

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

7 Attorneys for Defendants SHAPIRO,  
 BERNSTEIN & CO., INC. (incorrectly  
 8 sued as Shapiro, Bernstein & Co.);  
 RISTER EDITIONS and DAVID  
 9 GUETTA

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

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

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

**DEFENDANTS' MEMORANDUM  
 OF POINTS AND AUTHORITIES  
 IN OPPOSITION TO PLAINTIFF'S  
 MOTION FOR PRELIMINARY  
 INJUNCTION**

Date: January 31, 2011  
 Time: 10:00 A.M.  
 Dept.: 10A

Complaint Filed: October 28, 2010  
 Trial Date: Not Assigned

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**MEMORANDUM OF POINTS AND AUTHORITIES**

Defendants Shapiro Bernstein & Co., Inc. (“Shapiro Bernstein”), David Guetta, and Rister Editions (collectively “Defendants”) respectfully submit this Memorandum of Points and Authorities in Opposition to Plaintiff’s Motion for Preliminary Injunction (“Motion”).<sup>1</sup>

**Preliminary Statement**

Plaintiff’s Motion is, in a word, extraordinary. It seeks a sweeping preliminary injunction against essentially all use and distribution of one of the most popular and acclaimed songs in the world, and it does so some 18 months after the song was released, and despite indisputable evidence that no defendant copied any of Plaintiff’s alleged work.

The posture of this case is well known to all involved. Plaintiffs filed suit in October 2010 claiming that the internationally-acclaimed song “I Gotta Feeling” by the Black Eyed Peas (“BEP”), which was originally released in June 2009, infringed a derivative version of Plaintiff’s song “Take a Dive,” which Plaintiff claims to have created sometime in 1999. Shortly before the Thanksgiving holiday, and more than 15 months after “I Gotta Feeling” was released, Plaintiff moved *ex parte* for a temporary restraining order, which the Court promptly denied. All defendants in this action subsequently moved to dismiss Plaintiff’s complaint pursuant to Fed. R. Civ. P. 12(b), which motions should completely—and efficiently—resolve this entire action. In a desperate attempt to sidestep those pending motions—and drive up the strike value of a meritless claim—Plaintiff has

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<sup>1</sup> As with Defendant’s Motion to Dismiss, this opposition is submitted without waiver and with express reservation of all defenses and objections as to identity of parties and service of process.

1 now moved for a preliminary injunction against further use and distribution of an  
2 internationally acclaimed song **18 months** after it was released.

3 Plaintiff’s Motion not only fails to demonstrate any possibility whatsoever of  
4 irreparable harm—which failure is addressed more fully by co-defendants in their  
5 own concurrently filed oppositions to the Motion—but also demonstrates no  
6 possibility of success on the merits.<sup>2</sup> As an initial matter, Plaintiff fails to carry  
7 even the basic burden of providing that he created and actually owns a valid  
8 copyright in the work he claims was infringed—the derivative version of “Take a  
9 Dive.” Moreover, Plaintiff’s infringement claim hinges on the fantastical allegation  
10 that the co-authors of “I Gotta Feeling” somehow obtained and sampled from a  
11 recording of Plaintiff’s decade-old and obscure song. Not only does Plaintiff offer  
12 no evidence as to how the co-authors of “I Gotta Feeling” gained access to his  
13 unpublished song, Plaintiffs own evidence establishes that ***the “guitar twang***  
14 ***sequence” which Plaintiff claims is key to his infringement claim could not have***  
15 ***been “sampled” from the derivative version of “Take a Dive” that Plaintiff***  
16 ***allegedly distributed.*** Plaintiff provides no tenable theory—much less any evidence  
17 to support that theory—as to how Defendants could possibly have copied any  
18 portion of Plaintiff’s work.

