

No. 18-55426

IN THE
**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**SEAN HALL d.b.a. GIMME SOME HOT SAUCE MUSIC,
an individual; NATHAN BUTLER d.b.a. FAITH FORCE MUSIC,
an individual,**
Plaintiffs-Appellants,

v.

TAYLOR SWIFT, an individual, et al.,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
MICHAEL W. FITZGERALD, U.S. DISTRICT JUDGE
CASE No. 1:17-cv-6882-MWF (ASx)

APPELLANTS' OPENING BRIEF

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**SEAN HALL d.b.a. GIMME SOME HOT SAUCE MUSIC and
NATHAN BUTLER d.b.a. FAITH FORCE MUSIC**

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APPELLANTS' OPENING BRIEF

JURISDICTIONAL STATEMENT

Appellants filed this action against Appellees for copyright infringement. (2 ER 21-32.)¹ The District Court had subject matter jurisdiction under Section 1388(a) of the Copyright Act. *See* 28 U.S.C. § 1388(a) (West 2018).

¹ All internal alterations, quotation marks, footnotes and citations herein are omitted and all emphasis is added unless otherwise noted.

Appellees moved to dismiss the complaint for failure to state a claim and to strike portions of the complaint, and the District Court granted Appellees' motion without prejudice and with leave to amend on February 13, 2018. (1 ER 1-16.) As Appellants decided that the issues raised in the motion are best addressed by this Court, they filed a Notice of Intent Not to File an Amended Complaint on February 26, 2018. (2 ER 132-33.) The District Court entered judgment upon dismissal with prejudice on March 2, 2018. (1 ER 17-20.)

This Court has jurisdiction under 28 U.S.C. §§ 1291 and 1294(1). Appellants filed a notice of appeal from the judgment upon dismissal with prejudice on March 30, 2018. (2 ER 163-66.) Appellants' notice of appeal was timely under 28 U.S.C. § 2107(a) and Federal Rule of Appellate Procedure 4(a)(1)(A).

STATEMENT OF ISSUES PRESENTED

“There are very few recordings artists, if any, who have a greater interest than Ms. Swift in a robust regime of copyright,” wrote the District Court below. (2 ER 150.) Yet Taylor Swift, as uber-successful of an artist as she is, chose to disregard Appellants' authorship rights when she used their four-part lyrical sequence “Playas, they gonna play / And haters, they gonna hate / Ballers, they gonna ball / Shot callers, they gonna call” (comprising the chorus of Appellants' 2001 hit *Playas Gon' Play*) for the chorus in her mega-hit *Shake It Off*. To be sure, there is a myriad of creative ways to express the idea that Appellants touted in their song: namely, others will do

what they do, yet one need not be concerned with what they do and their judgment but rather stay one's own course. But Ms. Swift, along with co-authors of *Shake It Off*, chose the *Appellants'* expressive sequence by copying the first half of the sequence and closely mimicking the second part.

“Be careful what you wish for,” cautioned the District Court below when discussing Ms. Swift's attempts to penalize Appellants for their efforts to protect their authorship rights. (2 ER 150.) Indeed, expressly acknowledging that “there are at least colorable arguments on both sides,” the District Court declined to award Ms. Swift and the other Appellees their attorneys' fees, reasoning that “if the Court's only choice were between awarding fees to [Appellees] based on the Complaint or fees to Appellants ..., the Court would *without hesitation* award the fees to Appellants.” (2 ER 141.) This certainly suggests that the dismissal below was a close call.

The issue that is now before this Court is whether Appellants' lyrics contained in *Playas Gon' Play* that Appellees “assumedly” copied for the chorus in *Shake It Off*, standing on their own, are eligible for copyright protection. (2 ER 146.) The District Court below found that the lyrics were not “creative” enough for such protection and dismissed Appellants' complaint. As such, this Court must also face the issue of whether it was appropriate for the District Court to render this *subjective* value judgment of creativity on a motion to dismiss.

STATEMENT OF THE CASE

Appellants Sean Hall and Nathan Butler are song writers and music producers. (2 ER 24 [¶¶ 13-14].) Mr. Hall has written and produced hundreds of songs for various artists such as Justin Bieber, Color Me Badd, Xscape, 98°, Lionel Richie, P!nk, and Maroon 5. (2 ER 24 [¶ 13].) Mr. Butler worked with multi-platinum artists such as Luther Vandross, Victoria Beckham aka Posh Spice, Backstreet Boys, Christina Milian, Stacie Orrico, JoJo, Aaron Carter, and several others; to date, Mr. Butler has accounted for over 45 million records sold worldwide. (2 ER 24 [¶ 14].)

Appellants wrote the musical composition *Playas Gon' Play* for the popular girl group 3LW in 2001. (2 ER 24 [¶ 15].) *Playas Gon' Play* became a success for 3LW charting on the Billboard Hot 100, Billboard Hot R&B/Hip-Hop, and Billboard Rhythmic charts. (2 ER 24 [¶ 16].) On March 7, 2001, *Playas Gon' Play* debuted at #7 on TRL, MTV's video countdown show, which played the ten most requested music videos of the day. (2 ER 24 [¶18].) In the early 2000s, inclusion on the TRL top ten countdown was the benchmark for a top 40 song's popularity. (*Id.*)

The chorus of *Playas Gon' Play* is comprised of the lyrics "Playas, they gonna play / And haters, they gonna hate / Ballers, they gonna ball / Shot callers, they gonna call." (2 ER 25-26 [¶¶ 20 & 25].) This chorus is a four-part sequence discussing distinct actors engaging in a distinct activity. (2 ER 26 [¶ 25].) This four-part

sequence is meant to convey the idea that whatever other people do and whatever they may think, the narrator will not be bothered by that and will stick to her own devices. (1 ER 13.) In furtherance of that idea, the chorus continues with the lyrics “That ain’t got nothin’ to do / With me and you / That’s the way it is / That’s the way it is.” (2 ER 48-51.) Appellants were the first to combine the terms “playas” and “haters” along with other actors to convey the aforementioned message in this unique and original fashion. (2 ER 25-26 [¶ 24].) As such, Appellants allege that the four-part sequence is an original, unique and copyrightable expression of the message. (2 ER 26 & 29 [¶¶ 25, 28 & 43].)

In 2014, Appellees Taylor Swift, Karl Martin Sandberg, Karl Johan Schuster, Sony/ATV Music Publishing, LLC, Kobalt Music Publishing America, Inc., Big Machine Label Group, LLC, and Universal Music Group, Inc. wrote and released the musical composition *Shake It Off* performed by Appellee Taylor Swift. (2 ER 26 [¶ 26].) *Shake It Off* was a worldwide success for Appellees and has been certified 9x Platinum by the RIAA. (2 ER 28 [¶¶ 35-36].) The chorus of *Shake It Off* includes the infringing lyrics “Cause the players gonna play, play, play, play, play / And the haters gonna hate, hate, hate, hate, hate.” (2 ER 26 [¶ 27].) Just like in the sequence of *Playas Gon’ Play*, these lyrics are part of a four-part lyrical sequence of actors engaging in their regular activity. (2 ER 26 [¶ 28].) In Appellees’ version, the sequence continues with “Heartbreakers gonna break, break, break, break, break

/And the fakers gonna fake, fake, fake, fake, fake.” (*Id.*) Taking another page from *Playas Gon’ Play*, the chorus of *Shake It Off* includes a positive affirmation that the narrator is not concerned with the opinions of others in the lyrics “Baby, I’m just gonna shake, shake, shake, shake, shake / I shake it off, I shake it off.” (2 ER 53.) The side-by-side comparison of the lyrics below shows both the identical copying and the close paraphrasing of the two four-part sequences at issue:

Playas Gon’ Play

Shake It Off

Chorus:

Chorus:

“Playas, they gonna play

“Cause the players gonna play, play,

And haters, they gonna hate

play, play, play

Ballers, they gonna ball

And the haters gonna hate, hate, hate,

Shot callers, they gonna call

hate, hate

That ain’t got nothin’ to do

Baby, I’m just gonna shake, shake,

With me and you

shake, shake, shake

That’s the way it is

I shake it off, I shake it off

That’s the way it is”

Heartbreakers gonna break, break,

Introduction:

break, break, break

“The playas gon’ play

And the fakers gonna fake, fake, fake,

Them haters gonna hate”

fake, fake

Baby, I’m just gonna shake, shake,

Shake It Off (cont.)

shake, shake, shake

I shake it off, I shake it off”

After *Playas Gon’ Play*, Appellees are the only ones to combine the terms “playas gonna play” and “haters gonna hate” along with two other groups of actors to express the same idea. (2 ER 26 [¶ 25].)

