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JUNKIE PUBLISHING, LLC; will.i.am. music, llc; JEEPNEY MUSIC, INC.;  
12 CHERRY RIVER MUSIC CO.; and EMI APRIL MUSIC, INC.

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

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

Case No. SACV10-1656 JST(RZx)  
**DEFENDANTS' REPLY IN  
SUPPORT OF MOTION TO  
DISMISS FIRST AMENDED  
COMPLAINT; MOTION TO  
STRIKE; AND MOTION FOR  
MORE DEFINITE STATEMENT**  
Hon. Josephine Staton Tucker  
Courtroom 10A  
Date: January 24, 2011  
Time: 10:00 a.m.  
Courtroom: 10A  
Complaint Filed: October 28, 2010  
Trial Date: Not Assigned

**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. BRIEF PROCEDURAL BACKGROUND..... 2

III. ARGUMENT ..... 4

    A. Pringle Cannot Establish A Valid Copyright Registration For The Works At Issue ..... 4

    B. 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

        1. Plaintiff Is Not Entitled To Presumption Of Copyright Validity ..... 7

        2. Plaintiff Has Not And Cannot Establish Ownership Of A Valid Copyright..... 8

    C. Plaintiff Has Not Alleged That Defendants Factually Copied Any Element Of The Works At Issue ..... 10

        1. Exhibits To The FAC Prove That The Dance Version Of “Take a Dive” Was Not Sampled ..... 14

IV. PLAINTIFF’S OPPOSITION FAILS TO JUSTIFY PLAINTIFF’S IRRELEVANT AND IMPROPER ALLEGATIONS..... 16

    A. Claims Of Prior Copyright Infringement Are Improper And Must Be Stricken ..... 16

    B. Allegations Of “Conspiracy” And “Unfair Business Practices” Are Improper And Must Be Stricken ..... 18

    C. Allegations Of “Willfulness” Serve No Legitimate Purpose And Must Be Stricken ..... 19

V. PLAINTIFF MISUNDERSTANDS AND MISSTATES THE LAW WITH RESPECT TO ATTORNEYS’ FEES..... 22

VI. CONCLUSION..... 23

**TABLE OF AUTHORITIES**

	<u>Page</u>
<i>Cases</i>	
<i>Applied Equip. Corp. v. Litton Saudi Arabia Ltd.</i> , 7 Cal.4th 503 (1994) .....	19
<i>Ashcroft v. Iqbal</i> , 129 S.Ct. 1937 (2009) .....	1, 9, 10
<i>Associated Gen. Contrs. of Am. v. Metropolitan Water Dist.</i> , 159 F.3d 1178 (9th Cir. 1998).....	10
<i>Bell Atlantic Corp v. Twombly</i> , 127 S. Ct. 1955 (2007) .....	1, 9, 10
<i>Castle Rock Entertainment, Inc. v. Carol Pub. Group, Inc.</i> , 150 F.3d 132 (2d Cir. 1998).....	11
<i>Comedy III Productions, Inc. v. New Line Cinema</i> , 200 F.3d 593 (9 <sup>th</sup> Cir. 2000).....	18
<i>ConFold Pacific, Inc. v. Polaris Industries, Inc.</i> , 433 F.3d 952 (7th Cir. 2006).....	12
<i>Corrections USA v. Dawe</i> , 504 F. Supp. 2d 924 (E.D. Cal. 2007).....	18
<i>Cosmetic Ideas, Inc v. IAC/InteractiveCorp</i> , 606 F.3d 612 (9th Cir. 2010).....	5, 6
<i>Derek Andrew, Inc. v. Poof Apparel Corp.</i> , 528 F.3d 696 (9th Cir. 2008).....	22
<i>EMI Catalogue Partnership v. Hill, Holliday, Connors, Cosmopulos, Inc.</i> , 228 F. 3d 56 (2d Cir. 2000).....	19
<i>Entm't Research Group, Inc. v. Genesis Creative Group, Inc.</i> , 122 F.3d 1211 (9th Cir. 1997).....	19
<i>Faulkner v. National Geographic Soc.</i> , 576 F. Supp. 2d 609 (S.D.N.Y. 2008).....	21, 22
<i>Feist Publications, Inc. v. Rural Telephone Service Co., Inc.</i> , 499 U.S. 340 (1991).....	7, 9, 19
<i>Gucci Timepieces America Inc. v. Yidah Watch Co.</i> , 1998 WL 650078 (C.D. Cal. August 4, 1998).....	3, 8
<i>Harrison Music Corp. v. Tesfaye</i> , 293 F. Supp. 2d 80 (D.D.C. 2003) .....	22

1	<i>Jason v. Fonda,</i> 698 F.2d 966 (9th Cir. 1982).....	12
2		
3	<i>Johnson v. Jones,</i> 149 F.3d 494 (6th Cir. 1998).....	23
4	<i>Kodadek v. MTV Networks, Inc.,</i> 152 F.3d 1209 (9th Cir. 1998).....	6, 18
5		
6	<i>Lamps Plus, Inc. v. Seattle Lighting Fixture Co.,</i> 345 F.3d 1140 (9th Cir. 2003).....	8
7	<i>Morgan v. Hawthorne Homes, Inc.,</i> 2009 WL 1010476 (W.D. Pa. April 14, 2009).....	3, 8
8		
9	<i>Oboler v. Goldin,</i> 714 F.2d 211 (2d Cir. 1983).....	20
10	<i>On Davis v. The Gap, Inc.,</i> 246 F.3d 152 (2d Cir. 2001).....	20
11		
12	<i>Reader's Digest Ass'n v. Conservative Digest, Inc.,</i> 821 F.2d 800 (D.C. Cir. 1987).....	10
13	<i>Santrayll v. Burrell,</i> 1998 WL 24375 (S.D.N.Y. 1998).....	16
14		
15	<i>Sheldon v. Metro-Goldwyn Pictures,</i> 81 F.2d 49 (2d Cir. 1936).....	11
16	<i>Sid and Marty Krofft Television Productions, Inc. v. McDonald's Corp.,</i> 562 F.2d 1157 (9th Cir. 1977).....	12
17		
18	<i>Smith v. Jackson,</i> 84 F.3d 1213 (9th Cir. 1996).....	22
19	<i>Swirsky v. Carey,</i> 376 F.3d 841 (9th Cir. 2004).....	7, 20
20		
21	<i>Tisi v. Patrick,</i> 97 F. Supp. 2d 539 (S.D.N.Y. 2000).....	12
22	<i>Transphase Systems Inc. v. Southern California Edison Co.,</i> 839 F. supp. 711 (C.D. Cal. 1993).....	10
23		
24	<i>Ward v. National Geographic Society,</i> 208 F. Supp. 2d 429 (S.D.N.Y. 2002).....	3, 8
25	<b>Statutes</b>	
26	17 U.S.C. § 201(a).....	8
27	17 U.S.C. § 201(d)(1).....	8
28	17 U.S.C. § 301 .....	17