### 19 **Background**

20 Plaintiff alleges that in or around 1998, he wrote and recorded a song entitled  
21 “Take a Dive.” (FAC ¶ 27.) Plaintiff claims to have registered the copyright to that  
22 song as part of a compilation of seventeen other songs, even though the registration  
23

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24 <sup>2</sup> Present Defendants address only Plaintiff’s failure to establish a likelihood of  
25 success on the merits on the issues of ownership of a valid copyright and access to  
26 Plaintiff’s work. In their concurrent oppositions, which Defendants incorporate  
27 herein by reference, co-defendants also demonstrate that Plaintiff’s Motion fails for  
28 many additional reasons—for example, Plaintiff has failed to show any possibility  
of irreparable harm, that the balance of the equities tips in his favor, or that Plaintiff  
should be exempted from the bond requirement.

1 attached to the FAC does not list “Take a Dive” as among those songs. (*Id.* at ¶ 28,  
2 Exh. B.) Plaintiff allegedly created a new instrumental version of “Take a Dive” in  
3 1999, which added a “guitar twang sequence” (among other changes). Plaintiff  
4 purported to register this derivative version with the Copyright Office only after  
5 commencing this lawsuit in 2010. (*Id.* at ¶ 29.) The registration for the derivative  
6 version of “Take a Dive”—which is the only version that Plaintiff claims was  
7 infringed (*id.* at ¶ 30)—covers only Plaintiff’s sound recording, and not the  
8 underlying musical composition of “Take a Dive.” (Jan. 3, 2011 Decl. of Bryan  
9 Pringle (“Pringle Decl.”) at Exh. D.) The purported registration certificate for the  
10 derivative version of “Take a Dive” also states that the song was first published in  
11 the United States in December 1999.

12 On unspecified dates between 1999 and 2008, Plaintiff allegedly submitted an  
13 unspecified number of demo CDs containing a sound recording of the derivative  
14 version of “Take a Dive” to unidentified individuals at co-defendants UMG,  
15 Interscope and EMI. (*Id.* at ¶ 31.) According to Plaintiff, on unspecified dates over  
16 that same nine-year time period, he received written responses to his submissions,  
17 including responses from Interscope, UMG and EMI stating that they were not  
18 interested in Plaintiff’s music. (*Id.* at ¶ 33.) Plaintiff did not, however, attach any  
19 documentary evidence that he ever sent any works to any defendants or that he  
20 received any responses to these alleged submissions. Plaintiff also claims that, on  
21 unspecified dates and times, he advertised his music, including “Take a Dive,” on  
22 unspecified music websites, and that his music was played on unspecified radio  
23 stations and internet sites, including in France. (*Id.* at ¶ 32.) Plaintiff similarly  
24 provides no evidence of these alleged radio plays or internet postings.

25 Plaintiff does not claim that any of the individual co-authors of “I Gotta  
26 Feeling” ever actually received any of these purported submissions. Instead,  
27 Plaintiff argues solely “upon information and belief” that Defendant William  
28 Adams, a member of the musical group The Black Eyed Peas, acted as an informal

1 Artist and Repertoire representative for Interscope, and, also “[o]n information and  
2 belief,” that Adams therefore had access to *all* music submitted to Interscope during  
3 the nine-year time period from 1999 to 2008, which allegedly included Plaintiff’s  
4 song “Take a Dive.” (*Id.* at ¶ 35.) Based on these allegations, Plaintiff claims that  
5 one of the members of The Black Eyed Peas, David Guetta or Frederic Riesterer  
6 somehow accessed one of his demo CDs, listened to his song “Take a Dive,” and  
7 “sampled” the “guitar twang sequence” therein when recording the song “I Gotta  
8 Feeling.” (*Id.* at ¶¶ 37, 40.)

