

Katy Perry's Dark Horse Gets Trammeled—Is It Time For a New Breed of Music Copyright Protection?

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by J. Michael Keyes



This week, a California jury found that Katy Perry, Capitol Records and a few other players were liable for copyright infringement to the tune of approximately \$2,800,000. The offending song is Katy Perry's runaway smash hit "Dark Horse." The Plaintiff's work is a 2008 Christian rap entitled "Joyful Noise" by Flame. A thoughtful comparison

and analysis of the songs can be found here. As one can tell, they do bear some similarity in that they both employ a similar "hook" musical phrase involving notes that are played at the same interval. Under existing law, the jury probably got it right. The problem is, the law on music copyright is all wrong.

Under our current music copyright regime, one composer can be liable for infringement and damages when that composer copied a short musical phrase. The problem with this formulation is that it completely ignores centuries of how the musical art form flourished and developed in western civilization.

From Bach to Beethoven to Billy Joel, they all copied pre-existing musical works to create great works of their own. Classical music is replete with examples of the masters copying from other masters. Handel, Bach, Brahms, Mozart, Rachmaninoff and countless others borrowed musical phrases and ideas from each other without fear of infringement claims.

There's actually something quite "American" about musical copying. Don't believe me? Check out a prior article I wrote a number of years ago entitled *Musical Musings*. As

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detailed therein, colonial ballad-operas used pre-existing musical works set to new lyrics. Some African American spirituals were adopted from Irish-Scotch melodies. Even some of our most beloved patriotic songs are not “original” to America. For example, our national anthem is set to the tune of a British drinking song. “My Country Tis of Thee” is England’s very own “God Save The Queen.” What about the 4th of July staple “America?” Sorry to burst your patriotic bubble, but it too was written on the other side of the Atlantic. “America” is actually set to the tune “God Save The King,” a rather ironic development in musical history!

My point is simply this: for the last several decades, our music copyright law has bucked centuries of musical borrowings in our western culture. The Katy Perry Dark Horse verdict is the most recent example of this enduring problem. Unless and until we change to a system where compulsory licenses are used to license short musical phrases and ideas, I’m afraid more horses will be trampled in the future.