

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

1 Dean A. Dickie (*appearing Pro Hac Vice*)
Dickie@MillerCanfield.com
2 MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.
225 West Washington Street, Suite 2600
3 Chicago, IL 60606
Telephone: 312.460.4227
4 Facsimile: 312.460.4288

5 Ira Gould (*appearing Pro Hac Vice*)
Gould@igouldlaw.com
6 Ryan L. Greely (*appearing Pro Hac Vice*)
Rgreely@igouldlaw.com
7 GOULD LAW GROUP
120 North LaSalle Street, Suite 2750
8 Chicago, IL 60602
Telephone: 312.781.0680
9 Facsimile: 312.726.1328

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

15 Attorneys for Plaintiff
BRYAN PRINGLE

17 **UNITED STATES DISTRICT COURT**
18 **CENTRAL DISTRICT OF CALIFORNIA**
19 **SOUTHERN DIVISION**

20 BRYAN PRINGLE, an individual,) Case No. SACV 10-1656 JST(RZx)
21 Plaintiff,) **RESPONSE TO DEFENDANTS'**
22 v.) **MOTION TO DISMISS FIRST**
23 WILLIAM ADAMS, JR.; STACY) **AMENDED COMPLAINT,**
24 FERGUSON; ALLAN PINEDA; and) **MOTION TO STRIKE AND**
25 JAIME GOMEZ, all individually and) **MOTION FOR MORE DEFINITE**
collectively as the music group The Black) **STATEMENT**
26 Eyed Peas, *et al.*,) DATE: January 24, 2011
Defendants.) TIME: 10:00 a.m.
) CTRM: 10A

TABLE OF CONTENTS

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

Page

I.	INTRODUCTION	1
II.	ARGUMENT	2
A.	Standard For Motion To Dismiss	2
B.	Pringle’s Registration Is Sufficient and Was Sufficiently Alleged.....	3
C.	Pringle Sufficiently Alleges Access	5
D.	Defendants’ Request For Dismissal Under Rule 8(e) is Wholly Unsupported By A Single Case and Should Be Denied as Improper	8
E.	Defendants Have Not And Cannot Show That the Allegations In Pringle’s Amended Complaint Are So Indefinite That The Defendants Cannot Ascertain The Nature Of The Claim Being Asserted, Or So Indefinite As To Be Unintelligible	9
F.	Standard for Motion to Strike.....	10
1.	Defendants’ Custom, Habit and Ongoing Regular Business Practices are Relevant under the Federal Rules of Evidence.....	11
2.	Allegations Regarding Unfair Business Practices and Conspiracy Are Proper and Defendants Cannot Show They Should Be Stricken	18
3.	Plaintiff’s Request for Fees is Proper	19
III.	CONCLUSION.....	20

TABLE OF AUTHORITIES

Page(s)

Cases

1

2

3

4

5 *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S. Ct. 1937, 173 L. Ed. 2d 868
(2009).....2, 10

6 *Bailey v. Black Entm't Television*, CA No. 3:09 CV787, 2010 WL
1780403 (E.D. Va. May 3, 2010)6

7 *Bassiri v. Xerox Corp.*, 292 F. Supp. 2d 1212 (C.D. Cal. 2003)10

8 *Bell Art. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed.
9 2d 929 (2007).....2, 10

10 *Bender v. LG Elecs. U.S.A., Inc.*, No. C 09-02114, 2010 WL 889541
(N.D. Cal. Mar. 11, 2010).....9, 10

11 *Bridgeport Music v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005).....6

12 *Butler v. Target Corp.*, 323 F. Supp. 2d 1052 (C.D. Cal. 2004).....18

13 *Cal. Dept. of Toxic Substances Control v. Alco Pacific, Inc.*, 217 F.
14 Supp. 2d 1028 (C.D. Cal. 2002)10

15 *Cosmetic Ideas, Inc. v. IAC/Interactivecorp*, 606 F.3d 612 (9th Cir.
16 2010)3

17 *Dita, Inc. v. Mendez*, No. CV 10-6277 PSG (FMOx), 2010 WL 5140855
(C.D. Cal. Dec. 14, 2010)2

18 *Donen v. Paramount Pictures Corp.*, No. CV 08-03383, 2008 WL
19 5054340 (C.D. Cal. Nov. 20, 2008).....4

20 *Famolare, Inc. v. Edison Bros. Stores, Inc.*, 525 F. Supp. 940 (C.D. Cal.
1981)9

21 *Fantasy, Inc. v. Fogerty*, 984 F. 2d 1524 (9th Cir. 1993).....16, 17

22 *Feldman v. Twentieth Century Fox Film Corp.*, CA No. 09-10714, 2010
23 WL 2787698 (D. Mass. July 13, 2010)6

24 *Ferguson v. Nat'l Broad. Co.*, 584 F.2d 111 (5th Cir. 1978)5, 7

25 *Fitzgerald Publishing Co. v. Baylor Publishing Co.*, 807 F.2d 1110 (2d
Cir. 1986)12

26 *Ghahremani v. Borders Group, Inc.*, No. 10-cv-1248, 2010 WL
27 4008506 (C.D. Cal. Oct. 6, 2010).....13, 14

28 *Gillibeau v. City of Richmond*, 417 F.2d 426 (9th Cir. 1969).....8

TABLE OF AUTHORITIES (cont.)

