

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

1 Dean A. Dickie (appearing *Pro Hac Vice*)
Dickie@MillerCanfield.com
2 Kathleen E. Koppenhoefer (appearing *Pro Hac Vice*)
Koppenhoefer@MillerCanfield.com
3 MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.
225 West Washington Street, Suite 2600
4 Chicago, IL 60606
Telephone: 312.460.4200
5 Facsimile: 312.460.4288

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

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

16 Attorneys for Plaintiff
BRYAN PRINGLE

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

21 BRYAN PRINGLE, an individual,) Case No. SACV 10-1656 JST(RZx)
22 Plaintiff,)
23 v.) **PLAINTIFF’S REPLY IN**
24 WILLIAM ADAMS, JR.; STACY) **FURTHER SUPPORT OF**
FERGUSON; ALLAN PINEDA; and) **MOTION FOR PRELIMINARY**
25 JAIME GOMEZ, all individually and) **INJUNCTION**
collectively as the music group The Black)
26 Eyed Peas, *et al.*)
27 Defendants.)
28

DATE: January 31, 2011
TIME: 10:00 a.m.
CTRM: 10A

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. ARGUMENT	2
A. Pringle Is Likely To Succeed On the Merits of His Claim.....	2
1. Pringle Has a Valid Copyright Registration for His Musical Composition	2
2. Pringle Has Established A Likelihood of Success on the Merits of his Claim that Defendants Infringed the Musical Composition in the Derivative Version of “Take a Dive.”	5
3. Defendants’ Supposed “Independent Creation” of the Guitar Twang Sequence.....	6
B. Pringle Has Established Irreparable Harm.....	7
1. Pringle Has Made A Showing of Irreparable Harm Independent of His Likelihood of Succeeding on the Merits	7
2. Pringle Timely Sought Relief and There is No Delay That Rebuts His Presumption of Irreparable Harm	8
C. The Weighing of Hardships Strongly Favors Entering Injunctive Relief Against Defendants	9
D. Pringle Has Established Good Cause for The Court To Waive A Bond, a Matter Within The Court’s Sound Discretion	11
III. CONCLUSION	11

INDEX OF AUTHORITIES

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(s)

CASES

A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001).....7, 9, 10

Candle Factory, Inc. v. Trade Assocs. Group, Ltd., 23 F. App'x 134 (4th Cir. 2001)8

Control Data Sys., Inc. v. Infoware, Inc., 903 F. Supp. 1316 (D. Minn. 1995)9

Coquico, Inc. v. Rodriguez-Miranda, 2007 WL 3034259 (D.P.R. Oct. 15, 2007).....9

Cosmetic Ideas, Inc. v. IAC/Interactivecorp, 606 F.3d 612 (9th Cir. 2010).....2

eBay Inv. v. MercExchange, LLC, 547 U.S. 388, 126 S. Ct. 18377

Exchange Intern., Inc. v. Vacation Ownership Relief, LLC, 2010 WL 4983669 (M.D. Fla. Oct. 27, 2010).....8

Grocery Outlet Inc. v. Albertson’s, Inc., 497 F.3d 949 (9th Cir. 2007)2

Gucci Timepieces America Inc. v. Yida Watch Co., 1998 WL 650078 (C.D. Cal. 1998).....4

Inst. for Motivational Living, Inc. v. Sylvan Learning Ctr., Inc., 2008 WL 379654 (W.D. Pa. Feb. 8, 2008).....9

King v. Innovation Books, a Div. of Innovative Corp., 976 F.2d 824 (2d Cir. 1992).....9

Mandrigues v. World Sav., Inc., 2008 WL 5221074 (N.D. Cal. Dec. 12, 2008).....9

Reed Elsevier, Inc. v. Mucknick, 130 S.Ct. 1237 (2010).....4

Summit Entertainment, LLC v. Beckett Media, LLC, 2010 WL 147958 (C.D. Cal. Jan. 12, 2010).....7

Taylor Corp. v. Four Seasons Greetings, LLC, 403 F.3d 958 (8th Cir. 2005).....7

Three Boys Music v. Michael Bolton, 212 F.3d 477 (9th Cir. 2000).....6

Topline Corp. v. 4273371 Can., Inc., 2007 WL 2332471 (W.D. Wash. Aug. 13, 2007).....9

Walt Disney Co. v. Powell, 897 F.2d 565 (D.C. Cir. 1990).....8

Warner Bros. v. RDR, 575 F. Supp. 2d 513 (S.D.N.Y. 2008).....7

Warrior Sports, Inc. v. Nat’l Collegiate Athletic Ass’n, 2009 WL 230562 (E.D. Mich. Jan. 30, 2009).....9

1	STATUTES	
2	17 U.S.C. § 103(b).....	2
3	17 U.S.C. § 411(a).....	2, 4
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		

