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By Blake Brittain and Kyle Jahner

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Taylor Swift must face claims that her hit "Shake It Off" infringed the copyright in a 2001 song, in a Los Angeles federal court decision demonstrating how tough it is to resolve copyright complaints quickly.

The U.S. District Court for the Central District of California had dismissed songwriters Sean Hall's and Nathan Butler's claim in 2018, finding the lyrics not original enough to protect. But the Ninth Circuit reversed in October 2019.

While Swift's latest bid to escape the lawsuit raised "somewhat distinct" arguments, they "were "indisputably interrelated" to the one the Ninth Circuit rejected, U.S. District Court Judge Michael W. Fitzpatrick said Wednesday.

The decision follows what attorneys have described as a recent Ninth Circuit trend making quick wins difficult. It shows how numerous elements are required in some art forms to argue that the "selection and arrangement" of unprotected elements is protectable, that's not necessarily true in literary works, including song lyrics.

The songwriters claimed that the lyrics "Cause the players gonna play, play, play, play, play / And the haters gonna hate, hate, hate, hate, hate" in the chorus of Swift's 2014 hit ripped off their 2001 song "Playas Gon' Play," performed by the group 3LW, which features the lyrics "Playas, they gonna play / And haters, they gonna hate." The Ninth Circuit ruled that the district court shouldn't have found, at an early stage, that the lyrics weren't original enough to merit copyright protection.

Swift said Hall and Butler's claim was barred under the merger doctrine, which precludes copyright protection if the idea underlying a work can be expressed in only one way. Swift said the songwriters' lyrics cover the general idea that "people will do what they will do."

But the court said the lyrics are more complex than that, and it wasn't "abundantly clear from the Complaint that there are sufficiently few means of expressing this idea" to invoke the merger doctrine.

The court also said the Ninth Circuit's originality decision "dooms" Swift's merger argument, because "if the alleged material is deemed sufficiently original, it is unclear how it possibly could be so general to fail under the doctrine of merger."

The songwriters also didn't fail to plausibly allege copyright protection in the selection and arrangement of their lyrics, the court said.

Swift cited a number of cases suggesting that it takes a combination of more than two public domain elements, like players playing and haters hating, to render the lyrics protectable. But the district court said that the cited precedential cases involved glass sculptures and lamps, not literary works.

Swift did cite one case, *Masterson v. Walt Disney*, where the Ninth Circuit said five similarities between a book of poetry, movie script, and a movie weren't "numerous enough."

But that August decision was nonprecedential and therefore nonbinding, and the Ninth Circuit remand in Swift's case, plus a circuit precedent distinguishing literary from other works, barred dismissal, according to the district court.

Swift also argued the parties' lyrics would have to be "virtually identical" to sustain a copyright claim because of their "narrow range of available creative choices," and that they weren't virtually identical here. The court said it couldn't answer that question at this stage of the case.

Judge Michael W. Fitzgerald wrote the order.

Gerard Fox Law PC represents the songwriters. Davis Wright Tremaine LLP represents Swift.

The case is Hall v. Swift , C.D. Cal., No. 2:17-cv-06882, 9/2/20 .

(Updated with additional reporting.)

To contact the reporters on this story: Blake Brittain in Washington at bbrittain@bloomberglaw.com; Kyle Jahner in Washington at kjahner@bloomberglaw.com

To contact the editors responsible for this story: Rob Tricchinelli at rtricchinelli@bloomberglaw.com; Nicholas Datlowe at ndatlowe@bloomberglaw.com

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