection and move to strike as irrelevant. The fact that a different NRG file was inadvertently attached to the application for a TRO has no bearing on this case particularly in light of the forensic analysis performed on the NRG file containing "Take a Dive" (Dance Version). Gallant Decl. ¶ 4-9
81.	In his TRO declaration, Pringle quoted that CD's serial number and submitted a purported expert report attesting to creation and modification dates of that file.	Objection and move to strike as irrelevant. The fact that a different NRG file was inadvertently attached to the application for a TRO has no bearing on this case particularly in light of the forensic analysis performed on the NRG file containing "Take a Dive" (Dance Version). Gallant Decl. ¶ 4-9

1	82.	In his January 2011 preliminary injunction application, Pringle stated that the NRG file which he had cited in connection with his TRO application and given to his expert was the wrong file and did not contain the song at issue.	Objection and move to strike as irrelevant. The fact that a different NRG file was inadvertently attached to the application for a TRO has no bearing on this case particularly in light of the forensic analysis performed on the NRG file containing "Take a Dive" (Dance Version). Gallant Decl. ¶ 4-9
2			
3			
4			
5			
6			
7			
8			
9			
10			
11	83.	In a conference of counsel on November 1, 2011, Pringle's counsel clearly, expressly, and unequivocally stated that Pringle would withdraw his claim of infringement of his sound recording copyright.	Disputed. Plaintiff's counsel never stated that Plaintiff would withdraw his claim of infringement of a sound recording. See Declaration of Kathleen Koppenhoefer
12			
13			
14			
15			
16	84.	When Defendants' counsel proposed a stipulation dismissing Pringle's sound recording claim, Pringle's counsel refused to sign the stipulation.	Undisputed.
17			
18	85.	In an interrogatory response dated November 7, 2011, Pringle stated that he "is not seeking to recover for a physical appropriation of Take a Dive (Dance Version) at this time [but] Plaintiff reserves the right to seek recovery for physical appropriation of Take a Dive should Defendants produce evidence of said appropriation; investigation continues."	Undisputed.
19			
20			
21			
22			
23	II. Pringle's Claim that Defendants Infringed "Take a Dive" (Dance Version) is Barred by His Failure to Submit a <i>Bona Fide</i> Deposit Copy		
24	Authority: <i>Kodadek v. MTV Networks, Inc.</i> , 152 F.3d 1209 (9th Cir. 1998); 17 U.S.C. §§ 408(b)(1),(2), 411(a).		
25			
26			
27		UNCONTROVERTED MATERIAL FACT	OPPOSING RESPONSE
28			

1	86.	Pringle submitted to the Copyright Office an MP3 sound file as a deposit copy with his November 2010 copyright registration application.	Undisputed.
2			
3	87.	The MP3 sound file that Plaintiff submitted to the Copyright Office did not exist in 1999, but was re-created using the various instrument sounds contained in Pringle’s NRG file.	Disputed. Pringle Decl. ¶¶ 159-173
4			
5			
6	88.	Pringle testified that the MP3 file that he submitted to the Copyright Office was either created from his NRG file or copied from his original hard drive.	Disputed. Defendants again mischaracterize the referenced testimony. Pringle Dep. 262:10-14, 267:14, 268:9.
7			
8			
9			
10	89.	Pringle later acknowledged that he did not have the original hard drive in his possession when he created the MP3 file, so it could only have come from his NRG file.	Objection and move to strike as misleading. Pringle had made an identical image of the files and to suggest that he “acknowledged” not having it is misleading and false. Pringle Decl. ¶¶ 159-173.
11			
12			
13			
14			
15			
16	90.	Pringle created the MP3 file by “manually” “load[ing] each individual instrument in the proper place, load[ing] up the sequence . . . [and l]oad[ing] the effect that’s corresponding to that[.]”	Undisputed; see further explanation at Pringle Decl. ¶¶ 159-173.
17			
18			
19	91.	Re-creating “Take a Dive” (Dance Version) from Pringle’s NRG disk involved a process of “trial and error” and “switch[ing] things around until it finally played properly” based on Pringle’s recollection of “what the song sounded like” when he allegedly created it in 1999.	Disputed. Pringle did not “Re-create” “Take a Dive” (Dance Version). Pringle Decl. ¶¶ 159-173
20			
21			
22			

23 **III. Pringle Cannot Establish Infringement of “Take a Dive”**

24 **A. There is No Evidence That Any Defendant Had Access to “Take a Dive”**

25 Section I.B is incorporated by reference herein.

26 **B. “Take a Dive” and “I Gotta Feeling” are Not Substantially Similar**

27 **Authority:** *Kouf v. Walt Disney Pictures & Television*, 16 F.3d 1042, 1044 (9th Cir.1994).