		<u>Page(s)</u>
3	<i>Goldsmith v. Bagby Elevator Co.</i> , 513 F.3d 1261 (11th Cir. 2008)	14
4	<i>Hayes v. Woodford</i> , 444 F. Supp. 2d 1127 (S.D. Cal. 2006)	10
5	<i>Impulsive Music v. Pomodoro Grill, Inc.</i> , No. 08-cv-6293, 2008 U.S. Dist. Lexis 94148, 2008 WL 4998474 (W.D.N.Y. Nov. 19, 2008)	13
6	<i>In re TheMart.com, Inc. Sec. Litig.</i> , 114 F. Supp. 2d 955 (C.D. Cal. 2000)	11
7	<i>In re McKesson HBOC, Inc. Sec. Litig.</i> , 126 F. Supp. 2d 1239 (N.D. Cal. 2000).....	3
8	<i>Kaiser Aluminum & Chemical Sales, Inc. v. Avondale Shipyards, Inc.</i> , 677 F.2d 1045 (5th Cir. 1982)	10
9	<i>Kodadek v. MTV Networks, Inc.</i> , 152 F.3d 1209 (9th Cir. 1998)	3, 4
10	<i>Kuenzell v. U.S.</i> , 20 F.R.D. 96 (N.D. Cal. 1957)	9
11	<i>Lazar v. Trans Union, L.L.C.</i> , 195 F.R.D. 665 (C.D. Cal. 2000)	10
12	<i>Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit</i> , 507 U.S. 163, 113 S. Ct. 1160, 122 L. Ed. 2d 517 (1993)	2
13	<i>Loree Rodkin Mgmt. Corp. v. Ross-Simons, Inc.</i> , 315 F. Supp. 2d 1053 (C.D. Cal. 2004).....	3
14	<i>Mag Instrument, Inc. v. JS Products, Inc.</i> , 595 F. Supp. 2d 1102 (C.D. Cal. 2008).....	11
15	<i>Martinez v. McGraw</i> , No. 3:08-0738, 2010 WL 1493846 (M.D. Tenn. Apr. 14, 2010).....	5
16	<i>Merrill v. Paramount Pictures Corp.</i> , No. CV 05-1150 SVW, 2005 WL 3955653 (C.D. Cal. Dec. 19, 2005)	7
17	<i>Meta-Film Assocs., Inc. v. MCA, Inc.</i> , 586 F. Supp. 1346 (C.D. Cal. 1984)	5, 7
18	<i>Metro-Goldwyn-Mayer, Inc. v. Am. Honda Motor Co.</i> , 900 F. Supp. 1287 (C.D. Cal. 1995).....	5, 7
19	<i>Mohamed v. Jeppesen Dataplan, Inc.</i> , 579 F.3d 943 (9th Cir. 2009).....	2
20	<i>Neilson v. UnionBank of Cal., N.A.</i> , 290 F. Supp. 2d 1101 (C.D. Cal. 2003)	11, 13
21	<i>Rennie & Laughlin, Inc. v. Chrysler Corp.</i> , 242 F.2d 208 (9th Cir. 1958).....	10
22	<i>Rosales v. Citibank, Fed. Sav. Bank</i> , 133 F. Supp. 2d 1177 (N.D. Cal.	

TABLE OF AUTHORITIES (cont.)

	<u>Page(s)</u>
2001)	11
4 <i>Sagan v. Apple Computer, Inc.</i> , 874 F. Supp. 1072 (C.D. Cal. 1994).....	9
5 <i>Simplex, Inc. v. Diversified Energy Sys., Inc.</i> , 847 F.2d 1290 (7th Cir. 1988)	14
6 <i>Survivor Prods. LLC v. Fox Broad., Co.</i> , 2001 U.S. Dist. LEXIS 25512 7 (C.D. Cal. 2001).....	17
8 <i>Three Boys Music v. Michael Bolton</i> , 212 F.3d 477 (9th Cir. 2000).....	8
9 <i>Twin Peaks Productions, Inc. v. Publications, Int’l, Ltd.</i> , 996 F.2d 1366 10 (2d Cir. 1993).....	12
11 <i>Wood v. Apodaca</i> , 375 F. Supp. 2d 942 (N.D. Cal. 2005).....	9, 10
12 <i>Zubulake v. UBS Warburg LLC</i> , 382 F. Supp. 2d 536 (S.D.N.Y. 2005).....	14
<u>Statutes</u>	
13 17 U.S.C. § 408(b)	3, 4
14 17 U.S.C. § 411(a).....	3
15 17 U.S.C. § 412(a).....	19
16 Fed. R. Civ. P. 12(b)(6).....	2
17 Fed. R. Civ. P. 12(e).....	9
18 Fed. R. Civ. P. 12(f)	10, 11
19 Fed. R. Civ. P. 8(a)(2)	2, 8
20 Fed. R. Civ. P. 8(b)(5).....	9
21 Fed. R. Evid. 406.....	12, 14
<u>Other Authorities</u>	
23 WILLIAM W. SCHWARZER, <i>ET. AL.</i> , FEDERAL CIVIL PROCEDURE BEFORE 24 TRIAL, § 9:351 (The Rutter Group 2008)	9

1 **I. INTRODUCTION**

2 Plaintiff Bryan Pringle’s First Amended Complaint alleges that Defendants¹
3 have (i) engaged in the willful copyright infringement of his copyrighted work; and
4 (ii) done so as a routine, chronic, almost automatic aspect of their business practice.
5 If Pringle can establish through a preponderance of the evidence that Defendants’
6 conduct is as alleged, Pringle will be entitled to a verdict of liability and substantial
7 damages. Pringle intends to develop his claim regarding Defendants’ chronic pattern
8 and practice of willful infringement through discovery. There can be little doubt that
9 the First Amended Complaint’s allegations regarding this customary, and almost
10 automatic, business practice has put Defendants sufficiently on notice of the nature
11 and circumstances of that claim to require them to answer. There is also little doubt
12 that Pringle has appropriately alleged access by Defendants and that his allegations
13 regarding the registration of his copyright are appropriate and sufficient.

14 The instant Motion is devoid of substance and little more than a classic
15 defense tactic of manufacturing artificial pleading deficiencies in order to confuse the
16 issues before the Court and delay having to answer the allegations asserted against
17 them in a timely fashion. A reading of the arguments asserted demonstrates that the
18 Motion is neither well grounded in law nor fact and has been interposed simply to
19 cause the Court and Pringle to expend time and resources addressing arguments
20 typically raised and resolved through dispositive motions after discovery has closed,
21 not through Rule 12 motions challenging the evidentiary sufficiency of the First
22 Amended Complaint, or a motion to dismiss pursuant to Rule 8. For the reasons

23
24 _____
25 ¹ For purposes of this response, “Defendants” includes Defendants William Adams,
26 Stacy Ferguson, Allan Pineda, Jaime Gomez, Black Eyed Peas, Tab Magnetic
27 Publishing, Headphone Junkie Publishing, LLC, will.i.am. music, llc, Jeepney
28 Music, Inc., Cherry River Music Co., EMI April Music, Inc., and the defendants
joining in the Motion including UMG Recordings, Inc. Interscope Records, Shapiro,
Bernstein & Co., Inc., Rister Editions, and David Guetta. Pringle adopts and
incorporates each of the arguments in this Response as to each of these defendants.

1 stated below, Defendants’ Motion should be denied in its entirety and discovery
2 permitted forthwith so that the willful conduct alleged in this case can be tried at the
3 earliest opportunity.

