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12 CO.; HEADPHONE JUNKIE PUBLISHING, LLC; JEEPNEY MUSIC, INC.;
EMI APRIL MUSIC, INC.

13 **UNITED STATES DISTRICT COURT**
14 **CENTRAL DISTRICT OF CALIFORNIA, SOUTHERN DIVISION**

16 BRYAN PRINGLE, an individual,
17 Plaintiff,
18 v.
19 WILLIAM ADAMS, JR.; STACY
FERGUSON; ALLAN PINEDA; and
20 JAIME GOMEZ, all individually and
collectively as the music group the
21 Black Eyed Peas; DAVID GUETTA;
FREDERIC RIESTERER; UMG
22 RECORDINGS, INC.; INTERSCOPE
RECORDS; EMI APRIL MUSIC,
23 INC.; HEADPHONE JUNKIE
PUBLISHING, LLC; WILL.I.AM.
24 MUSIC, LLC; JEEPNEY MUSIC,
INC.; TAB MAGNETIC
25 PUBLISHING; CHERRY RIVER
MUSIC CO.; SQUARE RIVOLI
26 PUBLISHING; RISTER EDITIONS;
and SHAPIRO, BERNSTEIN & CO.,
27 Defendants.
28

Case No. SACV10-1656 JST (RZx)
Hon. Josephine Staton Tucker
Courtroom 10A

**DEFENDANTS' OPPOSITION TO
MOTION FOR PRELIMINARY
INJUNCTION**

[Filed Concurrently with Declaration of
Kara Cenar and Declaration of Jonathan
S. Pink]

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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.	LEGAL ARGUMENT	3
A.	Pringle is Not Entitled to a Preliminary Injunction.....	3
B.	Pringle Cannot Establish Success on the Merits	4
1.	Pringle Cannot Establish a Valid Copyright Registration for the Works at Issue	4
2.	Even Assuming a Valid Registration, Plaintiff Cannot Establish Ownership of a Valid Copyright or that the Defendants Factually Copied Any Element of Either Works.....	6
a.	Plaintiff is Not Entitled to Presumption of Copyright Validity	6
b.	Plaintiff Has Not and Cannot Establish Ownership of a Valid Copyright	8
c.	Plaintiff Has Not and Cannot Establish that Defendants Factually Copied Any Element of the Works at Issue.....	11
C.	Plaintiff Cannot Establish Irreparable Harm	16
D.	The Relative Hardship to Each Party Strongly Favors Denying Plaintiff’s Request for a Preliminary Injunction.....	18
III.	PLAINTIFF SHOULD NOT BE PERMITTED TO DEVIATE FROM THE REQUIREMENT OF A BOND AS SET FORTH IN RULE 65(C).....	20
IV.	THE DECLARATIONS OF PLAINTIFF’S EXPERTS ARE INADMISSIBLE UNDER THE FEDERAL RULES OF EVIDENCE	22
V.	CONCLUSION.....	26

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TABLE OF AUTHORITIES

	<u>Page</u>
Cases	
1 <i>A&M Records, Inc. v. Napster, Inc.</i> ,	
2 239 F.3d 1004 (9th Cir. 2001).....	21
3 <i>American Trucking Associations, Inc. v. City of Los Angeles</i> ,	
4 559 F.3d 1046 (9th Cir. 2009).....	3, 4
5 <i>Apple Computer, Inc. v. Microsoft Corp.</i> ,	
6 35 F.3d 1435 (9th Cir. 1994).....	26
7 <i>Builder's World, Inc. v. Marvin Lumber & Cedar, Inc.</i> ,	
8 482 F. Supp. 2d 1065 (E.D. Wis. 2007).....	21
9 <i>Burkhart v. Washington Metro. Area Transit Auth.</i> ,	
10 112 F.3d 1207 (D.C. Cir. 1997).....	24, 26
11 <i>Castle Rock Entertainment, Inc. v. Carol Pub. Group, Inc.</i> , 150 F.3d 132 (2d Cir.	
12 1998).....	13
13 <i>CFM Communications, LLC v. Mitts Telecasting Co.</i> ,	
14 424 F. Supp. 2d 1229 (E.D. Cal. 2005).....	24
15 <i>ConFold Pacific, Inc. v. Polaris Industries, Inc.</i> ,	
16 433 F.3d 952 (7th Cir. 2006).....	14
17 <i>Continuum Co. v. Incepts, Inc.</i> ,	
18 873 F.2d 801 (5th Cir. 1989).....	22
19 <i>Cosmetic Ideas, Inc v. IAC/InteractiveCorp</i> ,	
20 606 F.3d 612 (9th Cir. 2010).....	4, 5
21 <i>CyberMedia, Inc. v. Symantec Corp.</i> ,	
22 19 F. Supp. 2d 1070 (N.D. Cal. 1998).....	21
23 <i>eBay Inv. v. MercExchange, L.L.C.</i> ,	
24 547 U.S. 388 (2006).....	16
25 <i>Feist Publications, Inc. v. Rural Telephone Service Co., Inc.</i> ,	
26 499 U.S. 340 (1991).....	6
27 <i>Gucci Timepieces America Inc. v. Yidah Watch Co.</i> ,	
28 1998 WL 650078 (C.D. Cal. August 4, 1998).....	7
<i>Hologic, Inc. v. Senorx, Inc.</i> ,	
2008 WL 1860035 (N.D. Cal. April 25, 2008).....	16
<i>Jason v. Fonda</i> ,	
698 F.2d 966 (9th Cir. 1982).....	12
<i>Kodadek v. MTV Networks, Inc.</i> , 152 F.3d 1209 (9th Cir. 1998).....	5

1	<i>Lamps Plus, Inc. v. Seattle Lighting Fixture Co.</i> ,	8
	345 F.3d 1140 (9th Cir. 2003) (citation omitted).....	
2	<i>Los Angeles Memorial Coliseum Comm'n v. National Football League</i> ,	19
3	634 F.2d 1211 (9th Cir. 1980).....	
4	<i>Maiz v. Virani</i> ,	23
	253 F.3d 641 (11th Cir. 2001).....	
5	<i>Mattel, Inc. v. MGA Entertainment, Inc.</i> ,	26
6	616 F.3d 904 (9th Cir. 2010).....	
7	<i>Mead Johnson & Co. v. Abbott Labs.</i> ,	21
	201 F.3d 883 (7th Cir. 2000).....	
8	<i>Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.</i> ,	16
9	518 F. Supp. 2d 1197 (C.D. Cal. 2007)	
10	<i>Metro-Media Broadcasting Corp. v. MGM/UA Entertainment Co.</i> ,	17, 18
	611 F. Supp. 415 (C.D. Cal. 1985)	
11	<i>Morgan v. Hawthorne Homes, Inc.</i> ,	7
12	2009 WL 1010476 (W.D. Pa. April 14, 2009).....	
13	<i>Oakland Tribune, Inc. v. Chronicle Publ. Co.</i> ,	17, 18
	762 F.2d 1374 (9th Cir. 1985).....	
14	<i>Reader's Digest Ass'n v. Conservative Digest, Inc.</i> ,	10
15	821 F.2d 800 (D.C. Cir. 1987)	
16	<i>Religious Technology Center v. Netcom On-Line Communication Services, Inc.</i> ,	21
	923 F. Supp. 1231 (N.D. Cal. 1995)	
17	<i>Sampson v. Murray</i> ,	19
18	415 U.S. 61, 94 S.Ct. 937 (1974).....	
19	<i>Selle v. Gibb</i> ,	25
	741 F.2d 896 (7th Cir. 1984).....	
20	<i>Sheldon v. Metro-Goldwyn Pictures</i> ,	13
21	81 F.2d 49 (2d Cir. 1936).....	
22	<i>Sid and Marty Krofft Television Productions, Inc. v. McDonald's Corp.</i> , 562 F.2d	12
	1157 (9th Cir. 1977).....	
23	<i>Swirsky v. Carey</i> ,	6
24	376 F.3d 841 (9th Cir. 2004).....	
25	<i>Tisi v. Patrick</i> ,	12
	97 F. Supp. 2d 539 (S.D.N.Y. 2000).....	
26	<i>Trevino v. Gates</i> ,	25
27	99 F.3d 911 (9th Cir. 1996).....	
28	<i>U.S. v. Sinclair</i> ,	