On September 18, 2017, Appellants filed their complaint for copyright infringement against Appellees in the District Court below. (2 ER 21-32.) On January 3, 2018, Appellees moved to dismiss the complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim. (2 ER 33-35.) The District Court granted Appellees’ motion to dismiss on February 13, 2018. (1 ER 1-16.) Although the District Court dismissed Appellants’ complaint without prejudice and with leave to amend, Appellants decided that the issues raised in Appellees’ motion are best addressed by this Court. Accordingly, they filed a Notice of Intent Not to File an Amended Complaint on February 26, 2018. (2 ER 132-33.) The district court entered judgment upon dismissal with prejudice on March 2, 2018. (1 ER 17-20.) This appeal followed.

SUMMARY OF THE ARGUMENT

The District Court erred in reaching the issue of originality on a motion to dismiss because the question of whether the four-part sequence of song lyrics at issue

is sufficiently original to deserve copyright protection requires *subjective* value judgment that belongs to a jury.

In any event, the four-part lyrical sequence at issue here is sufficiently original when viewed as a unique combination of short phrases selected and arranged together to deliver a message that differed from the phrases' previous usage. The District Court erred when it employed a numerosity requirement reserved for analyzing copyrightability of useful articles that warrant only "thin" copyright protection. Even if viewed as "just six relevant words"—which is an improperly limited way to view Appellants' copyright claim, as Appellants claimed infringement of a four-part lyrical sequence expressing a distinct message, these lyrics represent a literary work written as part of a musical composition and thus command a higher level of protection that cannot be measured through precise formulas with certain numeric requirements. Rather, it must be viewed as an expressive creation as a whole, which may have used ordinary phrases but combined and arranged them together to create a unique expression. As such, it certainly meets (and easily surpasses) the "slight amount" of creativity that is required for copyright protection.

Finally, to the extent the District Court implied that Appellants' message is indistinguishable from the phraseology employed and thus merged with the expression, there are many ways to express the concept at issue here: namely, that

other people will do what they do, while the protagonist will not be bothered by that and will stay true to herself. Yet out of the myriad of ways to express this notion, Appellees chose *Appellants'* expression. Because of the variety of choices available, Appellees' copying and closely mimicking Appellants' creative expression cannot be shielded by the merger doctrine.

STANDARD OF REVIEW

A dismissal for failure to state a claim pursuant to Rule 12(b)(6) is a ruling on a question of law and, as such, is reviewed by this Court *de novo*. See *Shroyer v. New Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010). Such a dismissal is “proper only where there is no cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal theory.” *Id.* In conducting the review, this Court “accept[s] the factual allegations of the complaint as true and construe[s] them in the light most favorable to the plaintiff.” *AE ex rel. Hernandez v. Cty. of Tulare*, 666 F.3d 631, 636 (9th Cir. 2012).

ARGUMENT

I. ORIGINALITY IS A QUESTION OF FACT THAT CANNOT BE RESOLVED ON A MOTION TO DISMISS.

As an initial matter, the court below erred by resolving the question presented on a motion to dismiss. This Court's binding, long-standing precedent precludes resolution of such a fact question on the pleadings. See *Dezendorf v. Twentieth*

Century-Fox Film Corp., 99 F.2d 850, 851 (9th Cir. 1938) (holding that the question of originality in copyright law “is one of fact, not of law; one that may not be disposed of upon a motion to dismiss, but which must be established by proof”); *Divine Dharma Meditation Int’l Inc. v. Inst. of Latent Energy Studies*, No. SACV16226JLSJCGX, 2016 WL 7486286, at *5 (C.D. Cal. May 25, 2016) (following *Dezendorf* and denying motion to dismiss that would have required determination of originality); *Optima Tax Relief LLC v. Channel Clarity, Inc.*, No. SACV141902JLSJCGX, 2015 WL 12765016, at *3 (C.D. Cal. Aug. 26, 2015) (same).²

In fact, none of the cases cited on this point by the District Court involved determination of sufficient creativity or originality but rather dealt with the objective prong of the substantial similarity standard. *See Shame on You Prods., Inc. v. Elizabeth Banks*, 120 F. Supp. 3d 1123, 1150-69 (C.D. Cal. 2015) (resolving the

² Appellees’ attempt to distinguish some of these authorities below missed the mark. Thus, distinguishing *Dezendorf* as supposedly outdated, Appellees suggested that it is no longer good law after *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), yet courts in this Circuit continued relying on *Dezendorf* as a valid authority long after 2009. *See, e.g., Divine Dharma*, 2016 WL 7486286, at *5, at *3; *Optima Tax*, 2015 WL 12765016, at *3. This is unsurprising, given that *Twombly* and its progeny dealt with Rule 8 and allegations sufficient to pass its muster rather than distinctions between fact questions and questions of law. In turn, Appellees distinguished *Optima Tax* as involving detailed allegations of at least six website elements, yet the *Optima Tax* grounded its denial of defendant’s motion to dismiss not only on the allegations in question but also on the court’s inability to resolve factual questions of originality on the pleadings. *See id.* at *4 (“Given these detailed allegations of substantially similar website elements, the flexible definition of works falling within the scope of the Copyright Act, and the general approach of defining originality as a question of fact rather than of law, the Court declines to dismiss Optima’s copyright infringement claim on the basis of noncopyrightable subject matter.”).

question of “substantial similarity” by performing the objective “extrinsic” comparison of the works at issue and never reaching the subjective “intrinsic” part of the test on a motion to dismiss); *Campbell v. Walt Disney Co.*, 718 F. Supp. 2d 1108, 1111 (N.D. Cal. 2010) (same); *Thomas v. Walt Disney Co.*, No. C-07-4392 CW, 2008 WL 425647, at *2 (N.D. Cal. Feb. 14, 2008) (same); *see also Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 602 F.3d 57, 63 (2d Cir. 2010) (dealing with “[t]he question of substantial similarity” on a motion to dismiss and applying the objective “ordinary observer” test to determine whether the works were substantially similar); *cf. Veritas Operating Corp. v. Microsoft Corp.*, No. 2:06-CV-00703-JCC, 2007 WL 6872747, at *38 (W.D. Wash. May 29, 2007) (“[A]n ordinary observer ... and the like are ... deemed ‘objective’ because those standards do not depend on the subjective beliefs of the parties.”) (collecting cases); *accord Silverman v. Leombruni*, No. 15 CIV. 2260 (PAC), 2016 WL 715735, at *2 (S.D.N.Y. Feb. 19, 2016) (“To the extent Plaintiffs are suggesting that the ‘ordinary observer’ test is subjective rather than objective, they are wrong.”).³ Indeed,

