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## DARK HORSES, JOYFUL NOISES, AND THE BUILDING BLOCKS OF MUSICAL EXPRESSION

by Elizabeth Brannen and Sarah Rahimi

In the summer of 2019, a jury sitting in the Central District of California returned a verdict against pop star Katy Perry and several co-defendants for copyright infringement. The infringing work? Perry's hit song from 2013, "Dark Horse." The jury awarded \$2.8 million in damages to Christian hip-hop artists Marcus Gray, publicly known as Flame, Emanuel Lambert, and Chike Ojukwu for copying a similar portion of their song, "Joyful Noise." But whatever happy sound the verdict may have prompted from the plaintiffs was short-lived; in 2020 the district court vacated the jury award and granted judgment as a matter of law to the defendants. Recently, on March 10, 2022, the United States Court of Appeals for the Ninth Circuit affirmed the district court's decision in Perry's favor.

The Ninth Circuit agreed with the district court that the evidence presented at trial was legally insufficient: it failed to show that the portion of the musical composition that Dark Horse allegedly copied from Joyful Noise was copyrightable original expression. *Gray v. Hudson*, 28 F.4th 87 (9th Cir. 2022). This recent decision is noteworthy because it underscores that minor scales, chord progressions, and other conventional building blocks of musical expression belong to the public.

What was it about "Dark Horse" that allegedly plagiarized "Joyful Noise"? In essence, some of the underlying musical beat. More precisely, the repeating eight-note portion of Perry's song that prompted the jury's verdict is called an ostinato: a short musical phrase or rhythmic pattern repeated in a musical composition. A comparison of the songs prepared by the BYU Copyright Licensing Office that identifies the ostinatos is available [here](#).

At trial, it was undisputed that the ostinatos in Dark Horse and Joyful Noise had certain similarities. For example, both are based on the minor scale (although in different keys). Setting aside some stylistic embellishment in Joyful Noise based on sliding between notes (a technique called portamento), both ostinatos rely on a uniform rhythm, meaning each of the eight notes is equal in duration. But the ostinatos are by no means identical. For example, in Dark Horse the ostinato notes correspond to the minor scale degrees 3-3-3-3-2-2-**1-5** repeated twice, whereas the Joyful Noise ostinato is comprised of two slightly different eight-note figures that correspond to the minor scale degrees 3-3-3-3-2-2-**2-1** followed by 3-3-3-3-2-2-**2-6**.

The Ninth Circuit's decision ultimately did not turn solely on the similarities and differences between the ostinatos. What mattered more is the fundamental principle that for musical compositions, as with other works, copyright protection does not extend to every element. Rather, to prove copyright infringement, a plaintiff must show copying of elements of a work that are *original*. Here, the ostinato was the sole musical phrase underlying the infringement claim, and the

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court held that it is not original, protectable expression.

Copying can be proven either through direct evidence that the defendant actually copied the work or through a circumstantial showing that the defendant had access to the work and that the two works are substantially similar. Here, there was no direct evidence of actual copying so the plaintiffs had to prove infringement by showing access to Joyful Noise and substantial similarity. As this case exemplifies, substantial similarity, for its part, does not merely turn on whether a reasonable jury could find the total concept and feel of the works to be substantially similar. Substantial similarity first requires the plaintiff to establish that the work contains protected elements that are objectively similar to the corresponding elements of the accused work, either by identifying individually protectable elements or a protectable combination of individually unprotectable elements. This threshold inquiry is called the “extrinsic test,” and is often resolved by courts as a question of law rather than as a jury question. As the Ninth Circuit explained: “while we must refrain from usurping the jury’s traditional role of evaluating witness credibility and weighing the evidence, the extrinsic test requires us as a court to ensure that whatever objective similarities the evidence establishes between two works are legally sufficient to serve as the basis of a copyright infringement claim regardless of the jury’s views.” Here, they were not.

After reviewing the evidence in light most favorable to the plaintiffs (the same standard that applies on summary judgment), the district court had concluded that the Joyful Noise ostinato is not protectable because it is “not a particularly unique or rare combination” and that prior works, including by the parties, contain similar elements. And because it found that no protectable expression exists, the district court held that plaintiff’s infringement claim failed as a matter of law. The Ninth Circuit agreed, finding no individually protectable musical elements or any protectable combination of otherwise unprotectable musical elements in plaintiffs’ ostinato. Rather, the Ninth Circuit held that the ostinato consists of “a manifestly conventional arrangement of musical building blocks.” It added: “This combination is unoriginal because it is really nothing more than a two-note snippet of a descending minor scale, with some notes repeated,” and concluded that: “Allowing a copyright over this material would essentially amount to allowing an improper monopoly over two-note pitch sequences or even the minor scale itself, especially in light of the limited number of expressive choices available when it comes to an eight-note repeated musical figure.”

The Ninth Circuit also rejected plaintiffs’ challenge based on the fact that the district court, prior to trial, had denied summary judgment on the issue of extrinsic similarity. The court called the plaintiffs’ suggestion that it was therefore improper to grant judgment as a matter of law after trial “unsupported by any authority.” After trial, a “judge has had the benefit of hearing testimony and a full presentation of the evidence,” and this “may occasionally give her new insights into the legal sufficiency of the evidence,” as happened here.

A different Ninth Circuit decision likely also contributed to the district court’s willingness to find for the defense. The district court’s order granting defendants’ motion for judgment as a matter of law came a week after the Ninth Circuit decided a case addressing similar questions in *Skidmore v. Zeppelin*, 952 F.3d 1051 (9th Cir. 2020). There, the court described the concept of “thin” copyright and noted that in cases where a plaintiff seeks to meet the extrinsic test’s protectable expression requirement with “works where there is a narrow range of available creative choices, the defendant’s work would necessarily have to be ‘virtually identical’ to the plaintiff’s work in order to be substantially similar,” adding that “[m]ore similarities are required to infringe if the range of protectable expression is narrow, because the similarities between the two works are likely to cover public domain or otherwise unprotectable elements.” *Skidmore v. Zeppelin*, 952 F.3d 1051, 1076 (9th Cir.), cert. denied sub nom. *Skidmore as Tr. for Randy Craig Wolfe Tr. v. Zeppelin*, 141 S. Ct. 453, 208 L.

Ed. 2d 145 (2020), *reh'g denied*, 141 S. Ct. 946, 208 L. Ed. 2d 482 (2020). Applying this standard, the district court reached an alternate holding: that the Joyful Noise ostinato merited no more than a "thin" copyright, and the evidence did not support a conclusion that the ostinatos in the two works were virtually identical. On appeal, the Ninth Circuit did not even discuss this alternate holding, finding instead that "the Joyful Noise ostinato lacks the quantum of originality needed to merit copyright protection."

The key takeaway: although a combination of unprotectable elements may qualify as protectable expression where their selection and arrangement is original, the conventional building blocks of expression do not. In music, as with other forms of art, the basic building blocks are not something over which anyone can claim exclusive rights. They belong to the public and are free for all to use.