## 9 ARGUMENT

### 10 **I. PLAINTIFF CANNOT SHOW ANY LIKELIHOOD OF SUCCESS ON** 11 **THE MERITS OF HIS COPYRIGHT INFRINGEMENT CLAIM**

12 “To state a claim for copyright infringement, Plaintiff[] must allege: ‘(1)  
13 ownership of a valid copyright, and (2) copying of constituent elements of the work  
14 that are original.’” *Zella v. E.W. Scrips Co.*, 529 F. Supp. 2d 1124, 1132 (C.D. Cal.  
15 2007) (quoting *Feist Publ’ns, Inc. v. Rural Tele. Serv. Co.*, 499 U.S. 340, 361, 111  
16 S. Ct. 1282, 113 L.Ed.2d 358 (1991)). Plaintiff’s Motion completely fails to  
17 demonstrate any likelihood of success on either element.

#### 18 **A. Plaintiff Cannot Show Valid Copyright Ownership Of The** 19 **Derivative Version Of “Take a Dive”**

##### 20 **1. Plaintiff’s Registration Certificate Does Not Establish** 21 **Ownership**

22 While Plaintiff claims copyrights in both the original and derivative versions  
23 of “Take a Dive,” the only “copying” Plaintiff alleges in his complaint is of the  
24 “guitar twang sequence” sound recording contained in the derivative version of  
25 “Take a Dive.” (*See* FAC ¶ 30.) Yet Plaintiff fails to establish that he actually owns  
26 a copyright in this sound recording. The Copyright Act provides that a certificate of  
27 registration constitutes *prima facie* evidence of a valid copyright only if made within  
28 five years after first publication. 17 U.S.C. § 410(c); *Morrill v. Smashing Pumpkins*,

1 157 F. Supp. 2d 1120, 1125-26 (C.D. Cal. 2001). However, because Plaintiff  
2 himself alleges that he published the derivative version of “Take a Dive” in 1999,  
3 more than nine years before he obtained the registration in 2010, the registration  
4 does not constitute *prima facie* evidence of a valid copyright. (Pringle Decl. ¶ 4 and  
5 Exh. D.) Plaintiff therefore has the burden of establishing authorship and therefore  
6 ownership of a valid copyright in the derivative version of “Take a Dive,” including  
7 the “guitar twang sequence.” This sequence is the crucial musical passage in this  
8 case, and Plaintiff fails to even address his additional burden to establish original  
9 creation and ownership, much less meet it with credible evidence. Plaintiff does not  
10 even make the bare assertion that he independently composed the “guitar twang  
11 sequence”—instead, he merely states that he “modeled” this “guitar twang  
12 sequence” after the note progression in the original version of “Take a Dive.”  
13 (Pringle Decl. ¶ 4.) His Motion fails for this reason alone.

14  
15         Moreover, the registration certificate raises more questions than it answers  
16 about the circumstances under which Plaintiff claims to have created the derivative  
17 version of “Take a Dive.” Most importantly, the certificate claims a  
18 publication/creation date in 1999. Based on Plaintiff’s evidence, this creation date  
19 appears highly suspect. First, although Plaintiff claims to have first published the  
20 derivative version of “Take a Dive” in the United States in December 1999, he also  
21 claims to have traveled to France and distributed the song there in March 1999.  
22 (Pringle Decl. ¶ 8.) Second, even though only the derivative version of “Take a  
23 Dive” contains the crucial “guitar twang sequence,” Plaintiff does not explain why  
24 he waited nearly ten years after allegedly creating it—and more than a full year after  
25 the release of “I Gotta Feeling”—to submit an application to register the derivative  
26 version. And further, the dating of both the derivative version and the isolated  
27 “guitar twang sequence” remain very much open issues in this matter—indeed,  
28 Plaintiff *admits* in earlier briefing in this case that the sound recording he actually

1 submitted to the Copyright Office in 2010 was generated in 2010, not 1999. (*See*  
2 *Opp. to Motion to Dismiss* (Dkt. No. 74) at 4:19-22; *see also* Co-Defendant’s  
3 *Opposition Brief* at 4-5.) To obtain a proper copyright, the applicant must submit  
4 the original work or a bona fide copy to the Copyright Office as deposit materials—  
5 subsequent “reconstructions” of earlier works, even if faithful to the original, are  
6 insufficient. *See, e.g., Kodadek v. MTV Networks, Inc.*, 152 F.3d 1209, 1212-13 (9th  
7 Cir. 1998). Here, at the very least, there are serious questions about the ownership,  
8 lineage, and authenticity of the derivative version of “Take a Dive” which  
9 undermine Plaintiff’s attempt to establish a likelihood of success on the merits.

