Litigation and Legislation Seek Music Copyright Royalties for the "Golden Oldies"

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Digital radio providers, such as satellite radio broadcaster SiriusXM and Internet radio "webcaster" Pandora, arelegally obliged to pay royalty fees to both songwriters and recording artists whenever they transmit copyrighted music to their listeners. (AM/FM radio broadcasters pay royalty fees to songwriters but **not** to recording artists). However, these digital music services apparently interpret the Copyright Act as permitting them to use popular songs that were originally recorded prior to 1972 (by bands and musicians such as the Beatles, Aretha Franklin, and the Rolling Stones) *without* having to pay copyright royalties to the recording artists or record labels (though they do pay royalties to music publishers and songwriters). Such pre-1972 sound recordings constitute approximately 15% of all digital radio transmissions and would have provided about $60 billion in music royalties for recording artists in 2013, according to one industry estimate. The reason that digital radio providers have not obtained licenses or paid compensation to sound recording copyright holders for their use of such "golden oldies" recordings is that songs recorded before 1972 lack federal copyright protection.

Musical compositions have enjoyed federal copyright protection since 1831. However, the Copyright Act did not offer sound recordings any form of protection until 1971. In that year, Congress passed a law that grantedexclusive rights of reproduction and distribution to sound recording copyright holders as a response to the increased amount of unauthorized copying of records and tapes due to the popularity of the audiotape recorder. By its terms, the law was *prospective* only and provided limited federal copyright protection to sound recordings made on or after the effective date of the law, February 15, 1972. For sound recordings made prior to that date, their creators must seek legal relief in state courts for an unlawful use of their works.

Many states have enacted laws to protect pre-1972 sound recordings in an effort to combat sound recording piracy. These state laws generally fall within one of three categories—(1) criminal record piracy statutes, (2) common law rights involving unfair competition and misappropriation, and (3) civil laws that grant ownership rights. The state laws vary in their scope of protection and therefore lack the nationwide uniformity that is provided by the federal copyright law. In *Goldstein v. California*, the defendant, convicted of criminal record piracy under California state law, challenged the constitutionality of the state's penal statute on the grounds that it conflicted with the Copyright Clause and the Supremacy Clause of the U.S. Constitution and the federal copyright act. The U.S. Supreme Court held that California's protection for pre-1972 sound recordings was *not* preempted by federal copyright law or the Constitution.

Section 301(c) of the Copyright Act provides that state common law protection for sound recordings, if available under state statute or state common law (rights derived from state judicial decisions), will end on February 15, 2067, after which time they will enter the public domain. The Register of Copyrights issued a report in December 2011 recommending that Congress extend federal copyright protection to all sound recordings created before February 15, 1972. (To date, Congress has not considered any legislation that would grant such retroactive copyright protection.)

Frustrated with what they believe is an unfair "free" use of their creative works, recording artists and record companies filed state and federal lawsuits against SiriusXM and Pandora (in 2013 and 2014, respectively) in an effort to recover damages and injunctive relief. However, at least one music industry observer has raised doubtsabout the potential success of these lawsuits.

In addition, legislation has been introduced in the 113th Congress, H.R. 4772 (the Respecting Senior Performers as Essential Cultural Treasures, or RESPECT, Act), that would require companies transmitting pre-1972 sound recordings via satellite, Internet, and digital cable television to pay performance royalties to recording artists. The legislation would impose an obligation on digital music providers to pay royalties for such older recordings, but it would *not* grant them federal copyright protection. Thus, while the legislation would give creators of pre-1972 sound recordings the right to bring a federal civil action to obtain royalties for the digital transmission of their music, the legislation would not provide a right to sue for copyright infringement. Like most proposed changes to copyright law, the RESPECT Act has its share of supporters and critics. Though the legislation would provide royalty income to older recording artists, it could also have the effect of dissuading digital music services from including the "golden oldies" in their music catalogs. In a filing with the U.S. Securities Exchange Commission, Pandora warned that it might be forced to remove all pre-1972 sound recordings from its service if it is required (through legislation or by the courts) to pay royalties for the reproduction and performance of such music.

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