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9
 10 UNITED STATES DISTRICT COURT
 11 CENTRAL DISTRICT OF CALIFORNIA
 12 SOUTHERN DIVISION

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

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

**REPLY MEMORANDUM IN
 FURTHER SUPPORT OF MOTION
 FOR SUMMARY JUDGMENT BY
 DEFENDANTS SHAPIRO,
 BERNSTEIN & CO, INC.,
 FREDERIC RIESTERER AND
 DAVID GUETTA**

Complaint Filed: October 28, 2010
 Trial Date: March 27, 2012
 Motion Hearing Date: January 30, 2012

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1 Defendants Shapiro, Bernstein & Co, Inc., Frederic Riesterer and David
2 Guetta respectfully submit this Reply Memorandum in Support of their Motion for
3 Summary Judgment Pursuant to Rule 56 of the Federal Rules of Civil Procedure.

4 **PRELIMINARY STATEMENT**

5 Plaintiff finally admits what Defendants have been saying all along: “it
6 would have been *technologically impossible* for the Defendants to sample my guitar
7 twang sequence out of the full sound recording of ‘Take a Dive’ (Dance Version)
8 with all the instrumentation playing” (Pringle Decl. [198] ¶ 125) (emphasis added).
9 Pringle therefore concedes that “I do not contend . . . that the Defendants sampled
10 the ‘guitar twang sequence’ for ‘I Gotta Feeling’ directly out of the fully played
11 version of ‘Take a Dive’ (Dance Version) presented to the Court.” (*Id.* at ¶ 142.)
12 This admission dooms Pringle’s claim. Infringement of a sound recording requires
13 physical appropriation (i.e., “sampling”) of the plaintiff’s work. Because Pringle
14 admits that sampling was not possible, his infringement claim fails.

15 Pringle instead changes his story once again, and now bases his claim on a
16 *different* version of his song that supposedly had the guitar twang sequence soloed
17 out. But Plaintiff does not have a copy of this new version, cannot definitively state
18 he gave it to Defendants, and never registered it with the Copyright Office. As such,
19 Pringle’s claim must fail.

20 Pringle also fails to provide any probative evidence that Guetta or Riesterer,
21 the French creators of “I Gotta Feeling”, had access to any of his music, much less
22 received a copy of “Take a Dive” (Dance Version) or the mysterious new
23 (unregistered) version. Instead, Pringle twists the facts and the law to try to show
24 access. Both efforts fail.

25 Pringle’s composition claim on the original version of “Take a Dive”—which
26 does not contain the guitar twang sequence—also fails because Pringle’s own
27
28

1 experts admit that any similarities with “I Gotta Feeling” are commonplace musical
2 building blocks that are not original to “Take a Dive” and therefore not protectable.

3 Summary judgment must also be granted because Pringle disposed of the
4 computer hard drives he used between the release of “I Gotta Feeling” and the
5 magical appearance of the guitar twang sequence in a “Dance Version” of his song.

6 Pringle did so despite Defendants’ *numerous demands that he preserve his*
7 *computer equipment*, which would contain evidence that Pringle downloaded the
8 widely available “I Gotta Feeling” guitar twang stem, and back-dated his NRG file
9 to make it seem that he had created “Take a Dive” (Dance Version) years earlier.
10 Pringle’s own experts acknowledge that computer files can be back-dated by simply
11 changing the computer’s clock, and that proof of such manipulation would be found
12 on Pringle’s computer hard drives. Yet Pringle disposed of the very hard drives that
13 would prove his fraud. Dismissal is thus the only appropriate sanction.

14 ARGUMENT

15 **I. Pringle’s Claim Now Hinges on Defendants Having Copied a *Different*** 16 **Version of His Song That Has Never Been Registered for Copyright**

17 Pringle’s pleadings, TRO application, and preliminary injunction motion were
18 all based on the theory that Defendants had “directly sampled” “Take a Dive”
19 (Dance Version) which Pringle registered with the Copyright Office in November
20 2010. (Compl. [Doc. 1] ¶ 4; Am. Compl. ¶ 4; Pl.’s TRO Br. [Doc. 15-1] 5
21 (Defendants accessed “the derivative version of ‘Take a Dive,’ listened to the song,
22 and directly sampled the guitar twang sequence out of Pringle’s sound recording”);
23 Pl.’s PI Br. [Doc. 73-1] 16 (“Defendants directly sampled the sound recording of the
24 derivative version of ‘Take a Dive.’”). Indeed, Pringle registered a sound recording
25 copyright in “Take a Dive” (Dance Version) precisely so that he could pursue this
26 infringement claim. (Pl.’s PI Br. [Doc. 73-1] 14-15).

27 Defendants have repeatedly shown that Pringle’s sampling claim—which
28 requires actual physical appropriation of his sound recording, *see* 17 U.S.C. §

1 114(b)—is technologically impossible because the guitar twang sequence in “Take a
2 Dive” (Dance Version) is layered with other instrumentation and sound elements
3 that are not present in “I Gotta Feeling”. (Geluso PI Decl. [Doc. 81-1] ¶ 7; Geluso
4 MSJ Decl. [Doc. 162] ¶¶ 22-24). The Court reached the same conclusion in denying
5 Pringle’s preliminary injunction motion. (Doc. 99 at 9-10.)

6 Now, after more than a year of costly litigation, Pringle finally concedes that
7 Defendants could not have sampled the guitar twang sequence from “Take a Dive”
8 (Dance Version). (Pringle Decl. [198] ¶¶ 125, 142).¹ But rather than simply
9 withdraw his sampling claim as Pringle’s then counsel said he would,² he now
10 claims he sent Defendants a *different* version of this song that supposedly had the
11 guitar twang sequence soloed out. (Pringle Decl. [Doc. 198] ¶ 143) (“I had many
12 derivative versions of ‘Take a Dive’ which contained the ‘guitar twang sequence’
13 soloed out in the song, and provided samples of the same directly to Guetta and
14 Garraud, at least as far back as 1999 to 2003.”) None of these “many derivative
15 versions” were ever registered with the Copyright Office or produced in discovery.
16 Indeed, Pringle testified that he has no versions of “Take a Dive” other than what
17 was produced in discovery—*i.e.*, the original 1998 version and the “Dance Version”
18 registered in 2010. (Dickstein Decl., Ex. R, Pringle Tr. 162:14-22) (“the versions
19 that I have that are surviving, yes, I produced them to you”).³

21 ¹ In the section of Pringle’s brief titled “Pringle Has Produced Evidence That
22 Defendants Sampled His Sound Recordings”, he argues only that it would be
23 impossible for “Pringle to have sampled Defendants’ work.” (Pl.’s Opp. 21.)
24 Professor Geluso thoroughly refutes Pringle’s arguments, including showing that the
25 isolated “I Gotta Feeling” guitar twang stem was *widely available on the Internet
26 long after the Beatport re-mix competition ended*. (Geluso Decl. ¶¶ 33-45.)
27 Moreover, while Pringle’s arguments might be a defense to a claim that he infringed
28 Defendants’ song, they do nothing to show that Defendants infringed his song.

² See Declarations of Barry I. Slotnick and Kara E. F. Cenar, submitted herewith.

³ Pringle “does not contend in this litigation that any Defendant had access to the
NRG image file.” (Pl.’s Resp. to Def. Pineda’s RFA [Doc. 161-9] 36.)

