



## Don't count this "Dark Horse" out — Katy Perry avoids jury verdict

By Daniel Schnapp, Staci Jennifer Riordan, and Sydney Pritchett

The United States District Court for the Central District of California recently overturned a jury verdict requiring pop star Katy Perry to pay \$2.8 million dollars in damages for copyright infringement. This decision may have been prompted by the recent ruling in *Skidmore v. Led Zeppelin*, decided by the Ninth Circuit only a week earlier, where the Appeals Court ruled, *en banc*, in favor of the legendary band, and copyright defendant, Led Zeppelin.<sup>1</sup>

The Katy Perry case is based on a Christian rap group's allegation that Katy Perry's 2013 mega-hit "Dark Horse" ripped off an eight-note musical phrase from their song "Joyful Noise." In summer 2019, a jury decided "Dark Horse" did infringe on "Joyful Noise" and awarded the plaintiff \$2.8 million in damages.

Perry and her codefendants quickly moved for renewed judgment as a matter of law, including an amicus brief from a group of musicologists explaining why the underlying material in "Joyful Noise" was so commonplace that it did not warrant copyright protection.

On March 16, the district court, in a thirty-two page decision, set aside the jury verdict, finding that the plaintiff's claims could not meet copyright law's "extrinsic test." For the "extrinsic test" the court: "(1) identifies the protected elements of the plaintiff's work, and then (2) determines whether the protected elements are objectively similar to the corresponding elements in the allegedly infringing work."

The district court based its decision on a finding that each common element between the songs (for example, the length of the musical phrase, the key, and the evenly-syncopated rhythm) was not protected by eligible for copyright protection individually, and that the combination of the elements was not sufficiently unique or rare to qualify for copyright protection. The court seemed particularly swayed by the amicus musicologist's references to similar combinations in other musical works, and the fact that "prior compositions, including prior works composed by the

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<sup>1</sup> See our alert on this ruling, ["Good times, bad times: Ninth Circuit does away with "Inverse Ratio Rule" in Led Zeppelin copyright case and questions need to prove "access" March 10, 2020.](#)

parties, as well as what all agree is a separate non-infringing ostinato in ‘Dark Horse,’ all contain similar elements.”

While the court’s decision found that judgment as a matter of law was warranted on the non-copyrightability of the shared elements alone, the court also determined that the two works were not sufficiently similar under the second element of the extrinsic test. Specifically, the decision reinforced that the concept of “thin copyrights”—meaning that if a plaintiff is seeking protection for a combination of elements that are otherwise non-protectable, they must show virtual identity in order to succeed on their claims—was still applicable when analyzing only a portion of a musical work.

This decision comes after, and heavily cites, the recently decided landmark 9<sup>th</sup> Circuit case *Skidmore v. Led Zeppelin*. There, the en banc 9<sup>th</sup> Circuit decided that the infamous intro to Led Zeppelin’s “Stairway to Heaven” did not infringe on the plaintiff’s song. The court cited *Led Zeppelin* often for the proposition that, where a plaintiff seeks to prove copying of protected elements of “works where there is a narrow range of available creative choices, the defendant’s work would necessarily have to be ‘virtually identical’ to the plaintiff’s work in order to be substantially similar.” The decision also cites *Led Zeppelin*’s discussion of how access “may be established by a trivial showing that the work is available on demand” because of the infinitely increased online media access in the streaming age.

The timing of this decision, and its reliance on *Led Zeppelin* confirms earlier predictions that courts in the Ninth Circuit will feel empowered to find for defendants when, as is often true in musical copyright cases, artists are choosing between only a few musical options. Judge Snyder seemed to find this especially likely in pop music cases, stating “many if not most of the elements that appear in popular music are not individually protectable.”

Going forward, players in the music industry should take comfort in and caution from this decision. The Central District has made it clear that the bar to prove access has never been lower. In a time of streaming, social media sharing, and trackable downloads, it is easier and easier to show a way in which a defendant could have heard a plaintiff’s song. On the other hand, the bar for what is sufficiently unique for copyright protection has been raised. Most of the melodies, hooks, chord progressions, and ostinatos found in pop music will be merely combinations of otherwise unprotectable elements, meaning that in order to succeed on a claim of copyright infringement, any other works must be virtually identical. As the court stated in *Led Zeppelin*, these are “building blocks in the public domain” and just like on the playground, these blocks are meant to be shared.

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