

Gray v. Hudson  
28 F.4th 87  
United States Court of Appeals, Ninth Circuit.  
Filed March 10, 2022

## OPINION

M. SMITH, Circuit Judge:

Plaintiffs Marcus Gray (pka Flame), Emanuel Lambert, and Chike Ojukwu are Christian hip-hop artists who have sued Katheryn Hudson (pka Katy Perry), Capitol Records LLC, and several other defendants for copyright infringement. They claim that a repeating instrumental figure—in musical terms, an ostinato—in Hudson’s song “Dark Horse” copied a similar ostinato in plaintiffs’ song “Joyful Noise.” After a trial centering around the testimony of musical experts, a jury found defendants liable for copyright infringement and awarded \$2.8 million in damages. The district court vacated the jury award and granted judgment as a matter of law to defendants, concluding principally that the evidence at trial was legally insufficient to show that the Joyful Noise ostinato was copyrightable original expression.

We affirm. Copyright law protects “musical works” only to the extent that they are “original works of authorship.” 17 U.S.C. § 102(a). The trial record compels us to conclude that the ostinatos at issue here consist entirely of commonplace musical elements, and that the similarities between them do not arise out of an original combination of these elements. Consequently, the jury’s verdict finding defendants liable for copyright infringement was unsupported by the evidence.<sup>1</sup>

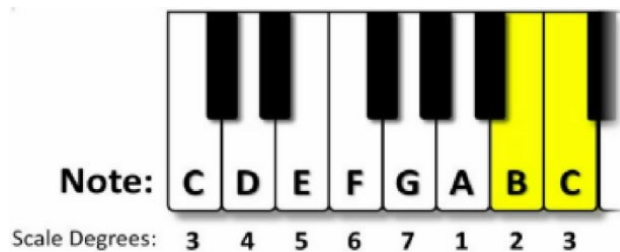
## BACKGROUND

### I. Musical Background

We begin by briefly explaining some vocabulary that we rely on throughout this opinion. A musical scale is essentially a sequence of musical notes or tones ordered by pitch (i.e., how “low” or “high” each note is). To illustrate this concept, a standard piano or keyboard instrument has white and black keys organized in a twelve-key repeating pattern. If one starts with any key on the piano and plays twelve white and black keys in order from left to right, she will have played all the notes of the “chromatic” scale in ascending order. That ordered sequence of twelve notes—which repeats itself at higher and lower registers across the keyboard—can be thought of as the musical equivalent of an artist’s coloring palette, as one can rearrange these notes into more complex sequences and add rhythmic (i.e., durational) variety to create memorable tunes.

In practice, many songs are based on scales that use only a smaller subset of the twelve notes in the chromatic scale. These scales have different names depending on which notes are chosen. The scale we are primarily concerned with today has seven notes and is called the “minor” scale.<sup>2</sup>

As with other scales, the notes in the minor scale can be referred to with alphabetic names (A, B, C, etc.), but the parties have generally opted to refer to them with numerical degrees indicating each note's ordered position in the scale. We agree that is the more convenient approach here. The image below, taken from the beginning of defendants' answering brief, illustrates how numerical scale degrees correspond to different keys on a piano in the minor scale<sup>3</sup> (the image begins with the third note of the scale on the far left rather than the first note—as discussed, the notes on a piano repeat themselves every twelve keys in different pitch registers):



## II. Factual Background

In 2007, plaintiff Ojukwu recorded a simple tune using a free music website. He later sold it to plaintiff Gray, who used it as an ostinato (i.e., a repeating musical figure) for Joyful Noise. A recording of Joyful Noise first appeared in the album *Our World Redeemed* in 2008. While Joyful Noise did not achieve significant commercial success or playtime on the radio, it received millions of views on YouTube and Gray's MySpace page. *Our World Redeemed* was also nominated for a Grammy award in the "Best Rock or Rap Gospel Album" category in 2009.

Defendants created Dark Horse in 2013. Hudson's trial testimony was that she met with two of her co-defendants at a recording studio and sampled several short musical fragments to consider using in a new song. The segment Hudson responded to most positively became the ostinato for Dark Horse. Dark Horse was first released on the album *Prism* along with several other tracks. It was a hit, resulting in a music video and a performance by Hudson at the Super Bowl halftime show in 2015.