1	17 U.S.C. § 410 (c).....	passim
2	17 U.S.C. § 411 .....	3, 5
3	17 U.S.C. § 411(a).....	5
4	17 U.S.C. § 412 .....	18, 19
5	17 U.S.C. § 504(c)(2).....	18
6	17 U.S.C. §114(b) .....	3, 6
7	<b>Rules</b>	
8	Fed. R. Civ. P. 8(a)(2).....	13
9	Fed. R. Civ. Pro. 1 .....	17
10	Fed.R.Civ.P. Rule 8.....	1
11	Rule 12(f) Fed. R. Civ. Pro. ....	16
12		
13		
14		
15		
16		
17		
18		
19		
20		
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1 Defendants William Adams; Stacy Ferguson; Allan Pineda; Jaime Gomez;  
2 Tab Magnetic Publishing; Headphone Junkie Publishing, LLC; Will.I.Am. Music,  
3 LLC; Jeepney Music, Inc.; Cherry River Music Co.; and EMI April Music, Inc.  
4 (collectively, “Defendants”) submit this reply in support of their Motion to Dismiss  
5 First Amended Complaint (“FAC”); Motion to Strike and Motion for more Definite  
6 Statement filed on December 14, 2010 (collectively, the “Motion”).

7 **I. INTRODUCTION**

8 The requests made in Defendants’ Motion should be granted because they are  
9 proper, necessary, and well grounded. There is a difference between a copyright  
10 infringement claim for a sound recording and a copyright infringement claim for a  
11 musical composition. Plaintiff attempts to blur the distinction to pursue its claim,  
12 but the Copyright Act does not permit this blurring, and neither should this Court.

13 Since the filing of this Motion, Plaintiff has filed a Motion for Preliminary  
14 Injunction based upon these deficient pleadings, and the Copyright Office has issued  
15 a registration from the November 15, 2010 application for registration. Rather than  
16 “moot” the issues raised in the Defendants’ Motion, as Plaintiff argues, these two  
17 post-filing events highlight the need for rulings on the issues raised therein both at  
18 the pleading stage (this Motion to Dismiss<sup>1</sup>), and at the proof stage (Motion for  
19 Preliminary Injunction).<sup>2</sup> Given the post filing events, Defendants provide a brief

20 <sup>1</sup> In the past several years, the Supreme Court has decided two key cases that set  
21 forth more rigorous pleading standards. First, the Court explained that Fed.R.Civ.P.  
22 Rule 8 requires a plaintiff to allege “enough facts to state a claim to relief that is  
23 plausible on its face.” *Bell Atlantic Corp v. Twombly*, 127 S. Ct. 1955, 1964-65  
(2007). “[A] plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to  
relief’ requires more than labels and conclusions. . . . Factual allegations must be  
enough to raise a right to relief above the speculative level.” *Id.* (emphasis added).

24 Second, in *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009), the Supreme Court held that  
25 courts should begin their analysis “by identifying pleadings that, because they are no  
26 more than conclusions, are not entitled to the assumption of truth.” 129 S. Ct. at  
27 1940. Under *Iqbal*, a plaintiff must allege “more than unadorned, the-defendant-  
unlawfully-harmed-me accusation[s],” and “threadbare recitals of the elements of a  
cause of action, supported by mere conclusory statements, do not suffice.” *Id.*

28 <sup>2</sup> This reply will address the failure of Plaintiff to state a claim upon which relief can  
be granted, and the need for more particularity *at the pleading stage*. The

1 “Procedural Background” discussion to highlight the continued ripe issues for ruling  
2 on the Motion.

3 **II. BRIEF PROCEDURAL BACKGROUND.**

4 On October 28, 2010, Pringle filed an initial Complaint for copyright  
5 infringement of solely the musical composition for the work “Take A Dive” Dance  
6 Version. DKT 1. Pringle did not register or apply for registration of this musical  
7 composition. The initial Complaint was knowingly deficient. Meet and confer  
8 efforts, at Defendants’ expense, convinced Plaintiff to refile a proper amended  
9 complaint.

10 On November 19, 2010, Pringle filed a First Amended Complaint (“FAC”),  
11 this time raising two separate and distinct claims of infringement, one for musical  
12 composition and a new claim “on information and belief” for “sampling” of a sound  
13 recording. See e.g. FAC para 41, DKT 9. In the body of the FAC, Paragraph 29,  
14 line 13-17, Pringle alleges that *he made an application for registration* of the works  
15 at issue with the U.S. Copyright Office. Plaintiff did not attach the application for  
16 that registration with the FAC. *Id.*

17 On December 13, 2010, Defendants filed this Motion. While this Motion was  
18 pending, the Copyright Office issued a certificate of registration from the pending  
19 application, with an effective date of registration of November 15, 2010. The  
20 Certificate of Registration provides that the “Date of First Publication” is December  
21 1, 1999<sup>3</sup>. The Certificate of Registration establishes that Plaintiff delayed 11 years  
22 before seeking registration, which triggers 17 U.S.C. § 410 (c) (registrations made  
23 after 5 years of publication carry with it no presumptions of ownership, validity,  
24 copyrightability etc.). Thus in connection with Defendants’ Motion, the sufficiency  
25  
26 opposition to the Motion for Preliminary injunction will address the deficiencies at  
the proof stage.

27 <sup>3</sup> Plaintiff’s submission of the Registration in opposition to the Motion to Dismiss is  
28 the first time Plaintiff has made any disclosure regarding its specific claimed date of  
publication.