1 **I. INTRODUCTION**

2 The most critical piece of information the Court should take from Defendants’¹
3 oppositions to Pringle’s Motion for Preliminary Injunction is this: **nowhere in**
4 **either opposition does any Defendant deny that the derivative version of “Take**
5 **a Dive” and “I Gotta Feeling” are strikingly similar if not virtually identical.**
6 None of the Defendants could provide an expert opinion to refute the stated opinions
7 of Pringle’s experts that the songs are substantially similar. Instead, Defendants
8 attempt to turn the Court’s attention away from the fact that “I Gotta Feeling” is
9 virtually identical to “Take a Dive” and fail to refute that Pringle has made a showing
10 of the following:

- 11 • He created the derivative version of “Take a Dive,” including the
12 guitar twang sequence, many years before Defendants “created” “I
13 Gotta Feeling”;
- 14 • He submitted the derivative version of “Take a Dive” directly to record
15 labels and publishing companies with whom the respective alleged
16 songwriter Defendants are directly associated; and
- 17 • The two songs are virtually identical, such that “I Gotta Feeling” could
18 not have been independently created without copying the derivative
19 version of “Take a Dive.”

20 For all of their efforts to confuse the issues and create artificial ones, none of
21 Defendants’ arguments succeed in refuting that Pringle has established each of the
22 required elements necessary to obtain injunctive relief. The equities favor enjoining
23 Defendants from further intentional and willful infringement of Pringle’s copyright

24 _____

25 ¹ For purposes of this response, “Defendants” refers to each of the Defendants who
26 filed oppositions to Pringle’s Motion for Preliminary Injunction or joined in such
27 oppositions including Defendants William Adams, Stacy Ferguson, Allan Pineda,
28 Jaime Gomez, Black Eyed Peas, Tab Magnetic Publishing, Headphone Junkie
Publishing, LLC, will.i.am. music, llc, Jeepney Music, Inc., Cherry River Music Co.,
EMI April Music, Inc., UMG Recordings, Inc. and Interscope Records.

1 and Pringle requests that the Court do just that: enjoin each of the Defendants from
2 further intentional and willful infringement of his copyright in “Take a Dive.”

3 **II. ARGUMENT**

4 To obtain injunctive relief, Pringle must show **either** (1) a combination of
5 probable success on the merits and possibility of irreparable harm **or** (2) that serious
6 questions exist, and the balance of hardships tips in his favor. *Grocery Outlet Inc. v.*
7 *Albertson’s, Inc.*, 497 F.3d 949, 951 (9th Cir. 2007). Pringle satisfies both ends of
8 this continuum and injunctive relief should be granted.

9 **A. Pringle Is Likely To Succeed On the Merits of His Claim.**

10 Contrary to Defendants’ unfounded assertions, Pringle has made a showing
11 that he will succeed on the merits of his copyright infringement claim.

12 **1. Pringle Has a Valid Copyright Registration for His Musical**
13 **Composition.**

14 Defendants argue that Plaintiff does not have a valid copyright in the musical
15 composition for the derivative version of “Take a Dive,” and therefore he cannot
16 bring suit in federal court, pursuant to 17 U.S.C. § 411(a). They are wrong.

17 First, Pringle has held a valid copyright registration for the musical
18 composition for the original version of “Take a Dive,” which does not contain the
19 guitar twang sequence, since 1999. That registration is prima facie evidence of the
20 validity of Pringle’s copyright in the original version of “Take a Dive.” *Cosmetic*
21 *Ideas, Inc. v. IAC/Interactivecorp*, 606 F.3d 612, 619 (9th Cir. 2010). Pringle is
22 therefore entitled to a presumption of validity for the original version of “Take a
23 Dive,” given the 1999 copyright registration.

24 As for the derivative version of “Take a Dive,” a copyright in a derivative
25 work extends only to the new material – all preexisting material dates back to the
26 original copyright. *See* 17 U.S.C. § 103(b). Therefore, the only section of the
27 derivative version of “Take a Dive” as to which there may be an issue of
28 presumption of validity is the guitar twang sequence itself.

1 Even if the Court were to determine that there is no presumption of validity for
2 Pringle’s creation of the guitar twang sequence, there is no requirement, as
3 Defendants suggest, that Pringle must **prove** the components of his copyright claim
4 at the preliminary injunction stage. In support of this argument, Defendants
5 misquote – from a page that does not exist – the opinion in *Ward v. National*
6 *Geographic Society opinion*, 208 F. Supp. 2d 429, 445 (S.D.N.Y. 2002). But *Ward*
7 is not a preliminary injunction case, it is a summary judgment case, and it does not
8 hold that when seeking a preliminary injunction, in the absence of a presumption of
9 validity, a plaintiff must **prove** each of the components of a valid copyright. The
10 taken-out-of-context quote actually says:

11 Furthermore, contrary to defendant's suggestion, the
12 plaintiff need not demonstrate that the Copyright Office's
13 denial of registration was erroneous in order to survive the
14 defendants' motion for summary judgment on the
15 infringement claim, as the district court makes an
16 independent determination of copyright ownership when
17 the plaintiff sues under Section 411(a), just as in any other
18 infringement action. The Copyright Office's refusal to
19 register a work at most **deprives the plaintiff** in such an
20 action **of Section 410(c)'s presumption of validity** which
21 is not conclusive on the district court in any case.

