

Docket No. 20-55401

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARCUS GRAY (p/k/a FLAME), et al.

Plaintiffs-Appellants

v.

KATHERYN ELIZABETH HUDSON (p/k/a KATY PERRY), et al.

Defendants-Appellees

On Appeal from the United States District Court

For the Central District of California

Case No. 2:15-cv-05642-CAS(JCx)

Hon. R. Christina A. Snyder, District Court Judge

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**AMICI CURIAE BRIEF OF MUSICOLOGISTS IN SUPPORT OF
DEFENDANTS-APPELLEES**

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April 5, 2021

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RULE 26.1 DISCLOSURE STATEMENT

Amici Musicologists have no parent corporation, are not publicly traded, and no publicly held company owns 10% or more of their stock. Defendants have consented to the filing of this *amici* brief, but plaintiffs have declined to consent.

Dated: April 5, 2021

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STATEMENT OF COMPLIANCE WITH RULE 29(c)(5)

This brief is submitted pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure. All parties have consented to its filing. No party's counsel authored the brief in whole or in part; no party or party's counsel contributed money intended to fund preparing or submitting the brief and no person or entity – other than the amicus curiae, its members, or its counsel – contributed funds for preparing or submitting the brief.

Dated: April 5, 2021

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I. INTRODUCTION

Judge Snyder in this case correctly vacated the errant jury verdict below, providing a comprehensive musical analysis, reviewing the expert testimony, and holding that as a matter of law, the trial evidence could not support the “extrinsic test” for substantial similarity. In so doing, consistent with Amici’s *amicus brief* in the district court case¹ and this Court’s decision in *Skidmore v. Led Zeppelin*, 952 F.3d 1051 (9th Cir. 2020) (en banc)², *cert den.*, reported at 2020 U.S. LEXIS 4591 (2020), the Court correctly found that: (i) none of the individual elements that Plaintiff’s expert Dr. Decker found similar were protectible - neither the 3-3-3-3-2-2- pitch sequence, the eighth note rhythm, the timbre, nor the texture, and (ii) the similarities in these elements were not “numerous enough, and their selection and arrangement original enough,” to warrant any copyright protection.

Of import to the Court was the fact that the portion of Katy Perry’s song “Dark Horse” at issue was an otherwise unprotectable musical phrase which appeared in prior art and that since this phrase was unprotectable, there could be no copyright infringement of those notes as a matter of law. The Court further concluded that even if the ostinato at issue were protected expression, because the phrase at issue comprises a small number of otherwise unprotectable elements,

¹ 3-ER-333-43.

² A similar group of Amici musicologists submitted briefs in this Circuit’s *en banc* review of *Skidmore*, Dckt. Nos. 103-2 (Amici’s brief) and 112 (reply memorandum) as well as in the so-called “Blurred Lines” case, *Williams v. Gaye*, Case No. 15-56880, Nos. 16-55089 and 16-55626 (consolidated), Dckt. No. 20, and the Petition for *en banc* review, Dckt. No. 99 (arguing that judges should seize upon their role as “gatekeeper” to prevent cases from going to a jury based on claims that should not survive the extrinsic test as a matter of law).

Plaintiffs, at best, had only a “thin copyright” and would have had to prove “virtual identity,” which they did not.

If this Court were to reverse and remand this case back for a second jury trial, it would be a step backward, worsening the rampant confusion and uncertainty within the American music industry about the application of current copyright jurisprudence to musical works. This confusion and uncertainty, in turn, would inhibit the work of American songwriters, and the American music industry at large, whose vigorous output of innovative expression has always depended upon access to, and unchecked use of, generic musical conventions and ideas. Accordingly, Amici Musicologists respectfully urge the Court to affirm the decision below vacating the Jury’s verdict.

II. INTEREST OF AMICI CURIAE

Amici are musicologists³ who research, teach and write about history, composition, analysis, and perception of musical works. In music copyright infringement cases musicologists provide testimony about similarities between contested musical works, and whether they are musically significant. Such testimony informs judges and jurors evaluating allegations of copyright infringement involving musical works.

