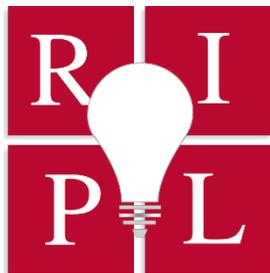


# UIC

## REVIEW OF INTELLECTUAL PROPERTY LAW



### IS *GRAY V. PERRY* THE ONE THAT GOT AWAY? THE IDEA-EXPRESSION DICHOTOMY AND MUSIC COPYRIGHT INFRINGEMENT

MARISA C. SCHUTZ

#### ABSTRACT

Many popular songwriters, recording artists, and bands—including Katy Perry, Juicy J, Pharrell Williams, Robin Thicke, and Led Zeppelin—find themselves involved in disputes over the copyrights in their musical compositions and sound recordings. Arguments arise over melody, lyrics, harmony, pitch, rhythm, tempo, tone, phrasing, and other musical elements in music copyright infringement matters. But which elements are actually protected under copyright law and which are so commonly used in the general creation of music that they are unprotectible? This is the difficult idea-expression dichotomy question that numerous courts are tasked with answering. This case note explores the idea-expression dichotomy in the context of music copyright infringement by taking a close look at the decision of the Central District of California in *Gray v. Perry* and the influential and related decisions of the Ninth Circuit in *Williams v. Gaye* and *Skidmore v. Led Zeppelin*. This case note examines how the courts decided which musical elements are protected under music copyright law and references decisions from different circuits that have wrestled with the same question: which musical elements are original expression and subject to copyright protection and which are tantamount to ideas that cannot be protected.

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MARISA C. SCHUTZ\*

I. INTRODUCTION

Whether it be listening to the radio in the car, singing along to Spotify in the shower, or attending a live concert of your favorite band, everyone can undoubtedly say that they have listened to music in “One Way Or Another.”<sup>1</sup> But have you ever considered how copyright law applies to your favorite recording artists such as Taylor Swift, Ed Sheeran, or Katy Perry?<sup>2</sup> Katy Perry and Juicy J definitely have.<sup>3</sup>

On September 11, 2019, the United States District Court for the Central District of California entered a judgment for \$2.8 million, holding that Katy Perry and Juicy J were liable for copyright infringement.<sup>4</sup> The copyright infringement lawsuit was brought by Christian rapper Marcus Gray, otherwise known as Flame.<sup>5</sup> Gray’s song “Joyful Noise” received notable recognition when it was nominated for a Grammy Award in 2008, and it peaked at number nine on the Billboard charts.<sup>6</sup> In the copyright infringement lawsuit he filed against Katy Perry and Juicy J, Gray claimed that their song “Dark Horse” infringed on “Joyful Noise.”<sup>7</sup> Katy Perry and Juicy J are both highly successful recording artists in the music industry. Their song “Dark Horse” was nominated for a Grammy Award in 2014, and it reached the number one spot on the Billboard charts.<sup>8</sup>

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<sup>1</sup> See BLONDIE, ONE WAY OR ANOTHER (Capitol Records 1978).

<sup>2</sup> See Hall v. Swift, No. CV 17-6882-MWF (ASx), 2020 WL 5358390, at \*2 (C.D. Cal. Sept. 2, 2020) (claiming that Taylor Swift’s song “Shake it Off” infringed on plaintiffs’ song “Playas Gon’ Play.”); see also Griffin v. Sheeran, 351 F. Supp. 3d 492, 494 (S.D.N.Y. 2019) (alleging that Ed Sheeran’s song “Thinking Out Loud” infringed on plaintiffs’ song “Let’s Get it On.”).

<sup>3</sup> See generally Gray v. Perry, 2:15-CV-05642-CAS-JCx, 2020 WL 1275221, at \*1 (C.D. Cal. Mar. 16, 2020) (arguing that Katy Perry and Juicy J’s song “Dark Horse” infringed on plaintiffs’ song “Joyful Noise.”).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> See FLAME, JOYFUL NOISE (2008); See also RECORDING ACADEMY GRAMMY AWARDS, <https://www.grammy.com/grammys/artists/flame/9045> (last visited Sept. 26, 2020) (showing the Grammy Award nomination Flame received for “Joyful Noise”); BILLBOARD, <https://www.billboard.com/music/lecrac/chart-history/gospel-digital-song-sales/song/680141> (last visited Sept. 26, 2020) (showing the peak position of the song “Joyful Noise” on the Billboard charts).

<sup>7</sup> Perry, 2020 WL 1275221, at \*1.

<sup>8</sup> See KATY PERRY AND JUICY J., DARK HORSE (Capitol Records 2014); see also RECORDING ACADEMY GRAMMY AWARDS, <https://www.grammy.com/grammys/artists/katy-perry/5726> (last visited on Sept. 26, 2020) (showing the Grammy Award that the song “Dark Horse” was nominated for);

Although the jury returned its verdict in favor of Gray, on March 16, 2020, District Judge Christina A. Snyder vacated the jury's verdicts and granted judgment for Perry and Juicy J as a matter of law.<sup>9</sup> This was done because Gray failed to show that the musical elements at issue in "Joyful Noise" were original expressions, either independently or combined.<sup>10</sup> Therefore, the musical elements at issue, namely an eight-note ostinato, were not entitled to copyright protection and were incapable of being infringed.<sup>11</sup>

This case note considers how the idea-expression dichotomy applies to popular music.<sup>12</sup> Part II of this case note will take an in-depth look at the case, *Gray v. Perry*. In Part III, this case note will discuss current copyright law and the idea-expression dichotomy in relation to copyright infringement. Part IV will analyze the court's position on the idea-expression dichotomy as it relates to commonplace musical elements.

In Part V, this case note will conclude that the court was correct when it held that the "Dark Horse" ostinato did not infringe upon the "Joyful Noise" ostinato.<sup>13</sup> An ostinato is a "short musical phrase or rhythmic pattern" that is used as a reoccurring theme throughout a musical composition.<sup>14</sup> Ostinatos are commonly used in musical compositions as one of the essential building blocks used to create a song.<sup>15</sup> This case note argues that to extend copyright protection to eight notes used recurringly in a musical composition would be akin to granting copyright protection to an idea rather than the original expression of the idea. Furthermore, this case note will suggest that future court decisions involving music copyright infringement should adhere to the precedent set by *Gray v. Perry* and the decision that shortly preceded it, *Skidmore v. Led Zeppelin*.<sup>16</sup>

## II. BACKGROUND

This section will discuss the relevant background material necessary to understand music copyright infringement, specifically in the Ninth Circuit. First, Subsection A will discuss the general principles of United States copyright law that

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BILLBOARD, <https://www.billboard.com/music/katy-perry/chart-history/HSI/song/797284> (last visited on Sept. 26, 2020) (showing the number one position the song "Dark Horse" reached on the Billboard charts).

<sup>9</sup> *Perry*, 2020 WL 1275221, at \*18.

<sup>10</sup> See generally *id.* at \*11 (noting that it was Katy Perry's star power and Capitol Records' marketing efforts, not the use of similar musical elements to Plaintiffs' song "Joyful Noise," that generated the commercial success of the song "Dark Horse.").

<sup>11</sup> *Id.* at \*17.

<sup>12</sup> See Copyright Act of 1976, 17 U.S.C. § 102 (codifying the idea-expression dichotomy which states that copyright protection extends only to the original expression of ideas and not to ideas themselves).

<sup>13</sup> *Perry*, 2020 WL 1275221, at \*1 (explaining that the portions of each song at issue, "Dark Horse" and "Joyful Noise," were both musical devices known as ostinatos).

<sup>14</sup> *Id.* at \*18 ("[The Encyclopedia Britannica defines] [a]n ostinato [as] a short musical phrase or rhythmic pattern repeated in a musical composition.").

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*; see generally *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1079 (9th Cir. 2020) (holding that the opening sequence of the band Led Zeppelin's song "Stairway to Heaven" does not infringe on the band Spirit's song "Taurus.").

one must understand before taking a closer look at music copyright law. After the foundation for general copyright law is laid, Subsection B will explore copyright law specifically as it relates to music. Next, Subsection C will briefly define the idea-expression dichotomy and explain how it applies to common musical elements. Finally, Subsection D will present the elements of a copyright infringement claim and the relevant tests used in the Ninth Circuit to analyze whether infringement exists.