28

1		UNCONTROVERTED MATERIAL FACT	OPPOSING RESPONSE
2			
3	92.	Dr. Lawrence Ferrara has analyzed the musical composition embodied in the original version of “Take a Dive” and “I Gotta Feeling,” and has determined that there are absolutely no similarities that would suggest copying.	Disputed. Plaintiff’s expert has analyzed “Take a Dive” “I Gotta Feeling” and concluded that they are substantially similar. Norris Decl. ¶¶ 11, 21, 42-48.
4			
5			
6			
7			
8	93.	There are significant differences between “I Gotta Feeling” and “Take a Dive” in every element of the respective compositions – structure, harmony, rhythm, melody, and lyrics.	Disputed. Plaintiff’s expert has analyzed “Take a Dive” “I Gotta Feeling” and concluded that they are substantially similar. Norris Decl. ¶¶ 11, 21, 42-48.
9			
10			
11			
12			
13	94.	There are numerous major structural differences between “I Gotta Feeling” and “Take a Dive.”	Disputed. Plaintiff’s expert has analyzed “Take a Dive” “I Gotta Feeling” and concluded that they are substantially similar. Norris Decl. ¶¶ 11, 21, 42-48.
14			
15			
16			
17			
18			
19	95.	The basic chord progressions in “I Gotta Feeling” and “Take a Dive” are not substantially similar.	Disputed. Plaintiff’s expert has analyzed “Take a Dive” “I Gotta Feeling” and concluded that they are substantially similar. Norris Decl. ¶¶ 11, 21, 42-48.
20			
21			
22			
23			
24			
25			
26			
27			
28			

1	96.	There are no similarities at all in melody or lyrics of “I Gotta Feeling” and “Take a Dive.”	Disputed. Plaintiff’s expert has analyzed “Take a Dive” “I Gotta Feeling” and concluded that they are substantially similar. Norris Decl. ¶¶ 11, 21, 42-48.
2			
3			
4			
5			
6	97.	“I Gotta Feeling” and “Take a Dive” have different “overall rhythmic feel and flow.”	Disputed. Plaintiff’s expert has analyzed “Take a Dive” “I Gotta Feeling” and concluded that they are substantially similar. Norris Decl. ¶¶ 11, 21, 42-48.
7			
8			
9			
10			
11			
12	98.	The similarities that do exist between “I Gotta Feeling” and “Take a Dive”—such as the fact that both songs happen to utilize 4/4 time, a “dance” tempo, a chorus with 8 bars, and a “I-IV” chord progression—are “musical building blocks and commonplace expression and practices.”	Disputed. Plaintiff’s expert has analyzed “Take a Dive” “I Gotta Feeling” and concluded that they are substantially similar. Norris Decl. ¶¶ 11, 21, 42-48.
13			
14			
15			
16			
17			
18	IV. Defendants are Entitled to Judgment Based on Plaintiff’s Spoliation of Evidence		
19	Authority: <i>Vieste, LLC v. Hill Redwood Development</i> , 2011 WL 2198257 (N.D. Cal. June 6, 2011); <i>Leon v. IDX Systems Corp.</i> , 464 F.3d 951 (9th Cir. 2006) (citing <i>Anheuser-Busch, Inc. v. Natural Beverage Distribs.</i> , 69 F.3d 337 (9th Cir. 1995)).		
20			
21			
22			
23		UNCONTROVERTED MATERIAL FACT	OPPOSING RESPONSE
24	99.	As early as July 24, 2010, The Black Eyed Peas’ counsel wrote to Pringle’s counsel “question[ing] ... the authenticity of Mr. Pringle’s representations regarding the dates of his computer files” and demanding that all of Pringle’s electronically stored information be preserved.	Undisputed.
25			
26			
27			
28			

1	100.	By email dated July 29, 2010, counsel for Pringle agreed to preserve Pringle's computer equipment and electronically stored information.	Undisputed
2			
3	101.	Pringle's computer hard drives used in 2009 and 2010 likely contained evidence of Pringle's copying of the guitar twang sequence from "I Gotta Feeling" and manipulation of the dates of his NRG file.	Disputed. It is impossible for Pringle to have copied the guitar twang sequence from "I Gotta Feeling." He did not copy the sequence and he did not manipulate the dates of his NRG file. Pringle Decl. ¶¶ 4, 97, 98, 101, 114, 117-144, Norris Decl. ¶ 6; Exhibit M to Dickie Decl.; Frederiksen-Cross ¶¶ 14, 45-61
4			
5			
6			
7			
8			
9			
10			
11			
12			
13	102.	The Black Eyed Peas' counsel further advised that Pringle's computer equipment would be "something we will necessarily request in discovery should this case ever reach a filed action."	Objection and move to strike as misleading and irrelevant. Pringle gave all of the files pertaining to the creation of "Take a Dive" (Dance Version) to David Gallant and, at the time in question, did not have any hard drive from 2009. Frederickson Cross Decl. at ¶¶ 14-44; Pringle Decl. at ¶¶ 4, 246-261; Gallant Decl. ¶¶ 4-9
14			
15			
16			
17			
18			
19			
20			
21			
22			
23			
24			
25			
26			
27			
28			