The following features of the two ostinatos are undisputed. Both ostinatos are based on the minor scale (although they are in different keys, meaning that they treat different notes—i.e., keys on a piano—as the first note of the scale). The Dark Horse ostinato is made up of eight notes (sixteen, when repeated) which correspond to the minor scale degrees 3-3-3-3-2-2-1-5, while the Joyful Noise ostinato is made up of two slightly different eight-note figures (sixteen notes when combined) that correspond to the minor scale degrees 3-3-3-3-2-2-2-1/6 (in other words, 3-3-3-3-2-2-2-1 for the first eight notes, and 3-3-3-3-2-2-2-6 for the second eight notes). So, while each eight-note pattern begins with 3-3-3-3-2-2, they differ in the last two notes. Leaving aside some stylistic embellishment in Joyful Noise (specifically, the use of portamento, or "sliding" between different notes), both ostinatos also rely on a completely uniform rhythm, meaning each note is of equal duration in time.

## III. Trial Proceedings

Plaintiffs filed their operative complaint for copyright infringement against Hudson and her co-defendants in November 2016. The case proceeded to a bifurcated jury trial taking place from July

17, 2019, to August 1, 2019, with separate phases to determine liability and damages. Rather than putting forward direct evidence that defendants had copied elements of Joyful Noise, plaintiffs focused on circumstantial evidence that defendants had a reasonable opportunity to access Joyful Noise and that the ostinatos in both songs were substantially similar. For the latter point, in addition to testimony from Hudson and other witnesses, the liability phase of the trial turned largely on testimony by plaintiffs' expert musicologist, Dr. Todd Decker.

The heart of Dr. Decker's testimony concerned which specific elements of the ostinatos in Dark Horse and Joyful Noise were similar. Dr. Decker testified that:

The length of [each] ostinato is similar, eight notes. The rhythm of the ostinato is similar. The melodic content, the scale degrees present. The melodic shape so the—the way the melody moves through musical space. Similar, the [timbre] or the quality and color of the sound is similar, and the use of the—the placement of this material, this ostinato, in the musical space of the recording in the mix[,] that is also similar. So that's five or six points of similarity between the two ostinatos.<sup>4</sup>

However, Dr. Decker also said that there was “no one single ... element” that caused him to believe the ostinatos at issue were “substantially similar” when viewed “in isolation.” Rather, while “[a]ny single one of those [elements] would not have been enough,” it was “the combination of them” that led Dr. Decker to conclude that Joyful Noise and Dark Horse had substantially similar ostinatos. He also admitted that the ostinatos were different in some respects, though he clarified that he did not think this negated the similarities between them.

The jury also heard testimony from defendants' expert, Dr. Lawrence Ferrara, who disagreed with Dr. Decker's assessment that the ostinatos were substantially similar. He noted the use of different scale degrees at the end of each ostinato, pointing out that Dark Horse has a “leap” from 1 to 5 while Joyful Noise uses “step-wise” motion from 2 to 1 at the corresponding point in time. In addition, Dr. Ferrara explained that two well-known songs—“Jolly Old Saint Nicholas” and “Merrily We Roll Along” (which, as Dr. Ferrara noted, has the same tune as “Mary Had a Little Lamb”)—also use the 3-3-3-3-2-2 pitch sequence that the Dark Horse and Joyful Noise ostinatos share (or a similar 3-3-3-2-2 sequence for Merrily We Roll Along, with the third 3 doubled in duration). This testimony was not refuted (though Dr. Decker dismissed its importance to the similarity inquiry), nor was Dr. Ferrara's testimony that three other pieces of music predating Joyful Noise also used pitch progressions proceeding from 3 to 2 to 1 played in an even rhythm: “Love Me Or Hate Me” (which was composed by defendant Lukasz Gottwald, pka Dr. Luke), “Brainchild,” and “Choosing Life.”

For each phase of the trial, the jury was instructed on the law and given a special verdict form. Among other conclusions, the jury found specifically that Dark Horse used protected material from Joyful Noise, that the two songs contained substantially similar copyrightable expression, that defendants had a reasonable opportunity to hear Joyful Noise before composing Dark Horse, and that plaintiffs were entitled to 22.5% of defendants' net profits from Dark Horse, resulting in a total verdict of about \$2.8 million in damages.