4 **II. ARGUMENT**

5 **A. Standard For Motion To Dismiss**

6 A complaint is sufficient if it gives the defendant “fair notice of what the . . .
7 claim is and the grounds upon which it rests.” *Bell Art. Corp. v. Twombly*, 550 U.S.
8 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). Generally, the Federal Rules
9 are designed to minimize technical disputes over pleadings. *Ashcroft v. Iqbal*, ___
10 U.S. ___, 129 S. Ct. 1937, 1950, 173 L. Ed. 2d 868 (2009) (emphasis added). As
11 such, motions to dismiss under Rule 12(b)(6) are disfavored and rarely granted.

12 In evaluating the sufficiency of a complaint under Rule 12(b)(6), courts must
13 be mindful that the Federal Rules of Civil Procedure require that the complaint
14 merely contain “a short and plain statement of the claim showing that the pleader is
15 entitled to relief.” *Dita, Inc. v. Mendez*, No. CV 10-6277 PSG (FMOx), 2010 WL
16 5140855, at *1 (C.D. Cal. Dec. 14, 2010) (citing Fed. R. Civ. P. 8(a)(2)). In
17 resolving a Rule 12(b)(6) motion, the Court must engage in a two-step analysis.
18 *Iqbal*, 129 S. Ct. at 1949. The Court must first accept as true all non-conclusory,
19 factual allegations made in the complaint. See *Leatherman v. Tarrant County*
20 *Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164, 113 S. Ct. 1160, 122
21 L. Ed. 2d 517 (1993). Based upon these allegations, the Court must draw all
22 reasonable inferences in favor of the plaintiff. See *Mohamed v. Jeppesen Dataplan,*
23 *Inc.*, 579 F.3d 943, 949 (9th Cir. 2009). After accepting as true all non-conclusory
24 allegations and drawing all reasonable inferences in favor of the plaintiff, the court
25 will only dismiss a complaint if it determines that the complaint fails to allege a
26 plausible claim for relief. See *Iqbal*, 129 S. Ct. at 1950. For those reasons, motions
27 to dismiss for failure to state a claim pursuant to Rule 12(b)(6) are typically
28

1 disfavored. *In re McKesson HBOC, Inc. Sec. Litig.*, 126 F. Supp. 2d 1239 (N.D. Cal.
2 2000).

3 **B. Pringle’s Registration Is Sufficient and Was Sufficiently Alleged**

4 Defendants claim that Pringle’s First Amended Complaint is insufficient
5 because until the U.S. Copyright Office registers or refuses to register the derivative
6 version of “Take a Dive,” he cannot plead facts sufficient to state a claim for
7 infringement. In support of this argument, Defendants rely on *Loree Rodkin Mgmt.*
8 *Corp. v. Ross-Simons, Inc.*, 315 F. Supp. 2d 1053, 1056 (C.D. Cal. 2004), a case that
9 has specifically been rejected by the Ninth Circuit on this exact issue. *See Cosmetic*
10 *Ideas, Inc. v. IAC/Interactivecorp*, 606 F.3d 612, 621 (9th Cir. 2010) (“We therefore
11 hold that receipt by the U.S. Copyright Office of a complete application satisfies the
12 registration requirement of § 411(a),” rejecting the “registration” approach as set
13 forth in *Loree*).

14 Defendants next argue that the registration of the derivative version of “Take a
15 Dive” does not fulfill § 408(b) of the Copyright Act, as the song submitted for
16 registration was not a bona fide copy of his original work. Besides making the bald
17 assertion that Pringle did not register a bona fide copy of the original, Defendants
18 cite to no facts that purport to prove that the copy registered was not an original, nor
19 do Defendants cite support for the idea that a plaintiff seeking relief for copyright
20 infringement must allege that the copyrighted material submitted to the U.S.
21 Copyright Office is a bona fide copy as a pleading requirement. In support of their
22 argument, Defendants cite the case of *Kodadek v. MTV Networks, Inc.*, 152 F.3d
23 1209 (9th Cir. 1998), in which the court held that a “reconstructed drawing” of
24 animated figures was not considered a bona fide copy of the original drawing and
25 therefore was insufficient for purposes of fulfilling the registration requirement of §
26 408(b) of the Copyright Act. *Kodadek*, a case that was decided not on a motion to
27 dismiss, but on a motion for summary judgment after discovery was conducted, is
28 inapplicable here and Defendants’ reliance on it is misplaced.

1 In *Kodadek*, the plaintiff alleged that he created but lost all originals and
2 copies of drawings that were later infringed by the MTV animated characters
3 “Beavis and Butthead” prior to his registering it with the U.S. Copyright Office.
4 After MTV allegedly infringed the plaintiff’s characters, the plaintiff “reconstructed”
5 (i.e. redrew) completely new drawings of the characters from memory, for the
6 purposes of registering it with the U.S. Copyright Office. The court concluded that
7 the reconstructed drawing was not a bona fide copy of the original because since it
8 was recreated from memory and without any reference to the original, it was bound
9 to not be an exact copy of the original. *See id.* at 1212.

10 In order for the *Kodadek* case to control here, Pringle would have had to have
11 lost the computer file containing the original copy of the derivative version of “Take
12 a Dive,” and all other copies of the song, and then subsequently rewritten and
13 rerecorded a new song completely from scratch and solely from his memory in
14 anticipation of this litigation. That did not happen here. Pringle did not
15 “reconstruct” anything; he made a copy of the original derivative version of “Take a
16 Dive” from a saved computer file that he has in his possession. The court in
17 *Kodadek* directly states that “a photocopy or **other electronic means of**
18 **reproduction of an original [work] could suffice** [for purposes of registration].”
19 *Id.* (emphasis added). Since Pringle merely made a copy of the derivative version of
20 “Take a Dive” from a saved computer file (i.e., an electronic means of reproduction),
21 that copy is a bona fide copy of the original and is sufficient for purposes of fulfilling
22 § 408(b) of the Copyright Act.

23 In any event, each of these arguments by Defendants is a red herring and, more
24 importantly, is moot. **The U.S. Copyright Office has now issued a Certificate of**
25 **Registration for the derivative version of “Take a Dive,”** entitled “Take a Dive
26 (Dance version),” a copy of which is attached as Exhibit D to the Declaration of
27 Bryan Pringle filed on January 3, 2011 in support of Pringle’s Motion for
28 Preliminary Injunction, and of which the Court may take judicial notice. *Donen v.*

1 *Paramount Pictures Corp.*, No. CV 08-03383, 2008 WL 5054340, at *2 (C.D. Cal.
2 Nov. 20, 2008).