### A. General Copyright Principles

The foundation for United States copyright law is found in the Patent and Copyright Clause of the Constitution: “The Congress shall have power to . . . promote the progress of science and useful arts, by securing for limited times to authors . . . the exclusive right to their . . . writings . . . .”<sup>17</sup> The Copyright Act of 1976 and its amendments elaborate on the different aspects of United States copyright law.<sup>18</sup> The underlying purpose of copyright law is to incentivize the creation of new creative works while also encouraging the free exchange of ideas.<sup>19</sup>

The general rule is that copyright protection extends to “original works of authorship fixed in any tangible medium of expression,” including musical compositions and sound recordings.<sup>20</sup> Although the original expression of ideas is copyrightable, ideas themselves are not eligible for copyright protection.<sup>21</sup> The copyright owner is typically the author or authors of the work.<sup>22</sup> The copyright owner enjoys six exclusive rights: (1) the reproduction right; (2) the derivative right; (3) the distribution right; (4) the public performance right; (5) the public display right; and (6) the digital public performance right.<sup>23</sup> These exclusive rights endure for the lifetime of the author plus seventy years after the author’s death, upon which copyright protection ends, and the work enters into the public domain.<sup>24</sup>

If any one of the exclusive rights is infringed, the copyright owner may bring a copyright infringement suit against the infringer.<sup>25</sup> However, a prerequisite to filing a copyright infringement suit is copyright registration with the United States Copyright

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<sup>17</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>18</sup> See generally 17 U.S.C. §§ 101–1401 (2021) (providing the current Copyright Act applicable to copyright registration, ownership, and infringement).

<sup>19</sup> *Feist Publications Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349–50 (1991).

<sup>20</sup> 17 U.S.C. § 102(a) (2021) (recognizing the different categories of creative works that are eligible for copyright protection).

<sup>21</sup> *Id.* § 102(b) (“In no case does copyright protection for an original work of authorship extend to any idea . . . regardless of the form in which it is described, explained, illustrated, or embodied in such work.”); see also *Feist*, 499 U.S. at 341 (reinforcing the fundamental principle of copyright law that facts and ideas cannot be copyrighted).

<sup>22</sup> 17 U.S.C. § 201(a) (2021).

<sup>23</sup> See *id.* § 106; see generally DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS, 212–13 (10th ed. 2019) (describing what the different exclusive rights entail in the context of musical works); see also *Diamond v. Gillis*, 357 F. Supp. 2d 1003, 1008 (E.D. Mich. 2005) (detailing the exclusive rights a copyright owner enjoys specifically related to musical compositions).

<sup>24</sup> 17 U.S.C. § 302 (2021); see also PASSMAN, *supra* note 23, at 310–11 (explaining that copyrighted works created after January 1, 1978, are protected for the life of the author plus seventy years and after expiring, go into the public domain; once in the public domain, the public may freely use the work without charge).

<sup>25</sup> 17 U.S.C. § 501 (2021).

Office.<sup>26</sup> At its core, a claim for copyright infringement requires a showing of ownership of a valid copyright and copying of protected elements within the copyrighted work.<sup>27</sup>

### B. *Music Copyright Fundamentals*

A song contains two separate copyrights: one for the musical composition and one for the sound recording.<sup>28</sup> A musical composition is comprised of the lyrics and melody of a song.<sup>29</sup> Contrastingly, a sound recording is the master audio recording of a song.<sup>30</sup> The copyright in a musical composition is infringed when an individual, without authorization from the copyright owner, reproduces the musical composition, creates a derivative work based on the musical composition, distributes the musical composition to the public, publicly performs the musical composition, or publicly displays the musical composition without permission.<sup>31</sup>

On the other hand, the copyright in a sound recording is more limited and is only infringed when an individual, without authorization from the copyright owner, reproduces the sound recording, creates a derivative work based on the sound recording, distributes copies of the sound recording, or publicly performs the sound recording through a digital transmission.<sup>32</sup>

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<sup>26</sup> 17 U.S.C. § 411 (2021); *see also* U.S. COPYRIGHT OFF., CIRCULAR 1: COPYRIGHT BASICS 5 (Dec. 2019), <https://www.copyright.gov/circs/circ01.pdf> (explaining that copyright registration is not required but confers several significant benefits including the ability to bring civil infringement suits, the establishment of a public record of a copyright claim, prima facie evidence of a valid copyright, and the eligibility for statutory damages, attorneys' fees, and costs); *but see* Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC, 139 S. Ct. 881, 892 (2019) (holding that registration is not complete until "the Register has registered a copyright after examining a properly filed application.").

<sup>27</sup> Williams v. Gaye, 895 F.3d 1106, 1119 (9th Cir. 2018) (outlining the basic elements of a copyright infringement claim, specifically in the Ninth Circuit).

<sup>28</sup> Newton v. Diamond, 204 F. Supp. 2d 1244, 1248–49 (C.D. Cal. 2002) ("Sound recordings and their underlying musical compositions are separate works with their own distinct copyrights.").

<sup>29</sup> *Id.* at 1249; *see also* 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.05 (2020) ("A musical composition consists of rhythm, harmony, and melody, and it is from these elements that originality is to be determined.").

<sup>30</sup> *See generally* 17 U.S.C. § 101 (2021) (defining sound recordings as "works that result from the fixation of a series of musical, spoken, or other sounds . . . regardless of the nature of the material objects . . . in which they are embodied."); *see also* BTE v. Bonnezeze, 43 F. Supp. 2d 619, 627 (E.D. La. 1999) (comparing sound recordings and musical compositions: "The sound recording is the aggregation of sounds captured in the recording, while the song or tangible medium of expression embodied in the recording is the musical composition.").

<sup>31</sup> 17 U.S.C. § 106 (2021); *see also* PASSMAN, *supra* note 23, at 213 (applying a copyright owner's exclusive rights specifically to musical compositions). Examples of public performances of a musical composition include playing a song at a concert venue, on the radio, or through a streaming service. Examples of a derivative work of a musical composition include a song that parodies the original, a sample, or a remix. The only example provided for the public display of a musical composition is the display of lyrics.

<sup>32</sup> 17 U.S.C. § 114(a) (2021).

### C. *The Idea-Expression Dichotomy*

The idea-expression dichotomy is codified in the Copyright Act of 1976 and states that the original expression of ideas is eligible for copyright protection, but ideas and facts are not protectible themselves.<sup>33</sup> In the context of musical works, musical devices such as notes, chords, scales, and key signatures are essential building blocks for the creation of music, and therefore, are not copyrightable subject matter by themselves.<sup>34</sup>

### D. *Music Copyright Infringement*

The two general elements of a music copyright infringement claim are proof of ownership of a valid copyright, in either a musical composition or sound recording, and proof of unauthorized copying of original elements from the musical work.<sup>35</sup> Ownership of a valid copyright is rarely contested because a certificate of copyright registration provides prima facie evidence of a valid copyright.<sup>36</sup> However, the second element, unauthorized copying of original elements of the copyrighted work, has been litigated extensively.<sup>37</sup>

There are two ways that unauthorized copying of a musical work can be established: (1) through direct evidence of copying; or (2) through a showing that the alleged infringer had access to the musical work and that there is substantial similarity between the original song and the infringing song.<sup>38</sup> Direct evidence of access to a musical work is rare, so access is typically shown through circumstantial evidence such as widespread dissemination of the original song.<sup>39</sup> The key to establishing access is determining whether an alleged infringer had a “reasonable

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<sup>33</sup> 17 U.S.C. § 102 (2021).

