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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

SEAN HALL, <i>etc., et al.</i> ,)	Case No. 2:17-cv-06882 MWF (ASx)
Plaintiffs,)	
vs.)	
TAYLOR SWIFT, <i>etc., et al.</i> ,)	DEFENDANTS' MEMORANDUM OF
Defendants.)	POINTS AND AUTHORITIES IN
)	SUPPORT OF SECOND MOTION FOR
)	SUMMARY JUDGMENT
)	
)	Date: September 19, 2022
)	Time: 10:00 a.m.

Courtroom of the Honorable
Michael W. Fitzgerald
United States District Judge

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MEMORANDUM OF POINTS AND AUTHORITIES

1. INTRODUCTION

(a) Summary of Argument

It is, unfortunately, not unusual for a hit song to be met by litigants hoping for a windfall based on tenuous claims that their own song was copied. But even against that background, Plaintiffs' claim sticks out as particularly baseless. Ostensibly suing for *Shake It Off*'s alleged copying of a musical composition, *Playas Gon' Play* ("Playas"), Plaintiffs admit that no music was copied. Instead, they claim that both songs combine the commonplace phrases players gonna play and haters gonna hate—phrases *Plaintiffs admit* are public domain and free for everyone to use—and include two other phrases that *Plaintiffs admit* are different in *Playas* and *Shake It Off*.

Accordingly, last year Defendants filed an early Motion for Summary Judgment under the extrinsic test, which requires substantial similarity in concrete, protected expression, not ideas or public domain elements. Defendants raised, for example, that, as a matter of law, Plaintiffs' claimed selection and arrangement is not infringed by allegedly copying two public domain phrases and *the idea* of adding two more but different phrases.¹ The Court, although observing that Defendants made a strong showing, declined to grant summary judgment. Dec. 9, 2021, Order ([Doc. 104](#)). Defendants timely moved the Court to amend or reconsider its ruling. That Motion was fully briefed and taken under submission by the Court, and remains pending. *See* [Dkt. Entry 114](#).

In the meantime, the parties have completed fact discovery, which has confirmed that Plaintiffs' copyright infringement claim has multiple additional and

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¹ See, e.g., [Bikram's Yoga Coll. of India, L.P. v. Evolution Yoga, LLC](#), 803 F.3d 1032, 1041 (9th Cir. 2015) ("[17 U.S.C.] Section 102's categorical bar on copyright protection for ideas" prohibits a selection-and-arrangement claim based on the alleged copying of selected-and-arranged ideas.); [Defs' Reply \(Doc. 113\) at 17-25](#).

1 fatal flaws. Accordingly, Defendants now file their Second Motion for Summary
2 Judgment, raising the following.²

3 First, Plaintiffs lack standing to bring this action because it is undisputed that
4 they each entered into music publishing agreements in which they conveyed to their
5 music publishers the exclusive rights to sue for the claimed infringement of the *Playas*
6 copyright, including the very claim they assert in this case. In fact, Plaintiffs also have
7 admitted that they asked their music publishers to transfer the claim back to them, but
8 the music publishers declined. Any and all rights Plaintiffs had to bring the claim they
9 assert here—whether as legal or beneficial owners or under any other standing theory
10 they may argue—belong to their music publishers, not them. *See below* at 8-13.

11 Second, the evidence is undisputed that the creators of *Shake It Off*—Taylor
12 Swift, Karl Martin Sandberg, and Karl Johan Schuster—did not copy from *Playas* the
13 idea of combining the public domain phrases players gonna play and haters gonna
14 hate. Indeed, Plaintiffs concede that the phrases were part of popular culture long
15 before *Shake It Off*'s creation in 2014. Plaintiffs also concede the two songs are not
16 strikingly similar and that Plaintiffs never provided *Playas* to *Shake It Off*'s
17 songwriters. Instead, Plaintiffs argue that *Playas* was widely disseminated in the
18 United States in 2001. But in 2001 two of the three *Shake It Off* songwriters lived in
19 Sweden and the third was only eleven years old and living in Wyomissing,
20 Pennsylvania, where *Playas* had almost no radio airplay. *See below* at 13-17.

21 Third, while Defendants emphatically deny copying, *Shake It Off*'s combining
22 of public domain player and hater phrases is protected by the fair use doctrine. All
23 four of the fair use factors favor Defendants. *Shake It Off* is undeniably
24 transformative: while *Playas* is about fidelity and trust in a romantic relationship,

25
26
27 ² The Court confirmed that parties may file more than one motion for summary
28 judgment as long as they are not simply duplicative. *See Rptr's Trans. of Proceedings*
Jan. 27, 2020 (Doc. 60) at 8:23-9:5.

1 *Shake It Off* uses the public domain phrases to advance its own transformative
2 message of independence and finding relief from criticism through music and dance.
3 And *Shake It Off* does so by setting those phrases to entirely different music and using
4 otherwise completely different lyrics. Also, the use is only incidentally commercial,
5 did not interfere with Plaintiffs' right of first publication, and is no more than needed
6 to advance *Shake It Off*'s transformative purposes. Lastly, *Shake It Off* has not had
7 any negative impact whatsoever on the market for *Playas*. See below at 17-24.

8 Defendants' Second Motion for Summary Judgment should be granted.

9 **(b) Summary of Uncontroverted Facts**

10 **(1) Plaintiffs Co-Author the *Playas* Musical Composition**

11 Plaintiffs are co-authors of the musical composition *Playas*, a romantic love
12 song in the R&B pop, or "Rhythmic," genre. Facts 308, 393, 453. In *Playas*, the
13 singer sings to her romantic partner and is deeply attached to him and their
14 relationship. She reassures him that, despite "so-called friends" trying behind his back
15 to break them up, she will never let him go and he can trust her love as she trusts his
16 love. Facts 453-58. The chorus of *Playas* includes the following lyrics:

17 Playas, they gon' play / And haters, they gonna hate / Ballers, they gon'
18 ball / Shot callers, they gonna call / That ain't got nothing to do / With
19 me and you / That's the way it is / That's the way it is

20 See Anderson Decl. Ex. 147.

21 **(2) Plaintiffs Assign to Their Music Publishers Their Rights to**
22 **Sue for Infringement and the Claim They Assert in this Case**

23 As co-authors of *Playa*, Plaintiffs agreed to equal, 50% interests in the *Playas*
24 musical composition. Facts 308. However, each Plaintiff assigned to a music
25 publisher at least half of his copyright interest in *Playas*. Facts 320, 346. Importantly,
26 each Plaintiff also assigned to his music publisher all of his rights to sue for
27 infringement of the *Playas* copyright, including the claim Plaintiffs assert in this case.
28 Facts 309-23, 335-52.

