

1 DONALD A. MILLER (SBN 228753)  
 dmiller@loeb.com  
 2 BARRY I. SLOTNICK (*Pro Hac Vice*)  
 bslotnick@loeb.com  
 3 TAL E. DICKSTEIN (*Pro Hac Vice*)  
 tdickstein@loeb.com  
 4 LOEB & LOEB LLP  
 10100 Santa Monica Boulevard, Suite 2200  
 5 Los Angeles, California 90067-4120  
 Telephone: 310-282-2000  
 6 Facsimile: 310-282-2200

7 Attorneys for SHAPIRO, BERNSTEIN  
 & CO., INC., FREDERIC  
 8 RIESTERER, AND DAVID GUETTA

9  
 10  
 11  
 12  
 13  
 14  
 15  
 16  
 17  
 18  
 19  
 20  
 21  
 22  
 23  
 24  
 25  
 26  
 27  
 28

UNITED STATES DISTRICT COURT  
 CENTRAL DISTRICT OF CALIFORNIA  
 SOUTHERN DIVISION

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

Case No. SACV 10-1656 JST(RZx)  
 Hon. Josephine Staton Tucker  
 Courtroom 10A

**RESPONSE TO PLAINTIFF'S  
 STATEMENT OF GENUINE  
 DISPUTES IN OPPOSITION TO  
 MOTION FOR SUMMARY  
 JUDGMENT [DOC. 196] BY  
 DEFENDANTS SHAPIRO,  
 BERNSTEIN & CO, INC.,  
 FREDERIC RIESTERER AND  
 DAVID GUETTA**

Complaint Filed: October 28, 2010  
 Trial Date: March 27, 2012

Hearing Date: January 30, 2012  
 10:00 AM

1 Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Central District  
 2 of California Local Rule 56-1, and the Court’s Initial Standing Order at 11(c)(i),  
 3 Defendants Shapiro, Bernstein & Co, Inc. (“Shapiro Bernstein”), Frederic Riesterer  
 4 and David Guetta (collectively, “Defendants”) respectfully submit this Response to  
 5 Plaintiff’s Statement of Genuine Disputes in Opposition to Motion for Summary  
 6 Judgment (Doc. 196). Plaintiff Bryan Pringle contends that the following alleged  
 7 material facts create genuine issues preventing summary judgment in favor of  
 8 Defendants. For the reasons set forth below, such facts are either undisputed, or  
 9 disputed but immaterial to Defendants’ Motion for Summary Judgment (Doc. 159).<sup>1</sup>

	<b>ADDITIONAL FACT AND PURPORTED SUPPORTING EVIDENCE</b>	<b>DEFENDANTS’ RESPONSE</b>
<b>Pringle’s Musical Background</b>		
112.	Plaintiff Bryan Pringle is a songwriter with many years of traditional and non-traditional music training. Pringle Decl. at ¶ 7	Disputed, but immaterial. The only “music training” Pringle identifies is studying drums in middle school, taking “piano lessons as a young boy” and music classes at a community college (Pringle Decl. ¶ 7) and Pringle has only ever earned “beer money” (i.e. \$2,000) from his music. (Pringle Tr. 338:21-339:4) <sup>2</sup>

<sup>1</sup> Pursuant to Local Rules and the procedures of this Court, this document responds only to the additional “facts” presented by Pringle, and does not respond to Pringle’s responses to Defendants’ own asserted uncontroverted facts. Defendants reserve all rights to address Pringle’s responses, and to demonstrate that none of Pringle’s responses establish any dispute of material fact requiring trial in this matter.

<sup>2</sup> All Declarations cited herein have been filed on the public docket in this matter. All other cited documents, including deposition testimony, have been filed as exhibits to the Declaration of Tal. E. Dickstein (Doc. 161), the Declaration of Tal E.

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

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	Disputed, but immaterial. Undisputed that Pringle has pursued music as a hobby at various times, but disputed that such music “span[s] a wide variety of musical genres.”
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	Disputed, but immaterial. The only “music training” Pringle identifies is studying drums in middle school, “piano lessons as a young boy” and music classes at a community college (Pringle Decl. ¶ 7), and Pringle has only ever earned “beer money” from his music. (Pringle Tr. 338:21-339:4). Further disputed to the extent Pringle proffers himself as an expert witness on the subject of “computer based musical composition,” for which he is not qualified. (Pringle Decl. ¶ 8).
<b>Pringle Composes “Take a Dive” And Its Derivative Dance Version</b>		
115.	In 1998 Pringle wrote and recorded “Take a Dive”, a cathartic ode to a failed relationship. Pringle Dep at: 101-102.	Undisputed to the extent Pringle refers to the original version of “Take a Dive.” Disputed, but immaterial, to the extent Pringle refers to any other versions of the song. (Pringle Tr. 100:24-101:8, 201:15-23, 202:13-18)

Dickstein in Further Support of Defendants’ Motion for Summary Judgment (filed concurrently), and/or the Declaration of Dean A. Dickie (Doc. 197).

