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A “Dark Horse” Victory for Katy Perry: Central District of California Overturns $2.8M Copyright Verdict

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Nearly eight months after a trial that culminated in an adverse jury verdict, pop singer Katy Perry recently achieved a “Dark Horse” victory, proving that the legal battle was “Never Really Over.”On March 16, 2020, the Central District of California tossed out a July, 2019 jury verdict, which would have required Katy Perry to pay $2.8M in copyright damages in connection with her 2013 song, “Dark Horse.” The Court’s ruling followed and was guided by the Ninth Circuit’s decision a week prior, in a copyright case concerning Led Zeppelin’s “Stairway to Heaven,” that musical “building blocks belong in the public domain and cannot be exclusively appropriated by any particular author.”

The jury verdict had been issued in a suit brought against Perry by hip-hop artist Flame, alleging that an eight-note ostinato in Perry’s “Dark Horse” infringed a sequence of notes in a song by Flame, titled “Joyful Noise.” At trial, plaintiffs relied on a theory of widespread dissemination of the “Joyful Noise” song to demonstrate Perry may have heard the song, and subconsciously copied the sequence of notes while composing “Dark Horse.”

During post-trial motion practice leading to this recent ruling, however, the Court focused on whether the eight-note “Joyful Noise” ostinato Perry was accused of copying was deserving of copyright protection, in the first instance.

While recognizing there is generally a low bar for originality in copyright, the court found that because “common themes frequently reappear in various compositions…many, if not most of the elements that appear in popular music are not individually protectable.” Analyzing the individual elements of the 8-note ostinato in “Joyful Noise,” the Court determined none were sufficiently unique or original to warrant copyright protection. For example, citing the trial testimony of Perry’s expert musicologist, the Court that the pitch sequence present in the “Joyful Noise” ostinato is also present in an even rhythm in the children’s songs “Merrily We Roll Along” and “Jolly Old St Nicholas.”

Additionally, the court observed that even if the “Joyful Noise” ostinato had constituted protectable expression (which it does not), Perry would still have been entitled to judgment as a matter of law, because the evidence submitted at trial did not support a legal conclusion that the “Joyful Noise” and “Dark Horse” ostinatos are substantially similar. The two ostinatos utilize different pitches on the seventh and eighth beats, in addition to using different keys, tempos, harmonies, and rhythms.

Given the extent to which popular music draws upon certain common beats, patterns, and themes, the Court’s recent ruling reverses the chilling effect that the jury verdict might have had upon the genre. This decision creates more breathing room for pop artists to continue to use and build upon common musical elements found throughout pop music.

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