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Two Recent Opinions Tackle the Issue of Protectability of Short Lyrical Phrases

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Two recent decisions, one hailing from the Ninth Circuit and the other from the Southern District of New York, deal with the protectability of short phrases in musical compositions.

In its October 28, 2019 decision in *Hall v. Swift*, the Ninth Circuit reversed the district court's dismissal of plaintiffs' infringement claim. Plaintiffs were the authors of the musical composition "Playas Gon' Play," whose chorus includes the lyrics "Playas, they gonna play / And haters, they gonna hate." Plaintiffs alleged that the chorus of the song "Shake it Off" by Taylor Swift *et al*.—specifically the lyrics "Cause the players gonna play, play, play, play, play / And haters gonna hate, hate, hate, hate, hate"—infringed their work. The district court acknowledged the "general rule" that short phrases are not copyright-protectable, but noted that there may be exceptions to the rule "where a short phrase is sufficiently creative." The district court noted that when plaintiffs released their work, American pop culture was heavily steeped in the concepts of players, haters, and player haters, and rejected plaintiffs' argument that their combination of unprotectable elements—players playing and haters hating—rendered the lyrical phrase protectable. In sum, the district court found the relevant portion of plaintiffs' lyrics "too brief, unoriginal, and uncreative to warrant protection," and granted defendants' motion to dismiss. The Ninth Circuit reversed, finding that the district court by so holding "constituted itself as the final judge of the worth of an expressive work," and that neither the complaint nor the matters of which the district court took judicial notice established the absence of originality. The Ninth Circuit declined to consider defendants' alternative arguments for affirmance, which the district court could consider on remand.

A district court in the Southern District of New York dealt with the same issue in a November 12, 2019 decision in *Pickett v. Migos Touring, Inc.* Plaintiff, author of the musical composition "Walk It Like I Talk It," alleged that defendants' composition "Walk It Talk It" infringed his work. The court found that plaintiff's claim was barred because he hadn't registered the copyright in his musical composition. However, dismissal would be warranted even if plaintiff were not barred from suing, because defendants' work was not substantially similar to protectable elements of plaintiff's work: "[t]he only meaningful similarity between Plaintiff's Work and Defendant's Work is that the lyrics 'walk it like I talk it' form each song's chorus or hook." The court noted that the Second Circuit and courts in this district have found that "short and commonplace phrases" are not protectable, and took judicial notice of 32 instances of "walk it like I talk it" and slight variations used in literature, music, and movies, with numerous examples dating from before plaintiff recorded his work. Concluding that the sole similarity between plaintiff's and defendants' works was not original to plaintiff, and therefore not protectable, the court granted defendants' motion to dismiss.

The *Hall* and *Migos* decisions may reflect different judicial approaches to motions to dismiss infringement claims alleging substantial similarity based on short phrases. In *Hall*, the Ninth Circuit found that the question of the protectability of a short phrase could not be decided as a matter of law on a motion to dismiss; *Migos* applied Second Circuit precedent finding that substantial similarity, and thus protectability, can be determined at the motion to dismiss stage. Whether *Hall* represents an incipient circuit split remains to be seen.

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