3 Defendants' remaining arguments, such as their claim that other variations, or
4 other songs, were not registered, is immaterial and irrelevant. Defendants cite no
5 case law that supports the proposition that failure to allege registration of other
6 variations or songs not at issue dooms a complaint and is grounds for dismissal.

7 **C. Pringle Sufficiently Alleges Access**

8 Pringle has more than sufficiently pled that Defendants had access to both the
9 original and the derivative version of "Take a Dive." Whether Pringle ultimately can
10 establish access is a question for the trier of fact, and certainly not an issue which is
11 appropriate for this Court to resolve at the pleading stage on a motion to dismiss.

12 All of the primary cases upon which Defendants rely in support of their
13 argument that Pringle fails to meet the pleading requirement for copyright
14 infringement are inapposite because they deal with what a plaintiff must ultimately
15 prove to establish access. *See Meta-Film Assocs., Inc. v. MCA, Inc.*, 586 F. Supp.
16 1346, 1355 (C.D. Cal. 1984); *Metro-Goldwyn-Mayer, Inc. v. Am. Honda Motor Co.*,
17 900 F. Supp. 1287, 1297 (C.D. Cal. 1995); *Ferguson v. Nat'l Broad. Co.*, 584 F.2d
18 111, 113 (5th Cir. 1978). None of these cases was decided in the context of a motion
19 to dismiss; they were all summary judgment cases decided after the plaintiffs had an
20 opportunity to take discovery. In other words, Defendants claim these cases
21 establish what a plaintiff must allege, but instead the cases establish what a plaintiff
22 must ultimately prove. At this stage of the litigation, Pringle does not need to
23 "demonstrate" his evidence; he needs to allege sufficient facts that provide the basis
24 for his claim.

25 Defendants also point to *Martinez v. McGraw*, No. 3:08-0738, 2010 WL
26 1493846, at *5 (M.D. Tenn. Apr. 14, 2010) in support of their arguments that Pringle
27 has failed to sufficiently allege access. But the *Martinez* plaintiff never alleged that
28 he provided the defendants with access to the allegedly infringed work. Instead, he

1 alleged that because the defendant, country singer Tim McGraw, recorded the
2 accused song at the same time the plaintiff's song was recorded, there must have
3 been access. The court noted that the plaintiff made no allegations as to how his
4 song got into any of the defendants' hands and did not allege that he gave the song to
5 the defendants. Likewise, in *Feldman v. Twentieth Century Fox Film Corp.*, CA No.
6 09-10714, 2010 WL 2787698, at *7 (D. Mass. July 13, 2010), the plaintiff alleged
7 that defendants may have accessed the allegedly infringing work either by hacking
8 her computer, or through her vindictive ex-boyfriend. Notably, she did not allege
9 that she provided copies of her work to the defendants. Similarly, in *Bailey v. Black*
10 *Entm't Television*, CA No. 3:09 CV787, 2010 WL 1780403 (E.D. Va. May 3, 2010),
11 the plaintiff alleged that he provided information about the allegedly infringed work
12 to the defendants after the defendants had already copyrighted the allegedly
13 infringing work. He did not allege that he provided the defendants access to the
14 allegedly infringed work before defendants copyrighted their work. None of these
15 cases help Defendants, given the credible allegations made by Pringle that (1)
16 Defendants sampled the derivative version of "Take a Dive" when creating "I Gotta
17 Feeling;" and (2) he submitted his work to Defendants and received rejections from
18 them in response.

19 First, Pringle has alleged that Defendants directly sampled the sound recording
20 of "Take a Dive" in "I Gotta Feeling." [*See* ECF Doc. No. 1 (¶ 41)]. "Sampling" is
21 the practice of directly lifting a portion of an existing sound recording and using it as
22 a component of a new song. *See, e.g., Grand Upright Music, Ltd v. Warner Bros.*
23 *Records Inc.*, 780 F.Supp. 182 (S.D.N.Y. 1991). Sampling of a sound recording
24 cannot be performed unless one is in the physical possession of said sound recording.
25 Unlike a musical composition, where one has to prove that **substantial** original
26 elements were copied, **any** unauthorized use of a sound recording, regardless of how
27 *de minimis* the portion of the sound recording that is used, constitutes copyright
28 infringement. *See Bridgeport Music v. Dimension Films*, 410 F.3d 792 (6th Cir.

1 2005). For the sound recording copyright holder, it is not the “song” but the sounds
2 that are fixed in the medium of his choice. When those sounds are sampled they are
3 taken directly from that fixed medium. It is a physical taking rather than an
4 intellectual one. *Id.*

5 Thus, sampling of a sound recording cannot be undertaken unless one is in the
6 physical possession of the sound recording, so if the Black Eyed Peas did in fact
7 sample the derivative version of “Take a Dive” – a question of fact that will be
8 determined at trial – it circumstantially proves that they had access to the sound
9 recording of the derivative version of “Take a Dive.”

10 Second, Pringle alleged that he repeatedly submitted the derivative version of
11 “Take a Dive” to Defendants Interscope, UMG, and EMI over the course of
12 approximately ten years. In response, Pringle received rejection letters from the
13 above Defendants, acknowledging that they received his work, but declining to
14 purchase it or sign him as an artist. [*See* ECF Doc. No. 1 (¶ 39)]. This implicitly
15 establishes that those that sent him the letters both received his music and listened to
16 it. Pringle also alleged that his music was available for purchase on various
17 international websites, and played on various radio stations. [*See* ECF Doc. No. 1
18 (¶ 32)].

19 Defendants argue that generally alleging that a work was submitted to large
20 corporate defendants is insufficient to state a claim for infringement, citing *Merrill v.*
21 *Paramount Pictures Corp.*, No. CV 05-1150 SVW, 2005 WL 3955653 (C.D. Cal.
22 Dec. 19, 2005). *Merrill* does not hold, however, that such an allegation is
23 insufficient to state a claim for infringement. Defendants likewise rely on *Meta*
24 *Film*, *MGM*, and *Ferguson* for this proposition. Each of those cases, including
25 *Merrill*, was decided on summary judgment after the plaintiff had an opportunity to
26 conduct discovery and come up with evidence in support of his claim—not at the
27 pleading phase. Every argument made by Defendants is supported by case law that
28 deals with summary judgment and not motions to dismiss. The arguments are

1 therefore inapplicable here. Defendants have not and cannot show that Pringle’s
2 pleading is deficient as it relates to his allegations of providing access to Defendants
3 of the derivative version of “Take a Dive.”²

