No. 16-55917

United States Court of Appeals for the Ninth Circuit

ABS ENTERTAINMENT, INC., an Arkansas corporation, each individually and on behalf of all others similarly situated; BARNABY RECORDS INC, a New York corporation; BRUNSWICK RECORD CORPORATION, a New York corporation; MALACO INC, a Mississippi corporation, each individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

– v. –

CBS CORPORATION, a Delaware corporation; CBS RADIO, INC., a Delaware corporation; DOES, 1 through 10,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA IN CASE NO. 2:15-CV-06257-PA-AGR HONORABLE PERCY ANDERSON

BRIEF FOR *AMICUS CURIAE* RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC. IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

COWAN LIEBOWITZ & LATMAN, P.C.
Attorneys for Amicus Curiae
114 West 47th Street
New York, New York 10036
(212) 790-9200

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, to enable judges and magistrates of the Court to evaluate possible disqualification or recusal, the undersigned attorney of record for *amicus curiae* certifies that the Recording Industry Association of America, Inc. has no parent corporation, and no publicly held company holds more than 10% of its stock.

Dated: February 23, 2017

/s/ Richard S. Mandel
Richard S. Mandel

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INTEREST OF *AMICUS CURIAE*

With the consent of all parties, *amicus curiae* Recording Industry Association of America, Inc. ("RIAA") respectfully submits this brief urging reversal of the district court's grant of summary judgment dismissing Plaintiffs' claims for copyright infringement under California state law.[1]

RIAA is the trade organization that supports and promotes the creative and financial vitality of the major recorded music companies. Its members are the music labels that comprise the most vibrant record industry in the world. RIAA members create, manufacture, and/or distribute approximately 85% of all legitimate recorded music produced and sold in the United States. RIAA members depend on copyrights and state laws that safeguard property to protect the valuable performances embodied in recorded music in which they have invested and which they have created in collaboration with musical artists and other creators.

RIAA submits this brief to address an issue that was not the focus of the district court's ruling, but that has significant consequences for the recording industry and the record companies' valuable state law rights in pre-1972 sound recordings. The district court's decision focused principally on whether the post-1972 digital remastering of pre-1972 sound recordings added sufficient originality

[1]Counsel for the parties have not authored this brief in whole or in part. No one other than amicus and its members contributed money that was intended to fund preparing or submitting this brief.

to create federally copyrighted derivative works in the remastered versions. RIAA does not address that fact intensive issue, which will turn on the nature of the remastering process involved in each particular case. However, even assuming that the remastered recordings here may qualify for federal copyright protection as derivative works, that does not compromise the exclusive California state law rights residing in the underlying pre-1972 recordings upon which the remastered versions are based. Those rights include the right to license or prohibit exploitation of pre-1972 sound recordings, both as they were originally recorded and to the extent those recordings are embodied in later remastered versions.

RIAA believes that it is well situated to address the interplay of federal and state law that governs this key issue, and to provide insight into how a ruling in this case may affect its members' valuable state law rights in the real world context of the recording industry. The pre-1972 sound recordings owned by RIAA member companies include some of the most historically significant and commercially successful records in music and cultural history. As RIAA's brief will demonstrate, those recordings are entitled to the protection of California state law, regardless of how the Court resolves the question of the copyrightability of the remasters in this case.

SUMMARY OF ARGUMENT

Federal copyright law does not apply to sound recordings fixed before February 15, 1972. It preserves protection of sound recordings fixed prior to that date exclusively to the states. Federal copyright law also is unambiguous that copyright protection for derivative works extends only to any *new* material contributed to such work, and that any copyright to which a derivative work may be entitled does not in any way lessen the scope of independent copyright protection in the preexisting material embodied in the derivative work.

The district court ignored these two basic precepts. It concluded that, if a post-1972 remastered version of a pre-1972 sound recording qualified for federal copyright protection as a derivative work, the federal compulsory licensing scheme provided broadcasters such as CBS with the right to use not only the new material added to the derivative work (protected by federal copyright), but also to exploit without permission the preexisting material from the pre-1972 sound recording (which is protected by state law). This conclusion is wrong.