1 **(3) *Playas* Is Recorded by 3LW and Released as a Single in 2001**

2 *Playas* was recorded by a musical group, 3LW, and released as a single in May
3 2001. Fact 487. Plaintiffs contend that in 2001 a music video of 3LW performing
4 *Playas* was included in an MTV television show, TRL (Total Request Live), and 3LW
5 performed *Playas* during a 2001 TRL concert tour of some eleven different groups.
6 Fact 394. *Playas* was never included in the soundtrack of any motion picture,
7 television show, or commercial. Facts 395-97. *Playas* received only limited radio
8 airplay, largely in approximately three months in 2001 on Rhythmic radio stations.
9 *See, e.g.*, Facts 424-433.

10 **(4) Before *Shake It Off*, the Allegedly Copied Player and Hater**
11 **Phrases Were Already Prevalent in Pop Culture and Music**

12 Plaintiffs admit that player and hater phrases, including players gonna play and
13 haters gonna hate, were part of the urban vocabulary before *Playas*, and are each
14 public domain and free for anyone to use. Facts 365-66, 490-91, 493-94. Plaintiffs
15 also admit that at least by 2013 and before *Shake It Off*'s creation in 2014, player and
16 hater phrases, including phrases such players gonna play and haters gonna hate, were
17 part of popular culture, including in music, television, movies, articles, books, and
18 even clothing. Fact 367.

19 **(5) In 2014, Taylor Swift, Max Martin, and Shellback Create**
20 ***Shake It Off***

21 In February 2014—thirteen years after *Playas*' claimed 2001 heyday and when
22 player and hater phrases were, as plaintiff Hall testified, part of popular culture—
23 defendants Taylor Swift, Karl Martin Sandberg, professionally known as Max Martin,
24 and Karl Johan Schuster, professionally known as Shellback, created *Shake It Off*.
25 Facts 369, 380-82. None of them had ever heard *Playas* or heard of 3LW, and
26 Plaintiffs do not contend that *Playas* was ever provided to any of them. Facts 383-91.

27 Nor is there a reasonable, non-speculative factual basis to conclude they
28 somehow heard *Playas*. Ms. Swift, who wrote *Shake It Off*'s lyrics, was only eleven

1 years old and a country music devotee in 2001 when *Playas* was released as a single;
2 she did not watch TRL until several years after the 2001 episode that allegedly
3 included a 3LW music video; and she did not go to clubs or concerts. Facts 382, 394,
4 414-15, 418-19, 421. *Playas* is an R&B pop song. Fact 393. In 2001, two radio
5 stations played R&B pop songs in Ms. Swift's hometown, and she was not allowed
6 to, and did not, listen to those stations. Facts 413-14, 423. And, in any event, one of
7 the stations never played *Playas* and the other played it only 83 times in 2001.³ Facts
8 424, 426. In 2001, Max Martin was living in Sweden; his musical background was
9 rock; and while he worked with A-list pop artists such as Britney Spears and
10 Backstreet Boys in his recording studio in Sweden, he did not listen to pop music or
11 work with R&B singers. Facts 435-37. Shellback was only 16 years old and also
12 living in Sweden in 2001; his background was heavy metal; and he did not start
13 working with Max Martin until 2007. Facts 442-445.

14 Further, in 2014 *Playas* was not the only source of players gonna play and
15 haters gonna hate phrases. Rather, Plaintiffs have conceded that the phrases were
16 public domain and commonplace long before *Shake It Off*. Facts 364-67, 369, 490-
17 91, 493-94. Ms. Swift had heard the phrases commonly used in middle school and
18 elsewhere, along with other idioms like take a chill pill or say it don't spray it. Fact
19 370. At the 2013 Billboard Music Awards, she performed wearing a t-shirt, bought
20 at a retail store, emblazoned with "Haters Gonna Hate." Fact 367. Later that year,
21 she attended the 2013 Country Music Awards and heard Eric Church perform his
22 song, *The Outsiders*, which includes the lyrics, "Yeah, the player's gonna play and a
23 haters gonna hate / And a regulators born to regulate." Facts 372-73.

24 ///

25 _____

26 ³ As an indication of how few 83 plays in a year is, in 2001 that radio station
27 played the top song of the year 1,402 times. Fact 427. Also, in 2001 that station
28 played each of the top ten songs over 800 times—roughly ten times the number of
plays that *Playas* had on that same radio station that year. Fact 428.

Ms. Swift included versions of the commonplace phrases players gonna play and haters gonna hate in *Shake It Off*, a song about independence and freedom from criticism. *Shake It Off* begins with the singer identifying critical things people say about her, then stating that she is just going to “shake off” that criticism and find comfort in music and dance. Facts 464-65, 473. The lyrics of *Shake It Off*’s chorus are:

‘Cause the players gonna play, play, play, play, play / And the haters gonna hate, hate, hate, hate, hate / Baby, I’m just gonna shake, shake, shake, shake, shake / Shake it off / Shake it off /

Heartbreakers gonna break, break, break, break, break / And the fakers gonna fake, fake, fake, fake, fake / Baby, I’m just gonna shake, shake, shake, shake, shake / Shake it off / Shake it off

See T. Swift Decl. Ex. 116.

(6) Plaintiffs File this Infringement Action on Narrow Grounds

In September 2017, Plaintiffs filed this action, alleging a single claim for copyright infringement. Fact 327. Plaintiffs do not claim ownership of the phrases players gonna play and haters gonna hate and do not claim copying of any music. Facts 362, 489-91, 492-94. Rather, Plaintiffs allege that *Shake It Off* copies *Playas* because each song combines a variation of a players gonna play phrase and a haters gonna hate phrase, and includes two other but very different tautological phrases. Facts 363, 497, 503. As Mr. Hall admitted in his deposition, Plaintiffs contend that *Shake It Off* copies the idea of combining players gonna play with haters gonna hate. Fact 495.

(7) Plaintiffs Ask Their Music Publishers to Assign the Alleged Claim to Them, But Their Music Publishers Decline

When they filed this action, Plaintiffs ignored that they had assigned the alleged copyright infringement claim to their respective music publishers. After Defendants raised that fact, Plaintiffs sent their music publishers e-mails in January 2018 asking

1 that within two business days their music publishers grant the alleged claim back to
2 Plaintiffs so that they could pursue this action. Facts 329-31, 355-56.