4 **D. Defendants’ Request For Dismissal Under Rule 8(e) is Wholly**
5 **Unsupported By A Single Case and Should Be Denied as Improper**

6 In support of their request for dismissal pursuant to Rule 8(a)(2), Defendants
7 can cite only to one forty-year-old case, *Gillibeau v. City of Richmond*, 417 F.2d 426
8 (9th Cir. 1969). But in *Gillibeau*, the Ninth Circuit reversed the trial court’s
9 dismissal of the complaint pursuant to Rule 8(a)(2), holding that the complaint was
10 not so verbose, confused and redundant that its true substance, if any, was disguised.
11 *Id.* Defendants cite to no case that has upheld dismissal of any complaint pursuant to
12 Rule 8(a). Defendants’ failure to advance support for the relief requested suggests
13 that the true purpose of this contention is to delay and prevent Pringle from litigating
14 the merits of his case. Moreover, Pringle has established that the First Amended
15 Complaint alleges facts sufficient to make a claim for infringement that meets the
16 federal pleading standards. Defendants’ request for dismissal therefore, should be
17 denied.

18
19
20
21
22 ² Moreover, even if Pringle ultimately cannot establish direct access, he can still
23 fulfill the elements of a copyright infringement claim at trial due to the “inverse ratio
24 rule.” Substantial similarity is inextricably linked to the issue of access. Pursuant to
25 the “inverse ratio rule,” the higher the level of access, the lower the standard of proof
26 for substantial similarity, and vice versa. *See Three Boys Music v. Michael Bolton*,
27 212 F.3d 477 (9th Cir. 2000). Therefore, a copyright plaintiff can still make out a
28 case of infringement by showing that the songs were “strikingly similar” – a standard
higher than that of substantial similarity – even in the absence of any proof of access.
Id. The derivative version of “Take a Dive” and “I Gotta Feeling” are “striking
similar” – in fact, they are virtually identical – and a simple listening of the two
songs makes this clear. Therefore, direct access can be presumed.

1 **E. Defendants Have Not And Cannot Show That the Allegations In**
2 **Pringle’s Amended Complaint Are So Indefinite That The**
3 **Defendants Cannot Ascertain The Nature Of The Claim Being**
4 **Asserted, Or So Indefinite As To Be Unintelligible**

5 Defendants first argue that Pringle alleges too much, and immediately follow
6 that argument with a complaint that Pringle does not allege enough. Because the
7 pleading requirements of the Federal Rules are construed liberally, Rule 12(e)
8 motions for a more definite statement are generally disfavored and rarely granted.
9 *Famolare, Inc. v. Edison Bros. Stores, Inc.*, 525 F. Supp. 940, 949 (C.D. Cal. 1981);
10 WILLIAM W. SCHWARZER, *ET. AL.*, FEDERAL CIVIL PROCEDURE BEFORE TRIAL, §
11 9:351 (The Rutter Group 2008). Furthermore, “it is improper to seek to utilize the
12 motion for a more definite statement for the purpose of eliciting evidentiary facts, or
13 for that matter, any facts beyond those which are necessary to enable the movant to
14 frame a responsive pleading.” *Kuenzell v. U.S.*, 20 F.R.D. 96, 97 (N.D. Cal. 1957).
15 Such motions are “proper only where the complaint is so indefinite that the defendant
16 cannot ascertain the nature of the claim being asserted.” *Bender v. LG Elecs. U.S.A.,*
17 *Inc.*, No. C 09-02114, 2010 WL 889541, at *2 (N.D. Cal. Mar. 11, 2010) (citing
18 *Sagan v. Apple Computer, Inc.*, 874 F. Supp. 1072, 1077 (C.D. Cal. 1994)). Put
19 differently, the motion is proper if the complaint is so indefinite as to be
20 unintelligible. *See Wood v. Apodaca*, 375 F. Supp. 2d 942, 949 (N.D. Cal. 2005).

21 Defendants argue that Pringle must provide a more definite statement because,
22 according to Defendants, Pringle does not describe with sufficient specificity when
23 the derivative versions were created, to whom they were sent, how they were created,
24 etc. Defendants complain that they cannot respond to the allegations of access based
25 on the pleadings. This is simply not so. If Defendants feel the allegation is untrue,
26 they can and should deny the allegation. In the alternative, if Defendants feel they
27 lack knowledge or information sufficient to form a belief about the truth of an
28 allegation, they can respond as such to the allegation as permitted by Rule 8(b)(5).

1 Further, Defendants have not met their burden to show that as pleaded, the
2 complaint is so unintelligible as to render the Defendants unable to respond, nor have
3 they shown that the allegations are so indefinite that Defendants cannot ascertain the
4 nature of the claim being asserted. *Wood*, 375 F. Supp. 2d at 949; *Bender*, 2010 WL
5 889541, at *2. Finally, though Defendants claim prejudice, they have provided
6 nothing other than the bald assertion that suggests the pleadings prejudice them in
7 any way. As such, the motion for a more definite statement, along with the request
8 to strike allegations, should be denied.

9 **F. Standard for Motion to Strike**

10 A complaint is sufficient if it gives the defendant “fair notice of what the . . .
11 claim is and the grounds upon which it rests.” *Twombly*, 550 U.S. at 555. More
12 generally, the Federal Rules are designed to minimize technical disputes over
13 pleadings. *Iqbal*, 129 S. Ct. at 1950.

14 Motions to strike under Rule 12(f) are “generally disfavored and not
15 frequently granted,” for three reasons: (1) the liberal pleading standard in federal
16 practice; (2) they are often deployed as a delay tactic; and (3) the prevailing view that
17 “a case should be tried on the proofs rather than the pleadings.” *Kaiser Aluminum &*
18 *Chemical Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1057 (5th Cir.
19 1982); *Bassiri v. Xerox Corp.*, 292 F. Supp. 2d 1212, 1220 (C.D. Cal. 2003); *Lazar v.*
20 *Trans Union, L.L.C.*, 195 F.R.D. 665, 669 (C.D. Cal. 2000); see *Rennie & Laughlin,*
21 *Inc. v. Chrysler Corp.*, 242 F.2d 208, 213 (9th Cir. 1958); see also *Cal. Dept. of*
22 *Toxic Substances Control v. Alco Pacific, Inc.*, 217 F. Supp. 2d 1028, 1033 (C.D.
23 Cal. 2002) (Rule 12(f) motions to strike are generally regarded with disfavor because
24 of the limited importance of pleading in federal practice, and because they are often
25 used as a delaying tactic); *Hayes v. Woodford*, 444 F. Supp. 2d 1127, 1132 (S.D. Cal.
26 2006).