1 74 F.3d 753 (7th Cir. 1996)..... 24, 26

2 *Ward v. National Geographic Society,*
3 208 F. Supp. 2d 429 (S.D.N.Y. 2002)..... 7

4 **Statutes**

5 17 U.S.C. § 114(a)..... 16

6 17 U.S.C. § 115 16

7 17 U.S.C. § 201(a)..... 8

8 17 U.S.C. § 201(d)(1)..... 8

9 17 U.S.C. § 410(c)..... 6, 7

10 17 U.S.C. § 411(a)..... 4

11 17 U.S.C. §114(b) 6

12 17 U.S.C. §408 9

13 17 U.S.C. §411 4, 5, 9

14 **Other Authorities**

15 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 13.01[B] (2011) 10,
16 11

17 **Rules**

18 Fed.R.Civ.Proc. 65(c)..... 19, 20

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 The first time he sought injunctive relief, Plaintiff Bryan Pringle (“Plaintiff”
4 or “Pringle”) delayed more than 18 months before filing an ex parte application for a
5 Temporary Restraining Order (“TRO”). That was three days before Thanksgiving,
6 on the cusp of the holiday shopping season. Plaintiff’s goal was to enjoin the
7 distribution, sale, use and performance of The Black Eyed Peas’ hit song, “I Gotta
8 Feeling.”

9 However, it was never clear why, after the passage of 18 months, Plaintiff
10 suddenly felt the need for emergency relief. This Court did not understand it either.
11 In an order dated November 24, 2010, it denied Plaintiff’s TRO, reasoning Plaintiff
12 admitted “I Gotta Feeling” was released in 2009 and had been widely performed,
13 sold, and marketed ever since. Pink Decl., ¶3, Exhibit 1. “Plaintiff has not shown
14 why he would suffer irreparable harm if a motion for injunctive relief were heard
15 according to a regularly-noticed motion.” *Id.*

16 Although not expressly stated, this Court left open the possibility that Plaintiff
17 could refile this motion. Given the apparent emergency Plaintiff felt in November
18 (after 18 months of relative calm), one would have expected a fast turn around. But
19 Plaintiff did not refile his motion that same week. He did not refile it the following
20 week either. Or the week after that. Or the week after that. Plaintiff waited *six*
21 weeks before filing this motion.

22 In light of this curious delay, either the relief sought is not time-critical (and
23 thus there is no danger of irreparable harm in denying the motion); or Plaintiff
24 needed more time to improve his motion; or the relief sought has always been
25 without merit, and Plaintiff’s timing has always been calculated to disrupt
26 Defendants’ sale, use or performance of “I Gotta Feeling.”

27 Plaintiff’s motion has not improved with age.
28

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1 In fact, Plaintiff's motion has not changed very much from six weeks ago.
2 Plaintiff again fails to establish the elements necessary to grant injunctive relief. He
3 again fails to state under oath that he will be irreparably harmed, and again fails to
4 explain why – six weeks later – time is of the essence. As with his TRO, Plaintiff
5 also again fails to establish a likelihood of success on the merits, or a tipping of the
6 harms in his favor. Indeed very serious questions of fact continue to plague and
7 pose a significant challenge to Plaintiff's claim of infringement. Among these are:

- 8 • Defendants' expert has concluded unequivocally that it would have been
9 technologically *impossible* for The Black Eyed Peas to have copied
10 Plaintiff's sound recording. Defendants' work contains a "clean" guitar
11 sequence, free of the other musical elements heard in Plaintiff's recording.
12 Even Plaintiff's expert admits that these musical elements could not have
13 been "scrubbed" from Plaintiff's recording to produce that "clean" guitar
14 sequence;
- 15 • Plaintiff is unable to establish a valid copyright registration for the musical
16 composition or the sound recording at issue in this case;
- 17 • Plaintiff is unable to establish copyright ownership in the musical
18 composition or sound recording at issue, or Defendants' copying thereof; and
- 19 • The purported "date of creation" of Plaintiff's 1999 sound recording, as
20 determined by Plaintiff's then-expert and under the penalty of perjury with
21 Plaintiff's TRO papers has been "withdrawn"; Plaintiff has: (a) discarded that
22 expert; and (b) discarded that creation date in a favor of new, more
23 convenient "date of creation."¹

24 ¹ Plaintiff's assertions of "innocent mistake" by the computer expert are not
25 credible. Pringle's original declaration, at paragraph 5 gave testimony under oath
26 about this now "mistaken date." Moreover, in July 2009, Plaintiff submitted
27 purported computer discs that he contended memorialized this claim. Defense
28 counsel, after consultation with a computer forensic expert, was concerned enough
over the questionable dating of the computer files, that it gave Plaintiff's counsel
express written notice of this concern and made an express request for preservation
of the entire computer files of Mr. Pringle, before Mr. Pringle had any opportunity
to "make innocent mistakes." The that, after receiving this notice, Plaintiff's

1 Any one of the foregoing makes Plaintiff's likelihood of success unlikely.
2 Nonetheless, for the second time in two months, Plaintiff has asked this Court for
3 extraordinary, equitable relief. For the second time in two months, this Court should
4 deny that request.²

5 **II. LEGAL ARGUMENT**

6 **A. Pringle is Not Entitled to a Preliminary Injunction**

7 Under Ninth Circuit authority, a plaintiff needs to prove four factors to
8 establish entitlement to preliminary injunctive relief; merely demonstrating a
9 possibility of irreparable harm does not suffice. *See, American Trucking*
10 *Associations, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009).

11 Here, Plaintiff's motion relies on earlier cases that have suggested a lesser
12 standard. (MPI, page 12, line 26 through page 13, line 14.) Those standards are no
13 longer the law. Under *American Trucking*, "[a] plaintiff seeking a preliminary
14 injunction must establish that he is likely to succeed on the merits, that he is likely
15 to suffer irreparable harm in the absence of preliminary relief, that the balance of
16 equities tips in his favor, and that an injunction is in the public interest. To the extent
17 that our cases have suggested a lesser standard, *they are no longer controlling, or*
18 *even viable.*" *America Trucking, supra*, 559 F.3d at 1052 (emphasis added).

19 Plaintiff has not and cannot make the required showing under the *American*
20 *Trucking* standard. Therefore, Plaintiff's motion must be denied.

21 **B. Pringle Cannot Establish Success on the Merits**

22
23 counsel failed to check the veracity of Pringle's computer files before filing the
24 Complaint or moving for a TRO is very concerning. Cemar Decl. ¶1, Ex. 1.