1 of the pleadings must be evaluated in light of the fact that Plaintiff must allege all  
2 elements of all aspects of its claim.<sup>4</sup>

3 Although Plaintiff's FAC contained separate claims, one for musical  
4 composition, and a new claim for – “on information and belief” – “sampling” of a  
5 sound recording, the November 15, 2010 Copyright Registration states on its face  
6 that the Copyright Registration is expressly limited to just the sound recording, and  
7 the Copyright Registration expressly excluded “music, lyrics,” which is the musical  
8 composition claim.

9 Therefore, as of the filing of this Reply, there continues to be no Copyright  
10 Registration for the musical composition of “Take A Dive” dance version, in  
11 violation of the requirements of 17 U.S.C. § 411. The request for dismissal of the  
12 musical composition claim for failure to comply with 17 USC § 411 is thus proper  
13 and continues to be ripe for ruling by this Court.

14 Defendants' motion also sought dismissal of the “sampling of the sound  
15 recording” claim (FAC 41), for lack of sufficient pleading, and for failure to submit  
16 an appropriate deposit copy with the Copyright office of the 1999 sound recording.  
17 The issuance of the November 15, 2010 registration does not moot these issues for  
18 three reasons:

19 **First**, with respect to a sound recording claim, a plaintiff must allege that the  
20 *actual recording itself* was used by the defendant. 17 U.S.C. §114(b) (“[t]he

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



1 exclusive right of the owner of copyright in a sound recording under clause (1) of  
2 section 106 is limited to the right to duplicate the sound recording in the form of  
3 phonorecords or copies that directly or indirectly recapture the actual sounds fixed  
4 in the recording”). As discussed herein, the 2010 registration does not cover the  
5 1999 sound recording of the Dance Version. That registration applies – at most – to  
6 Plaintiff’s 2010 sound recording of the Dance Version. These are not the same  
7 recording. Also the sufficiency of the deposit copy (i.e. it is not a copy of the 1999  
8 Sound recording, but instead a 2010 sound recording) is an issue ripe for ruling in  
9 this Motion.

10 **Second**, since the FAC is now limited to just a sound recording claim (by  
11 virtue of no registration for the musical composition), the insufficiency of the FAC  
12 with respect to allegations of “access” to the actual 1999 sound recording that is the  
13 subject of the registration is also ripe for ruling on Defendants’ Motion.

14 **Third**, the issue of the insufficiency of the pleadings of the sound recording  
15 claim in view of the tardiness of application for registration, and thus lack of  
16 presumptions, remains ripe for this Court. 17 USC 410 (c).

17 Finally, the motion to strike immaterial pleadings remains ripe for ruling.  
18 Each of these issues will be addressed below.

### 19 **III. ARGUMENT**

#### 20 **A. Pringle Cannot Establish A Valid Copyright Registration For The** 21 **Works At Issue**

22 Two works are at issue in this lawsuit. One is the 1999 sound recording in  
23 Plaintiff’s dance version of “Take a Dive” (the “Dance Version”).<sup>5</sup> The other is the  
24 musical composition in the Dance Version. Plaintiff is required to have a valid  
25 copyright registration for both works. Plaintiff lacks a valid copyright registration  
26 in these works.

27 <sup>5</sup> Plaintiff alleges that the Dance Version is a 1999 derivative work of his 1998 work,  
28 entitled “Dive” on Plaintiff’s 1998 Copyright Registration for that underlying work.  
(FAC, ¶ 27-29.)

1 It is well established law that 17 U.S.C. § 411(a) provides that a plaintiff must  
2 register the work allegedly infringed prior to instituting an action for copyright  
3 infringement. *Cosmetic Ideas, Inc v. IAC/InteractiveCorp*, 606 F.3d 612, 615 (9th  
4 Cir. 2010) (holding “[s]ection 411(a)’s registration requirement is a pre-condition to  
5 filing a claim”) (citation omitted).

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

12 The 2010 registration also does not cover the 1999 sound recording of the  
13 Dance Version. That registration applies – at most – to Plaintiff’s 2010 sound  
14 recording of the Dance Version. These are not the same recording. Plaintiff admits  
15 this. First, he admits the “recordings” are actually an NRG Image File that contains  
16 “individual component directories, instruments, and sequences,” which when  
17 processed through “an Ensoniq ASR-10 synthesizer,” accesses the stored data and  
18 plays the sounds. (See MPI, page 5, lines 1-8; DKT 28, Pringle TRO Decl. ¶5.)  
19 Secondly, Plaintiff admits that the copy he submitted the United States Copyright  
20 office as a deposit was created in 2010. (Opp. to Motion to Dismiss, page 4, lines  
21 19-22.) He states he made this *new* recording from “a saved [NRG] computer file”  
22 and submitted that *new* recording “for purposes of fulfilling § 408(b) of the  
23 Copyright Act.” (*Id.*)

24 The recording from Plaintiff’s NRG file is a sound recording from 2010, *not*  
25 1999. A sound recording from 2010 does not suffice for purposes of registering the  
26 copyright in the 1999 sound recording under 17 U.S.C. § 411. See *Kodadek v. MTV*  
27 *Networks, Inc.*, 152 F.3d 1209, 1211 (9th Cir. 1998) (drawings made in 1993 from  
28 memory of drawings originally made in 1991 did not satisfy deposit requirement

1 because they were not made by “directly referring to the originals,” nor were they  
2 “bona fide copies of the originals”); *Cosmetic Ideas, supra*, 606 F.3d at 621  
3 (registration is not complete without a submission of bona fide copies of the work; a  
4 reconstruction of the same will not suffice).

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

9 **B. Even Assuming A Valid Registration, Plaintiff Cannot Establish**  
10 **Ownership Of A Valid Copyright Or That The Defendants**  
11 **Factually Copied Any Element Of Either Works**

12 As indicated above, Plaintiff claims infringement of two works. One is the  
13 1999 sound recording in the Dance Version, the other is the musical composition  
14 embodied therein. To properly allege a claim for copyright infringement, and in  
15 particular, a violation of the reproduction right, a plaintiff must allege “(1)  
16 ownership of a valid copyright, and (2) copying of constituent elements of the work  
17 that are original.” *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499  
18 U.S. 340, 361 (1991); see also *Swirsky v. Carey*, 376 F.3d 841, 844 (9th Cir. 2004).  
19 With respect to a sound recording, a plaintiff also must allege that the actual  
20 recording itself was used by the defendant. 17 U.S.C. §114(b) (“[t]he exclusive  
21 right of the owner of copyright in a sound recording under clause (1) of section 106  
22 is limited to the right to duplicate the sound recording in the form of phonorecords  
23 or copies that directly or indirectly recapture the actual sounds fixed in the  
24 recording”).