<sup>34</sup> *Id.*; see generally *Gaste v. Kaiserman*, 863 F.2d 1061, 1068–69 (2d Cir. 1988) (only a “limited number of notes and chords [are] available to composers” and as a result “common themes frequently reappear in various compositions . . . Thus, [substantial] similarity between pieces of popular music must extend beyond . . . themes that are so trite as to be likely to reappear in many compositions.”); see also *Tisi v. Patrick*, 97 F. Supp. 2d 539, 548 (S.D.N.Y. 2000) (holding that musical elements such as key signature, tempo, chord structure and harmonic progression, and guitar rhythm are common, unprotectable musical elements that are not subject to copyright protection as a matter of law).

<sup>35</sup> *Tisi*, 97 F. Supp. 2d at 546.

<sup>36</sup> See *Milton H. Greene Archives, Inc. v. BPI Commc’ns, Inc.*, 378 F. Supp. 2d 1189, 1194 (C.D. Cal. 2005); *Sony Music Entm’t v. Cox Commc’ns, Inc.*, 426 F. Supp. 3d 217, 224 (E.D. Va. 2019); *King Records, Inc. v. Bennett*, 438 F. Supp. 2d 812, 837 (M.D. Tenn. 2006).

<sup>37</sup> See *Feist*, 499 U.S. at 361; *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 574 (1994); *Bikram’s Yoga College of India, L.P. v. Evolution of Yoga, LLC*, 803 F.3d 1032, 1037 (9th Cir. 2015); *Williams*, 895 F.3d at 1120; *Led Zeppelin*, 925 F.3d at 1064.

<sup>38</sup> See generally *L.A. Printex Indus. v. Aeropostale, Inc.*, 675 F.3d 841, 846 (9th Cir. 2012) (providing the general test to prove copying and establish copyright infringement); see also *Selle v. Gibb*, 741 F.2d 896, 900 (7th Cir. 1984) (specifying the test for copying in regard to a musical composition).

<sup>39</sup> See *Selle*, 741 F.2d at 901 (“[D]irect evidence of copying is rarely available, [so] the plaintiff can rely upon circumstantial evidence to prove [copying], and the most important [type] of this sort of circumstantial evidence is proof of access.”); see also *Loomis v. Cornish*, 836 F.3d 991, 995 (9th Cir. 2016) (“Where there is no evidence of access, circumstantial evidence can be used to prove access either by (1) establishing a chain of events linking the plaintiff’s work and the defendant’s access, or (2) showing that the plaintiff’s work has been widely disseminated.”).

opportunity” to hear an artist and copyright owner’s original song.<sup>40</sup> Courts have inferred access where a song is readily available on multiple mediums such as terrestrial radio or streaming services.<sup>41</sup>

Once access is shown, there is no copyright infringement unless substantial similarity between the two songs is also established.<sup>42</sup> Similar to the test to prove copying, the Ninth Circuit uses a two-prong test to show substantial similarity between the original song and the infringing song: (1) the objective extrinsic test; and (2) the subjective intrinsic test.<sup>43</sup> The objective extrinsic test requires the court to identify the protected elements of the copyright owner’s song and determine whether the protected musical elements are objectively similar to corresponding elements in the alleged infringing song.<sup>44</sup> The extrinsic test helps courts discern whether the alleged copying of a song was illicit or permitted.<sup>45</sup>

Although individual elements of a song may be ineligible for copyright protection on their own, they may be eligible for copyright protection when they are combined.<sup>46</sup> However, it is nearly impossible to extend copyright protection to a combination of individually unprotected musical elements that have a “narrow range of available creative choices,” such as common musical devices, including scales and chord progressions, unless the new combination is nearly identical to the original song.<sup>47</sup>

The extrinsic test can be satisfied in one of two ways: (1) either the musical elements at issue are individually protectable; or (2) the musical elements are protectable when combined.<sup>48</sup> To receive copyright protection, the individual elements of a song must be original and expressed in tangible form.<sup>49</sup> Similar musical devices are used in most popular music, and therefore, “many of the elements that appear in popular music are not individually protectable.”<sup>50</sup> All new music necessarily relies on

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<sup>40</sup> See 4 NIMMER, *supra* note 29, § 13.02[A].

<sup>41</sup> See *Led Zeppelin*, 952 F.3d at 1068 (“Given the ubiquity of ways to access media online, from YouTube to subscription services like Netflix and Spotify, access may be established by a trivial showing that the work is available on demand.”).

<sup>42</sup> *Williams*, 885 F.3d at 1168.

<sup>43</sup> See *Perry*, 2020 WL 1275221 at \*3; see also *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 485 (9th Cir. 2000) (“Proof of the substantial similarity is satisfied by a two-part test of extrinsic similarity and intrinsic similarity.”).

<sup>44</sup> See *Led Zeppelin*, 952 F.3d at 1064 (“The extrinsic test compares the objective similarities of specific expressive elements in the two [songs]. Crucially, because only substantial similarity in protectable expression may constitute actionable copying that results in infringement liability, it is essential to distinguish between the protected and unprotected material . . . .”); *Malibu Textiles, Inc. v. Label Lane Int’l*, 922 F.3d 946, 952 (9th Cir. 2019); *Swirsky v. Carey*, 376 F.3d 841, 845 (9th Cir. 2004); *Morill v. Stefani*, 338 F. Supp. 3d 1051, 1058 (C.D. Cal. 2018).

<sup>45</sup> See *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1117 (9th Cir. 2018) (“[C]opyright law does not forbid all copying, only the illicit copying of protected works.”).

<sup>46</sup> See *Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003) (“[A] combination of unprotectable elements is eligible for copyright protection only if those elements are numerous enough and their selection and arrangement original enough that their combination constitutes an original work of authorship.”).

<sup>47</sup> See *Led Zeppelin*, 952 F.3d at 1079 (holding that there is a narrow range of creative choices available for musical compositions using specific major or minor scales because there are a limited number of chord progressions that can accompany lyrics and still sound appealing).

<sup>48</sup> *Perry*, 2020 WL 1275221, at \*4, \*8.

<sup>49</sup> 17 U.S.C. § 102(a) (2021); see *Carey*, 376 F.3d at 851.

<sup>50</sup> See *Perry*, 2020 WL 1275221, at \*4; see also 1 NIMMER, *supra* note 29, § 2.05 (“In the field of popular songs, many, if not most compositions bear some similarity to prior songs.”).

the essential musical devices and common building blocks utilized in other music.<sup>51</sup> “These building blocks belong in the public domain and cannot be exclusively appropriated by any particular author.”<sup>52</sup>

When musical elements are not protected individually, they may still qualify for copyright protection as a combination. A combination of musical elements is protected when the particular selection and arrangement of the music is an original expression.<sup>53</sup> However, “[i]t is most unusual for infringement to be found on the basis of similarity of a single line, and generally, the likelihood of copying but a single line of such importance . . . is remote.”<sup>54</sup> If the extrinsic test cannot be satisfied on either ground, there is no copyright infringement because the musical elements at issue are not copyrightable expression.<sup>55</sup>

If the objective extrinsic test is satisfied, the subjective intrinsic test is applied.<sup>56</sup> The subjective intrinsic test asks whether an ordinary observer would think that the two works were substantially similar or “whether the ordinary reasonable person would find the total concept and feel of the works to be substantially similar.”<sup>57</sup> The subjective intrinsic test is generally left to the jury to decide, and because of this, courts are hesitant to disturb the jury’s findings with regard to the intrinsic test.<sup>58</sup> Both the objective extrinsic test and the subjective intrinsic test must be satisfied to conclude that two works are substantially similar.<sup>59</sup>

### III. THE CASE

#### A. *Facts*

Christian rappers Marcus Gray, Emmanuel Lambert, and Chike Ojukwu, filed a copyright infringement lawsuit against popstar Katy Perry, rapper Juicy J, and the other parties involved in the chain of distribution of the song “Dark Horse.”<sup>60</sup> The complaint alleged that Defendants’ song “Dark Horse” infringed on Plaintiffs’ song “Joyful Noise.”<sup>61</sup> A similar eight-note ostinato incorporated into both songs was at the

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<sup>51</sup> See *Campbell*, 510 U.S. at 575 (“Music . . . borrows, and must necessarily borrow, and use much which was well known and used before.”).

<sup>52</sup> *Led Zeppelin*, 952 F.3d at 1069.