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

116.	He created the song using a stand alone Ensoniq ASR-10 keyboard. Pringle Decl. at ¶ 161	Undisputed to the extent Pringle refers to the original version of “Take a Dive.” Disputed, but immaterial, to the extent Pringle refers to any other versions of the song. Disputed insofar as Pringle testified he also used computer equipment to create the song. (Pringle Tr. 100:24-101:8, 201:15-23, 202:13-18)
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.	Undisputed as to the original version of “Take a Dive.” Disputed, but immaterial, as to any other unidentified “original songs,” which are not at issue in this litigation.
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.	Undisputed.
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	Disputed, but immaterial. Pringle provides no evidence that he created any version of “Take a Dive” other than the “Dance Version,” and no version that any of the Defendants had access to or copied. (Pringle Dep. Tr. 17:1-19:7, 69:5- 71:6, 72:20-73:13, 76:3-6, 100:24-101:8, 124:2-20, 201:15-23, 375:22-377:22)

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

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	Disputed, but immaterial. Uncontroverted evidence shows that Defendants, not Mr. Pringle, composed the “guitar twang sequence” (Riesterer Decl. ¶¶ 4-7; Riesterer Tr. 165:19-166:21, 179:10-181:8). Mr. Pringle has also testified that he recorded the “guitar twang” sequence in 1999 rather than 1997, and that it was “modeled ... after ‘Take a Dive’s’ progression of notes in the chorus vocals of the original version, which [he] sang,” rather than recorded for the song “Faith.” (Pringle TRO Decl. ¶ 4; Pringle PI Decl. ¶ 4)
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)	Disputed, but immaterial. Uncontroverted evidence shows that Defendants, not Mr. Pringle, composed the “guitar twang sequence” (Riesterer Decl. ¶¶ 4-7; Riesterer Tr. 165:19-166:21, 179:10-181:8). Further disputed on the ground that the cited evidence demonstrates that the “guitar twang sequence” consists of only three chords.

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

122.	Otherwise, the derivative Dance Version was very much the same song. Declaration of Dr. Alex Norris (“Norris Decl.”) at ¶ 6	Disputed, but immaterial. The recording of “Take a Dive” (Dance Version) that Pringle has presented is similar in many respects to the original version of “Take a Dive,” but removes the vocals, adds the “guitar twang sequence,” and also changes the placement of certain drum patterns. (Ferrara Decl. ¶¶ 4-5, 89). However, Pringle now alleges that Defendants copied a different version of the song, which he did not register and does not have. (Pringle Decl. ¶¶ 125, 142)
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	Disputed, but immaterial. The recording of “Take a Dive” (Dance Version) that Pringle has presented is similar in many respects to the original version of “Take a Dive,” but removes the vocals, adds the “guitar twang sequence,” and also changes the placement of certain drum patterns. (Ferrara Decl. ¶¶ 4-5, 89). However, Pringle now alleges that Defendants copied a different version of the song, which he did not register and does not have. (Pringle Decl. ¶¶ 125, 142)

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

124.	Mr. Pringle created “Take a Dive” Dance Version using an Ensoniq ASR-10 keyboard. Pringle Decl. ¶ 161	Disputed, but immaterial. Uncontroverted evidence shows that Defendants, not Mr. Pringle, composed the “guitar twang sequence” (Riesterer Decl. ¶¶ 4-7; Riesterer Tr. 165:19-166:21, 179:10-181:8). Moreover, Pringle now alleges that Defendants copied a different version of the song from the one he has presented, which different version he did not register and does not have. (Pringle Decl. ¶¶ 125, 142). In addition, Pringle admits that he used pre-existing sample library disks in creating “Take a Dive” (Dance Version). (Pl.’s Opp. 14; Pringle Tr. 230:7-231:2, 235:20-236:20)
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	Undisputed, but immaterial.
126.	These samples are then sequenced and arranged by the user to create and record songs. Pringle Decl. ¶ 161	Undisputed, but immaterial.
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	Undisputed, but immaterial. Mr. Pringle testified that various instrument files and other sound processing effects must be loaded “properly” in order to play back a mixed sound recording from his alleged “creation file.” (Pringle Tr. 254:21-256:18)

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

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.	Disputed, but immaterial. Uncontroverted evidence shows that Defendants, not Mr. Pringle, composed the “guitar twang sequence” (Riesterer Decl. ¶¶ 4-7; Riesterer Tr. 165:19-166:21, 179:10-181:8). Moreover, Pringle now alleges that Defendants copied a different version of the song from the one he has presented, which different version he did not register and does not have. (Pringle Decl. ¶¶ 125, 142). Pringle’s NRG file does not contain a mix of “Take a Dive” (Dance Version). (Pringle Tr. 254:21-256:18; Geluso Decl. ¶ 27)
------	--	--

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

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)	Disputed but immaterial, on the grounds that Pringle has failed to provide any evidence that “Take a Dive” (Dance Version) was submitted to anyone in the music industry, via demo CD or otherwise, at any time. (Pringle Dep. Tr. 17:1-19:7, 69:5-71:6, 72:20-73:13, 76:3-6, 124:2-20, 375:22-377:22)
------	---	--



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

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).	Disputed but immaterial, on the grounds that Pringle has failed to provide any evidence that “Take a Dive” (Dance Version) was submitted to anyone in the music industry, via demo CD or otherwise, at any time. (Pringle Dep. Tr. 17:1-19:7, 69:5-71:6, 72:20-73:13, 76:3-6, 124:2-20, 375:22-377:22). Moreover, Pringle has admitted that Defendant Adams did not change any of the music he received from Mr. Guetta; thus any alleged access through UMG, Interscope, and/or EMI is immaterial. (Pl.’s Resp. to SMF ¶ 21)
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.	Disputed, but immaterial. Mr. Guetta, Mr. Garraud, and Mr. Carre never received any such alleged correspondence (Garraud Decl. at ¶¶ 2-3; Riesterer Decl. at ¶ 3-4, 8-9; Guetta Decl. at ¶¶ 2-7; Carre Decl. ¶¶ 5-8), and Mr. Pringle has no evidence that any such correspondence existed. (Pringle Tr. 90:5-23, 93:9-94:9, 113:1-11). Moreover, Mr. Guetta testified that he has never corresponded with Pringle in any form at any time. (Guetta Tr. 20:4-22:7, 68:16-69:9, 165:24-168:14; Guetta Decl. ¶¶ 5-6)