Section 301(c) of the Copyright Act preserves the exclusive state law rights possessed by the owners of pre-1972 sound recordings. The fact that an owner of a pre-1972 sound recording subsequently authorizes a remastered version of that recording does not mean that the owner forfeits state law rights. Even if such remastering may result in a derivative work that is subject to federal copyright

protection, the plain language of the Copyright Act and Supreme Court precedent establish that the copyright in the post-1972 work extends only to the new material contributed to that work. For this reason, any compulsory license available under federal law only extends to the new copyrightable material (if any) added during the remastering process. In no way does that process deprive the owner of the original pre-1972 sound recording of continuing exclusive state law protection in that work.

ARGUMENT

I. SECTION 301(c) OF THE COPYRIGHT ACT PRESERVES STATE LAW RIGHTS IN PRE-1972 SOUND RECORDINGS

Congress did not extend federal copyright protection to sound recordings until 1972. *See* Pub. L. No. 92-140, 85 Stat. 391 (1971) (extending federal copyright protection to sound recordings created on or after February 15, 1972 – the effective date of amendment). Before that time, many states had created common law or statutory schemes affording legal protection for sound recordings. *See, e.g.*, *Capitol Records, Inc. v. Naxos of Am., Inc.*, 4 N.Y.3d 540, 555 (2005) (noting that by the 1970s, approximately half the states had adopted criminal statutes prohibiting piracy of musical recordings); *see also Goldstein v. California*, 412 U.S. 546, 560 (1973) ("the language of the Constitution neither explicitly

precludes the States from granting copyrights nor grants such authority exclusively to the Federal Government").[2]

Congress was fully familiar with these state law regimes when it extended federal copyright protection to sound recordings as of 1972. It chose to apply federal copyright protection only to "sound recordings fixed, published, and copyrighted on and after [February 15, 1972]," Pub. L. No. 92-140, 85 Stat. 391, 392 (1971), while leaving state law protection in place for recordings created before 1972. Congress also made clear that "nothing in [the Copyright Act] shall be applied retroactively or be construed as affecting in any way any rights with respect to sound recordings fixed before" the February 15, 1972 effective date of the statute. Id.

When Congress enacted the Copyright Act of 1976 four years later, it reaffirmed its decision to preserve state law protection for pre-1972 sound recordings. Thus, while enacting a broad general preemption clause providing that rights "equivalent to any of the exclusive rights within the general scope of

[2] Following the *Goldstein* case holding that federal law did not preempt state law protection of sound recordings, state legislatures passed many more anti-piracy laws with respect to pre-1972 recordings. *See* U.S. Copyright Office, *Federal Copyright Protection for Pre-1972 Sound Recordings: A Report of the Register of Copyrights* at 13 (2011). Today, nearly all states have criminal record piracy laws applicable to pre-1972 sound recordings. *Id*. at 20. Some states also have civil statutes protecting pre-1972 sound recordings, and most states have some form of non-statutory civil protection available for such recordings. *Id*. at 28-30.

copyright" are governed exclusively by federal law, 17 U.S.C. § 301(a), Congress carved out an important exception placing pre-1972 sound recordings outside the reach of federal law and subject to exclusive state law jurisdiction until 2047: "With respect to sound recordings fixed before February 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 February 15, 2047." Pub. L. No. 94-553, tit. § 301(c), 90 Stat. 2541, 2572 (1976). In 1998, Congress extended exclusive state law jurisdiction over pre-1972 sound recordings by twenty more years. *See* Pub. L. No. 105-298, 112 Stat. 2827 (1998), codified at 17 U.S.C. § 301(c). Accordingly, section 301(c) of the Copyright Act preserves exclusive state law rights in pre-1972 sound recordings until 2067.