<sup>53</sup> See *id.* at 1059; see also *Williams*, 895 F.3d at 1117 (finding that a combination of musical elements may receive copyright protection if it is sufficiently original).

<sup>54</sup> See 4 NIMMER, *supra* note 29, § 13.03[A][2][a].

<sup>55</sup> *Stefani*, 338 F. Supp. 3d at 1058.

<sup>56</sup> *Malibu Textiles*, 922 F.3d at 952–53.

<sup>57</sup> *Pasillas v. McDonalds Corp.*, 927 F.2d 440, 442 (9th Cir. 1991).

<sup>58</sup> *Perry*, 2020 WL 1275221, at \*13.

<sup>59</sup> *Id.* at \*3.

<sup>60</sup> *Id.* at \*1 (naming the other defendants in the case as Dr. Luke, Sarah Hudson, Max Martin, Cirkut, Kasz Money Inc., Capitol Records LLC, Kitty Purry Inc., UMG Recordings Inc., Universal Music Group Inc., WB Music Corp., BMG Rights Management LLC, and Kobalt Music Publishing America, Inc.).

<sup>61</sup> *Id.* at \*1.

heart of the allegations.<sup>62</sup> Plaintiffs complained that the utilization of an eight-note ostinato in “Dark Horse” infringed on the musical composition copyright of a similar eight-note ostinato in “Joyful Noise.”<sup>63</sup> Plaintiffs claimed that the individual ostinato in “Joyful Noise” was protected original expression and that Defendants had access to it when they composed the ostinato for “Dark Horse.”<sup>64</sup>

### B. *Procedural History and Issues*

Between July 17, 2019, and August 1, 2019, a jury trial was held to decide whether the “Dark Horse” ostinato infringed the “Joyful Noise” ostinato.<sup>65</sup> After the trial, the jury found Katy Perry and Juicy J liable for copyright infringement and awarded Marcus Gray and the other plaintiffs \$2.8 million in damages.<sup>66</sup> On September 11, 2019, judgment was entered in favor of Plaintiffs.<sup>67</sup> Defendants followed with a string of procedural moves, attempting to persuade the court to grant judgment as a matter of law or, in the alternative, a new trial on the issues.<sup>68</sup>

Ultimately, a bench trial was held to determine whether judgment as a matter of law in favor of Katy Perry and Juicy J was appropriate, whether a new trial was appropriate, and whether prejudgment interest should be granted to Marcus Gray and the other plaintiffs.<sup>69</sup> The main issue concerning music copyright infringement turned on whether the individual elements of Plaintiffs’ song “Joyful Noise” were independently protectable original expression, and if not, whether unprotected elements of a song are protected when they are combined.<sup>70</sup>

### C. *The Holding of the Court*

The court granted Defendants’ motion for judgment as a matter of law, vacating the jury’s verdicts that held Defendants liable for infringement and granted Plaintiffs \$2.8 million in damages.<sup>71</sup> The court held that the “Dark Horse” ostinato did not infringe on the “Joyful Noise” ostinato because none of the individual elements at issue in the “Joyful Noise” ostinato were independently entitled to copyright protection.<sup>72</sup>

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<sup>62</sup> *Perry*, 2020 WL 1275221, at \*18.

<sup>63</sup> *Id.* at \*1.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Perry*, 2020 WL 1275221, at \*1.

<sup>68</sup> *Id.* (detailing the various procedural mechanisms used by Defendants and Plaintiffs, including Defendants’ motions for judgment as a matter of law and for a new trial and Plaintiffs’ opposition and motion for prejudgment interest).

<sup>69</sup> *Id.* at \*2 (explaining when judgment as a matter of law is appropriate).

<sup>70</sup> *Id.* at \*3 (“The sole issue at trial concerned . . . whether defendants’ “Ostinato 2” in “Dark Horse” infringed upon plaintiffs’ ostinato in “Joyful Noise” by copying constituent elements of plaintiffs’ ostinato that are original.”).

<sup>71</sup> *Id.* at \*18.

<sup>72</sup> *Perry*, 2020 WL 1275221, at \*7 (“The Court cannot conclude, pursuant to the extrinsic test, that any of the allegedly original individual elements of the “Joyful Noise” ostinato are independently protectable as a matter of law.”).

Likewise, the court also held that the individual elements of the “Joyful Noise” ostinato were unprotectable as a combination.<sup>73</sup>

The court based its decision, in part, on Plaintiffs’ own expert witness testimony, which highlighted five characteristics of the “Joyful Noise” ostinato that demonstrated that the individual elements of the ostinato were not original.<sup>74</sup> First, the phrase length of the “Joyful Noise” ostinato is eight beats, a typical length for ostinatos.<sup>75</sup> Second, the pitch sequence used in the ostinato is a commonly used musical pattern that generally serves to build up to a climax in songs.<sup>76</sup> Third, the note resolution used in the ostinato is commonplace in the majority of popular music and more necessary than original.<sup>77</sup> Fourth, the rhythm of the ostinato is simple.<sup>78</sup> Finally, the “pingy synthesized” timbre of the ostinato is common in popular music.<sup>79</sup>

Plaintiffs presented nine elements intended to prove the originality of the “Joyful Noise” ostinato: (1) the minor scale key and melody; (2) the phrase length; (3) the pitch sequence; (4) the resolution; (5) the eight-note rhythm; (6) the syncopated, even rhythm; (7) the general use of the ostinato as a musical device; (8) the timbre; and (9) the texture.<sup>80</sup> However, the court discredited each of these elements and held that none of them were individually entitled to copyright protection.<sup>81</sup>

First, the key or scale of a song is ineligible for copyright protection.<sup>82</sup> Second, the length of a phrase is not an “independently protectable musical element.”<sup>83</sup> Third, pitch sequence is “not entitled to copyright protection.”<sup>84</sup> Fourth, resolution is ineligible for individual copyright protection because it is commonplace in popular music.<sup>85</sup> Fifth, a rhythm consisting of eight notes is also common and not afforded individual copyright protection.<sup>86</sup> Sixth, an evenly-spaced rhythm, standing alone, does not warrant copyright protection.<sup>87</sup> Seventh, an ostinato is another common musical element that,

<sup>73</sup> *Perry*, 2020 WL 1275221, at \*10 (“[T]he musical elements that comprise the 8-note ostinato in ‘Joyful Noise’ are [not] numerous enough and [not] arranged in a sufficiently original manner to warrant copyright protection.”).

<sup>74</sup> *Id.* at \*6 (showing that the “Joyful Noise” ostinato was not comprised of original elements entitled to copyright protection).

<sup>75</sup> *Id.* (“It is characteristic for a phrase [such as an ostinato] to last for eight beats.”).

<sup>76</sup> *Id.* (“A repeating scale degree of 3 that later resolves is a technique used for building up tension that wants to be released and . . . when such tension is released in a song with a strong beat . . . it is released to 2.”).

<sup>77</sup> *Id.* (“[S]cale degrees have tendencies in popular music such that, to make a pleasant consonant sound, 3 wants to go down to 2 and 2 desperately wants to go to 1 because 1 is our home note.”).

<sup>78</sup> *Perry*, 2020 WL 1275221, at \*6 (“This is a relatively simple rhythmic choice and . . . no composer [is] entitled to monopolize the rhythm of eight even quarter notes.”).

<sup>79</sup> *Id.* (“[The timbre] is essentially common since it would be very difficult to monopolize.”).

<sup>80</sup> *Id.* at \*5.

<sup>81</sup> *Id.* at \*6 (“The nine individual elements that the plaintiffs identify . . . are precisely the kinds of commonplace elements that courts have routinely denied copyright protection.”).

<sup>82</sup> *Id.* (“The key or scale in which a melody is composed is not protectable as a matter of law.”).