1	103.	In the February 18, 2011 Joint Rule 26 Report, Defendants advised that “Mr. Pringle’s ESI will likely play a crucial role in discovery in this action, as it goes directly to the threshold issues of Plaintiff’s ownership of a valid copyright, including the dates and manner of Plaintiff’s alleged creation of ‘Take a Dive’ and ‘Take a Dive’ Derivative, and the validity of Plaintiff’s asserted copyright registrations of those works.”	Objection and move to strike as misleading and irrelevant. Pringle gave all of the files pertaining to the creation of "Take a Dive" (Dance Version) to David Gallant and, at the time in question, did not have any hard drive from 2009. Frederickson Cross Decl. at ¶¶ 14-44; Pringle Decl. at ¶¶ 4, 246-261; Gallant Decl. ¶¶ 4-9
2			
3			
4			
5			
6			
7			
8			
9			
10			
11			
12	104.	After Pringle filed suit, Defendants requested, and Pringle agreed to, a forensic inspection of all of Pringle’s computer hardware and music equipment from 2009 to the present.	Undisputed.
13			
14			
15	105.	Shortly before a scheduled inspection of Pringle’s computer equipment, Pringle’s counsel informed Defendants that just a few weeks earlier Pringle had returned the computer hard drive that he had been using since January 2011 to its manufacturer, and that he had previously disposed of the hard drive that he used in 2009 and 2010.	Disputed as to the characterization and incomplete nature of this Fact. See; Frederickson Cross Decl. at ¶¶ 14-44; Pringle Decl. at ¶¶ 4, 246-261 for a more accurate recitation of these facts.
16			
17			
18			
19			
20			
21	106.	Pringle claimed to be following a practice of “replac[ing] his hard drive every 6 to 12 months” and “discard[ing] the prior drive” – even after he retained litigation counsel in February 2010 and filed suit in October 2010.	Disputed as to the characterization and incomplete nature of this Fact. See; Frederickson Cross Decl. at ¶¶ 14-44; Pringle Decl. at ¶¶ 4, 246-261 for a more accurate recitation of these facts.
22			
23			
24			
25			
26			
27			
28			

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

107.	The computer hard drive that Pringle had used in 2009 and 2010 is “probably in a landfill” because Pringle discarded it in December 2010 or January 2011.	Disputed as to the characterization and incomplete nature of this Fact. See; Frederickson Cross Decl. at ¶¶ 14-44 Pringle Decl. at ¶¶ 4, 246-261 for a more accurate recitation of these facts.
108.	Pringle acknowledged that he “did not make a full and complete copy of the entire drive from 2010” including any “program-related files or Internet-related files[.]”	Disputed as to the characterization and incomplete nature of this Fact. See; Frederickson Cross Decl. at ¶¶ 14-44 Pringle Decl. at ¶¶ 4, 246-261 for a more accurate recitation of these facts.
109.	These and other system files from Pringle’s hard drives would contain evidence of the true date of the NRG file.	Disputed. The true date of the NRG file has been determined by Pringle’s expert and Defendants experts concede they have no evidence to the contrary. Gallant Decl. ¶¶ 4-9; Frederiksen-Cross Decl. at ¶¶ 14-44

1 2 3 4 5 6 7 8 9 10 11	110. Pringle testified that in July or August 2011, he returned to the manufacturer the computer hard drive that he had been using since January 2011.	Undisputed, but Plaintiff further states that this hard drive could not have contained evidence relating to the alleged downloading of Beatportal.com remix contest tracks since those materials were no longer available for download when the second drive was placed in service. Frederiksen-Cross Decl. at ¶ 41.
12 13 14 15 16 17 18 19 20 21 22 23 24	111. Pringle testified that the “I Gotta Feeling” re-mixes that he obtained which had the guitar twang sequence in the clear were saved to either the 2009/2010 hard drive that he discarded in late 2010 or early 2011, or the 2011 drive that he returned to the manufacturer in July 2011.	Disputed. Defendants blatantly mischaracterize the referenced testimony. Pringle specifically said that he did not recall when he received the referenced samples and therefore did not know on which computers they were saved. Additionally, Pringle has produced evidence that the discarded hard drives could not have had the relevant remixes on them. Frederiksen-Cross Decl. at ¶¶ 34-42.

II. STATEMENT OF ADDITIONAL FACTS

Plaintiff Bryan Pringle contends that the following additional material facts show genuine issues preventing summary judgment in favor of Defendants.

	ADDITIONAL FACT	SUPPORTING EVIDENCE
Pringle’s Musical Background		
112.	Plaintiff Bryan Pringle is a songwriter with many years of traditional and non-traditional music training.	Pringle Decl. at ¶ 7
113.	He has been writing contemporary popular music since 1986 and since that time written hundreds of songs that span a wide variety of musical genres.	Pringle Decl. at ¶ 7
114.	His training and experience have also helped him to develop a substantial amount of knowledge of and experience with computer based musical composition.	Pringle Decl. at ¶ 8
Pringle Composes “Take a Dive” And Its Derivative Dance Version		
115.	In 1998 Pringle wrote and recorded “Take a Dive”, a cathartic ode to a failed relationship.	Pringle Dep at : 101-102.
116.	He created the song using a stand alone Ensoniq ASR-10 keyboard.	Pringle Decl. at ¶ 161
117.	He registered a claim for “Take a Dive” and several other original songs he wrote and recorded by submitting a CD entitled <i>Dead Beat Club: 1998</i> to the United States Copyright Office.	Copyright Registration attached as Exhibit M to Dickie Decl.
118.	The Register of Copyrights issued a Certificate of Registration for <i>Dead Beat Club: 1998</i> on April 29, 1998, identified as SRu 387-433 (“Take a Dive” is referred to on the Certificate as “Dive”)	Copyright Registration attached as Exhibit M to Dickie Decl.
119.	Mr. Pringle made several derivative variations of “Take a Dive” including the “Dance Version” that is central to this case.	Pringle Decl. at ¶ 55
120.	He was not particularly enamored with the vocals in the original “Take a Dive” so, for the Dance Version, he replaced the vocals with a repeating eight-bar melody using a “guitar twang” instrument that he had previously recorded in 1997 for his song “Faith.”	Pringle Decl. at ¶ 70
27 28		