27 Instead, courts prefer to adjudicate cases on their merits and not based on
28 technicalities. As a result, such motions are “generally not granted unless it is clear

1 that the matter sought to be stricken could have no possible bearing on the subject
2 matter of the litigation.” *Rosales v. Citibank, Fed. Sav. Bank*, 133 F. Supp. 2d 1177,
3 1180 (N.D. Cal. 2001) (emphasis added) (citation omitted). Any doubt concerning
4 the import of the allegations to be stricken weighs in favor of denying the motion to
5 strike. *See In re 2TheMart.com, Inc. Sec. Litig.*, 114 F. Supp. 2d 955, 965 (C.D. Cal.
6 2000).

7 As such, a Rule 12(f) movant not only must demonstrate the allegedly
8 offending material is “redundant, immaterial, impertinent, or scandalous,” or
9 constitutes an insufficient defense, but must also show how such material will cause
10 prejudice. Fed. R. Civ. P. 12(f); *see also Mag Instrument, Inc. v. JS Products, Inc.*,
11 595 F. Supp. 2d 1102, 1106 (C.D. Cal. 2008) (“Given their disfavored status, courts
12 often require a showing of prejudice by the moving party before granting the
13 requested relief.”) (citing *Neilson v. UnionBank of Cal., N.A.*, 290 F. Supp. 2d 1101,
14 1152 (C.D. Cal. 2003)).

15 **1. Defendants’ Custom, Habit and Ongoing Regular Business**
16 **Practices are Relevant under the Federal Rules of Evidence**

17 Pringle alleges that Defendants have engaged, and continue to engage, in a
18 pattern and practice which is systematic, chronic and a nearly automatic campaign of
19 copyright infringement as their *modus operandi* for producing successful musical
20 hits, and that their infringement of the song “Take a Dive” is part of that chronic,
21 pervasive business pattern and practice. Pringle’s First Amended Complaint points
22 out numerous instances of similar willful copyright infringement, including
23 references to prior lawsuits. Defendants seek to strike these allegations as “improper
24 inclusions” of “redundant, immaterial, impertinent, or scandalous” matter that have
25 no “tangible” bearing on the subject matter of the litigation and are only “wasteful”
26 and “scandalous,” “colorful” and “flamboyant” because they do not like them.
27 Defendants object to the description of their business practices as being virtually
28 habitual because they obviously want to conceal from the general public a business

1 practice which calls into question the creative abilities of the musical group and the
2 integrity of those who manage, promote and market them. Defendants' rhetoric
3 notwithstanding, these allegations, if supported by credible admissible evidence at
4 trial, will provide Pringle with a strong basis upon which the trier of fact can
5 conclude that the copyright infringement at issue was intentional and willful, and that
6 Defendants knew when copying Pringle's intellectual property that they were
7 engaged in willful misconduct.

8 Defendants' Motion is off-base, wasteful and offered simply to delay
9 answering the First Amended Complaint and engaging in any form of expeditious
10 discovery. Contrary to Defendants' contention, these allegations were pled to
11 address whether (a) Defendants' infringement was intentional and willful; and (b)
12 Defendants had access to the protected music, an element on which the Plaintiff has
13 the burden of proof. The allegations of Defendants' customary and habitual business
14 practices unambiguously serve in part to frame the nature and scope of the discovery
15 which Pringle intends to pursue during the pendency of this action. In reality,
16 Defendants' request to strike these allegations is a transparent strategic attempt to
17 insulate them at the initial pleading stage from the repercussions of their intentional
18 and nearly automatic copying of the musical works of others.

19 Whether Defendants' business practices fall within the ambit of Federal Rule
20 of Evidence 406 simply cannot be determined at this point in the case; but Pringle
21 certainly should have the right to pursue the issue during discovery.

22 Prior allegations of copyright infringement against a defendant are admissible
23 for the purpose of establishing the willfulness of copyright infringement. *See Twin*
24 *Peaks Productions, Inc. v. Publications, Int'l, Ltd.*, 996 F.2d 1366, 1382 (2d Cir.
25 1993). The standard for willfulness is whether the defendant had knowledge that its
26 conduct represented infringement or perhaps recklessly disregarded the possibility
27 that it did so. *Id.* (citing *Fitzgerald Publishing Co. v. Baylor Publishing Co.*, 807
28 F.2d 1110, 1115 (2d Cir. 1986)). In the case of *Twin Peaks Productions, Inc.*, the

1 court held that the defendant's infringement was willful based on review of the
2 defendant's substantial [copyright] litigation history. (i.e. previous claims brought
3 against it), and emphasized that the defendant was happy to go as far as it thought it
4 could to use others' copyrighted material with the view that it could ultimately settle
5 for some minor sanction. *Id.* Accordingly, Pringle's allegations regarding the
6 Defendants' customary business practices, including their chronic copying of the
7 intellectual property of others, is relevant and material, and Defendants cannot
8 contend at this stage of the proceedings that these allegations have no possible
9 bearing on the litigation.

10 Courts have also held that allegations supplying historical background
11 regarding other claims will not be stricken unless such allegations are unduly
12 prejudicial to the moving party. *Ghahremani v. Borders Group, Inc.*, No. 10-cv-
13 1248, 2010 WL 4008506 (C.D. Cal. Oct. 6, 2010); *see also Impulsive Music v.*
14 *Pomodoro Grill, Inc.*, No. 08-cv-6293, 2008 U.S. Dist. Lexis 94148, at *8, 2008 WL
15 4998474 (W.D.N.Y. Nov. 19, 2008). In this regard, Defendants do not establish or
16 set forth how and to what extent allegations regarding their chronic business
17 practices have prejudiced their ability to defend the claims advanced, nor does the
18 motion explain how these allegations are immaterial to the issues of willfulness and
19 access. Simply put, just because allegations in a complaint may reflect badly on a
20 defendant does not mean the allegation must be stricken as unduly prejudicial. All
21 allegations of wrongdoing have the effect of prejudicing the allegedly offending
22 party; otherwise, the document would not be called a "complaint," but that is never
23 the test. The allegations or evidence which is to be excluded in such circumstances
24 must be unduly prejudicial and there is no assertion of such prejudice here.

