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ABS Entertainment, Inc. v. CBS Corporation: No New Copyright for Digital Remasters

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The US Court of Appeals for the Ninth Circuit, in reversing a grant of summary judgment in favor of defendants, found that digitally remastered pre-1972 sound recordings were not entitled to protection under federal law as new copyrighted songs. *ABS Entertainment, Inc. v. CBS Corporation et al.*, [Case No. 16-55917](#) (9th Cir. Aug. 20, 2018) (Linn, J, sitting by designation).

ABS owned several pre-1972 analog recordings of classic songs. It hired remastering engineers to remaster the songs onto digital formats using standard technical processes to create accurate reproductions of the analog recordings. CBS played the remastered songs through terrestrial radio broadcasts and digital internet streams without permission. For all of its broadcast content, CBS paid a royalty to the owner of the underlying musical composition. For the digitally streamed content, CBS paid the compulsory license fee under the Sound Recording Act to Sound Exchange. For content delivered by terrestrial radio, CBS paid no license fee.

As background to the legal issues presented, for many years sound recordings were not covered by federal copyright law. The compositions (music and lyrics) were covered under federal copyright law, but the actual recordings were not. In view of this gap in protection, many states created their own laws protecting sound recordings. In 1971, the Copyright Act was updated, and sound recordings were accorded protection, but only for songs recorded in 1972 or later. That left all songs recorded before 1972 protected only by a patchwork of state laws.

ABS filed a class action lawsuit, alleging that CBS was publicly performing pre-1972 songs in violation of California state law. CBS argued that the digitally remastered recordings were authorized original derivative works, subject only to federal copyright law and not protected under state law. The issue was whether a sound engineer's remastering, which involved subjectively and artistically altering the work's timbre, spatial imagery, sound balance and loudness range, but otherwise leaving the work unedited, was entitled to federal copyright protection.

CBS's expert posited that the remastering process involved originality and aesthetic judgment. ABS's expert testified that the remastered recordings embodied the same performance as the analog recording. The district court excluded ABS's expert testimony as "unscientific" and "irrelevant." Considering only CBS's expert testimony, the district court found no genuine issue of fact in dispute, determined that the remastered recordings were authorized derivative works governed only by federal copyright law, and granted summary judgment. ABS appealed.

The Ninth Circuit stated that a derivative work is copyrightable when it meets two criteria under the test set forth in *Durham Indus. v. Tomy*. The test asks "whether the derivative work is original to the author and non-trivial" and requires that the work does not hinder the original copyright owner's ability to exercise its rights. The Court analyzed case law from the 10th and Second Circuits and guidance from the Copyright Office before concluding that "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 distinguishable from the underlying work."

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The Ninth Circuit noted that a digital file that does not add or remove sounds from the underlying recording, does not change the sequence of the sounds, and does not remix or otherwise alter the sounds in sequence or character, is likely to be nothing more than a copy—devoid of the authorship required for copyright protection.

The Ninth Circuit concluded that here, the district court applied an incorrect test for copyrightability and in doing so placed critical reliance on the testimony of CBS's expert. The Court noted that the purpose and effect of the remastering in this case was similar to a technical improvement and did not amount to a change in the essential character and identity of the sound recording. Rather, as the Court explained, a derivative sound recording identifiable solely by the changes incident to the change in medium generally does not exhibit the minimum level of originality to be copyrightable.

Practice Note: The decision is a victory for owners of pre-1972 songs who, for many years, have battled broadcasters over royalties. As Federal Circuit Judge Linn, sitting by designation, stated, 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.”

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