3 Sony Music Publishing, whose companies include Mr. Hall's music publisher,
4 considered his request and, two weeks later, declined, explaining that, having
5 performed an internal evaluation and consulted an expert musicologist, it "concluded
6 that there was no merit to the infringement claim." Facts 324-26, 332-34. A
7 representative of Universal Music Publishing Group ("UMPG"), whose companies
8 include Mr. Butler's music publisher, initially did not object to him pursuing the
9 claim. But within two weeks, UMPG wrote declining to grant to him the right to
10 pursue the claim. Facts 353, 357-359. Mr. Butler did not rely on UMPG's initial
11 response. Fact 360.

12 After their music publishers refused to assign to Plaintiffs the claim they assert
13 in this action, their manager unsuccessfully lobbied a United States Congressman to
14 get a House sub-committee to intervene. Fact 361.

15 (c) **Procedural Posture**

16 At the outset of this action, Defendants moved to dismiss the Complaint for
17 failure to state a claim, raising that the Complaint did not allege copying of protected
18 expression. [Doc. 20](#). The Court granted the motion but that ruling was reversed on
19 appeal. [Hall v. Swift, 786 F. App'x 711, 712 \(9th Cir. 2019\)](#). The Court of Appeals
20 ruled only that Plaintiffs had plausibly alleged originality in *Playas'* so-called four-
21 part lyrical phrase. The Court of Appeals did not reach other issues, including that
22 the songs are not substantially similar under the extrinsic test. [Id. at 712, n.1](#).

23 On remand, this Court set a separate schedule for early expert disclosures and
24 discovery as to the extrinsic test. [Doc. 87](#). After that expert discovery was completed,
25 Defendants moved for summary judgment as to that issue. On December 9, 2021, the
26 Court denied the motion. [Doc. 104](#). Defendants timely filed their Motion to Amend
27 or Reconsider ([Doc. 108](#)), which was taken under submission and is pending before
28 ///

1 the Court. In the meantime, fact discovery has closed and expert discovery as to, *e.g.*,
2 damage issues, closes on August 18, 2022.

3 **2. DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT SHOULD**
4 **BE GRANTED**

5 **(a) The Standards Applicable to this Motion**

6 “Summary judgment procedure is properly regarded not as a disfavored
7 procedural shortcut, but rather as an integral part of the Federal Rules as a whole,
8 which are designed ‘to secure the just, speedy and inexpensive determination of every
9 action.’” *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (quoting Fed. R. Civ.
10 P. 1). Summary judgment is appropriate if “there is no genuine dispute as to any
11 material fact and the movant is entitled to a judgment as a matter of law.” Fed. R.
12 Civ. P. 56(a). Once the movant shows that summary judgment is appropriate,
13 “the burden shifts to the non-moving party to set forth, by affidavit or as otherwise
14 provided in Rule 56, specific facts showing that there is a genuine issue for trial.”
15 *F.T.C. v. Stefanchik*, 559 F.3d 924, 927-28 (9th Cir. 2009) (citation omitted).
16 “[M]ere speculation ... is insufficient to defeat summary judgment.” *Hill v. Walmart*
17 *Inc.*, 32 F.4th 811, 818 (9th Cir. 2022). Also, summary judgment is proper “[i]f the
18 evidence is merely colorable, or is not significantly probative....” *Id. at 822* (quoting
19 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)). Further, “[w]here the
20 record taken as a whole could not lead a rational trier of fact to find for the nonmoving
21 party, there is no ‘genuine issue for trial.’” *Matsushita Elec. Indus. Co. v. Zenith*
22 *Radio Corp.*, 475 U.S. 574, 587 (1986).

23 **(b) Plaintiffs Do Not Own the Claim They Assert in this Action**

24 **(1) Authors May Assign the Right to Sue for Copyright**
25 **Infringement**

26 Plaintiffs’ action is properly dismissed for lack of standing because they
27 assigned to their respective music publishers the exclusive rights to sue for
28 infringement of the *Playas* copyright, including the specific claim they assert here.

1 Section 501 of the Copyright Act provides that “the legal or beneficial owner
2 of an exclusive right under a copyright is entitled . . . to institute an action for any
3 infringement of that particular right committed while he or she is the owner of it.” 17
4 U.S.C. § 501(b). Ownership of copyright rights vests initially in the author and may
5 be transferred by assignment or exclusive license. 17 U.S.C. § 201(a), (d); Minden
6 Pictures, Inc. v. John Wiley & Sons, Inc., 795 F.3d 997, 1003 (9th Cir. 2015).
7 Beneficial owners include “author[s] who ha[ve] parted with legal title to the
8 copyright in exchange for percentage royalties based on sales or license fees.” Warren
9 v. Fox Family Worldwide, Inc., 328 F.3d 1136, 1144 (9th Cir. 2003) (citation omitted).

10 A copyright owner can, however, transfer the right to sue for past, present, or
11 future infringements so long as the transferee is an owner of that copyright. Silvers v.
12 Sony Pictures Entm’t, Inc., 402 F.3d 881, 890, 890 n.1 (9th Cir. 2005) (citing with
13 approval ABKCO Music, Inc. v. Harrisongs Music, Ltd., 944 F.2d 971, 980-81 (2d
14 Cir. 1991) (grant of right to pursue and control infringement claims was valid when
15 coupled with assignment of copyright rights)). Discovery has confirmed that is
16 exactly what Plaintiffs did here.

17 **(2) Mr. Hall Assigned to Famous Music All of His Rights to Sue**
18 **for Infringement of the *Playas* Copyright**

19 In 1992, Mr. Hall, individually and doing business as “Bam Publishing,”
20 entered into an Exclusive Songwriter and Co-Publishing Agreement with Famous
21 Music Corporation, which later converted to a limited liability company and changed
22 its name to Famous Music LLC (“Famous Music”). Facts 309-11, 324. That Co-
23 Publishing Agreement governs Mr. Hall’s rights in all musical compositions—which
24 the Co-Publishing Agreement refers to as “Compositions”—that he wrote or co-wrote
25 during the Co-Publishing Agreement’s term. Facts 312. He has admitted that *Playas*
26 is one of those Compositions and is governed by his Co-Publishing Agreement. Facts
27 318.