<sup>83</sup> *Perry*, 2020 WL 1275221, at \*6.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at \*7 (“[T]he way that the “Joyful Noise” ostinato resolved is determined by rules of consonance common in popular music, it is not the type of musical element that is protectable as a matter of law.”).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* (“[A]n evenly-syncopated rhythm . . . is also not a protectable element.”).

by itself, is not entitled to individual copyright protection.<sup>88</sup> Eighth, the timbre is yet another commonplace musical element ineligible for copyright protection.<sup>89</sup> Lastly, the texture of a musical composition is not an element individually afforded copyright protection.<sup>90</sup>

After concluding that the individual elements of the “Joyful Noise” ostinato were not entitled to copyright protection, the court also held that the elements were not protected as a combination.<sup>91</sup> Using the same factors mentioned above, the court concluded that, even in combination, the individually unprotected elements contained in the “Joyful Noise” ostinato were ineligible for copyright protection.<sup>92</sup> Therefore, because neither the individual elements nor the combination of the individual elements were found to be protected copyrightable expression, the court held that Defendants were not liable for copyright infringement and vacated the \$2.8 million award of damages to Plaintiffs.<sup>93</sup>

#### IV. ANALYSIS

This section will argue that the court correctly decided *Gray v. Perry* when it concluded that the eight-note ostinato in Defendants’ song, “Dark Horse,” did not constitute copyright infringement of the eight-note ostinato in Plaintiffs’ song, “Joyful Noise.”<sup>94</sup> In support of this argument, this section will show how the idea-expression dichotomy applies to commonplace elements of popular music.<sup>95</sup> In addition, this section will demonstrate how the *Perry* court properly adhered to Ninth Circuit precedent established by *Skidmore v. Led Zeppelin*, when it held that the eight-note

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<sup>88</sup> *Perry*, 2020 WL 1275221, at \*7 (“[A]n ostinato is a basic musical device that is common in popular music, [so] the use of an ostinato in a given composition is not, standing alone, protectable.”).

<sup>89</sup> *Id.* (“A synthesized timbre is a commonplace element of contemporary popular music that is not protectable as a matter of law.”).

<sup>90</sup> *Id.* (“[A] composition’s texture is an inherent feature in any kind of music.”).

<sup>91</sup> *Id.* at \*10 (“[T]he signature elements of the 8-note ostinato in “Joyful Noise” . . . [are] not a particularly unique or rare combination, even in [their] deployment as an ostinato.”).

<sup>92</sup> *Id.* (“[T]he sole musical phrase that plaintiffs claim infringement upon is not protectable expression . . . and plaintiffs infringement claim fails as a matter of law.”).

<sup>93</sup> *Perry*, 2020 WL 1275221, at \*10.

<sup>94</sup> *Id.*, at \*18 (finding that defendants were not liable for copyright infringement because the musical elements in the “Joyful Noise” ostinato were neither individually nor collectively protected by the copyright for the underlying musical composition).

<sup>95</sup> See *Darrell v. Joe Morris Music Co.*, 113 F.2d 80 (2d Cir. 1940); *Granite Music Corp. v. United Artists Corp.*, 532 F.2d 718, 720 (9th Cir. 1976); *Selle*, 741 F.2d at 905; *Smith v. Jackson*, 84 F.3d 1213, 1221 (9th Cir. 1996); *Tisi*, 97 F. Supp. 2d at 548; *Newton*, 204 F. Supp. 2d at 1259; *Cottrill v. Spears*, CIV.A.-02-3646, 2003 WL 21223846, at \*9 (E.D. Pa. May 22, 2003); *Griffin v. J-Records*, 398 F. Supp. 2d 1137, 1143 (E.D. Wash. 2005); *Allen v. Destiny’s Child*, 06-C-6606, 2009 WL 2178676, at \*12 (N.D. Ill. July 21, 2009); *Batiste v. Najm*, 28 F. Supp. 3d 595, 616 (E.D. La. 2014); *Stefani*, 338 F. Supp. 3d at 1059; *Led Zeppelin*, 952 F. 3d at 1069. These are all cases decided prior to *Gray v. Perry* that assess similar claims of music copyright infringement in which courts have come to the same conclusion as that of *Perry*: by way of the idea-expression dichotomy, common elements of popular music are not subject to copyright protection, and when these elements are asserted as the basis for a music copyright infringement claim, the claim must necessarily fail.

ostinato in “Joyful Noise” fails the objective extrinsic test.<sup>96</sup> Further, this section will argue that prior decisions in the Ninth Circuit, which contradict *Gray v. Perry* or *Skidmore v. Led Zeppelin*, such as *Williams v. Gaye*, should be overruled as inconsistent with Ninth Circuit jurisprudence.<sup>97</sup> Finally, this section will conclude by contending that future decisions should follow the precedent set by both *Gray v. Perry* and *Skidmore v. Led Zeppelin*, that commonplace musical elements are not subject to copyright protection, and therefore, cannot serve as the foundation for a claim of copyright infringement.<sup>98</sup>

#### A. *The Idea-Expression Dichotomy and Popular Music*

The idea-expression dichotomy presupposes that generic elements of copyrighted works are not subject to copyright protection because they are tantamount to ideas.<sup>99</sup> The idea-expression dichotomy stands for the fundamental principle that only the expression of ideas may be protected under copyright law, not the individual ideas themselves.<sup>100</sup> Accordingly, elements of musical compositions that are incapable of copyright protection on their own fall within the scope of the idea-expression dichotomy, and therefore, cannot serve as the basis for a copyright infringement claim because commonplace musical elements are unprotected ideas.<sup>101</sup>

For years, courts across the United States have recognized and followed the guidance of the idea-expression dichotomy in decisions regarding music copyright

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<sup>96</sup> See generally *Led Zeppelin*, 952 F.3d at 1079 (illustrating the precedent that commonplace musical elements cannot serve as the basis for a copyright infringement claim because they are not individually protected elements and because they are essential building blocks used for the creation of music); see *Perry*, 2020 WL 1275221, at \*18.

<sup>97</sup> See generally *Williams*, 895 F.3d at 1143 (holding less than two years prior to the *Perry* and *Led Zeppelin* decisions that common musical elements contained in a twelve-note sequence including phrases that begin with repeated notes, similar pitch sequences in the first two measures, identical rhythm, and the use of a melisma, constituted individually protectable elements under copyright law).

<sup>98</sup> *Perry*, 2020 WL 1275221, at \*18; *Led Zeppelin*, 852 F.3d at 1079.

<sup>99</sup> See 17 U.S.C. § 102 (2021) (“Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression, now known or later developed, [and] [i]n no case does copyright protection for an original work of authorship extend to any idea . . . described, explained, illustrated, or embodied in such work.”); see also 5 NIMMER, *supra* note 29, § 19E.04 (noting the importance of the idea-expression dichotomy as a fundamental principle of copyright law which holds that ideas are not protected and are characterized as “raw materials that serve as building blocks for creativity” that enable authors to build on “previous ideas and works.”).

<sup>100</sup> See *Feist*, 499 U.S. at 341; *Nike*, 883 F.3d at 1119; see also PASSMAN, *supra* note 23, at 322–25 (reinforcing the general concept that only the expression of ideas is protected, while ideas are unprotected).

<sup>101</sup> See PASSMAN, *supra* note 23, at 325. Passman succinctly illustrates the concept of unprotectable common musical elements through two examples: first, if one wrote new lyrics to a song in the public domain such as “Old MacDonald” or “Twinkle, Twinkle Little Star”, only the new lyrics could serve as a basis for a copyright infringement claim, not the common melody of these public domain songs; and second, if one decided to compose a song using the standard blues chord progression, the chord structure of the song could not serve as the basis for a copyright infringement claim because it is a common musical element that anyone can borrow from.

infringement.<sup>102</sup> Numerous decisions confirm that the same basic musical elements are consistently used in musical compositions, especially those that fall within the same musical genre.<sup>103</sup> These basic musical elements are regarded as “building blocks” for the creation of music, not individually protectable elements of musical compositions.<sup>104</sup>

In *Gray v. Perry*, Plaintiffs unsuccessfully argued that the basic musical elements contained in the song, “Joyful Noise,” were individually protectable under copyright law and that Defendants’ song, “Dark Horse,” constituted actionable copyright infringement of “Joyful Noise.”<sup>105</sup> The musical elements that Plaintiffs introduced as original expression in the “Joyful Noise” ostinato<sup>106</sup> were refuted by the court and have been routinely recognized as unprotectable common musical elements by most courts.<sup>107</sup> As such, the *Perry* court appropriately recognized the foregoing precedent

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<sup>102</sup> See *Darrell*, 113 F.2d at 80; *Granite Music Corp.*, 532 F.2d at 720; *Selle*, 741 F.2d at 905; *Jackson*, 84 F.3d at 1221; *Tisi*, 97 F. Supp. 2d at 548; *Newton*, 204 F. Supp. 2d at 1259; *Spears*, 2003 WL 21223846, at \*9; *Griffin*, 398 F. Supp. 2d at 1143; *Destiny’s Child*, 2009 WL 2178676, at \*12; *Batiste*, 28 F. Supp. 3d at 616; *Stefani*, 338 F. Supp. 3d at 1059; *Led Zeppelin*, 952 F. 3d at 1069. These cases span a range of eighty years and demonstrate the prevalence of the idea-expression dichotomy as it relates to music copyright infringement cases. They also underscore the precedent that most courts across the United States follow: common musical elements are not entitled to copyright protection individually and only warrant copyright protection collectively when the combination is found to be substantially original.