³ Appellees’ Ninth Circuit authorities cited below on this point are no different. *See, e.g., Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1119-20 & 1123-24 (9th Cir. 2018) (cautioning that the Court would decide the case “[w]ithout gainsaying the originality of the pose Rentmeester created” and, while “accept[ing] as true all of Rentmeester’s allegations concerning the creative choices he made in producing his photograph,” concluding that the issue of substantial similarity could be resolved on a motion to dismiss because “[n]othing disclosed during discovery could alter the fact that the allegedly infringing works are as a matter of law not substantially similar to Rentmeester’s photo”); *Silas v. HBO, Inc.*, 201 F. Supp. 3d 1158, 1182 (C.D. Cal. 2016) (gauging substantial similarity between the works at issue via the extrinsic test); *Puckett v. Hernandez*, No. 216CV02199SVWAGR, 2016 WL 7647555, at *5 (C.D. Cal. Dec. 21, 2016) (same). The sole exception is the decision in *Steward v.*

comparing two works and performing the *objective* “extrinsic” analysis to determine whether they sufficiently *resemble* each other is a question that can be resolved as a matter of law. *See, e.g., Peter F. Gaito Architecture*, 602 F.3d at 64 (“When a court is called upon to consider whether the works are substantially similar, no discovery or fact-finding is typically necessary, because ‘what is required is only a ... comparison of the works.’”).⁴ By contrast, whether a given work is sufficiently creative or original is a subjective inquiry that belongs to the jury. “Originality ... is not a question of law and cannot be determined at the Rule(12)(b) stage.” *Olson v. Sperry*, No. 2:14-CV-07901-ODW AS, 2015 WL 846547, at *3 (C.D. Cal. Feb. 26, 2015) (denying motion to dismiss); *accord Craig Frazier Design, Inc. v. Zimmerman Agency, LLC*, No. C 10-1094 SBA, 2010 WL 3790656, at *4 (N.D. Cal.

West, No. CV1302449BROJCX, 2013 WL 12120232, at *3 (C.D. Cal. Sept. 6, 2013), wherein the court dismissed a copyright infringement claim for several reasons, including lack of originality. Yet the *Steward* court cited no Ninth Circuit authority supporting its reasoning, save for this Court’s decision dealing with a *summary judgment* motion, *see id.*, citing *Narell v. Freeman*, 872 F.2d 907, 911 (9th Cir. 1989). As for out-of-circuit authority cited by Appellees, it should carry little weight because there is a circuit split on the issue of whether originality is a question of fact. *See, e.g., Cody Foster & Co. v. Urban Outfitters, Inc.*, No. 8:14-CV-80, 2015 WL 12698385, at *4 (D. Neb. Sept. 25, 2015) (on a summary judgment motion, noting the circuit split and concluding that “[b]ecause originality is an inherently fact-specific inquiry, the Court is persuaded that copyrightability is a mixed question of law and fact, and that originality is a question of fact for the jury”).

⁴ Even for the extrinsic analysis, this Court emphasized that expert testimony should come in where, as here, there are considerations at play that make Appellees’ allegations of infringement “unique,” since they involve an element of a musical composition. *Swirsky v. Carey*, 376 F.3d 841, 849 (9th Cir. 2004) (observing that “[t]here is no one magical combination of ... factors that will automatically substantiate a musical infringement suit,” and as “each allegation of infringement will be unique,” the extrinsic test is met, “[s]o long as the plaintiff can demonstrate, **through expert testimony** ..., that the similarity was ‘substantial’ and to ‘protected elements’ of the copyrighted work”).

Sept. 27, 2010) (“[D]etermination of the originality of a derivative work is a factual question that is inappropriate for resolution on a motion to dismiss.”).⁵

Here, the question decided by the District Court turned on whether the combination of the phrases at issue was “sufficiently creative” to warrant copyright protection. (1 ER 12.) True, the extrinsic prong of the “substantial similarity” analysis often calls for the determination of whether certain elements are protectable. But where, as here, such a question becomes one of “sufficient” originality, it should be reserved for the jury. Indeed, out-of-circuit authority that stands for a contrary proposition has been criticized as possibly violating plaintiffs’ constitutional right to a trial by jury.⁶

⁵ Notably, Appellees’ cases resolving the issue of substantial similarity on a motion to dismiss are entirely consistent with *Dezendorf* and its progeny because they never reach the subjective part of the test. See, e.g., *Shame On You Prods., Inc. v. Banks*, 893 F.3d 661, 667 (9th Cir. 2018) (“If plaintiff satisfies the extrinsic test, the intrinsic test’s subjective inquiry must be left to the jury and [any dispositive motion] must be denied.”); cf. *Campbell*, 718 F. Supp. 2d at 1111 (on a motion to dismiss, declining to find substantial similarity after performing extrinsic part of the test and thus never reaching the subjective intrinsic part). Indeed, the District Court below expressly acknowledged that both *Shame on You* and *Thomas* courts decided only objective “extrinsic” factors. (1 ER 9.)

⁶ See, e.g., Stephen D. Milbrath, “The 11th Circuit’s New Copyright Standard for Architectural Works,” Fla. B.J., November 2009, at 49, 50-51, citing *Oravec v. Sunny Isles Luxury Ventures, L.C.*, 527 F.3d 1218 (11th Cir. 2008). Observing that courts are often called upon to draw lines “between that which is protected expression and that which is so abstract as to represent only an idea or a concept ineligible for copyright protection,” the author, along with the Eleventh Circuit, notes that “[i]f this line is drawn too narrowly, the incentive to innovate, to create, and to protect creativity can be extinguished, a result at odds with the central aim of the Copyright Act....” The author then rightfully points out that “[w]hat the *Oravec* court did not say, however, is why a federal court should be deemed more competent than a jury in drawing the appropriate line in all but the most dubious of cases. The Seventh Amendment was intended to reserve such decisions to juries, as the arbiters of genuinely disputed facts.”

This Court’s approach exemplified by *Dezendorf* and its progeny is further buttressed by policy considerations, given that creativity and originality involve inherently subjective issues deeply rooted in community values, which are thus better suited to resolution by members of the community rather than judges. As commentators emphasized, this is especially so given that originality is inherently nebulous and, as such, poorly suited for judicial adjudication.⁷ Rather, the issue belongs to jurors acting as average representatives of their community and thus personifying the multiplicity of opinions within it. Their consensus decision “would not only more accurately reflect the community’s appraisal of a particular work, it would also avoid the creeping in of cultural and intellectual bias and snobbery.” Reytblat, at 207. The latter observation is particularly acute in the context of hip hop culture, which provides the defining context for the controversy at hand and, as “street” culture, may be better understood by laymen rather than professional jurists—who, as the District Court did here, reject street art as insufficiently creative

⁷ See, e.g., Julia Reytblat, “Is Originality in Copyright Law A ‘Question of Law’ or A ‘Question of Fact?’: The Fact Solution,” 17 *Cardozo Arts & Ent. L.J.* 181 (1999) (“Reytblat”). Given the amorphous nature of originality, its status as defendants’ go-to weapon to eradicate litigation in its early stages is especially unfair. See, e.g., Russ VerSteege, “Rethinking Originality,” 34 *Wm. & Mary L. Rev.* 801, 883 n.24 (1993) (“VerSteege”) (observing that rush judgments on originality exhibit judges’ attempts to “lean[] over backwards to make the law fit the circumstances”—a concept that the Supreme Court eventually corrected in the area of “work for hire” doctrine cases; concluding that “[c]ourts should try to avoid making a questionable ruling on originality in lieu of allowing the litigation to proceed to the next phase” to avoid “sacrific[ing] the integrity of originality jurisprudence in the wake of its race to what may be a just end result. The speed of such results may, in the long run, be at the expense of a clear understanding of originality.”).

because they may not have developed sufficient appreciation for the medium on the same level as the rest of the community. (1 ER 15 (concluding that phrases “must be more creative than the lyrics at issue here” to warrant copyright protection and combining “two truisms about playas and haters” to deliver a new message “is simply not enough”).)