28 ///

1 In Section 2(a) of his Co-Publishing Agreement, Mr. Hall assigned to Famous
2 Music and another publisher, Groove Asylum Music Publishing, Inc., 66 2/3% of Mr.
3 Hall's copyright interests in the Compositions, including *Playas*. Facts 313-14, 320-
4 21. As a result, he remained a co-owner of legal title in the *Playas* copyright. While
5 owners of legal title to a copyright or exclusive rights under it have the right to license
6 or exploit the copyrighted work (*see, e.g., Selznick v. Turner Ent. Co.*, 990 F. Supp.
7 1180, 1187 (C.D. Cal. 1997) (only owners or co-owners "of legal title to [a] work"
8 may license and exploit the work)), Mr. Hall assigned that right to Famous Music in
9 Section 3 of his Co-Publishing Agreement. That Section provides that,
10 "[n]otwithstanding [the] co-ownership" of the copyrights, Mr. Hall's "grant,
11 conveyance and assignment to [Famous Music] include[s] ... the sole, exclusive and
12 universal right, on behalf of [Mr. Hall and Famous Music] ... to administer, use and
13 exploit all legal rights, titles and interests in the Compositions, of every kind, nature,
14 and description[.]" Anderson Decl. Ex. 131 at 3, § 3(b).

15 Consistent with his agreed-upon role as a passive participant in his music
16 publisher's exploitation of the Compositions, including *Playas*, in Section 19 of his
17 Co-Publishing Agreement, Mr. Hall transferred to Famous Music "the sole and
18 exclusive right to take (or refrain from taking) such action as [Famous Music] deems
19 necessary, on behalf of [Famous Music and Mr. Hall], to protect all legal rights and
20 interests in the Compositions, including, but not limited to, the right to institute or
21 defend against any legal action, claim, demand or other proceeding affecting the
22 Compositions, as well as to resolve such matters in [Famous's] sole discretion." Fact
23 315, 318. He also signed a separate Assignment in which he assigned to Famous
24 Music "any and all of [his] rights of every kind, nature and description," in "any past,
25 present and future legal causes of action respecting infringing of the Compositions...."
26 Facts 316, 319. Mr. Hall has admitted that his Assignment includes the claim he
27 asserts in this action. Facts 317-19, 323. Indeed, in January 2018 he urgently

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1 requested that Famous Music assign the claim to him so that he could pursue this
2 action. Facts 329-30. However, Famous Music declined. Fact 333.

3 Finally, Plaintiffs have suggested that Mr. Hall might have standing to sue as a
4 beneficial owner of the *Playas* copyright. However, he is not a beneficial owner
5 because, by retaining a portion of the copyright, he did not “part[] with legal title.”
6 [*Warren*, 328 F.3d at 1144](#). Further, in his Co-Publishing Agreement he assigned all
7 rights to sue for infringement of the *Playas* copyright, and in his Assignment he
8 expressly assigned “all of [his] rights *of every kind, nature, and description*” in claims
9 for infringement. Fact 316 (emphasis added). By the plain and unambiguous
10 language of Mr. Hall’s Co-Publishing Agreement and Assignment, all rights to assert
11 the claim he asserts in this case—whether as a beneficial owner or under any other
12 standing theory he might try to invoke—were assigned to Famous Music, for it and
13 its successors to exercise or decline to exercise in its or their sole discretion. Indeed,
14 all of these provisions in Mr. Hall’s Co-Publishing Agreement and Assignment would
15 be meaningless if he could avoid them just by suing as a beneficial owner or otherwise.

16 Any and all rights that Mr. Hall had or could have to assert the claim he asserts
17 in this action belong to Famous Music, not him. Accordingly, he lacks standing and
18 his claim must be dismissed.

19 **(3) Mr. Butler Also Assigned to His Music Publisher All of His**
20 **Rights to Sue for Infringement of the *Playas* Copyright**

21 Mr. Butler lacks standing for essentially the same reasons.

22 In 1999, Mr. Butler entered into a Co-Publishing Agreement with three Zomba
23 companies (collectively, “Zomba”). Facts 335-39. That Co-Publishing Agreement
24 governs his rights in all musical compositions—likewise referred to as
25 “Compositions”—that he wrote or co-wrote during the agreement’s term, and he has
26 admitted that includes *Playas*. Fact 345.

27 In Section 3.02 of his Co-Publishing Agreement, he assigned to Zomba 50% of
28 his copyright interest in the Compositions. Fact 340. In Section 3.03, he assigned to

1 Zomba all rights “to administer and grant rights and licenses in the Compositions ...
2 and to exercise all rights in the Compositions as fully as if [Zomba] were the sole
3 owner of the Compositions and such copyrights (or to refrain from exploiting and
4 exercising any and all such rights, in [Zomba’s] sole discretion).” Anderson Decl. Ex.
5 137 at 8, § 3.03.

6 Also consistent with his agreed-upon role as a passive participant in his music
7 publisher’s exploitation of the Compositions, in Section 8.06(b) of his Co-Publishing
8 Agreement Mr. Butler granted Zomba the “sole right, but not the obligation, to initiate,
9 prosecute, defend, settle, and compromise, in [Zomba’s] sole discretion, any and all
10 claims, demands, lawsuits, actions, or other proceedings in respect of the
11 Compositions,” including any actions “against any alleged infringer of any
12 Composition.” Fact 342. In addition, Mr. Butler signed a separate Assignment in
13 which, after assigning to Zomba 50% of his copyright interest in *Playas*, he goes on
14 to also assign to Zomba “any and all causes of action for infringement of the same,
15 and any other claims, demands or causes of action of whatsoever nature pertaining to
16 the Compositions, whether past, present or future..., to be held by [Zomba], and its
17 affiliates, successors and assigns, fully, entirely, and absolutely.” Facts 341, 343, 346.
18 He admits his Assignment to Zomba includes the claim in this action. Facts 348-52.

19 Mr. Butler further confirmed that he did not have the claim he asserts in this
20 action when, in January 2018, he, through his manager, urgently asked UMPG to
21 “grant” him the claim so that he could pursue this action. Facts 355-56. A UMPG
22 representative initially replied by e-mail that UMPG did not object to him pursuing
23 the claim. But UMPG quickly, and before Mr. Butler took any action in reliance on
24 the e-mail, expressly declined to grant those rights to him. Facts 357-60. The initial
25 e-mail also is irrelevant because standing “is based on facts that exist at the time of
26 filing,” and Mr. Butler indisputably lacked the right to sue when he filed this action
27 four months earlier. *See Righthaven LLC v. Hoehn*, 716 F.3d 1166, 1171 (9th Cir.
28 [2013](#)) (copyright interest acquired after filing does not confer standing).

1 Finally, and as with Mr. Hall, Mr. Butler is not a beneficial owner of the *Playas*
2 copyright because he did not “part[] with legal title” to it. [Warren, 328 F.3d at 1144](#).
3 Also, any right Mr. Butler had to sue as a beneficial owner or under any other standing
4 theory is subsumed within his grant to his music publisher of all of his rights to sue.
5 *See above* at 11-12. To conclude otherwise would render all of these provisions of in
6 his Co-Publishing Agreement and Assignment meaningless.

