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Ninth Circuit Says Remastered Songs Not Original in Win for Pre-1972 Artists

Even if engineers make the sound brighter or cleaner, they do not alter the expressive character and identity of the original recording. The decision wipes away a creative defense mounted by broadcasting companies.

By Scott Graham

With an assist from Toucan Sam and Tony Bennett, owners of pre-1972 sound recordings no longer have to worry about losing their common law copyright claims to a creative theory developed by CBS and Irell & Manella.

The U.S. Court of Appeals for the Ninth Circuit ruled Monday that analog recordings digitally remastered for CDs during the 1980s and 1990s are not original derivative works governed by post-1972 federal copyright law.

ABS Entertainment v. CBS Corp. reverses a judgment of U.S. District Judge Percy Anderson that threw a monkey wrench into efforts by older artists and the owners of their rights to enforce state and common law copyrights. The California Supreme Court is weighing the issue right now, but some broadcasters have already settled out of cases for eight- and nine-figure sums.

Photo: thepipe26/Wikimedia Commons

Al Green performing at the New Orleans Jazz & Heritage Festival in 2012.

"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 declicking, noise reduction and small changes in volume or emphasis, is no less Bennett's 'I Left My Heart in San Francisco' recording," visiting Federal Circuit Judge Richard Linn wrote for a unanimous panel Monday.

"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," Linn wrote. "That is so, even if the digital version would be perceived by a listener to be a brighter or cleaner rendition."

Judges Marsha Berzon and Paul Watford concurred.

Linn buttressed the holding with a 1997 Ninth Circuit decision involving inflatable versions of cereal box characters like Fruit Loops' Toucan Sam. Though the inflatable versions included different facial features and expression, any reasonable observer would have seen them as replicas. "The essential character and identity of each were not changed," Linn wrote.

Before 1972, federal copyright law made no mention of sound recordings. Instead, it only covered performances. But the California Legislature has granted authors "exclusive ownership" of pre-1972 recordings. Music owners say the Legislature was trying to cover the gap in federal law and have been suing over the playing of those old recordings.

McKool Smith and Robert Allen, a former legal affairs chief for Universal Music Publishing Group, represent a class that holds copyrights in the music of Al Green, the Everly Brothers, Mahalia Jackson and others.

Robert Allen, McKool Smith

"When Al Green and his band went into the studio and recorded their vocal and instrumental performances, that was the date that sounds were initially fixed in a tangible medium," Allen told the Ninth Circuit last fall. The fact that sound engineers may have later optimized them for digital transmission didn't create new derivative works, he argued.

Monday's decision "completely vindicates our clients," he said in a written statement.

Robert Schwartz, the Irell & Manella partner who masterminded the defense for CBS, said engineers spend weeks and even months creating a new aesthetic when remastering recordings. That lets the music owners market it as, "If you want to hear the Everly Brothers as you've never heard them before, you need to buy this new remaster."

"But it's the same recording," Linn told him at the argument.

"It's not the same recording," Schwartz replied. "It is the same studio performance." But the engineer may say, "I want them to hear the bass line more. Or I want them to hear the background singers more."

That, Schwartz said, "is creative expression ... sufficient to create a new work that is subject to copyright."

Linn had the last word Monday. He also relied on a Tenth Circuit opinion by then-Judge Neil Gorsuch, which held that using digital wire frames to create a 3D replica of an automobile did not create an original work.

"From the foregoing," Linn wrote, "it should be evident that a remastered sound recording is not eligible for independent copyright protection as a derivative work unless its essential character and identity reflect a level of independent sound recording authorship that makes it a variation."

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