Indeed, Justice Holmes warned about judicial meddling in originality determinations more than a hundred years ago:

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. At the one extreme, some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to pictures, which appealed to a public less educated than the judge. Yet if they command the interest of any public ... it would be bold to say that they have not an aesthetic and educational value—and the taste of any public is not to be treated with contempt.

Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 252 (1903); accord *Estate of Smith v. Cash Money Records, Inc.*, 253 F. Supp. 3d 737, 748 (S.D.N.Y. 2017) (citing Justice Holmes in *Bleistein* to the effect that “[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [art], outside of the narrowest and most obvious limits” and concluding that “[u]ltimately, a determination of whether the copied portions ... are

entitled to copyright protection depends on a subjective assessment better suited for a jury than a court”); *cf. Star Athletica, L.L.C. v. Varsity Brands, Inc.*, ___ U.S. ___, 137 S. Ct. 1002, 1015 (2017) (relying on *Bleistein* and warning against “substitut[ing] judicial aesthetic preferences for the policy choices embodied in the Copyright Act”); *see also* 1 *Nimmer on Copyright* § 2.01 (2018) (“Nimmer”) (“The *Bleistein* doctrine that judges may not properly assay artistic merit has found expression in many succeeding cases where the author’s creative contribution was of a much humbler and more minimal nature than in the [work of art at issue in *Bleistein*].”).

This Court echoed this sentiment in *N. Coast Indus. v. Jason Maxwell, Inc.*, 972 F.2d 1031, 1034-35 (9th Cir. 1992), when it found triable issues of fact on the issue of originality of a fabric design modeled on Mondrian’s artwork. Holding that “plaintiff was entitled to have the validity of its copyright determined by a trier-of-fact,” the Court observed that adjudging “the differences in the placement of geometric shapes ... as trivial” would condemn Mondrian’s creativity as nonexistent after his first painting: “This is not the judgment of art history, and it cannot be the correct judgment of a court as a matter of law.” *Id.* at 1035. As the Court thus confirmed, these value judgments belong to the jury. *See also ABS Entm’t, Inc. v. CBS Corp.*, No. 16-55917, ___ F.3d ___, 2018 WL 3966179, at *19 (9th Cir. Aug. 20, 2018) (suggesting that the issue whether remastered recordings were sufficiently

original to deserve copyright protection should have been left to the jury).

To the extent the continued validity of *Dezendorf* and its progeny is unclear, the above-described considerations provide compelling reasons for this Court to reaffirm it.⁸ This would assure consistency and judicial uniformity on the key issue of copyright law (at least in this Circuit), as well as solidify protections for plaintiffs' constitutional right to a jury trial.

II. THE DISTRICT COURT IMPROPERLY MEASURED ORIGINALITY BY ELEVATING QUANTITY OVER QUALITY.

The District Court erred in dismissing the claim below based on its finding that the combination of the phrases at issue were not “sufficiently creative.” (1 ER 12-15.) The District Court's value judgment was incorrect because the court elevated quantity over quality, holding that “just six relevant words” cannot amount to a protectable creation.

To establish copyright infringement by Appellees, Appellants had to plead

⁸ Commentators observe that “allocation of decisionmaking in copyright cases is remarkably unclear” and cite this Circuit's treatment of the copyrightability and originality as one of such examples. See Mark A. Lemley & Mark P. McKenna, “Scope,” 57 Wm. & Mary L. Rev. 2197, 2235-36 & n.149 (2016) (comparing, *inter alia*, *N. Coast Indus.*, 972 F.2d at 1034, with *Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068, 1076 (9th Cir. 2000) (holding that a photograph as a form of expression is sufficiently creative to warrant copyright protection, yet passing no such judgment as to the particular photograph at issue below)). Accord *Reytblat*, at 200-07 (summarizing inconsistency and judicial bias betrayed by opinions that waiver between treating originality as a question of fact or a question of law and commenting, for example, on the Eighth Circuit's decision in *Toro Co. v. R & R Prod. Co.*, 787 F.2d 1208 (8th Cir. 1986), as involving an inappropriate value judgment vis-à-vis a creative expression: “This is exactly the type of a result that Justice Holmes warned against, and the reason why this question should have gone to the jury. Although the issue of ... originality [of the creation at issue] is, admittedly, a close one, a jury verdict would have been a more accurate gauge of how the community would perceive this ... [creation].”).

two elements: “(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.” *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991); *Cavalier v. Random House, Inc.*, 297 F.3d 815, 822 (9th Cir. 2002) (“To establish a successful copyright infringement claim, a plaintiff must show that he or she owns the copyright and that defendant copied protected elements of the work.”). Appellees never challenged the first prong in the District Court, and the issue on this appeal is thus the trial court’s analysis under the second prong.

As an initial matter, it appears that the District Court decided the wrong issue. The court framed the issue as follows: “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.” (1 ER 10.) As Appellants’ complaint demonstrates, this is too narrow of an understanding of the allegations at issue. Indeed, in their complaint, Appellants claimed copyright protection in “[t]he lyrical phrase ‘Playas, they gonna play / And haters, they gonna hate’ *along with* the four-part sequence of actors engaging in a specific activity” (2 ER 29 [¶ 43].) As further detailed in the complaint, the four-part sequence of actors engaging in a specific activity presented in Appellants’ song was as follows: “‘Playas, they gonna play / And haters, they gonna hate. Ballers, they gonna ball / And [s]hot callers, they gonna call.’” (2 ER 26 [¶ 25].) This four-part sequence was mimicked in Appellees’ song by the following four-part sequence: “[T]he players gonna play, play, play,

play, play / And the haters gonna hate, hate, hate, hate, hate Heartbreakers gonna break, break, break, break, break / And the fakers gonna fake, fake, fake, fake, fake.” (2 ER 26 [¶¶ 27-28].) As such, it is not just the “six relevant words” that are at issue.⁹ Rather, it is the four-part *sequence* of phrases combined together to convey the concept that one need not concern oneself with what other people do and think. (2 ER 26 [¶ 25] (“[T]his *sequence* created by Plaintiffs is unique and copyrightable.”) & *id.* [¶ 28] (“The *sequence* is substantially similar to the sequence . . . created by Plaintiffs.”).)¹⁰

A. Appellants’ Sequence of Four Phrases is a Protectable Expression.

Having now correctly framed the issue, it should become obvious that the

⁹ Appellees will argue that the last two phrases should not sway the analysis because their song used different actors and actions—i.e., heartbreakers instead of ballers and fakers instead of shot callers. Yet substantial similarity need not be established where Appellees admit direct copying. See *ITC Textile Ltd. v. Wal-Mart Stores Inc.*, No. CV122650JFWAJWX, 2015 WL 12712311, at *5 (C.D. Cal. Dec. 16, 2015) (“A showing of ‘substantial similarity’ is irrelevant in a case like this one [which] entailed direct copying of copyrighted works. . . . Thus, the law is clear that in cases of direct copying, the fact that the final result of defendant’s work differs from plaintiff’s work is not exonerating.”), citing *Norse v. Henry Holt & Co.*, 991 F.2d 563, 566 (9th Cir. 1993). Since Appellants’ allegations are taken as true on a motion to dismiss, direct copying is assumed here. As such, substantial similarity analysis is “inapposite.” *Norse*, 991 F.2d at 566. Regardless, Appellees’ sequence of four actors doing what they do closely resembles Appellants’ original sequence, even if the latter two groups in Appellees’ sequence is not exactly the same. Whether the variation is trivial or substantial should be a jury question. See *Williams v. Gaye*, 895 F.3d 1106, 1120 (9th Cir. 2018) (in judging subjective similarity, a trier of fact may “find that the over-all impact and effect indicate substantial appropriation,” even if “any one similarity taken by itself seems trivial”).