<sup>103</sup> See *Gaste*, 863 F.2d at 1068; *Batiste*, 28 F. Supp. 3d at 615 (“the basic . . . building blocks of music, especially popular music, have long been treated by courts as well-worn, unoriginal elements that are not entitled to copyright protection.”); *Destiny’s Child*, 2009 WL 2178676, at \*11; *Spears*, 2003 WL 21223846, at \*9; *Tisi*, 97 F. Supp. 2d at 548; *Selle*, 741 F.2d at 905; *Granite Music Corp.*, 532 F.2d at 720; see also *Darrell*, 113 F. 2d at 80 (“There are an enormous number of possible permutations of the musical notes of the scale, only a few are pleasing; and much fewer still suit the . . . demands of the popular ear.”). Each of these cases recognizes that the same common musical elements frequently appear in popular music.

<sup>104</sup> See *Led Zeppelin*, 952 F. 3d at 1069; *Granite Music Corp.*, 532 F.2d at 721; *Newton*, 388 F.3d at 1196; see also *Williams*, 895 F.3d at 1141 (9th Cir. 2018) (“If a [composer] uses commonplace [musical] elements, that are firmly rooted in the genre’s tradition, the expression is unoriginal and thus uncopyrightable.”).

<sup>105</sup> *Perry*, 2020 WL 1275221, at \*1

<sup>106</sup> *Id.* at \*6–7. The plaintiffs erroneously pointed to the scale, major and minor keys, phrase length, pitch sequence, chord progression, resolution, rhythm, syncopation, ostinato, timbre, and texture in “Joyful Noise” as examples of expressive musical elements despite the fact that each of these elements have been refuted as being individually capable of copyright protection.

<sup>107</sup> See *Led Zeppelin*, 952 F.3d 1051 at 1071 (“Just as we do not give an author a monopoly over the note of B-flat, . . . scales and arpeggios cannot be copyrighted . . .”); see also *Gaste*, 863 F.2d at 1068 (finding that modulation between major and minor keys is a common musical element, not individually protected under copyright); *Darrell*, 113 F.2d at 80 (characterizing a phrase length of eight notes with similar pitch as common or “trite” and not entitled to individual copyright protection); *Granite Music Corp.*, 532 F.2d at 720 (recognizing that a four-note pitch sequence that often appears in pop music is not individually protected by copyright); *Carey*, 376 F.3d at 848 (conceding that chord progressions are a common musical element not individually protected by copyright); *Stefani*, 338 F. Supp. 3d at 1060 (showing that common musical elements such as rhythm, beat, and syncopation are not individually protected under copyright); *Jackson*, 84 F.3d at 1216 (defining a motive as a short musical phrase, usually comprised of only a few notes, and concluding that common motives, such as ostinatos, are basic musical elements that are not given individual copyright protection); *Batiste*, 28 F. Supp. 3d at 623 (explaining that synthesized timbre and texture are basic musical elements within the pop genre and are not individually protected by copyright).

pertaining to the common features of popular music<sup>108</sup> and correctly applied it when it decided that the “Dark Horse” ostinato did not infringe on the “Joyful Noise” ostinato.<sup>109</sup> The court properly concluded that the “Joyful Noise” ostinato necessarily fails the extrinsic test<sup>110</sup> because none of the individual elements of the ostinato were independently protected by the overarching musical composition copyright.<sup>111</sup>

In addition to its failure to show individual copyrightability of the musical elements at issue, Plaintiffs also failed to demonstrate that the individual musical elements of the “Joyful Noise” ostinato were protected as a combination.<sup>112</sup> The court correctly concluded that, “the musical elements that comprise the 8-note ostinato in ‘Joyful Noise’ are [not] numerous enough [or] arranged in a sufficiently original manner to warrant copyright protection.”<sup>113</sup> Plaintiffs’ music copyright infringement claim was limited to the recurring eight-note “Joyful Noise” ostinato, and there is no precedent showing that the combination of eight notes into a musical phrase warrants copyright protection.<sup>114</sup> In fact, there are several decisions showing that short musical phrases are not protectable expression under copyright law.<sup>115</sup> Accordingly, the court was correct in finding that Plaintiffs failed to satisfy the extrinsic test on the alternative ground of demonstrating that the musical elements at issue in the “Joyful

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<sup>108</sup> See *Destiny’s Child*, 2009 WL 2178676, at \*12; *Griffin*, 398 F. Supp. 2d at 1143; *Spears*, 2003 WL 21223846, at \*9; *Newton*, 482 F. Supp. 2d at 1258; *Williams*, 895 F.3d at 1140; *Tisi*, 97 F. Supp. 2d at 548; *Selle*, 741 F.2d at 905; *Three Boys Music Corp.*, 212 F.3d at 485. The preceding cases provide instances where courts have characterized additional musical elements as basic ingredients for the creation of music and thus, deemed them individually unprotected by copyright. Some of these additional elements include intervallic structure, pitch sequences ranging from three to eight pitches, time signature, musical genre, tempo, theme, hook phrase, and a fading ending.

<sup>109</sup> *Perry*, 2020 WL 1275221, at \*7.

<sup>110</sup> See *id.* at \*3; see also *Three Boys Music Corp.*, 212 F.3d at 485. Recall that the extrinsic test requires a determination of the protected elements of a copyrighted song and a determination of whether protected elements are substantially similar to an allegedly infringing song.

<sup>111</sup> *Perry*, 2020 WL 1275221, at \*18. As is the case in *Perry*, when a plaintiff fails to satisfy the extrinsic test altogether, it means that they failed to show that the musical elements at issue were either individually or collectively protectable under copyright.

<sup>112</sup> *Id.* at \*10.

<sup>113</sup> See *id.*; see also *Led Zeppelin*, 952 F.3d at 1071 (“We have never extended copyright protection to just a few notes. Instead, we have held that a four-note sequence common in the music field is not the copyrightable expression in a song.”).

<sup>114</sup> See *Perry*, 2020 WL 1275221, at \*11 (“[T]he sole musical phrase that plaintiffs claim infringement upon is not protectable expression, the extrinsic test is not satisfied, and plaintiffs infringement claim . . . fails as a matter of law.”); but see *Metcalf v. Bochco*, 294 F.3d 1069, 1074 (9th Cir. 2002) (“Each note in a scale is not protectable, but a pattern of notes in a tune *may* earn copyright protection.”). Even though the Ninth Circuit has recognized that a pattern of notes can potentially receive copyright protection, its cases have not established that an eight-note combination of notes warrants this potential protection.

<sup>115</sup> See *Stefani*, 338 F. Supp. 3d at 1060 (finding no protection for the combination of five common musical elements even when they were used throughout the entire song); *Griffin*, 398 F. Supp. 2d at 1143 (finding no protection for a combination of common musical elements used in a seven-note melodic sequence); *Destiny’s Child*, 2009 WL 2178676, at \*12 (finding no protection for a three-note sequence that used combined common musical elements in a musical composition); *Jackson*, 84 F.3d at 1216 (holding that a relatively common eight-note combination of unprotected elements was not original enough even in combination, to be protected under copyright). These cases exhibit that individually unprotected elements, even when combined into short musical phrases, are not eligible for copyright protection because they fail to satisfy the originality requirement necessary to receive copyright protection.