25 Here, Plaintiff has not alleged ownership of a valid copyright or Defendants’  
26 copying of original elements from either work, or that the actual 1999 sound  
27 recording was used by the Defendants.  
28

1                   **1. Plaintiff Is Not Entitled To Presumption Of Copyright**  
2                   **Validity**

3                   Contrary to Plaintiff's assertion, Plaintiff's copyright registration does not  
4 "constitute evidence of the validity of the copyrights and Pringle's ownership in"  
5 them, nor the purported factual statements made in the certificate. (See e.g. DKT  
6 73, MPI, page 15, lines 3-4.) 17 U.S.C. § 410 (c) makes clear that those  
7 presumptions apply where the work is registered within five years of the date it was  
8 first published. See, *Id.* ("In any judicial proceedings the certificate of a registration  
9 made before or within five years after first publication of the work shall constitute  
10 prima facie evidence of the validity of the copyright and of the facts stated in the  
11 certificate").

12                   Here, Plaintiff's registration certificate, even if it could be construed to cover  
13 any of the two works directly at issue was obtained roughly *eleven years* after the  
14 works' first publication in December 1999. That tardiness strips Plaintiff of the  
15 presumptions usually associated with a certificate of registration under 17 U.S.C. §  
16 410 (c) and the above-stated case law. As such, Plaintiff is now required to  
17 *affirmatively allege* and *prove* each of the components of a valid copyright. See,  
18 *Ward v. National Geographic Society*, 208 F. Supp. 2d 429, 455 (S.D.N.Y. 2002)  
19 (lack of a copyright registration "deprives the plaintiff . . . of Section 410(c)'s  
20 presumption of validity."); *Gucci Timepieces America Inc. v. Yidah Watch Co.*,  
21 1998 WL 650078, at \*1 (C.D. Cal. August 4, 1998) (lack of a valid registration  
22 removes the effect of the presumption as to the copyright's validity, originality,  
23 compliance with statutory formalities, and copyrightability). These elements  
24 include copyrightability, originality, and compliance with all statutory formalities.  
25 *Morgan v. Hawthorne Homes, Inc.*, 2009 WL 1010476, at \*7 (W.D. Pa. April 14,  
26 2009) (finding that when plaintiff lacked presumption of validity afforded by  
27 copyright registration certificate, onus was on plaintiff to prove validity of the  
28 claimed copyrights). Plaintiff has not and cannot establish these elements.

1                   **2. Plaintiff Has Not And Cannot Establish Ownership Of A**  
2                   **Valid Copyright**

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

8                   There are only two ways that Plaintiff could allege copyright ownership of the  
9 subject works, including the “guitar twang sequence” principally at issue here.  
10 Either: (1) as an author or (2) through a transfer of ownership from another entity  
11 who held title. *See*, 17 U.S.C. § 201(a) (“Copyright in a work protected under this  
12 title vests initially in the author or authors of the work”); 17 U.S.C. § 201(d)(1)  
13 (“The ownership of a copyright may be transferred in whole or in part by any means  
14 of conveyance or by operation of law”). As set forth above, Plaintiff’s eleven year  
15 delay in seeking a copyright registration deprives him of the evidentiary benefits a  
16 copyright registration certificate often provides pursuant to 17 U.S.C. § 410 (c),  
17 including the presumption of copyright ownership. As such, Plaintiff must  
18 affirmatively allege all of the elements that are evaluated in determining ownership  
19 including copyrightability, originality, compliance with statutory formalities, and  
20 facts surrounding the works’ creation.<sup>6</sup> Plaintiff’s complaint does not surmount this  
21 initial hurdle.

22                   While Plaintiff provides conclusory claims to have authored the “guitar twang

23 <sup>6</sup> Because Plaintiff by statute is not entitled to a presumption of copyright validity,  
24 under *Twombly* and *Iqbal*, he must allege facts demonstrating a valid copyright  
25 within the body of the FAC. This includes, at the most fundamental level, an  
26 allegation that the purported 1999 derivative work at issue – and in particular, the “3  
27 note guitar twang” – was created by Pringle and is *original* to Pringle. *See Feist*  
28 *Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 345, 111 S. Ct. 1282, 113 L.  
Ed. 2d 358 (1991) (“[t]he sine qua non of copyright[ability] is originality” and that  
“[o]riginal, as the term is used in copyright, means only that the work was  
independently created by the author (as opposed to copied from other works), and  
that it possesses at least some minimal degree of creativity”)

1 sequence” at the heart of this dispute, he alleges no facts supporting this claim.  
2 Plaintiff has failed to expressly allege that he actually composed the “guitar twang  
3 sequence.” He only claims to have added the sequence as a whole to a prior work.  
4 (FAC ¶29; Pringle Decl., ¶4.)

5 Further, Plaintiff has not alleged that the “guitar twang” harmonic figure was  
6 sufficiently original to merit copyright protection. This includes having made no  
7 allegations that Plaintiff himself did not copy it from another source. *See, Feist*, 499  
8 U.S. at 345 (“Original, as the term is used in copyright, means only that the work  
9 was independently created by the author (as opposed to copied from other works),  
10 and that it possesses at least some minimal level of creativity.”); *Reader’s Digest*  
11 *Ass’n v. Conservative Digest, Inc.*, 821 F.2d 800, 806 (D.C. Cir. 1987) (originality  
12 means “that the work owes its origins to the author—i.e., that the work is  
13 independently created rather than copied from other works”). Plaintiff must be  
14 ordered to allege the actual equipment, software, internal or external sound banks  
15 used by Pringle to create his song in the time frame he represents he created his  
16 song, and that he did not copy it from another.

