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Goldstein v. California, 412 U.S. 546 (1973)

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CASE COMMENTS

Copyright—SOUND RECORDINGS—CALIFORNIA STATUTE PROHIBITING MUSIC PIRACY IS A VALID EXERCISE OF RETAINED STATE POWERS AND DOES NOT CONFLICT WITH FEDERAL COPYRIGHT PROTECTION.—*Goldstein v. California*, 412 U.S. 546 (1973).

Donald Goldstein and others were charged with violating California penal code section 653h, which prohibits the unauthorized duplication of sound recordings[1] for commercial purposes.[2] Defendants moved to dismiss the complaint on the grounds that the California statute conflicted with the copyright clause of the United States Constitution[3] and the federal Copyright Act,[4] which implements the clause by granting owners of certain creative works exclusive rights for a specified period to copy and sell their copyrighted material.[5] Upon denial of their motion to dismiss, the defendants pleaded nolo contendere. On appeal the Appellate Department of the Superior Court of California upheld the validity of the statute. After granting certiorari the United States Supreme Court, in a 5-4 decision, affirmed.[6] The Court held first that the copyright clause does not necessarily preclude states from granting copyright protection. Secondly, the Court determined that the federal Copyright Act did not preempt the California statute, at least as both Act and statute existed at the time the master recordings at issue in *Goldstein* had been fixed.[7] The unauthorized duplication at issue had

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1. For the purposes of this comment a "sound recording" is a material object on which musical, spoken or other sounds are fixed and from which the sounds can be reproduced, either directly or with the aid of a machine. *See* 17 U.S.C. § 26 (Supp. I, 1971), *amending* (1970) (originally enacted as Act of Oct. 15, 1971, Pub. L. No. 92-140, § 1(e), 85 Stat. 391). A sound recording should be distinguished from the original musical composition (*i.e.*, sheet music), copyrightable under 17 U.S.C. § 5(e) (1970), and from a musical production of the original composition, protected by 17 U.S.C. § 101(e) (1970).

2. CAL. PENAL CODE § 653h (West 1970) provides in part:

(a) Every person is guilty of a misdemeanor who:

(1) Knowingly and willfully transfers . . . any sounds recorded on a phonograph record, disc, wire, tape . . . with intent to sell or cause to be sold, or to use or cause to be used for profit through public performance, such article on which such sounds are so transferred, without the consent of the owner.

(2) Sells any such article with the knowledge that the sounds thereon have been so transferred without the consent of the owner.

3. U.S. CONST. art. I, § 8, cl. 8, provides that Congress shall have the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . . ."

4. 17 U.S.C. §§ 1-216 (1970), *as amended*, (Supp. I, 1971).

5. *See* 17 U.S.C. §§ 1, 24 (1970).

6. Goldstein v. California, 412 U.S. 546 (1973).

7. The term "fixed" apparently refers to the process of reproducing sounds upon a material object. *See* note 1 *supra*. Neither the Copyright Act nor the interpretive cases

occurred prior to February 15, 1972, the effective date of the Sound Recording Amendments of 1971.[8] The Court therefore did not consider whether the Amendments, which for the first time brought sound recordings within the federal Act as copyrightable subject matter,[9] preclude states from protecting recordings fixed after that date.

The degree of protection afforded sound recordings by the federal copyright system has long remained unclear. As early as 1908 the Supreme Court held that a player piano roll was not a copy of copyrighted sheet music,[10] since a machine was required to convert the perforations into musical notes.[11] Congress reversed this narrow holding by enacting sections 101(e) and 1(e) of the Copyright Act of 1909, which provide for civil remedies, including injunctions and mandatory royalties, for the "unauthorized mechanical reproduction of musical works."[12] Regardless of these provisions, and the broad wording of sections four and five of the Act,[13] courts generally have been unwilling to find in the Act any effective copyright protection for sound recordings.[14]

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have provided a precise definition of the word. Subsequent to the fixing of these recordings, the Copyright Act was amended. *See* notes 8 & 9 and accompanying text *infra*.