Defendants rely on judges to screen out speculative infringement cases where there is no extrinsic similarity between musical works. Judges do so by gauging the significance of originality of expression in two musical compositions and, based on this information, reversing errant jury verdicts of infringement. Amici have a strong interest in

³ A complete list of Amici Musicologists and their affiliations is attached hereto as **Exhibit 1**.

Courts correcting obvious errors in juries' understanding of evidence relating to extrinsic similarity. The District court did just that in reversing the verdict below. Amici therefore has a strong interest in having the decision below affirmed.

III. ARGUMENT

To find actionable infringement, a jury must find that two works are both “extrinsically” *and* “intrinsically” substantially similar. *Swirsky v. Carey*, 376 F.3d 841 (9th Cir. 2004). The “extrinsic test” asks whether two works share a similarity of ideas and expression based on external, objective criteria.” *Smith v. Jackson*, 84 F.3d 1213, 1218 (9th Cir. 1996) (emphasis added), requiring the analytical dissection of a work and expert testimony” to “break[] the works down into their constituent elements, and compar[e] those elements for proof of copying” *Swirsky*, 376 F. 3d at 845. The intrinsic test is left to the trier of fact and “examines an ordinary person’s subjective impressions of the similarities between two works.” *Funky Films v. Time Warner Entertainment Co.*, 462 F. 3d 1072, 1077.

The jury as fact finder only reaches the question of intrinsic similarity after it has been established that the defendant’s work is extrinsically substantially similar to the plaintiff’s protectable expression. *See generally Swirsky, supra*. If a jury finds that there is no extrinsic similarity, as it should have here, it may not evaluate the works for intrinsic similarity. Jurors aurally perceive music differently and, where there is no objective similarity between two pieces of music, their intrinsic evaluations, produce uneven and unpredictable results.

The sole issue at trial below was whether “Ostinato 2” in “Dark Horse” infringed the ostinato in ”Joyful Noise”. 1-ER-5. Plaintiff’s

expert, Dr. Todd Decker, testified at trial based his findings of musical similarity entirely on a combination of five commonplace and unremarkable musical elements he alleged were shared by “Dark Horse” and “Joyful Noise”:

- (i) *A pitch sequence of scale degrees 3-3-3-3-2-2;*
- (ii) The temporal spacing of the notes (*i.e.*, rhythm);
- (iii) Timbre (in the form of a “pingy” synthesizer sound);
- (iv) A purported phrase length of eight notes; and
- (v) The “placement” of the ostinato in the sound recording’s mix.

2-ER-224:19-226:10; 2-ER-230:6-13; 2-ER-232:7-21; 2-ER-303:9-15.⁴

Dr. Decker’s testimony also established that these alleged similarities are commonplace elements and unremarkable, 2-ER-227:3-11; 2-ER-295:1-296:4, which was a viewpoint shared by Defendants’ expert Dr. Lawrence Ferrara.

Dr. Decker also testified as to the numerous differences between the two musical phrases at issue. 2-ER-238:20-239:25; 2-ER-241:1-6; 2-ER-278:8-280:10; 2-ER-284:9-22.

Because there was no similarity of protectable expression and because the selection and arrangement of the commonplace elements was not virtually identical, the Court below overturned the jury verdict here where the jury had found infringement. Amici believe that was a sound decision.

⁴ Plaintiffs argued at trial that these same elements purportedly constituted seven similarities. However organized, these were the only similarities at issue.

Musical works, like works of expression in other fields such as literature and visual arts, are comprised of unprotectable elements that are the building blocks for original creative expression. All copyrightable musical expression uses a limited number of pitches, rhythms, harmonies, key signatures, tempos, genres, etc., which may be monopolized by any musician. Using these basic elements, composers build more complex structures like chords and melodic and rhythmic motifs, which they further develop and combine to create the rhythmically structured melodies and underlying harmonic progressions that constitute the original backbone of a musical work.

