

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

ABS ENTERTAINMENT, INC., an
Arkansas corporation; 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.

No. 16-55917

D.C. No.
2:15-cv-06257-
PA-AGR

ORDER AND
AMENDED
OPINION

Appeal from the United States District Court
for the Central District of California
Percy Anderson, District Judge, Presiding

Argued and Submitted November 9, 2017
Pasadena, California

Filed August 20, 2018
Amended October 31, 2018

Before: Richard Linn,* Marsha S. Berzon,
and Paul J. Watford, Circuit Judges.

Order;
Opinion by Judge Linn

SUMMARY**

Copyright

The panel reversed the district court's grant of summary judgment in favor of the defendants on claims of violation of state law copyrights possessed by the plaintiffs in sound recordings originally fixed before 1972.

Under the Sound Recording Act, sound recordings fixed after February 15, 1972, are subject to a compulsory license regime for performance via digital transmission and are excused from infringement for performance via terrestrial radio. Congress reserved governance of sound recordings fixed before 1972 to state statutory and common law and excluded such sound recordings from federal copyright protection until 2067.

The plaintiffs owned sound recordings embodying musical performances initially fixed in analog format prior

* The Honorable Richard Linn, United States Circuit Judge for the U.S. Court of Appeals for the Federal Circuit, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

to February 15, 1972. They remastered these pre-1972 sound recordings onto digital formats.

The panel held that the district court erred in finding a lack of a genuine issue of material fact about the copyright eligibility of remastered sound recordings distributed by the defendants. The panel concluded that a derivative sound recording distinctly identifiable solely by the changes in medium generally does not exhibit the minimum level of originality to be copyrightable.

The panel held that the district court erred in concluding that plaintiffs' state copyright interest in the pre-1972 sound recordings embodied in the remastered sound recordings was preempted by federal copyright law. The panel held that the creation of an authorized digital remastering of pre-1972 analog sound recordings that qualify as copyrightable derivative works does not bring the remastered sound recordings exclusively under the ambit of federal law.

The panel held that the district court abused its discretion by excluding the testimony of plaintiffs' expert, excluding certain reports as evidence of defendants' performance of plaintiffs' sound recordings in California, and granting partial summary judgment of no infringement with respect to the samples contained in those reports.

The panel concluded that the district court's strict application of its local rules with respect to the timeliness of plaintiffs' motion for class action certification was inconsistent with the Federal Rules of Civil Procedure and was thus an abuse of discretion.

The panel reversed the grant of summary judgment and the striking of class certification and remanded for further proceedings.

COUNSEL

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ORDER

The Opinion filed August 20, 2018, and reported at 900 F. 3d 1113, is hereby amended. The amended opinion will be filed concurrently with this order.

The panel has unanimously voted to deny Appellees' petition for panel rehearing. Judge Berzon and Judge Watford have voted to deny the petition for rehearing en banc. Judge Linn recommends denial of the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for panel rehearing and the petition for rehearing en banc are **DENIED**.

Future petitions for rehearing or rehearing en banc will not be entertained in this case.

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