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State interpretations of copyright's 'bundle of (drum) sticks': The dilemma of pre-1972 sound recordings

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The saying that copyright is a "bundle of sticks" has never been more true than it has been for music.

As the technology of creating and enjoying music has evolved, copyright law has attempted to keep pace — but has often lagged behind.

This uneven development has led to situations in which the same piece of music may have different copyright protections depending on when and where it was created.

To date, it appears that state laws across the country are coalescing around limiting the copyright protection of pre-1972 sound recordings with regard to any right not explicitly created by federal statute.

However, pending cases in Florida and California may create a circuit split on an issue that casts doubt on one of the foundations of the music industry's business model.

MUSICAL COPYRIGHTS

Within a given piece of music, there are two primary tangible or quasi-tangible portions of the work that are subject to copyright.

The first is the underlying musical compositions, which consist of the lyrics and melody of the song. These are typically owned by songwriters or music publishers pursuant to agreements.

The other is the sound recordings embedded in a phonorecord, which are often owned by record labels pursuant to agreements with the recording artists.

The federal copyright statute has provided broad protection for underlying musical compositions since 1831, but federal protection for sound recordings was not added until 1971 — a few decades after record players became widely available. This was when Congress enacted the Sound Recordings Act, later codified in the Copyright Act of 1976.

Prior to 1971, state laws protected sound recording owners from piracy either through statute, like in California, or through common law, as in New York.

The U.S. Supreme Court held in *Goldstein v. California*, 412 U.S. 546 (1973), that these state laws remain valid and are not preempted by federal law.

Congress ratified this decision in Section 301(c) of the 1976 Copyright Act, which states, "With respect to sound recordings fixed before Feb. 15, 1972, any rights or remedies under the common law or statutes of any state shall not be annulled or limited by this title until Feb. 15, 2067."

Thus, copyright protections for sound recordings fixed before Feb. 15, 1972, are governed exclusively by state law.

Pending cases in Florida and California may create a circuit split on an issue that casts doubt on one of the foundations of the music industry's business model.

Underlying musical compositions have protected public performance rights that usually allow owners to collect royalties if the owned composition is played for a nonprivate audience, such as when the composition is played on terrestrial radio.

On the other hand, federal law has never provided such a public performance right to sound recordings. Instead, sound recordings have received only rights in reproduction, adaptation and distribution.

In essence, copyright owners of a musical composition are protected against both piracy and unauthorized use, whereas copyright owners of a sound recording are protected against piracy only.

This inconsistency was caused by broadcast lobbyists who opposed the addition of such an expanded right for sound recordings prior to the passage the Sound Recordings Act.

However, under the Digital Performance Right in Sound Recording Act of 1995, Congress created a digital performance right for "digital audio transmissions" of sound recordings, which