

Remastered Pre-1972 Songs Are New IP, CBS Tells 9th Circ.

By **Melissa Daniels**

Law360, Los Angeles (November 9, 2017, 8:54 PM EST) -- CBS told a Ninth Circuit panel on Thursday that remastered versions of songs recorded before 1972 are fundamentally different enough from the originals to qualify for federal copyright protection in an appeal from ABS Entertainment and others seeking to revive a class action claiming the media giant owes them royalties for radio broadcasts.

The appeal presents a novel question about a legal gray area of copyright law in the music world — songs recorded before 1972 are protected by a mess of state laws rather than federal copyright law, which has never required royalty payments.

CBS' attorney Robert Schwartz of Irell & Manella LLP told the panel in Pasadena, California, that a lower court correctly granted them summary judgment based on their argument that the remastered versions of pre-1972 songs it broadcasted were created well after the cutoff point.

"The purpose of the remastered song records is to create something that is completely different," that can be marketed to the public as a brand new work, he said. "It is not the same sound recording."

The remastering process is the result of "aesthetic and creative decisions," rendering them post-72, derivative works that are eligible for federal copyright protection, Schwartz said.

"The real standard is ... did the creator of the new work apply sufficient expression, significant artistic creativity, to make a difference," he said. "It's a very low threshold. Now that's the standard and these works on the undisputed record meet that standard."

But Robert Allen of McKool Smith Hennigan PC argued for ABS Entertainment and other rights holders that other the lower court incorrectly applied federal copyright law, as there is a "brightline rule" over whether sounds were "fixed" before or after the 1972 cutoff date.

"Nobody went back into the studio and recorded any new sounds," he said.

Thursday's oral arguments set the stage for a panel consisting of U.S. Circuit Judges Richard Linn, Marsha S. Berzon and Paul J. Watford to decide whether AM/FM radio operators like CBS must pay millions in new royalties for the old tunes.

Similar pre-1972 song cases against Sirius and Pandora had gone in the rights holders' favor when California and New York judges issued surprising rulings that those states' laws require radio stations to pay royalties. The actions raise the possibility of millions in new

costs for radio operators, since terrestrial stations have never paid sound recordings royalties.

The instant suit, first filed in **August 2015**, came from ABS Entertainment Inc., which owns recordings by Al Green, Willie Mitchell, Ann Peebles and others. Other named plaintiffs and appellants now involved in the case include Barnaby Records Inc., Brunswick Record Corporation and Malaco Inc.

CBS **had argued** that it was allowed to use the recordings because even if it played pre-1972 songs, it did so using remastered versions of the recordings that were created well after that time.

U.S. District Judge Percy Anderson in June 2016 agreed, saying that the recordings had undergone sufficient enough changes in the remastering process to qualify for federal copyright protection.

ABS filed the appeal in June of last year. Allen told Law360 that his clients take the position that the brightline between pre-1972 and post-1972 recordings is based on when the sounds were initially fixed to a tangible medium, which is when they were recorded.

"We strongly felt that the district court got it completely wrong when it summarily dismissed our claims in this case," he said. "The claims were brought because CBS and other entities take pre-'72 recordings, and contrary to what they may say, our clients have not received any money for digital public performance."

They also argued on appeal that even if the remastered versions counted as derivative works, the federal copyright protections only applies to the new elements — such as a vocal track added after 1972 to an instrumental track that was recorded before the cutoff date, Allen said.

During Thursday's oral arguments, Judge Linn asked Allen about whether the remastered works contained different elements like voices, musicians and musical arrangements. Allen said no to all variables.

Judge Berzon asked him if changes a sound engineer made to the volume of instruments like a piano or guitar would make the song a new work.

"No, it would not, because the sounds were affixed prior to 1972," Allen said. "That's the test."

But Schwartz said that works weren't simply adjusted for sound levels. Instead, the engineers who had permission to do the remastered songs scoured through all the original tape recordings to make the music be heard in a whole new way. He used the example of positioning backup singers higher in the mix.

"You need to think of this as a work of art that somebody wants to make changes to," Schwartz said.

Judge Berzon continued the metaphor, asking if a cleaned-up version of the "Mona Lisa" would be the same work.

Schwartz said if the painting was just cleaned up, it wouldn't be different, but the introduction of creative expression that aimed to create a different-looking painting would be sufficient to create a new work.

An attorney for CBS declined to comment on Thursday.

U.S. Circuit Judges Richard Linn, Marsha S. Berzon and Paul J. Watford sat for the panel.

CBS is represented by Robert M. Schwartz, Victor Jih, Andrew J. Strabone and Amit Q. Gressel of Irell & Manella LLP.

ABS Entertainment Inc., Barnaby Records Inc., Brunswick Record Corporation and Malaco Inc. are represented by Lawrence M. Hadley, Roderick G. Dorman, Robert E. Allen and Alan P. Block of McKool Smith Hennigan PC and Marvin A. Miller, Andrew Szot and Kathleen E. Boychuck of Miller Law LLC.

The case is ABS Entertainment Inc. et al. v. CBS Corp. et al., case number 16-55917 in the U.S. Court of Appeals for the Ninth Circuit.

--Additional reporting by Bill Donahue and Kat Greene. Editing by Alanna Weissman.

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