19 *Id.* (Bolded portion represents Defendants’ quoted text).

20 Second, Pringle previously attempted to copyright the musical composition of
21 the derivative version of “Take a Dive” (i.e. the guitar twang sequence) with the
22 Copyright Office; however, the Copyright Office refused his registration. To be
23 copyrightable, a derivative work must ... contain a substantial amount of new
24 material. Minor changes do not qualify the work as a new work for copyright
25 purposes. *See* U.S. Copyright Office Circular 14: Derivative Works, a copy of which
26
27
28

1 is attached as Exhibit 1.² Since the only new material in the derivative version of
2 “Take a Dive” that is not included in the original 1999 registration was the guitar
3 twang sequence, the Copyright Office denied the application based on the fact that
4 the guitar twang sequence, by itself, was not a “substantial amount of new material”
5 for purposes of registration. That decision has no bearing on this case.

6 The fact that the Copyright Office refused Pringle’s registration for the
7 derivative version of “Take a Dive” does not prohibit Plaintiff from bringing suit in
8 federal court for a claim of infringement of said version. Section 411(a) expressly
9 allows courts to adjudicate infringement claims involving unregistered works in three
10 circumstances, one being where the holder attempted to register the work and
11 registration was refused. *Reed Elsevier, Inc. v. Mucknick*, 130 S. Ct. 1237, 1246
12 (2010). Likewise, the Copyright Office’s refusal to copyright the musical
13 composition in the guitar twang sequence is not determinative of its copyrightability
14 or originality, because the Court makes an independent determination of copyright
15 ownership. *See Ward*, 208 F. Supp. 2d at 445.

16 Defendants’ position is further undermined by their reliance on *Gucci*
17 *Timepieces America Inc. v. Yida Watch Co.*, 1998 WL 650078 at *1 (C.D. Cal.
18 1998). In *Gucci*, the Central District of California affirmed its prior granting of a
19 preliminary injunction in favor of the plaintiff even after the copyright registration
20 office cancelled the plaintiff’s registration. As such, Defendants’ reliance on this
21 case is puzzling.

22 It cannot be disputed here that Pringle is the registered copyright owner of the
23 musical composition for the original version “Take a Dive,” and that the Copyright
24 Office’s refusal to register the derivative version (i.e. the guitar twang sequence),
25 does not bar Pringle from bringing suit for infringement or obtaining injunctive

26
27 ² Pringle requests that the Court take judicial notice of Exhibit 1, an official
28 publication of the United States Copyright Office.

1 relief. Pringle has made a very strong showing of his likelihood of prevailing on his
2 copyright infringement claim based on infringement of his musical composition.

3 **2. Pringle Has Established A Likelihood of Success on the**
4 **Merits of his Claim that Defendants Infringed the Musical**
5 **Composition in the Derivative Version of “Take a Dive.”**

6 The narrow focus of Defendants’ opposition to Pringle’s Motion shows they
7 are unable to rebut the strong showing of infringement of his musical composition.
8 Indeed, perhaps the best evidence that Defendants cannot rebut the substantial, if not
9 striking, similarity between the songs is that Defendants do not address the central
10 issue of the copyright infringement of the musical composition anywhere in their
11 brief. It speaks volumes that the musical composition of the two songs is so
12 strikingly similar that **Defendants could not find any expert willing to opine they**
13 **are not substantially similar.** Rather, Defendants focus their opposition on
14 challenging Pringle’s argument that Defendants sampled the sound recording of the
15 derivative version of “Take a Dive” by directly taking the guitar twang sequence
16 from Pringle’s recording and inserting it into “I Gotta Feeling.”

17 The guitar twang sequence in both “Take a Dive” and “I Gotta Feeling” is
18 identical, and this is part of the reason why the songs sound virtually identical or at
19 least strikingly similar in terms of musical composition. The Court, however, need
20 not even reach the issue of whether Pringle has established a likelihood he will be
21 able to prove Defendants sampled his sound recording. The direct sampling issue,
22 which is highly technical and will be fleshed out further in discovery,³ is just one
23 basis for a finding of infringement.

24
25 _____
26 ³ The Report of Pringle’s sound engineering expert, Mark Rubel, acknowledges
27 that further discovery will need to be taken in order to determine whether Defendants
28 definitively sampled Plaintiff’s song but concludes nonetheless that it is his opinion
that the two songs are substantially similar. *See* Exhibit A to Rubel Decl.; *See also*,
Rubel Decl. at ¶¶ 8 and 10.