¹⁰ While the District Court later acknowledges that it is the “*combination*” of the phrases that is at issue here (1 ER 13), the acknowledgement pertains only to the first two phrases and accounts neither for the full sequence claimed here nor the concept expressed by the sequence as juxtaposed to the narrator doing his/her own thing despite what other people may do or say.

District Court’s reliance on cases dealing with mere “short phrases” missed the mark. (1 ER 11-12 (collecting cases).) In fact, the District Court’s reliance on, *inter alia*, *Narell v. Freeman*, 872 F.2d 907, 911 (9th Cir. 1989), is especially notable, since the Court there specifically distinguished sequences from mere short ordinary phrases. *See id.* (“Freeman’s borrowings did not take a ‘sequence of creative expression,’ as opposed to an ordinary phrase, and therefore were not infringing.”).¹¹ Indeed, none of the cited cases involved a combination or sequence of phrases drawn together to express a social wisdom. *See id.*; *see also Alberto-Culver Co. v. Andrea Dumon, Inc.*, 466 F.2d 705, 711 (7th Cir. 1972) (finding one phrase “most personal sort of deodorant” unprotected as a “short phrase or expression” but also noting that

¹¹ The District Court also relied on *Acuff-Rose Music, Inc. v. Jostens, Inc.*, 155 F.3d 140, 143-44 (2d Cir. 1998), which had nothing to do with the issue of sufficient creativity of a short phrase but rather focused on whether the words at issue were used before and whether that usage was sufficiently widespread to place the words in public domain. While Appellees contended that this is a distinction without a difference, since the phrases at issue here were similarly in public domain, this argument fails for the reasons set forth below. *See infra* at Part IV. Appellees’ other cases dealing with short phrases that were found unprotected because of their prior usage rather than their supposed lack of creativity are inapplicable for the same reason. *See Johnson v. Gordon*, 409 F.3d 12, 24 (1st Cir. 2005) (finding the lyric to be “too trite” to warrant protection because it was in public domain); *Batiste v. Najm*, 28 F. Supp. 3d 595, 626 (E.D. La. 2014) (finding certain short phrases to be unprotectable because they were both in public domain and dissimilar to plaintiff’s lyrics, yet denying dismissal for certain other short phrases and reserving the issue of their originality to the fact finder); *Pers. Keepsakes, Inc. v. Personalizationmall.com, Inc.*, 975 F. Supp. 2d 920, 925 (N.D. Ill. 2013) (finding the phrase to be “too ubiquitous” to be protected because it was “a common expression of a blessing”). Notably, the *Pers. Keepsakes* court cited a Google search that returned “10,800 results” for the phrase showing the commonality of the blessing at issue, *id.* at n.4. By contrast, a Google search of “playas gonna play” will display the clip of Appellants’ song and their lyrics as top results for the search. *See* <https://www.google.com/search?q=playas+gonna+play&oq=playas+gonna+play&aqs=chrome..69i57j0l5.2855j0j7&sourceid=chrome&ie=UTF-8>, conducted on September 5, 2018.

“perhaps most important” attribute of the phrase was that it also served as *descriptive text* for the advertised product).¹²

By contrast, courts dealing with sequences of “ordinary” short phrases find them sufficiently original *in toto* to warrant copyright protection—especially where, as here, they are combined together to convey a familiar notion in a new way. *See, e.g., Norse*, 991 F.2d at 566 (holding that seven phrases, although ordinary in themselves, together warranted copyright protection); *Fodor v. Los Angeles Unified Sch. Dist.*, No. CV 12-8090 DMG (CWX), 2014 WL 12235424, at *13 (C.D. Cal. June 3, 2014) (holding that copied text passages, although involving “‘ordinary’ words and word combinations,” gave rise to copyright protection based on “[t]he authors’ manner of expression, analysis, structuring of material and marshaling of facts, choice of words, and emphasis”); *Glass v. Sue*, No. CV 09-08570-RGK, 2010

¹² And neither did any of Appellees’ cases cited on this issue below. *See CMM Cable Rep, Inc. v. Ocean Coast Properties, Inc.*, 97 F.3d 1504, 1520 (1st Cir. 1996) (holding that radio campaign’s phraseology consisting of short phrases was “inescapably functional in that it tells potential participants how to participate and how the contest works”); *see also Hutchins v. Zoll Med. Corp.*, 492 F.3d 1377, 1385 (Fed. Cir. 2007) (following *CMM Cable* and denying protection to phrases contained in CPR instructions because they were “devoid of ‘creative expression that somehow transcend the functional core of the directions;’” also observing that “the standard instructions for performing CPR are indispensable for applying CPR, and remain in the public domain”); *Prunte v. Universal Music Grp., Inc.*, 699 F. Supp. 2d 15, 25-28 (D.D.C. 2010) (denying protection for short phrases such as “fire in the hole” and “so high”). The sole exception is the decision in *Puckett*, 2016 WL 7647555, at *5, which arguably involved a sequence of lyrics, yet the court found it dissimilar to plaintiff’s sequence. *See id.* (also concluding that the phrases themselves, such as “I would die for you” and “You won’t do the same,” when judged outside of the sequence, are too common to be protected and thus belong in public domain). Here, by contrast, the sequence is almost verbatim for the first two phrases and very similar for the remaining two phrases, continuing the same structure and naming more actors doing their thing.

WL 4274581, at *4 (C.D. Cal. Oct. 22, 2010) (finding that the “He Says, She Says” lists, including their phrasing and arrangement, demonstrate the minimum threshold of creativity, even though “[t]he phrases themselves may be considered ordinary phrases that are common to this particular subject matter”); *see also Oracle Am., Inc. v. Google Inc.*, 750 F.3d 1339, 1362 (Fed. Cir. 2014) (“[B]y dissecting the individual lines of declaring code at issue into short phrases, the district court further failed to recognize that an original *combination* of elements can be copyrightable.”) (original emphasis); *cf. Swirsky*, 376 F.3d at 851 (“Although it is true that a single musical note would be too small a unit to attract copyright protection (one would not want to give the first author a monopoly over the note of B-flat for example), an arrangement of a limited number of notes can garner copyright protection.”).¹³ The

¹³ *See also Andreas v. Volkswagen of Am., Inc.*, 336 F.3d 789, 791 (8th Cir. 2003) (observing that the jury found copyright infringement of a phrase “don’t get too comfortable & fall asleep & miss your life,” which was not disputed on appeal); *BMS Entm’t/Heat Music LLC v. Bridges*, No. 04 CIV. 2584 (PKC), 2005 WL 1593013, at *3 (S.D.N.Y. July 7, 2005) (rejecting the argument that two songs that “combine[d] a call-and-response format, the lyrics ‘like that’ preceded by a one-syllable word,” and a particular rhythm were not protectable where “[t]hese elements in combination are repeated multiple times in each composition and arguably constitute the hooks in each song”); *Santrayll v. Burrell*, No. 91 CIV. 3166 (PKL), 1996 WL 134803, at *1 (S.D.N.Y. Mar. 25, 1996) (holding that “[t]he one measure ‘hook,’ consisting of the word ‘uh-oh’ repeated four times to a particular rhythm” deserved copyright protection); *Tin Pan Apple, Inc. v. Miller Brewing Co.*, No. 88 CIV. 4085 (CSH), 1994 WL 62360, at *4 (S.D.N.Y. Feb. 24, 1994) (“I hold that a jury could find that the Hugga–Hugga and Brrr sounds, used as lyrics in the copyrighted work, are sufficiently creative to warrant copyright protection, quite apart from the rhythmic patterns or durations demonstrated by that work and the commercial.”); *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp. 177, 178 (S.D.N.Y. 1976) (finding for plaintiff on the issue of plagiarism and holding that “[w]hile neither motif is novel, the four repetitions of A, followed by four repetitions of B, is a highly unique pattern”); *accord Raffoler, Ltd. v. Peabody & Wright, Ltd.*, 671 F. Supp. 947, 951 (E.D.N.Y. 1987) (holding that while advertisement contains ordinary phrases, it is protected as a whole because it adds up to an original creation); *see also Fischer v. Forrest*, No. 14CIV1304PAEAJP,