1	121.	He used this instrument to play a total of four notes (D4, C4, B3 AND G3), in the following progression: D4-C4-B3-C4-B3-C4, and in the key of G3 (the “guitar twang sequence”).	Pringle Jan 3 2011 Decl. (“Pringle TRO Decl.”) at ¶ 4. (Dck. 71a)
2			
3			
4	122.	Otherwise, the derivative Dance Version was very much the same song.	Declaration of Dr. Alex Norris (“Norris Decl.”) at ¶ 6
5			
6	123.	It had the exact same ambient sounds at the beginning of both versions, identical keyboard motifs at :09 seconds, identical bass parts, identical chord progression, identical sonic sweeps at similar points in time of both tracks, identical changes in the bass parts at similar points in each track, identical key, identical tempo, and identical timbre’s with regard to all of the aforementioned similarities.	Norris Decl. at ¶ 6
7			
8			
9			
10			
11			
12	124.	Mr. Pringle created “Take a Dive” Dance Version using an Ensoniq ASR-10 keyboard.	Pringle Decl. ¶ 161
13			
14	125.	The ASR-10 is a complete digital music production studio that allows a user to upload instruments, sounds, and other audio samples from external third-party sources into the keyboard.	Pringle Decl. ¶ 161
15			
16			
17	126.	These samples are then sequenced and arranged by the user to create and record songs.	Pringle Decl. ¶ 161
18			
19	127.	A song, its component parts, and the sequencing and arrangement information can then be saved on an external disc drive as a “creation file.” [BPX]	Pringle Decl. ¶ 161
20			
21			
22	128.	In 1999, after Mr. Pringle created and recorded “Take a Dive” Dance Version, he backed up his creation file onto an NRG image file he titled “DISK05.NRG”2.	Pringle Decl. at ¶ 161; See also, Declaration of David Gallant (“Gallant Decl.”) at ¶ 9.
23			
24	“Take a Dive” Dance Version Is Sent To Defendants		
25			
26			
27			
28			

1	129.	Mr. Pringle endeavored to promote his music so that he could either sign on with a major record label or sell his music to publishing companies and other artists. In 1999 he began to regularly submit demo cd's, including the "Take a Dive" Dance Version, to record labels, artists, publishing companies and many others.	Pringle TRO Decl. at ¶ 7. (Dck. 71a)
2			
3			
4			
5			
6	130.	He sent copies of this work by mail to Defendants UMG, Interscope and EMI, as partially evidenced by the USPS postal receipts produced during discovery.	Pringle TRO Decl. at ¶ 7. (Dck. 71a).
7			
8			
9	131.	He also sent a copy to Gum Productions, a music production company co-owned by Defendant David Guetta, Joachim Garraud, and Jean Charles Carre.	Pringle Decl. at ¶; 5; Guetta Dep. at pp 20-22.
10			
11	132.	Mr. Pringle distributed his demo cd's in France at various times in 1999 and between 2001 and 2003 and enlisted the help of his brother Jeffrey, a professional and part time disc jockey, to assist with promotions.	Jeffrey Pringle Decl. ¶ 7, 9.
12			
13			
14			
15	133.	Jeffrey Pringle brought Mr. Pringle to several night clubs in France, including "Rex Club", "Le Queen" and "Le Palace", where he distributed his demo cd to the local disc jockeys.	Jeffrey Pringle Decl. at ¶¶ 9.
16			
17			
18	134.	Jeffrey Pringle also hosted radio and internet programs that were broadcast in the Netherlands, France and Canada. He played Mr. Pringle's music, including "Take a Dive" Dance Version on these programs.	Jeffrey Pringle Decl. at ¶ 6, 7
19			
20			
21			
22	135.	Michael Scott Brown was also a professional and part time disc jockey in Western Europe.	Jeffrey Pringle Decl. at ¶6
23	136.	He and Jeffrey Pringle served in the U.S. military together. Mr. Brown also played Mr. Pringle's music, including cuts from the copyrighted <i>Dead Beat Club</i> album, regularly on the Armed Forces Network radio and Dutch and German radio stations. These stations broadcasted on the internet and all over Western Europe, including in France.	Jeffrey Pringle Decl. at ¶6
24			
25			
26			
27			
28			

1	137.	In addition to these efforts in Europe, Mr. Pringle also made “Take a Dive” Dance Version available for sale on several websites, including www.mp3.com , www.gemm.com .	Pringle Dep. at 132, 133
2			
3			
4	Black Eyed Peas Release “I Gotta Feeling”		
5	138.	In 2009, the Black Eyed Peas released “I Gotta Feeling” as the second single off their album <i>The E.N.D.</i> “I Gotta Feeling” achieved tremendous success and worldwide acclaim.	Pringle TRO Decl. ¶ 10.
6			
7	139.	When Mr. Pringle first heard it however, he knew that “there was a problem,” he knew that “there was intentional, willful infringement” of “Take a Dive” Dance Version.	Pringle Dep. at 63:4-63:19.
8			
9			
10	140.	There were numerous and undeniable similarities between the songs.	Norris Decl. at ¶ , Declaration of Alex Stewart (“Stewart Decl.”) at ¶ 3, 5
11			
12			
13	Alleged Creation of “I Gotta Feeling”		
14	141.	David Guetta and Joachim Garraud, the two recipients of Mr. Pringle’s submission to Gum Production, collaborated with Defendant Riesterer in the selection of the instrumental portion of “I Gotta Feeling.”	Riesterer Dep. 125:11-129:21.
15			
16			
17	142.	Joachim Garraud first met Defendant Riesterer in 1989.	Deposition of Frederick Riesterer at p. 78 (“Riesterer Dep.”) attached as Exhibit _ to Dickie Decl.
18			
19			
20	143.	They worked together at a French radio station called “Maximum” where Garraud was a producer and Riesterer was a disc jockey.	Riesterer Dep. at pp. 75-76.
21			
22	144.	Garraud and Riesterer shared an interest in music, became close friends, and then “naturally” began to make music together in the early 1990’s.	Riesterer Dep. at p. 79.
23			
24			
25	145.	They would often exchange ideas and concepts, exchange demo tapes, and “put them together” in a sound sequencer.	Riesterer Dep. at p. 88.
26			
27			
28			