If the Court's vacatur of the jury verdict below is overturned and the case remanded for a new jury trial, this will encourage similar speculative claims bolstered by spurious evidence of similarity of protectable musical expression. The jury will be permitted to hear an expert's cherry-picking an array of commonplace unprotectable musical elements and unprotectable sonic attributes, between two works to show similarity. This potential manipulation of musically untrained juries should have no place in a court's analysis of what constitutes actionable substantial musical similarity.

The Court's decision below provides a roadmap for other courts to follow in applying the "extrinsic test" and filtering out unmeritorious cases before they go to a jury. The decision below should be affirmed in all respects.

A. Judge Snyder is Correct That the Alleged Similarities Between the Ostinatos in Question Were Not of Original Expression

1. Fundamental Elements of Music

Musical works are built from a common vocabulary of fundamental elements like pitch, duration, meter, key and timbre⁵. It has been demonstrated that non-musicians are particularly susceptible to finding musical works to be similar based on a particular timbre or performance style they share. See Jamie Lund, *An Empirical Examination of the Lay Listener Test in Music Composition Copyright Infringement*, 11 Va. Sports Ent. L.J. 137 (2012). Accordingly, the unprotectable *sounds* of particular instruments, or vocal styles, which an author selects for the performance of a work can have an outsized effect on a jury's perception of *musical* similarity between the works. This subtle risk not readily understood by a jury of "lay audience" members underscores the reason why the "extrinsic test" must be rigorously applied. Otherwise, juries will be charged with applying the highly subjective intrinsic test to songs sharing merely a few unoriginal musical elements.

⁵ "Pitch" refers to one of the twelve notes in the standard chromatic scale of sound frequencies used in most Western music.

"Duration" refers to the length for which a note is sounded (e.g., quarter note and half note).

"Meter" refers to the grouping of beats, as indicated by a time signature (e.g., 4/4 refers to 4 equally spaced quarter-note beats per bar).

"Key" refers to a work's harmonic home base.

"Timbre" refers to the character or quality of a sound, e.g., "shrill", "percussive", "reverberant", etc.

The most important elements of a musical composition are *melody, harmony and rhythm*. *Melody* comprises a linear succession of pitches, each sounded for an assigned duration. It is typically the most distinctive and memorable musical aspect of a popular song and of musical works in general because melody is what listeners most readily comprehend, recall and replicate⁶. In popular songs, the sung vocal line is the most identifiable and hummable part of a composition, and substantial similarity analysis between two popular songs almost invariably results in a question of melodic similarity.⁷

Harmony is the relationship between two or more pitches that are sounded simultaneously or in close succession (*e.g.*, arpeggios). These pitches are commonly said to constitute a “chord.” The harmonic progression of a composition is the sequence of chords that typically supports melodies.⁸

Rhythm is the pattern of sounds and silences in a piece of music as determined by the sequence and duration of the notes being performed or the beats of a percussion instrument.⁹

⁶ See “Melody” in Glossary, MUSIC COPYRIGHT INFRINGEMENT RESOURCE, <https://blogs.law.gwu.edu/mcir/2018/12/20/melody/> (last accessed on April 3, 2021).

⁷ See Fishman, J. P., *Music as a Matter of Law*, Harvard Law Review, Vol. 131, pp. 1861–1923 (2018). Melody is the only musical element mentioned in the U.S. copyright and foreign copyright statutes.

⁸ See “Harmony” in Glossary, MUSIC COPYRIGHT INFRINGEMENT RESOURCE, <https://blogs.law.gwu.edu/mcir/2018/12/20/harmony/> (last accessed on April 3, 2021).

⁹ See “Rhythm” in Glossary, MUSIC COPYRIGHT INFRINGEMENT RESOURCE, <https://blogs.law.gwu.edu/mcir/2018/12/20/rhythm/> (last accessed on April 3, 2021).