First Circuit echoed this notion when it accorded copyright protection to ordinary phrases, such as “black and white thinkers” and “[y]our explanation guides your intervention,” holding that the material as a whole deserved protection because it embodied “succinct articulation of a complex concept.” *Greene v. Ablon*, 794 F.3d 133, 160 (1st Cir. 2015) (“Importantly, the question here is not whether Greene has a copyright in those words taken in isolation, but whether their use in the particular context is protected.”); accord *Shaw v. Lindheim*, 919 F.2d 1353, 1363 (9th Cir. 1990) (reasoning that a common “pattern [that] is sufficiently concrete” deserves protection, “[e]ven if none of these [common] plot elements is remarkably unusual in and of itself”). Indeed, as the Second Circuit reasoned dealing with a similar issue,

The “ordinary” phrase may enjoy no protection as such, but its use in a sequence of expressive words does not cause the entire passage to lose protection. And though the “ordinary” phrase may be quoted without fear of infringement, a copier may not quote or paraphrase ***the sequence of creative expression*** that includes such a phrase.

Salinger v. Random House, Inc., 811 F.2d 90, 98 (2d Cir.), *opinion supplemented on denial of reh’g*, 818 F.2d 252 (2d Cir. 1987) (holding that although an “ordinary” phrase in itself may be unprotected, the allegedly infringed material “as a whole displays a sufficient degree of creativity as to sequence of thoughts, choice of words, emphasis, and arrangement to satisfy the minimal threshold of required creativity”).

2017 WL 2992663, at *10 (S.D.N.Y. July 14, 2017) (same).

Here, Appellants may have taken “ordinary” phrases that were prevalent in pop culture, yet they combined them in a four-part sequence that delivered a new take on a familiar social wisdom. Although the District Court opined that one “must be more creative” to deserve copyright protection and that combining ordinary phrases to deliver a new take on a known concept was “simply not enough,” it did also acknowledge that Appellants used what may have been well-known phrases to deliver a “different” message than the kind of messages those phrases delivered before Appellants’ song (1 ER 15). And while in District Court’s subjective judgment this kind of creativity does not rise to the level of copyright protection, the caselaw discussed above shows differently.¹⁴

B. The Elements Comprising Appellants’ Lyrical Sequence Do Not Render It Unprotectable.

The District Court referred to “[t]he concept of actors acting in accordance with their essential nature” as “banal” (1 ER 13), yet failed to address Appellants’

¹⁴ Even if viewed in isolation as mere short phrases or as a short phrase in its own, the sequence is still protectable if it is sufficiently original, and the message it conveys through Appellants’ original selection and arrangement of the phrases at issue makes it so. As one court reasoned, citing dissent by Judge Roth of the Third Circuit in *Southco, Inc. v. Kanebridge Corp.*, 390 F.3d 276, 297 (3d Cir. 2004) (which was joined by “five of the thirteen judges on the *en banc* panel”), “it does not make sense to state categorically that no combination of numbers or words short enough to be deemed a ‘phrase’ can possess ‘at least some minimal degree of creativity’” as required for copyright protection under *Feist*.” *Health Grades, Inc. v. Robert Wood Johnson Univ. Hosp., Inc.*, 634 F. Supp. 2d 1226, 1238 & n.11 (D. Colo. 2009) (also noting, along with Judge Roth, “the paucity of cases holding that an otherwise original expression is uncopyrightable solely because it can be described as a short phrase”); accord Michael Mattioli, “Disclosing Big Data,” 99 Minn. L. Rev. 535, 583 n.186 (2014) (“A survey of case law indicates that the bar on short words and phrases is not absolute and is typically applied with sensitivity to the specific words and phrases that are used.”).

ingenuity in expressing this supposedly “banal” concept in their own unique way by transforming it into a new and “different” message. In essence, the court below appears to have been swayed with the sheer familiarity of the elements that Appellants combined together to express their message, finding that at the time Appellants created the lyrics at issue, “popular culture was adequately suffused with the concepts of players and haters,” and thus combining these concepts together was not sufficiently original (1 ER 13-14).

But “[o]riginal, as the term is used in copyright, means *only* that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.” *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991). This is an “extremely low” threshold, as “even a slight amount will suffice.” *Id.* Indeed, “[t]he vast majority of works make the grade quite easily, as they possess some creative spark, ‘no matter how crude, humble or obvious’ it might be.” *Id.*, citing *Nimmer*. As the Supreme Court further pointed out (and which is directly on point here), “[o]riginality does not signify novelty....” *Feist*, 499 U.S. at 345; *accord Nimmer* at n.31 (citing legislative history in support of the proposition that “[t]his standard [of originality] does not include requirements of novelty ... and there is no intention to enlarge the standard of copyright protection to require them”). This has been echoed by courts and commentators alike: “Courts and commentators time and again have restated the

fundamental position that copyright originality means independent creation and not novelty, uniqueness, or artistic merit.” VerSteege, at 873 & n.319 (collecting authorities). As one court put it, “It is axiomatic that the designation ‘original’ is not intended to be limited to works that are novel or unique. Rather, the word ‘original,’ which was ‘purposely left undefined’ by Congress, refers to works that have been ‘independently created by an author,’ *regardless of their literary or aesthetic merit, or ingenuity, or qualitative value.*” *Lotus Dev. Corp. v. Paperback Software Int’l*, 740 F. Supp. 37, 48 (D. Mass. 1990).

As such, the District Court’s emphasis on novelty or creativity is not entirely consistent with the legislative intent underlying the statute. (*Compare* 1 ER 12 (defining the question presented as whether Appellants’ “short phrase ... is sufficiently creative”), 1 ER 14 (“what matters is whether ... [the work] is sufficiently original and creative”) & 1 ER 15 (holding that “short phrases ... must be more creative” to warrant protection), *with* Nimmer at n.59 (citing legislative history to the effect that “when it came to drafting, a great deal of concern was expressed about the dangers of using a word like ‘creative’” in defining protected material under the statute).) Regardless, Appellants were first to use the elements at issue here to express the message that the District Court confirmed was “different” from that conveyed by all the other combinations of players and haters that came before them. (1 ER 15.)

Indeed, Appellees' collection of various lyrics allegedly using the same elements¹⁵ further underscores Appellants' originality: while most of these lyrics revolved around the concept of "playa haters," *only two* of them concerned "playas" playing and haters hating—and those are the two songs at issue on this appeal. *See also Braham v. Sony/ATV Music Publ'g*, No. 215CV8422MWFGJSX, 2015 WL 7074571, at *4 (C.D. Cal. Nov. 10, 2015) (setting forth the history of the sequence about "playas" playing and haters hating and noting that it was Appellants' song that was the first to combine these phrases to relay this particular concept). Indeed, the other songs in popular culture at the time used the terms "playa" and "playa hater" to represent the dichotomy between the "playa"—one who is successful at courting women, and the "playa hater"—one who is notably jealous of the "playas'" success. The verb "playa hate" represents the outward act of that "playa hater" expressing his jealousy towards the "playa."