1 Pringle thus apparently plans to ask a jury to find that “I Gotta Feeling”
2 infringes a version of his song that the jury cannot listen to, cannot be subjected to
3 expert analysis, and has never been registered with the Copyright Office.
4 Fortunately, the law does not permit such a frivolous exercise. An infringement
5 claim must be based on a work that actually exists and has been deposited with the
6 Copyright Office. *See* 17 U.S.C. §§ 411(a), 408(b)(1),(2); *KnowledgePlex, Inc. v.*
7 *Placebase, Inc.*, 2008 WL 5245484, at *9 (N.D. Cal., Dec. 17, 2008) (“A key
8 purpose. . . of the deposit requirement is to prevent confusion about which work the
9 author is attempting to register.”); *E. Mishan & Sons, Inc. v. Marycana, Inc.*, 662 F.
10 Supp. 1339, 1346 (S.D.N.Y. 1987) (plaintiff has standing “only to vindicate
11 infringement of its work deposited with the registration”).^{4,5} Because Pringle has
12 not registered the work that he now claims Defendants copied, his claim fails.

13 **II. There is No Evidence That Defendants Ever Had Access to Any of** 14 **Pringle’s Music**

15 Even if it were technologically possible for Defendants to have sampled from
16 “Take a Dive” (Dance Version)—which Plaintiff admits it was not—there is no
17 basis for a jury to conclude that Defendants actually did so, because Pringle has
18 provided no evidence that Defendants had access to *any* version of his song.

19 **A. Pringle Misrepresents the Record to Fabricate Proof of Access**

21 ⁴ Pringle’s registration of the original “Take a Dive” is irrelevant, as that version did
22 not contain the guitar twang sequence that Defendants allegedly sampled. *See Well-*
23 *Made Toy Mfg. Corp. v. Goffa Int’l Corp.*, 210 F. Supp. 2d 147, 158 (E.D.N.Y.
24 2002) (“[W]here the preexisting work is registered, but the derivative work is not, a
25 suit for infringement may be maintained as to any protected element contained in
the registered preexisting work, *but not as to any element original to the*
unregistered derivative work.”) (emphasis added).

26 ⁵ Any testimony about alleged versions of Pringle’s song which he does not have are
27 also inadmissible under Fed. R. Evid. 1002, which provides that “[a]n original
28 writing, recording, or photograph is required in order to prove its content[.]” The
Advisory Committee specifically notes that Rule 1002 applies to copyright actions.

1 Pringle resorts to distorting the facts to try to conjure up some inference of
2 access. First, he argues that his alleged submissions of demo CDs to everyone in the
3 music business are “partially” evidenced by postal service receipts. (Pl.’s Opp. 3.)
4 Yet Pringle cannot even bring himself to show the Court copies of these postal
5 receipts, because they are, in fact, evidence of nothing. All they show are that
6 *someone* mailed *something* to *somebody* *somewhere* in 2006. (Dickstein Decl., Ex.
7 S.) There is no evidence that any of the mailings reflected by these receipts
8 included any version of “Take a Dive”, or that they were sent to any Defendants.
9 (*Id.*)⁶ Thus, although Pringle claims to have sent “thousands of demo CDs for over
10 a decade,” he has no evidence of any such mailings, or that any of those alleged
11 demo CDs contained “Take a Dive” (Dance Version). (Pl.’s Resp. to SMF ¶ 54.)

12 Second, Pringle contends that he sent a copy of his demo CD to Gum
13 Productions, the French music production company founded by Guetta and Joachim
14 Garraud, and that sometime between 2001 and 2003 Gum actually received a copy
15 of “Take a Dive” (Dance Version). (Pl.’s Opp. 3-4.) As support for that contention,
16 Pringle cites Guetta’s deposition testimony (Pl.’s SAF ¶¶ 131, 148) (citing Guetta
17 Tr. 20-22, 66-69). But Guetta testified only that it was “possible” that *unspecified*
18 artists had been solicited to perform on Guetta’s albums or had submitted
19 *unspecified* samples of their work. That Pringle would have the Court construe that
20 testimony as establishing Guetta’s receipt of Pringle’s “Take a Dive” (Dance
21 Version) shows the depths to which Pringle will sink to avoid summary judgment.
22 In fact, Guetta has expressly denied ever having received or listened to any of
23 Pringle’s music (Guetta Decl. [Doc. 167] ¶¶ 5-6), and Gum’s director states that an

24 _____
25 ⁶ Pringle’s 2006 mailing receipts reference zip codes in the United States, even
26 though he now claims that his music was stolen in a French nightclub in 2001-2003.
27 Because Pringle admits that The Black Eyed Peas’ William Adams wrote the lyrics
28 for “I Gotta Feeling” but did not change any of the music he received from Guetta
(Pl.’s Resp. to SMF ¶ 21), any alleged access through The Black Eyed Peas, their
music publishers or record label is immaterial.

1 extensive search of its business records showed no indication of any correspondence
2 with Pringle (Carre Decl. [Doc. 168] ¶¶ 6-8). Pringle’s unsupported speculation to
3 the contrary is insufficient to create a genuine issue of fact. *See Meade v.*
4 *Cedarapids, Inc.*, 164 F.3d 1218, 1225 (9th Cir. 1999) (creating a genuine issue of
5 material fact “requires evidence, not speculation”).

6 Third, Pringle makes a series of unsupported and demonstrably false
7 assertions to try to show that Joachim Garraud received Pringle’s music and used it
8 in creating “I Gotta Feeling.” Pringle cites only his own self-serving testimony that
9 Garraud supposedly wrote to Pringle asking for specific music tracks, including
10 “Take a Dive” (Dance Version). (Pl.’s Opp. 4, 19; Pl.’s SAF ¶¶ 149-150) (citing
11 Pringle Decl. ¶ 5.) Yet Pringle admits he has no copy of any communication with
12 Garraud (Pl.’s Resp. to SMF ¶¶ 49-50), and he completely ignores the
13 uncontroverted testimony of Garraud himself (an unbiased third party) that he never
14 listened to or received any of Pringle’s music. (Garraud Decl. [Doc. 165] ¶¶ 2-3.)

15 Pringle nevertheless tries to connect Garraud to the creation of “I Gotta
16 Feeling” by asserting that a guitar sequence in the 2007 song “Love is Gone,” which
17 was co-produced by Garraud, Riesterer and Guetta, is actually the same guitar twang
18 sequence that later appeared in “I Gotta Feeling” released in 2009. (Pl.’s Opp. 5.)
19 But Pringle’s own sound recording expert, Mark Rubel, testified that the guitar
20 sequence in “Love is Gone” is “completely different” than the guitar sequence in “I
21 Gotta Feeling.” (Rubel Report [Doc. 73-1] at 10.) Riesterer similarly explains that
22 the notes, chords, guitar pre-set and sound effects processing were all different in
23 “Love is Gone” and “I Gotta Feeling.” (Riesterer Decl. [Doc. 166] ¶¶ 6-8.)⁷

24
25 ⁷ Although Riesterer initially stated in an October 2010 Declaration opposing
26 Pringle’s *ex parte* TRO application that the guitar parts in “I Gotta Feeling” and
27 “Love is Gone” were the same, he later explained that he misunderstood his TRO
28 declaration because it had not been translated into his native French. (Riesterer
Decl. [Doc. 166] 7 n.2; Riesterer Decl. ¶¶ 10-12.) This does not create an issue of

1 Pringle also contends that Garraud was involved with the creation of “I Gotta
2 Feeling” (Pl.’s Opp. 4; Pl.’s SAF ¶ 141) (citing Riesterer Tr. [Doc. 197-3] 125:11-
3 129:21.) But once again, the deposition testimony Pringle cites does not support his
4 contention. Riesterer testified that Garraud was involved in the production of “Love
5 is Gone,” *not* “I Gotta Feeling”—which, as explained above, had an entirely
6 different guitar sequence. The uncontroverted evidence thus shows that Garraud
7 was not involved in Guetta and Riesterer’s creation of “I Gotta Feeling.” (Guetta
8 Decl. [Doc. 167] ¶ 7; Riesterer Decl. [Doc. 166] ¶ 9.).⁸