8. Act of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391, *amending* 17 U.S.C. §§ 1, 5, 19, 20, 26, 101(e) (1970). These amendments are reflected in 17 U.S.C. §§ 1(f), 5, 19, 20, 26, 101(e) (Supp. I, 1971).

9. *See* 17 U.S.C. §§ 1(f), 5(n) (Supp. I, 1971), *amending* 17 U.S.C. §§ 1, 5 (1970).

10. White-Smith Music Publishing Co. v. Apollo Co., 209 U.S. 1 (1908).

11. The Court described a "copy" as " 'a written or printed record of [the original] in intelligible notation.' " *Id.* at 17. The Court explained: "It may be true that in a broad sense a mechanical instrument which produces a tune copies it; but this is a strained and artificial meaning . . . . These musical tones are not a copy [of the sheet music] which appeals to the eye." *Id.*

12. 17 U.S.C. § 101(e) (1970), *as amended,* (Supp. I, 1971); 17 U.S.C. § 1(e) (1970). The original § 101(e), still effective for recordings fixed before February 15, 1972, provides that when the owner of a copyrighted musical composition (*i.e.,* sheet music) permits others to make mechanical reproductions, any unauthorized reproduction or other infringement can be enjoined and damages as specified in § 1(e) can be obtained, but no criminal actions can be initiated. Section 1(e) provides the owner of a copyrighted musical composition with the exclusive right to perform the composition publicly for profit and to record it. However, once the owner has permitted a mechanical reproduction of the composition, others may make similar use of the composition by paying the copyright owner a royalty of two cents, trebled upon an original failure to pay, for each piece manufactured. No such royalty payments are required if the owner has not filed notice to record with the copyright office.

13. 17 U.S.C. § 4 (1970) provides that "all the writings of an author" may be copyrighted. 17 U.S.C. § 5 (1970), *as amended,* (Supp. I, 1971), specifies fourteen classes of works, including musical compositions (*i.e.,* sheet music), but also states that the enumeration of classes is not to be held to limit the scope of copyrightable writings.

14. In *Goldstein* the Court observed that although sound recordings can be included as "writings" within the copyright clause, 412 U.S. at 561-62, the courts, with one early exception, *see* Fonotipia, Ltd. v. Bradley, 171 F. 951, 963 (E.D.N.Y. 1909), have never held that the statutory "writings" of 17 U.S.C. §§ 4, 5 (1970), *as amended,* (Supp. I, 1971), include sound recordings. 412 U.S. at 568. *See also* Capitol Records, Inc. v. Mercury Record

Like sound recordings, news content lacked copyright protection under the 1909 Copyright Act. In 1918, however, the Supreme Court found a means of protecting news copy in *International News Service v. Associated Press*[15] *(INS)*. The Court created this protection by finding a quasi-property right in news and by using a combination of the doctrines of unfair competition and misappropriation to enjoin news piracy.[16] Several state courts have applied the *INS* unfair competition theory to protect uncopyrightable sound recordings.[17] Occasionally courts have found a further source of state power in the states' retained ability to protect common law rights in unpublished works.[18] More

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Corp., 221 F.2d 657, 661 (2d Cir. 1955). 17 U.S.C. § 5(n) (Supp. I, 1971) now specifically includes sound recordings as one class of copyrightable work.

The "copyright control" provided in the compulsory licensing provisions, 17 U.S.C. § 1(e) (1970); 17 U.S.C. § 101(e) (1970), *as amended,* (Supp. I, 1971), discussed in note 12 *supra,* is very narrow. Unlike an owner of writings protected by §§ 4 and 5, the copyright owner of a musical composition lacks the exclusive right to make copies of a recording of his composition. Also, the owner's remedies are much more restrictive. Although the Act's general remedy provision allows full damages, including lost profits, for copyright infringement, *see* 17 U.S.C. § 101(b) (1970), the musical copyright owner's remedies are limited to the minimal royalties and perhaps litigation costs. *See* Shapiro, Bernstein & Co. v. Goody, 248 F.2d 260 (2d Cir. 1957).