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

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.	Disputed, but immaterial. Jeffrey Pringle's Declaration (Doc. 190) fails to show that Defendants ever had access to "Take a Dive," "Take a Dive" (Dance Version), or any of Pringle's music. (Pringle Tr. 90:5-23, 93:9-94:9, 113:1-11, Garraud Decl. at ¶¶ 2-3; Riesterer Decl. at ¶ 3-4, 8-9; Guetta Decl. at ¶¶ 2-7; Carre Decl. ¶¶ 5-8)
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.	Disputed, but immaterial. Jeffrey Pringle's Declaration (Doc. 190) fails to show that Defendants ever had access to "Take a Dive," "Take a Dive" (Dance Version), or any of Pringle's music. (Pringle Tr. 90:5-23, 93:9-94:9, 113:1-11, Garraud Decl. at ¶¶ 2-3; Riesterer Decl. at ¶ 3-4, 8-9; Guetta Decl. at ¶¶ 2-7; Carre Decl. ¶¶ 5-8). Pringle provides no evidence that any of the Defendants worked at any of these night clubs.
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	Disputed, but immaterial. Jeffrey Pringle's Declaration (Doc. 190) fails to show that Defendants ever had access to "Take a Dive," "Take a Dive" (Dance Version), or any of Pringle's music. (Pringle Tr. 90:5-23, 93:9-94:9, 113:1-11, Garraud Decl. at ¶¶ 2-3; Riesterer Decl. at ¶ 3-4, 8-9; Guetta Decl. at ¶¶ 2-7; Carre Decl. ¶¶ 5-8). The cited evidence does not support the statement.

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

135.	Michael Scott Brown was also a professional and part time disc jockey in Western Europe. Jeffrey Pringle Decl. at ¶ 6	Disputed, but immaterial. Jeffrey Pringle’s Declaration (Doc. 190) fails show that Defendants ever had access to “Take a Dive,” “Take a Dive” (Dance Version), or any of Pringle’s music. (Pringle Tr. 90:5-23, 93:9-94:9, 113:1-11, Garraud Decl. at ¶¶ 2-3; Riesterer Decl. at ¶ 3-4, 8-9; Guetta Decl. at ¶¶ 2-7; Carre Decl. ¶¶ 5-8)
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	Disputed, but immaterial. Jeffrey Pringle’s Declaration (Doc. 190) fails to show that Defendants ever had access to “Take a Dive,” “Take a Dive” (Dance Version), or any of Pringle’s music. (Pringle Tr. 90:5-23, 93:9-94:9, 113:1-11, Garraud Decl. at ¶¶ 2-3; Riesterer Decl. at ¶ 3-4, 8-9; Guetta Decl. at ¶¶ 2-7; Carre Decl. ¶¶ 5-8)
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	Disputed, but immaterial. Pringle has failed to show that Defendants ever had access to “Take a Dive,” “Take a Dive” (Dance Version), or any of Pringle’s music. (Pringle Tr. 90:5-23, 93:9-94:9, 113:1-11, Garraud Decl. at ¶¶ 2-3; Riesterer Decl. at ¶ 3-4, 8-9; Guetta Decl. at ¶¶ 2-7; Carre Decl. ¶¶ 5-8)

**Black Eyed Peas Release “I Gotta Feeling”**

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

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.	Undisputed that in 2009, the Black Eyed Peas released “I Gotta Feeling” as the second single from their album <i>The E.N.D.</i> Disputed to the extent that Pringle relies on the ambiguous and argumentative terms “tremendous success” and “worldwide acclaim” without defining them.
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.	Disputed, but immaterial. Uncontroverted evidence shows that Defendants, not Mr. Pringle, composed the “guitar twang sequence,” and that nothing in “I Gotta Feeling” infringes any of Pringle’s works. (Riesterer Decl. ¶¶ 4-7; Riesterer Tr. 165:19-166:21, 179:10-181:8)
140.	There were numerous and undeniable similarities between the songs. Norris Decl. at ¶ , [sic] Declaration of Alex Stewart (“Stewart Decl.”) at ¶ 3, 5	Disputed, but immaterial. There are no meaningful similarities of original expression common to “Take a Dive” and “I Gotta Feeling,” and, setting aside the “guitar twang sequence,” there are no such similarities between “Take a Dive” (Dance Version) and “I Gotta Feeling.” (Ferrara Decl. ¶ 4-5, 65, 91-97; Ferrara Rebuttal Report; Norris Tr. 80:22-81:3, 249:24-250:16; Stewart Tr. 281:10-284:19)

**Alleged Creation of “I Gotta Feeling”**

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

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.	Disputed, but immaterial. Pringle has no evidence that he ever submitted anything to Gum Productions (Garraud Decl. at ¶¶ 2-3; Riesterer Decl. at ¶ 3-4, 8-9; Guetta Decl. at ¶¶ 2-7; Carre Decl. ¶¶ 5-8; Pringle Tr. 90:5-23, 93:9-94:9, 113:1-11). Moreover, Mr. Riesterer and Mr. Guetta composed the instrumental portion of “I Gotta Feeling,” and Mr. Garraud was not involved. (Riesterer Decl. ¶¶ 4-7; Riesterer Tr. 165:19-166:21, 179:10-181:8). Mr. Riesterer composed and created the “guitar twang sequence.” (Riesterer Decl. ¶¶ 4-7)
142.	Joachim Garraud first met Defendant Riesterer in 1989. Deposition of Frederick Riesterer at p. 78 (“Riesterer Dep.”) attached as Exhibit C to Dickie Decl.	Undisputed.
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.	Undisputed.
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.	Undisputed that Mr. Garraud and Mr. Riesterer are musicians and that Mr. Riesterer has, at times in the past, composed music with Mr. Garraud. The remainder of the statement is disputed, though immaterial. (Riesterer Tr. 78:23-82:6)

