US Perspectives: US Courts Recognise New Performers' Rights

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For performers and record labels in the United States, it is terrific news. They possess previously unrecognised rights in audio recordings, according to three recent court rulings. But not everyone is pleased about this. The decisions not only upend 75 years of US copyright law, they create big problems for broadcasters, webcasters and many other internet firms, all of whom now face hefty liability for copyright infringement.

How did this come about? It all began with America's unique approach to audio recordings.

There are two basic sets of rights in audio recordings. Like other nations, the US grants copyright protection to composers and lyricists. These artists have a legal right to be paid when recordings of their compositions are played publicly, via radio broadcasts or internet streaming.

As for the singers and musicians who make audio recordings, their legal situation is more complicated.

"In most countries, performers' rights in audio recordings are protected by neighbouring rights, not by copyright. They are protected under the Rome Convention, not the Berne Convention," said Prof. Neil W. Netanel of UCLA School of Law. The Rome Convention grants performers rights in the copying, distribution and public performance of their audio recordings (AKA phonograms).

In the United States, things are very different. It is the only developed nation that has not signed the Rome Convention. And until 1972, the US federal government gave performers absolutely no legal rights in their recorded performances.

That changed when the Sound Recording Act of 1971 took effect. This federal law granted performers a copyright in their recorded performances, but only for works recorded on and after 15 February, 1972.

The law contained another caveat, too, inserted at the behest of the broadcast industry. The new statute gave performers the right to control the reproduction and distribution of their recorded performances, but it did not give them any rights in the public performances of their recordings. In other words, the law allowed performers to sue companies for making and selling unauthorized copies of records or cassettes, but it did not entitle performers to receive royalties when their recordings were played by radio stations.

In 1978, the US narrowed this caveat, granting performers a public performance right in audio recordings that were transmitted digitally – i.e., by webcasting, digital downloads, or satellite radio services.

"When the internet became important, broadcasters were willing to let Congress enact a public performance right for digital transmissions for post-15 February, 1972 works and to provide a compulsory licence for those works. So performers get paid for streaming, but not for digital audiovisual transmissions or for analogue transmissions. That makes no sense," said Prof. Tyler T. Ochoa of Santa Clara Law School.

It does, however, reflect the political clout of broadcasters. And that was the legal situation in the United States.

Then, in the last few months, three different courts ruled that, even when federal law grants no public performance rights in audio recordings, such rights can be found under state law.

Beyond the Beltway

Copyright in the United States is governed almost exclusively by federal law. However, each of the 50 states can provide creators with some additional copyright protections, provided these do not conflict with the federal copyright scheme.

Federal copyright law does not grant performers any rights in pre-1972 audio recordings, but it does not forbid the states from granting such rights. As a result, many state copyright laws in the US provide performers with the right to control the copying and distribution of their pre-1972 audio recordings. Companies that make and sell unauthorised copies of these recordings can be held liable for infringing state copyright law.

Do these state copyright laws also provide performers with rights in the public performances of their audio recordings? Absolutely not, according to the Second Circuit's 1940 decision in *RCA Mfg. Co. v. Whiteman*. In an opinion by famed judge Learned Hand, the court held that a performer's common law rights in a copy of a recording terminate once that copy is sold, so the performer cannot stop a purchaser from freely broadcasting its purchased copy over the radio.

The decision was seen as definitive. "When the Supreme Court refused certiorari for this case, lawyers (in the US) treated this decision as applying to the entire country," said Ochoa. "As a result, it has been settled since 1940 that there is no performance right in a sound recording. Everyone acquiesced in it. It is hornbook law in any copyright treatise you care to look in."

Then, on 22 September of this year, things began to change dramatically, when a federal district court in California issued a ruling in *Flo & Eddie Inc. v. Sirius XM Radio* (PDF). At issue was the scope of California Civil Code §980(A)2), a state copyright law that gives performers "exclusive ownership" rights in sound recordings made before 15 February 1972. Without even mentioning the *RCA* case, the court held that the statute gave performers the right to control public performances of their recordings. The court granted summary judgment against Sirius, ruling it had committed copyright infringement when it digitally broadcast the plaintiff's pre-1972 recordings.

Less than a month later, a California state trial court concurred with this interpretation of the law. In its 14 October ruling in *Capitol Records v. Sirius XM Radio* (PDF), the court held that California's copyright law granted a public performance right to creators of pre-1972 sound recordings. (Capitol Records was able to assert these rights because, like many record labels, it routinely acquired all the musicians' rights in their sound recordings.)

On 14 November, a third court chimed in, ruling on another of the cases that Flo & Eddie had filed around the nation against Sirius XM. This court applied New York law, but it reached the same conclusion as the two earlier California cases. The federal district court in Manhattan held in *Flo & Eddie Inc. v. Sirius XM Radio* (PDF) that New York's common law grants a public performance right to creators of pre-1972 audio recordings and that Sirius apparently infringed this common law copyright when it digitally broadcast plaintiff's recordings. The court briefly cited the *RCA* case, but made no attempt to explain why that decision wasn't controlling precedent.

A Huge Payday

It is unclear if the other 48 states' copyright laws also provide performers with public performance rights. However, just having New York and California recognize these rights gives a big boost to performers – and to the record labels that typically purchase performers' legal rights.

"This will have wide-ranging ramifications," said Kevin Goldberg, a member of the Arlington, Virginia law firm of Fletcher, Heald & Hildreth.

Consider the way performers and record labels will be able to squeeze money out of digital broadcasters, such as Sirius. "Sirius broadcasts nationwide from a satellite. It doesn't have any practical way to block streams to an individual state," said Ochoa.

Thus, if digital broadcasters like Sirius want to continue to play pre-1972 songs, from popular artists like the Beatles and Rolling Stones, these broadcasters will need to reach nationwide royalty deals with performers and record labels. That, of course, will be in addition to the millions of dollars such companies must pay for past state copyright infringements of pre-1972 recordings.

Companies that stream music online, such as Spotify and Pandora, also will need to pay if they want to keep streaming pre-1972 recordings. And these companies will be on the hook for past infringements of those recordings.

Webcasters and digital broadcasters may wind up paying hundreds of millions of dollars, according to some performers and record labels. Still, it could be worse. Because these digital music companies are already paying performance royalties for recordings made after 15 February 1972, the trio of rulings affect the companies' use of just pre-1972 recordings.

Traditional radio broadcasters, by contrast, have never paid performance royalties. But now, according to the logic of the three court rulings, these broadcasters will need to pay performance royalties for *all* of the recordings they broadcast. Moreover, these broadcasters face state copyright infringement liability for *all* the music they have played over the past decades.

"Traditional broadcasters are sweating bullets," said Ochoa. "They are the ones with the most to lose."

Online service providers, such as Dropbox and SoundCloud, are also at risk. They may be liable for infringing audio recordings posted by their users. A federal statute, the Digital Millennium Copyright Act (DMCA), ordinarily insulates online service providers against such liability, but that statute was written with federal copyright infringement in mind.

"The courts have split on whether the DMCA's safe harbour applies to sound recordings protected under state law," said Netanel.

With so much at stake, the three recent trial court rulings are unlikely to be last word on whether state copyright laws grant public performance rights in audio recordings. A lot more litigation is expected.

However, if the US courts ultimately hold that state copyright laws protect public performance rights, this will be a significant step in harmonising performers' legal rights in the US with protections found almost everywhere else.

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Steven Seidenberg is a freelance reporter and attorney who has been covering intellectual property developments in the US for more than 15 years. He is based in the greater New York City area and may be reached at info@ip-watch.ch.

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