25 ² In light of the fact that Plaintiff had provided no supporting evidence for much of
26 the foregoing, Defendants requested that he produce limited discovery targeted at
27 key issues he would have to prove in order to prevail on this motion. His lawyers
28 made it abundantly clear that *no* discovery would be provided before the hearing on
Plaintiff's motion. Cemar Decl., ¶¶ 2, 3, Exs. 2, 3.

1 **1. Pringle Cannot Establish a Valid Copyright Registration for**
2 **the Works at Issue**

3 Two works are at issue in this lawsuit. One is the 1999 sound recording in
4 Plaintiff's dance version of "Take a Dive" (the "Dance Version").³ The other is the
5 musical composition in the Dance Version. Plaintiff is required to have a valid
6 copyright registration for both works. As Defendants explained in their Reply in
7 support of their recently filed Motion to Strike, Plaintiff lacks a valid copyright
8 registration in these works.

9 The Court will have considered these issues in connection with the standards
10 for pleading (see DKT 52, Motion to Dismiss). The issues are equally significant, if
11 not more so, at the proof stage. It is well established that 17 U.S.C. § 411(a)
12 provides a plaintiff must register the work allegedly infringed prior to instituting an
13 action for copyright infringement. *Cosmetic Ideas, Inc v. IAC/InteractiveCorp*, 606
14 F.3d 612, 615 (9th Cir. 2010) (holding "[s]ection 411(a)'s registration requirement
15 is a pre-condition to filing a claim") (citation omitted).

16 Here, Plaintiff sought and received a copyright registration in the Dance
17 Version on November 15, 2010. Plaintiff expressly *excluded* from that registration
18 the "music and lyrics," *i.e.* the *musical composition* in the Dance Version. (See
19 Pringle Decl., Exhibit D.) As such, the 2010 registration does not cover the musical
20 composition. Therefore, under 17 U.S.C. § 411, Plaintiff may not institute an action
21 for infringement of that work.

22 The 2010 registration also does not cover the 1999 sound recording of the
23 Dance Version. That registration applies – at most – to Plaintiff's 2010 sound
24 recording of the Dance Version. The 1999 and 2010 sound recordings are not the
25 same. Plaintiff admits this. First, he alleges the "recording" is actually an NRG

26 _____
27 ³ Plaintiff alleges that the Dance Version is a 1999 derivative work of his 1998
28 work, entitled "Dive" on Plaintiff's 1998 Copyright Registration for that underlying
work. (FAC, ¶ 27-29.)

1 Image File that contains “individual component directories, instruments, and
2 sequences” which, when processed through “an Ensoniq ASR-10 synthesizer,”
3 accesses the stored data and plays sounds.⁴ (See MPI, page 5, lines 1-8.) Secondly,
4 Plaintiff admits that the copy he submitted the United States Copyright office was
5 created in 2010. (Opp. to Motion to Dismiss, page 4, lines 19-22.) He states he
6 made this *new* recording from “a saved [NRG] computer file” and submitted that
7 recording “for purposes of fulfilling § 408(b) of the Copyright Act.” (*Id.*)

8 That new recording from Plaintiff’s NRG file is a sound recording from 2010,
9 *not* 1999. A sound recording from 2010 does not suffice for purposes of registering
10 the copyright in the 1999 sound recording under 17 U.S.C. § 411. See *Kodadek v.*
11 *MTV Networks, Inc.*, 152 F.3d 1209, 1211 (9th Cir. 1998) (drawings made in 1993
12 from memory of drawings originally made in 1991 did not satisfy deposit
13 requirement because they were not made by “directly referring to the originals,” nor
14 were they “bona fide copies of the originals”); *Cosmetic Ideas, supra*, 606 F.3d at
15 621 (registration is not complete without a submission of bona fide copies of the
16 work; a reconstruction of the same will not suffice).

17 Based on the foregoing, neither of the works that Plaintiff claims were
18 infringed is subject to Plaintiff’s 2010 copyright registration. Therefore, he holds no
19 registration that covers the works at issue in this lawsuit, and hence holds no
20 “admission ticket” to federal court.

21 **2. Even Assuming a Valid Registration, Plaintiff Cannot**
22 **Establish Ownership of a Valid Copyright or that the**
23 **Defendants Factually Copied Any Element of Either Works**

24 As indicated above, Plaintiff claims infringement of two works. One is the

25 ⁴ An NRG Image File is not a sound recording. It merely contains image files of
26 separate musical, spoken or other sounds, and data containing instructions to an
27 ASR 10 on how to create a performance. Plaintiff has not submitted the NRG
28 Image File as evidence in support of his motion for preliminary injunction, but
Plaintiff himself admitted it was an image file. (DKT 10, Pringle TRO Declaration,
¶5.)

1 1999 sound recording of the Dance Version, and the other is the musical
2 composition embodied therein. To establish a claim for copyright infringement, and
3 in particular a violation of the reproduction right, a plaintiff must prove “(1)
4 ownership of a valid copyright, and (2) copying of constituent elements of the work
5 that are original.” *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499
6 U.S. 340, 361 (1991); see also *Swirsky v. Carey*, 376 F.3d 841, 844 (9th Cir. 2004).
7 With respect to a sound recording, a plaintiff also must prove that the actual
8 recording itself was used by the defendant. 17 U.S.C. §114(b) (“[t]he exclusive
9 right of the owner of copyright in a sound recording under clause (1) of section 106
10 is limited to the right to duplicate the sound recording in the form of phonorecords
11 or copies that directly or indirectly recapture the actual sounds fixed in the
12 recording.”).

13 Here, Plaintiff cannot establish ownership of a valid copyright or Defendants’
14 copying of original elements from either work.

15 a. **Plaintiff is Not Entitled to Presumption of Copyright**
16 **Validity**

17 Contrary to Plaintiff’s assertion, Plaintiff’s copyright registration does not
18 “constitute evidence of the validity of the copyrights and Pringle’s ownership in”
19 them, nor does it constitute the validity of the purported factual statements made
20 therein. (MPI, page 15, lines 3-4.) 17 U.S.C. § 410(c) makes clear that those
21 presumptions apply where the work is registered within five years of the date it was
22 first published. See, *Id.* (“In any judicial proceedings the certificate of a registration
23 made before or within five years after first publication of the work shall constitute
24 prima facie evidence of the validity of the copyright and of the facts stated in the
25 certificate.”).

26 Here, Plaintiff registration certificate, even if it could be construed to cover
27 either of the two works at issue, was obtained roughly *eleven years* after the works’
28 first publication in December 1999. That tardiness strips Plaintiff of the

1 presumptions usually associated with a certificate of registration under 17 U.S.C. §
2 410(c). As such, Plaintiff is now required to affirmatively allege and prove each of
3 the components of a valid copyright. See, *Ward v. National Geographic Society*,
4 208 F. Supp. 2d 429, 455 (S.D.N.Y. 2002) (lack of a copyright registration
5 "deprives the plaintiff . . . of Section 410(c)'s presumption of validity."); *Gucci*
6 *Timepieces America Inc. v. Yidah Watch Co.*, 1998 WL 650078, at *1 (C.D. Cal.
7 August 4, 1998) (lack of a valid registration removes the effect of the presumption
8 as to the copyright's validity, originality, compliance with statutory formalities, and
9 copyrightability). These elements include copyrightability, originality, and
10 compliance with all statutory formalities. *Morgan v. Hawthorne Homes, Inc.*, 2009
11 WL 1010476, at *7 (W.D. Pa. April 14, 2009) (finding that when plaintiff lacked
12 presumption of validity afforded by copyright registration certificate, onus was on
13 plaintiff to prove validity of the claimed copyrights). Plaintiff has not and cannot
14 establish these elements.