7 Accordingly, both Mr. Hall and Mr. Butler lack standing to assert the claim they
8 assert and, for that reason alone, summary judgment should be granted.

9 **(c) The Evidence Does Not Raise a Genuine Dispute as to Copying**

10 As an independent ground for summary judgment, Plaintiffs cannot raise a
11 genuine dispute as to whether copying occurred. “[A]bsent copying, there can be no
12 infringement of copyright, regardless of the extent of similarity” between the parties’
13 works. [2 M. NIMMER & D. NIMMER, NIMMER ON COPYRIGHT § 8.01\[A\] \(2022\)](#);
14 [Skidmore v. Led Zeppelin, 952 F.3d 1051, 1064 \(9th Cir. 2020\)](#) (in addition to other
15 requirements, a “plaintiff must prove that a defendant copied the work”). Copying is
16 proven circumstantially by evidence of either (1) “striking similarity” or (2) access
17 plus substantial similarities between the defendant’s and the plaintiff’s works that are
18 probative of copying. [Malibu Textiles, Inc. v. Label Lane Int’l, Inc., 922 F.3d 946,](#)
19 [952 \(9th Cir. 2019\)](#). Plaintiffs fail to raise a genuine dispute under either theory.

20 **(1) *Playas and Shake It Off Are Not Strikingly Similar***

21 “To show a striking similarity between works, a plaintiff must produce evidence
22 that the accused work *could not possibly* have been the result of independent creation.”
23 [Stabile v. Paul Ltd., 137 F. Supp. 3d 1173, 1188 \(C.D. Cal. 2015\)](#) (citations omitted).
24 “In other words, as a matter of logic, the only explanation for the similarities between
25 the two works must be ‘copying rather than ... coincidence, independent creation, or
26 prior common source.’” [4 NIMMER ON COPYRIGHT § 13D.07\[A\]](#) (quoting [Skidmore,](#)
27 [952 F.3d at 1064](#)). Expert testimony is necessary to establish striking similarity in
28 music cases. [Id. at 13D.07\[C\]\[2\]](#). However, Plaintiffs’ expert concluded only that

1 there “*could have*” been copying. Facts 378-79 (emphasis added). That precludes
2 striking similarity. See Stabile, 137 F. Supp. 3d at 1188 (expert’s equivocation fails
3 to establish striking similarity (gathering cases)).

4 Furthermore, the evidence shows copying is not even the *likely* explanation for
5 *Shake It Off*’s inclusion of tautologies or players play and haters hate phrases. It is
6 undisputed that tautologies are commonplace, including in lyrics (Facts 374-75) and
7 that players gonna play and haters gonna hate were commonplace phrases before
8 *Playas* (Fact 364-66). Indeed, in 2000 and before the release of *Playas*, the recording
9 artist R Kelly released a song whose lyrics were so close to *Playas* – “Players wanna
10 play / Ballers wanna ball / Rollers wanna roll” – that Plaintiffs felt R Kelly had copied
11 them. Fact 65; Ex. 36 (Doc. 92-42 (R. Kelly lyrics)); Anderson Decl., Ex. 145, at
12 146:18-147:23. And, importantly, by 2013 and before *Shake It Off* was created, these
13 phrases were not only part of popular culture (Facts 367, 369) but were heard by Ms.
14 Swift in middle school and elsewhere, including at the 2013 country Music Awards
15 where Eric Church performed his song, *The Outsiders*, with the lyrics, “the player’s
16 gonna play, and a haters gonna hate, and a regulators born to regulate” (Facts 370-73).

17 Plaintiffs fail to raise a genuine dispute as to striking similarity.

18 **(2) The *Shake It Off* Songwriters Did Not Have Access to *Playas***

19 To prove copying without striking similarity, Plaintiffs must present evidence
20 of *both* access *and* substantial similarity probative of copying. Rentmeester v. Nike,
21 Inc., 883 F.3d 1111, 1117 (9th Cir. 2018), *overruled on other grounds by* Skidmore,
22 952 F.3d at 1051. To prove access, a plaintiff must show a “reasonable possibility,
23 not merely a bare possibility, that an alleged infringer had a chance to view the
24 protected work.” Loomis v. Cornish, 836 F.3d 991, 995 (9th Cir. 2016) (quoting Art
25 Attacks Ink, LLC v. MGA Entm’t, Inc., 581 F.3d 1138, 1143 (9th Cir. 2009)). Access
26 may be shown either by “(1) establishing a chain of events linking the plaintiff’s work
27 and the defendant’s access, or (2) showing that the plaintiff’s work has been widely
28 disseminated.” Id. In either event, “[a]ccess may not be inferred through mere

speculation or conjecture.” Three Boys Music Corp. v. Bolton, 212 F.3d 477, 482 (9th Cir. 2000) (citation omitted), *overruled on other grounds by* Skidmore, 952 F.3d 1051.

(i) No Chain of Events Supports Access

A chain-of-events access theory requires “evidence of a nexus” between (1) a person with possession of the plaintiff’s work and (2) the individuals who created the allegedly infringing work. Loomis, 836 F.3d at 995-96. Ms. Swift, Max Martin, and Shellback created *Shake It Off* (Facts 380-82) and Plaintiffs admit that Plaintiffs did not provide *Playas* to any of them and that no one has told Plaintiffs that any of them received or heard *Playas*. Facts 389-91.

Mr. Hall does claim to have said “hello” to Ms. Swift sometime between 2007 and 2011 when she visited a recording studio in which he was present. But there was no mention of *Playas* or 3LW. Anderson Decl. Ex. 145 at 164:20-166:6. Mr. Hall claims he met Max Martin sometime between 2006 and 2012 when Max Martin visited a recording studio in which Mr. Hall was present. Mr. Hall also claims to have sent him texts and an e-mail in 2010. But, again, there was no mention of *Playas* or 3LW in the recording studio or the texts and e-mail. *Id.* at 172:7-173:18; 175:9-176:4, 176:25-178:22.