This limitation upon damages is substantial. In the legitimate recording industry approximately 48% of the expenses are incurred for royalties, master recording costs and advertising. Stark, *The Great Tape Robbery,* TAPE RECORDER GUIDE 1973 at 38-41 (Winter ed.). Since a recording pirate can almost eliminate these expenses, he can sell the copy for a much lower price. For example, in Capitol Records, Inc. v. Greatest Records, Inc., 252 N.Y.S.2d 553 (Sup. Ct. 1964), the pirates were able to sell their copies for $2.99 while the original recordings sold for $3.98. In fact, the provisions seem to benefit the pirates more than the original recorders. *See* notes 64-67 and accompanying text *infra.*

15. 248 U.S. 215 (1918).

16. *Id.* at 236, 240. Traditionally the common law doctrine of unfair competition prohibited (1) the appropriation of the investment or skill of another, (2) by a competitor, (3) through fraudulent deception among consumers as to the actual source of the products. *See* Goldstein, *Federal System Ordering of the Copyright Interest,* 69 COLUM. L. REV. 49, 57 (1969).*Cf.* RESTATEMENT OF TORTS §§ 711, 712 (938). In *INS* the Court treated misrepresentation as a subcategory of unfair competition by eliminating the third requirement:

> [D]efendant's conduct differs from the ordinary case of unfair competition in trade principally in this that, instead of selling its own goods as those of complainant, it substitutes misappropriation in the place of misrepresentation, and sells complainant's goods as its own.

248 U.S. at 242. In this comment the two doctrines are used interchangeably unless otherwise noted.

17. *See, e.g.,* Capitol Records, Inc. v. Spies, 264 N.E.2d 874 (Ill. Ct. App. 1971); Capitol Records, Inc. v. Greatest Records, Inc. 252 N.Y.S.2d 553 (Sup. Ct. 1964); Liberty/UA, Inc. v. Eastern Tape Corp., 180 S.E.2d 414 (N.C. Ct. App. 1971); Waring v. WDAS Broadcasting System, 194 A. 631 (Pa. 1937). *See also* M. NIMMER, COPYRIGHT § 35.22 (1973).

18. *See, e.g.,* Capitol Records, Inc. v. Mercury Records Corp., 221 F.2d 657 (2d Cir. 1955); Capitol Records, Inc. v. Greatest Records, Inc., 252 N.Y.S.2d 553 (Sup. Ct. 1964). *Cf.* Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp., 101 N.Y.S.2d 483 (Sup.

recently states have enacted statutes imposing criminal sanctions for the unauthorized sale or copying of sound recordings.[19]

Judge Learned Hand of the United States Court of Appeals for the Second Circuit led a strong movement against such state protection and in favor of federal preemption of the entire copyright field.[20] Hand rejected the *INS* unfair competition doctrine by limiting that case to its facts.[21] In resisting attempts to base state protection on the states' retained powers over unpublished works, Hand determined that any "common law property" in musical performances ended, at the latest, once recordings were sold,[22] and that any subsequent protection could only be obtained from Congress.[23] Hand emphasized that only nationally uniform laws could properly provide published writings with effective protection consistent with the "for limited Times" restriction in the copyright clause.[24]

In 1964 the Supreme Court seemed to indicate that Judge Hand's preemption logic had prevailed over state attempts to provide local remedies for patent and copyright infringement. In the companion cases of *Sears, Roebuck & Co. v. Stiffel Co.*[25] and *Compco Corp. v.*

Ct. 1950), *aff'd*, 107 N.Y.S.2d 795 (App. Div. 1951). These cases refer to publication as "dedication to the public."

17 U.S.C. § 2 (1970) allows a state to provide an author with common law copyright protection of his unpublished works. The owner of this copyright has the exclusive right to first publication of his work for a potentially unlimited duration. However, once the author has distributed his work to the public through a general publication, he forfeits this state common law copyright protection. *See generally* RCA Mfg. Co. v. Whiteman, 114 F.2d 86 (2d Cir.), *cert. denied*, 311 U.S. 712 (1940). Most courts have considered the public sale or distribution of sound recordings to constitute a publication, and therefore to fall outside the scope of § 2. *See* M. NIMMER, *supra* note 17, §§ 50.2, 50.3.