10  
11 Finally, not only does Plaintiff fail to even allege that he independently  
12 created the “guitar twang sequence” in the derivative version of “Take a Dive,” his  
13 evidence actually *contradicts* this claim. Plaintiff has submitted an isolated version  
14 of the “guitar twang sequence” to the Court, and has submitted a purported expert  
15 declaration claiming that the same “guitar twang sequence” in the isolated version is  
16 also found in “I Gotta Feeling.” To support his (unsuccessful) motion for  
17 Temporary Restraining Order, however, Plaintiff previously relied on a purported  
18 computer forensics expert’s conclusion that the derivative version of “Take a Dive”  
19 was created in June 1999. Now, Plaintiff expressly disclaims that “expert” opinion,  
20 and offers **no** independent evidence whatsoever regarding the creation date of  
21 derivative version of “Take a Dive” or the “guitar twang sequence” contained  
22 therein. (*See* Motion at 18 n.4.) And further, as set forth in greater detail below,  
23 technical analysis of the isolated “guitar twang sequence” and Plaintiff’s sound  
24 recording in the derivative version of “Take a Dive” conclusively proves that the  
25 isolated version could not have come from Plaintiff’s sound recording—indeed, if  
26 anything, the evidence Plaintiff has submitted tends to show that Plaintiff copied  
27 this “guitar twang sequence” from Defendants, not the other way around. In other  
28

1 words, Plaintiff’s own evidence suggests that he did *not* independently create the  
2 “guitar twang sequence” in 1999.

3  
4 **2. Plaintiff’s Registration In A Sound Recording Does Not**  
5 **Implicate Any Of Defendants’ Activities**

6 As noted above, Plaintiff himself alleges that only the derivative version of  
7 “Take a Dive” contains the “guitar twang sequence” which Plaintiff claims was  
8 copied. (FAC ¶ 30.) Crucially, this is a registration of a copyright in the particular  
9 **sound recording** only, not the underlying musical composition—indeed, the  
10 certificate specifically disclaims any rights in the “music” or any “lyrics.” *See*  
11 *Pringle Decl.*, Exh. D (Copyright Registration Number SR 659-360, issued  
12 November 15, 2010 under the name “Take a Dive (Dance Version).”) Therefore,  
13 even assuming Plaintiff owns a valid copyright in this sound recording—which he  
14 does not—this copyright would only give Plaintiff the right to control the use and  
15 distribution of that particular sound recording, and no rights concerning the  
16 underlying musical composition. *See, e.g., Newton v. Diamond*, 388 F.3d 1189,  
17 1191 (9th Cir. 2004) (stating that “[s]ound recordings and their underlying  
18 compositions are separate works with their own distinct copyrights” and finding that  
19 where the plaintiff licensed the sound recording rights, he could only file suit for  
20 infringement of the composition); *Marshall v. Huffman*, No. C 10-1665 SI, 2010  
21 WL 5115418, at \*3 (N.D. Cal. Dec. 9, 2010) (“ The Copyright Act recognizes  
22 separate protections for ‘musical works’ (i.e., compositions) as distinct from ‘sound  
23 recordings’ which may embody those compositions.”); 17 U.S.C. § 102(a)(2), (7).