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

145.	They would often exchange ideas and concepts, exchange demo tapes, and “put them together” in a sound sequencer. Riesterer Dep. at p. 88.	Undisputed that Mr. Garraud and Mr. Riesterer are musicians and that Mr. Riesterer has, at times in the past, composed music with Mr. Garraud. The remainder of the statement is disputed, though immaterial. (Riesterer Tr. 78:23-82:6, 85:2-89-15)
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	Undisputed that Mr. Garraud and Mr. Riesterer are musicians and that Mr. Riesterer has, at times in the past, composed music with Mr. Garraud. Disputed, but immaterial, that Mr. Riesterer “remained close” with Garraud and that the two are in contact regarding music. (Riesterer Tr. 122:21-123:30)
147.	In 2001, Garraud, David Guetta and Jean Charles Carre founded Gum Productions so that they could “make music.” Guetta Dep. at p. 21.	Undisputed that the purpose of Gum Productions is to facilitate the production of music by David Guetta and others, and that it was founded by Garraud, Guetta, and Carre. Carre Decl. ¶ 5.

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

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	Disputed, but immaterial. Gum Productions has never had a policy or practice of soliciting music from unknown artists, and during the entire 2001 to 2009 time period, Gum Productions received, at most, five promotional tracks of unsolicited music, none of which included “Take a Dive” (Dance Version) or was from Bryan Pringle. (Carre Decl. ¶ 8). In the cited portions of his testimony, Pringle is not even discussed, and Mr. Guetta merely states that, to his knowledge, it is “possible” that Gum Productions and/or Mr. Garraud sought out unidentified artists, and that artists may have submitted samples of their work to Gum Productions. (Guetta Tr. 66:20-70:18). Mr. Guetta testified that he did not believe that Mr. Garraud received such samples (Guetta Tr. 70:12-24), and that he has never corresponded with Pringle in any form at any time. (Guetta Tr. 20:4-22:7, 68:16-69:9, 165:24-168:14; Guetta Decl. ¶ 3-5)
------	---	--

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

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	Disputed, but immaterial. There is no evidence that Gum Productions ever received any CD from Bryan Pringle containing “Take a Dive” (Dance Version) or any other material. (Carre Decl. ¶ 8). Gum Productions, Mr. Guetta, and Mr. Garraud have never engaged in any correspondence with Bryan Pringle. (Carre Decl. ¶ 7; Guetta Decl. ¶ 5; Garraud Decl. ¶ 3; Guetta Tr. 20:4-22:7, 68:16-69:9, 165:24-168:14). Furthermore, Pringle has no evidence that such a letter ever existed. (Pringle Tr. 90:5-23, 93:9-94:9, 113:1-11)
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	Disputed, but immaterial. There is no evidence that Gum Productions ever received any CD from Bryan Pringle containing “Take a Dive” (Dance Version) or any other material. (Carre Decl. ¶ 8). Gum Productions, Mr. Guetta, and Mr. Garraud have never engaged in any correspondence with Bryan Pringle. (Carre Decl. ¶ 7; Guetta Decl. ¶ 5; Garraud Decl. ¶ 3; Guetta Tr. 20:4-22:7, 68:16-69:9, 165:24-168:14). Furthermore, Pringle has no evidence that such correspondence ever existed. (Pringle Tr. 90:5-23, 93:9-94:9, 113:1-11)



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

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	Undisputed.
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	Disputed, but immaterial, insofar as Mr. Riesterer created the guitar part of “Love is Gone” without any input from Guetta or Garraud. (Riesterer TRO Decl. ¶ 4; Riesterer Decl. ¶ 6)
153.	They constantly exchanged “sounds” and “advice” in order to have the “best possible” song. Riesterer Dep. at 129	Undisputed that, in the course of creating “Love is Gone,” Mr. Guetta, Mr. Riesterer, and Mr. Garraud exchanged musical sounds and attempted to create the best possible work they could. Disputed that they did so “constantly.” (Riesterer Tr. 122:11-129:21). Disputed, but immaterial, insofar as Mr. Riesterer created the guitar part of “Love is Gone” without any input from Guetta or Garraud. (Riesterer TRO Decl. ¶ 4; Riesterer Decl. ¶ 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

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.	Disputed, but immaterial. Mr. Riesterer has clarified that, while the “guitar twang sequence” is <i>based on</i> “Love is Gone,” the composition’s guitar preset and sound effects are different (Riesterer Tr. 191:23-192:23, 202:6-14; Riesterer Decl. ¶ 6), and further testified that Mr. Garraud had no role in the creation of the “guitar twang sequence.” (Riesterer Tr. 194:23-25).
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	Disputed, but immaterial. Undisputed that, in his TRO Declaration—which was obtained on an emergency basis—Mr. Riesterer stated that he used a preset titled “Strat with SM57 Crunchy” to create the “guitar twang sequence.” In his MSJ Declaration, Mr. Riesterer clarified that he in fact used a very similar preset titled “Strat with SM57 Stereo Spread.” Riesterer Decl. ¶ 7 & n.2. Moreover, Mr. Riesterer testified that his “managers would translate for [him] (Riesterer Tr. at 172:1), and that he made the statements that ultimately went into his emergency TRO Declaration in French, and for translation by his trusted associates ( <i>id.</i> at 172:3-5, 177:5-13).