19. At least seventeen states have enacted such statutes. *See* Dunaj, *Tape Piracy and Applicable Florida Criminal Laws*, 48 FLA. B.J. 338, 341 n.12 (1974).

20. *See* Goldstein, *supra* note 16, at 51-53.

21. *See* RCA Mfg. Co. v. Whiteman, 114 F.2d 86, 90 (2d Cir.), *cert. denied*, 311 U.S. 712 (1940).

22. *Id.* at 88.

23. *Id.* at 89.

24. *See* Capitol Records, Inc. v. Mercury Records Corp., 221 F.2d 657, 667 (2d Cir. 1955) (dissenting opinion). In this case the majority abandoned Hand's preemption position. *See id.* at 662-63.

25. 376 U.S. 225 (1964). The Stiffel Company patented and manufactured a pole lamp. Sears produced a substantially identical lamp which sold at a retail price equal to the Stiffel wholesale price. The district court invalidated the Stiffel patents for want of invention, but held that Sears had violated the Illinois unfair competition laws by manufacturing a lamp confusingly similar to the Stiffel design. The court of appeals affirmed. Stiffel Co. v. Sears, Roebuck & Co., 313 F.2d 115 (7th Cir. 1963). On certiorari, the Supreme Court reversed. The Court held that the federal patent laws prevent the states from providing protection against copying articles unprotected by valid federal patents:

> Just as a State cannot encroach upon the federal patent laws directly, it cannot, under some other law, such as that forbidding unfair competition, give protection

Day-Brite Lighting, Inc.,[26] the Court held that federal law had preempted the patent field and that states could not use the doctrine of unfair competition to provide protection even for mechanical devices which are unpatentable under federal law.[27] The Court, in dicta, included copyright law within the scope of its consideration, and stated that the strong federal policy of free competition demanded that the statutory monopolies created by both patent and copyright law be strictly limited to the bounds provided by Congress:

> [W]hen an article is unprotected by a patent or a copyright, state law may not forbid others to copy that article. To forbid copying would interfere with the federal policy, found in Art. I, § 8, cl. 8, of the Constitution and in the implementing federal statutes, of allowing free access to copy whatever the federal patent and copyright laws leave in the public domain.[28]

Despite this strong statement of the dominance of the federal policy of free competition over retained state powers, courts frequently have refused to apply the *Sears-Compco* preemption doctrine to restrict state protection of sound recordings.[29] Instead, the courts have created tenuous distinctions between state efforts to prevent copying, which *Sears-Compco* prohibited,[30] and the *INS* unfair competition doctrine, which still could be used to combat recording pirates.[31]

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of a kind that clashes with the objectives of the federal patent laws.
376 U.S. at 231.

26. 376 U.S. 234 (1964). Day-Brite patented and manufactured a florescent lighting fixture with unique diffusion qualities. Compco sold a substantially identical lighting fixture. The district court invalidated the Day-Brite patents, but held that Compco had violated the Illinois unfair competition laws by manufacturing fixtures confusingly similar to the Day-Brite model. The court of appeals affirmed. Day-Brite Lighting, Inc. v. Compco Corp., 311 F.2d 26 (7th Cir. 1962). On certiorari, the Supreme Court reversed for policy reasons substantially the same as those expressed in *Sears*. *See* note 25 *supra*.

27. 376 U.S. at 231-32. The Court noted that states can prevent imitating manufacturers from misleading purchasers as to the source of the goods, but cannot prevent the actual copying of unpatented articles. *Id.* at 232-33.

28. 376 U.S. at 237. The *Sears* Court stated:

> The purpose of Congress to have a national uniformity in patent and copyright laws can be inferred from such statutes as that which vests exclusive jurisdiction to hear patent and copyright cases in federal courts, 28 U.S.C. § 1338(a), and that section of the Copyright Act which expressly saves state protection of unpublished writings but does not include published writings, 17 U.S.C. § 2.