17 Finally, Plaintiff has made no specific allegation of the creation date for the  
18 specific works at issue. This is significant with respect to the sound recording claim  
19 in particular, as that claim requires access to the specific sound recording at issue,  
20 and Plaintiff’s allegations in the FAC reference “numerous variations” allegedly  
21 distributed during the same time period. (See, e.g., DKT 9, FAC ¶3.)

22 **C. Plaintiff Has Not Alleged That Defendants Factually Copied Any**  
23 **Element Of The Works At Issue**

24 Plaintiff’s Opposition incredibly contends that, for purposes of ruling on a  
25 12(b)(6) motion, the Court must accept as true every allegation Plaintiff asserts, no  
26 matter how speculative or unreasonable. Conclusory assertions are insufficient to  
27 defeat a motion to dismiss. *Associated Gen. Contrs. of Am. v. Metropolitan Water*  
28 *Dist.*, 159 F.3d 1178, 1181 (9th Cir. 1998) (“conclusory allegations of law and

1 unwarranted inferences are not sufficient” to defeat a motion to dismiss). Indeed,  
2 this is consistent with the ruling in *Twombly* and *Iqbal* that the Court need not  
3 accept as true “unreasonable inferences or unwarranted deductions of fact.”  
4 *Twombly, supra*, 127 S. Ct. at 1974; see also *Transphase Systems Inc. v. Southern*  
5 *California Edison Co.*, 839 F. supp. 711, 718 (C.D. Cal. 1993). As stated above, the  
6 standards on 12(b)(6) motions are not so austere as to provide Plaintiff with *carte*  
7 *blanche* to assert *anything* he wishes, no matter how vague and far from the truth.

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

14 Before a challenged work can be analyzed to determine whether it  
15 appropriates an impermissible quantum of protected material, it must be established  
16 that, as a factual matter, the defendant copied plaintiff’s work in creating the  
17 challenged work. *Castle Rock Entertainment, Inc. v. Carol Pub. Group, Inc.*, 150  
18 F.3d 132, 137 (2d Cir. 1998) (“It is only after actual copying is established that one  
19 claiming infringement then proceeds to demonstrate that the copying was improper  
20 or unlawful by showing that the second work bears ‘substantial similarity’ to  
21 protected expression in the earlier work.”) (citations omitted).

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

1 (“[A] patent right is good against the whole world. A copyright is not because  
2 independent discovery is a defense to a copyright—or a trade secret—claim”).

3 Because of this, in order to state a claim for infringement, Plaintiff has to  
4 allege specific facts of copying the specific works at issue. This includes access to  
5 the specific works at issue. *See, Sid and Marty Krofft Television Productions, Inc.*  
6 *v. McDonald’s Corp.*, 562 F.2d 1157, 1172 (9th Cir. 1977); *see also Jason v. Fonda*,  
7 698 F.2d 966, 967 (9th Cir. 1982) (bare possibility of seeing or hearing the work  
8 does not establish access); *see Tisi v. Patrick*, 97 F. Supp. 2d 539, 547 (S.D.N.Y.  
9 2000) (holding an unsolicited submission of a musical work to a record company  
10 does not establish access by the recording artist).

11 Here, Plaintiff has not alleged that any of the Defendants, especially those  
12 directly involved in the creation of “I Gotta Feeling,” were ever in contact with  
13 Plaintiff, or ever heard his works.<sup>7</sup> Rather than providing such allegations, Plaintiff  
14 instead reels off a roll call of general categories of persons and entities associated  
15 with the music business in the North American and European continents that were  
16 allegedly provided with a copy of his works *over a decade time period*. Plaintiff  
17 does not allege the who, what and when such unnamed categories of individuals  
18 allegedly received the specific work at issue (i.e. the specific 1999 sound recording).  
19 For example, given Pringle’s allegations of many variations of “Take A Dive” over  
20 a decade period of time, but only a single claim of “sampling” of an alleged 1999  
21 sound recording, is the Complaint to be read that the 1999 sound recording was sent

22 <sup>7</sup> Given the record that has occurred since the filing of the Motion to Dismiss, and  
23 the Declaration of Frederic Riesterer (submitted in Defendants’ Opposition to  
24 Plaintiff’s TRO) Plaintiff cannot in good faith maintain the pleadings without  
25 specific allegations of alleged access to Mr. Riesterer in particular. In that  
26 document, Mr. Riesterer states that he composed the guitar twang sequence heard in  
27 “I Gotta Feeling” in 2008, based in part on his prior work and in part on material  
28 licensed from the French music library, *Univers Sons*. (Riesterer Decl., ¶¶ 3-6.)  
Mr. Riesterer states that he created these works without access to any musical works  
created by Plaintiff, and having never obtained any of Plaintiff’s works. (Riesterer  
Decl., ¶ 7.)



1 every year? Only in 1999? Or that the later alleged distributions did not include the  
2 1999 sound recording, but instead only a later variation?

3 It is a much different scope of litigation if the 1999 sound recording (which is  
4 all that is at issue) was only distributed in 1999 and the creator of the guitar Twang  
5 at issue, particularly now that Mr. Riesterer, is known to Plaintiff. Given the  
6 limitations in the Certificate of Registration to just the 1999 sound recording, and  
7 Plaintiff's knowledge of the creator of the accused element of Defendants' song, the  
8 deficiencies of Plaintiff's allegations regarding access and the lack of notice they  
9 provide are illuminated, as is the lack of notice and prejudice the current pleadings  
10 cause one attempting to defend the accusations.

11 Plaintiff's *ipse dixit* assertion that his unsubstantiated, and frankly  
12 questionable, dissemination efforts resulted in copies of his works being placed in  
13 the hands of Defendants must be rejected as insufficient pleadings of the fact of  
14 copying, including access. Plaintiff has the burden to provide allegations on the  
15 issue of factual copying of the actual work at issue (i.e. a 1999 sound recording),  
16 and Plaintiff has failed to do precisely that. *See, Castle Rock*, 150 F.3d at 137  
17 (plaintiff has the "initial burden of proving actual copying by indirect evidence.").  
18 It is not sufficient to allege that many variations are out there, all over the world, and  
19 then limit the registration to just one specific 1999 sound recording, and allege  
20 sampling of a specific 1999 sound recording. Pleadings of this nature are  
21 ambiguous and misleading.