1	146.	When Riesterer left Maximum in 1993, he remained close with Garraud and they continued to “talk all the time” about music.	Riesterer Dep. at pp. 80, 81, 126
2			
3	147.	In 2001, Garraud, David Guetta and Jean Charles Carre founded Gum Productions so that they could “make music.”	Guetta Dep. at p. 21.
4			
5	148.	Gum Productions often recruited and signed artists to perform on albums that it produced and it received submissions from prospective artists as well. Some time between 2001 and 2003, Gum Productions received Pringle’s demo cd that included the “Take a Dive” Dance Version.	Guetta Dep. at p. 66-69
6			
7			
8			
9			
10	149.	After receiving this cd, Gum Productions sent a letter to Pringle in which Garraud and Guetta expressed their approval for Pringle’s music.	Pringle Decl. at ¶ 5
11			
12	150.	They then asked for and received additional tracks from Pringle, including the settings instrumentation and sound effects for his songs, including “Take a Dive” (Dance Version)	Pringle Decl. at ¶ 5
13			
14			
15	151.	In 2006, Joachim Garraud called Fred Riesterer and asked him if he would be willing to work on a music project with he and David Guetta.	Riesterer Dep. at 125
16			
17	152.	The three of them worked together collaboratively on a song called “Love is Gone” for David Guetta’s upcoming album.	Riesterer Dep. at 127-128
18			
19	153.	They constantly exchanged “sounds” and “advice” in order to have the “best possible” song.	Riesterer Dep. at 129
20			
21	154.	It was during this process that they came upon the “guitar twang sequence” that Riesterer admitted in his November 2010 declaration was eventually used in “I Gotta Feeling.”	Declaration of Frederic Riesterer (“Riesterer Nov. 23 Decl.”) attached to Opposition to Motion for Preliminary Injunction (Dckt. No. 22-3) at ¶¶ 4-6.
22			
23			
24			
25			
26			
27			
28			

1	155.	In “his” November 23, 2010 declaration, Riesterer claimed that the entire “guitar twang sequence” was recorded by Univers Sons and available in its library under the name “Strat with SM57 Crunchy”. In his deposition however, Riesterer admitted that he never reviewed this declaration, did not understand it as written in English and that that statement was patently false.	Riesterer Nov. 23 Decl. at ¶ 6; Riesterer Dep. at 164-167; 175:11-176:7
2			
3			
4			
5			
6			
7	156.	Riesterer and Guetta continued to work together after the release of “Love is Gone.”	Riesterer Dep. 190:18-191:4.
8			
9	157.	In October 2008, they began working in Riesterer’s studio on an “instrumental” song called “David Pop GTR.”	Riesterer Dep. at 194; Guetta Dep. at p. 143-144
10			
11	158.	They “wanted to create a song with the same guitar as in “Love is Gone” and they worked tirelessly “one next to another” in order to get it done.	Riesterer Dep. at 194:
12			
13	159.	Around the same time however, Defendant Adams reached out to David Guetta because he “want[ed] him to produce a song for the Black Eyed Peas.”	Deposition of William Adams (“Adams Dep”) at 237, attached to Dickie Decl. as Exhibit _.
14			
15			
16	160.	Guetta and Adams began discussing a possible “swap deal” that would see Guetta and the Black Eyed Peas appear on each others’ albums in some capacity.	Guetta Dep. at p. 197
17			
18			
19	161.	Adams specifically asked Guetta to “produce a song for the Black Eyed Peas that [was] similar to [Love is Gone].”	Adams Dep. at 237.
20			
21	162.	Adams was particularly attracted to the “guitar twang” used in Love is Gone.	Adams Dep. at 239.
22	163.	Guetta then sent Adams a sound file containing “David Pop GTR.”	Adams Dep. at 77-78.
23			
24	164.	Guetta did not check with Riesterer before sending the file to Adams.	Guetta Dep. at p. 150.