24 As a result, Plaintiff’s allegations of “sampling” from a sound recording do  
25 not implicate the music publisher defendants Shapiro Bernstein, Rister Editions or  
26 Frederic Riesterer. These Defendants have no involvement with Plaintiff’s sound  
27 recording; rather, they control licensing of musical *compositions*, including “I Gotta  
28 Feeling.” Plaintiff’s claims regarding “sampling” from this particular sound

1 recording therefore do not implicate any of these Defendants’ ongoing and  
2 legitimate licensing activities. Accordingly, Plaintiff’s requested injunctive relief—  
3 which includes a blanket prohibition of *all* licensing of “I Gotta Feeling” (Motion at  
4 3)—is grossly overbroad and cannot properly be applied to any parties that license  
5 only the musical composition “I Gotta Feeling,” including Shapiro Bernstein, Rister  
6 Editions or Frederic Riesterer.

7       **B. Plaintiff Cannot Show That Any Defendants Had Access To The**  
8       **Sound Recording Of The Derivative Work**

9       As set forth at greater length in Defendants’ motion to dismiss, filed on  
10 December 13, 2010 (Dkt. No. 53), an essential element of a copyright infringement  
11 claim is access by the infringer to the infringed work. To satisfy this element, a  
12 plaintiff “must show more than that the defendant had a ‘bare possibility’ of access  
13 ... instead, the plaintiff must demonstrate that the defendant had a ‘reasonable  
14 possibility’ to view the plaintiff’s work.” *Meta-Film Assocs., Inc. v. MCA, Inc.*, 586  
15 F. Supp. 1346, 1355 (C.D. Cal. 1984) (citations omitted). Far from showing a  
16 likelihood that Defendants had access to his work, Plaintiff’s claims are  
17 technologically impossible and directly contradicted by incontrovertible evidence.

18       **1. Plaintiff’s Speculations That Defendants “Sampled” His**  
19       **Sound Recording Are Technologically Impossible**

20       Plaintiff presents no direct evidence whatsoever that Defendants had access to  
21 the “guitar twang sequence” in his derivative work. To fill this glaring gap in his  
22 theory of the case, Plaintiff contends that the “guitar twang sequence” in “I Gotta  
23 Feeling” was sampled directly from “Take a Dive,” and that therefore—reasoning  
24 backwards—Defendants must have somehow had access to a copy of the work from  
25 which they made the sample. While clever in concept, this argument is  
26 **technologically impossible.**

27       In support of his “sampling” theory, Plaintiff presents the purported expert  
28 testimony of Mark Rubel, a claimed expert in forensic sound analysis. Mr. Rubel

1 states that he was given three mp3 music files—(1) a copy of the derivative version  
2 of “Take a Dive” that Plaintiffs claims to have distributed, (2) a file containing the  
3 “guitar twang sequence” which, Mr. Rubel was informed, purportedly was “soloed  
4 out” from the derivative version of “Take a Dive,” and (3) a copy of “I Gotta  
5 Feeling.” (Nov. 17, 2010 Decl. of Mark Rubel (“Rubel Decl.”) at ¶ 4.) Mr. Rubel  
6 performed a “waveform” analysis of the three files, and opined that the isolated  
7 “guitar twang sequence” can be found in both “I Gotta Feeling” and the derivative  
8 version of “Take a Dive.” (*Id.* at ¶ 5-10.) As an initial matter, it is impossible to  
9 independently test Mr. Rubel’s analysis because he analyzes only approximately 50  
10 milliseconds out of the approximately 15 second “guitar twang sequence” without  
11 identifying which portion he used. (Jan. 10, 2011 Decl. of Paul Geluso (“Geluso  
12 Decl.”), filed concurrently, at ¶ 13.) Mr. Rubel also failed to provide any of the  
13 audio samples on which he clearly relied in his analysis. (*Id.*)