In addition to the primary components of melody, harmony, and rhythm, there are, of course, myriad other elements available to composers. These include, for example, tempo, instrumentation, genre, dynamics, articulation, and phrasing.¹⁰ While combinations and deployments of these secondary elements may enhance the appeal of a musical work, these are essentially embellishments of the primary melodies, harmonies, and rhythm.

Describing a musical work merely by its a constellation of elements like ostinato, key, meter, dynamic markings, and timbre is meaningless. All songwriters draw upon these commonplace elements in forging their original musical expression. The fact that two or more composers may choose to employ some of the same common musical elements, however, has no bearing on the question whether their works contain substantially similar musical *expression*.

Amici believe that the Court below got it right: where there is no significant similarity of melody, harmony or rhythm, there can be no possibility of actionable similarity between two musical compositions. And no jury should ever be the fact finder on any such case.

¹⁰ “Tempo” refers to the pace of the beat (expressed as beats per minute measured on a metronome for example)

“Instrumentation” refers to Guitars, drums, piano, trumpet, trombone, etc.

“Genre” refers to Hip hop, rock, country, rhythm and blues, classical, etc.

“Dynamics” refers to the relative volume of the notes

“Articulation” refers to the attack, duration and decay of a given note, e.g., staccato, legato and slurred.

“Phrasing” refers to how groups of notes are played.

2. **There Were No Protectible Similarities Between the Ostinatos In “Dark Horse” And “Joyful Noise”**

The only evidence of alleged similarity the jury considered below was limited to five characteristics of the two ostinatos, none of which is original. Indeed, Dr. Decker acknowledged that similarity in any one of these elements would be an insufficient basis for infringement, but that it was their “combination” that was significant. 2-ER-303:1-17.

Judge Snyder was correct in rejecting the notion that that there were protectible similarities between the music compositions at issue.

The following illustration prepared by Amici Musicologists is derived from the undisputed transcriptions of the two phrases at issue and shows the two phrases transposed into the same key of A Minor.¹¹

The image displays two musical staves in 4/4 time, both transposed into the key of A Minor. The top staff, labeled "Joyful Noise", features a melodic line with eighth and sixteenth notes, including a triplet of eighth notes. The bottom staff, labeled "Dark Horse", shows a simpler melodic line primarily composed of quarter and eighth notes. The two phrases are presented side-by-side for comparison.

¹¹ The “Dark Horse” ostinato in this transcription is repeated simply to align it with the relevant ostinato in “Joyful Noise,” which is twice the length of that of “Dark Horse.” These adjustments are commonplace and accepted ways to compare two pieces of music.

a. The pitch sequence is not original

The sequence of pitches comprising the ostinato is so trite, and found in myriad pre-existing and public domain works, that it merits no copyright protection whatever.¹²

b. The Rhythm is not original

The rhythm in question is a pattern of repeating evenly spaced notes of equivalent length notes, an utterly commonplace sequence found in innumerable musical compositions. It is ubiquitous throughout all genres of Western Music and is entitled to no copyright protection.

c. The “pingy” sound of the synthesizer and placement of the ostinato in the “mix” are not compositional elements of the music, but rather elements of the sound recording

The sound of the recordings should not bear on the analysis to determine whether these two pieces of music share any original musical compositional elements. Indeed, in evaluating two pieces of music under the “extrinsic test,” the fact finder must not consider the sound of the recording. The selection of a particular sound is not a protectable element of a musical work and should not have been considered by the jury in this case.

¹² Appellants’ counsel has taken out of context statements Amici properly made in their amici brief to the district court concerning prior art. Appellees have replied to these misstatements in their brief (p. 39), Dckt No. 44.

d. The phrase length of the ostinato at issue is not original

The ostinatos do not simply repeat – their iterations are different. According to Dr. Decker, the ostinato in “Joyful Noise” takes 16 beats for all of the melodic content in that ostinato to be expressed before it repeats. According to Dr. Decker, in contrast, it only takes 8 beats for all the melodic content in ostinato 2 in “Dark Horse” to be expressed.