#### **IV. Post-Trial Motions**

After the trial, defendants moved for judgment as a matter of law (JMOL) or, alternatively, for a new

trial pursuant to [Federal Rule of Civil Procedure 50\(b\)](#). . . .

The district court vacated the jury’s verdict and granted defendants’ JMOL motion. . . . As relevant here, the district court’s 32-page decision rejected all of defendants’ challenges to the jury verdict except their argument that the ostinatos were not substantially similar. Citing Dr. Decker’s testimony, the district court reasoned that none of the individual points of similarity the expert identified between Dark Horse and Joyful Noise constituted copyrightable original expression. The district court also did not believe that the combination of these elements constituted original expression. Alternatively, the district court concluded that this combination merited no more than a “thin” copyright, which is infringed only by “virtually identical” works. The district court determined that there were enough objective distinctions between the ostinatos such that they were not virtually identical.

Plaintiffs timely appealed. . . .

## ANALYSIS

The operative question is whether a “reasonable jury” would have had “a legally sufficient evidentiary basis” to conclude that defendants engaged in copyright infringement. [Fed. R. Civ. P. 50\(a\)\(1\)](#). . . .

Copyright protection extends only to works that contain original expression. . . . “Original, as the term is used in copyright, means only that the work was independently created by the author ... and that it possesses at least some minimal degree of creativity.” *Feist*, 499 U.S. at 345, 111 S.Ct. 1282. “To establish [copyright] infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work *that are original*.” *Id.* at 361, 111 S.Ct. 1282 (emphasis added).

We agree with the district court that plaintiffs failed to establish copying of any original—and, consequently, protected—elements of Joyful Noise. For that reason, we affirm its decision to vacate the jury award and grant JMOL to defendants. . . .

### I. Legal Framework for Copyright Infringement

Because plaintiffs did not present any direct evidence that defendants copied Joyful Noise’s ostinato, they were required to show that (1) defendants had “access” to their work and (2) the ostinatos in Joyful Noise and Dark Horse “are substantially similar.” . . . . We need not address the access prong because we may resolve this case based on the “substantially similar” prong. For that requirement, we have “traditionally determined whether copying sufficient to constitute infringement has taken place under a two-part test having ‘extrinsic’ and ‘intrinsic’ components.” *Apple*, 35 F.3d at 1442. “Both tests must be satisfied for the works to be deemed substantially similar.” . . . .

“The extrinsic test considers whether two works share a similarity of ideas and expression as measured by external, objective criteria. The extrinsic test requires ... breaking the works down into their constituent elements, and comparing those elements for proof of copying as measured by substantial similarity. Because the requirement is one of substantial similarity to protected elements of the copyrighted work, it is essential to distinguish between the protected and unprotected material in a plaintiff’s work.” . . . The intrinsic test focuses on “similarity of expression from the standpoint of the

ordinary reasonable observer, with no expert assistance.” *Apple*, 35 F.3d at 1442.

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## II. Protected Elements Contained in Joyful Noise

Because the extrinsic test for substantial similarity requires us to distinguish between “protected and unprotected material in a plaintiff’s work,” *Swirsky*, 376 F.3d at 845, the threshold issue is what—if anything—about the Joyful Noise ostinato qualifies as original expression that can serve as the basis for a copyright infringement claim. . . .

“Although copyright protects only original expression, it is not difficult to meet the famously low bar for originality.” *Skidmore*, 952 F.3d at 1069. “[T]he requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, no matter how crude, humble or obvious it might be.”

But “[e]ven in the face of this low threshold, copyright *does* require at least a modicum of creativity and does not protect every aspect of a work; ideas, concepts, and common elements are excluded. Nor does copyright extend to common or trite musical elements, or commonplace elements that are firmly rooted in the genre’s tradition. These building blocks belong in the public domain and cannot be exclusively appropriated by any particular author.” . . .

