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 UMG RECORDINGS, INC. and
 7 INTERSCOPE RECORDS

8 **UNITED STATES DISTRICT COURT**
 9 **CENTRAL DISTRICT OF CALIFORNIA**
 10 **SOUTHERN DIVISION**

12 BRYAN PRINGLE, an individual,
 13 Plaintiff,

14 v.

15 WILLIAM ADAMS, JR.; STACY
 16 FERGUSON; ALAN PINEDA; and
 JAIME GOMEZ, all individually and
 17 collectivley as the music group the
 Black Eyed Peas; DAVID GUETTA;
 18 FREDERICK RIESTERER; UMG
 RECORDINGS, INC.; INTERSCOPE
 19 RECORDS; EMI APRIL MUSIC,
 INC.; HEAPHONE JUNKIE
 20 PUBLISHING, LLC.; WILLIAM
 MUSIC, LLC; JEEPNEY MUSIC,
 21 INC.; TAB MAGNETIC
 PUBLISHING; CHERRY RIVER
 22 MUSIC, CO.; SQUARE RIVOLI
 PUBLISHING; RISTER EDITIONS;
 23 and SHAPIRO, BERNSTEIN & CO.,

24 Defendants.

Case No. SACV 10-1656 JST (RZx)

**JOINDER TO OPPOSITION AND
 OPPOSITION BY DEFENDANTS
 UMG RECORDINGS, INC. AND
 INTERSCOPE RECORDS TO EX
 PARTE APPLICATION FOR
 TEMPORARY RESTRAINING
 ORDER AND TO SHOW CAUSE
 RE PRELIMINARY INJUNCTION;
 DECLARATIONS OF LINDA M.
 BURROW AND IKE YOUSSEF;
 EXHIBITS**

Trial Date: None Set

1 **I. INTRODUCTION**

2 Defendants UMG Recordings, Inc. and Interscope Records (collectively,
3 “UMG”) hereby oppose the *Ex Parte* Application for a Temporary Restraining
4 Order and Order to Show Cause Regarding Preliminary Injunction filed by Plaintiff
5 Bryan Pringle. Instead of repeating the arguments and evidence presented by the
6 Black Eyed Pea Defendants (collectively “BEP”), UMG hereby joins in their
7 Opposition. UMG firmly agrees with the BEP that Plaintiff has failed to establish
8 that he is likely to prevail on the merits of his claim, reason enough to deny his *ex*
9 *parte* request for a Temporary Restraining Order. UMG files this brief statement to
10 support BEP’s Opposition, and emphasize that Plaintiff’s Application can be denied
11 based upon Plaintiff’s failure to make any showing that he will suffer irreparable
12 harm in the absence of a TRO.

13 **II. PLAINTIFF WILL NOT SUFFER IRREPARABLE HARM WITHOUT**
14 **THIS EXTRAORDINARY RELIEF**

15 **A. *This Court May Not Merely Presume That Plaintiff Will Suffer***
16 ***Irreparable Harm***

17 As set forth in the BEP’s Opposition, Plaintiff has not demonstrated that he is
18 likely to succeed on the merits of his copyright infringement claim. Even if he
19 could, however, he is still not entitled to an injunction, as he has failed entirely to
20 offer any *evidence* of irreparable harm. Indeed, Plaintiff appears to believe that he
21 need not offer any evidence of harm, but that this Court may merely *presume* harm
22 from his (defective) infringement claims.

23 Contrary to Plaintiff’s assertion, however, this Court may not merely assume
24 irreparable harm simply because this is a copyright infringement case. Indeed,
25 injunctive relief has *never* been automatic, even in a copyright infringement case.
26 *See Abend v. MCA, Inc.*, 863 F.2d 1465 (9th Cir. 1988) (declining to enjoin
27 distribution of alleged infringing film). *Summit Entertainment, LLC v. Beckett*

28

1 *Media, LLC*, No. CV 09-8161, 2010 WL 147958 (C.D. Cal. Jan. 12, 2010)
2 (Gutierrez, J.), the unpublished district court case on which Plaintiff relies, is not to
3 the contrary. In *Summit Entertainment*, the Court, after noting case law describing
4 this “presumption,” went on to make a factual determination that the plaintiff had, in
5 fact, demonstrated that irreparable harm was likely. *See id.* at *4. That finding was
6 necessary, particularly in light the Supreme Court’s decision in *eBay Inc. v.*
7 *MercExchange, L.L.C.*, 547 U.S. 388 (2006), in which it specifically determined that
8 there can be no presumption of irreparable harm with respect to permanent
9 injunctions in intellectual property cases. *See* 547 U.S. at 394. Since *eBay*, courts
10 in this District and elsewhere have cast serious doubt on the validity of the
11 presumption of irreparable harm in assessing the need for *preliminary* relief such as
12 a TRO. *See, e.g., Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 518
13 F.Supp.2d 1197, 1212-13 (C.D. Cal. 2007) (Wilson, J.) (citing cases and observing
14 that “a significant number” of courts have determined that the presumption no
15 longer applies); *see also Aurora World, Inc. v. Ty Inc.*, No. CV09-08463, ---
16 F.Supp.2d ---, 2009 WL 6617192, at *37 (C.D. Cal. Dec. 15, 2009) (Morrow, J.)
17 (declining to apply presumption of irreparable harm in trademark case).¹