22 **1. Exhibits To The FAC Prove That The Dance Version Of**  
23 **"Take a Dive" Was Not Sampled**

24 Equally defective from a pleading perspective are Plaintiff's conclusory  
25 allegations of "sampling." See FAC ¶ 41. Even assuming *arguendo*, sampling  
26 requires access to a specific sound recording and is not established by saying the  
27 sounds are similar, Plaintiff alleges no facts to establish Defendants sampled any  
28 specific sound recording. This would require, *e.g.* allegations that the specific

1 Defendants had physical possession of Plaintiff’s specific sound recording subject to  
2 the copyright registration, made an actual copy of that sound recording, and  
3 included that copy in Defendants’ own work. Because the FAC is founded on  
4 conclusory allegations of access it remains fatally defective, notwithstanding  
5 Plaintiff’s arguments to the contrary. Simply concluding that Defendants have  
6 “sampled” Plaintiff’s work, or gained access to some sound recording among “many  
7 variations” and based on a decade-long, globe-trotting distribution of unsolicited  
8 copies, is insufficient under the pleading standards set forth by the Supreme Court.  
9 In order to meet the “fair notice” requirements of Fed. R. Civ. P. 8(a)(2) and elevate  
10 his right above a speculative level, Plaintiff must assert facts in support of his claim.  
11 Thus far he has failed to do so, and therefore, the FAC must be dismissed pursuant  
12 to Rule 12(b)(6).<sup>8</sup> It is also necessary to curtail abusive litigation tactics – 11 years  
13 late filing the registration, two years late bringing a claim, changing stories, and 2  
14 attempts at extraordinary preliminary relief while refusing to disclose the basis of  
15 his claim is basis enough to require this Plaintiff to finally commit to his claim with  
16 particularity.

17 Plaintiff’s sampling claim is solely set forth in the FAC ¶41. It does not  
18 allege that the sound recording allegedly sampled was the 1999 “Take A Dive”  
19 Dance Version. By virtue of the now issued registration, and the limitations  
20 contained therein, this is now a known limitation to the claim. The FAC  
21 insufficiently alleges sampling “on information and belief.” However, the  
22 allegations are contrary to the exhibits attached to the FAC. This Court, on a motion  
23 to dismiss, can consider the exhibits to the motion in connection with the motion to  
24 dismiss. Now that the registration reveals that the claim is limited to a single 1999  
25 sound recording, which is represented to be attached to the FAC, dismissal of the

26 <sup>8</sup> Without repeating these arguments, for the same reasons (and as set forth in the  
27 moving papers), good cause likewise exists to dismiss pursuant to Rule 8(a)(2)  
28 (requiring a “short and plain statement of the claim showing that the pleader is  
entitled to relief”). Plaintiff’s speculative pleadings fail to comply with that Rule.

1 sampling claim is proper.

2 Plaintiff has attached what he alleges is the 1999 sound recording. Plaintiff  
3 also attaches the “I Gotta Feeling” accused song as an exhibit to the FAC. It is  
4 impossible as a factual matter for the Dance Version of “Take a Dive” to have  
5 provided the basis for the “guitar twang sequence” in “I Gotta Feeling” for two  
6 reasons. First, Plaintiff’s 2010 copyright registration does not cover the 1999 sound  
7 recording of “Take a Dive” Dance Version. Rather, the 2010 registration only  
8 covers a sound recording that was created in 2010, which post-dates Defendants’  
9 creation of “I Gotta Feeling.” Plaintiff has not alleged – nor could he – that  
10 Defendants’ work copied Plaintiff’s 2010 recording.

11 Second, it is technologically impossible for the guitar twang sequence in “I  
12 Gotta Feeling” to have been sampled from the Dance Version of “Take a Dive.”<sup>9</sup>  
13 The guitar twang sequence in “Take a Dive” Dance Version is layered with other  
14 musical elements. The “guitar twang” sequence in “I Gotta Feeling,” conversely is  
15 not. It is – in many instances – “clean.” This means that it is not layered with other  
16 musical elements. It is not technologically possible to obtain the “clean” guitar  
17 twang sequence from one that is layered with other musical elements.

18 Had the sequence that appears in “I Gotta Feeling” been sampled from the  
19 Dance Version of “Take a Dive,” it could not have been “clean.” It would always  
20 have the remnants of other musical elements. Thus the exhibits to the FAC actually  
21 disprove, Plaintiff’s “on information and belief” allegations, and proves Defendants  
22 did not sample the 1999 sound recording. While not raised originally because the  
23 Registration had not yet issued, revealing that the actual registration sought and  
24 obtained did not include anything other than the 1999 sound recording, this Court, in  
25 the interest of judicial efficiency, may address this issue now. Dismissal of the  
26 sampling claim is proper, and Defendants request an order of dismissal on the FAC,  
27

28 <sup>9</sup> See also experts’ opinions on same issue in motion for preliminary injunction.

1 with prejudice, and an award of their attorneys' fees and costs.

2 **IV. PLAINTIFF'S OPPOSITION FAILS TO JUSTIFY PLAINTIFF'S**  
3 **IRRELEVANT AND IMPROPER ALLEGATIONS**

4 **A. Claims Of Prior Copyright Infringement Are Improper And Must**  
5 **Be Stricken**

6 Defendants seek to strike as immaterial, allegations of prior copyright  
7 infringement lawsuits asserted against The Black Eyed Peas. As set forth in the  
8 moving papers, evidence of prior copyright infringement has no relevance as to  
9 whether a defendant subsequently copied another party's work. *Santrayll v. Burrell*,  
10 1998 WL 24375 (S.D.N.Y. 1998). As such, allegations concerning other claims  
11 asserted against a few, but not all, Defendants have no relationship whatsoever to  
12 this lawsuit and should be stricken.

13 Although Plaintiff liberally makes numerous references to other  
14 unsubstantiated claims of infringement, none of such claims have ever been  
15 substantiated or reduced to judgment. They are simply improper to include in this  
16 case. Those prior unrelated actions, as a matter of law, have no relevance to this  
17 lawsuit.

