

Ninth Circuit Remands Golden Oldies Copyright Case

By Jenna Greene

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Two years ago, lawyers from **Irell & Manella** notched one of those too-good-to-be-true wins.

Based on a novel theory, they convinced a federal judge in Los Angeles to dismiss a potentially massive copyright class action against **CBS Corp. and CBS Radio** on summary judgment.

It was nice while it lasted, but on Monday, the **U.S. Court of Appeals for the Ninth Circuit** in no uncertain terms reversed and remanded just about every piece of the decision by **Judge Percy Anderson**.

CBS was sued in 2015 by four record companies that own pre-1972 sound recordings by artists such as **Al Green, the Everly Brothers, Andy Williams, Jackie Wilson and The Chi-Lites**. (Under the Sound Recording Act, sound recordings fixed after February 15, 1972, are subject to a different regime that's not in dispute here.)

Represented by **McKool Smith**, the companies said CBS had no right to air the pre-1972 recordings without obtaining a license from them.

But **Irell** lawyers responded that the recordings used for radio broadcast were not actually the originals. Rather, they said, their client was playing new, remastered versions of those recordings, covered by a new federal copyright. Therefore, the plaintiffs' state law-based claims were eliminated.

So ... no.

The Ninth Circuit panel focused on whether a remastered sound recording could be eligible for independent copyright protection. The only way that could happen is if the "essential character and identity" of the recordings distinguish them from the underlying work, wrote **Judge Richard Linn**, sitting by designation from the **U.S. Court of Appeals for the Federal Circuit**.

And that's where CBS fell short.

"A remastering, for example, of **Tony Bennett's** 'I Left My Heart in San Francisco' recording from its original analog format into digital format, even with declipping, noise reduction and small changes in volume or emphasis, is no less Bennett's 'I Left My Heart in San Francisco' recording—it retains the same essential character and identity as the underlying original sound recording, notwithstanding the presence of trivial, minor or insignificant changes from the original," he wrote, with **Judges Marsha Berzon and Paul Watford** concurring. "That is so even if the digital version would be perceived by a listener to be a brighter or cleaner rendition."

The remasters, **Linn** continued, "lacked the originality necessary to support copyright protection as derivative works."

The record companies—**ABS Entertainment Inc., Barnaby Records, Brunswick Record Corp. and Malaco Inc.**—were represented by **McKool's Robert Allen**, who handled the oral argument, as well as **Alan Block, Roderick Dorman and Lawrence Hadley**. Chicago's **Miller Law** was co-counsel.

The case also attracted significant amicus interest.

The **Recording Industry Association of America**, represented by **Cowan Liebowitz & Latman**, backed the record companies, as did the **California Society of Entertainment Lawyers**, represented by **Gerard Fox Law and Lowe and Associates**. Sound recording owner **Flo & Eddie Inc.**, with counsel from **Susman Godfrey and Gradstein & Marzano**, was also on the record companies' side.

The **National Association of Broadcasters**, represented by **Paul Hastings**, supported CBS, as did **iHeartMedia**, with counsel from **Latham & Watkins**.