1 The Court also need not reach the issue of sampling to establish Defendants’
2 access to Plaintiff’s song. Given the very strong showing Pringle has made
3 regarding the striking similarity of the musical compositions of the two songs,
4 Pringle is likely to prevail even without a showing of direct access, or proof of
5 sampling, pursuant to the inverse ratio rule. *See Three Boys Music v. Michael*
6 *Bolton*, 212 F.3d 477, 485 (9th Cir. 2000) (a copyright plaintiff can make out a case
7 of infringement by showing that the songs were “strikingly similar” – a standard
8 higher than that of substantial similarity – even in the absence of any proof of direct
9 access). Nowhere in their Oppositions do the Defendants refute the applicability of
10 the inverse ratio rule, or its significance in light of the striking similarity between the
11 songs.

12 Further, as set forth above, Pringle has submitted evidence showing that he
13 directly submitted his demo CDs, all of which contain the derivative version of
14 “Take a Dive,” to major record labels, publishing companies and radio DJs in over
15 ten countries, including Paris, France, where Frederick Riesterer, the supposed
16 author of the guitar twang sequence, lives. Such evidence of access, combined with
17 the very strong showing Pringle has made regarding the striking similarity of the
18 musical compositions, makes it very likely Pringle will prevail, even putting aside
19 the issue of direct sampling.

20 3. Defendants’ Supposed “Independent Creation” of the Guitar 21 Twang Sequence

22 Nothing in the submitted declaration of Defendant Riesterer refutes any of the
23 facts presented by Pringle:

- 24 1. Pringle created the guitar twang sequence in 1999, well before Riesterer
25 supposedly licensed the sound in 2004 and nearly a decade before he
26 “wrote” the guitar twang sequence in 2008. *See Pringle Decl.* at ¶ 4.
- 27 2. Pringle traveled to Paris France, where Defendant Riesterer lives, in
28 1999 and heavily distributed the derivative version of “Take a Dive” to

1 major record labels, publishers and DJs, and had the song played on
2 French radio. *Id.* at ¶ 8.

3 3. Both of Pringle’s musicologist experts have opined that the guitar twang
4 sequences are *identical* and that, as a result, Defendants could not have
5 independently created it without copying Plaintiff’s song. *See* Stewart
6 Decl. at ¶ 4 and Byrnes Decl. at ¶¶ 4 and 5.

7 **B. Pringle Has Established Irreparable Harm**

8 Pringle established irreparable harm in two ways, both by establishing a
9 likelihood of success on the merits and by independently setting forth and
10 establishing the existence of irreparable harm in this case.

11 Even in the aftermath of *eBay Inv. v. MercExchange, LLC*, 547 U.S. 388, 126
12 S. Ct. 1837; 164 L. Ed. 2d 641 (2006), this District has held that irreparable harm is
13 established in a copyright infringement case upon a showing of the likelihood of
14 success on the merits: “In copyright and trademark infringement actions, irreparable
15 injury is presumed upon a showing of likelihood of success on the merits.” *Summit*
16 *Entertainment, LLC v. Beckett Media, LLC*, 2010 WL 147958 at *4, CV 09-8161
17 (C.D. Cal. Jan. 12, 2010) (citing *Marlyn Nutraceuticals, Inc. v. Mucos Pharma*
18 *GmbH & Co.*, 571 F.3d 873, 877 (9th Cir. 2009)). In *Warner Bros. v. RDR*, 575 F.
19 Supp. 2d 513 (S.D.N.Y. 2008), the Southern District of New York explicitly noted
20 that District courts (including the Central District of California) “have continued to
21 apply the presumption post-*eBay*.” *Id.* at 552.

22 **1. Pringle Has Made A Showing of Irreparable Harm**
23 **Independent of His Likelihood of Succeeding on the Merits.**

24 Even if the Court concludes that a separate showing of irreparable harm must
25 be made, Pringle has more than adequately done so. First, the loss of the right and
26 power to control one’s intellectual property establishes irreparable harm. *See A&M*
27 *Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1029 (9th Cir. 2001) (in the absence of
28 injunctive relief, “plaintiffs would lose the power to control their intellectual

1 property”); *Taylor Corp. v. Four Seasons Greetings, LLC*, 403 F.3d 958, 968 (8th
2 Cir. 2005) (plaintiff “certainly has the right to control the use of its copyrighted
3 materials, and irreparable harm inescapably flows from the denial of that right”).
4 Here, it is beyond dispute that Defendants, through their **virtually identical song**,
5 have deprived Pringle of the right to control the use of the copyright he has in “Take
6 a Dive.” Defendants never denied the songs are identical. In his Motion for
7 Preliminary Injunction, Pringle identified this precise issue as one creating
8 irreparable harm. *See* ECF Doc. No. 73-1 at p. 21 (“Each time the song is played or
9 sold, Pringle is denied his exclusive right to copy, distribute, and perform the
10 song...”)