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

156.	Riesterer and Guetta continued to work together after the release of “Love is Gone.” Riesterer Dep. 190:18-191:4.	Undisputed.
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	Undisputed.
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:	Undisputed that Mr. Riesterer worked hard to create the “guitar twang sequence.” Disputed, but immaterial, to the extent Pringle claims that the “guitar twang sequence” in “I Gotta Feeling” actually appears in “Love is Gone.” Riesterer has clarified that, while the “guitar twang sequence” is based on “Love is Gone,” the composition’s guitar preset and sound effects are different. (Riesterer Tr. 191:23-192:23, 202:6-14; Riesterer Decl. ¶ 6)
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 _ [sic]	Undisputed that Mr. Adams contacted Mr. Guetta in 2009 to discuss Mr. Guetta producing a song for a Black Eyed Peas album. Disputed that this was “[a]round the same time” as Mr. Guetta and Mr. Riesterer were working on “David Pop GTR” and/or the “guitar twang sequence.”
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	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

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	Undisputed that Mr. Adams stated, based on his recollection of a telephone conversation with Mr. Guetta, that he told Mr. Guetta that “I love your song ‘Now That The Love Is Gone.’ Can you produce a song for The Black Eyed Peas that’s similar to that?” (Adams Tr. 237:14-16).
162.	Adams was particularly attracted to the “guitar twang” used in Love is Gone. Adams Dep. at 239.	Undisputed that Mr. Adams requested a song “similar” to “Love is Gone,” and that he mentioned a “guitar twang” in “Now That The Love Is Gone” at his deposition. (Adams Tr. 237:14-16, 239:1-2). Disputed, but immaterial, that Mr. Adams testified that he “was particularly attracted to the ‘guitar twang’ used in Love is Gone.” <i>Id.</i>
163.	Guetta then sent Adams a sound file containing “David Pop GTR.” Adams Dep. at 77-78.	Undisputed that Mr. Guetta sent Mr. Adams a sound file containing “David Pop GTR.”
164.	Guetta did not check with Riesterer before sending the file to Adams. Guetta Dep. at p. 150.	Undisputed that Mr. Guetta did not ask for, or need, express authorization from Mr. Riesterer before sending “David Pop GTR” as a demo file to Mr. Adams in 2009. (Guetta Tr. 150:10-16)

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

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.	Undisputed that Mr. Guetta and Mr. Adams exchanged music files, and that, for artistic, commercial and competitive reasons, Mr. Guetta and Mr. Adams did not publicize the tracks they were exchanging and took appropriate steps to maintain the confidentiality of their proprietary work. (Guetta Tr. 205:25-206:5 (“So it has often happened that music has been leaked on the Internet before the official release of the album. So [Mr. Adams is] obviously asking me to be protective so that a third party does not put this on the Internet.”); Riesterer Tr. 198:6-18) (generally same)). Disputed, but immaterial, that this practice involved a “shroud of secrecy” or was for any improper purpose. (Guetta Tr. 205:13-208:1)
------	---	--

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

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	Disputed, but immaterial. In the cited testimony, Mr. Guetta was asked only about “[t]he lyrics and the vocal melody” of unidentified tracks on unnamed albums, and simply stated that he did not recall whether he had specifically asked any of the artists he had worked with if their lyrics were “copied.” (Guetta Tr. 110:5-111:7). Moreover, the statement is immaterial because Mr. Riesterer and Mr. Guetta independently created “David Pop GTR” and the “guitar twang sequence” as original musical works and did not copy or sample from any other work. (Riesterer Decl. ¶¶ 4-7; Riesterer Tr. 165:19-166:21, 179:10-181:8)
------	--	--

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

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	Undisputed that Mr. Adams stated that he found the “chord progression”—not necessarily the “guitar ‘chord progression’”—in “David Pop GTR” to be “amazing” and that Mr. Adams wanted to, and did, use the music in “David Pop GTR” on a Black Eyed Peas album. (Adams Tr. 79:18-80:7). Disputed, but immaterial, that “David Pop GTR” is a completed “song.” Also disputed, but immaterial, that Mr. Adams spoke the specific words “I love that song I want it on my album”—Pringle cites to Mr. Riesterer’s testimony rather than Mr. Adams’ testimony.
168.	And so, after he contributed his vocals and lyrics, “David Pop GTR” became “I Gotta Feeling.” Adams Dep. at 79	Undisputed that portions of the music in “David Pop GTR” became the musical bed for “I Gotta Feeling,” and that Mr. Adams contributed his vocals and lyrics.

**None of The Defendants Can Explain The Origin Of The “Guitar Twang Sequence”**

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.	Undisputed that Mr. Adams composed the lyrics to “I Gotta Feeling,” and that Mr. Guetta is one of the creators of the music for “I Gotta Feeling.” Disputed, but immaterial, that Mr. Adams “admitted” that this is the case, and that Mr. Adams “could not account for the origin of the ‘guitar twang’ sequence,” as Mr. Guetta sent him the “guitar twang” sequence, and Mr. Guetta and Mr. Riesterer created it. (Riesterer Decl. ¶¶ 4-7; Riesterer Tr. 165:19-166:21, 179:10-181:8). There is no evidence that Mr. Adams was “careful to specify” that Guetta “merely” represented that he composed it himself.
170.	Guetta claimed that the guitar instrumentation “came from [Riesterer]” and that Riesterer never told him where he got it from. Dickie Decl. Ex. [sic] Guetta Dep. at p. 115:2-116:8.	Disputed, but immaterial. Riesterer has explained the software, presets, and effects he used to create the “guitar twang sequence.” (Riesterer Decl. ¶ 5-7). Moreover, in the cited testimony, Mr. Guetta stated that he did not need to ask Mr. Riesterer about the origins of the ideas for “Love is Gone”—not “I Gotta Feeling”—“because it was obvious” that Mr. Riesterer created it. (Guetta Tr. 115:2-116:8)