14 Mr. Rubel’s work also relies entirely on an unproven assumption that he did  
15 not test—namely, that the isolated “guitar twang sequence” actually came from the  
16 derivative version of “Take a Dive” and not from some other source. (*Id.* at ¶ 11.)  
17 As Defendants’ independent technical analysis confirms, however, this assumption  
18 is not only unproven, it is ***demonstrably false***. As shown by the independent  
19 analysis of expert musical technician Paul Geluso, professor and Chief Recording  
20 Engineer in the Department of Music and Performing Arts Professions at the  
21 Steinhardt School of Education at New York University,<sup>3</sup> it is a 100% technological  
22 impossibility that the “guitar twang sequence” contained in “I Gotta Feeling”—  
23 which Plaintiff claims Defendants sampled—was actually extracted from the  
24 derivative version of “Take a Dive.” (Geluso Decl. at ¶ 7.) The “guitar twang  
25 sequence” in Plaintiff’s recording of “Take a Dive” is heavily layered with multiple  
26 sound effects and other orchestration. (*Id.*) The “guitar twang sequence in “I Gotta

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27 <sup>3</sup> Mr. Geluso’s qualifications as an expert are addressed more fully in his  
28 Declaration at ¶¶ 1-3.

1 Feeling,” however, is “clean,” and contains no “ghosts” or “artifacts” of Plaintiff’s  
2 “mix.” (*Id.*) Accordingly, in order to have “sampled” from the derivative version of  
3 “Take a Dive,” the authors of “I Gotta Feeling” would have had to somehow isolate  
4 the sequence from the “mix.” (*Id.*) Mr. Rubel did not test whether this isolation is  
5 possible, and as Mr. Geluso’s analysis shows, it is not.

6 Mr. Geluso applied several forensic techniques to the three files Plaintiff  
7 provided, attempting to isolate the “guitar twang sequence” from the derivative  
8 version of “Take a Dive.” (*Id.* at ¶¶ 8-9.) Nevertheless, Mr. Geluso was unable to  
9 yield even a remotely artifact-free isolated “guitar twang sequence,” as was present  
10 in “I Gotta Feeling.” (*Id.* at ¶ 9.) As a result, it is technologically impossible for the  
11 producer of “I Gotta Feeling” to have sampled the “guitar twang sequence” from the  
12 derivative version of “Take a Dive” which Plaintiff claims to have submitted to  
13 certain of the defendants. (*Id.* at ¶ 10.) If anything, Plaintiff’s expert report tends to  
14 show that the “guitar twang sequence” contained in the derivative version of “Take  
15 a Dive” actually came from “I Gotta Feeling,” not the other way around. In other  
16 words, it is far more likely that Plaintiff copied from Defendants, rather than vice  
17 versa. (*See id.* at ¶¶ 10-12.)<sup>4</sup>

18 In sum, Plaintiff’s conspiracy theories notwithstanding, the technological  
19 reality is that the “guitar twang sequence” that appears in “I Gotta Feeling” ***could***  
20 ***not have been “sampled”*** from Plaintiff’s recording of the derivative version of  
21 “Take a Dive.” And as discussed above, the only claim advanced by Plaintiff is an  
22 infringement of the sound recording in the derivative version of “Take a Dive.” As  
23 a result, this finding conclusively refutes Plaintiff’s principal argument and  
24 supporting evidence for Defendants’ supposed “access” to Plaintiff’s work—and,  
25 indeed, it refutes Plaintiff’s entire claim of infringement.

26  
27 \_\_\_\_\_  
28 <sup>4</sup> Notably, neither of Plaintiff’s two remaining experts, Alexander Stewart or Kevin  
Byrnes, even address the “sampling” issue.

1                   **2. Plaintiff Cannot Even Adequately Allege that Defendants**  
2                   **Had Access To “Take a Dive”**

3           Not only is Plaintiff’s theory that Defendants digitally sampled from the  
4 derivative version of “Take a Dive” technologically impossible as shown above,  
5 Plaintiff’s speculative and amorphous allegations as to how Defendants supposedly  
6 might have gained access to his song cannot even survive a motion to dismiss, let  
7 alone establish likelihood of success on the ultimate merits.