18 Plaintiff attempts to characterize these prior actions as evidence of  
19 Defendants' "customary business practices, or habit" of committing copyright  
20 infringement. (See Opp. Page 12, lines 6-7.)<sup>10</sup> But unsubstantiated claims and  
21 assertions by others – none of which have resulted in judgment or finding of  
22 infringement – do not show a "pattern and practice" of Defendants, only the sad  
23 reality that any third party is free to make allegations, whether true or not – Plaintiff

24 <sup>10</sup> Indeed, Plaintiff admits that his objective in asserting such claims is "in part to  
25 frame the nature and scope of the discovery which [he] intends to pursue during the  
26 pendency of this action." (Opp., page 12, lines 13 – 15.) But even under a liberal  
27 pleading standard, Plaintiff does not have the right to assert anything he wants  
28 merely in hopes of digging up dirt to support those allegations. Fed.R. Civ. P.  
11(b)(3) provides that allegations should be included only after the party's attorney  
had made "an inquiry reasonable under the circumstances" to verify the veracity of  
the same.

1 is one of them. He makes wild accusations regarding individual members of The  
2 Black Eyed Peas, and then learns that Mr. Riesterer independently created the guitar  
3 twang at issue.

4 None of the half-dozen lawsuits identified by Plaintiff has established  
5 infringement, or even resulted in a judgment. As such, no matter how many times  
6 Plaintiff uses the words “chronic”; “habit”; “pattern”; “practice”; “automatic”;  
7 “systematic”; or “repeated,” this does not transform the nature of the prior lawsuits  
8 into something it is not or make it admissible under Rule 406.

9 Even if there were actual findings of infringement, which there are not, the  
10 unrelated cases do not relate to any issue in this case. Due to late filing of the  
11 registration, statutory damages and attorneys’ fees are unavailable forms of recovery  
12 for Plaintiff. Thus, willfulness which only relates to the issue of statutory damages,  
13 is irrelevant.

14 Accordingly, notwithstanding the gratuitous use of buzzwords, Plaintiff has  
15 failed to demonstrate how prior lawsuits against these Defendants constitutes habit  
16 evidence of Defendants, as opposed to habit of third parties in making claims and  
17 impermissible character evidence. Littering his FAC with awkwardly contrived and  
18 counterfactual statements that serve no legitimate evidentiary purpose is exactly  
19 what Rule 12(f) Fed. R. Civ. Pro. is designed to strike. Thus, allegations regarding  
20 prior claims of infringement, as well as statements concerning rampant and  
21 “chronic” copying, should be stricken as irrelevant, prejudicial and immaterial. See  
22 *Corrections USA v. Dawe*, 504 F. Supp. 2d 924, 930 (E.D. Cal. 2007) (allegations in  
23 pleading may be stricken where they “have no possible relation to the controversy,  
24 and may cause prejudice to one of the parties”). The requested paragraphs of the  
25 FAC regarding pattern and practice and unrelated lawsuit should be stricken.

26 **B. Allegations Of “Conspiracy” And “Unfair Business Practices” Are**  
27 **Improper And Must Be Stricken**

28 As Plaintiff readily admits, he has not asserted a claim for conspiracy or

1 unfair business practices. Opp. Page 18, lines 22-25. Plaintiff admits that he  
2 included the unrelated “hot button” buzz words to fish for a claim he *might* want to  
3 add at a later stage. Opp. Page 18, line 28 – Page 19, lines 1-2. If he has a claim it  
4 must be brought. Otherwise the pleading requirements of Rule 8, and Rule 11 Fed.  
5 R. Civ. Pro. prevent inclusion of unrelated allegations and unsubstantiated claims.  
6 Rule 1 Fed. R. Civ. Pro. also requires a “just, speedy, and inexpensive determination  
7 of every action,” and further prohibits such pleading practices. Fed. R. Civ. Pro. 1.

8 Moreover, no matter how much discovery Plaintiff seeks in this case, with an  
9 eye toward unfair business practices under California’s Unfair Competition Law  
10 (“UCL”), Business & Professions Code Sec. 17200, or conspiracy, its efforts will be  
11 futile. This is because Plaintiff’s claim is simply a claim of copyright infringement  
12 with no “additional element.” Such claims are preempted under 17 U.S.C. § 301.  
13 See also *Kodadek v. MTV Networks, Inc.*, 152 F.3d 1209, 1212-13 (9<sup>th</sup> Cir. 1998);  
14 *Comedy III Productions, Inc. v. New Line Cinema*, 200 F.3d 593 (9<sup>th</sup> Cir. 2000);  
15 *EMI Catalogue Partnership v. Hill, Holliday, Connors, Cosmopulos, Inc.*, 228 F. 3d  
16 56 (2d Cir. 2000).

17 Similarly, there is no way Plaintiff could breathe life into his “conspiracy”  
18 allegations. Civil conspiracy is not an independent tort under California law.  
19 *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal.4th 503, 510-511 (1994);  
20 see also *Entm't Research Group, Inc. v. Genesis Creative Group, Inc.*, 122 F.3d  
21 1211, 1228 (9th Cir. 1997). Moreover, because Plaintiff would have to establish  
22 liability on the basis of copyright infringement in order to establish a conspiracy, his  
23 claim of conspiracy would necessarily be preempted under Section 301 of the  
24 Copyright Act. Therefore, all references to “conspiracy” and unfair business  
25 practices have no relevance to this lawsuit and must be stricken.

26 **C. Allegations Of “Willfulness” Serve No Legitimate Purpose And**  
27 **Must Be Stricken**

28 Throughout the FAC, Plaintiff repeatedly refers to Defendants’ conduct as

1 willful (even going so far to claim that defendants infringe copyrights as a business  
2 practice), all without: (1) factual support and (2) the identification a legitimate  
3 purpose for such statements.

4 Under the facts of this case, allegations of willfulness are not appropriate as  
5 they have no bearing on establishing a claim or infringement,<sup>11</sup> or on what – if any –  
6 monetary relief Plaintiff might hope to recover. This is because punitive damages  
7 are not available for copyright infringement actions, and Plaintiff cannot use  
8 willfulness to enhance any statutory damages as he has no right recover statutory  
9 damages. See *Oboler v. Goldin*, 714 F.2d 211, 213 (2d Cir. 1983) (“[W]e note that  
10 punitive damages are not available under the Copyright Act of 1976.”); *On Davis v.*  
11 *The Gap, Inc.*, 246 F.3d 152, 172 (2d Cir. 2001) (“As a general rule, punitive  
12 damages are not awarded in a statutory copyright infringement action. The purpose  
13 of punitive damages – to punish and prevent malicious conduct – is generally  
14 achieved under the Copyright Act through the provisions of 17 U.S.C. § 504(c)(2),  
15 which allow increases to an award of statutory damages in cases of willful  
16 infringement.”) (citations omitted); 17 U.S.C. § 412 (“no award of statutory  
17 damages . . . shall be made for (1) any infringement of copyright in an unpublished  
18 work commenced before the effective date of its registration; or (2) any  
19 infringement of copyright commenced after first publication of the work and before  
20 the effective date of its registration, unless such registration is made within three  
21 months after the first publication of the work.”).