9 **B. Pringle’s Unsupported Self-Serving Testimony Does Not Create a**
10 **Genuine Issue of Fact**

11 Because he has no evidence of access, Pringle falls back on his own
12 unsupported self-serving testimony, claiming that “[d]ocumentary evidence is not
13 necessary to establish access where the Plaintiff testifies that he submitted his work
14 to the Defendants.” (Pl.’s Opp. 19-20.) Not only does that proposition run contrary
15 to the rule that “[u]ncorroborated and self-serving testimony, without more, will
16 not create a ‘genuine issue’ of material fact precluding summary judgment” *Baker v.*
17 *Walker*, 2011 WL 1239826, at *1 (E.D. Cal. Mar. 29, 2011) (quoting *Villiarimo v.*
18 *Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002))—it is also unsupported
19 by the cases Pringle relies upon.

20
21
22 fact, especially since Pringle’s own expert acknowledges that the two guitar parts
23 are “completely different.” *Horn v. United Parcel Servs., Inc.*, 433 F. App’x 788,
24 796 (11th Cir. 2011) (“inconsistent testimony of a witness, corrected in the same
25 deposition, affirmed by an affidavit, coupled with the consistent testimony of
26 another witness, is not sufficient to create a genuine issue of material fact.”).

25 ⁸ See *Meta-Film Assocs. v. MCA, Inc.*, 586 F. Supp. 1346, 1355-56 (C.D. Cal. 1984)
26 (“the dealings between the plaintiff and the intermediary and between the
27 intermediary and the alleged copier must involve some overlap in subject matter to
28 permit an inference of access.”)

1 In *Straughter v. Raymond*, 2011 WL 3651350 (C.D. Cal. Aug. 19, 2001), the
2 defendants actually *admitted* that the alleged third party intermediary, hip-hop artist
3 Warren G, had received a copy of plaintiff’s song—indeed, he helped produce it.
4 *Id.* at *2. Moreover, on reconsideration, the *Straughter* court acknowledged that
5 “Warren G’s relationship to defendants may not have been such that he would be
6 found to be a third-party intermediary,” and relied instead on access through
7 widespread distribution as a result of plaintiff’s song having reached number 32 on
8 Billboard’s charts. *Straughter v. Raymond*, CV 08-2170 CAS (CWx) (C.D. Cal.
9 Nov. 21, 2011) (Doc. 313 at *5, 7).

10 In *Bethea v. Burnett*, 2005 WL 1720631 (C.D. Cal. June 28, 2005), the
11 defendant—whose television show allegedly infringed plaintiff’s treatment for a
12 show—*admitted* that his business manager had met with the plaintiff on several
13 occasions to discuss possible television programs. *Id.* at *1-2.⁹

14 In *L.A. Printex Indus. v. Lia Lee, Inc.*, 2009 WL 789877 (C.D. Cal. Mar. 23,
15 2009), defendants did not dispute that they had access to all but one of plaintiff’s
16 copyrighted fabric design patters. *Id.* at *1. Indeed, *L.A. Printex* denied *plaintiff’s*
17 motion for summary judgment, rejecting its contention that a declaration from the
18 head of its sales department established access. *Id.* at *4-5.

19 Here, unlike the cases Pringle relies upon, not only do Defendants dispute
20 access, but Pringle has come forward with absolutely no probative evidence that
21 they had access to his music—through a third-party intermediary or otherwise.

22 **C. The Vague and Unsupported Declaration of Pringle’s Brother Does**
23 **Not Create a Genuine Issue of Fact on Access**

24 Recognizing that his own self-serving testimony is insufficient to raise an
25 issue of fact, Pringle has enlisted the help of his brother, Jeffrey Pringle, to conjure

26 ⁹ Moreover, *Bethea* actually *granted* defendants’ summary judgment motion on
27 grounds of independent creation and no substantial similarity, rendering any
28 discussion of access mere *dicta*. *Id.* at *15-16.

1 up some way that the Defendants could have had access to his song. However,
2 “[c]onclusory and speculative testimony” from the plaintiff’s brother is “insufficient
3 to raise genuine issues of fact to defeat summary judgment.” *Estate of Parker ex*
4 *rel. Parker v. AIG Life Ins.*, 317 F. Supp. 2d 1167, 1175 (C.D. Cal. 2004).¹⁰

5 Moreover, aside from vague assertions about *unidentified* songs that *other* people
6 may have played on the radio in other countries (J. Pringle Decl. [Doc. 190] ¶¶ 3-6),
7 the only concrete statement Jeffrey Pringle makes about distribution of “Take a
8 Dive” (Dance Version)—the only registered work at issue¹¹—is that:

9 During the period August 1999 to June 2002 while performing as
10 a professional and part-time DJ and spoken-word radio host, I
11 personally played Bryan Pringle’s music, including his song ‘Take a
12 Dive’ (Dance Version) during numerous programs on CHRY radio
13 during my shows. These shows were broadcast live in Toronto, Canada
14 and via the Internet. (J. Pringle Decl. [Doc. 190] ¶ 7.)¹²

14 Even accepting that statement as true, it falls far short of establishing access
15 through widespread dissemination. Radio station CHRY is a “community-based

16 ¹⁰ For the reasons set forth in Defendants’ Evidentiary Objections to the Declaration
17 of Jeffrey Pringle, submitted herewith, the entire declaration should be stricken
18 because Jeffrey Pringle was never disclosed in Pringle’s disclosures as required by
19 Rule 26(a) (Dickstein Decl., Ex. W), and paragraphs 3-9 should be stricken as
inadmissible and therefore not a proper basis to oppose summary judgment.

20 ¹¹ Jeffrey Pringle’s claim that Pringle “delivered his Demo CDs which included
21 songs that contained the ‘guitar twang sequence’ used in his song ‘Take a Dive’
22 (Dance Version), to several DJs at various night clubs in Paris” (J. Pringle Decl.
23 [190] ¶ 9), is immaterial, as Pringle has neither registered those unidentified songs
24 with the Copyright Office nor produced them in discovery. *See supra*, 3. Moreover,
25 that statement is inadmissible because Jeffrey Pringle does not explain how he can
possibly “attest to the fact” that the Pringle’s Demo CDs actually contained those
songs, when Pringle admitted distributing demo CDs with any number of songs, or
no songs at all. (Pringle Tr. [Doc. 161-5] 349:23-353:9.)

26 ¹² Jeffrey Pringle’s sudden recollection of events that allegedly took place decades
27 ago is remarkable given that he “lost a substantial amount of his memory” and that
28 when asked about distributing Pringle’s music in Paris, he responded “‘you know,
my memory is bad. I can’t recall.’” (Dickstein Decl., Ex. R, Pringle Tr. 96-97.)

1 campus station” located in Toronto, Canada.¹³ Guetta and Riesterer live in France,
2 and there is no evidence that either of them have ever been to Toronto. *See Repp v.*
3 *Webber*, 947 F. Supp. 105, 115 (S.D.N.Y. 1996) (no inference of access from radio
4 airplay in Connecticut and Virginia, when defendant “lived in Vienna, Austria at the
5 time of these broadcasts, and no evidence was introduced at trial that [defendant]
6 was near either of these cities on the dates these stations played [plaintiff’s song]”).