25
26
27
28

1	165.	In fact, Guetta and Adams exchanged numerous files under a shroud of secrecy, with Adams warning Guetta to “be very protective of this... You’re the only one who has this—not management, record company, just me and you.”	Guetta Dep. at p. 205; Exhibit L to Dickie Decl.
2			
3			
4			
5	166.	Neither Guetta nor Adams concerned themselves with determining whether the tracks being exchanged had been copied or sampled from copyrighted work.	Guetta Dep. at p. 110, Adams Dep. at 111-112
6			
7			
8	167.	When Adams heard “David Pop GTR”, he said “I love that song I want it on my album.” He thought that the song was “amazing” because of the guitar “chord progression.”	Riesterer Dep. at 195; Adams Dep. at 79
9			
10			
11	168.	And so, after he contributed his vocals and lyrics, “David Pop GTR” became “I Gotta Feeling.”	Adams Dep. at 79
12			
13	None of The Defendants Can Explain The Origin Of The “Guitar Twang Sequence”		
14	169.	Adams admitted that he contributed only the lyrics for “I Gotta Feeling” and that he relied on Guetta for “the music.” He could not account for the origin of the “guitar twang” sequence and he was careful to specify that Guetta merely “represented” that he composed it himself.	Adams Dep. at 124-125.
15			
16			
17			
18			
19	170.	Guetta claimed that the guitar instrumentation “came from [Riesterer]” and that Riesterer never told him where he got it from.	Dickie Decl. Ex. Guetta Dep. at p. 115:2-116:8.
20			
21			
22	171.	Riesterer submitted wholly contradictory claims as to the origins of the “guitar twang sequence.” He first claimed that the entire sequence used in “I Gotta Feeling” came pre-packaged from a licensed Univers-Sons music library.	Riesterer TRO Decl. at ¶¶ 5-6. (Dck. 22-3)
23			
24			
25			
26	172.	He later claimed however that he took the guitar sequence from “Love is Gone” and changed the “preset” and “processing effects” to make the sequence for “I Gotta Feeling.”	Riesterer Nov. 9, 2011 Decl. at ¶ 6. (Dck. 166)
27			
28			

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

173.	He could provide no explanation for the origin of the sequence from “Love is Gone” however because he doesn’t “remember exactly” how he created it.	Riesterer Dep. at 130:9-16.
174.	He also had no recollection or evidence of the “preset” and “processing effects” he allegedly used.	Riesterer Dep. at 130:9; Declaration of Paul Geluso at ¶ 18.
175.	Riesterer cannot even produce the computer that he allegedly used to create the sequence, claiming that he gave it to a “friend” whose name he can’t remember because he “has a lot of friends.”	Riesterer Dep. at 192:24-193:6.
176.	Geluso claims that Riesterer files 1-9 and 30 constitute the original David Pop Guitar creation files.	Geluso at ¶ 6.

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

177.	Furthermore, the creation dates and other metadata of Riesterer’s alleged “creation files” for “I Gotta Feeling” suggest that Defendants have manipulated these files. First, Riesterer failed to produce the hard drive that he allegedly used to create “David Pop GTR” which became “I Gotta Feeling.” Second, several of the creation files allegedly used to create the original version of “I Gotta Feeling” have creation dates which show that they were created <u>after</u> the original version of “I Gotta Feeling” was already recorded and released. Third, the “David Pop GTR” song file that Riesterer claims he used to create “I Gotta Feeling” contains an entry in the document Data Logic File for an audio device allegedly used in the creation of “I Gotta Feeling” that wasn’t available in 2008 or 2009, when “I Gotta Feeling” was created. Fourth, one of the alleged creation files is titled “Disk 1 tb Litige (def) OK. David Pop Guitar: Audio Files. There is no reason why a file that was allegedly created in 2008 or 2009 would refer to “litigation” and be “ok.” Fifth, one of the alleged creation files, “0.6s_Snare Hall.SDIR”, has been produced twice by the defense and has had two different creation dates each time.	Pringle Decl. at ¶¶ 234-244. Frederiksen-Cross Decl. ¶¶ 46-53.
------	--	--

Defendants Concoct Another Explanation

178.	More than a year into the litigation, and unable to justify the striking similarity between “Take a Dive” Dance Version, which was created in 1999, and “I Gotta Feeling”, which was created in 2009, Defendants decided to make the reckless and wholly unsupported allegation that Plaintiff first heard the “guitar twang sequence” some time after “I Gotta Feeling” was released in 2009.	Exhibit J to Dickie Decl.
------	--	---------------------------

1	179.	They then claimed that Plaintiff somehow reverse engineered “I Gotta Feeling” in 2009 to make it look like “Take a Dive” Dance Version was created in 1999.	Exhibit J to Dickie Decl.
2			
3			
4	180.	Defendants have not presented a single piece of evidence that proves or even suggests that Pringle engaged in such conduct.	Deposition of Erik Laykin at 92:17-92:20, 93:12-93:19, 94:22-24, , (“Laykin Dep.”), attached to Dickie Decl. as Exhibit E.; Frederiksen-Cross Decl. at ¶¶ 14-44
5			
6			
7			
8			
9	181.	Plaintiff has produced evidence that "Take a Dive" (Dance Version) is a derivative of "Take a Dive.”	Norris Decl. ¶ 6.
10			
11	182.	Plaintiff has produced evidence that establishes conclusively that August 22, 1999 was the last time that the creation file for “Take a Dive” Dance Version, containing the song, its component parts and its sequencing and arrangement information, was modified. [Gallant, Frederickson]	Gallant Decl. at ¶ 9; Frederiksen-Cross Decl. at ¶ 14-44
12			
13			
14			
15	183.	Defendants theory is based on the assumption that Mr. Pringle wanted to create a backdated NRG file;	Frederiksen-Cross Decl. at ¶ 21
16			
17			
18	184.	Defendants theory is based on the assumption that Mr. Pringle retained blank CD recording media for approximately 10 years and was also able to somehow determine the age of this media to identify how old it was	Frederiksen-Cross Decl. at ¶ 21
19			
20			
21	185.	Defendants theory is based on the assumption that the CD recording media was stored in an environment with sufficient protection from heat and damage that it would still be useable after that time period	Frederiksen-Cross Decl. at ¶ 21
22			
23			
24			
25			
26			
27			
28			