Plaintiffs fail to raise a genuine dispute as to a chain-of-events access theory.

ii. Plaintiffs’ Theory of Access through Wide Dissemination Also Fails

Plaintiffs also fail to raise a genuine dispute that *Playas* was widely disseminated so as to create a “reasonable possibility” that the creators of *Shake It Off* had access to it. Loomis, 836 F.3d at 995. “In most cases, the evidence of widespread dissemination centers on the degree of a work’s commercial success and on its distribution through radio, television, and other relevant mediums,” but the evidence “will vary from case to case.” *Id.*

Plaintiffs contend that in 2001 *Playas* was a hit single, but they do not claim it was a number one hit or even a top ten hit. *Cf.* ABKCO Music, 722 F.2d at 998

(sufficient evidence of access based on wide dissemination where allegedly infringed song was “Number One” on the *Billboard Charts* in the United States for five weeks, and was one of the “Top Thirty Hits” in England for seven weeks); *Acuff-Rose Music, Inc. v. Jostens, Inc.*, 988 F. Supp. 289, 290 (S.D.N.Y. 1997) (widespread dissemination where “song was a hit and rose to number five on the national country charts” within a year before alleged infringement), *aff’d*, 155 F.3d 140, 141 (2d Cir. 1998). Nor was *Playas* omnipresent on radio. Plaintiffs apparently contend the song received radio play from late April to July 2001 before dropping off in late July. But a song playing on radio for roughly three months does not establish widespread dissemination. *See Intersong-USA v. CBS, Inc.*, 757 F. Supp. 274, 281 (S.D.N.Y. 1991) (evidence that plaintiff’s song was played on radio in Spring 1979 insufficient). As for television, Plaintiffs contend only that a 3LW *Playas* music video was played on a cable show, TRL, in 2001. Fact 394. They have produced no evidence that, for example, *Playas* was ever incorporated into a movie, television, or commercial soundtrack, or that it was nominated for or won a GRAMMY. Facts 395-403.

Further, dissemination rises to widespread dissemination only if it creates a “reasonable possibility” that the creator of the defendant’s work heard the plaintiff’s work. While that “reasonable possibility” may be shown by evidence that the plaintiff’s work “saturat[ed] a relevant market in which both the plaintiff and the defendant participate[d]” (*Loomis*, 836 F.3d at 997), that is a high standard. *See, e.g., id. at 998* (testimony that plaintiff’s song received “tons of airplay” by Santa Barbara, California radio stations and was written about in local newspaper insufficient where defendants were only in Santa Barbara for ten days and no evidence they listened to radio or read newspaper); *see also Intersong-USA*, 757 F. Supp. at 281 (evidence of radio play in cities in which defendants lived was “insufficient basis to conclude that any [defendant] heard the song at that time”); *McRae v. Smith*, 968 F. Supp. 559, 563 (D. Co. 1997) (music performances in Colorado and Wyoming insufficient to establish access where defendants were not in those States at the time).

1 Here, Plaintiffs' claimed widespread dissemination of *Playas* is confined to
2 2001 and falls far short of establishing a "reasonable possibility" of access by Ms.
3 Swift. At the time, she was eleven years old and lived with her parents in Wyomissing
4 Hills, Pennsylvania. Facts 413, 421. Her radio listening was confined to country
5 music and her parents did not permit her to watch TRL until several years later. Facts
6 414-19. The two radio stations available in Wyomissing Hills in 2001 whose format
7 included R&B pop music such as *Playas* were not only stations she did not listen to,
8 but one station never played *Playas*, and the other played it only 83 times in all of
9 2001. Facts 423-26. As a result, Plaintiffs' weak theory of wide dissemination does
10 not extend to Ms. Swift.

11 Nor does Plaintiffs' claimed widespread dissemination in the U.S. in 2001
12 support a "reasonable possibility" of access by Max Martin or Shellback. They were
13 born and raised in Sweden and began their music careers in rock and heavy metal
14 bands. Facts 435-36, 443-44. While Max Martin was actively producing and writing
15 pop music in Sweden in 2001 for A-list recording artists such as Britney Spears,
16 Backstreet Boys, and others, he never listened to pop music other than the music he
17 created, did not follow R&B, and did not watch TRL. Facts 437. He has never
18 subscribed to or read Billboard. Fact 439. In 2001, Shellback was only sixteen years
19 old, was in a heavy metal band, and also lived in Sweden. Facts 442-44. He did not
20 listen to radio, did not follow R&B or pop music, and did not watch TRL or read
21 Billboard. Facts 446-451. Plaintiffs' weak wide dissemination theory also does not
22 extend to Max Martin or Shellback.

23 Copying is a required element of the claim Plaintiffs assert and their failure to
24 submit evidence creating a genuine dispute as to striking similarity or access is an
25 independent ground for summary judgment.

26 **(d) Plaintiffs Also Cannot Avoid the Fair Use Doctrine**

27 Defendants emphatically deny that *Shake It Off* copies anything from *Playas*.
28 But even if copying were assumed for argument's sake, the fair use doctrine extends

1 to *Shake It Off*'s combination of public domain player and hater phrases and the idea
2 of tautologies, in the creation of a new and different song.

3 Fair use "permits and requires courts to avoid rigid application of the copyright
4 statute when, on occasion, it would stifle the very creativity which that law is designed
5 to foster." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994). The
6 Copyright Act sets forth four factors that courts apply in determining fair use: (1) "the
7 purpose and character of the use," (2) "the nature of the copyrighted work," (3) "the
8 amount and substantiality of the portion used in relation to the copyrighted work as a
9 whole," and (4) "the effect of the use upon the potential market for or value of the
10 copyrighted work." 17 U.S.C. § 107(1)-(4). "Where no material, historical facts are
11 at issue and the parties dispute only the ultimate conclusions to be drawn from those
12 facts," fair use may be decided on summary judgment. *Seltzer v. Green Day, Inc.*,
13 725 F.3d 1170, 1175 (9th Cir. 2013). Each factor favors fair use here.

14 **(1) The Purpose and Character of the Use**

15 **(i) *Shake It Off*'s Use of Player and Hater Phrases Is**
16 **Transformative**

17 "The first factor in the fair use inquiry is 'the purpose and character of the use,
18 including whether such use is of a commercial nature or is for nonprofit educational
19 purposes.'" *Seltzer*, 725 F.3d at 1175 (quoting 17 U.S.C. § 107(1)). "[T]he 'central
20 purpose' of this factor is to see 'whether and to what extent the new work is
21 transformative.'" *Id.* at 1175-76 (quoting *Campbell*, 510 U.S. at 579). A work is
22 transformative if it "adds something new, with a further purpose or different character,
23 ... with new expression, meaning or message." *Id.* (quoting *Campbell*, 510 U.S. at
24 579). "What is critical is how the work in question appears to the reasonable
25 observer." *Id.* at 1181 (quoting *Cariou v. Prince*, 714 F.3d 694, 706 (2d Cir. 2013)).
26 While fair use cases sometimes involved parody, there is no requirement that a work
27 "comment on the original." *Id.* at 1177 (citing, *inter alia*, *Cariou*, 714 F.3d at 708
28 (work that did not "comment on, relate to the historical context of, or critically refer

1 back to the original work[]” nevertheless transformative where it presented a
2 “fundamentally different aesthetic”)). The “more transformative the new work, the
3 less will be the significance of other factors ... that may weigh against a finding of
4 fair use.” Campbell, 510 U.S. at 579.