7 Airplay on one obscure campus radio station is insufficient to prove access by
8 widespread dissemination. *See Maharam v. Patterson*, 2007 WL 2702195, at *1
9 (S.D.N.Y. Sept. 17, 2007) (no “widespread dissemination” even where “radio
10 stations played her songs during the Christmas holiday season, which received
11 attention in the print media”); *cf. L.A. Printex Indus. v. William Carter Co.*, 2010
12 WL 5174378, at *3 (C.D. Cal. July 2, 2010) (“In *Three Boys*, the Ninth Circuit
13 found that substantial evidence supported a jury’s finding of access where the
14 copyrighted song enjoyed significant radio airplay over 20 years.”); *Acuff–Rose*
15 *Music, Inc. v. Jostens, Inc.*, 988 F. Supp. 289, 293 (S.D.N.Y. 1997) (widespread
16 dissemination where plaintiff’s song achieved a “top five ranking as a country hit”).

17 Jeffrey Pringle also fails to explain how many of these “numerous” programs
18 where broadcast on the Internet, where they were available on the Internet, how
19 prominent the website was, and when they were broadcast during this three-year
20 span seven years before the release of “I Gotta Feeling”. Such vague and
21 conclusory testimony is insufficient to create an issue of fact, especially where
22 access must be supported by “significant, affirmative and probative evidence,”
23 *Gable v. Nat’l Broad Co.*, 727 F. Supp. 2d 815, 824 (C.D. Cal. 2010), and “may not
24 be inferred through mere ‘speculation or conjecture.’” *Metro-Goldwyn-Mayer, Inc.*
25 *v. Am. Honda Motor Co.*, 900 F. Supp. 1287, 1297 (C.D. Cal. 1995).

27 ¹³http://www.chry.fm/index.php?option=com_content&task=blogsection&id=8&Itemid=46.
28

1 **D. Defendants’ Evidence of Independent Creation Undercuts Any**
2 **Inference of Access Based on “Striking Similarity”**

3 As a last ditch attempt to avoid summary judgment, Pringle argues that a jury
4 could find that Defendants copied “Take a Dive” (Dance Version) without any
5 evidence that they had access to it, merely because Pringle claims that the three-
6 chord guitar twang sequence in “Take a Dive” (Dance Version) is “strikingly
7 similar” to the guitar twang in “I Gotta Feeling.” (Pl.’s Opp. 20.) Neither the facts
8 nor the law support Pringle’s argument.

9 Striking similarity gives rise to an inference of access only where there is no
10 “possibility of independent creation,” *Jorgensen v. Careers BMG Music Pub.*, 2002
11 WL 1492123, at *5 (S.D.N.Y. July 11, 2002) (emphasis added), and where “the *only*
12 *reasonable explanation* for such a great degree of similarity is that the later . . . was
13 copied from the first.” *Cox v. Abrams*, 1997 WL 251532, at *5 (S.D.N.Y. May 14,
14 1997) (emphasis added); *see also Seals-McClellan v. Dreamworks, Inc.*, 120 F.
15 App’x 3, 4 (9th Cir. 2004) (“[t]o show a striking similarity between works, a
16 plaintiff must produce evidence that the accused work *could not possibly* have been
17 the result of independent creation.”) (citations omitted) (emphasis in original);
18 *Gaste v. Kaiserman*, 863 F.2d 1061, 1068 (2d Cir. 1988) (“A plaintiff has not
19 proved striking similarity sufficient to sustain a finding of copying if the evidence as
20 a whole does not preclude *any reasonable possibility* of independent creation.”)
21 (emphasis added).

22 Pringle’s expert musicologist admits that copying is *not* the only explanation
23 for any similarity between “I Gotta Feeling” and “Take a Dive” (Dance Version),
24 and thus there is no inference of access. (Dickstein Decl., Ex. U, Norris Tr. 216.)

25 Moreover, Defendants have proffered evidence that raises far more than a
26 mere *possibility* of independent creation. As Professor Geluso explains, Frederic
27 Riesterer’s creation files contain the separate, unprocessed notes that comprise the
28 guitar twang sequence, while Pringle’s NRG “creation” file contains only the pre-

1 processed fused chords, which are indicative of sampling from another source.
2 (Geluso Decl. [Doc. 162] ¶¶ 15-21, 25-28.) Rather than offer a response from his
3 sound recording expert, Pringle relies on his own speculative arguments (Pringle
4 Decl. [Doc. 198]) as well as the misguided arguments of a computer programmer
5 who has no experience examining sound recordings (Frederiksen-Cross Decl. [Doc.
6 189]). Professor Geluso has thoroughly addressed all of Pringle and Frederiksen-
7 Cross’s arguments and shown that they hold no water. (*See* Geluso Decl.)

8 None of the alleged “inconsistencies” in Riesterer’s music creation files (Pl.’s
9 Opp. 14-15) are more than quibbles, and none undercut Defendants’ evidence that
10 he independently created the guitar twang sequence. First, Professor Geluso
11 explains that none of the files in Riesterer’s creation files with dates before or after
12 the release of “I Gotta Feeling” are the guitar twang sequence itself, but rather
13 miscellaneous drum samples which Riesterer likely imported from previous projects
14 or later opened and used for other projects. (Geluso Decl. ¶¶ 49-51; Riesterer Decl.
15 ¶ 9.) Second, the reference in Riesterer’s creation files to an audio device that
16 Riesterer acquired after creating “I Gotta Feeling” is merely the result of the Logic
17 data file logging a device that was connected to Riesterer’s computer when he
18 opened the Logic session in 2011 before producing it in discovery. (Geluso Decl. ¶
19 52; Riesterer Decl. ¶ 6.) Third, the reference in Riesterer’s Logic data file to
20 “Litige” and “OK” was not some devious indication of tampering, but merely
21 Riesterer’s way of noting disagreements he had with Guetta while creating the
22 music for “I Gotta Feeling.” (Riesterer Decl. ¶ 7.)

23 At the very least, Defendants have raised the “possibility” of independent
24 creation, which negates any inference of access based on claimed “striking
25 similarity.” *See Seals-McClellan*, 120 F. App’x at 4; *Gaste*, 863 F.2d at 1068. And
26 because Pringle has no probative evidence of access, his claim fails.

27 **III. Pringle Cannot Prove that He Owns a Valid Copyright in “Take a Dive”**
28 **(Dance Version)**

1 Pringle does not dispute that he has the burden of proving that he owns a valid
2 copyright to the guitar twang sequence (the only material added in “Take a Dive”
3 (Dance Version)), including that (i) he independently created the guitar twang
4 sequence, and (ii) that it constitutes sufficiently original expression.¹⁴ Pringle
5 cannot carry either burden.

6 **A. Pringle Cannot Prove That He Independently Created “Take a Dive”**
7 **(Dance Version)**

8 In denying Pringle’s preliminary injunction motion, the Court discounted
9 Pringle’s “vague” statement that he “‘add[ed]’ the guitar twang sequence using a
10 ‘guitar twang instrument,’ and that he ‘modeled’ the sequence after the chorus in the
11 original version.” (Doc. 99 at 7.)

12 Remarkably, Pringle again states only that he “recorded a ‘guitar twang’
13 sound instrument” and cites his TRO declaration which is essentially identical to his
14 deficient PI declaration. (Pl.’s Opp. 13-14; Pl.’s SAF ¶ 121) (citing Pringle TRO
15 Decl. ¶ 4.) Even Pringle’s latest declaration merely speculates that he “*most likely*
16 used [a] stereo spread effect”, “*may have* recorded the ‘guitar twang sequence’ in
17 one recording”, or “*may have* simply used a fully processed original guitar sound”
18 (Pringle Decl. [Doc. 198] ¶¶ 58, 154, 225(iv)) (emphasis added). Indeed, Pringle’s
19 admission that the guitar twang sounds “were obtained from a music sample library”
20 (Pl.’s Opp. 14) means that he did not create those sounds, and that any sound
21 recording copyright belongs to the creator of the music sample library, not Pringle.

