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9th Circ. Says Taylor Swift Can't Shake Off Copyright Suit

By **Bill Donahue**

Law360 (October 28, 2019, 7:11 PM EDT) -- The Ninth Circuit on Monday revived a lawsuit accusing Taylor Swift of ripping off lyrics for "Shake It Off" from an earlier song, citing a century-old ruling that says it's "dangerous" for judges to quickly toss copyright suits.

A three-judge panel overturned a trial judge's decision last year that said the older lyrics — written by songwriters Sean Hall and Nathan Butler — were not "original" enough to be afforded copyright protection.

Notably, Monday's decision cited a 1903 ruling by famed U.S. Supreme Court Justice Oliver Wendell Holmes Jr. that it would be "dangerous" for judges themselves to quickly assess the originality of a copyrighted work.

"Justice Holmes' century-old warning remains valid," the panel wrote. "By concluding that, 'for such short phrases to be protected under the Copyright Act, they must be more creative than the lyrics at issues here,' the district court constituted itself as the final judge of the worth of an expressive work."

"Because the absence of originality is not established either on the face of the complaint or through the judicially noticed matters, we reverse," the court wrote.

Hall and Butler sued Swift in September 2017, claiming the star had infringed the copyright to "Playas Gon' Play" — released in 2001 by the group 3LW — with her 2014 smash hit "Shake It Off."

The 2001 song featured the lines "playas, they gonna play" and "haters, they gonna hate." Swift's song features the line "Cause the players gonna play, play, play, play, play and the haters gonna hate, hate, hate, hate, hate."

Last year, U.S. District Judge Michael W. Fitzgerald dismissed the case, ruling that the allegedly infringed lyrics were merely "short phrases that lack the modicum of originality and creativity required for copyright protection."

The case made more headlines in April 2018, when Fitzgerald **pointedly refused** to punish Hall and Butler for bringing the case.

"There are very few recording artists, if any, who have a greater interest than Ms. Swift in a robust regime of copyright law," Judge Fitzgerald wrote at the time. "Be careful what you wish for."

In Monday's ruling, the appeals court cited Holmes' 1903 opinion in a case called Bleistein v. Donaldson Lithographing Co., which held that the question of when works are sufficiently original is a question of fact that ought not be decided by judges.

"It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits," read the quote.

Following the ruling, an attorney for Hall and Butler told Law360 that they would "continue their fight to protect the songwriters' rights once the case comes down to the district court."

"We are pleased with the ruling and believe it is one the entire industry should review," said Marina V. Bogorad of the firm Gerard Fox Law PC. "Gerard Fox Law is always eager to protect songwriters."

An attorney for Swift did not immediately return a request for comment on Monday.

Hall and Butler are represented by Gerard P. Fox, Lauren M. Greene and Marina V. Bogorad of Gerard Fox Law PC.

Swift and the other defendants are represented by Peter J. Anderson of Davis Wright Tremaine LLP.

The suit is Sean Hall et al. v. Taylor Swift et al., case number 18-55426, at the U.S. Court of Appeals for the Ninth Circuit.

--Editing by Haylee Pearl.

Update: This story has been updated with a statement from an attorney for the plaintiffs.