11 Irreparable harm is also established by the risk of future infringement. *Walt*
12 *Disney Co. v. Powell*, 897 F.2d 565, 567-68 (D.C. Cir. 1990); *Exchange Intern., Inc.*
13 *v. Vacation Ownership Relief, LLC*, 2010 WL 4983669 (M.D. Fla. Oct. 27, 2010).
14 Here, as alleged in Pringle’s First Amended Complaint and discussed in detail in his
15 opposition to Defendants’ Motion to Dismiss (*see* ECF Doc. No. 74 at pp. 11-18),
16 Pringle has made a showing that Defendants have a business practice of intentional
17 infringement of the intellectual property of others. There is a strong likelihood of
18 future infringement here, which further bolsters the argument that Pringle will suffer
19 irreparable harm without injunctive relief.

20 **2. Pringle Timely Sought Relief and There is No Delay That**
21 **Rebuts His Presumption of Irreparable Harm.**

22 Although Defendants argue that Pringle cannot establish irreparable harm
23 because he did not seek immediate injunctive relief, the case law makes clear that a
24 plaintiff is not required to race to the courthouse immediately or else be barred from
25 obtaining injunctive relief. In fact, courts have held that delays of even over one year
26 are reasonable. Courts have particularly noted that delay in seeking injunctive relief
27 caused by investigation into merits of claim and attempts to resolve dispute without
28 court intervention – a point noted in Defendants’ opposition – are reasonable and do

1 not rebut the presumption of irreparable harm. *See Candle Factory, Inc. v. Trade*
2 *Assocs. Group, Ltd.*, 23 F. App'x 134, 137-39 (4th Cir. 2001) (1 year delay was
3 reasonable); *King v. Innovation Books, a Div. of Innovative Corp.*, 976 F.2d 824, 831
4 (2d Cir. 1992) (8 month delay, during which the plaintiff made consistent objections
5 to the defendant, was reasonable); *Warrior Sports, Inc. v. Nat'l Collegiate Athletic*
6 *Ass'n*, 2009 WL 230562, at *5 (E.D. Mich. Jan. 30, 2009) (6 month delay was
7 reasonable); *Mandrigues v. World Sav., Inc.*, 2008 WL 5221074, at *4 (N.D. Cal.
8 Dec. 12, 2008) (14 month delay was reasonable); *Inst. for Motivational Living, Inc.*
9 *v. Sylvan Learning Ctr., Inc.*, 2008 WL 379654, at *4 (W.D. Pa. Feb. 8, 2008) (4 1/2
10 month delay to conduct good faith investigation of merits was reasonable); *Coquico,*
11 *Inc. v. Rodriguez-Miranda*, 2007 WL 3034259, at *4-*5 (D.P.R. Oct. 15, 2007)
12 (delay of a little more than one year was reasonable); *Topline Corp. v. 4273371 Can.,*
13 *Inc.*, 2007 WL 2332471, at *13 (W.D. Wash. Aug. 13, 2007) (10 month delay while
14 attempting to resolve dispute without court intervention was reasonable); *Control*
15 *Data Sys., Inc. v. Infoware, Inc.*, 903 F. Supp. 1316, 1325 (D. Minn. 1995) (delay of
16 several months was reasonable in complex case).

17 Defendants' argument regarding delay therefore does not hold up, given
18 Pringle's due diligence and investigation into the ability to bring suit, his attempts to
19 notify Defendants of their infringement and his efforts to seek a reasonable out of
20 court settlement. His conduct and efforts were reasonable and Defendants cannot
21 rebut the presumption of irreparable harm that exists.

22 C. **The Weighing of Hardships Strongly Favors Entering Injunctive**
23 **Relief Against Defendants.**

24 Pringle has made a strong showing of a likelihood of success on the merits,
25 and has established irreparable harm. This in and of itself establishes his right to
26 injunctive relief. Pringle has further established his right to injunctive relief because
27 he has made a showing that serious questions exist and the balance of hardships
28 weighs in his favor. *Napster*, 239 F.3d at 1013. In response to Pringle's showing,

1 Defendants complain that because they were so successful at intentionally and
2 willfully stealing Pringle’s intellectual property, such that their infringing song has
3 become a worldwide hit, it would be patently unfair to prohibit them from continuing
4 to make money off of Pringle’s song, and further unfair to make them incur the cost
5 associated with remediating their intentional infringement. In doing so, Defendants
6 themselves praise “I Gotta Feeling” as being part of a “multi-platinum album” sold
7 worldwide. ECF Doc. No. 83 at p. 18.