Noise” ostinato were protectable expression when combined, because the ostinato itself is an unprotectable combination of common musical elements that cannot serve as the basis for a music copyright infringement claim.

### B. *The Led Zeppelin Decision*

*Skidmore v. Led Zeppelin*<sup>116</sup> was decided by the Ninth Circuit Court of Appeals shortly before the court’s decision in *Gray v. Perry*<sup>117</sup> and played a large role in the *Perry* court’s decision.<sup>118</sup> Together, these two cases establish a firm precedent in the Ninth Circuit: music copyright infringement claims that center around issues of commonplace musical elements in a copyrighted song and an alleged infringing song, will generally fail as a matter of law because these elements are individually unprotectable under copyright law as basic elements necessary to the composition of music.

Similar to the inquiry in *Gray v. Perry*,<sup>119</sup> the *Led Zeppelin* court was tasked with determining whether Led Zeppelin’s song, “Stairway to Heaven,” infringed on the musical composition copyright in the band Spirit’s song, “Taurus.”<sup>120</sup> Spirit’s copyright infringement claim was limited to the eight-measure introduction of “Stairway to Heaven” and alleged that Led Zeppelin improperly copied protected elements of “Taurus” into the opening sequence.<sup>121</sup> Consequently, the *Led Zeppelin* decision provided much of the framework for the court’s decision in *Gray v. Perry*<sup>122</sup> because it embarked on an analysis revolving around the objective extrinsic test and came to the same conclusion: basic musical elements common to all musical compositions are not subject to copyright protection individually or when combined.<sup>123</sup>

In *Led Zeppelin*, as in *Perry*, the plaintiffs attempted to assert that common musical elements including scale, key signature, arpeggios, note duration, successive eight-note rhythm, and pitch sequence are individually protected copyrightable expression.<sup>124</sup> However, even the plaintiffs’ own expert witness conceded that scales and arpeggios are common musical elements, and Led Zeppelin’s expert witness aptly pointed out that the similarities claimed by the plaintiffs were “unprotectable musical elements.”<sup>125</sup>

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<sup>116</sup> *Led Zeppelin*, 952 F.3d at 1055.

<sup>117</sup> *Perry*, 2020 WL 1275221, at \*1.

<sup>118</sup> *Id.* at \*3, \*5, \*8, \*10, \*11, \*13. The court relied on the *Led Zeppelin* decision extensively in its opinion.

<sup>119</sup> *Perry*, 2020 WL 1275221, at \*1.

<sup>120</sup> *Led Zeppelin*, 952 F.3d at 1054.

<sup>121</sup> *Id.* at 1058. Again, this is similar to the *Gray v. Perry* decision because the copyright infringement claim was limited to a short musical sequence.

<sup>122</sup> *Perry*, 2020 WL 1275221, at \*18.

<sup>123</sup> *Led Zeppelin*, 952 F.3d at 1071 (“[A] limited set of a useful three-note sequence and other common musical elements [are] not protectable.”).

<sup>124</sup> *Id.* at 1069 (“[C]opyright does not protect ideas, themes, or common musical elements, such as descending chromatic scales, arpeggios, or short sequences of three notes.”).

<sup>125</sup> *Id.* at 1060.

The court correctly found in favor of Led Zeppelin and recognized that the elements at issue were not individually protected by copyright law<sup>126</sup> and, therefore, could not underscore a claim for music copyright infringement.<sup>127</sup> In its decision, the court also emphasized the fact that it is impermissible for an author to lay claim to the common ingredients that comprise the foundation of all musical compositions.<sup>128</sup>

In addition, the court refuted the plaintiffs' argument that the unprotected musical elements contained in "Taurus" were collectively protected as a combination, just as the *Perry* court concluded the same about the eight-note "Joyful Noise" ostinato.<sup>129</sup> In *Gray v. Perry*,<sup>130</sup> the court firmly adhered to the precedent established by *Skidmore v. Led Zeppelin*.<sup>131</sup> It was correct to do so because the majority of music copyright infringement cases across the United States have recognized that common musical elements are individually unprotectable and cannot support a claim for music copyright infringement.<sup>132</sup>

### C. *Williams v. Gaye: A Contradictory Decision*

The holding in *Williams v. Gaye*<sup>133</sup> contradicts both the precedent set by the Ninth Circuit in *Skidmore v. Led Zeppelin*<sup>134</sup> and the decision of the Central District of

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<sup>126</sup> See 17 U.S.C. § 102(b) (2021); see also *Feist*, 499 U.S. at 345–46 (recognizing that copyright does require at least a modicum of creativity and does not protect every aspect of a work); *Jackson*, 84 F.3d at 1216 (finding that copyright does not extend to "common or trite" musical elements); *Williams*, 895 F.3d at 1140–41 (conceding that copyright does not protect "commonplace elements that are firmly rooted in a genre's tradition.").

<sup>127</sup> *Led Zeppelin*, 952 F.3d at 1069 ("These building blocks belong in the public domain and cannot be exclusively appropriated by any particular author;" "[Songwriters] borrow from predecessors' [songs] to create new ones, so giving exclusive rights to the first [songwriter] who incorporated [a common musical element] would frustrate the purpose of copyright law . . .").

<sup>128</sup> *Id.* at 1070 (repeating that no individual may own non-protectable musical building blocks).

<sup>129</sup> *Id.* at 1075 (concluding that the selection and arrangement of the intros to the songs "Taurus" and "Stairway to Heaven" were not substantially similar because the songs do not share substantial amounts of the same combination of unprotectable elements).

<sup>130</sup> *Perry*, 2020 WL 1275221, at \*18.

<sup>131</sup> *Led Zeppelin*, 952 F.3d at 1079.

<sup>132</sup> See *Darrell*, 113 F.2d at 80; *Granite Music Corp.*, 532 F.2d at 720; *Selle*, 741 F.2d at 905; *Jackson*, 84 F.3d at 1221; *Tisi*, 97 F. Supp. 2d at 548; *Newton*, 204 F. Supp. 2d at 1259; *Spears*, 2003 WL 21223846, at \*9; *Griffin*, 398 F. Supp. 2d at 1143; *Destiny's Child*, 2009 WL 2178676, at \*12; *Batiste*, 28 F. Supp. 3d at 616; *Stefani*, 338 F. Supp. 3d at 1059; *Led Zeppelin*, 952 F. 3d at 1069; *Gaste*, 863 F.2d at 1068; *Carey*, 376 F.3d at 848; *Williams*, 895 F.3d at 1140; *Three Boys Music Corp.*, 212 F.3d at 485 (providing cases in the Ninth, Second, and Seventh Circuits as well as their respective district courts, and additional district courts, which recognize that the musical elements common to all musical compositions are not individually protected under copyright law and are only protected as a combination when the arrangement and combination is significantly original).

<sup>133</sup> See generally *Williams*, 895 F.3d at 1114 (holding that the song "Blurred Lines" by Pharrell Williams and Robin Thicke infringed on the song "Got to Give it Up" by Marvin Gaye where a combination of six similar musical elements appeared in both songs).

<sup>134</sup> See generally *Led Zeppelin*, 952 F.3d at 1074 (holding that the song "Stairway to Heaven" by the band Led Zeppelin did not infringe on the song "Taurus" by the band Spirit where the combination of five similar musical elements was used in each song).