The implication that if the phrase lengths were the same in “Dark Horse” and “Joyful Noise” this would be significant on the matter of musical similarity, signals the extraordinarily attenuated nature of plaintiff’s allegation of copying. This is immediately obvious to musicians, given the ubiquitous and long-standing use of four-bar phrases in virtually every genre of Western music. Implying that this commonality has any relevance to the issue of copying is akin to suggesting that the fact that two books are written in the same language bears on the question whether one is a copy of the other.

3. The “combination” of these unoriginal elements is not original

Because none of the allegedly similar elements between “Joyful Noise” and “Dark Horse” are separately original and protectable, Plaintiffs resorted to the extravagant suggestion that because they selected and deployed these particular elements, they could legally prevent others from using a similar combination. Even if Plaintiffs’ compilation of elements acquired a modicum of protection, there are critical differences between the two ostinatos and no rational and reasonable jury could have found them to be “virtually identical,” per the Court’s instruction.

Again, Judge Snyder got it right in reversing the jury verdict.

First, the “Joyful Noise” ostinato is significantly different from that of “Dark Horse” because, “Joyful Noise” contains six instances¹³ of “portamento”¹⁴. These portamentos, which are significant to the “Joyful Noise” composition appear nowhere in “Dark Horse.”

Second, the first, fifth, eighth, ninth, thirteenth, and sixteenth pitches of “Dark Horse” occur before the corresponding pitches in “Joyful Noise.”

Third, the “Joyful Noise” ostinato is twice as long as the “Dark Horse” ostinato.

Finally, the resolution of the “Dark Horse” ostinato to the pitch at an interval of a sixth degree below the starting note is fundamentally different from the “Joyful Noise” ostinato, which resolves to the pitch a fifth degree below its primary starting pitch. This is apparent from a visual inspection of the final notes of the notated ostinatos (*see above*). In fact, there is not one note in common between the ostinatos in the fourth beat, nor even in any of the measures in question.

IV. CONCLUSION

The jury verdict of infringement below, which the Court below correctly vacated, had threatened to constrict the public domain and contribute to the spreading paralyzing uncertainty for songwriters and composers in general. The Court’s ruling put a stop to this runaway jurisprudence by confirming that juries may not find infringement when

¹³ The first to second, sixth to seventh, tenth to eleventh, twelfth to thirteen, seventeenth to eighteenth and twenty-first to twenty-second pitches in the example.

¹⁴ “Portamento” is a technique by which performers slide between frequencies of the notes they sing or play.

the musical similarities between works are trivial, commonplace, and not virtually identical. This ruling provided some solace to songwriters by protecting their use of the limited number of common elements, or “building blocks” available to songwriters.

It is well established that judges are responsible for ensuring that the “extrinsic test,” among other copyright doctrines, is carefully applied to prevent specious jury verdicts in music infringement cases based, in large part, on jurors’ perception of similar and unprotectable *sounds* between two musical compositions. Judge Snyder fulfilled her duties to a “t” in reversing this errant jury verdict and setting the law straight as to the Judge’s role in filtering out specious cases as a matter of law and providing a proper framework to analyze music copyright cases.

Amici urge this Court to affirm the decision below.

Dated: April 5, 2021

FREUNDLICH LAW
s/ Kenneth D. Freundlich
Kenneth D. Freundlich *Attorneys*
for Amici Curiae

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3023 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 365 in 14-point Century Schoolbook.

Dated: April 5, 2021

FREUNDLICH LAW

s/ Kenneth D. Freundlich
Kenneth D. Freundlich
Attorneys for Amici Curiae

CERTIFICATE OF SERVICE

I, Kenneth D. Freundlich, a member of the Bar of this Court, hereby certify that on April 5, 2021, I electronically filed the foregoing *AMICI CURIAE BRIEF OF MUSICOLOGISTS IN SUPPORT OF DEFENDANTS-APPELLEES* with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Kenneth D. Freundlich