8 It is for precisely this reason that public policy strongly supports protecting a
9 plaintiff’s intellectual property and the balance of hardships weighs in Pringle’s
10 favor, not Defendants’ favor. Any hardship to Defendants in rectifying their
11 intentional infringement is irrelevant here, where Pringle has made a sufficient
12 showing to warrant injunctive relief. This is particularly true where, as is the case in
13 this David and Goliath situation, an unknown artist is forced to take on powerful
14 Defendants with virtually unlimited resources. Defendants would not be in the
15 uncomfortable position of having to retract the ill-gotten gains of their infringement
16 had they not willfully stolen Pringle’s song – a song they do not even deny is
17 virtually identical to the derivative version of “Take a Dive.” Further, Pringle’s
18 requested relief is specifically set forth to effectively minimize any unnecessary costs
19 to the Defendants and protect them from potential financial loss in the event that
20 Pringle does not ultimately prevail on his claims.⁴

24 ⁴ Defendants previously filed a Declaration from Ike Youssef, CFO of Defendant
25 Interscope, stating that Defendants face “incalculable cost” in pulling the infringing
26 material from the market. See ECF Doc. No. 28-3 at ¶ 5. Plaintiff’s requested relief
27 specifically states that any prohibition of physical sales or licensing would *not* entail
28 the collection already distributed physical copies – it would only prevent *future*
distribution. See ECF Doc. No. 73 at p. 3. Plaintiff’s requested relief also protects
Defendants from any financial loss, by requesting that profits made from “I Gotta
Feeling” be held in escrow pending the outcome of the litigation. *Id.*

1 Defendants have not established and cannot reasonably establish that the
2 balance of hardships weighs in favor of permitting them to continue to infringe on
3 Pringle’s copyrighted material.

4 **D. Pringle Has Established Good Cause for The Court To Waive A**
5 **Bond, a Matter Within The Court’s Sound Discretion.**

6 As set forth in Pringle’s moving papers, the equities here favor either waiving
7 a bond, or else setting a nominal bond, given the following:

- 8 • Pringle has established a strong showing of likelihood of success on the
9 merits;
- 10 • Pringle cannot afford to post a substantial bond given his status as an
11 unknown artist, in sharp contrast to the worldwide success of the Black
12 Eyed Peas;
- 13 • The public interest supports waiving or setting a nominal bond.

14 Pringle requests that the Court exercise its broad discretion and waive the
15 bond, or else set a nominal bond in light of the balance of equities between the
16 parties.

17
18
19
20
21
22
23
24
25
26
27
28

1 **III. CONCLUSION**

2 For each of these reasons, Plaintiff Bryan Pringle requests that the Court grant
3 his motion and grant the relief as set forth in his moving papers, and for such further
4 and other relief the Court deems proper.

5 Dated: January 14, 2011

6 Dean A. Dickie (appearing *Pro Hac Vice*)
7 Kathleen E. Koppenhoefer (appearing *Pro Hac Vice*)
8 MILLER, CANFIELD, PADDOCK AND STONE,
9 P.L.C.

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

13 George L. Hampton IV (State Bar No. 144433)
14 Colin C. Holley (State Bar No. 191999)
15 HAMPTONHOLLEY LLP

16 By: /s/ Ira Gould
17 Ira Gould

18 Attorneys for Plaintiff
19 BRYAN PRINGLE
20
21
22
23
24
25
26
27
28

Copyright Registration for Derivative Works

A derivative work is a work based on or derived from one or more already existing works. Also known as a “new version,” a derivative work is copyrightable if it includes what copyright law calls an “original work of authorship.” Any work in which the editorial revisions, annotations, elaborations, or other modifications represent, as a whole, an original work of authorship is a derivative work or a new version.

A typical derivative work registered in the Copyright Office is a primarily new work but incorporates some previously published material. The previously published material makes the work a derivative work under copyright law.

To be copyrightable, a derivative work must differ sufficiently from the original to be regarded as a new work or must contain a substantial amount of new material. Making minor changes or additions of little substance to a preexisting work will not qualify a work as a new version for copyright purposes. The new material must be original and copyrightable in itself. Titles, short phrases, and formatting are not copyrightable.

Examples of Derivative Works

The following are examples of the many different types of derivative works:

- Television documentary (that contains archival footage and photographs)
- Motion picture (based on a play)
- Novel in English (a translation of a book originally published in Russian)
- Sound recording (CD in which two of the ten selections were previously published online)
- Sculpture (based on a drawing)
- Drawing (based on a photograph)
- Book of maps (based on public-domain maps with some new maps)
- Lithograph (based on a painting)
- Biography of John Doe (that contains journal entries and letters by John Doe)
- Drama about John Doe (based on the letters and journal entries of John Doe)
- Super Audio CD (in which all the tracks were previously released in a CD and have been remixed)
- Words and music (that include words from the Bible)
- Words and musical arrangement (arrangement is based on a piece by Bach)
- Musical arrangement (based on a work by Bach)

Compilations and Abridgments

Compilations and abridgments may also be copyrightable if they contain new works of authorship. When the collecting of the preexisting material that makes up the compilation is a purely mechanical task with no element of editorial

selection, or when only a few minor deletions constitute an abridgment, copyright protection for the compilation or abridgment as a new version is not available.