22 In addition, Pringle no longer claims that the guitar twang sequence of notes
23 was derived from the original version of “Take a Dive”, but that it was “based upon”
24 another song titled “Faith”. (Pringle Decl. ¶ 133.) But the guitar twang sequence is

25
26 ¹⁴ 17 U.S.C. § 410(c) (“the certificate of a registration made *before or within five*
27 *years after first publication of the work* shall constitute prima facie evidence of the
28 validity of the copyright and of the facts stated in the certificate.” (emphasis
added)); see *Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068, 1075-76 (9th Cir. 2000).

1 not present in “Faith” (Geluso Decl. ¶ 31), and when Pringle inserted the guitar
2 twang sequence into a new version of “Faith” for his opposition, he had to change
3 the pitch and tempo from how it appears in “Take a Dive” (Dance Version). (*Id.* at
4 ¶ 31.) Thus, rather than offer actual evidence of independent creation, Pringle
5 apparently instead wants the Court to simply accept his claim on “Faith”.

6 **B. Pringle Can Not Show That The Guitar Twang Sequence is a**
7 **Copyrightable Musical Composition**

8 The Copyright Office rejected Pringle’s application to register a composition
9 copyright in “Take a Dive” (Dance Version) because the guitar twang sequence
10 “does not contain enough original musical authorship to be copyrightable”
11 (Dickstein Decl., Ex. H [Doc.161-8] 33), and Defendants provided authority that
12 short musical phrases consisting of only a few notes or chords are not copyrightable
13 (Def.’s Br. [Doc. 159-2] 16-17.) In response, Pringle merely cites general principles
14 of law, but provides no authority or analysis that the guitar twang sequence, which
15 Pringle admits is “not musically complex” and contains only a few repeating notes,
16 is protectable. (Pl.’s Opp. 10-11, 16; Pringle Decl. [Doc. 198] ¶ 55.)

17 Pringle also argues that “[b]ecause Pringle holds a copyright for his song
18 ‘Take a Dive,’ the derivative is eligible for protection as a derivative because it adds
19 original pieces.” (*Id.* at 11.) But the only “original pieces” added to create the
20 Dance Version, and the only material Pringle claims Defendants copied, is the guitar
21 twang sequence—yet he does not explain why that sequence is protectable, and his
22 claim therefore fails.¹⁵

24 ¹⁵ To the extent Pringle contends the guitar twang sequence is protectable merely
25 because the *other parts* of “Take a Dive” (Dance Version) were also in the original
26 version, he is incorrect. See 17 U.S.C. § 103(b); 2 Nimmer on Copyright §
27 7.16[B][5][b] (“[If] the materials copied from the derivative work consist only of the
28 newly added components ... registration of the underlying work alone cannot
suffice to support a complaint against copying of only those separate elements that
went into creation of the derivative work.”); *Johnson v. Gordon*, 409 F.3d 12, 20

1 **C. Pringle Has Not Satisfied the *Bona Fide* Deposit Copy Requirement**

2 Pringle does not dispute that his NRG file contains only separate instrumental
3 files, and that he had to load those files into specific slots in his ASR-10 to create
4 the mixed MP3 he submitted to the Copyright Office. (Pringle Decl. [Doc. 198] ¶
5 159.) As Professor Geluso explains, “it is possible to load the instrument files into
6 the ASR-10 track slots in any number of different combinations, each of which
7 would result in a different mixed sound recording.” (Geluso Decl. ¶ 46.)¹⁶ Re-
8 constructing “Take a Dive” (Dance Version) from the NRG file is thus not a matter
9 of difficulty, but of choice. Other than Pringle’s alleged recollection, there is no
10 evidence that the MP3 Pringle created and deposited in 2010 actually matches the
11 supposed original “Take a Dive” (Dance Version) allegedly created in 1999.

12 Pringle’s November 2010 submission to the Copyright Office was thus not a *bona*
13 *fide* copy of “Take a Dive” (Dance Version). (Def.’s Br. [Doc. 159-2] 20-21.)

14 None of the cases Pringle cites stand for his proposition that the bona fide
15 copy requirement can be met “without actually having a copy of the original work
16 and even by recreating the original work from scratch.” (Pl.’s Opp. 17) Indeed,
17 they hold the opposite. *See Coles v. Wonder*, 283 F.3d 798, 802 (6th Cir. 2002)
18 (“Since Coles failed to retain a copy of his 1982 recording, he could not satisfy the
19 deposit requirement of § 408.”); *Kodadek v. MTV Networks, Inc.*, 152 F.3d 1209
20 (9th Cir. 1998) (no claim when artist did not retain original copies of drawing).

21 Pringle’s reliance on *Three Boys Music Corp. v. Bolton*, 212 F.3d 477 (9th
22 Cir. 2000) and *Shady Records, Inc. v. Source Enters.*, 2005 WL 14920 (S.D.N.Y.
23 Jan. 3, 2005) is misplaced. *Shady Records* stated that “copies made from bona fide

24
25 (1st Cir. 2005) (“copyright protection [extends] to those elements of the plaintiff’s
26 long version [of his song] that are derived directly from the registered short version,
27 but not to those elements contained exclusively in the unregistered long version.”)

28 ¹⁶ Pringle appears to acknowledge this when he says the instrument files in his NRG
file must be loaded “properly” into the ASR-10 in order to hear “Take a Dive”
(Dance Version). (*See, e.g.*, Pringle Decl. [Doc. 198] ¶¶ 159, 165, 170.)

1 *copies of the original* will satisfy the deposit copy requirement.” *Id.* at *14
2 (emphasis added). Here, there is no evidence showing what the “original” version
3 of “Take a Dive” (Dance Version) sounded like¹⁷—indeed, there is no evidence it
4 ever *existed* before this lawsuit—and thus no way for Pringle to prove that the mix
5 he deposited in 2010 was a copy “made from bona fide copies of the original.” And
6 the statement from *Harris v. Emus Records Corp.*, 734 F.2d 1329, 1335 (9th Cir.
7 1984) quoted in *Three Boys Music* at 486 dealt with a mistaken author identification
8 in the registration application, not the sufficiency of a deposit copy.

9 **IV. Pringle’s Musicologists Concede that the Original Version of “Take a
10 Dive” and “I Gotta Feeling” Are Not Substantially Similar**

11 Pringle continues to claim that “I Gotta Feeling” infringes the original version
12 of the musical composition “Take a Dive”—even though it does not contain the
13 guitar twang sequence. Defendants’ expert musicologist, Dr. Lawrence Ferrara
14 (whose deposition Pringle chose not to take) has shown that there are fundamental
15 differences between the two works, and that any similarities that do exist are nothing
16 more than generic musical building blocks common to many works of popular
17 music—such as 4/4 meter (i.e. “common time”), a repeating 8-bar chorus, a “dance”
18 tempo, and the Mixolydian mode. (Ferrara Decl. [Doc. 172] ¶¶ 4-5, 65, 91-97;
19 Dickstein Decl., Ex. T (Ferrara Rebuttal Report ¶¶ 3-5, 45-49)).