15 **b. Plaintiff Has Not and Cannot Establish Ownership of a**
16 **Valid Copyright**

17 Plaintiff has not and cannot establish the validity of, or copyright ownership
18 in, the Dance Version musical composition or the sound recording thereof.
19 "Ownership of the copyright is always a threshold question" and a copyright
20 infringement case cannot proceed in its absence. See, *Lamps Plus, Inc. v. Seattle*
21 *Lighting Fixture Co.*, 345 F.3d 1140, 1144 (9th Cir. 2003) (citation omitted).

22 There are only two ways Plaintiff could have acquired copyright ownership of
23 the subject works, including the "guitar twang sequence" principally at issue here.⁵

24 ⁵ It should be noted that Plaintiff, in a obviously self-serving manner, refers to the
25 "guitar twang" figure as a "melody" (MPI at 4), as a "hook," (*Id.* at 12), or as
26 "prominent" (*Id.*) in both his and Defendants' works. This is simply incorrect,
27 especially considering the fact that the hook in Defendants' "I Gotta Feeling" is
28 found in a melodic vocal line that, not coincidentally, dovetails the title of the work.
The "guitar twang" is not a melody—it is a harmonic figure consisting of 3, two-
note chords that are represented as "I IV vi" in the key of G major. In "I Gotta
Feeling," the figure's purpose is purely harmonic in nature and supports the melodic
material heard on top of it—as is typical of homophonic music. That the figure may

1 That is, either: (1) as an author or (2) through a transfer of ownership from another
2 person or entity who held title. See, 17 U.S.C. § 201(a) (“Copyright in a work
3 protected under this title vests initially in the author or authors of the work.”); 17
4 U.S.C. § 201(d)(1) (“The ownership of a copyright may be transferred in whole or
5 in part by any means of conveyance or by operation of law.”). As set forth above,
6 Plaintiff’s eleven year delay in seeking a copyright registration deprives him of the
7 evidentiary benefits a registration certificate often provides, including the
8 presumption of copyright ownership. As such, Plaintiff must affirmatively prove all
9 the elements evaluated in determining ownership: copyrightability, originality,
10 compliance with statutory formalities, and facts surrounding the works’ creation.
11 Plaintiff is unable to surmount this initial hurdle.

12 While Plaintiff claims to have authored the “guitar twang sequence” at the
13 heart of this dispute, he provides no facts or other documentary evidence supporting
14 this claim. Indeed, even though he provides experts’ declarations, none can point to
15 Plaintiff as the sequence’s creator with any authority. The statements of Mark
16 Rubel, Plaintiff’s forensic sound expert, are illuminating. Mr. Rubel concludes that
17 the “guitar twang sequence” originated with Plaintiff, but then admits having simply
18 accepted at face value the Gould Law Group’s representation on this point. (Rubel
19 Decl. ¶ 4, stating that the guitar twang sequence was “identified to [him]” by the
20 Gould Law Group as having originated from Plaintiff). Thus, Mr. Rubel’s
21 conclusion that Plaintiff is the copyright owner of that sequence, lacks foundation
22 and carries no evidentiary weight. Nor does Mr. Rubel, Plaintiff, or anyone else
23 offer facts demonstrating that Plaintiff acquired a copyright ownership in that
24 sequence through a transfer from someone else who legitimately held title.⁶

25 appear as “prominent” in Plaintiff’s composition underscores its lack of well-
26 defined and memorable melodic material, as well as its sparse arrangement of
constituent musical elements—not the musical purpose of the figure.

27 ⁶ Indeed, Plaintiff has failed to expressly allege that he composed the “guitar twang
28 sequence.” He only claims to have added it to a prior work. (FAC ¶29; Pringle
Decl., ¶4.)

1 Further, Plaintiff has offered no evidence that the “guitar twang” harmonic
2 figure was sufficiently original to merit copyright protection. This includes having
3 offered no evidence that Plaintiff himself did not copy it from another source. See,
4 *Feist*, 499 U.S. at 345 (“Original, as the term is used in copyright, means only that
5 the work was independently created by the author (as opposed to copied from other
6 works), and that it possesses at least some minimal level of creativity.”); *Reader’s*
7 *Digest Ass’n v. Conservative Digest, Inc.*, 821 F.2d 800, 806 F.2d 800, 806 (D.C.
8 Cir. 1987) (originality means “that the work owes its origins to the author—i.e., that
9 the work is independently created rather than copied from other works.”).

10 Because Plaintiff’s Declaration is devoid of any discussion as to how he
11 allegedly “originated” the guitar twang harmonic figure, Defendants counsel asked
12 to Plaintiff to voluntarily provide an explanation of this critical evidentiary point
13 prior to opposing this motion. (See Cemar Decl., Exs. 2, 3.) Exhibit 2 states “Please
14 inform us today of the names of the actual equipment, software, internal or external
15 sound banks used by Mr Pringle to create his song in the time frame he represents he
16 created his song.” Plaintiff’s counsel refused to provide that information outside of
17 “formal discovery.” (Cemar Decl., Exs. 2, 3.) This dearth of evidence on the issue
18 of “originality,” coupled with Plaintiff’s unwillingness to provide it, merits a denial
19 of the requested preliminary relief.⁷

20 Finally, Plaintiff has submitted no evidence on the purported date of creation
21 for the works at issue. In fact, when this Court compares Plaintiff’s declaration in
22 support of his TRO, at paragraph 5, to the Declaration at paragraph 5 he submits in
23 support of this motion, it will find that Pringle has withdrawn his prior evidence on
24 this point. Moreover, his lawyers have conceded that the date previously provided
25 by Plaintiff’s computer expert was wrong. Plaintiff has submitted no other date of

26 ⁷ Beyond the foregoing, as set forth above, Plaintiff also neglects to provide any
27 evidence of compliance with statutory formalities including registration pursuant to
28 17 U.S.C. §411, and the deposit of a bona fide copy with the Copyright Office
registration pursuant to 17 U.S.C. §408.

1 creation, or evidence of a date of creation, or any corroborating evidence regarding
2 the alleged date of creation in support of this motion. Again, Defendants' requests
3 to obtain such information through a voluntary production was rebuffed by
4 Plaintiff's counsel. (See Cemar Decl. ¶ 5.)⁸

5 Based on the foregoing, Plaintiff has failed to adduce evidence establishing
6 the threshold requirements of copyright validity, or copyright ownership, in the
7 Dance Version musical composition and sound recording at issue in this lawsuit.
8 Accordingly, Plaintiff cannot establish the likelihood of success on the merits of his
9 claim for infringement, and thus his motion must be denied.

10 **c. Plaintiff Has Not and Cannot Establish that**
11 **Defendants Factually Copied Any Element of the**
12 **Works at Issue**

13 It is axiomatic that independent creation negates a critical component of a
14 copyright plaintiff's case: *e.g.* that factual copying occurred. Melville B. Nimmer &
15 David Nimmer, Nimmer on Copyright § 13.01[B] (2011) (“[E]ven when two works
16 are substantially similar with respect to protectible expression, if the defendant did
17 not copy as a factual matter, but instead independently created the work at issue,
18 then infringement liability must be denied.”).

