

9th Circ. Revives Case Against CBS Over Pre-1972 Songs

By **Bill Donahue**

Law360 (August 20, 2018, 4:28 PM EDT) -- The Ninth Circuit on Monday revived a lawsuit against CBS over radio broadcasts of so-called pre-1972 recordings, overturning a novel ruling that “remastered” versions of old tracks are entirely new copyrighted songs.

The ruling came two years after a lower court tossed the lawsuit on the grounds that remastering had effectively changed pre-1972 songs — which aren’t covered by federal copyright law — into newer songs. That’s a crucial distinction for radio stations, which don’t pay royalties to broadcast post-1972 songs.

In overturning that earlier decision, the Ninth Circuit ruled Monday that merely improving sound quality and other technical changes didn't amount to the kind of original authorship that’s covered by copyright law.

“Although we do not hold that a remastered sound recording cannot be eligible for a derivative work copyright, a digitally remastered sound recording made as a copy of the original analog sound recording will rarely exhibit the necessary originality to qualify for independent copyright protection,” U.S. Circuit Judge Richard Linn wrote for a three-judge panel.

To qualify as a new copyrighted song, the judge wrote, a remastered song's "essential character and identity" must show "a level of independent sound recording authorship that makes it a variation distinguishable from the underlying work.”

As an example, Judge Linn cited Tony Bennett’s famous “I Left My Heart in San Francisco” — saying that even a new digital version of the song that was updated with “declicking, noise reduction and small changes in volume or emphasis” was “no less” the same iconic tune.

“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,” the judge wrote.



Ruling against CBS, the Ninth Circuit said mere technical improvements to pre-1972 songs didn't convert them into newer songs covered by copyright law. (AP)

The ruling is a setback for CBS, which like other broadcasters has been sued in courts around the country in recent years over pre-1972 songs. The songs are a legal gray area, since tracks recorded prior to that year are protected by state-level quasi-copyrights rather than the federal copyright system.

The current case was filed in 2015 by a song-owning company called ABS Entertainment Inc., which claimed CBS should have been paying for the old tracks. CBS' radio division has since merged with Entercom to form one of the largest radio station operators in the country.

With the "remaster defense" now struck down, the entire case against CBS will likely turn on a separate pending lawsuit that is awaiting a ruling from the California Supreme Court.

That case, filed against the internet radio service Pandora by the 1960s rock band The Turtles, will decide whether pre-1972 songs require payment in the first place. A ruling for Pandora would effectively end the case against CBS.

Such a ruling would also largely end five years of nationwide litigation over pre-1972s. The state supreme courts of both New York and Florida have already ruled that radio stations and online streamers in those states do not need to pay to play the old songs.

Following the ruling, an attorney for ABS said the decision "completely vindicates our clients." An attorney for CBS did not immediately return a request for comment.

ABS Entertainment is represented by Robert E. Allen, Roderick G. Dorman, Lawrence M. Hadley and Alan P. Block of McKool Smith Hennigan PC and Marvin A. Miller, Andrew Szot and Kathleen Boychuck of Miller Law LLC.

CBS is represented by Robert M. Schwartz, Victor Jih, Joshua C. Lee and Andrew J. Strabone of Irell & Manella LLP.

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

--Editing by Alyssa Miller.