

Defending Lack of Reasonable Opportunity of Access in Copyright Infringement Claims – Inference is Insufficient

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by Cathy Dahl



The decision and damages awarded to Marcus Gray, Emanuel Lambert, and Chike Ojukwu in the Katy Perry “Dark Horse” copyright infringement case last week have the attention of the music industry. We provided some commentary here on the potential impact of the decision on what has been the historical development of the musical art form, and provide here

a deeper dig.

Pivotal in this case is the repetition of a string of eight staccato notes or “ostinato” that share some similarity to a riff in the song “Joyful Noise” by Marcus Gray et al.

Musicologists have also identified the use of a highly similar ostinato in several other well-known works – Bach’s “Adagio in F Minor,” “Jolly Old Saint Nicholas,” “Go Down, Moses,” and Akira Ifukube’s “Theme to Godzilla” (1954 movie), for starters.

What did Marcus Gray need to show in order to succeed on the copyright infringement claim? That Katy Perry and her music writing team had a reasonable opportunity to access and hear the “Joyful Noise” song before writing “Dark Horse,” and the “Joyful Noise” and “Dark Horse” songs are “substantially similar.”

Perry and her songwriting team testified that none of them had ever heard the song “Joyful Noise” prior to writing the “Dark Horse” song, and that they had not heard of the plaintiffs either. In this case, in the eyes of the jury, working against Katy Perry and her songwriting team are that “Joyful Noise” had 4 million views on YouTube and 2 million views on Facebook. In 2008, the song was nominated for a “Best Rap/Hip Hop Recorded Song of the Year” GMA Dove Award. And Perry is the child of two Pentecostal pastors

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and herself pursued a career in gospel music as a teenager. Why were these factors enough in the eyes of the jury? It seems that the factors in this case call into question the viability of any inference of access. Given the ubiquitous nature of music in social media, music streaming apps and websites, music award nominations and shows, and satellite radio, it seems rather easy to establish a reasonable probability of access. If a person can find or be exposed to almost any music by searching and/or subscribing to various sources of music, even the obscure and rare, how do we define widespread availability or reasonably accessible? Would it not be more just for a plaintiff to prove access in an objective manner – rather than through circumstantial inference?

In terms of the similarity of the songs, both sides of the case called musicologists to dissect and compare any commonalities. The plaintiffs' musicologist was clearly most persuasive with the jury, but was the jury sophisticated enough to appreciate all of the differences between the songs? The songs share a repetitious and common ostinato. But what else do they share? By all appearances – nothing. "Joyful Noise" is a Christian rap song released in 2008 and its lyrics focus on Jesus Christ and the Christian faith. Perry's "Dark Horse" is a pop music song released in 2013 and its lyrics focus on what appears to be an unstable and passionate relationship between two individuals, with a somewhat threatening undertone.

The jury held that Perry and her songwriting team did not independently create "Dark Horse." Rather, it was inspired by or taken from the song "Joyful Noise." But what if "Dark Horse" was actually inspired by Bach's "Adagio in F Minor" or the old gospel song "Go Down, Moses?" How do you isolate the influence of centuries of music down to one riff of eighth notes featured in a song, call it copyright infringement, and award damages of \$2.78M? The plaintiff does not seem to have adequately proven up its case.

Perry's counsel has made public statements pointing to a likely appeal of the decision. We will continue to follow the case and provide updates as they develop.