These rights are codified in California by Cal. Civ. Code § 980(a)(2), which broadly provides that "[t]he author of an original work of authorship consisting of a sound recording initially fixed prior to February 15, 1972, has an exclusive ownership therein until February 15, 2047 as against all persons,"[3] and also reside in California common law. *See Flo & Eddie, Inc. v. Pandora Media, Inc.*, 113 U.S.P.Q.2d 2031, 2039 (C.D. Cal. 2015) (appeal pending) (California protects "sound recordings not only through its copyright statutes …, but also through

[3] The California statute was not amended to match the additional twenty year period of exclusive state law protection (through 2067) Congress provided for in its 1998 amendment of section 301(c) of the Copyright Act.

common law property concepts") (citing *Lone Ranger Television, Inc. v. Program Radio Corp.*, 740 F.2d 718, 725-26 (9th Cir. 1984)). The rights afforded by California law to pre-1972 sound recordings are free from intrusion by federal law, which only protects post-1972 sound recordings.

One result of these complementary schemes of protection is that the state law rights provided by Cal. Civ. Code § 980(a)(2) and/or California common law (and preserved by 17 U.S.C. § 301(c)) are in certain key respects different from and broader than those provided by federal law. The present case provides one example of the differing treatment that may be afforded sound recordings under federal and state law. Federal copyright law imposes a compulsory license for non-interactive digital transmissions of post-1972 sound recordings. *See* 17 U.S.C. § 114(d)(2). However, California state law imposes no such restriction for pre-1972 sound recordings, leaving their owners free to negotiate or refuse licenses.

Had Congress wished to extend the compulsory license provisions to pre-1972 sound recordings, it could easily have enacted an express statutory provision doing so. Congress was clearly aware of the many historically significant and commercially successful pre-1972 sound recordings that are regularly the subject of digital transmission by parties such as CBS. Yet Congress was content to limit the compulsory licensing provisions to post-1972 sound recordings, while also leaving in place continuing state law protection for pre-1972 sound recordings, as

expressly indicated in Section 301. The only reasonable conclusion that follows from such actions is that Congress did not intend to impose a compulsory licensing scheme with respect to pre-1972 sound recordings. *See, e.g., Whitfield v. United States*, 543 U.S. 209, 216 (2005) ("Congress has included an express overt-act requirement in at least 22 other current conspiracy statutes, clearly demonstrating that it knows how to impose such a requirement when it wishes to do so"); *Dole Food Co. v. Patrickson*, 538 U.S. 468, 476 (2003) (Congress knows how to refer to an 'owner' "in other than the formal sense," and did not do so in the Foreign Sovereign Immunities Act's definition of foreign state 'instrumentality'); *FCC v. NextWave Pers. Commc'ns, Inc.*, 537 U.S. 293, 302 (2003) (when Congress has intended to create exceptions to bankruptcy law requirements, "it has done so clearly and expressly").

The district court here ignored the express preservation of state law rights contained in section 301(c) of the Copyright Act. *See* 17 U.S.C. § 301(c) (state law rights in pre-1972 sound recordings "shall not be annulled or limited by this title until February 15, 2067"). The district court mistakenly assumed that, by authorizing a later remastered version of a pre-1972 sound recording, the copyright owners unwillingly gave up the very rights that section 301(c) of the Copyright Act expressly preserved. But, as set forth below, the creation of a remastered derivative work does not affect the copyright owner's exclusive state law rights to

control exploitation of its pre-1972 sound recordings. Federal copyright protection and any accompanying federal compulsory license extend only to the new copyrightable material added to the remastered recordings.

II. THE RIGHT TO EXPLOIT A DERIVATIVE WORK UNDER FEDERAL COPYRIGHT LAW DOES NOT INCLUDE THE RIGHT TO EXPLOIT THE UNDERLYING WORK UPON WHICH THE DERIVATIVE WORK IS BASED WITHOUT AUTHORIZATION

In extending the federal compulsory license scheme to include pre-1972 sound recordings that are embodied in post-1972 remastered versions of such recordings, the district court erroneously concluded that authorization to exploit the remastered versions as "derivative works" carried with it the concomitant right to exploit the underlying pre-1972 sound recordings embodied in those derivative works. Established principles of federal copyright law concerning derivative works contradict this conclusion. Any right broadcasters may have to exploit post-1972 remastered sound recordings does not relieve them of the need to obtain authorization to exploit the underlying pre-1972 sound recordings on which the remastered versions are based from the owners of those underlying recordings.