19 Here, overwhelming evidence (or the lack thereof) establishes that: (1)
20 Defendants did not have access to Plaintiff's sound recording and musical
21 composition; (2) Defendants created the challenged “guitar twang” loop
22 independently of Pringle's work; and (3) it is factually impossible for the Dance
23 Version of “Take a Dive” to have provided the basis for anything heard in “I Gotta

24 ⁸ On the evening of Friday, January 7, 2011, after the close of business, Plaintiff's
25 counsel hand delivered a CD on which was written, with magic marker, “**Correct**”
26 **NRG file “Disk05 NRG.”** Receipt of this disc was followed by a refusal by
27 Plaintiff's counsel to voluntarily provide *any* information about the disc or its
28 creation. See Cemar Decl., Ex. 2, 3. Instead Plaintiff's counsel again obstreperously
insisted on “formal discovery.” Given the significance of that file, and its date of
creation, to the merits of Plaintiff's motion, such stonewalling is egregious and, in
and of itself, justifies a denial of Plaintiff's motion.

1 Feeling.”

2 (1) **Defendants did have not access to Plaintiff’s**
3 **works.**

4 “It is generally not possible to establish copying as a factual matter by direct
5 evidence, as it is rare that the plaintiff has available a witness to the physical act of
6 copying. . . . Therefore, copying is ordinarily established indirectly by the plaintiff’s
7 proof of access and ‘substantial’ similarity.” Melville B. Nimmer & David Nimmer,
8 Nimmer On Copyright § 13.01[B] (2011). Proof of access requires “an opportunity
9 to view or to copy plaintiff’s work.” See, *Sid and Marty Krofft Television*
10 *Productions, Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1172 (9th Cir. 1977); see
11 also *Jason v. Fonda*, 698 F.2d 966, 967 (9th Cir. 1982) (bare possibility of seeing or
12 hearing the work does not establish access); see *Tisi v. Patrick*, 97 F. Supp. 2d 539,
13 547 (S.D.N.Y. 2000) (holding an unsolicited submission of a musical work to a
14 record company does not establish access by the recording artist).

15 Here, Plaintiff has provided no actual evidence that any of the Defendants,
16 and especially those directly involved in the creation of “I Gotta Feeling,” were ever
17 in contact with Plaintiff or had heard his works. Plaintiff likewise has failed to
18 establish that the composition and sound recording he claims his brother
19 disseminated in France 10 years before “I Gotta Feeling” was created, ever made
20 their way to Frederic Riesterer, the creator of the “guitar twang sequence” in “I
21 Gotta Feeling.” Indeed, noticeably absent from Plaintiff’s motion is any declaration
22 from his brother. Rather than providing such evidence, Plaintiff instead reels off a
23 roll call of general categories of persons and entities associated with the music
24 business in the North American and European continents who were allegedly
25 provided with a copy of his works. As discussed above, Plaintiff suspiciously
26 declined Defendants’ request for the identity of those individuals or entities. (Cenar
27 Decl., Ex. 2, 3.)

28 Plaintiff’s *ipse dixit* assertion that his unsubstantiated, and frankly

1 questionable, dissemination efforts resulted in copies of his works being placed in
2 the hands of Defendants must be rejected. Plaintiff has the burden of production
3 (and persuasion) on the issue of factual copying, and Plaintiff has failed to carry that
4 burden. See, *Castle Rock*, 150 F.3d at 137 (plaintiff has the “initial burden of
5 proving actual copying by indirect evidence.”). It is not Defendants’ burden to
6 prove that factual copying did not occur.

7 (2) **Defendants created “guitar twang” loop**
8 **independently of Plaintiff’s work**

9 Before a challenged work can be analyzed to determine whether it
10 appropriates an impermissible quantum of protected material, it must be established
11 that, as a factual matter, the defendant copied plaintiff’s work in creating the
12 challenged work. *Castle Rock Entertainment, supra*, 150 F.3d at 137 (“It is only
13 after actual copying is established that one claiming infringement then proceeds to
14 demonstrate that the copying was improper or unlawful by showing that the second
15 work bears ‘substantial similarity’ to protected expression in the earlier work.”)
16 (citations omitted).

17 This is because the Copyright Act only prohibits copying; it does not provide
18 a *per se* monopoly over the copyrighted work or its constituent elements. See
19 *Sheldon v. Metro-Goldwyn Pictures*, 81 F.2d 49, 54 (2d Cir. 1936) (“if by some
20 magic a man who had never known it were to compose anew Keat’s Ode on a
21 Grecian Urn, he would be an ‘author,’ and, if he copyrighted it, others might not
22 copy that poen, though they might of course copy Keat’s.”) (L. Hand, J.); *ConFold*
23 *Pacific, Inc. v. Polaris Industries, Inc.*, 433 F.3d 952, 959 (7th Cir. 2006) (Posner J.)
24 (“[A] patent right is good against the whole world. A copyright is not because
25 independent discovery is a defense to a copyright—or a trade secret—claim.”).

26 The Declaration of Frederic Riesterer (submitted in Defendants’ Opposition
27 to Plaintiff’s TRO) specifically addresses this issue. In that document, Mr. Riesterer
28 states that he composed the guitar twang sequence heard in “I Gotta Feeling” in

1 2008, based in part on his prior work and in part on material licensed from the
2 French music library, *Univers Sons*. (DKT 22, Riesterer Decl., ¶¶ 3-6.) Mr.
3 Riesterer states that he created these works without access to any musical works
4 created by Plaintiff, and without having never obtained any of Plaintiff's works.
5 (DKT 22, Riesterer Decl., ¶ 7.)

6 (3) **It is impossible as a factual matter for the Dance**
7 **Version of "Take a Dive" to have provided the**
8 **basis for anything heard in "I Gotta Feeling."**

9 It is impossible as a factual matter for the Dance Version of "Take a Dive" to
10 have provided the basis for the "guitar twang sequence" in "I Gotta Feeling" for two
11 reasons. First, Plaintiff's 2010 copyright registration does not cover the 1999 sound
12 recording of "Take a Dive." Rather, the 2010 registration only covers a sound
13 recording that was created in 2010, which post-dates Defendants' creation of "I
14 Gotta Feeling." Plaintiff has not alleged -- nor could he -- that Defendants' 2009
15 work copied Plaintiff's 2010 recording.

16 Second, it is technologically impossible for the guitar twang sequence in "I
17 Gotta Feeling" to have been sampled from the derivative Dance Version of "Take a
18 Dive." (See Declaration Of Paul Geluso In Support Of Defendants' Opposition To
19 Plaintiff's Motion For Preliminary Injunction, ["Geluso Decl.,"] ¶7.) The "guitar
20 twang" sequence in "Take a Dive" is layered with other musical elements. The
21 "guitar twang" sequence in "I Gotta Feeling," is not. It is -- in many instances --
22 "clean," meaning it is not layered with other musical elements. It is technologically
23 impossible to obtain the "clean" guitar twang sequence from one that is layered with
24 other musical elements. (*Id.*)

25 Had the sequence that appears in "I Gotta Feeling" been sampled from the
26 Dance Version of "Take a Dive," it could not have been "cleaned." (Geluso
27 Decl. ¶7.) It would always have the remnants of other musical elements. (*Id.*)
28 Indeed, even Plaintiff's expert, Mark Rubel, does not dispute this conclusion.

1 According to Mr. Rubel, the guitar twang sequence in the derivative version of
2 “Take a Dive” is layered with other sound elements that are not present in “I Gotta
3 Feeling.” (Rubel Decl. ¶4; Rubel Report, pages 17, 18.) Moreover, even Mr. Rubel
4 was unable to isolate a clean sample of the guitar twang sequence from “Take a
5 Dive.” As stated in the supporting Declaration of Paul Geluso, “[t]his supports the
6 conclusion that the producer of “I Gotta Feeling” likewise could not have sampled
7 the guitar twang sequence from the derivative version of ‘Take a Dive’ allegedly
8 distributed by Plaintiff.” (Geluso Decl., ¶7.)

