

# Ninth Circuit affirms dismissal of copyright suit against Katy Perry's "Dark Horse"

By [Richard Z. Lehv](#)

Christian hip-hop artists Marcus Gray ("Flame"), Emanuel Lambert, and Chike Ojukwu, composers of the song "Joyful Noise," sued Katy Perry and others, claiming her hit song, "Dark Horse," copied the ostinato – a short musical phrase consisting of eight notes – in plaintiffs' song.[More](#)

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Christian hip-hop artists Marcus Gray ("Flame"), Emanuel Lambert, and Chike Ojukwu, composers of the song "Joyful Noise," sued Katy Perry and others, claiming her hit song, "Dark Horse," copied the ostinato – a short musical phrase consisting of eight notes – in plaintiffs' song.

After a trial, the jury found defendants liable for copyright infringement and awarded \$2.8 million in damages. But the district court vacated the jury award and granted judgment as a matter of law to defendants, saying the "Joyful Noise" ostinato was not copyrightable original expression.

On March 10, 2022, the U.S. Court of Appeals for the Ninth Circuit affirmed the district court's decision.

The appellate court wrote, "The trial record compels us to conclude that the ostinatos at issue here consist entirely of commonplace musical elements." The Ninth Circuit held that earlier songs, including "Jolly Old Saint Nicholas" and "Merrily We Roll Along" (which has the same tune as "Mary Had a Little Lamb"), used the same sequence of notes the plaintiffs were trying to protect.

The decision is a reminder that, in copyright cases, two works can't be compared in a vacuum: to assess "substantial similarity," expert witnesses and juries must first filter out similarities that are merely "commonplace elements." When that was done here, nothing protectable was left.

## **Primary Contacts**

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