California in *Gray v. Perry*.<sup>135</sup> Accordingly, the decision should be overruled as inconsistent with Ninth Circuit music copyright infringement jurisprudence.<sup>136</sup> In fact, in both the *Led Zeppelin*<sup>137</sup> and *Perry*<sup>138</sup> decisions, the court expressly embraced the dissent in *Williams* over the majority opinion.<sup>139</sup>

The dissent in *Williams v. Gaye* sharply disputes the majority opinion and argues that the musical elements the Gaye estate based its infringement claim on are unprotected under copyright law, both individually and when combined.<sup>140</sup> The dissent astutely opined that “musical compositions are expressed primarily through the building blocks of melody, harmony, and rhythm” and consequently “not all expression is protectable [and] the mere fact that a work is copyrighted does not mean that every element of the work may be protected.”<sup>141</sup> These assertions by the dissent, recognizing the idea-expression dichotomy and its application to music copyright infringement, exemplify that its reasoning is correct and that the majority opinion in *Williams v. Gaye*<sup>142</sup> should be overruled as inconsistent with the holdings of *Skidmore v. Led Zeppelin*<sup>143</sup> and *Perry v. Gray*.<sup>144</sup>

#### D. *The Future of Copyright Infringement Suits*

It is essential that future court decisions surrounding the issue of music copyright infringement adhere and apply the precedent set by *Gray v. Perry* and its sister decision, *Skidmore v. Led Zeppelin*. These cases solidify the application of the idea-expression dichotomy in the context of popular music and overwhelmingly recognize that common musical elements are akin to ideas, which are not subject to copyright protection. When common musical elements are the foundation of a music copyright infringement claim, the claim cannot survive.

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<sup>135</sup> *Perry*, 2020 WL 1275221, at \*11 (holding that the song “Dark Horse” by Katy Perry and Juicy J did not infringe on the song “Joyful Noise” by Marcus Gray where the combination of nine common musical elements was present in each song).

<sup>136</sup> See *Granite Music Corp.*, 532 F.2d at 720; *Jackson*, 84 F.3d at 1221; *Newton*, 204 F. Supp. 2d at 1259; *Griffin*, 398 F. Supp. 2d at 1143; *Stefani*, 338 F. Supp. 3d at 1059; *Led Zeppelin*, 952 F. 3d at 1069 (listing several cases decided in the Ninth Circuit and its district courts which concluded that a song is not infringed where the similarities in the alleged infringing song are common musical elements essential to the creation of all musical compositions).

<sup>137</sup> See *Led Zeppelin*, 952 F.3d at 1069, 1071 (citing the dissent in *Williams v. Gaye* that “copyright [does not] extend to commonplace elements that are firmly rooted in the genre’s tradition.”). The court also joined in the dissent’s skepticism regarding the idea that three notes used in a song can be copyrightable and observing that there is a minimal amount of note combinations that are useful in a musical composition.

<sup>138</sup> *Perry*, 2020 WL 1275221, at \*5 (citing the dissenting opinion in *Williams v. Gaye*).

<sup>139</sup> *Williams*, 895 F.3d at 1138–51.

<sup>140</sup> *Id.* at 1143–50 (discounting the majority opinion and showing that common musical elements such as repeated notes, pitch, rhythm, hook phrases, keyboard parts, bass line, and lyrics are not individually protected under copyright law and that the signature phrases in each song are not protected as a combination either).

<sup>141</sup> *Id.* at 1140–42.

<sup>142</sup> *Id.* at 1114–38.

<sup>143</sup> *Led Zeppelin*, 952 F.3d at 1079.

<sup>144</sup> *Perry*, 2020 WL 1275221, at \*18.

## V. CONCLUSION

The court was correct when it held that the “Dark Horse” ostinato did not infringe upon the “Joyful Noise” ostinato. As a result, Katy Perry and Juicy J emerged from *Gray v. Perry*<sup>145</sup> as clear winners over Plaintiffs. On the other hand, Marcus Gray and the other plaintiffs, were left feeling like Defendants were “The One That Got Away.”<sup>146</sup> However, litigation in a music copyright infringement suit is “Never Really Over,”<sup>147</sup> as evidenced by Plaintiffs’ efforts to appeal Judge Christina Snyder’s final judgment as a matter of law in favor of Perry and Juicy J.<sup>148</sup>

The court was correct when it ruled in favor of Perry and Juicy J because Plaintiffs’ music copyright infringement claim was based on commonplace musical elements that cannot be used as the foundation for a copyright infringement claim.<sup>149</sup> Ostinatos, short reoccurring musical themes, are a common mechanism used in popular music and musical compositions, and are one of the essential building blocks used to create a song.<sup>150</sup> To extend copyright protection to eight notes in succession throughout a musical composition, would be tantamount to granting copyright protection to an idea rather than the original expression of the idea.<sup>151</sup> The principle of the idea-expression dichotomy exists to preserve such things as commonplace musical elements for the general use of all songwriters when composing new songs.<sup>152</sup>

Future court decisions that address issues of music copyright infringement must keep the decisions of *Gray v. Perry*<sup>153</sup> and *Skidmore v. Led Zeppelin*<sup>154</sup> at the forefront of their opinions and adhere to the precedent they set: commonplace musical elements or musical building blocks used for the creation of all songs cannot serve as the foundation for allegations of music copyright infringement. Ultimately, previous cases

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<sup>145</sup> *Perry*, 2020 WL 1275221, at \*18 (granting Defendants’ motion for judgment as a matter of law, vacating the jury verdicts as to liability and damages, declaring that Plaintiffs’ failed to satisfy the extrinsic test, and denying Plaintiffs’ motion for prejudgment interest).

<sup>146</sup> *See id.*; *see also* KATY PERRY, *THE ONE THAT GOT AWAY* (Capitol Records 2011).

<sup>147</sup> *See* KATY PERRY, *NEVER REALLY OVER* (Capitol Records 2019).

<sup>148</sup> *See* Record of Petitioner’s Appeal to the Ninth Circuit Court of Appeals, *Gray v. Hudson*, 2020 WL 20-55401 (showing the appeal that plaintiffs filed following the ruling in *Gray v. Perry*). The original appeal to the Ninth Circuit Court of Appeals was filed on April 15, 2020, less than a month after the district court entered its judgment.

<sup>149</sup> *See generally Perry*, 2020 WL 1275221, at \*1–\*18 (holding that the plaintiffs failed to satisfy the extrinsic test, which asks what the protected elements of a song are, when its only basis for music copyright infringement against the defendants was a similar eight note ostinato present in both songs).

<sup>150</sup> *Id.* at \*18 (defining the term “ostinato” as a short musical phrase or rhythmic pattern repeated in a musical composition).

<sup>151</sup> 17 U.S.C. § 102 (2021).

<sup>152</sup> *See* 5 NIMMER, *supra* note 29, § 19E.04 (commenting on the purpose of the idea-expression dichotomy in preserving the use of generic or common elements for use in future works and providing that general elements of creative works, like musical compositions, cannot be monopolized by one songwriter).

<sup>153</sup> *Perry*, 2020 WL 1275221, at \*18.

<sup>154</sup> *Led Zeppelin*, 952 F.3d at 1079.

contrary to the decisions of *Perry*<sup>155</sup> and *Led Zeppelin*,<sup>156</sup> such as *Williams v. Gaye*,<sup>157</sup> should be overruled as inconsistent with the precedent of the Ninth Circuit.<sup>158</sup>

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<sup>155</sup> *Perry*, 2020 WL 1275221, at \*18.

<sup>156</sup> *Led Zeppelin*, 952 F.3d at 1079.

<sup>157</sup> *Williams*, 895 F.3d at 1114.

<sup>158</sup> See *Darrell*, 113 F.2d at 80; *Granite Music Corp.*, 532 F.2d at 720; *Selle*, 741 F.2d at 905; *Jackson*, 84 F.3d 1213, 1221 (9th Cir. 1996); *Tisi*, 97 F. Supp. 2d at 548; *Newton*, 204 F. Supp. 2d at 1259; *Spears*, 2003 WL 21223846, at \*9; *Griffin*, 398 F. Supp. 2d at 1143; *Destiny's Child*, 2009 WL 2178676, at \*12; *Batiste*, 28 F. Supp. 3d at 616; *Stefani*, 338 F. Supp. 3d at 1059; *Led Zeppelin*, 952 F. 3d at 1069 (providing a string of cases in the Ninth Circuit, its lower district courts, and other federal courts throughout the United States, dating back to 1940, which uphold the finding that due to the idea-expression dichotomy codified in the Copyright Act, common elements of popular music are not subject to copyright protection and, therefore, when these elements are asserted as the basis for a music copyright infringement claim, the claim must necessarily fail).