In a case decided under the 1909 Act, the Supreme Court explained in *Stewart v. Abend*, 495 U.S. 207 (1990), that the right to exploit a derivative work is independent of any rights in the underlying work on which the derivative work is based. In that case, the defendants had produced the film "Rear Window" based on motion picture rights they acquired to a Cornell Woolrich short story. *Id*. at

212. Plaintiff Abend, who had acquired copyright ownership of Woolrich's short story for the renewal term under the 1909 Act, brought a lawsuit alleging that the continued exploitation of the derivative work film infringed his copyright in the underlying short story on which the film had been based. *Id*. at 213.

The Supreme Court found that defendants' rights in their derivative work film provided no defense to a claim of copyright infringement in the underlying work. As the Court explained:

> The aspects of a derivative work added by the derivative author are that author's property, but the element drawn from the pre-existing work remains on grant from the owner of the pre-existing work. So long as the pre-existing work remains out of the public domain, its use is infringing if one who employs the work does not have a valid license or assignment for use of the pre-existing work. It is irrelevant whether the pre-existing work is inseparably intertwined with the derivative work.

Id. at 223 (citations omitted).

The 1976 Copyright Act expressly codified the independent nature of the copyright in the derivative work and the copyright in the preexisting material on which the derivative work is based:

> The copyright in a … derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. *The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.*

17 U.S.C. §103(b) (emphasis added). Thus, even where the underlying work is protected by federal copyright law rather than state law, the creation of a derivative work will not affect the scope of protection in the preexisting material on which such derivative work is based. *See, e.g.*, *Russell v. Price*, 612 F.2d 1123, 1128 (9th Cir. 1979) (permitting suit by owners of "Pygmalion" play against unauthorized distributor of derivative work film that had entered public domain based on separate copyright protection that continues to inhere in underlying play); *Durham Indus., Inc. v. Tomy Corp.*, 630 F.2d 905, 909 (2d Cir. 1980) ("the scope of protection afforded a derivative work … must not in any way affect the scope of any copyright protection in that preexisting material").

For this reason, Congress has made certain to provide express statutory exemptions in situations in which it intends to allow for exploitation of derivative works without authorization from the owner of the underlying work. For example, in enacting the 1976 Act's termination scheme providing authors and their families a right to terminate grants or licenses of copyright rights in specified circumstances, Congress expressly provided that derivative works prepared prior to termination of the grant "may continue to be utilized under the terms of the grant after its termination." *See* 17 U.S.C. §§ 203(b)(1), 304(c)(6)(A). That is, the Copyright Act makes special mention of exceptions to the general rule, reflected in §103(b), that exploitation of a derivative work requires authorization from the

owner of rights in the underlying work. The Supreme Court made this very point in *Abend* when it noted that Congress would not have included such express language in the termination provisions unless it had assumed that the owner of the underlying work would otherwise hold the right to sue for infringement even after the incorporation of the pre-existing work into the derivative work.[4] 495 U.S. at 226-27.

Ignoring these bedrock principles of copyright law, the district court here concluded that, as long as CBS had the right to use the remastered recordings as authorized derivative works under federal copyright law, it was free of any obligations under California state law to obtain permission to use the original recordings embodied in those remastered versions. Although acknowledging that "the copyright in the derivative work extends only to the original and independent expression contained therein," the district court did not appreciate the legal significance of that distinction:

> The relevant question is whether CBS had the right to perform the remastered, post-1972 sound recordings. Under federal law, CBS has the right to perform post-1972 sound recordings on terrestrial radio without payment, and to perform them through digital platforms under a statutory compulsory license. 17 U.S.C. § 114. There is no allegation that CBS has failed to comply with any of its royalty payment obligations under federal law. As a result, CBS has only played sound recordings which it had the right to use.