By contrast, it was the Appellants who first used these terms in the context of a third party (the narrator of the song), who is neither a "playa" nor a hater, stating that other people will do what they will and positively affirming that the narrator will not let the judgement of others affect her. Rather than criticizing anyone's

¹⁵ These lyrics are from the two songs at issue on this appeal, as well as the following songs: "Dreams," "Psychobetabuckdown," "Playa Hata," "Man U Luv Ta Hate," "Playa Hater," "Hater Players," "Don't Hate The Playa," and "Don't Hate the Player." (2 ER 57, 70-72, 86-89, 93-97, 101, 106-06, 111-13 & 115.) The parties moved this Court to have these songs transmitted as an exhibit on August 8, 2018.

behavior, Appellants' heroine instead declares that she is not bothered by anyone's opinion or criticism. Just because Appellants used certain slang terminology to create a new way to deliver their message does not mean that their creation was unoriginal. *See, e.g., Mayimba Music, Inc. v. Sony Corp. of Am.*, No. 12 CIV. 1094 AKH, 2014 WL 5334698, at *16 (S.D.N.Y. Aug. 19, 2014), *order suspended on other grounds*, No. 12 CIV. 1094 AKH, 2015 WL 6917260 (S.D.N.Y. Apr. 30, 2015) (finding that a short phrase "Loca con su Tiguer" used in a Shakira song—which meant "Crazy with Her Tiger," where "Tiguer/Tiger" was a "slang word" referring to a boyfriend, was copyrightable: "the fact that that one word in a phrase is slang does not mean that the phrase itself is necessarily so common that it cannot be copyrighted" and citing other examples of "[p]opular musicians [that] have been using slang and metaphors in their songs for decades").

As such, this was more than a "merely trivial variation" of any previous use of the terms "playa" and hater. *Cellular Accessories for Less, Inc. v. Trinitas LLC*, 65 F. Supp. 3d 909, 913 (C.D. Cal. 2014); *accord Soc'y of Holy Transfiguration Monastery, Inc. v. Gregory*, 689 F.3d 29, 48 (1st Cir. 2012) (holding that one's unique arrangement and selection of uncopyrightable material renders the product deserving of copyright protection). Yet the District Court relied on this Court's opinions in *Satava v. Lowry*, 323 F.3d 805, 810 (9th Cir. 2003), and *Lamps Plus, Inc. v. Seattle Lighting Fixture Co.*, 345 F.3d 1140, 1143 (9th Cir. 2003), to find that

a combination of unprotectable elements cannot be protected where the elements are not “numerous enough,” and their selection and arrangement are not “original enough.” (1 ER 13-14.) However, neither involved a literary work used in a musical composition such as at issue here: rather, *Satava* dealt with a jellyfish-lamp, and *Lamps Plus* concerned a Victorian Tiffany lamp. Obviously, there are only so many ways that one can depict a jellyfish or a Tiffany look in a lamp. *See, e.g., Stanislawski v. Jordan*, 337 F. Supp. 2d 1103, 1116 (E.D. Wis. 2004) (emphasizing that the *Satava* court struggled to “locate the faint line between unprotected idea and original expression *in the context of realistic animal sculpture*” and observing that “those elements that are natural to jellyfish physiology could not be protectable. This reasoning is sound. An artist cannot protect an element of his realistic art that is inherent in an animal’s physiology. One could no more copyright the shape of oak leaf or the shape of a horse.”).

While the District Court rejected the distinction (1 ER 14 (finding no authority supporting “Plaintiffs’ position that there is some meaningful difference between words and physical objects”)), this Court expressly adopted it:

[T]he law of this circuit has implicitly recognized *the distinction between situations in which idea and expression merge in representational objects and those in which the idea is distinct from the written expression of a concept by a poet, a playwright, or a writer*. A high degree of similarity is ‘inevitable from the use of [the] jewel-encrusted bee forms ..., or the stuffed dinosaur forms ..., or the karate video games.... As a result, the scope of the copyright protection afforded such works is necessarily narrow. *In contrast, there is an*

infinite variety of novel or creative expression available to the author of a book, script, play, or motion picture based on a preexisting idea.

Shaw, 919 F.2d at 1360.¹⁶ Moreover, lyrics in a musical composition, such as at issue here, are closer in range to the protections afforded in musical cases rather than those involving inanimate objects representing fish or iconic looks. *Cf. Gray v. Perry*, No. 215CV05642CASJCX, 2018 WL 3954008, at *6 n.6 (C.D. Cal. Aug. 13, 2018) (“The Ninth Circuit recently distinguished music, which is comprised of a large array of elements, from the glass-in-glass jellyfish sculpture at issue in *Satava*, and declined to deviate from the substantial similarity standard articulated in *Swirsky* in musical infringement suits.”), citing *Williams*, 895 F.3d at 1120; *see also Swirsky*, 376 F.3d at 849 (observing that “[t]here is no one magical combination of ... factors that will automatically substantiate a musical infringement suit,” and as “each allegation of infringement will be unique,” the extrinsic test is met, “[s]o long as the plaintiff can demonstrate, through expert testimony ..., that the similarity was ‘substantial’ and to ‘protected elements’ of the copyrighted work”); *Tin Pan Apple*, 1994 WL 62360, at *4 (finding lyrics to be protectable in themselves, apart from

¹⁶ *Accord Cavalier*, 297 F.3d at 826 (“The precise factors evaluated for literary works do not readily apply to art works.”); *Kepner-Tregoe, Inc. v. Carabio*, No. 8-71025, 1979 WL 1072, at *7 (E.D. Mich. Apr. 20, 1979) (“[M]ore similarity between two works of a commercial and useful character is required to find infringement than between two literary works. Two useful works might bear resemblance that would show infringement if literary, but which is not because they are technical.”); *cf. Leadsinger, Inc. v. BMG Music Pub.*, 512 F.3d 522, 527 (9th Cir. 2008) (“Song lyrics are copyrightable as a literary work and, therefore, enjoy separate protection under the Copyright Act.”), citing, *inter alia*, 1 Nimmer on Copyright § 2.05[B] (2018) (stating that lyrics “alone are nevertheless copyrightable as a literary work”).

“the rhythmic patterns or durations” of the musical composition that includes them. In other words, the District Court’s application of lamps to music simply does not hold water. As such, it should be reversed.

III. APPELLANTS’ FOUR-PART SEQUENCE IS DISTINCT FROM THE MESSAGE CONVEYED, AND THERE IS THUS NO MERGER TO PRECLUDE COPYRIGHT PROTECTION.

Under the merger doctrine, “where an idea contained in an expression cannot be communicated in a wide variety of ways, ... the idea and expression may merge ... [such] that even verbatim reproduction of a factual work may not constitute infringement.” *Williams*, 895 F.3d at 1141. To the extent the court below implied that the four-part lyrical sequence at issue here cannot be distinguished from the message conveyed—i.e., that “one should persist regardless of others’ thoughts and actions” (1 ER 15 (observing that it was “hardly surprising” that the idea was conveyed by using the phrases at issue)), such a determination that the expression essentially merged with the underlying idea was improper for at least two reasons.

First, merger is an affirmative defense that cannot be resolved on a motion to dismiss unless it is apparent on the face of the complaint. *See Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068, 1082 (9th Cir. 2000) (“Although there is some disagreement among courts as to whether [the merger doctrine and *scènes a faire*] figure into the issue of copyrightability or are more properly defenses to infringement, we hold that they are defenses to infringement.”); *see also Durham v.*

Prudential Ins. Co. of Am., 236 F. Supp. 3d 1140, 1151 (C.D. Cal. 2017) (“[B]ecause the defendant usually bears the burden of pleading and proving an affirmative defense, courts usually cannot grant motions to dismiss based on such defenses.”); *cf. Rivera v. Peri & Sons Farms, Inc.*, 735 F.3d 892, 902 (9th Cir. 2013) (noting that affirmative defense can be resolved on the pleadings only where it is “obvious on the face of a complaint”).¹⁷ Here, the only facts that are “obvious” on the face of Appellants’ complaint concern Appellees’ appropriation of the four-part sequence at issue for use in Appellees’ song. This, of course, is entirely different from, for example, plaintiffs’ alleging that events took place on a certain date that places it out of range for purposes of the applicable statute of limitations.

