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In suing over pre-1972 recordings, the Turtles shake up music industry

The state of music copyright law is a mess, and it's about to get messier.

The history of music copyright law is tortuous. Since musical compositions first became eligible for federal copyright in 1831, the law has developed into a snarl of different rights and recondite licensing practices, made even more complex by the clash of new technology with legal rules devised in the era of piano rolls.

The case that has the music industry all shook up is *Flo & Eddie Inc. v. Sirius XM Radio* (C.D. Cal, Sept. 22, 2014). While it doesn't go back to the piano-roll era, it does pit the oldies against satellite radio.

Flo & Eddie is a corporation controlled by Howard Kaylan and Mark Volman, two of the founding members of the 1960s rock group The Turtles, best known for the memorable, if annoying, song "Happy Together." The Turtles think Sirius should be paying license fees to play their oldies. Sirius says that has never been the law or the practice in the music broadcasting industry.

Judge Philip Gutierrez, in his recent ruling in the case, says it is the law now — at least in California, where the case was filed.

The consequences of the ruling could be staggering, both in terms of potential damages to broadcasters like Sirius who have been playing pre-1972 sound recordings for years without licenses and in terms of the future availability of pre-1972 music on digital platforms such as satellite radio and Internet-streaming services.

To understand the ruling, it's necessary to delve into some of the enigmas of music copyright law. First, copyright protects music in two forms: musical compositions (the basic music and lyrics, apart from any specific performance of recordings of it) and sound recordings (a specific recorded performance of a song).

These are two kinds of works of authorship, each warranting independent copyright protection. Copyright in a musical composition is typically owned by the composer (and usually transferred to a music publishing company). Copyright in a sound recording is typically owned by the record company that produced the recording.

To complicate matters, each of these types of works has a different set of rights under the Copyright Act. The musical composition copyright has broad rights that allow control over making copies, derivative works and public performances of music.

The sound recordings copyright is much narrower. The owner can prohibit copying, but only in the form of exact duplication of the original sounds — sound-alike recordings and covers are specifically permitted, so long as royalties are paid to the owner of copyright in the musical composition.

Importantly, sound recordings have only a limited right to control public performances. That right extends only to "digital audio transmissions," such as performances on Pandora, Sirius and similar music services.

For this reason, analog AM and FM radio stations have never had to pay public performance royalties for any sound recordings (though they must pay such royalties for the musical composition copyright, typically through agencies such as ASCAP and BMI).

Compared to the musical composition copyright, the sound recording copyright is an unloved child in the copyright family (thanks to decades of lobbying power exercised by broadcasters).

There is one more piece of the puzzle necessary to understand why this lawsuit involves The Turtles and not Taylor Swift or Will.i.am. Protection for sound recordings was not added to the federal Copyright Act until 1972.

INSIDE IP LAW

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Before that, protection, if any, for sound recordings was based on state legislation or common law. The 1972 federal legislation adding sound recordings as copyright subject matter was not retroactive, so the oldies continue to look to state law for protection.

Most states have not found the topic of pre-1972 sound recordings compelling enough to enact specific legislation in this area. States have looked to principles of unfair competition law or common law copyright to address unauthorized duplication of pre-1972 sound recordings.

Much remains to be sorted out, not the least of which is whether the law of one state will dictate how this will all play out, or what happens if courts in different states reach contrary results.

Few cases have dealt with the duplication issue, and even fewer have addressed the issue of whether common law copyright for sound recordings includes the right to control public performances of the recording.

California is an exception. It stepped into the federal regulatory void in 1982 and enacted a statute granting explicit protection to pre-1972 recordings. The California law says that the author of a pre-1972 sound recording "has exclusive ownership therein."

Mimicking the federal scope or protection for post-1971 recordings, the California law makes an exception for independent recordings that do not duplicate the actual sounds of the original (thus allowing covers and sound-alike recordings).

The Turtles invoked the California statute as the basis for their claim that Sirius needed a license to play "Happy Together" and other Turtles records. Sirius argued that the phrase "exclusive ownership" was ambiguous and that it should be interpreted only to prevent duplication of sound recordings, not the public performance of the recordings.

The court rejected this argument. It found that the plain meaning of "exclusive ownership" is that the owner has the right to use and control the recording to the exclusion of others.

Pointing to well-established principles of statutory construction, the court noted that the California legislature included an exception for sound-alike recordings, from which the court concluded that the legislature did not intend to include any other exceptions (such as for public performance).

In addition, the California law modeled its sole exception (for covers and sound-alikes) on the same exception appearing in the federal law yet did not incorporate the federal exception for public performance applicable to post-1971 recordings.

From a statutory construction standpoint, it's hard to argue with the court's conclusion. The ruling will no doubt be appealed, but in the meantime we can expect similar lawsuits to be filed. Who will be next to file — Elvis, the Beatles, the Supremes, Bob Dylan?

Much remains to be sorted out, not the least of which is whether the law of one state will dictate how this will all play out, or what happens if courts in different states reach contrary results.

One thing is certain, though: For the near term, at least, the unsettled state of music copyright law will persist.