The trial record here requires us to conclude that no single point of similarity between Joyful Noise and Dark Horse arises out of a protectible form of expression. For this issue, it is arguably sufficient that plaintiffs’ expert musicologist, Dr. Decker, candidly testified that “[a]ny single one of those [elements] would not have been enough” for him to conclude that substantial similarity existed, and that only “the combination” of those elements led him to this conclusion. Nonetheless, Dr. Decker testified as an expert musicologist, not as an expert on copyright law. For that reason, we provide a brief overview of the individual musical elements identified by plaintiffs as original, and explain why those elements are not individually entitled to copyright protection. We address whether copyright law protects the combination of these unprotectible elements in the next section.

To reiterate, Dr. Decker drew attention to the following musical elements in support of his opinion that the Joyful Noise and Dark Horse ostinatos are substantially similar:

The length of [each] ostinato is similar, eight notes. The rhythm of the ostinato is similar. The melodic content, the scale degrees present. The melodic shape so the—the way the melody moves through musical space. Similar, the [timbre] or the quality and color of the sound is similar, and the use of the—the placement of this material, this ostinato, in the musical space of the recording in the mix[,] that is also similar. So that’s five or six points of similarity between the two ostinatos.

Though it used slightly different terminology, plaintiffs’ opening brief focused on essentially the same musical elements, adding that both ostinatos were based on the minor scale.

The evidence at trial was legally insufficient to establish that these musical elements are individually copyrightable. We note that Dr. Decker himself acknowledged that many of these elements are commonplace in the musical world, even if some aspects of the Joyful Noise and Dark Horse ostinatos were unusual for their respective genres. For example, apart from conceding that “there are many” songs “predating the creation of Joyful Noise that have ostinatos,” Dr. Decker explained that it is “characteristic” for musical phrases playing a role similar to the ostinatos at issue here “to last for eight beats.” And while Dr. Decker opined that it is uncommon to use completely even rhythms in popular music, he also testified that the use of such a rhythm in Joyful Noise and Dark Horse was a “relatively simple rhythmic choice” that “no composer’s entitled to monopolize.”<sup>6</sup> Plaintiffs adduced no evidence at trial contradicting their own expert’s testimony suggesting that these shared elements of the two ostinatos are merely common musical “building blocks” belonging to the public domain.

Even leaving aside these admissions, our precedents and other persuasive decisions make clear that no element identified by plaintiffs or Dr. Decker is individually copyrightable. Plainly, no person may copyright the minor scale, as such scales are common musical building blocks belonging to the public. . . . The fact that Joyful Noise and Dark Horse both make use of “sequence[s] of eight notes” played in an even rhythm is a similarly “trite” musical choice outside the protection of copyright law. . . . Along somewhat different lines, the fact that Joyful Noise and Dark Horse arguably have similar textures<sup>7</sup> is far too abstract of a similarity to be legally cognizable. . . .

Dr. Decker’s remark that the ostinatos have a similar timbre also does not help plaintiffs. Dr. Decker explained that timbre is a way of describing a sound’s quality: for example, a clarinet and a piano playing the same notes will sound noticeably different. Dr. Decker testified that the synthesizers used to play the Joyful Noise and Dark Horse ostinatos have similar timbres because they both use sounds that are “artificial,” are in a “high” register, and seem “pingy,” among other similar descriptors. But a copyright to a musical work does not give one the right to assert ownership over the sound of a synthesizer any more than the sound of a trombone or a banjo.

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That leaves us with plaintiffs’ contention that the pitch sequence utilized by the Joyful Noise ostinato is copyrightable, and with Dr. Decker’s related comments that the two ostinatos use similar “scale degrees” and have the same “melodic content [and] shape.” At this point, it is necessary to distinguish between an abstract sequence of pitches and a melody (or, more colloquially, a tune). Though the concepts are sometimes equated, creating a melody involves more than writing down a sequence of pitches; at a minimum, that sequence must also be “rhythmically organized” so as to form an “esthetic whole.” . . . While an eight-note *melody* may be copyrightable, the abstract eight-note *pitch sequence* that is a component of the melody is not. . . .

We note that this conclusion is consistent with the rule that “chord progressions may not be individually protected” because they are basic musical building blocks. *Swirsky*, 376 F.3d at 848. Chords are ultimately just a combination of pitches played simultaneously, . . . so a chord progression itself consists of multiple pitch sequences playing out at the same time. If the chord progression cannot be protected, the individual pitch sequences forming the progression cannot be either.