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



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

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. (Doc. 22-3)	Disputed, but immaterial. Riesterer has explained the software, presets, and effects he used to create the “guitar twang sequence,” and has fully explained any alleged inconsistency with his emergency 2010 TRO declaration. (Riesterer Decl. ¶ 5-7)
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)	Disputed, but immaterial. Riesterer has explained the software, presets, and effects he used to create the “guitar twang sequence.” (Riesterer Decl. ¶ 5-7)
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.	Disputed, but immaterial. Riesterer has explained his creation of “Love is Gone” in detail, including the equipment and software he used, and his process of composition. (Riesterer Tr. 127:13-134:17)
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.	Disputed, but immaterial. Riesterer has explained his creation of “Love is Gone” in detail, including the equipment and software he used, and his process of composition. (Riesterer Tr. 127:13-134:17; Riesterer TRO Decl. ¶¶ 4-5)

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

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.	Disputed, but immaterial. Mr. Riesterer created backup files and all information necessary to confirm his creation of the “guitar twang sequence” (which information has been produced to Pringle in this case). (Riesterer Tr. 193:12-194:10; Geluso Decl. [Doc. 162] ¶¶ 15-21, 25-28; Riesterer Reply Decl. ¶ 5)
176.	Geluso claims that Riesterer files 1-9 and 30 constitute the original David Pop Guitar creation files. Geluso at ¶ 6.	Disputed, but immaterial. Mr. Geluso was provided with, and analyzed, true and correct copies of Mr. Riesterer’s creation files. (Geluso Decl. [Doc. 162] ¶¶ 15-21, 25-28; Riesterer Reply Decl. ¶ 5)

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.	<p>Furthermore, the creation dates and other metadata of Riesterer’s alleged “creation files” for “I Gotta Feeling” suggest that Defendants have manipulated these files.</p> <p><b>First</b>, Riesterer failed to produce the hard drive that he allegedly used to create “David Pop GTR” which became “I Gotta Feeling.”</p> <p><b>Second</b>, 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. <b>Third</b>, 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. <b>Fourth</b>, 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.” <b>Fifth</b>, 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. <b>[emphasis added]</b></p>	<p>Disputed, but immaterial.</p> <p><b>First</b>, Mr. Riesterer created backup files and all information necessary to confirm his creation of the “guitar twang sequence” (which information has been produced to Pringle in this case). (Riesterer Tr. 193:12-194:10; Geluso Decl. [Doc. 162] ¶¶ 15-21, 25-28; Riesterer Reply Decl. ¶ 5).</p> <p><b>Second</b>, Mr. Riesterer’s creation files do pre-date “I Gotta Feeling”; the files to which Pringle refers are not related to the “guitar twang sequence, and their “creation” dates simply reflect Mr. Riesterer opening and using them in connection with newer music projects. (Geluso Rebuttal Decl. ¶ 51; Riesterer Reply Decl. ¶¶ 6, 8). <b>Third</b>, Mr. Riesterer did not use this device to create “David Pop GTR”; the data to which Pringle refers merely reflects that, when Mr. Riesterer opened the file to confirm it was the correct file to produce in litigation, the device was connected to his computer at the time. (Geluso Rebuttal Decl. ¶ 52; Riesterer Reply Decl. ¶ 6). <b>Fourth</b>, the reference to “Litige” in this file has nothing to do with “litigation”; rather, it reflects the French term for “disagreement,” and refers to a</p>
------	--	---

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

		<p>musical “disagreement” between Mr. Riesterer and Mr. Guetta. The “OK” in the file name simply reflects that the disagreement was resolved. (Riesterer Reply Decl. ¶ 7). <b><u>Fifth</u></b>, the referenced creation file is not the “guitar twang sequence,” and is, accordingly, irrelevant. (Riesterer Reply Decl. ¶ 9; <i>see also</i> “<b><u>First</u></b>,” above)</p>
--	--	---

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

**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.	Disputed, but immaterial. This statement is irrelevant because Defendants need not “prove” that Pringle copied “I Gotta Feeling” to prevail on the instant motion—such copying would constitute copyright infringement by Pringle, which Defendants have not elected to assert at this time. Regardless, Pringle has not established that he actually created “Take a Dive” (Dance Version) in 1999, and the recording he has submitted to the Copyright Office and the Court was in fact created in 2010. (Pringle Dep. Tr. 17:1-19:7, 69:5-71:6, 72:20-73:13, 76:3-6, 100:24-101:8, 124:2-20, 201:15-23, 375:22-377:22). Moreover, the physical evidence precludes sampling by Defendants, but suggests sampling of “I Gotta Feeling” by Mr. Pringle, and Mr. Pringle has destroyed evidence that would confirm this. (Geluso TRO Decl. ¶ 7; Geluso MSJ Decl. ¶¶ 10-13; Laykin MSJ Decl. ¶¶ 30-36)
------	---	--

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

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.	Disputed, but immaterial. This statement is irrelevant because Defendants need not “prove” that Pringle copied “I Gotta Feeling” to prevail on the instant motion—such copying would constitute copyright infringement by Pringle, which Defendants have not elected to assert at this time. Moreover, Pringle provides no meaningful evidence that he actually created “Take a Dive” (Dance Version) in 1999, and the recording he has submitted to the Copyright Office and the Court was created in 2010. (Pringle Dep. Tr. 17:1-19:7, 69:5-71:6, 72:20-73:13, 76:3-6, 100:24-101:8, 124:2-20, 201:15-23, 375:22-377:22). However, the physical evidence precludes sampling by Defendants, but suggests sampling of “I Gotta Feeling” by Mr. Pringle, and Mr. Pringle has destroyed evidence that would confirm this. (Geluso TRO Decl. ¶ 7; Geluso MSJ Decl. ¶¶ 10-13; Laykin MSJ Decl. ¶¶ 30-36)
------	---	---