18 ***B. Plaintiff Cannot Show Irreparable Harm***

19 Plaintiff offers no evidence of irreparable harm in this case. To the contrary,
20 Plaintiff concedes that the infringement began upon release of “I Gotta Feeling” in
21 May 2009, over a year and a half ago. *See* Declaration of Bryan Pringle (“Pringle
22 Decl.”), ¶ 12; *see also* Declaration of Ike Youssef (“Youssef Decl.”), ¶ 2²

23

24 ¹ The lack of viability of the presumption of irreparable harm was reinforced by the
25 Supreme Court’s decision in *Winter v. Natural Resources Defense Council, Inc.*,
26 129 S.Ct. 365 (2008), which held that the Ninth Circuit erred in granting a
preliminary injunction based upon a *possibility* of irreparable harm. *Id.* at 375-76.

27 ² The statements in the Pringle Declaration are repeated in the First Amended
28 Complaint (the “FAC”). *See, e.g.* FAC, ¶ 44. Although the FAC was filed on
(footnote continued)

1 Plaintiff’s attorney first contacted counsel for Defendants concerning “I Gotta
2 Feeling” in May of 2010—more than six months ago—but did not either file a
3 complaint or seek an injunction at that time. *See* Declaration of Linda M. Burrow
4 (“Burrow Decl.”), Exh. A. Indeed, Plaintiff did not file his complaint until several
5 weeks after settlement discussions broke down, Burrow Decl., ¶¶ 3-4, and then
6 waited an additional month before seeking injunctive relief. *Id.*

7 “Plaintiff’s long delay before seeking a preliminary injunction implies a lack
8 of urgency and irreparable harm.” *Oakland Tribune, Inc. v. Chronicle Publishing*
9 *Co., Inc.*, 762 F.2d 1374, 1377 (9th Cir. 1985) (upholding denial of TRO where
10 plaintiff failed to show significant threat of irreparable injury). Moreover, a
11 “preliminary injunction is sought upon the theory that there is an urgent need for
12 speedy action to protect the plaintiff’s rights. By sleeping on its rights a plaintiff
13 demonstrates the lack of need for speedy action” *Gillette Co. v. Ed Pinaud,*
14 *Inc.*, 178 F.Supp. 618, 622 (S.D.N.Y. 1959) (denying preliminary injunction where
15 Plaintiff waited six months after Defendant started marketing a product to request
16 injunction for alleged trademark infringement).

17 The absence of irreparable harm to Plaintiff is further bolstered by Plaintiff’s
18 failure even to *register* his work in the eleven years since it was created. *See* Pringle
19 Decl., ¶ 4 (stating that he created the derivative of “Take a Dive” in 1999, but
20 registered the work with the Copyright Office in 2010). As Pringle had registered
21 previous works with the Copyright Office, *see id.*, ¶ 3, he was well-aware of the
22 steps he needed to take to invoke the Copyright Act’s protections. Nevertheless,
23 Pringle proceeded to submit CDs with his unregistered work to music labels,
24 internet websites and virtually anyone else who would listen. *See id.*, ¶ 7. If Pringle
25

26 November 19, 2010, Plaintiff has not yet made an effort to serve UMG. Burrow
27 Decl., ¶ 5.

1 himself could not be bothered to make even the most basic efforts at protecting his
2 work despite more than a decade of distribution, he cannot now claim that further
3 distribution of “I Gotta Feeling” would harm him irreparably.

4 *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001), on which
5 Plaintiff relies, is not to the contrary. In *Napster*, the Ninth Circuit held that the
6 activities of the Napster file-sharing service, which allowed users to download
7 copyrighted sound recordings for free, had an irreparable “deleterious effect on the
8 present and future digital download market” for such recordings. 239 F.3d at 1017.
9 This case does not concern an entire *market*, as was the case in *Napster*, but a single
10 work, which Plaintiff concedes he has never sold. Similarly inapposite is *Taylor*
11 *Corp. v. Four Seasons Greetings, LLC*, 403 F.3d 958 (8th Cir. 2005), in which the
12 court concluded that the plaintiff’s decision not to seek monetary relief did not
13 preclude it from obtaining a permanent injunction following trial—particularly
14 where, as in that case, the defendants’ use of the plaintiff’s copyrighted greeting
15 cards precluded the plaintiff from making any use of that material thereafter. *Id.* at
16 962, 967-68.