25 Defendants cite to *Neilson*, 290 F. Supp. 2d 1101, in support of their argument
26 that allegations of custom and habit as a matter of law are superfluous. Defendants'
27 reliance on *Neilson* is misplaced. The *Neilson* court determined that the challenged
28 allegations should be stricken because they sought to associate Union Bank with

1 practices that were not at issue in the case. *Id.* at 1147. Unlike the situation in
2 *Neilson*, the willful and routine nature of Defendants’ copyright infringement
3 conduct is directly at issue here. The allegations regarding Defendants’ customary
4 and habitual copying of others’ copyrighted material is relevant, and the Defendants’
5 attempt to draw some parallel between the instant case and the holding in *Neilson* is
6 unconvincing and unpersuasive.

7 Even though Defendants’ argument is premature and made without the benefit
8 of any discovery, the fact remains that when the substance of the allegations is
9 considered, the conduct and customary business practices alleged, if demonstrated to
10 be chronic, are obviously material and relevant under the Rule 406 of the Federal
11 Rules of Evidence. Rule 406 provides in pertinent part: “[e]vidence of the . . .
12 routine practice of an organization . . . is relevant to prove that the conduct of the . . .
13 organization on a particular occasion was in conformity with the . . . routine
14 practice.” Fed. R. Evid. 406; *Ghahremani*, 2010 WL 4008506, at *3. The
15 *Ghahremani* court noted that Rule 406 often creates tension with Federal Rule of
16 Evidence 404 because of the difficulty in distinguishing between admissible
17 evidence of habit and inadmissible character evidence. *Id.* (citing *Simplex, Inc. v.*
18 *Diversified Energy Sys., Inc.*, 847 F.2d 1290, 1290 (7th Cir. 1988)). However, the
19 court noted that to balance these interests, “the offering party [of the habit, or routine
20 practice evidence] must establish the degree of specificity and frequency of uniform
21 response that ensures more than a mere ‘tendency’ to act in a given manner, but
22 rather, conduct that is ‘semi-automatic’ in nature.” *Simplex, Inc.*, 847 F.2d at 1293;
23 *see Zubulake v. UBS Warburg LLC*, 382 F. Supp. 2d 536, 542 (S.D.N.Y. 2005). In
24 short, the conduct must “reflect a systematic response to specific situations to avoid
25 the danger of unfair prejudice that ordinarily accompanies the admission of
26 propensity evidence.” *Ghahremani*, 2010 WL 4008506, at *2 (citing *Goldsmith v.*
27 *Bagby Elevator Co.*, 513 F.3d 1261, 1285 (11th Cir. 2008)). In the *Ghahremani*
28 case, the court granted the defendant’s motion to strike the pattern and practice

1 allegations, because the *Ghahremani* plaintiff failed to meet the threshold required to
2 show a pattern and practice, concluding that only one instance of the same conduct
3 does not establish a “tendency” for the defendant to commit infringement. *Id.* at *3
4 (emphasis added). The facts alleged here set forth far more than a single instance of
5 copyright infringement. Accordingly, Pringle has pled an ongoing, chronic course of
6 conduct which satisfies any pattern and practice pleading requirement.

7 In contrast to the complaint in *Ghahremani*, Pringle’s First Amended
8 Complaint alleges several examples of the essentially Pavlovian nature of
9 Defendants’ repeated instances of intentional copyright infringement. Pringle
10 specifically alleges the semi-automatic nature of Defendants’ conduct in a general
11 fashion throughout the complaint, including references such as: “The actions alleged
12 herein are not a single isolated incident” and “This is routinely done without gaining
13 the proper authorization from the Copyright holders....” [ECF Doc. No. 1 (¶ 59)].
14 These allegations have put Defendants on notice of Pringle’s claim that they have
15 and continue to engage in a repetitive and nearly automatic business practice of
16 copyright infringement when choosing new songs to be used by the Black Eyed Peas.
17 There can be no confusion or ambiguity as to whether Pringle intends to pursue via
18 discovery the nature and conduct of the Defendants’ business relating to the
19 “creation” of new music for the Black Eyed Peas.³

20 _____
21 ³ Plaintiff alleges three specific prior claims of copyright infringement against the
22 Defendants. In addition to the three claims mentioned in the Complaint, there are
23 two other infringement lawsuits currently underway in the Central District of
24 California against the Defendant members of the Black Eyed Peas, Interscope
25 Records, and UMG Recordings, Inc., among others: one by famed-funk musician,
26 George Clinton, who recently filed suit on December 10, 2010, for a sound recording
27 violation, Case No. 10 CV 09476; and one by an unknown songwriter, Ebony Latrice
28 Batts, who filed suit on October 28, 2010, for infringement on her musical
composition and sound recording, Case No. CV 10-8123. In addition to those cases,
two songwriters and dance DJs, Deadmau5 and Timofey, have recently made public
announcements that their works were infringed upon by the Black Eyed Peas for
songs on their new album, *The Beginning*. **This case included, that totals seven
known claims of copyright infringement against these Defendants in the last
year.**

1 Likewise, Plaintiffs allege specific examples of this repeated and chronic
2 conduct. [See, e.g., ECF Doc. No. 1 (17:13–18:19)]. Indeed, Plaintiffs have
3 provided Defendants more than sufficient notice of the existence of their claim that
4 Defendants’ routine business practice of copying, in whole or in part, the creative
5 copyrighted works of others for the Black Eyed Peas is chronic and virtually
6 habitual. For Defendants to contend that Plaintiffs’ allegations fail to establish that
7 more than a tendency exists is belied by the nature and extent of the allegations
8 themselves.

9 Further, *Fantasy, Inc. v. Fogerty*, 984 F. 2d 1524 (9th Cir. 1993), *rev’d on*
10 *other grounds*, 510 U.S. 517, 114 S. Ct. 1023, 127 L. Ed. 2d 455 (1994), heavily
11 relied on by Defendants, does not hold that evidence of prior copyright infringement
12 has no relevance to claims of copyright infringement. Accordingly, Defendants’
13 reliance on *Fantasy* is unavailing. Although *Fantasy* involved a copyright
14 infringement case brought by a song holder against the musician who originally
15 wrote the song, the stricken allegations were contained in the counterclaim filed by
16 the defendant musician and sought only rescission of the music publishing agreement
17 entered into with the copyright holder's predecessor. *Id.* at 1526–27. While the
18 Ninth Circuit upheld the District Court’s decision to strike certain allegations as
19 creating a serious risk of prejudice to *Fantasy*, *id.* at 1528, Defendants omit any
20 discussion of the fact that the allegations that the *Fantasy* court deemed immaterial
21 and impertinent were allegations that the minority shareholder and director of
22 *Fantasy* and *Galaxy*'s sole shareholder had fraudulently induced *Fogerty* to enter an
23 unwise and illegal tax shelter scheme between 1969 and 1974. These allegations
24 were completely unrelated to either the alleged copyright infringement or the
25 rescission claims at issue in the counterclaim. *Id.*

26 Moreover, in noting the lack of materiality, the *Fantasy* court stated:

27 Although the course of conduct between the parties to a
28 contract may be relevant to the materiality of a breach,
Fogerty offers no authority for the proposition that the
conduct of a predecessor-in-interest is relevant to

1 materiality; in fact, he now denies that Zaentz was a
2 predecessor-in-interest to Fantasy... The court did not
3 abuse its discretion in concluding that whether Zaentz
4 fraudulently induced Fogerty's consent to the tax plan
agreements simply was not relevant to the materiality of
any breach Fantasy might have committed by escrowing
royalties in 1985.”

