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U.S. COURT OF APPEALS

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| ALISA APPS,<br><br>Plaintiff-Appellant,<br>v.<br><br>UNIVERSAL MUSIC GROUP, INC.; ISLAND RECORDS; JOHN NEWMAN; STEVE BOOKER,<br><br>Defendants-Appellees. | No. 17-17122<br><br>D.C. No. 2:16-cv-01132-JAD-NJK<br><br>MEMORANDUM* |

Appeal from the United States District Court
for the District of Nevada
Jennifer A. Dorsey, District Judge, Presiding

Argued and Submitted February 12, 2019
San Francisco, California

Before: SCHROEDER, O'SCANNLAIN, and RAWLINSON, Circuit Judges.

Singer-songwriter Alisa Apps appeals the district court's grant of summary judgment in favor of Universal Music Group, Inc. ("UMGI") and songwriters John Newman and Steve Booker in Apps's action for copyright infringement.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Apps provided no direct evidence of copying, so she was required to show both that the claimed infringing work and her work are "substantially similar" and that the alleged infringers had "access" to her work. *See Loomis v. Cornish*, 836 F.3d 991, 994 (9th Cir. 2016) (citations and quotations omitted).

Apps failed to show substantial similarity. The only lyrical commonality between both songs is the phrase "I need to know now." "Words and short phrases" are not copyrightable, 37 C.F.R. § 202.1(a), nor are "[o]rdinary phrases." *Narell v. Freeman*, 872 F.2d 907, 911 (9th Cir. 1989). Moreover, these lyrics are not original to Apps. UMGI showed that at least 11 songs pre-dating Apps's song included this common phrase.

Apps also argues that the sound of defendant's recording of "Love me Again" is similar to the sound of her copyrighted recording of her composition. Yet she does not, and could not, argue that there was any copying of her recording itself; she argues only that there is similarity. That is insufficient under the terms of the statute. The exclusive copyright in a sound recording does not extend to a recording of other sounds, "even though such sounds imitate or simulate those in the copyrighted sound recording." 17 U.S.C. § 114(b). We have held that even mimicking copyrighted recording is not infringement absent actual copying. *See VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 882-84 (9th Cir. 2016).

To the extent that Apps continues to argue infringement of the musical composition of her song, she failed to produce sufficient evidence of objective similarities between the compositions of the songs to allow such a claim to proceed to trial. *See Funky Films, Inc. v. Time Warner Entm't Co.*, 462 F.3d 1072, 1077 (9th Cir. 2006) ("A plaintiff who cannot satisfy the [objective] test necessarily loses on summary judgment, because a jury may not find substantial similarity without evidence on both the [objective] and [subjective] tests." (quotations omitted)).

Because Apps cannot show substantial similarity, we need not decide whether she could establish access, whether UMGI is an improper defendant, or whether Apps should have been granted leave to name a different defendant.

**AFFIRMED.**