

“Dark Horse” Copyright Claim Against Katy Perry – Hoofing it on a Stairway to Heaven?

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We previously reported on the [Marcus Gray, et al. \(“Gray”\) v. Katheryn Hudson, et al. \(“Perry”\)](#) case on [August 2nd](#) and [August 15th](#) of 2019.

When we initially reported the details of this case, Gray was awarded damages to the tune of \$2.8 million on the basis that Perry’s “Dark Horse” song infringed upon Gray’s “Joyful Noise” song. Most specifically, a jury decided that a string of eight staccato notes or “ostinato” in Perry’s song infringed upon a riff in Gray’s song. Perry sought to overturn

the jury's verdict issued in Gray's favor, and U.S. District Court Judge Christina A. Snyder did so in March 2020 upon review of the extrinsic evidence. Judge Snyder's determination was based upon a review of the extrinsic evidence and also took into account a recent decision in the Skidmore v. Led Zeppelin case (discussed on the TMCA), and concluded that "the range of protectable expression in an 8-note pop music ostinato comprised of individually unoriginal elements is narrow," and that "[t]he evidence in this case does not support a conclusion that the relevant ostinatos in "Dark Horse" and "Joyful Noise" are virtually identical."

On Appeal, Gray asserts that the trial judge was wrong in tossing the \$2.8 million jury verdict. In a recent argument before a panel of judges for the 9th Circuit Court of Appeals, panelist Judge Milan D. Smith noted that the trial court "did not question the jury's analysis of the intrinsic or factual evidence, but applied an extrinsic test in determining as a matter of law that the short combination of notes in Gray's "Joyful Noise" are "too basic to be protectable." Judge Smith further stated "[i]t seems to me that the case law says that we as judges are fully authorized and empowered and indeed required to examine the extrinsic evidence test ourselves, and we do not defer to the jury on that, it's really a matter of law."

Interestingly, Perry explained under oath at trial that the ostinato (which she calls the chorus) is the most identifiable part of the song. Her counsel advised the 9th Circuit Court of Appeals panel that Perry was testifying as a pop star and not a musicologist. The ostinato was called "the hook" by Perry's counsel during the recent hearing, which the panel deemed as potentially significant in terms of the importance of the ostinato. Is the importance of "the hook" enough to convince the panel that the ostinato infringes upon Gray's copyright?

Maybe. But Judge Richard R. Clifton on the panel told Gray's counsel during the hearing that he simply could not hear what Gray wants him to hear – in listening to the songs, it took a while for him to figure out what the purported similarities were. At a minimum, there appears to be the possibility of a split panel decision.

Will the case resolve in line with the Led Zeppelin decision? We will keep you apprised of developments in the case.