

**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

Marcus Gray, PKA Flame;  
EMANUEL LAMBERT; CHIKE  
OJUKWU,

*Plaintiffs-Appellants,*

v.

KATHERYN ELIZABETH HUDSON,  
PKA Katy Perry; JORDAN HOUSTON,  
PKA Juicy J; LUKASZ GOTTWALD,  
PKA Dr. Luke; SARAH THERESA  
HUDSON; KARL MARTIN SANDBERG,  
PKA Max Martin; HENRY RUSSELL  
WALTER, PKA Cirkut; KASZ  
MONEY, INC.; CAPITOL RECORDS,  
LLC; WB MUSIC CORP.; KOBALT  
MUSIC PUBLISHING AMERICA, INC.,  
*Defendants-Appellees.*

No. 20-55401

D.C. No.  
2:15-cv-05642-  
CAS-JC

OPINION

Appeal from the United States District Court  
for the Central District of California  
Christina A. Snyder, District Judge, Presiding

Argued and Submitted January 11, 2022  
Pasadena, California

Filed March 10, 2022

Before: RICHARD R. CLIFTON, MILAN D. SMITH,  
JR., and PAUL J. WATFORD, Circuit Judges.

Opinion by Judge Milan D. Smith, Jr.

---

### SUMMARY\*

---

#### Copyright

The panel affirmed the district court's order vacating a jury's award of damages for copyright infringement and granting judgment as a matter of law to Katheryn Hudson (pka Katy Perry) and other defendants.

Christian hip-hop artists Marcus Gray (pka Flame), Emanuel Lambert, and Chike Ojukwu claimed that an ostinato, or repeating instrumental figure, in Hudson's song "Dark Horse" copied a similar ostinato in plaintiffs' song "Joyful Noise."

The panel held that copyright law protects musical works only to the extent that they are "original works of authorship." The panel concluded that the ostinatos at issue here consisted entirely of commonplace musical elements, and the similarities between them did 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 because plaintiffs failed to put forward legally sufficient evidence

---

\* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

---

that Joyful Noise and Dark Horse were extrinsically similar works with respect to any musical features protectible under copyright law.

---

### COUNSEL

Michael A. Kahn (argued), Capes Sokol, Clayton, Missouri, for Plaintiffs-Appellants.

Vincent H. Chieffo (argued), Greenberg Traurig LLP, California, for Defendant-Appellee Katheryn Elizabeth Hudson.

Christine Lepera (argued), Jeffrey M. Movit, Jacob D. Albertson, and J. Matthew Williams, Mitchell Silberberg & Knupp LLP, New York, New York; Aaron M. Wais and Gabriella A. Nourafchan, Mitchell Silberberg & Knupp LLP, Los Angeles, California; for Defendants-Appellants Lukasz Gottwald, Sarah Theresa Hudson, Karl Martin Sandberg, Henry Russell Walter, Kasz Money Inc., Capitol Records LLC, WB Music Corp., and Kobalt Music Publishing America Inc.

John G. Snow, King Holmes Paterno & Soriano LLP, Los Angeles, California, for Defendant-Appellee Jordan Houston.

Eugene Volokh, Los Angeles, California, for Amici Curiae Recording Industry Association of America Inc., and National Music Publishers' Association.

Anjani Mandavia and David L. Burg, Mandavia Ephraim & Burg LLP, Los Angeles, California, for Amicus Curiae Motion Picture Association Inc.

Kenneth D. Freundlich, Freundlich Law, Encino, California, for Amicus Curiae Musicologists.

Edwin F. McPherson, McPherson LLP, Los Angeles, California, for Amici Curiae 110 Individual Songwriters, Composers, Musicians, Producers, Music Publishers, and Other Music Industry Professionals; Nashville Songwriters Association International; and Music Artists Coalition.

---

### 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

---

<sup>1</sup> We accept the amicus briefs submitted by (1) the Recording Industry Association of America and the National Music Publishers’ Association, (2) the Motion Picture Association, (3) a group of 110 individual songwriters and other music industry professionals, along with Nashville Songwriters Association International and Music Arts Coalition, and (4) a group of musicologists. *See* Dkt. Nos. 51, 54, 56, 58. We deny as moot defendants’ motion to strike material from plaintiffs’ opening brief, Dkt. No. 29, because we conclude that even if we were to consider the purportedly improper material, we would still decide this case in defendants’ favor for the same reasons given in this opinion.

# Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

## Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

## Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

## Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

## API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

## LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

## FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

## E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.