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Copyright Lessons from Taylor Swift

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In 2017, Sean Hall and Nathan Butler filed a copyright infringement lawsuit against Taylor Swift, alleging that Swift's 2014 song *Shake It Off* includes lyrics from Hall and Butler's 2001 song *Playas Gon' Play*. Specifically, Hall and Butler claim Swift copied their lyrics, "Playas, they gonna play / And haters, they gonna hate." As the district court judge noted, "The lynchpin of this entire case is … whether or not the lyrics 'Playas, they gonna play / And haters, they gonna hate' are eligible for protection under the Copyright Act." *Sean Hall et al. v. Taylor Swift et al.*, Civ. No. 17-6882 (C.D. Cal. Feb. 13, 2018).

Short phrases are generally not protectable under copyright law. For example, phrases like "You've got to stand for something, or you'll fall for anything" and "Most personal sort of deodorant" have been found insufficiently creative to qualify for copyright protection. *See Acuff-Rose Music, Inc. v. Jostens, Inc.*, 155 F.3d 140, 143-44 (2d Cir. 1998); *Alberto-Culver Co. v. Andrea Dumon*, Inc., 466 F.2d 705, 711 (7th Cir. 1972). However, a short phrase can be protectable if it is sufficiently creative. Examples of protectable short phrases are scarce, but one notable example is the phrase "ET Phone Home," which was found protectable in a 1982 Texas case. *Universal City Studios, Inc. v. Kamar Indus., Inc.*, 217 U.S.P.Q. (BNA) 1162 (S.D. Tex. 1982).

In his February 2018 order, the district court judge concluded that Hall and Butler's lyrics were "too brief, unoriginal, and uncreative to warrant protection under the Copyright Act" and dismissed the case against Swift. The 9th Circuit overturned this order on appeal, quoting Justice Holmes in cautioning, "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." *Hall et al. v. Swift et al.*, No. 18-55426 (9th Cir. 2019) (quoting *Bleinstein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251–52 (1903)). The court concluded that the district court improperly "constituted itself as the final judge of the worth of an expressive work," and sent the case back to be determined by a jury. *Id.*

The parties settled in December 2022, so we'll never know how a jury would have ruled. But future litigants should keep the 9th Circuit's order in mind when arguing that their short phrases are also sufficiently creative to qualify for copyright protection.