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

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	Disputed, but immaterial. This statement is irrelevant because Defendants need not “prove” that Pringle copied “I Gotta Feeling” to prevail on the instant motion—such copying would constitute copyright infringement by Pringle, which Defendants have not elected to assert at this time. Moreover, Pringle provides no meaningful evidence that he actually created “Take a Dive” (Dance Version) in 1999, and the recording he has submitted to the Copyright Office and the Court was created in 2010. (Pringle Dep. Tr. 17:1-19:7, 69:5-71:6, 72:20-73:13, 76:3-6, 100:24-101:8, 124:2-20, 201:15-23, 375:22-377:22). However, the physical evidence precludes sampling by Defendants, but suggests sampling of “I Gotta Feeling” by Mr. Pringle, and Mr. Pringle has destroyed evidence that would confirm this. (Geluso TRO Decl. ¶ 7; Geluso MSJ Decl. ¶¶ 10-13; Laykin MSJ Decl. ¶¶ 30-36)
------	---	---

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

181.	Plaintiff has produced evidence that “Take a Dive” (Dance Version) is a derivative of “Take a Dive.” Norris Decl. ¶ 6.	Disputed, but immaterial. Pringle has not established that he actually created “Take a Dive” (Dance Version) in 1999, and the recording he has submitted to the Copyright Office and the Court was created in 2010—after the release of “I Gotta Feeling.” (Pringle Dep. Tr. 17:1-19:7, 69:5- 71:6, 72:20-73:13, 76:3-6, 100:24-101:8, 124:2-20, 201:15-23, 375:22-377:22)
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	Disputed, but immaterial. The creation date of Pringle’s alleged “creation file” for “Take a Dive” (Dance Version) can be easily backdated, and without his computers and hard drives—which Pringle has destroyed—it is impossible to verify the true creation date(s). (Laykin MSJ Decl. ¶ 21-29)
183.	Defendants theory is based on the assumption that Mr. Pringle wanted to create a backdated NRG file[.] Frederiksen-Cross Decl. at ¶ 21	Disputed, but immaterial. The statement is irrelevant because Defendants need not “prove” that Pringle copied “I Gotta Feeling” to prevail on the instant motion—such copying would constitute copyright infringement by Pringle, which Defendants have not elected to assert at this time.



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

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	Disputed, but immaterial. This statement is irrelevant because Defendants need not “prove” that Pringle copied “I Gotta Feeling” to prevail on the instant motion—such copying would constitute copyright infringement by Pringle, which Defendants have not elected to assert at this time. Moreover, Pringle admitted purchasing CDs in bulk, and his expert was easily able to determine the manufacture date of the CD. (Pringle Tr. 76:3-7, 276:9-10; Gallant Decl. ¶ 6). None of these assumptions are impossible or even remarkable.
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	Disputed, but immaterial. This statement is irrelevant because Defendants need not “prove” that Pringle copied “I Gotta Feeling” to prevail on the instant motion—such copying would constitute copyright infringement by Pringle, which Defendants have not elected to assert at this time. None of these assumptions are impossible or even remarkable.

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

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 coincidentally 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	Disputed, but immaterial. This statement is irrelevant because Defendants need not “prove” that Pringle copied “I Gotta Feeling” to prevail on the instant motion—such copying would constitute copyright infringement by Pringle, which Defendants have not elected to assert at this time. None of these assumptions are impossible or even remarkable.
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	Disputed, but immaterial. This statement is irrelevant because Defendants need not “prove” that Pringle copied “I Gotta Feeling” to prevail on the instant motion—such copying would constitute copyright infringement by Pringle, which Defendants have not elected to assert at this time. None of these assumptions are impossible or even remarkable.
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	Disputed, but immaterial. This statement is irrelevant because Defendants need not “prove” that Pringle copied “I Gotta Feeling” to prevail on the instant motion—such copying would constitute copyright infringement by Pringle, which Defendants have not elected to assert at this time. None of these assumptions are impossible or even remarkable.

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

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	Disputed, but immaterial. Pringle provides no meaningful evidence that he actually created "Take a Dive" (Dance Version) in 1999, and the recording he has submitted to the Copyright Office and the Court was created in 2010—after the release of "I Gotta Feeling." (Pringle Dep. Tr. 17:1-19:7, 69:5- 71:6, 72:20-73:13, 76:3-6, 100:24-101:8, 124:2-20, 201:15-23, 375:22-377:22). Moreover, uncontroverted evidence shows that Defendants, not Mr. Pringle, composed the "guitar twang sequence" (Riesterer Decl. ¶¶ 4-7; Riesterer Tr. 165:19-166:21, 179:10-181:8). Mr. Pringle has also testified that he recorded the "guitar twang" sequence in 1999 rather than 1997, and that it was "modeled ... after 'Take a Dive's' progression of notes in the chorus vocals of the original version, which [he] sang," rather than recorded for the songs "Faith" and/or "Regret." (Pringle TRO Decl. ¶ 4; Pringle PI Decl. ¶ 4)
------	---	---

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

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	Disputed, but immaterial. It is uncontested that Pringle has destroyed relevant evidence during the pendency of this litigation. (Laykin MSJ Decl. ¶¶ 21-36). There is no authenticated admissible evidence that Pringle created “Take a Dive” (Dance Version) in 1999.
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	Disputed, but immaterial. Pringle presents no evidence that he actually did this, or when—Gallant merely declares that Pringle <i>told him</i> he did this. (Gallant Decl. ¶ 4). Pringle no longer has this alleged hard drive or any of the related equipment. ( <i>Id.</i> ; Pringle Decl. ¶¶ 147, 148)
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	Disputed, but immaterial. Pringle presents no evidence that he actually did this, or when—Gallant merely declares that Pringle <i>told him</i> he did this. (Gallant Decl. ¶ 4). Pringle no longer has this alleged hard drive or any of the related equipment. ( <i>Id.</i> ; Pringle Decl. ¶¶ 147, 148)