20 Indeed, Pringle’s own musicologists *agree with Dr. Ferrara’s conclusions*.
21 Dr. Norris’ Declaration expressly limits its finding of substantial similarity to “Take
22 a Dive” (Dance Version). (Norris Decl. [Doc. 192] ¶ 5). Norris testified that (i) any
23 similarities are not original to “Take a Dive” and therefore not protectable,¹⁸ and (ii)

24 _____
25 ¹⁷ Pringle recognizes this when he argues (incorrectly) that the bona fide copy
26 requirement can be met “without actually having a copy of [his] original work and
27 even by recreating the original work from scratch.” (Pl.’s Opp. 17.)

28 ¹⁸ (Dickstein Decl., Ex. U Norris Tr. 249:24-250:16) (“Q. So you acknowledge that
none of these [common, unprotectable] elements . . . is original to ‘Take A Dive’
original version? A. They are not original. Q. And the same is true of ‘Take A

1 the similarities that do exist are outweighed by the differences.¹⁹ Dr. Stewart
2 similarly acknowledged that any alleged similarities are not original to “Take a
3 Dive,” and are thus not protectable. (Dickstein Decl., Ex. V, Stewart Tr. 281-285).

4 Nor can Pringle argue that these otherwise unprotectable similarities are
5 protectable in combination. Simple aggregation of otherwise unprotectable
6 elements does not result in original protectable expression, unless they are combined
7 in a unique and expressive way. *See, e.g., Batts v. Adams*, CV 10-8123-JFW (RZX)
8 (C.D. Cal. Oct. 21, 2011 Order at 4) (“the party claiming infringement may place *no*
9 reliance upon any similarity in expression resulting from unprotectable elements”)
10 (collecting cases); *Satava v. Lowry*, 323 F.3d 805 (9th Cir. 2003); *Onofrio v.*
11 *Reznor*, 208 F.3d 222 (9th Cir. 2000). Neither of Pringle’s experts was willing to
12 claim that Pringle’s combination of unprotectable elements was itself original.
13 (Norris Tr. 250:17-251:9; Stewart Tr. 284:20-285:16.)²⁰

14 Pringle cannot argue that “dueling” expert reports somehow preclude
15 summary judgment—primarily because his experts *agree with Dr. Ferrara’s*
16 *conclusions*. Moreover, *Batts* involved “competing” expert reports from two of the
17 same experts involved here, yet held that “the mere existence of dueling expert
18 reports does not necessarily create a triable issue of fact.” (*Id.* at 6 n.6) (citing
19 *Gable v. Nat’l Broad. Co.*, 727 F. Supp. 2d 815, 836-37 (C.D. Cal. 2010)); *see also*
20

21
22 Dive’ derivative version? A. Yes. Q. So in your opinion all of those elements are
23 nonprotectable for both songs? A. Yes.”)

24 ¹⁹ *Id.* (Norris Tr. 80:22-81:3 (“Q. Would you not agree that the differences between
25 the original version of ‘Take A Dive’ and ‘I Gotta Feeling’ outweigh any
26 similarities that those two works might share? A. Yes.”))

27 ²⁰ Pringle’s claims for “Take a Dive” original version also fail because he fails to
28 establish any possibility of access to that work. Indeed, Pringle brother’s
29 declaration, which was designed to bolster Pringle’s “evidence” of access, makes no
30 mention whatsoever of the original version of “Take a Dive.” (J. Pringle Decl.
31 [Doc. 190]).

1 *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1180 (9th Cir. 2003) (summary judgment
2 for defendant despite competing expert reports).

3 **V. Pringle’s Spoliation of His Hard Drives Mandates Dismissal of His Claim**

4 Even assuming Pringle’s infringement claims were not doomed on their
5 merits, summary judgment should nevertheless be granted based on Pringle’s
6 admitted destruction of two computer hard drives while this lawsuit was pending.
7 Because those hard drives likely contained evidence critical to Defendants’ case,
8 dismissal is the only appropriate remedy for Pringle’s brazen discovery misconduct.

9 **A. Pringle Clearly Had a Duty to Preserve His Computer Hard Drives**

10 Pringle acknowledges that a party has a duty to preserve evidence when he
11 “has some notice that the evidence is potentially relevant to litigation” and that the
12 preservation obligation applies to computer equipment when the plaintiff is “put on
13 notice by the defendants to maintain his computer” (Pl.’s Opp. 24). Pringle
14 contends he had no notice that his computer hard drives were even potentially
15 relevant when he disposed of them in January 2011 and August 2011. That
16 argument completely ignores Defendants *repeated demands that Pringle preserve*
17 *all of his computer systems* and produce them for inspection:

- 18 • July 23, 2010: Defendants question “the authenticity of Mr. Pringle’s
19 representations regarding the dates of his computer files” because there are “easy
20 ways for Mr. Pringle to modify the Creation, Accessed and Modified dates of his
21 computer files” and demand that Pringle “preserve all computer records”
22 including “have an independent forensic computer person image his entire hard
drive etc. to capture and preserve everything on his system[.]” (Dickstein Decl.,
Ex. K [Doc. 161-11].)
- 23 • July 24, 2010: Defendants re-send their preservation demands in a “formal
24 correspondence.” (Dickstein Decl., Ex. J [Doc. 161-10].)
- 25 • July 28, 2010: Defendants reiterate their “request for preservation of evidence of
26 Mr. Pringle’s computer files” because “there are serious issues of whether that
date [of Pringle’s NRG file] is actual or fabricated.” (Dickstein Decl., Ex. K.)
- 27 • November 23, 2010: Defendants file an expert report explaining that “a common
28 method for fraudulently ‘backdating’ the date and time stamps for files . . . can

1 be as simple as changing the clock on your computer” and that it would therefore
2 “be vital to review the original computer which managed the burning of the CD
3 in the first instance.” (Laykin Decl. [Doc. 22-2] ¶ 4(i),(o).)

- 4 • February 14, 2011: Defendants demand inspection of Pringle’s computer
5 equipment used from 2009 to the present. (Dickstein Decl., Ex. N. [Doc. 161-
6 14] at 3.)
- 7 • February 18, 2011: Defendants inform the Court that “Mr. Pringle’s ESI will
8 likely play a crucial role in discovery in this action, as it goes directly to the
9 threshold issues of Plaintiff’s ownership of a valid copyright, including the dates
10 and manner of Plaintiff’s alleged creation of ‘Take a Dive’ and ‘Take a Dive’
11 Derivative, and the validity of Plaintiff’s asserted copyright registrations of those
12 works.” [Doc. 110 at 7:21-25.]
- 13 • July 8, 2011: Pringle acknowledges that “[t]o the extent that you seek metadata
14 associated with the creation of any sound recording by Mr. Pringle, that would
15 require an inspection of Mr. Pringle’s computer hard drive, which we have
16 offered to provide for inspection at the offices of our computer expert.”
17 (Dickstein Decl., Ex. M [Doc. 161-13] at 21.)
- 18 • July 27, 2011: Defendants write to Pringle to arrange inspection of “Mr.
19 Pringle’s computer hard drive(s) that he has used from 2009 to the present, and
20 all backups thereof.” (Dickstein Decl., Ex. F [Doc. 161-6] at 13.)

21 All of this took place *before* Pringle disposed of his 2011 hard drive in August 2011,
22 and most took place *before* he disposed of his 2010 hard drive in January 2011—as
23 Defendants learned later in August 2011. (Dickstein Decl., Ex. F at 9-10, Ex. E,
24 Pringle Tr. 31:4-35:2, 341:21-342:20.)²¹ There is thus no question that Pringle had a
25 duty to preserve his computer equipment at the time he disposed of his hard drives.²²

26 ²¹ Pringle’s accusations that Defendant Riesterer destroyed evidence is a
27 smokescreen designed to distract the Court from Pringle’s own blatant discovery
28 abuses. (Pl.’s Opp. 23.) Although Pringle asserts that Defendant Riesterer “*recently*
dispos[ed] of the computer containing his creation files for ‘I Gotta Feeling’”,
Riesterer—unlike Pringle—gave away his outdated computer in April 2010, long
before there was any anticipation of litigation. (Riesterer Decl. ¶ 5.) Riesterer has
produced the music creation files for “I Gotta Feeling” that he had saved to his
external hard drives. (*Id.* at ¶ 5.)