9 Notably, none of the facts underpinning Mr. Geluso’s analysis are
10 contradicted by Mark Rubel. Mark Rubel’s report states that he was able to obtain a
11 nearly clean sample of the guitar twang from the “I Gotta Feeling” sound recording,
12 which would be impossible if that sound recording had been sampled from
13 Plaintiff’s Demo CD. (Rubel Decl., ¶ 9, lines 19-22.) This is because, as Mr. Rubel
14 concedes, he was unable to isolate a clean sample of the guitar twang sequence from
15 “Take a Dive.” (Rubel Decl., Ex. A, page 17.) Mr. Rubel also concedes that he
16 would need additional testing to reinforce his conclusions. (Rubel Decl., Ex. A,
17 page 19.) That admission, when coupled with his disregard (turning a “deaf ear”) to
18 information that disproves Defendants’ sampling, defeats Plaintiff’s assertion of a
19 likelihood of success on the merits.⁹

20 **C. Plaintiff Cannot Establish Irreparable Harm**

21 In light of the Supreme Court’s holding in *eBay Inv. v. MercExchange, L.L.C.*,
22 547 U.S. 388 (2006), Pringle is simply wrong that if a copyright plaintiff establishes
23 a likelihood of success on the merits, a presumption of irreparable harm
24 automatically follows. (MPI at page 2.)

25 ⁹ Neither of Pringle’s other two experts, Alexander Stewart or Kevin Byrnes,
26 address the sound recording sampling claim. These experts only address aspects
27 related to the musical compositions at issue, and both only review a 2010 sound
28 recording – not a 1999 sound recording. Notably, they are also inconsistent with
one another. See e.g. Compare Byrnes para 6B to Stewart 4C. These flaws make
their options unreliable under FRE 702.

1 In *eBay*, the Court stated that it had “consistently rejected invitations to
2 replace traditional equitable considerations with a rule that an injunction
3 automatically follows a determination that a copyright has been infringed.” *Id.* at
4 392-93. As one post-*eBay* court noted, it is “doubtful that the Supreme Court
5 intended for the presumption to survive for purposes of preliminary injunctions.”
6 *Hologic, Inc. v. Senorx, Inc.*, 2008 WL 1860035, *15 (N.D. Cal. April 25, 2008);
7 see also *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 518 F. Supp. 2d
8 1197, 1211 (C.D. Cal. 2007) (“The *eBay* Court held that it is Plaintiffs who ‘must
9 demonstrate’ (meaning, have the burden of proof) that the traditional factors favor a
10 permanent injunction.”).

11 It is thus clear that even if Plaintiff can demonstrate a likelihood of success on
12 the merits—which he cannot—he still must make an affirmative showing that he
13 will likely suffer irreparable harm if the requested preliminary relief is not granted.
14 This he cannot do.

15 It has been held that a “long delay before seeking a preliminary injunction
16 implies a lack of urgency and irreparable harm.” *Oakland Tribune, Inc. v.*
17 *Chronicle Publ. Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985). In fact, at least one Court
18 in the Central District of California held that a *four month* delay in seeking
19 injunctive relief supported a denial of plaintiff’s motion for preliminary injunction.
20 See, *Metro-Media Broadcasting Corp. v. MGM/UA Entertainment Co.*, 611 F. Supp.
21 415, 427 (C.D. Cal. 1985).

22 Here, Plaintiff’s delay was significantly greater than four months. The
23 alleged “infringement” began upon release of “I Gotta Feeling” in June 2009, more
24 than a year and a half ago. Plaintiff likely heard the song at that time given its
25 popular success and wide distribution (Pink Decl., Ex. 1.) He certainly knew of it
26 in May 2010 when his counsel contacted The Black Eyed Peas regarding the alleged
27 infringement. (DKT 22, Cemar Decl. in Opp. to TRO, ¶ 1.) Yet Pringle did not seek
28 an injunction last May.

1 He also did not seek an injunction in September 2010, after having made
2 various settlement demands on The Black Eyed Peas, each of which was rejected.
3 Nor did he seek injunctive relief in October 2010, when filing his original
4 Complaint. (DKT 22, Cenar Decl. in Opp. to TRO, ¶ 2.) He did eventually file for
5 emergency injunctive relief in November 2010, but that request was denied as the
6 Court found that no emergency existed to justify its granting. While the Court did
7 not expressly permit it, it also did not preclude Plaintiff from refileing its motion for
8 injunctive relief. Plaintiff did not expeditiously act on that ruling. Not in the least.
9 Apparently in no hurry whatsoever, he did not file this motion for *six weeks*. There
10 is an old expression that actions speak louder than words. While Plaintiff may claim
11 urgency and irreparable harm, his actions tell a different story. There is no hurry, no
12 urgency and -- by definition -- no irreparable harm. See *Oakland Tribune, supra*,
13 762 F.2d at 1377; *Metro-Media, supra*, 611 F. Supp. 427.¹⁰

14 Equally telling is the absence of any claim of “irreparable harm” by Plaintiff
15 himself in his Declaration. This cannot have been mere oversight. Plaintiff made
16 the same omission in connection with his application for a TRO. Given the six
17 week hiatus prior to filing the instant motion (during which Plaintiff prepared a *new*
18 declaration), he could easily have correct this had he wanted to. Nonetheless, and

19
20 ¹⁰ In the moving papers Plaintiff claims irreparable harm in that “[e]ach time the
21 song [musical composition] is played or sold, Pringle is denied his exclusive right to
22 copy, distribute, and perform the song, including his right to control how, by whom,
23 and in what manner his recording is used.” MPI at 21. Never mind that the
24 foregoing conflates two discrete works, the musical composition and the sound
25 recording, Plaintiff is wrong. First, assuming Plaintiff’s efforts in disseminating his
26 works, under his authority, rises to a public distribution under the Copyright Act (his
27 descriptions of such are hopelessly vague), it is quite possible that 17 U.S.C. § 115’s
28 compulsory licensing scheme is implicated, thus providing Defendants with the
right to reproduce and distribute Plaintiff’s composition subject to the payment of
statutorily prescribed mechanical royalties. Second, a live performance would not
infringe the allegedly infringed sound recording as there is no performance right in
non-digitally transmitted sound recordings. 17 U.S.C. § 114(a) (“The exclusive
rights of the owner of copyright in a sound recording are limited to the rights
specified by clauses (1), (2), (3) and (6) of section 106, and do not include any right
of performance under section 106.”). As such, Plaintiff’s characterization of his
ability to control the subject works is not as expansive as he would suggest.

1 despite his own self interest, he apparently refused to state under oath that he would
2 suffer irreparable harm absent the granting of his motion. This is a strong indication
3 that no such harm *exists*. If the relief Plaintiff seeks was truly intended to protect his
4 valuable rights, he would – at the very least – have shared this belief with the Court
5 in his sworn declaration.