17 Indeed, cases cited by the *Napster* court actually *undermine* Plaintiff’s claim
18 to irreparable harm in this case. In *Abend v. MCA, Inc.*, 863 F.2d 1465 (9th Cir.
19 1988), for example, the Ninth Circuit declined to enjoin further distribution of the
20 film *Rear Window*, holding instead that the Plaintiff could “be compensated
21 adequately for the infringement by monetary compensation.” 863 F.3d at 1479; *see*
22 *also Elvis Presley Enterprises, Inc. v. Passport Video*, 357 F.3d 896, 899-900 (9th
23 Cir. 2004) (holding that the district court committed a “miscarriage of justice” in
24 failing to consider monetary remedies as an alternative to an injunction in a
25 copyright infringement case).

1 **C. *The Harm to UMG Would be Immense***

2 Not only does Plaintiff fail to offer any evidence of irreparable harm, but it is
3 clear from his motion that UMG would suffer incalculable harm if an injunction
4 should issue. “I Gotta Feeling” is contained on the Black Eyed Peas album, “The
5 E.N.D.” which is sold in more than 7,000 stores nationwide. *See* Youssef Decl., ¶ 3.
6 Simply pulling the album from inventory would cost UMG hundreds of thousands
7 of dollars, if not millions of dollars in harm, including but not limited to the cost of
8 working with retailers to pull “The E.N.D.” from their shelves, the loss of good will
9 with those retailers, and damages of at least \$900,000 related to returns of product
10 that is already in the marketplace. *Id.* UMG would also incur overhead in working
11 with on-line retailers, such as iTunes, to remove “I Gotta Feeling” from their
12 inventory. *See id.*, ¶ 4. Moreover, as Plaintiff also notes, “I Gotta Feeling” has also
13 been licensed for various uses, including in films and television programs, which
14 UMG neither owns nor distributes. *See* FAC, ¶ 45(e); *see also* Youssef Decl., ¶ 5.
15 UMG would thus have to arrange not only to pull its own inventory from stores, but
16 would also have to incur the cost of preventing buyers from purchasing another
17 companies’ product, likely harming its ability to license similar works in the future.³

18 **III. TO PROTECT UMG, PLAINTIFF WOULD HAVE TO POST AN**
19 **IMMENSE BOND**

20 Under Federal Rule of Civil Procedure 65(c) the Court is *required* to require
21 Plaintiff to post a bond “to pay the costs and damages sustained by any party found
22 to have been wrongfully enjoined or restrained.” Fed. R. Civ. P. 65(c). “When
23 _____

24 ³ Should the Court find that the Plaintiff has demonstrated a sufficient question on
25 the merits to warrant further consideration of its *ex parte* application, UMG requests
26 that it be given additional to prepare a more comprehensive response, which would
27 include more specific evidence of the harm UMG would suffer as a result of the
entry of an injunction in this case. Given Plaintiff’s long delay in bringing this case,
he cannot complain of any additional harm he might suffer in the time necessary for
order to allow UMG to prepare and file a more detailed response.

1 setting the amount of security, district courts should err on the high side. . . . [A]n
2 error in the other direction produces irreparable injury, because the damages for an
3 erroneous preliminary injunction cannot exceed the amount of the bond.” *Mead*
4 *Johnson & Co. v. Abbott Laboratories*, 201 F.3d 883, 888 (7th Cir. 2000).

5 Here, the Plaintiff is an individual—apparently unsuccessful—songwriter,
6 who seeks to force UMG to incur, at a minimum, hundreds of thousands of dollars
7 in costs in complying with an injunction against future sales of “I Gotta Feeling”
8 when Plaintiff himself allowed those sales to continue for a year and a half before
9 seeking any sort of relief. As UMG would be required to take immediate action to
10 comply with the TRO, the “costs and damages” it incurs, *see* Fed. R. Civ. P. 65(c),
11 would be immediate and substantial. *See generally* Youssef Decl., ¶¶ 3-5.
12 Accordingly, in the unlikely event this Court is inclined to issue a TRO, it should
13 require the Plaintiff to post a substantial bond to cover the harm to UMG should the
14 injunction be found to have been improvidently entered.

15 **IV. CONCLUSION**

16 For the reasons stated herein, and in the Opposition filed by the BEP, this
17 Court should deny Plaintiff’s *ex parte* application and decline to issue the requested
18 TRO.

19 DATED: November 23, 2010

Respectfully submitted,

20 CALDWELL LESLIE & PROCTOR, PC
21 LINDA M. BURROW
22 HEATHER PEARSON

23 By _____ /s/
24 LINDA M. BURROW
25 Attorneys for Defendants
26 UMG RECORDINGS, INC. and INTERSCOPE
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