5 Plaintiffs claim that *Shake It Off* copies the idea of combining a public domain
6 players play phrase with a public domain haters hate phrase and two otherwise
7 different public domain tautologies, to depict a “world ... full of untrustworthy
8 people.” Fact 460. While that is disputed, it is beyond dispute that *Shake It Off* uses
9 its phrases to create a new work with dramatically different meaning and message and
10 “new aesthetics, new insights and understandings.” Seltzer, 725 F.3d at 1176 (quoting
11 Pierre Leval, Toward a Fair Use Standard, 103 HARV. L. REV. 1105, 1111 (1990)).

12 In *Playas*, the focus is on the singer’s romantic relationship. The singer uses
13 the phrases to convey to her partner that she is not concerned about “so-called friends”
14 who are trying to interfere with their relationship, and that her partner should not be
15 concerned either, because their relationship is trusting and secure. Facts 453-57.
16 While *Playas* is a love song about trust in a romantic relationship, *Shake It Off* is about
17 individual freedom, independence from critics, and finding comfort in music and
18 dance. Facts 461-482. With *Shake It Off*, Ms. Swift took a comedic, empowering
19 approach to making people feel better through music and through dance and through
20 independence. T. Swift Decl. at 2-3, ¶ 8. *Shake It Off* includes the allegedly copied
21 phrases in presenting a different solution to a different type of adversity than what is
22 identified in *Playas*. In doing so, *Shake It Off* indisputably adds “new insights and
23 understandings” to these phrases, and creates a dramatically different message for its
24 listeners. Seltzer, 725 F.3d at 1176.

25 *Shake It Off* also is a very different artistic work from *Playas* overall, and the
26 many differences emphasize *Shake It Off*’s transformative nature. For example, while
27 *Playas* is an R&B pop song with a soulful and intimate mood, *Shake It Off* is an
28 upbeat, defiant pop song. Facts 393, 453-54. *Shake It Off*’s repetition of “play,”

1 “hate,” “shake,” etc., further expresses defiance and joyfulness, and contributes to a
2 lyrical and musical dynamism, mood, and pace entirely different from *Playas*. Fact
3 462.

4 This is decidedly not “the typical ‘non-transformative’ case” where the use
5 “makes no alteration to the *expressive content or message* of the original work.”
6 *Seltzer*, 725 F.3d at 1177; *see also* *Dr. Suess Enterps., L.P. v. ComicMix LLC*, 983
7 *F.3d 443, 454 (9th Cir. 2020)* (defendant did not transform Dr. Suess stories by
8 replacing original characters and leaving story and drawings otherwise intact).
9 Rather, *Shake It Off* uses the phrases—which Plaintiffs concede are public domain—
10 as “raw material” in its own creative expression that is nothing like *Playas*. *Seltzer*,
11 *725 F.3d at 1176-77* (use of drawing that said “nothing about religion” in backdrop
12 for video about religion was fair); *Cariou*, 714 F.3d at 706 (defendant’s “hectic and
13 provocative” works incorporating plaintiff’s “serene and deliberately composed”
14 photographs were transformative). *Shake It Off* is a highly transformative work.

15 **(ii) *Shake It Off*’s Use Is Not Primarily Commercial**

16 Under the first factor, the Court also considers whether the defendant’s use is
17 “of a commercial nature or is for nonprofit educational purposes.” 17 U.S.C. § 107(1).

18 While *Shake It Off* is a commercial work, that does not carry “presumptive force
19 against a finding” of fair use. *Campbell*, 510 U.S. at 584. Rather, the court considers
20 “the degree to which the new user exploits the copyright for commercial gain—as
21 opposed to incidental use as part of a commercial enterprise.” *Seltzer*, 725 F.3d at
22 *1178*. In *Seltzer*, for example, the band Green Day’s use of a copyrighted drawing in
23 a video backdrop at concerts was only incidentally commercial because, while the
24 “concert was undoubtedly commercial in nature,” the band “never used [plaintiff’s
25 work] to market the concert, CDs, or merchandise.” *Id.* Also, the “more
26 transformative the new work, the less will be the significance of other factors, like
27 commercialism, that may weigh against a finding of fair use.” *Campbell*, 510 U.S. at
28 *579*; *SOFA Entm’t v. Dodger Prods, Inc.*, 709 F.3d 1273, 1278-79 (9th Cir. 2013)

1 (“[B]ecause [defendant’s] use of the clip [from television show] is transformative, the
2 fact that [defendant’s musical] is a commercial production is of little significance.”).

3 The same is true here. Defendants did not sell copies of *Playas*, or use *Playas*
4 to market or promote *Shake It Off*. Instead, the alleged *combination* of public domain
5 tautological phrases are the lyrics of a song that is highly transformative. Accordingly,
6 the first factor weighs strongly in favor of fair use.

7 (2) The Nature of Plaintiffs’ Copyrighted Work

8 Under the second factor, courts consider whether the first work is creative
9 (meriting stronger protection) or factual, and whether the first work has been
10 published (meriting weaker protection). Seltzer, 725 F.3d at 1178.

11 While *Playas* is a creative musical work, it had been published for thirteen years
12 by the time of *Shake It Off*’s release in 2014. Fact 487. Plaintiffs accordingly
13 controlled “the first public appearance” of *Playas*, a consideration that favors fair use.
14 Seltzer, 725 F.3d at 1178; Kelly v. Arriba Soft Corp., 336 F.3d 811, 820 n.31 (9th Cir.
15 2003) (same). Moreover, “the second factor may be of limited usefulness where [a]
16 creative work of art is being used for a transformative purpose.” Bill Graham Archives
17 v. Dorling Kindersley Ltd., 448 F.3d 605, 612 (2d Cir. 2006). Here, the alleged use
18 of a published work is highly transformative and, accordingly, this factor favors fair
19 use, but, in any case, should not be given great weight in the analysis. Therefore, to
20 the extent this factor is material to the analysis at all, it supports a finding of fair use.