5 *Id.* at 1528. The *Fantasy* court concluded that in granting Fantasy's motion to strike,
6 the district court correctly noted that those allegations created serious risks of
7 prejudice to Fantasy, delay, and confusion of the issues in great part because the
8 allegations did not involve the parties to the copyright infringement action and would
9 have unnecessarily complicated the trial of the copyright claim by requiring the
10 introduction of extensive evidence of the tax plan agreements. *Id.* In direct contrast
11 to the *Fantasy* case, Pringle’s allegations regarding prior lawsuits or threats of
12 lawsuits against the Black Eyed Peas consist of virtually identical infringing conduct
13 as that alleged by Pringle. Thus, any parallel that Defendants attempt to draw
14 between this case and *Fantasy* should be disregarded.

15 Defendants also rely on *Survivor Prods. LLC v. Fox Broad., Co.*, 2001 U.S.
16 Dist. LEXIS 25512 (C.D. Cal. 2001) in support of their argument. That case too,
17 however, is readily distinguishable. There, the allegations stricken were only those
18 that referred to news reporters’ opinions as to the similarities between two different
19 television shows, “Survivor” and “Boot Camp.” The stricken allegations were not
20 allegations demonstrating a routine business practice that consisted of the chronic
21 copying of the copyrighted work of others. *Id.* Defendants’ reliance on this
22 authority therefore, is misplaced and inappropriate. Certainly *Survivor* does not
23 stand for the proposition that Pringle’s allegations of habit and business practice
24 must be stricken by the Court.

25 Throughout their Motion, Defendants ignore the substance of Pringle’s
26 allegations which unambiguously allege a course of business conduct directed at
27 Defendants’ practices regarding the creation and development of new musical
28 material. Defendants’ conduct is alleged to constitute a chronic, systematic and

1 automatic pattern and practice of intentional copyright infringement. All of the
2 allegations as to prior conduct, including references to prior lawsuits or threats of
3 lawsuits, and the way the Defendants do business, form a legitimate basis of inquiry
4 upon which Pringle may rely to establish Defendants' willful and intentional
5 conduct. Striking those allegations now would unfairly prejudice Pringle's ability to
6 discover the truth about the Defendants' infringing conduct and, accordingly, should
7 be denied.

8 **2. Allegations Regarding Unfair Business Practices and**
9 **Conspiracy Are Proper and Defendants Cannot Show They**
10 **Should Be Stricken**

11 Defendants argue that state law claims for Unfair Business Practices and
12 Conspiracy are preempted and therefore, any use of the words "unfair business
13 practice" or "conspiracy" can never be included in a complaint seeking relief for
14 copyright infringement. That contention is without support in law or fact. Contrary
15 to Defendants' position, it is not black letter law that such claims are automatically
16 preempted. Rather, claims under California's Unfair Business Statute are allowed
17 and are not preempted where the complaint alleges an "extra element" that makes the
18 claim something more than a copyright infringement claim. *Butler v. Target Corp.*,
19 323 F. Supp. 2d 1052, 1055, 1057-58 (C.D. Cal. 2004) (unfair business practice
20 claim not preempted by Copyright Act where "extra element" alleged which changes
21 the nature of the action).

22 Regardless, Pringle has not alleged a claim for conspiracy or unfair business
23 practices, revealing further Defendants' propensity to advance arguments in support
24 of a motion which have little, if any, support in the case law and have not actually
25 been made. Here the allegations are that the Defendants' conduct is tantamount to
26 unfair business practices and engaged in by all of the Defendants with knowledge of
27 the intentional copying. The allegations are properly included here because they go
28 to the nature and circumstances of Defendants' conduct. They support Pringle's

1 contention that Defendants’ conduct was willful, and Pringle anticipates taking
2 discovery on this aspect of Defendants’ willfulness. Further, Defendants’ business
3 practices, as they relate to the willful nature of their copyright infringement, will
4 have a significant evidentiary impact on the copyright claim. Whether discovery will
5 ultimately substantiate the existence of an extra element which will give rise to a
6 specific count for unfair competition is unknown today, but certainly the possibility
7 that such a count may develop once the discovery of documents has occurred cannot
8 be discounted.

9 This, as with the other arguments set forth in Defendants’ Motion, is but
10 another example of Defendants’ intention to litigate on pleading technicalities and
11 straw man arguments raised by them, not the proofs. The allegations are proper, and
12 the request to strike the allegations regarding unfair business practices and
13 conspiracy should be denied.

14 **3. Plaintiff’s Request for Fees is Proper**

15 Defendants’ argument that Pringle’s request for attorneys’ fees is improper
16 ignores the fact that the infringement of “Take a Dive” continues even now, and the
17 work is registered. As such, under the plain language of 17 U.S.C. § 412(a), Pringle
18 can recover attorneys’ fees for the ongoing infringement of “Take a Dive.” The
19 request for relief is therefore proper and should not be stricken.

1 **III. CONCLUSION**

2 Defendants' Motion is long on rhetoric but short on substance and case law
3 support. Each of the allegations in Pringle's First Amended Complaint is proper. As
4 such, Defendants' Motion should be denied in its entirety and Defendants should be
5 required to answer the First Amended Complaint and proceed with discovery.
6

7 Dated: January 3, 2011

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

9 Ira Gould (*appearing Pro Hac Vice*)
10 Ryan L. Greely (*appearing Pro Hac Vice*)
GOULD LAW GROUP

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

13
14 By: /s/ Dean A. Dickie
Dean A. Dickie

15
16 Attorneys for Plaintiff
BRYAN PRINGLE