22 Despite this well established law, Plaintiff asks this Court to believe that his  
23 willfulness allegations will “form the basis for the Court [in] awarding attorneys’  
24

25 <sup>11</sup> *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340, 361  
26 (1991) (“To establish infringement, two elements must be proven: (1) ownership of  
27 a valid copyright, and (2) copying of constituent elements of the work that are  
28 original.”); *Swirsky v. Carey*, 376 F.3d 841, 844 (9th Cir. 2004) (“To establish a  
successful copyright infringement claim, [plaintiff] must show that (1) he owns the  
copyright in [the subject work] and (2) defendant copied protected elements of [the  
subject work]”).

1 fees and costs at the conclusion of the case.” Opp. at 4. As in Section III below,  
2 Plaintiff will not be entitled to any such relief because 17 U.S.C. § 412 makes clear  
3 that timely registration of the copyrighted work is a precondition to an award of  
4 attorneys’ fees. Specifically, Plaintiff purported to register the 1999 derivative  
5 version of the sound recording, “Take a Dive,” and the musical composition  
6 embodied therein with a SR form. Plaintiff filed that form well after Defendants’  
7 alleged infringement, and the claimed publication date of those works. This later-  
8 filing precludes Plaintiff from any award of attorney's fees under Section 412. *Id.*

9 Finally, in the event that Plaintiff still persists in believing that allegations and  
10 evidence of willfulness are proper in this case, *Faulkner v. National Geographic*  
11 *Soc.*, 576 F. Supp. 2d 609 (S.D.N.Y. 2008) is instructive. After concluding that  
12 evidence of willfulness served no part in computing damages (also noting that  
13 punitive damages are unavailable in copyright suits), the *Faulkner* court rejected  
14 plaintiff's contention that evidence of willfulness was nevertheless relevant as an  
15 element of his claim for infringement. *Id.* at 613. Specifically, the court said that  
16 plaintiff “misses the point”. Copyright infringement is a strict liability wrong in the  
17 sense that a plaintiff need not prove wrongful intent or culpability in order to  
18 prevail. *Id.* The court continued:

19 [T]here is no proper role for proof of willfulness. Its only function would be  
20 in service of an attempt by plaintiff to prejudice the jury's assessment of  
21 damages and, if it proves to be in issue, liability by portraying defendants in  
22 an unflattering light. Accordingly, the evidence is not relevant because it  
23 would not make any fact at issue here more or less probable that it would be  
24 in its absence. And even if the evidence had some probative value on a  
25 question of consequence, its unfair prejudicial effect would outweigh it  
26 substantially. *Id.*

27 As was the case in *Faulkner*, and as is true for all copyright suits, a plaintiff  
28 need not need prove willfulness in prosecuting a claim for infringement. As such,



1 all allegations concerning willfulness are irrelevant and impertinent to this lawsuit.  
2 Therefore, such claims should be stricken from the FAC.

3 **V. PLAINTIFF MISUNDERSTANDS AND MISSTATES THE LAW**  
4 **WITH RESPECT TO ATTORNEYS' FEES**

5 Plaintiff suggests that he can recover attorneys' fees for any alleged  
6 infringement of his derivative work that "continues" after the 2010 registration of  
7 that work. Plaintiff misunderstands the law in this area.

8 Section 412 expressly states that "no award of attorney's fees . . . shall be  
9 made for . . . (2) any infringement of copyright commenced *after* first publication of  
10 the work and *before* the effective date of its registration, *unless* such registration is  
11 made within three months after the first publication. . . ." 17 U.S.C. § 412  
12 (emphasis added).

13 That statute couldn't be clearer. Nor could the case law interpreting it. Black  
14 letter law has consistently and unequivocally held that a prevailing plaintiff was not  
15 entitled to seek a recovery of attorneys' fees unless it had obtained a copyright  
16 registration before – or within *three months* – of the original infringement. See  
17 *Harrison Music Corp. v. Tesfaye*, 293 F. Supp. 2d 80, 84 (D.D.C. 2003); *Smith v.*  
18 *Jackson*, 84 F.3d 1213, 1219 (9th Cir. 1996); see also *Derek Andrew, Inc. v. Poof*  
19 *Apparel Corp.*, 528 F.3d 696, 701-701 (9th Cir. 2008). Indeed, every court to  
20 consider this issue has held that infringement "commences" for purposes of Section  
21 412 "when the first act in a series of acts constituting continuing infringement  
22 occurs." *Johnson v. Jones*, 149 F.3d 494, 506 (6th Cir. 1998) (to allow statutory  
23 damages and attorneys' fees where an infringing act occurs before registration and  
24 then reoccurs thereafter would defeat the dual incentives of Section 412).

25 Here, Plaintiff registered the work at issue ten *years* (117 months) after the  
26 purported first publication of that work. According to the FAC, infringement began  
27 in or around June 2009, more than a year *prior* to that registration. (DKT 9, FAC ¶  
28 44.) As such, Plaintiff is not entitled to a recovery of his attorneys' fees irrespective

1 of whether he ultimately prevails under the clear language of the statute, and the  
2 case law interpreting it. Thus, his prayer for fees or costs must stricken.

3 **VI. CONCLUSION**

4 For the reasons set forth above, and as based on the argument and evidence  
5 contained in the moving papers, Defendants respectfully request that this Court  
6 grant the instant motion and dismiss the FAC in its entirety. In the alternative,  
7 Defendants request that this Court strike those allegations which have no bearing on  
8 this lawsuit, and only seek to cast dispersions on the Defendants.

9  
10 Dated: January 10, 2011

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