Turning finally to the ostinatos' "melodic shape," Dr. Decker described this as "the way the melody moves through musical space." He explained that "scale degrees have in them tendencies .... There are scale degrees that want to go somewhere ... and scale degrees that say you're home like 1." Later in his testimony, he elaborated that "3 wants to go to 2, [and] the 2 wants to go to 1 because 1 is our home note." Applying this concept to the Joyful Noise and Dark Horse ostinatos, he testified that the repetition of scale degree 3 in both songs created "tension that wants to be released and it's released to [scale degree 2] on a particularly strong beat."

As with musical texture, it could be argued that the overall "shape" of a melody as described by Dr. Decker is nothing more than an abstraction outside the protection of copyright law. . . . In any event, as the district court recognized, Dr. Decker's explanation that the two ostinatos moved "through musical space" in similar ways simply reflects "rules of consonance common in popular music." Just as films often rely on tropes to tell a compelling story, music uses standard tools to build and resolve dramatic tension. In this vein, courts have recognized that "while there are an enormous number of possible permutations of the musical notes of the scale, only a few are pleasing." . . . This is also underscored by the fact that uncontradicted evidence at trial showed that two songs predating Joyful Noise—Merrily We Roll Along and Jolly Old Saint Nicholas—used the same pitch sequence (albeit in the "major" scale rather than the minor scale) and melodic shape. . . .

Because the use of similar pitch sequences in the Joyful Noise and Dark Horse ostinatos results only from the use of commonplace, unoriginal musical principles, it cannot be the basis for a copyright infringement claim on its own. . . .

### **III. Protection of the Unprotectible Musical Elements in Combination**

Although no individual musical component of the Joyful Noise ostinato is copyrightable, we still must consider whether the Joyful Noise ostinato is protectible as a "combination of unprotectable elements." . . . That is the case only if the "selection and arrangement" of those elements is original in some way. . . .

We begin this analysis with some guiding principles. To start, the fact that the ostinatos here are only eight notes long does not foreclose the possibility of a protected arrangement of commonplace musical elements. . . . "Each note in a scale ... is not protectable, but a pattern of notes in a tune *may* earn copyright protection." . . . On the other hand, despite "the famously low bar for originality," *Skidmore*, 952 F.3d at 1069, "[t]rivial elements of compilation and arrangement ... fall below the threshold of originality." . . .

One circumstance where an arrangement of individual elements lacks enough creativity to garner copyright protection is when that arrangement is "practically inevitable" or in keeping with "an age-old practice, firmly rooted in tradition and so commonplace that it has come to be expected as a matter of course." . . . "For example, it is well-settled that copyright of a map does not give the author an exclusive right to the coloring, symbols, and key used in delineating boundaries of and locations within the territory depicted." . . . The same is true for an alphabetical arrangement of numbers in a phonebook. *Feist*, 499 U.S. at 363, 111 S.Ct. 1282. These are all utterly conventional ways of arranging information, and so they cannot be called "original" under copyright law.

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Likewise, the portion of the Joyful Noise ostinato that overlaps with the Dark Horse ostinato consists of a manifestly conventional arrangement of musical building blocks. Joyful Noise and Dark Horse contain similar arrangements of basic musical features mainly in that both employ the pitch progression 3-3-3-3-2-2 played in a completely flat rhythm. This combination is unoriginal because it is really nothing more than a two-note snippet of a descending minor scale, with some notes repeated. . . . Allowing a copyright over this material would essentially amount to allowing an improper monopoly over two-note pitch sequences or even the minor scale itself, especially in light of the limited number of expressive choices available when it comes to an eight-note repeated musical figure. . . .

Consequently, insofar as it combines musical building blocks in the same way that the Dark Horse ostinato does, the Joyful Noise ostinato lacks “the quantum of originality needed to merit copyright protection.” *Satava*, 323 F.3d at 811. If we were to hold otherwise, “it is hard to believe that any collection” of pitches arranged in a flat rhythm “could fail” to meet the originality threshold. . . .

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## CONCLUSION

Plaintiffs failed to put forward legally sufficient evidence that Joyful Noise and Dark Horse are extrinsically similar works with respect to any musical features protectible under copyright law. Consequently, we affirm the district court’s order vacating the jury award and granting JMOL to defendants.

**AFFIRMED.**