

Chord Progression Katy Perry Found to Have Copied Deemed Uncopyrightable

Gray v. Hudson, 2022 WL 711246 (9th Cir. Mar. 10, 2022)

By: Reid Huefner & Nick Wheeler | March 18, 2022

On March 10, 2022, the Ninth Circuit (“the court”) held that the similarities between the ostinatos (the repeating musical phrases) of the songs “Joyful Noise” from Christian hip-hop artists Marcus Gray, Emanuel Lamber, and Chike Ojukwu (collectively “Gray”) and “Dark Horse” by Katheryn Hudson (“Katy Perry”) were not original expressions and therefore were not protectible under copyright law.

Gray sued Katy Perry for copyright infringement relating to Perry’s hit song “Dark Horse.” Gray claimed Perry copied an ostinato—specifically, a series of eight notes (sixteen when combined)—from their song “Joyful Noise.” The two ostinatos differed in the last two notes, but relied on a uniform rhythm. A jury found Perry liable for infringement and awarded Gray \$2.8 million in damages. After the trial, Perry moved for judgment as a matter of law or, alternatively, a new trial. The district court vacated the judgment as a matter of law finding that none of the identified individual points of similarity between the two ostinatos—such as the length, rhythm, melodic content, melodic shape, quality and color of the sound, or the placement of the ostinato in the musical space—either alone or in combination, constituted a copyrightable original expression. Gray appealed to the Ninth Circuit.

On appeal, the court addressed the threshold issue of what is a copyrightable original expression. The court noted “copyright protection extends only to works that possess...some minimal degree of creativity.” Gray was required to show Perry had (1) access to Joyful Noise and (2) both ostinatos were substantially similar. The court focused on the second prong, which mandates that Gray satisfy both the extrinsic and intrinsic tests of copying. The extrinsic test requires parties to distinguish between protected and unprotected material in a work. The court focused only on the extrinsic test as it can be resolved as a matter of law while the intrinsic test examines substantial similarity from the viewpoint of an ordinary observer and is usually left to the factfinder. The court applied the extrinsic analysis to each proposed similarity to determine which aspects of Joyful Noise’s ostinato, if anything, qualified as an original expression. The court stated that copyright law has a “famously low bar for originality” but that “copyright does require at least a modicum of creativity” and does not protect “common or trite musical elements, or commonplace elements that are firmly rooted in the genre's tradition.”

The court held that each point of similarity identified by Gray between the two ostinatos was not a protectible form of expression. The court noted that the playing of eight notes, even in rhythm, is a “trite” musical choice that is unprotectible. Next, the court found the texture of the ostinato or how the different musical elements are mixed together, and the melodic shape was too abstract for protection. Thereafter, the court held that the timbre or sound quality of the ostinatos through the use of synthesizers was not protectible. The court then found that the eight-note pitch sequence was not copyrightable even as a component of a protectible melody which the court noted is consistent with current caselaw finding that chord progressions cannot be individually protected as they are basic musical building blocks. Next, the court examined the components of the ostinato as a combination and found that the ostinato only employed a conventional arrangement of musical building blocks and could not be protected.

This decision is sure to impact enforcement efforts for copyrights of musical works. Parties will be emboldened to argue note sequences in a musical work are not original and, thus, not copyrightable.