²² The fact that Pringle claims to have been experiencing technical difficulties with
his hard drives when he disposed of them is obviously no defense. *See Kvitka v.*

1 Although Pringle cites *Leon v. IDX Sys., Corp.*, 2004 WL 5571412, at *3
2 (W.D. Wash. Sept. 30, 2004), that case supports Defendants’ position. The court in
3 *Leon* found that the preservation obligation was triggered based on just two letters
4 written to plaintiff’s counsel over the span of ten days, *id.* at *2, while Defendants
5 here sent *numerous* demands for preservation and inspection of Pringle’s current
6 computer systems over *more than a year*. Pringle’s preservation obligation was
7 thus even clearer here than it was in *Leon*.

8 **B. Pringle’s Hard Drives Were, At The Very, Least Potentially Relevant**

9 Pringle tries to convince the Court that none of the electronic data on his hard
10 drives could possibly have contained any relevant evidence. (Pl.’s Opp. 24.)
11 Although Pringle is fond of repeating his mantra that he created “Take a Dive”
12 (Dance Version) in 1999, Defendants were entitled to test Pringle’s story through
13 discovery—especially considering that Pringle did not register that song until
14 November 2010, and that there is no evidence it ever existed until this lawsuit was
15 filed. Defendants therefore sought discovery as to whether Pringle had, in fact,
16 obtained the guitar twang sequence in 2009 or 2010 after “I Gotta Feeling” was
17 released and the guitar twang stem made available on the Internet, and then back-
18 dated the NRG file to make it seem that he had created “Take a Dive” (Dance
19 Version) years earlier.²³

22 *Puffin Co.*, 2009 U.S. Dist. Lexis 11214 (M.D. Pa. Feb. 13, 2009) (dismissing
23 plaintiff’s lawsuit because he threw away an “old” laptop that might have contained
24 recoverable relevant e-mails, even though the plaintiff was having technical
25 problems). Indeed, Pringle’s own computer expert acknowledged that a hard drive
26 that had been requested in litigation should be preserved, even if it was not
functioning properly in the user’s computer, as data could nevertheless be

27 ²³ Pringle’s counsel and experts were fully aware of this possibility from the
28 beginning of the case. Mr. Gallant testified that when he was initially retained in the
summer of 2010, Pringle’s counsel asked him “if by simply setting the [computer]

1 Pringle’s own computer experts acknowledge that computer files and CDs
2 can easily be back-dated by simply changing the computer’s clock before creating or
3 saving the file, which would explain the 1999 dates in Pringle’s NRG disc. (*See*
4 Dickstein Decl., Ex. Z, Frederiksen-Cross Tr. 55:7-22 (“By backdating the computer
5 date it’s possible to cause a file to be created or modified with a date that reflects
6 whatever – [t]he date is always dependent on the operating system date . . . There is
7 also specialized software that can be used to adjust almost any form of metadata.”);
8 *id.* at Tr. 95:15-96:1, 140:19-141:8; Dickstein Decl., Ex. Y, Gallant Tr. 204:23-
9 205:2 (“Q. [T]he file creation dates that you could see, are those dates that could be
10 modified by somebody adjusting the clock on their computer? A. Theoretically,
11 yes.”); *id.* at 198-200, 215, 274-276.)

12 Evidence of such back-dating could be found on the hard drive of Pringle’s
13 computer. Pringle’s own computer expert testified that, had he been asked to
14 determine whether Pringle created the NRG file after “I Gotta Feeling” was
15 released, one thing he would want to examine would be Pringle’s computers from
16 2009 and 2010. (Gallant Tr. 27:23-29:7, 55:18-57:4, 221:17-222:11; Frederiksen-
17 Cross Tr. 39:9-20, 109:3-110:21.)²⁴ There is no dispute that Pringle’s 2009 and
18 2010 computer hard drives were at least potentially relevant.²⁵

19 While Pringle asserts that the hard drive he used in 2009 was replaced before
20 he claims to have learned of “I Gotta Feeling”, and that his 2011 hard drive

21 clock back could the files that had already been created be – reflect the change.”
22 (Dickstein Decl., Ex. Y, Gallant Tr. 54:1-11, 254:4-256:10.)

23 ²⁴ And during Mr. Gallant’s investigation as to whether Pringle’s NRG file could
24 have been back-dated, he was told on January 3, 2011 that “[l]inked files and
25 metadata entries on the system originally creating the CD are . . . *obvious choices* to
26 the [sic] consider” (Gallant Tr. 219:19-21) (emphasis added), which indicates that
Pringle’s computer systems would contain evidence of the NRG file’s true date.

27 ²⁵ Although Pringle claims that Defendants have produced no evidence that he
28 *actually* back-dated his NRG file (Pl.’s Opp. 22), that is because such evidence
would be on the computer hard drives that Pringle destroyed.

1 allegedly contained no evidence of “I Gotta Feeling,”^{26,27} Pringle glaringly fails to
2 mention the hard drive he used in 2010. (Pl.’s Opp. 24.) Yet it was that 2010 hard
3 drive that was in use between February 2010 when Pringle claims to have first
4 learned of “I Gotta Feeling” and October 2010 when Pringle’s NRG file containing
5 “Take a Dive” (Dance Version) mysteriously first surfaced.

6 Pringle’s 2010 hard drive, which he disposed of in January 2011, contained
7 other relevant evidence as well. In 2010 Pringle downloaded “I Gotta Feeling” re-
8 mixes that had the guitar twang sequence in the clear (Dickstein Decl., Ex. E
9 (Pringle Tr. [Doc. 161-5] at 190:6-191:23)), which could further confirm that
10 Pringle copied from Defendants, rather than the other way around. (Geluso Decl.
11 [Doc. 162] at ¶ 15 n.8.)²⁸ The information on Mr. Pringle’s 2010 hard drive was
12 thus, at the very least, potentially relevant. And Pringle “can hardly assert any
13 presumption of irrelevance as to the destroyed documents” because “the relevance
14 of destroyed documents cannot be clearly ascertained because the documents no
15 longer exist[.]” *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 959 (9th Cir. 2006).²⁹

18 ²⁶ Pringle asserts that “the only evidence before this Court is that the 2011 hard drive
19 did not contain a copy of ‘I Gotta Feeling’ [and thus] the 2011 hard drive was not
20 potentially relevant” (Pl.’s Opp. 24), but he does not identify what “evidence” he
21 refers to. In addition, this is essentially a recognition that his 2010 hard drive, which
22 *did* contain copies of “I Gotta Feeling” *was* at potentially relevant.

22 ²⁷ Pringle asserts, without support, that he gave a “copy of a hard drive used by
23 Pringle in 2011” to Mr. Gallant in August 2011 (Pl.’s Opp. 22), yet Mr. Gallant
24 testified that Mr. Pringle in fact gave him a DVD which could not have been a
25 forensic backup of Pringle’s entire hard drive. (Gallant Tr. 36:12-23, 182-184.)