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

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	Disputed, but immaterial. Pringle presents no evidence that he actually “preserved” any evidence of alleged creation of “Take a Dive” Dance Version in 1999. (Gallant Decl. ¶ 4; Pringle Decl. ¶¶ 147, 148; Pringle Dep. Tr. 17:1-19:7, 69:5-71:6, 72:20-73:13, 76:3-6, 100:24-101:8, 124:2-20, 201:15-23, 375:22-377:22)
194.	According to <a href="http://www.beatportal.com">www.beatportal.com</a> , 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	Disputed, but immaterial. Even if the various stems of “I Gotta Feeling” were available on <a href="http://www.beatportal.com">www.beatportal.com</a> only between August 21 and September 8, 2009, that does not preclude their availability on other websites or from other sources at other times. Indeed, Defendants’ expert personally downloaded the remix stems for “I Gotta Feeling” as recently as January 2, 2012. (Geluso Rebuttal Decl. ¶ 35).

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

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	Disputed, but immaterial. Ms. Frederiksen-Cross has no basis to state what was or was not on a computer she did not examine, and even if the various stems of “I Gotta Feeling” were available on www.beatportal.com only between August 21 and September 8, 2009, that does not preclude their availability on other websites or from other sources at other times. Indeed, Defendants’ expert personally downloaded the remix stems for “I Gotta Feeling” as recently as January 2, 2012. (Geluso Rebuttal Decl. ¶ 35).
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	Disputed, but immaterial. Ms. Frederiksen-Cross has no basis to state what was or was not on a computer she did not examine, and even if the various stems of “I Gotta Feeling” were available on www.beatportal.com only between August 21 and September 8, 2009, that does not preclude their availability on other websites or from other sources at other times. Indeed, Defendants’ expert personally downloaded the remix stems for “I Gotta Feeling” on January 2, 2012. (Geluso Rebuttal Decl. ¶ 35). Moreover, this statement does not address Mr. Pringle’s computer hard drive used in 2010.

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

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	Disputed, but immaterial. Pringle and Ms. Frederiksen-Cross have no basis to state what records Beatportal may or may not keep, and whether such records (if any) would be available to third parties. Moreover, the referenced musical stems were also available from sources other than Beatportal. (Geluso Rebuttal Decl. ¶ 35).
198.	Defendants have produced no evidence of same and Clark Warner’s declaration makes no such reference. Declaration of Clark Warner, Dckt. No. 163.	Undisputed, but irrelevant. Pringle and Ms. Frederiksen-Cross have no basis to state what records Beatportal may or may not keep, and whether such records (if any) would be available to third parties. Moreover, the referenced musical stems were also available from sources other than Beatportal. (Geluso Rebuttal Decl. ¶ 35).
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	Disputed, but immaterial. Pringle offers no evidence of the contents of this allegedly defective hard drive and no basis to deny that he has spoliated critical evidence. (Laykin MSJ Decl. ¶¶ 34-36)

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

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	Disputed, but immaterial. Pringle offers no evidence of the contents of this allegedly defective hard drive and no basis to deny that he has spoliated critical evidence. (Laykin MSJ Decl. ¶¶ 34-36). Defendants made numerous demands that Pringle preserve and produce for inspection <u>all</u> of his computer equipment from 2009 to the present.
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	Disputed, but immaterial. Pringle failed to conduct a proper forensic backup of the discarded hard-drive and, therefore, the “backup” files could not contain the key evidence (such as temporary Internet files, program data or system data) that Pringle destroyed. (Laykin MSJ Decl. ¶¶ 34-36; Pringle Tr. 286)
202.	Mr. Aga declined to inspect the hard drive. Pringle Decl. at ¶ 254	Disputed, but immaterial. The “hard drive” Pringle made available for inspection was not the hard drive he disposed of, but alleged “backup” files saved to a DVD. (Pringle Decl. ¶ 254). Pringle failed to conduct a proper forensic backup of the discarded hard-drive and, therefore, the “backup” files could not contain the key evidence (such as temporary Internet files, program data or system data) that Pringle destroyed. (Laykin MSJ Decl. ¶¶ 34-36)



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

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.	Undisputed.
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.	Undisputed that the Copyright Office issued a registration in the sound recording of “Take a Dive” (Dance Version) and denied registration of same as a new musical composition, based on an application submitted on November 15, 2010 (after Pringle filed suit).
205.	Plaintiff has notified the Copyright Office of the litigation pursuant to Section 411(a) of the Copyright Act. Exhibit K to Dickie Decl.	Disputed, but immaterial. Undisputed that Plaintiff notified the Copyright Office of litigation pertaining to the original version of “Take a Dive” on or around October 28, 2010. (Doc. 3). Disputed that Plaintiff notified the Copyright Office, in any form, of litigation pertaining to “Take a Dive” (Dance Version) at that time, or at any time prior to December 9, 2011. (Dickie Decl., Ex. K (Doc. 197-11)).

Dated: January 9, 2012

LOEB & LOEB LLP

By: /s/ Tal E. Dickstein  
Donald A. Miller  
Barry I. Slotnick  
Tal E. Dickstein

Attorneys for Defendants  
SHAPIRO, BERNSTEIN & CO., INC.,  
FREDERIC RIESTERER and DAVID  
GUETTA