6 **D. The Relative Hardship to Each Party Strongly Favors**
7 **Denying Plaintiff’s Request for a Preliminary Injunction**

8 A balancing of the hardships here strongly favors The Black Eyed Peas, and
9 thus justifying a denial of Plaintiff’s motion for a preliminary injunction.
10 Specifically, Plaintiff has neither shown nor even suggested that monetary damages
11 are insufficient to compensate him for injuries he would suffer should injunctive
12 relief be denied at this stage of the litigation. *Sampson v. Murray*, 415 U.S. 61, 88,
13 94 S.Ct. 937, 952 (1974). In *Sampson*, the Supreme Court expressly stated that “the
14 temporary loss of income, ultimately to be recovered, does not usually constitute
15 irreparable injury ... 'The key word in this consideration is irreparable. Mere injuries,
16 however substantial, in terms of money, time and energy necessarily expended ...
17 are not enough. The possibility that adequate compensatory or other corrective relief
18 will be available at a later date, in the ordinary course of litigation, weighs heavily
19 against a claim of irreparable harm.'” *Id.* (citations omitted).

20 Here, Plaintiff cannot demonstrate the existence of any potential irreparable
21 damage from the denial of his motion under the holding in *Sampson, supra*; see also
22 *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 634 F.2d
23 1211, 1202 (9th Cir. 1980). This is because, even assuming *arguendo* Plaintiff can
24 establish infringement, he can be adequately compensated in terms of monetary
25 relief at a later date. Plaintiff has not alleged – nor could he – that such
26 compensation (in conjunction with any other corrective relief) would be entirely
27 adequate. As the Supreme Court stated, the possibility of such relief, albeit at a later
28 date, “weighs heavily against a claim of irreparable harm.” *Sampson*, 415 U.S. at

1 88. This alone warrants the denial of Plaintiff's request for preliminary injunctive
2 relief.

3 Conversely, The Black Eyed Peas and the other Defendants in this action
4 would be greatly harmed by an injunction. Defendants are in the business of selling,
5 performing and licensing music. In order to comply with Plaintiff's proposed
6 injunctive relief, Defendants would be required to pull from third-party distributors
7 all albums that include "I Gotta Feeling" and any derivative version thereof. That is
8 no simple task. That song is included on The Black Eyed Peas' multi-platinum
9 album, The E.N.D., which is sold in thousands of stores worldwide and over the
10 Internet.¹¹ Not only that, but as Plaintiff admits, "I Gotta Feeling" was licensed for
11 use "in several nationwide commercials, television episodes," and motion pictures
12 which Defendants neither own nor distribute. (See FAC, ¶43(e).) Nonetheless,
13 under the relief Plaintiff requests, Defendants would be obligated to prevent buyers
14 from purchasing other companies' products, likely harming their ability to license
15 similar works in the future.

16 In short, the relief Plaintiff seeks is not only unnecessary, but if granted, it is
17 assured to wreak havoc on *all* the Defendants in this case as well as those third
18 parties to whom the song has been licensed. Thus, not only is there no need for the
19 relief sought, a balancing of the hardships that would follow sharply favors the
20 Defendants.

21 **III. PLAINTIFF SHOULD NOT BE PERMITTED TO DEVIATE FROM**
22 **THE REQUIREMENT OF A BOND AS SET FORTH IN RULE 65(C)**

23 Plaintiff would like this Court to rule that, as a struggling musician, he should
24 not be required to post a bond around the requested relief. If Plaintiff did not want
25 to post a bond, he should not have brought this motion. Federal Rule of Civil
26

27 ¹¹ As stated in the brief defendant UMG filed in opposition to Plaintiff's application
28 for a temporary restraining order, pulling the album from inventory would cost
hundreds of thousands of dollars, if not millions of dollars in harm.

1 Procedure 65(c) expressly requires a plaintiff to post a security before a preliminary
2 injunction may issue. *Id.* (“no restraining order or preliminary injunction shall issue
3 except upon the giving of security by the applicant, in such sum as the court deems
4 proper, for the payment of such costs and damages as may be incurred or suffered
5 by any party who is found to have been wrongfully enjoined or restrained”).

6 While Rule 65(c) grants courts discretion in determining the amount of the
7 bond to be posted, “[b]ecause an error in setting the bond too high is not serious, the
8 district courts should err on the high side when setting bond.” *Builder's World, Inc.*
9 *v. Marvin Lumber & Cedar, Inc.*, 482 F. Supp. 2d 1065, 1078 (E.D. Wis. 2007)
10 (*citing Mead Johnson & Co. v. Abbott Labs.*, 201 F.3d 883, 888 (7th Cir. 2000)).

11 Indeed, in the Ninth Circuit, the general rule is to require the posting of a
12 bond in a copyright infringement action where a preliminary injunction has been
13 sought. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1028 (9th Cir. 2001)
14 (\$5 million bond in copyright infringement action); *Religious Technology Center v.*
15 *Netcom On-Line Communication Services, Inc.*, 923 F. Supp. 1231, 1266 (N.D. Cal.
16 1995) (\$25,000 bond in copyright case); *CyberMedia, Inc. v. Symantec Corp.*, 19 F.
17 Supp. 2d 1070, 1080 (N.D. Cal. 1998) (requiring the posting of a bond of \$1.6
18 million, which figure represented the profits the alleged infringer expected to lose
19 on lost sales pending trial).

20 The bond requirement of Rule 65 is based on sound public policy.
21 Specifically, it “assures the enjoined party that it may readily collect damages from
22 the funds posted or the surety provided in the event that it was wrongfully enjoined,
23 without further litigation and without regard to the possible insolvency of the
24 assured.” *Continuum Co. v. Inceptis, Inc.*, 873 F.2d 801, 803 (5th Cir. 1989). This is
25 precisely the situation here.

26 As a struggling musician who has based his request for a departure from Rule
27 65 in part on the argument that this is appropriate where the “moving party cannot
28 afford to post” a bond, this is precisely the type of case for which a security is meant

1 to provide assurance and protection. That is, Plaintiff has everything to gain and
2 little to lose. He claims to be an “unknown singer/songwriter” yet seeks to enjoin
3 any use, performance, or reproduction of Defendants’ “Grammy award-winning,
4 record-breaking, mega-hit single.” Defendants, on the other hand, stand to lose a
5 fortune if they are wrongfully enjoined.

6 In light of this, and the policy behind Rule 65(c), Defendants respectfully
7 request that the Court require Plaintiff to post security in the amount of \$15,000,000.
8 This amount should cover costs and pecuniary damages for being wrongfully
9 enjoined. Defendants will provide further proof of costs and damages as required.

10 **IV. THE DECLARATIONS OF PLAINTIFF’S EXPERTS ARE**
11 **INADMISSIBLE UNDER THE FEDERAL RULES OF EVIDENCE**

12 This Court should disregard the expert declarations submitted by Plaintiff due
13 to their substantial deficiencies. The declarations (and concomitant reports) of Mark
14 Rubel, Kevin Byrnes, and Alexander Stewart are inadmissible because they are not
15 helpful to the trier of fact based on reliability issues, and impermissibly opine on the
16 ultimate issue of copyright infringement. *See*, Fed. R. Evid. 702. As the proponent
17 of his experts’ testimony, Pringle bears the “burden to show that [they are]
18 ‘qualified to testify competently regarding the matters he intend[ed] to address; []
19 the methodology by which the expert reach[ed] [their] conclusions is sufficiently
20 reliable; and [] the testimony assists the trier of fact.’” *Maiz v. Virani*, 253 F.3d 641,
21 662 (11th Cir. 2001). This, Pringle has failed to.

22 First, the conclusions offered by Mr. Rubel are flawed because he analyzed
23 the wrong work: not the allegedly infringed 1999 sound recording of the Dance
24 Version, but instead, the 2010 sound recording, which postdates “I Gotta Feeling.”
25 [Rubel Decl., Ex. B]. The 2010 work is not a part of this lawsuit, and any
26 discussion of it will only serve to confuse the trier of fact.