8           A plaintiff must show a “reasonable possibility” of access, and generalized  
9 allegations of unsolicited submissions to large corporate defendants are insufficient  
10 to state a claim for infringement; indeed, courts have consistently rejected the “bare  
11 corporate receipt” doctrine, noting that, because “countless unsolicited scripts are  
12 submitted to numbers of individuals on studio lots every day ... it is clearly  
13 unreasonable to attribute the knowledge of any one individual—especially a non-  
14 employee—to every other individual just because they occupy offices on the same  
15 studio lot.” *Meta-Film Assocs., Inc. v. MCA, Inc.*, 586 F. Supp. 1346, 1357-58  
16 (C.D. Cal. 1986); *see also Merrill v. Paramount Pictures Corp.*, No. CV 05-1150  
17 SVW (MANx), 2005 WL 3955653, at \*7, 9 (C.D. Cal. Dec. 19, 2005).

18           Here, Plaintiff’s speculative and conjectural allegations are plainly  
19 insufficient to even adequately plead access. First, Plaintiff claims that he sent  
20 various derivative versions of “Take a Dive” to three of the corporate co-defendants,  
21 UMG, EMI and Interscope, but does not identify any individual or even department  
22 at those companies to whom he allegedly sent his song, or on what dates during a  
23 *nine-year* time period from 1999 to 2008 he claims to have submitted his song.  
24 Plaintiff also fails to identify which of the “numerous derivative versions” of “Take  
25 a Dive” that he claims to have sent to those co-defendants was allegedly copied.  
26 Nor does Plaintiff even allege any facts tending to show that his work was passed on  
27 to any of the members of BEP, much less the actual composers of the musical bed of  
28 “I Gotta Feeling,” Frederic Riesterer and David Guetta. As a result, Plaintiff’s

1 speculative and vague theory as to how Defendants gained access to his work cannot  
2 even survive a motion to dismiss, much less establish a likelihood of success on the  
3 merits.

4 **3. Defendants’ Uncontroverted Evidence Establishes That They**  
5 **Independently Created The “Guitar Twang Sequence” In “I**  
6 **Gotta Feeling” In 2008**

7 The evidence shows that, rather than copy the “guitar twang sequence” in “I  
8 Gotta Feeling” from Plaintiff’s work, Defendants independently created the “guitar  
9 twang sequence” in “I Gotta Feeling” and did not copy any of Plaintiff’s work.  
10 Defendant Frederic Riesterer has submitted a declaration explaining that he created  
11 the “guitar twang sequence” ultimately used in “I Gotta Feeling,” in his studio in  
12 France. Specifically, Mr. Riesterer has declared that (1) he composed “I Gotta  
13 Feeling” in his “personal studio in Paris from October 2008 through February or  
14 March 2009,” (2) the “guitar twang sequence” he incorporated in “I Gotta Feeling”  
15 was derived from two earlier songs he also personally composed, and (3) this “guitar  
16 twang sequence” was derived and licensed from a “French music library known as  
17 Univers Sons” which was not available before approximately 2004. (Nov. 23, 2010  
18 Decl. of Frederic Riesterer (“Riesterer Decl.”), at ¶¶ 4-6). To resolve any remaining  
19 doubts, Mr. Riesterer further clarified that he “never had access to any musical  
20 works created by Plaintiff ... and no music publisher, record company, or other  
21 individual ever provided [him] with a copy of any of [Plaintiff’s] works.” (*Id.* at  
22 ¶ 7). Thus, not only did Defendants never have access to or hear Plaintiff’s work,  
23 the evidence shows that they created “I Gotta Feeling” independent of any of  
24 Plaintiff’s works.

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**Conclusion**

For all the foregoing reasons, and for all the reasons identified by co-defendants, Defendants respectfully ask that the Court deny Plaintiff’s motion for a preliminary injunction.

Dated: January 10, 2011

LOEB & LOEB LLP

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

Attorneys for Defendants  
SHAPIRO, BERNSTEIN & CO., INC.  
(incorrectly sued as Shapiro, Bernstein &  
Co.); RISTER EDITIONS and DAVID  
GUETTA