

Chicago Daily Law Bulletin®

VOLUME 168, NO. 93

LAW BULLETIN MEDIA

Minimum creativity examined in lawsuit over Katy Perry song

Question: How low is the minimum threshold of creativity for copyright protection?

Discussion: An ostinato is a continually repeated musical phrase or rhythm. Marcus Gray (aka Flame) used an ostinato in his song “Joyful Noise.” The song was never a commercial success, although a performance of it online received millions of views.

Five years later, singer-songwriter Katy Perry created “Dark Horse.” It was a big hit, and Perry performed it during the Super Bowl halftime show in 2015. “Dark Horse” used an ostinato that was slightly different from the one used in “Joyful Noise.” But both have a uniform rhythm and equal note duration in time.

Gray and his co-writer sued Perry and her co-defendants for copyright infringement. Gray relied on an expert opinion from a musicologist to prove that the two ostinatos were substantially similar. Perry’s expert musicologist disagreed.



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The jury found for Gray and awarded \$2.8 million in damages. The district court granted a motion to vacate the jury award and entered judgment as a matter of law for Perry.

Gray appealed. The Ninth Circuit affirmed the judg-

ment for Perry, focusing on the threshold issue of whether the “Joyful Noise” ostinato qualified as an original work of authorship. Based on the trial record, the Ninth Circuit found that the “Joyful Noise” ostinato contained commonplace musical elements. Commonplace elements of music are not copyrightable. So, Perry could not have been held to have infringed on Gary’s copyright as a matter of law.

Answer: Commonplace musical elements do not qualify for copyright protection.

Case Cite: *Gray v. Hudson*, 9th Cir., No. 20-55401, March 10, 2022.

Sur-Reply: The low bar for copyrightability was set by the U.S. Supreme Court’s decision in *Feist Publications, Inc., v. Rural Telephone Service Co.*, 499 U.S. 340 (1991), which stated the standard arrangement of information in a telephone book was not copyrightable.