27 Further, the underlying basis for Rubel’s opinion consists of twenty audio
28 examples he claims to have sampled. *See*, Rubel Decl., Exh. A, page 000020 (index

1 of CD Audio Examples 1-20.). Those examples, however, were withheld from the
2 Defendants. Notably, they are also the same audio tracks which were withheld from
3 Defendants during the TRO proceedings, at which time Defendants raised the
4 impropriety and inadmissibility of Mr. Rubel’s opinion based upon this.
5 Defendants’ submit that Plaintiff’s calculated decision to continue withholding these
6 critical audio files – especially during a second shot at extraordinary relief, and
7 given the leisurely pace at which Plaintiff elected to renew this motion – shows a
8 bad faith intent to withhold evidence and impede Defendants’ opposition. Simply
9 put, this merits the striking of Mr. Rubel’s declaration. Without these underlying
10 audio samples, neither this Court nor Defendants have a fair opportunity to
11 understand, let alone test, the veracity of Mark Rubel’s representations.

12 Mark Rubel’s report is also flawed because he takes no steps to determine the
13 origin or date of creation of Pringle’s work. His report does not reflect that he
14 undertook this analysis, that he himself looked at any “computer files,” or that he
15 even spoke to Mr. Pringle himself. Thus, even if Mr. Rubel’s work had been done
16 properly, and there were similarities between these two works, he has absolutely no
17 foundation to conclude which party copied the other. Indeed, Mr. Rubel’s report
18 could easily be read to conclude that Pringle (who has yet to provide evidence of
19 how and when he came up with his “guitar twang”) copied The Black Eyed Peas.¹²
20 Complete discovery of Mr. Pringle’s Computer(s) and Computer files (which were
21 asked to be preserved back in July 2009) and discovery of Pringle’s claims of
22 creation will provide significant material evidence of Mr. Pringle’s activities.

23 Beyond the foregoing deficiencies, Rubel’s opinions are problematic because
24 he attempts to opine regarding the protected status of a work based on copyright
25

26 ¹² Certainly Pringle was technologically sophisticated enough to take the vocals
27 from “I Gotta Feeling” and place them over his work, which he published on the
28 Internet. (Pink Decl., Ex. 2.) Thus Pringle has demonstrated an ability and past
conduct of access to The Black Eyed Peas work and co-mingling of The Black Eyed
Peas work with his own.

1 duration rules, as well as on whether a certain act constitutes infringement. *See*,
2 Rubel Rep. at 3. Rubel's opinions regarding the same are impermissible legal
3 conclusions that do not assist the trier of fact, especially considering that they
4 emanate from an individual who styles himself as a "professional forensic sound
5 engineer," and not a lawyer versed in copyright law. *See, Burkhart v. Washington*
6 *Metro. Area Transit Auth.*, 112 F.3d 1207, 1213 (D.C. Cir. 1997) ("Each courtroom
7 comes equipped with a 'legal expert,' called a judge, and it is his or her province
8 alone to instruct the jury on the relevant legal standards."); *U.S. v. Sinclair*, 74 F.3d
9 753, 758 n. 1 (7th Cir. 1996) (Fed. R. Evid. 702 and 704 "prohibit experts from
10 offering opinions about legal issues that will determine the outcome of a case.");
11 *CFM Communications, LLC v. Mitts Telecasting Co.*, 424 F. Supp. 2d 1229, 1238
12 (E.D. Cal. 2005) (expert's opinions concerning law as it applied to the facts of the
13 case were "utterly unhelpful" to the court.").

14 Moreover, Rubel's report is littered with statements for which he obviously
15 has no foundation as they relate to the facts of this case, *e.g.*, his opinions on the
16 "recording/assembly process" or whether recordings "contain data or instructions
17 for sound." Rubel Rep. at 3. Such statements must be disregarded. *See, Trevino v.*
18 *Gates*, 99 F.3d 911, 922 (9th Cir. 1996) ("Where foundational facts demonstrating
19 relevancy are not sufficiently established, exclusion of proffered expert testimony is
20 justified.") (citation omitted). Rubel's report indicates that he never reviewed any
21 original Pringle-computer image file.

22 The declarations of Messers. Stewart and Byrnes should likewise be discarded
23 because both individuals stray beyond their purported expertise as musicologists to
24 offer legal conclusions that speak to the ultimate issue in an infringement case:
25 actionable copying. For instance, Stewart opines that the Dance Version and "I
26 Gotta Feeling" are "more than *substantially similar*, they are *strikingly similar*."
27 Stewart Decl., ¶ 4. Both are terms of art that have a special significance in
28 copyright law; the former speaks to the ultimate issue of actionable copying and the

1 latter speaks to the establishment of factual copying. *See, e.g.*, MELVILLE B.
2 NIMMER & DAVID NIMMER, § 13.01[b] (2011) (substantially similarity refers to
3 copying as a legal proposition—a taking that is characterized by a sufficient
4 quantum of protected material such that liability attaches); *Selle v. Gibb*, 741 F.2d
5 896, 901 (7th Cir. 1984) (striking similarity is characterized by “similarity which is
6 so striking that the possibilities of independent creation, coincidence and prior
7 common source are, as a practical matter, precluded.”).

8 The Byrnes declaration is also problematic as he purports to apply the
9 extrinsic/intrinsic test used in the Ninth Circuit to determine whether two works are
10 “substantially similar.” *See, e.g.*, Byrnes Decl., ¶¶ 3-4. Nowhere does Byrnes
11 attempt to identify and filter the unprotected material in Plaintiff’s works as required
12 by the extrinsic test. *See, Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435,
13 1446 (9th Cir. 1994) (“the unprotectable elements have to be identified, or filtered,
14 before the works can be considered as a whole.”); *Mattel, Inc. v. MGA*
15 *Entertainment, Inc.*, 616 F.3d 904, 913 (9th Cir. 2010) (“At the initial “extrinsic”
16 stage, we examine the similarities between the copyrighted and challenged works
17 and then determine whether the similar elements are protectable or unprotectable.
18 For example, ideas, scenes a faire (standard features) and unoriginal components
19 aren’t protectable. When the unprotectable elements are ‘filtered’ out, what’s left is
20 an author’s particular expression of an idea, which most definitely *is* protectable.”).
21 Compounding this error, Byrnes apparently applied the intrinsic test, which focuses
22 on whether the “total concept and feel” of the copyrighted and challenged work is
23 “substantially similar.” *Three Boys Music Corp. v Bolton*, 212 F.3d 477, 485 (9th
24 Cir. 2000). Notably, expert testimony is not permitted when conducting the intrinsic
25 test. *See, Sid & Marty Krofft Television Productions, Inc. v. McDonalds Corp.*, 562
26 F.2d 1157, 1164 (for the “intrinsic test, analytic dissection and *expert testimony are*
27 *not appropriate.*”) (emphasis added). Simply put, Plaintiff’s effort to marshal self-
28 serving legal analysis (if it can even be called that, especially when misapplying 9th

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1 Circuit copyright jurisprudence) through the expert testimony of his hired-gun
2 musicologists is not helpful the trier of fact. *See, Burkhart*, 112 F.3d 1207 at 1213;
3 *Sinclair*, 74 F.3d at 758 n. 1; *CFM Communications*, 424 F. Supp. 2d at 1238.

4 **V. CONCLUSION**

5 For the foregoing reasons, Defendants respectfully request the Court deny
6 Plaintiff's Motion for Preliminary Injunction.

7 Dated: January 10, 2011

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9
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