Second, the merger doctrine cannot preclude protection here because there are countless ways to express the idea conveyed by Appellants’ sequence: namely, that other people are going to do what they are going to do, and one need not be concerned with the criticism and negative opinions of those people. As this Court reasoned,

Some ideas can be expressed in myriad ways, while others allow only

¹⁷ *Accord Roberts v. Gordy*, No. 13-24700-CIV, 2015 WL 11202323, at *5 (S.D. Fla. Feb. 6, 2015) (refusing to determine whether the phrase “[e]veryday I’m hustling” has merged with the underlying message because “at this stage of the proceedings the Court’s inquiry is limited to the pleadings and to a determination of whether plaintiff has alleged sufficient facts to state a claim upon which relief may be granted”); *FC Online Mktg., Inc. v. Burke’s Martial Arts, LLC*, No. 14-CV-3685 SJF SIL, 2015 WL 4162757, at *15 (E.D.N.Y. July 8, 2015) (“Defendants’ reliance upon the doctrines of merger and ‘scenes a faire’ is misplaced at the pleadings stage, since those doctrines are considered to be defenses to a claim of infringement.”), citing, *inter alia*, *Oracle Am., Inc. v. Google Inc.*, 750 F.3d 1339, 1358 (Fed. Cir. 2014), and *Kregos v. Associated Press*, 937 F.2d 700, 705 (2d Cir. 1991).

a narrow range of expression. Fictional works generally fall into the first category. The basic idea of a fictional work might be that classic, boy meets girl. ***This idea can be expressed, as it has been through thousands of years of literature, with infinite variations in setting, sequence of incident, and characterization.*** An author wishing to write yet another work using the ‘boy meets girl’ idea can choose from a wide range of materials in composing his or her own expression of the idea.

Landsberg v. Scrabble Crossword Game Players, Inc., 736 F.2d 485, 488 (9th Cir. 1984); accord *Palmer v. Braun*, 287 F.3d 1325, 1334 n.3 (11th Cir. 2002) (“[T]here may be only one way to express the idea of a particular color or number of fish. But when those ideas are arranged in a particular order—such as ‘one fish, two fish, red fish, blue fish’—the expression is no longer covered by the merger doctrine.”); *Bach v. Forever Living Prod. U.S., Inc.*, 473 F. Supp. 2d 1127, 1136 (W.D. Wash. 2007) (“The expression of the Jonathan Livingston Seagull character does not flow from the ideas underlying it. The themes and ideas Jonathan Livingston Seagull espouses are not, as Defendants argue, monopolized by the fact that his character is protected by copyright. ***Indeed, there are limitless metaphors for the ideas of achievement, perseverance, and enlightenment.*** The unique expression of those ideas through the story of Jonathan Livingston Seagull is protectable.”).

Here, the idea being expressed in the four-part sequence at issue is that people will do what they do and think what they think, while none of it bothers the narrating protagonist.¹⁸ Despite the myriad of ways to express the idea of other people doing

¹⁸ Appellees’ literal interpretation of the lyrics below as simply acknowledging that

their things and having their opinions while the protagonist chooses not to be bothered by that, Appellees here have chosen to copy *Appellants'* expression of that sentiment. The similarities in the delivery of the concept at issue becomes clear when the lyrics in the chorus of both songs are examined:¹⁹

Playas Gon' Play

Shake It Off

Chorus:

Chorus:

“Playas, they gonna play

“Cause the players gonna play, play,

And haters, they gonna hate

play, play, play

Ballers, they gonna ball

And the haters gonna hate, hate, hate,

Shot callers, they gonna call

hate, hate

That ain't got nothin' to do

Baby, I'm just gonna shake, shake,

With me and you

shake, shake, shake

That's the way it is

I shake it off, I shake it off

That's the way it is”

Heartbreakers gonna break, break,

Introduction:

break, break, break

“playas” play and haters hate is far too limiting. *Cf. Allen v. Destiny's Child*, No. 06 C 6606, 2009 WL 2178676, at *9 (N.D. Ill. July 21, 2009) (declining to limit substantial similarity analysis to literal phrases and holding that copying of the phrase “cater to you” expressed the same idea as in the allegedly infringed work, which was “one of relieving the stress from the significant other and getting them to relax”). Here, Appellants are not just conveying an idea that players play, haters hate, and actors engage in activity. Rather, the idea being conveyed in the sequence of lyrics at issue is that other people will do what they do, and the protagonist chooses not to be concerned with the criticism and negative opinions of other people.

¹⁹ 2 ER 48-51 & 53.

Playas Gon' Play (cont.)

“The playas gon’ play
Them haters gonna hate”

Shake It Off (cont.)

And the fakers gonna fake, fake, fake,
fake, fake
Baby, I’m just gonna shake, shake,
shake, shake, shake
I shake it off, I shake it off”

Appellees’ delivery of the message has the same setting, sequence, and characterization as that of Appellants’ song. Both songs convey the idea with four separate actors who have their own thing going, include an affirmation not to be bothered by what those other people are doing, and are told from a female perspective. Both songs include “playas” playing, haters hating, and two other actors engaging in the activity their description suggests. Both songs include the same sequence of four separate actors and a positive statement not to worry about what those actors think. Finally, both songs contain the same characterization of the main sentiment: namely, a female describing what other people are doing and stating that the narrator is not concerned with it.

Because there are several ways to express the concept delivered by Appellants’ four-part sequence, “a new work incorporating that idea need not be a verbatim copy or close paraphrase of an earlier work to infringe that work.” *Landsberg*, 736 F.2d at 488. Nevertheless, Appellees’ song here represents virtual

copying combined with close paraphrasing. “[T]he players gonna play, play, play, play, play / And the haters gonna hate, hate, hate, hate, hate” is undoubtedly part virtual copy, part close paraphrase of “Playas, they gonna play / And haters, they gonna hate.” Appellees’ lyrics are an even closer paraphrase of Appellants’ introduction “The playas gon’ play / Them haters gonna hate.” To be sure, the phrases use the same subjects (“playas” and haters) and predicates (gonna play and gonna hate). The negligible differences between the phrases do not change the fact that Appellees’ song closely resembles Appellants’ work. *Cf. Warner Bros. Entm’t Inc. v. RDR Books*, 575 F. Supp. 2d 513, 529 (S.D.N.Y. 2008) (comparing literary works and finding that “[a] shape shifter that prefers to live in dark, confined spaces, taking the form of the thing most feared by the person it encounters; nobody knows what a boggart looks like in its natural state” was a close paraphrase of “[b]oggarts like dark, enclosed spaces,” “[i]t’s a shape-shifter.... It can take the shape of whatever it thinks will frighten us most,” and “[n]obody knows what a boggart looks like when he is alone, but when I let him out, he will immediately become whatever each of us most fears”). Therefore, the merger doctrine cannot negate Appellants’ infringement claim.

CONCLUSION

This Court should reverse with directions to deny Appellees' motion to dismiss.

September 17, 2018

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STATEMENT OF RELATED CASES

Under Ninth Circuit Rule 28-2.6, appellants are unaware of any related cases pending in this Court.

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28.1-1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 18-55426

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Signature of Attorney or
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