Some examples of copyrightable compilations are:

- Book of best short stories of 2006 (selected from stories published in magazines and literary journals in 2006)
- Sound recording of biggest pop hits of 2004 (selected from recordings released in 2004)
- Book of great news photos of 2002 (selected from newspapers and newsmagazines published in 2002)

In the above examples, original authorship was involved in deciding which were the best stories, the biggest hits, or greatest photos and in what order to present the respective works within the compilation.

Copyright Protection in Derivative Work

The copyright in a derivative work covers only the additions, changes, or other new material appearing for the first time in the work. It does not extend to any preexisting material and does not imply a copyright in that material.

One cannot extend the length of protection for a copyrighted work by creating a derivative work. A work that has fallen into the public domain, that is, a work that is no longer protected by copyright, can be used for a derivative work, but the copyright in the derivative work will not restore the copyright of the public-domain material. Neither will it prevent anyone else from using the same public-domain work for another derivative work.

In any case where a protected work is used unlawfully, that is, without the permission of the copyright owner, copyright will not be extended to the illegally used part.

Right to Prepare Derivative Work

Only the owner of copyright in a work has the right to prepare, or to authorize someone else to create, a new version of that work. The owner is generally the author or someone who has obtained rights from the author. Anyone interested in a work who does not know the copyright owner can search the records of the Copyright Office or ask the Office to conduct a search for an hourly fee. For details, see Circular 22, *How to Investigate the Copyright Status of a Work*.

Notice of Copyright

Before March 1, 1989, the use of copyright notice was mandatory on all published works, and any work first published before that date should have carried a notice. For works published on and after March 1, 1989, use of copyright notice is optional.

Although not required by law, it is perfectly acceptable (and often helpful) for a work to contain a notice for the original material as well as for the new material. For example, if a previously registered book contains only a new introduction, the notice might be © 1941 John Doe; introduction © 2008 Mary Smith. For information about copyright notice, see Circular 3, *Copyright Notice*.

Copyright Registration

There are several ways to register a copyright with the U.S. Copyright Office. Online registration through the electronic Copyright Office (eCO) is the preferred way to register basic claims for literary works; visual arts works; performing arts works, including motion pictures; sound recordings; and single serials. Advantages of online filing include a lower filing fee; the fastest processing time; online status tracking; secure payment by credit or debit card, electronic check, or Copyright Office deposit account; and the ability to upload certain categories of deposits directly into eCO as electronic files. For details about eCO and other options for registering a copyright, see Circular 1, *Copyright Basics*, or sL 35, *Online Copyright Registration*.

Unfortunately, registration is often delayed because of mistakes or omissions in completing copyright applications. The following points should be helpful for those registering derivative works. The categories specified appear on copyright applications.

Author • Name the author(s) of the copyrightable material being claimed. Ordinarily, the author is the person who actually created the work. (Where the work or any contribution to it is a work made for hire, the employer is considered the author.) Do not name the author of previously published or registered work(s) or public-domain material incorporated into the derivative work, unless that person is also the author of the new material. The application should name only the author(s) of the new material in which copyright is claimed.

Author Created • Specify what the author(s) created. Examples include “text,” “translation,” “editing,” “music,” “lyrics,” “musical arrangement,” “photographs,” “artwork,” “compilation.”

Year of Completion • The year of completion is the year in which the new work—the particular version for which registration is sought—was fixed in a copy or phonorecord for the first time, even if other versions exist or if further changes or additions are planned. Do not confuse completion with publication.

Publication • Copyright law defines “publication” as “the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication.”

The following do not constitute publication: performing the work, preparing phonorecords, or sending the work to the Copyright Office.

The date of publication is the month, day, and year when the work for which registration is sought was first published. If the work has not been published, no date of publication should be given on the application.

Copyright claimant • The copyright claimant is either the author of the work or a person or organization who has obtained from the author all the rights the author initially owned. When the claimant named is not the author, a brief transfer statement is required to show how the claimant acquired the copyright. Examples are “by written agreement” and “by inheritance.” Do not send copies of documents of transfer with the application.

When the name of the claimant is not the name of the author, but the two names identify one person, the relationship between the names should be explained. Examples are “Doe Publishing Company, solely owned by John Doe” or “John Doe doing business as Doe Recording Company.”

Previous registration • If no registration has been made for this version or an earlier version of this work, leave this portion of the application blank.

If a previous registration for this work or another version of it was completed and a certificate of registration was issued, give the requested information about the previous registration, if known.

Limitation of claim • Complete this portion of the application if the work being registered contains a *substantial* amount of material that

- was previously published,
- was previously registered in the U.S. Copyright Office,
- is in the public domain, or

- is not included in the claim.

Material excluded • Briefly, in general terms, describe the preexisting material that has been recast, transformed, or adapted. See examples below. Do not complete this space for compilations.

New material included • Briefly, in general terms, describe all new copyrightable authorship covered by the copyright claim for which registration is sought. See examples below. All elements of authorship described in “author created” should be accounted for in “new material included.”