1	186.	Defendants theory is based on the assumption that Mr. Pringle somehow discovered a copy of the guitar twang from an Internet source, that the guitar twang <u>coincidentally</u> matched a song that Mr. Pringle wrote and copyrighted a decade before, and that Mr. Pringle was able to integrate the guitar sequence somehow with the music for “Take A Dive” that Mr. Pringle had already composed, in order to create a new recording that he would then backdate	Frederiksen-Cross Decl. at ¶ 21
2			
3			
4			
5			
6			
7			
8	187.	Defendants theory is based on the assumption that Mr. Pringle deliberately set the computer date back to 1999, so that the files he wrote would have operating system dates from 1999	Frederiksen-Cross Decl. at ¶ 21
9			
10			
11	188.	Defendants theory is based on the assumption that Mr. Pringle coincidentally kept at least 134 contemporaneous photos, including photos of himself, whose external file dates and internal metadata dates are from September 6th and 8th 1999	Frederiksen-Cross Decl. at ¶ 21
12			
13			
14			
15	189.	It is uncontroverted that "Take a Dive" (Dance Version) is a derivative of "Take a Dive", along with Plaintiff's other songs "Faith" and "Regret," which are also on the copyrighted album "Deadbeat Club."	Pringle Decl. ¶ 133
16			
17			
18	190.	In addition to providing uncontroverted evidence that he created “Take a Dive” Dance Version in 1999, Plaintiff took considerable and significant steps to preserve this evidence.	Gallant Decl. at ¶ 4
19			
20			
21	191.	Plaintiff backed up the creation file for “Take a Dive” Dance Version on to a small computer serial interface (SCSI) hard drive.	Gallant Decl. at ¶ 4
22			
23	192.	He then connected the SCSI drive to a Windows 98 based computer and, using Ensoniq Disk Manager (EDM) software, he created .NRG image files creation files he burned on to a cd and titled “DISK05.NRG”2.	Gallant Decl. at ¶ 4
24			
25			
26			
27			
28			

1	193.	These steps preserved the evidence of his creation of the “Take a Dive” Dance Version even after his hard drives and audio equipment were stolen from a storage locker on October 19, 2000.	Pringle Decl. at ¶ 147 ;Gallant Decl. at ¶ 4
2			
3			
4	194.	According to www.beatportal.com , the website from which the Defendants claim Pringle downloaded Black Eyed Peas samples, the tracks were only available from August 21 to September 8, 2009.	Frederiksen-Cross Decl. at ¶ 35
5			
6			
7	195.	Evidence of that downloading would have been on the hard drive that he upgraded in January 2010, at least a month before he became aware of “I Gotta Feeling.”	Frederiksen-Cross Decl. at ¶ 36
8			
9			
10	196.	His replacement hard drive, in operation from January 2010 to January 2011, would not have had any data relating to activities from 2009.	Frederiksen-Cross Decl. at ¶ 37
11			
12			
13	197.	Furthermore, Beatportal would have records evidencing Pringle’s alleged registration, downloading of tracks, and credit card payment for purchase of tracks.	Frederiksen-Cross Decl. at ¶ 38
14			
15	198.	Defendants have produced no evidence of same and Clark Warner’s declaration makes no such reference.	Declaration of Clark Warner, Dckt. No. 163.
16			
17	199.	When Plaintiff returned his defective hard drive to Western Digital for warranty repair or replacement in the summer of 2011, it did not contain any remix of “I Gotta Feeling.”	Pringle Decl. at ¶ 246
18			
19			
20	200.	As of July 2011, Plaintiff had no reason to believe that there was anything on his defective hard drive that had anything to do with his case because he, in good faith, believed that all such materials were turned over to David Gallant in 2010.	Pringle Decl. at ¶ 247
21			
22			
23			
24	201.	Before returning the hard drive for repair, Plaintiff backed up everything he could onto a DVD-Rom and provided it to Gallant, who made it available to Defendant’s expert, Mr. Aga on August 8, 2011.	Pringle Decl. at ¶ 250
25			
26			
27	202.	Mr. Aga declined to inspect the hard drive.	Pringle Decl. at ¶ 254
28			

1	203.	On November 15, 2011 Mr. Pringle submitted an application to the U.S. Copyright Office for the registration of the derivative Dance Version of "Take a Dive."	Exhibit K to Dickie Decl.
2			
3			
4	204.	The Copyright Office registered the sound recording in "Take a Dive (Dance Version)," but refused to register the musical composition in the new material added, stating that the "work does not contain enough original musical authorship to be copyrightable."	Exhibit K to Dickie Decl.
5			
6			
7			
8	205.	Plaintiff has notified the Copyright Office of the litigation pursuant to Section 411(a) of the Copyright Act.	Exhibit K to Dickie Decl.
9			

CONCLUSIONS OF LAW

For his Conclusions of Law, Plaintiff states as follows:

	CONCLUSION OF LAW	SUPPORTING CITATION
13		
14	1.	A party may not rely on evidence which was not disclosed in contravention of Rule 26.
15		Fed. R. Civ. P. 26, Rule 37; <i>Harris v. U.S.</i> , 132 Fed. Appx. 183 (9th Cir. 2005)
16		<i>Yeti by Molly, Ltd. v. Deckers Outdoor Corp.</i> , 259 F.3d 1101, 1106 (9th Cir. 2001). I
17		
18		
19	2.	"Take a Dive" (Dance Version) is protectable under the Copyright Statute.
20		<i>Reed Elsevier, Inc. v. Muchnick</i> , 130 S. Ct. 1237, 176 L. Ed. 2d 18 (2010);
21		<i>Shady Records, Inc. v. Source Enterprises, Inc.</i> , 2005 WL 14920, *8 (S.D.N.Y. January 3, 2005. 17 U.S.C. § 411(a);
22		
23		
24		
25		A Plaintiff may adjudicate infringement actions...where the holder attempted to register the work and registration was refused."
26		<i>Reed Elsevier, Inc. v. Muchnick</i> , 130 S. Ct. 1237, 176 L. Ed. 2d 18 (2010)
27		

1		CONCLUSION OF LAW	SUPPORTING CITATION
2			
3		"Take a Dive" (Dance Version) is a protected derivative version of "Take a Dive."	<i>Stewart v. Abend</i> , 495 U.S. 207, 220, (1990); <i>Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.</i> , 499 U.S. 340, 361 (1991).
4			
5			
6		"[T]he standard for originality of a ... derivative work is 'minimal' and of 'a low threshold,' and is 'modest at best.'"	<i>Harvester v. Rule Joy Trammell + Rubio, LLC</i> , 716 F. Supp. 2d 428, 439 (E.D. Va. 2010) quoting <i>Kramer Mfg. Co., Inc. v. Andrews</i> , 783 F.2d 421, 438 (4th Cir. 1986).
7			
8			
9			
10			
11		Whether a work is original is a question of fact for the jury.	<i>Vargas v. Pfizer, Inc.</i> , 418 F.Supp.2d 369, 372-373 (S.D.N.Y 2005) <i>Kregos v. Assoc. Press</i> , 937 F.2d 700, 709 (2d Cir. 1991)
12			
13			
14		Plaintiff deposited a <i>bona fide</i> copy of "Take a Dive" (Dance Version) with the Copyright Office.	<i>Harris v. Emus Records Corp.</i> , 734 F.2d 1329, 1335 (9th Cir. 1984) ; <i>Coles v. Wonder</i> , 283 F.3d 798 (6th. Cir. 2002); <i>Kodadek v. MTV Networks, Inc.</i> 152 F.3d 1209 (9th Cir. 1998)
15			
16			
17			
18			
19		Pringle has provided evidence that he gave "Take a Dive" (Dance Version) to Defendants.	<i>Bethea v. Burnett</i> , No. CV 04-7690JFWPLAX, 2005 WL 1720631 (C.D.Cal., Jun. 28, 2005); <i>Straughter v. Raymond</i> , No. CV 08-2170 CAS CWX, 2011 WL 3651350 (C.D.Cal. Aug. 19, 2011).
20			
21			
22			
23			
24			
25			
26			
27			
28			

1		CONCLUSION OF LAW	SUPPORTING CITATION
2			
3		Where experts provide competing opinions, summary judgment is improper.	” <i>Goldman v. Standard Ins. Co.</i> , 341 F.3d 1023, 1034 (9th 2003) (citing <i>Suzuki Motor Corp. v. Consumers Union of U.S., Inc.</i> , 330 F.3d 1110, 1140 (9th Cir. 2003). <i>Dorn v. Burlington</i> , 397 F.3d 1183, 1196 (9th Cir. 2005) (citing <i>Humetrix, Inc. v. Gemplus S.C.A.</i> , 268 F.3d 910, 919 (9th Cir. 2001)); see also <i>Goldman v. Standard Ins. Co.</i> , 341 F.3d at 1036 (“Who is correct in [the] battle of experts is not for us to decide.”); <i>S.E.C. v. Todd</i> , 642 F.3d 1207 (9th Cir. 2011)
4			
5			
6			
7			
8			
9			
10			
11			
12			
13			
14			
15		The duty to preserve evidence commences when litigation is reasonable anticipated or contemplated.	See <i>Silvestri v. General Motors</i> , 271 F.3d 583, 590 (4th Cir. 2001); <i>Kronisch v. United States</i> , 150 F.3d 112, 126 (2nd Cir. 1998).
16			
17			
18		Terminating sanctions should only be levied when “a party has engaged deliberately in deceptive practices that undermine the integrity of judicial proceedings” because “courts have inherent power to dismiss an action when a party has willfully deceived the court and engaged in conduct utterly inconsistent with the orderly administration of justice.”	<i>Anheuser-Busch, Inc. v. Natural Beverage Distributors</i> , 69 F.3d 337, 348 (9th Cir. 1995)).
19			
20			
21			
22			
23			
24		Terminating sanctions require a finding of bad faith.	<i>Anheuser-Busch, Inc. v. Natural Beverage Distributors</i> , 69 F.3d 337, 348 (9th Cir. 1995)).
25			
26			
27			
28			

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

Dated: December 19, 2011

Dean A. Dickie (appearing Pro Hac Vice)
Kathleen E. Koppenhoefer (appearing Pro Hac Vice)
MILLER, CANFIELD, PADDOCK AND STONE,
P.L.C.

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

By: /s/ Dean A. Dickie
Attorneys for Plaintiff Bryan Pringle

CERTIFICATE OF SERVICE

1 On December 19, 2011, I electronically filed the foregoing PLAINTIFF'S
2 STATEMENT OF GENUINE DISPUTES IN OPPOSITION TO MOTION FOR
3 SUMMARY JUDGMENT using the CM/ECF system which will send notification of
4 such filing to the following 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 Efriam 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