

Wesley Lewis in Bloomberg Law: Two Vanished Paragraphs Muddy Taylor Swift 'Shake it Off' Ruling

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PRACTICES Intellectual Property Litigation, Copyright, Intellectual Property

Haynes Boone Associate Wesley Lewis talked with *Bloomberg Law* about The Ninth Circuit's brief order reviving a copyright infringement lawsuit against music superstar Taylor Swift.

Here is an excerpt:

After a California district court judge found the lyric that Swift allegedly swiped wasn't original enough to protect, the Ninth Circuit chastised him for deigning himself "the final judge of the worth of an expressive work." It also quoted a 1903 Supreme Court opinion by Justice Oliver Wendell Holmes, stating the danger of judges deciding artistic value, in *Bleistein v. Donaldson Lithographing Co.*, a case involving advertising images. Holmes' quote was edited out of the circuit opinion as well.

What remained was one paragraph introducing the case and one outlining the ruling. Excluding the introduction and citations, the decision was two sentences: "The district court dismissed the complaint based on a lack of originality in the pertinent portions of Hall's work. Even taking into account the matters of which the district court took judicial notice Hall's complaint still plausibly alleged originality."

The court may have removed the paragraphs because the "citation to Bleistein is a little bit out of context," Wesley Lewis of Haynes Boone said. Holmes was cautioning courts on judging particular types of work rather than judging individual works, Lewis said.

But Lewis said the circuit's rebuke, before and after the edit, still passed on an opportunity "to go into detail about what they thought the right approach would be." Lewis interpreted it as "an exercise in judicial restraint" where they simply made a non-precedential ruling of a specific error without expounding on a broader standard.

"I think this was the Ninth Circuit deliberately not addressing that question," said Lewis, who often defends media companies in infringement cases. "Maybe they just thought it was not an appropriate time to answer that question."

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