[4] Although the *Abend* decision was based on the 1909 Act, the Supreme Court also looked to the 1976 Act for guidance. 495 U.S. at 224.

ABS Entm't, Inc. v. CBS Corp., 119 U.S.P.Q.2d 1152, 1163 (C.D. Cal. 2016). This conclusory logic violates basic copyright principles and should be rejected.

First, as discussed above, any such holding contravenes §301(c), whose very purpose is to ensure that nothing "under this title" (the Copyright Act) limits state law rights in pre-1972 sound recordings. Section 301(c) is rendered ineffective if the mere advent of a later remastered version protected under federal law extinguishes all state law rights in the original pre-1972 recordings, such as the right to negotiate or refuse licenses. Second, and perhaps more importantly, the lower court's reasoning contradicts the law of derivative works as set forth in 17 U.S.C. §103(b) and *Abend*, which make clear that the right to exploit a derivative work does not encompass the right to exploit any element of the underlying work on which it is based. There can be no dispute that exploiting the post-1972 remastered version necessarily entails exploiting materials embodied in that underlying pre-1972 recording. Accordingly, CBS's purported "right to perform" the remastered versions as "derivative works" under federal law does not eliminate its additional obligation to obtain permission to perform the underlying pre-1972 sound recording embodied in those derivative works. *See Abend*, 495 U.S. at 223 ("…the element drawn from the pre-existing work remains on grant from the owner of the pre-existing work.…[I]ts use is infringing if one who employs the

work does not have a valid license or assignment for use of the pre-existing work").

In reaching a contrary conclusion, the district court relied on *Pryor v. Jean*, 112 U.S.P.Q.2d 1419 (C.D. Cal. 2014), which held that defendants did not infringe plaintiff's original sound recording because they only used the "actual sounds" from an authorized remastered version of that recording. *Id*. at 1423. Such reasoning is simply incompatible with the reality that remastered versions are "derivative works," which are by definition "based upon one or more preexisting works." *See* 17 U.S.C. § 101.

Moreover, the copyright in a sound recording is hardly so limited as the district court's opinion, and the poorly reasoned *Pryor* decision upon which it is based, suggest. "Sound recordings" are not merely the technical capture of live sounds by recording engineers, but rather "works that result from the fixation of a series of musical, spoken or other sounds…." 17 U.S.C. §101. As the legislative history explains:

> The copyrightable elements in a sound recording will usually, though not always, involve "authorship" both on the part of the performers whose performance is captured and on the part of the record producer responsible for setting up the recording session, capturing and electronically processing the sounds, and compiling and editing them to make the final sound recording.

H.R. Rep. No. 94-1476, 94 Cong., 2d Sess., at 56 (1976). *See also* D. &. M. Nimmer, *Nimmer on Copyright* §2.10[A][2], at 2-130 (2016) (sound recordings

embody performers' originality). In other words, the copyrightable "actual sounds" of a sound recording include the underlying musical performance and "musical sounds" – John Lennon's voice, Miles Davis's trumpet – captured by the recording medium. The original recordings necessarily embody the "musical sounds" of that performance, and such sounds remain integral to any later technical manipulations and remastering of those recordings, no matter how "creative" that remastering is alleged to be. Stated otherwise, every subsequent remastering of a 1964 recording of the Beatles will still embody those same musical performances and "sounds," no matter how an engineer might later manipulate those sounds to improve, enhance or alter their quality.

It would rewrite fundamental principles of copyright law to hold in this case that any authorization CBS had to exploit remastered versions of pre-1972 sound recordings relieves it of its obligation to obtain authorization to use the underlying recordings themselves. Nor would requiring broadcasters to negotiate with copyright owners for use of pre-1972 sound recordings that are embodied in post-1972 remastered recordings interfere with the statutory compulsory licensing scheme. Nothing in the compulsory license provisions or the Copyright Act generally mandates that a single permission will always be sufficient to permit use of a particular work. To the contrary, it is standard practice in the music industry, including with respect to the very digital transmissions at issue here, for

broadcasters to obtain multiple permissions from different right holders in order to exploit a work.