25 ²⁸ Mr. Gallant acknowledged that “[a]ny time a file is downloaded, it lends the
26 possibility that remnant data exists on the computer that was used to download the
27 file.” (Gallant Tr. 241:2-14, 259:2-259:6)

27 ²⁹ When asked whether he examined Mr. Pringle’s hard drives for evidence of back-
28 dating, Mr. Gallant acknowledged “It’s hard to analyze something that you do not
have.” (Gallant Tr. 128:24-129:13.)

1 **C. Pringle’s Bad Faith Destruction of Critical Evidence Mandates**
2 **Dismissal of His Claim**

3 Recognizing that he destroyed critical evidence while the lawsuit was
4 pending, Pringle argues that dispositive sanctions would nevertheless be
5 inappropriate. Pringle’s “argument” consists of only three lines of conclusory
6 assertions. (Pl.’s Opp. 25.) Not only is Pringle’s intentional spoliation an ample
7 basis for dismissal of his claim, it is the only sanction that will remedy the severe
8 prejudice to Defendants.

9 Pringle recognizes that dismissal is an appropriate sanction when potentially
10 relevant evidence is destroyed with “willfulness, fault or bad faith.” (Pl.’s Opp. 25.)
11 The Ninth Circuit has explained that “[w]illful spoliation occurs when a party has
12 clear notice of an obligation to preserve evidence and proceeds to intentionally
13 destroy evidence in spite of its obligation not to.” *Leon v. IDX Sys. Corp.*, 2004 WL
14 5571412, at *4 (W.D. Wash. Sept. 30, 2004).

15 Given Defendants’ torrent of preservation demands, *supra* at 18-19, there is
16 no question that Pringle had clear notice that his computer hard drives were relevant
17 to the litigation.³⁰ It is hard to imagine how Defendants’ preservation notices could

18
19 ³⁰ Pringle apparently intends to feign ignorance of Defendants’ repeated
20 preservation demands by claiming that those demands were never communicated to
21 him by counsel. (*See* Frederiksen-Cross Decl. [Doc. 189] ¶ 40) (“Based on my
22 conversation with Mr. Dickie, counsel for Mr. Pringle, Mr. Pringle had not been
23 advised of Defendants’ request to inspect his hard drive at the time he opened the
24 warranty claim [on August 1, 2011] and sent his hard disk to Western Digital for
25 repair or replacement.”) Not only is that argument troubling, given that counsel’s
26 failure take reasonable steps to preserve potentially relevant evidence is itself
27 sanctionable—*see Qualcomm Inc. v. Broadcom Corp.*, 2008 U.S. Dist. Lexis 911,
28 *31 (S.D. Cal. Jan. 7, 2008) (“Attorneys must take responsibility for ensuring that
their clients conduct a comprehensive and appropriate document search.”); *Zubulake*
v. UBS Warburg LLC, 229 F.R.D. 422, 432 (S.D.N.Y. 2004) (counsel must “oversee
compliance with the litigation hold, monitoring the party’s efforts to retain and
produce relevant documents”); (*Frederiksen-Cross Tr.* 296:10-298:20) (“I do firmly
believe that [Pringle’s] counsel should have advised him on first contact to maintain

1 have been any clearer. Defendants’ preservation demands came even earlier in the
2 litigation and with more frequency than in *Leon* where the Ninth Circuit affirmed
3 the imposition of terminating sanctions. Moreover, although Defendants had
4 requested inspection of Pringle’s *entire* drives, he disposed of those drives without
5 backing them up, including the temporary Internet files, program files and system
6 files, which is where evidence of his downloading of “I Gotta Feeling” and back-
7 dating of his NRG file would be found. (Dickstein Decl., Ex. E [Doc. 161-5]
8 Pringle Tr. 286; Frederiksen-Cross Tr. 41:15-42:2.)

9 Defendants have been severely prejudiced by Pringle’s destruction of his
10 computer hard drives, as it prevented Defendants from discovering evidence that
11 goes to the *heart of their defenses*. As discussed above, Pringle’s spoliation has
12 prevented Defendants from discovering evidence that would likely show that, rather
13 than Defendants having copied from Pringle as he claims, Pringle copied the guitar
14 twang sequence from the “I Gotta Feeling” guitar twang stem that was available on
15 Beatport.com and elsewhere, inserted portions of that guitar twang stem into “Take
16 a Dive” to create “Take a Dive” (Dance Version),³¹ and then used his computer to
17 create a back-dated NRG file to make it seem as though he created the Dance
18 Version before “I Gotta Feeling” was released. If Defendants were forced to go to
19

20 and preserve everything that he had.”)—it is also legally unsupportable, as a
21 communication to counsel necessarily functions as a communication to the client.
22 *See Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 92 (1990) (communication to
23 counsel is imputed to client, because to “read the term ‘receipt’ to mean only ‘actual
24 receipt by the claimant’ would render the practice of notification through counsel a
25 meaningless exercise”). To permit Pringle to argue otherwise would be to permit
any litigant to destroy evidence, fire his attorneys, and then avoid the consequences
of his actions by claiming ignorance.

26 ³¹ Pringle has demonstrated the ease with which he is able to modify and insert the
27 guitar twang sequence into his own earlier recordings. (Pringle Decl. [Doc. 198] ¶
28 135) (stating that Pringle added the guitar twang sequence to another song that he
created in 1998 named “Faith”).

1 trial on Pringle’s infringement claim without that evidence, they would effectively
2 be forced to fight with both hands tied behind their backs.

3 **VI. Pringle’s Attempt to Exclude Certain of Defendants’ Declarants is a Red-**
4 **Herring and Lacks Merit**

5 Defendants were not required to disclose declarants offered to impeach
6 Pringle’s claims. *See* Fed. R. Civ. P. 26(a)(1)(A)(i). Pringle’s brother’s declaration,
7 however, is offered (unsuccessfully) to support Pringle’s affirmative claim that
8 Defendants had access to his song. But Jeffrey Pringle was not included in Pringle’s
9 disclosures, and Pringle refused to provide his brother’s contact information during
10 his deposition. (Dickstein Decl., Ex. W, Ex. R, Pringle Tr. 94-96.) Jeffrey Pringle’s
11 declaration must therefore be excluded. Fed. R. Civ. P. 37(c)(1).

12 In any event, Defendants’ declarants and their contact information was
13 disclosed during discovery, and thus there is no basis for exclusion. *See* Fed. R.
14 Civ. P. 26(e) Advisory Committee Notes (“[t]here is [] no obligation to provide
15 supplemental or corrective information that has been otherwise made known to the
16 parties in writing or during the discovery process); *McKesson Info. Solutions, Inc. v.*
17 *Bridge Med., Inc.*, 434 F. Supp. 2d 810 (E.D. Cal. 2006). Not only was Jean-
18 Charles Carre the subject of extended testimony during David Guetta’s deposition,
19 but he was actually present at both Guetta and Frederic Riesterer’s depositions.
20 (Dickstein Decl., Ex. AA, Guetta Tr. 10, 20-21, 30-37.) Clark Warner of Beatport
21 was disclosed in documents produced in discovery (Dickstein Decl., Ex. D [Doc.
22 161-4]), as was Alain Etchart of Univers Sons (Dickstein Decl., Ex. X.). And any
23 failure to disclose Gary Roth of BMI and Thibaud Fouet of SACEM is harmless, as
24 Pringle now admits that he never registered “Take a Dive” (Dance Version) with
25 either of those performing rights organizations. (Pringle Decl. [198] ¶ 12.)

26 **CONCLUSION**

27 For the above reasons, Defendants Shapiro Bernstein, Riesterer and Guetta
28 respectfully request that the Court grant their motion for summary judgment.

1 Dated: January 9, 2012

LOEB & LOEB LLP

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