21 (3) The Amount and Substantiality of the Portion Used

22 The third factor examines the “‘amount and substantiality’ of the portion of the
23 original copyrighted work used ‘in relation to the [original] copyrighted work as a
24 whole.’” 17 U.S.C. § 107(3). The amount and substantiality used are considered “in
25 relation to the [defendant’s] justification for the use.” Seltzer, 725 F.3d at 1178.
26 Notably, “[t]his factor captures the fact that an allegedly infringing work that copies
27 little of the original is likely to be a fair use.” Id.

28 ///

1 Here, copying is disputed, but the alleged use of *Playas* in *Shake It Off* is not
2 only minimal, it is ephemeral. There are zero musical similarities and, out of all the
3 lyrics, Plaintiffs claim copying only of the idea of combining two public domain
4 phrases and adding other tautologies. Facts 488-504. That idea is abstract and not a
5 substantial portion of *Playas*.⁴ See also *Fisher v. Dees*, 794 F.2d 432, 436 (9th Cir.
6 1986) (use of 6 of 38 bars of music, including “recognizable main theme,” in parody
7 song was fair); *Threshold Media Corp. v. Relativity Media, LLC*, No. CV 10-09318,
8 2013 WL 12331550 at *11 (C.D. Cal., Mar. 19, 2013) (use of 41 out of 189 seconds
9 (22%) of one audio recording and additional 28 out of 209 seconds (13%) of another
10 audio recording of same song, including music and lyrics, was fair).

11 For similar reasons, the allegedly copied material is not qualitatively significant
12 to *Playas*. Plaintiffs cannot reasonably argue that *Shake It Off* copies the most
13 important part of *Playas* when they admit *Shake It Off* uses none of *Playas*’ music and
14 only public domain phrases. *SOFA Entm’t*, 709 F.3d at 1279 (clip of television show
15 not qualitatively important to show where, *inter alia*, “doubtful that the clip on its own
16 qualifies for copyright protection”); *Stewart v. West*, No. CV 13-02449, 2014 WL
17 12591933 at *9 (C.D. Cal. Aug. 14, 2014) (use of spoken word introduction “without
18 any significant musical accompaniment” was not qualitatively significant).

19 But even if *Shake It Off* copied the “heart” of *Playas*, which it did not do, the
20 third factor would still favor fair use because the allegedly copied decision to use the
21 public domain phrases is relevant to *Shake It Off*’s transformative purpose. *Kelly*, 336
22 F.3d at 820-21; *Lennon v. Premise Media Corp.*, 556 F. Supp. 2d 310, 326 (S.D.N.Y.
23
24

25 ⁴ Comparing the two songs’ lyrics, the allegedly copied lines consist of
26 approximately 102 out of the 606 total words in *Playas* (16.5%). See Anderson Decl.
27 Ex. 147. Even that low figure is improperly exaggerated because Plaintiffs contend
28 only that the idea of *combining* player and hater phrases was copied, rather than the
words themselves. Fact 496.

1 2008) (third factor favored fair use where lyrics and music at heart of song “relevant
2 to defendants’ commentary”); *see above* at 19-20. This factor also favors fair use.

3 **(4) The Effect on the Market for or Value of Plaintiffs’ Work**

4 Finally, the Court considers the “secondary use’s impact on the market for the
5 original work and the market for derivative works[.]” *SOFA Entm’t*, 709 F.3d at 1280;
6 17 U.S.C. § 107(3). “The market for potential derivative uses,” however, “includes
7 only those that creators of original works would in general develop or license others
8 to develop.” *Campbell*, 510 U.S. at 592. “Where the secondary use is not a substitute
9 for the original and does not deprive the copyright holder of a derivative use, the fourth
10 factor weighs in favor of fair use.” *SOFA Entm’t*, 709 F.3d at 1280.

11 *Shake It Off* is not a market substitute for *Playas*. *Shake It Off* includes
12 completely different music, is in a different genre, and includes virtually none of the
13 same lyrics. Courts have recognized that highly transformative uses of only a small
14 amount of allegedly borrowed material are not market substitutes for the original. *See*,
15 *e.g.*, *Red Label Music Pub., Inc. v. Chila Prods.*, 388 F. Supp. 3d 975, 986 (N.D. Ill.
16 2019); *Threshold Media*, 2013 WL 12331550 at *12 (It is “inconceivable that hearing
17 a [30-second] clip [of a song] would dissuade a listener from purchasing [the song] if
18 the listener were otherwise predisposed to do so.”). Unsurprisingly, Plaintiffs’
19 testimony confirms that *Shake It Off* has not usurped *Playas*’ market share: Plaintiffs
20 were unable to attribute to *Shake It Off* any negative impact on *Playas* sales,
21 streaming, or royalties. Facts 506-08, 510-11. Indeed, Mr. Hall testified that he did
22 not believe *Shake It Off* caused people to stop listening to *Playas*. Fact 505.

23 There is also no evidence that *Shake It Off* impaired any market for derivative
24 uses of *Playas*. Plaintiffs cannot argue that Defendants’ alleged use deprived them of
25 a licensing fee, because a copyright owner is “not entitled to a licensing fee for a work
26 that otherwise qualifies for the fair use defense[.]” *Leibovitz v. Paramount Pictures*
27 *Corp.*, 137 F.3d 109, 117 (2d Cir. 1998). Rather, Plaintiffs must show impairment to
28 an existing or “traditional, reasonable, or likely to be developed [licensing] market”

1 for the type of use at issue. Bill Graham Archives, 448 F.3d at 614-15. And they have
2 not: Plaintiffs acknowledge that the use of player and hater phrases is widespread in
3 popular culture and in other works, yet Plaintiffs have apparently never obtained a
4 license for any of these uses. Facts 367, 369, 372, 509. *Shake It Off* cannot be
5 negatively affecting a market or potential market that does not exist. See, e.g., Seltzer,
6 725 F.3d at 1179 (plaintiff failed to present evidence establishing defendant's use
7 harmed a market for his work); Blanch v. Koons, 467 F.3d 244, 258 n.9 (2d Cir. 2006)
8 (same). Thus, like all others, the fourth factor favors fair use.

9 The highly transformative alleged use of the idea of combining versions of two
10 public domain phrases, together with consideration of the other fair use factors, leads
11 to only one conclusion: the "copyright law's goal of 'promoting the Progress of
12 Science and useful Arts,' U.S. Const., art. I, § 8, cl. 8, would be better served by
13 allowing [*Shake It Off*'s alleged use of the phrases] than by preventing it." Blanch,
14 467 F.3d at 259. Accordingly, the alleged use, even if proven, which Plaintiffs have
15 not done, is a non-infringing fair use. 17 U.S.C. § 107.

16 **3. CONCLUSION**

17 Accordingly, summary judgment should be granted in Defendants' favor.
18

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