In this respect, it bears noting that the musical sound recordings that broadcasters transmit are themselves derivative works incorporating the underlying musical compositions performed by the musicians, so that broadcasters like CBS need authorization to exploit not only the recording (typically owned by a record company) but also the musical composition (typically owned by a composer or music publisher). *See In re Cellco P'ship*, 663 F. Supp.2d 363, 369 n. 6 (S.D.N.Y. 2009) ("Sound recordings are 'derivative' works of the preexisting musical composition, and to obtain a copyright in a sound recording one must secure a license from the copyright owner of the underlying work"); Nimmer, *supra*, §2.10[A][1][b], at 2-126 (2016) ("A sound recording is a derivative work in relation to the musical work recorded therein"). There is of course no suggestion that obtaining such additional license upsets the congressional compulsory license scheme, or that broadcasters' right to use the derivative work sound recording somehow extends to the preexisting musical composition on which the sound recordings are based without a separate license and payment. There is no reason why the result should be any different with respect to the underlying rights in a pre-1972 sound recording, particularly where Congress has expressly provided for continuing protection in such works. *See* 17 U.S.C. § 301(c). To the extent the

compulsory license gives broadcasters the right to exploit the remastered recordings, such right extends only to the new material added on remastering under section 103(b) of the Copyright Act, not to the preexisting material on which the remastered works were based (such as the underlying musical composition or the pre-1972 sound recording).

CBS advocates for a contrary system that is both illogical and impractical. CBS would have this Court believe that Congress enacted a statutory scheme designed to ensure that broadcasters avoid negotiating with copyright holders of pre-1972 sound recordings when such works were remastered, but yet was perfectly content to require such separately negotiated licenses in those cases where the pre-1972 works were not the subject of later remastering (or the remastering was not sufficiently original to qualify for copyright protection). There is no evidence that Congress intended to enact a compulsory licensing scheme with respect to pre-1972 sound recordings at all, let alone one that was wholly dependent on the vagaries of the remastering process – a fact-intensive question that broadcasters would need to investigate recording by recording before determining whether they could use a particular recording under the compulsory license.

Because broadcasters are unlikely to undertake such a case-by-case inquiry, CBS asks the Court to assume that *all* remastered recordings not only meet the

originality requirement, but also somehow extinguish the original sounds in the underlying recordings. While such an approach may be a self-serving money saver for broadcasters, Congress certainly did not envision such a system.[5] The plain statutory language of sections 103(b) and 301(c) of the Copyright Act confirms that pre-1972 sound recordings continue to enjoy state law protection, which does not somehow evaporate when such recordings are remastered.

[5] Such a blanket rule is also inconsistent with the Copyright Office's guidance that a remix from multitrack sources or a remastering "that involves multiple kinds of creative authorship, such as adjustments of equalization, sound editing, and channel assignment" can be registered as derivative works, while "[m]echanical changes or processes applied to a sound recording, such as a change in format, declicking, and noise reduction, generally do not represent enough original authorship to be registered." United States Copyright Office Circular No. 56 (2014) at 3-4, available online at http://www.copyright.gov/circs/circ56.pdf.

CONCLUSION

For the reasons stated above, the district court's grant of summary judgment in favor of CBS should be reversed.

Dated: February 23, 2017

Respectfully submitted,

/s/ Richard S. Mandel
Richard S. Mandel
COWAN, LIEBOWITZ & LATMAN, P.C.
114 West 47th Street
New York, New York 10036
Telephone: (212) 790-9200
Fax: (212) 575-0671

George M. Borkowski
RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.
1025 F Street, N.W.
Washington, D.C. 20005
Telephone: (202) 775-0101
Fax: (202) 775-7523

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Signature of Attorney or Unrepresented Litigant: s/Richard S. Mandel

Date: 2/23/2017

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