If the claim is in the compilation only, state “compilation” in “new material included.” If the claim is in the compilation and any other material, state both “compilation” and the material that has been compiled—for example, “compilation and foreword”; “compilation of photographs, additional photography, and foreword”; “compilation of recordings and liner notes”; “compilation of gospel songs, additional music, and foreword”; “compilation of 19th-century political cartoons, new foreword, and index.”

Examples for “Material Excluded” and “New Material Included” entries for derivative works:

- Motion picture based on the novel *Little Women*:

<i>Material Excluded:</i>	Text
<i>New Material Included:</i>	Entire Motion Picture
- New arrangement of preexisting music for piano:

<i>Material Excluded:</i>	Music
<i>New Material Included:</i>	Musical Arrangement
- Two-act play expanded to a three-act play with editing throughout:

<i>Material Excluded:</i>	Text
<i>New Material Included:</i>	Text, Editing
- A new edition of Shakespeare’s *Romeo and Juliet* with a new introduction:

<i>Material Excluded:</i>	Text
<i>New Material Included:</i>	Text
- A 1989 catalog that has been revised and to which new text and photographs have been added:

<i>Material Excluded:</i>	Text, Photographs
<i>New Material Included:</i>	Text, Photographs, Editing
- Lithographic print of a 19th-century oil painting:

<i>Material Excluded:</i>	Artwork
<i>New Material Included:</i>	Reproduction by photolithography [in “other” space]
- U.S. Geological Survey map of southern Virginia with additional maps and text added:

<i>Material Excluded:</i>	Map
<i>New Material Included:</i>	Map, Text

- A CD containing previously published sound recordings on some tracks and new sound recordings on other tracks:

Material Excluded: Sound Recording

New Material Included: Sound Recording

- A new release of a sound recording first published in the 1980s with new photographs and text included in the CD package:

Material Excluded: Sound Recording

New Material Included: Photograph(s), Text of liner notes

- Remixed sounds from a 1970 recording by Sperryville Symphony of Bach Double Concerto

Material Excluded: Sound Recording

New Material Included: Remix

For Further Information

By Internet

Circulars, announcements, regulations, certain application forms, and other related materials are available from the Copyright Office website at www.copyright.gov. To send an email message, click on *Contact Us* at the bottom of the homepage.

By Telephone

For general information about copyright, call the Copyright Public Information Office at (202) 707-3000. Staff members are on duty from 8:30 AM to 5:00 PM, Monday through Friday, eastern time, except federal holidays. Recorded information is available 24 hours a day. To request paper application forms or circulars, call the Forms and Publications Hotline at (202) 707-9100 and leave a recorded message.

By Regular Mail

Write to:

Library of Congress

Copyright Office—COPUBS

101 Independence Avenue SE

Washington, DC 20559-6304

CERTIFICATE OF SERVICE

1 On January 14, 2011, I electronically filed the foregoing PLAINTIFF'S
2 REPLY IN FURTHER SUPPORT OF MOTION FOR PRELIMINARY
3 INJUNCTION using the CM/ECF system which will send notification of such filing
4 to the following registered CM/ECF Users:

5 Mariangela Seale merili.seale@bryancave.com
6 Karen R. Thorland vhenderson@loeb.com, kthorland@loeb.com
7 Barry I. Slotnick bslotnick@loeb.com
8 Ira P. Gould gould@igouldlaw.com
9 Tal Efram Dickstein tdickstein@loeb.com
10 Linda M. Burrow wilson@caldwell-leslie.com, burrow@caldwell-leslie.com,
11 popescu@caldwell-leslie.com,
12 Ryan Christopher Williams williamsr@millercafield.com
13 Kara E. F. Cenar kara.cenar@bryancave.com
14 Ryan L. Greely rgreely@igouldlaw.com
15 Robert C. Levels levels@millercafield.com
16 Kathleen E. Koppenhoefer koppenhoefer@millercafield.com
17 Rachel Aleeza Rappaport rrappaport@loeb.com
18 Jonathan S. Pink jonathan.pink@bryancave.com,
19 carlie.peisley@bryancave.com,
20 elaine.hellwig@bryancave.com
21 Dean A. Dickie dickie@millercafield.com, frye@millercafield.com,
22 deuel@millercafield.com, smithkaa@millercafield.com,
23 seaton@millercafield.com, williamsr@millercafield.com
24 Heather L. Pearson pearson@caldwell-leslie.com

25 I am unaware of any attorneys of record in this action who are not registered
26 for the CM/ECF system or who did not consent to electronic service.

27 I certify under penalty of perjury under the laws of the United States of
28 America that the foregoing statements are true and correct.

Dated: January 14, 2011 /s/Colin C. Holley

George L. Hampton IV (State Bar No. 144433)
Colin C. Holley (State Bar No. 191999)
HAMPTONHOLLEY LLP
2101 East Coast Highway, Suite 260
Corona del Mar, California 92625
Telephone: 949.718.4550
Facsimile: 949.718.4580