376 U.S. at 231 n.7.

29. *See, e.g.*, Tape Head Co. v. RCA Corp., 452 F.2d 816 (10th Cir. 1971); Tape Industries Ass'n of America v. Younger, 316 F. Supp. 340 (C.D. Cal. 1970), *appeal dismissed*, 401 U.S. 902 (1971); Capitol Records, Inc. v. Erickson, 82 Cal. Rptr. 798 (Ct. App. 1969); Capitol Records, Inc. v. Spies, 264 N.E.2d 874 (Ill. Ct. App. 1970); Liberty/UA, Inc. v. Eastern Tape Corp., 180 S.E.2d 414 (N.C. Ct. App. 1971).

30. *See* notes 25 & 26 *supra*.

31. *See, e.g.*, Capitol Records, Inc. v. Greatest Records, Inc., 252 N.Y.S.2d 553 (Sup.

In Florida an attempt to impose such a distinction failed. In *International Tape Manufacturers Ass'n v. Gerstein*[32] the Federal District Court for the Southern District of Florida declared unconstitutional section 543.041 of the Florida statutes,[33] an anti-piracy statute similar to that involved in *Goldstein*.[34] In examining the application of the statute to recordings fixed prior to February 15, 1972, the effective date of the 1971 Sound Recordings Amendments to the 1909 Copyright Act,[35] the court found that the Florida statute was a state unfair competition law which offended both the *Sears-Compco* rationale and the federal copyright scheme.[36] With regard to recordings fixed after February 15, 1972, the court found that the absence of a durational limitation[37] and the lack of a notice provision[38] in the Florida statute presented "gross

Ct. 1964); Liberty/UA, Inc. v. Eastern Tape Corp., 180 S.E.2d 414 (N.C. Ct. App. 1971); Columbia Broadcasting System, Inc. v. Custom Recording Co., 189 S.E.2d 305 (S.C. 1972). One commentator explained that the courts were distinguishing between copying, the process by which a substantially identical product is developed by an independent party, and misappropriation, the production of an exact reproduction of the original without the same initial investment as is required in making the original. *See* Note, *The "Copying-Misappropriation" Distinction: A False Step in the Development of the Sears-Compco Pre-Emption Doctrine*, 71 COLUM. L. REV. 1444, 1461-63 (1972). *See also* M. NIMMER, *supra* note 17, § 35.224; Goldstein, *supra* note 16, at 71-73.

32. 344 F. Supp. 38 (S.D. Fla. 1972), *vacated and remanded*, 494 F.2d 25 (5th Cir. 1974). The Fifth Circuit held that the record did not show that the plaintiff had been prosecuted or threatened with prosecution. The court therefore remanded the case to determine whether a ripe controversy existed.

33. FLA. STAT. § 543.041 (1973) states in part:

(2) It is unlawful:

(a) Knowingly and willfully and without the consent of the owner, to transfer or cause to be transferred any sounds recorded on a phonograph record, disc, wire, tape, . . . with the intent to sell or cause to be sold for profit such article on which sounds are so transferred.

(b) To sell any such article with the knowledge that the sounds thereon have been so transferred without the consent of the owner.

34. *See* note 2 *supra*.

35. *See* notes 8 & 9 and accompanying text *supra*.

36. 344 F. Supp. at 53-54. It is significant that the court did not invalidate the Florida statute by holding that Congress intended the federal copyright law to preempt the field. The court said:

> While conceding that Congress may not have preempted all state laws, common or statutory, regulating the dissemination of sound recordings, it does not follow that the absence of preemption validates each and every such state law. A state law rendering criminal the unauthorized manufacture and sale of sound recordings flies in the face of *Sears* and *Compco*, regardless of whether Congress has preempted the field.

Id. at 52.

37. FLA. STAT. § 543.041 (1973) allows a potentially unlimited period of protection for the work. Copyrighted work enters into the public domain after the termination of the copyright period, and thus may be freely copied by anyone without suffering any consequences for infringement. *See* 17 U.S.C. § 24 (1970).

38. FLA. STAT. § 543.041 (1973) contains no notice or registration requirements, whereas such requirements are very strict under the federal act. *See* 17 U.S.C. §§ 10, 13, 14, 19, 20,

conflicts" with federal copyright law.[39] The court declined to save the state statute by restricting its application to the state's retained power to protect common law copyright in unpublished works,[40] and held that the sale and distribution of the original recordings constituted a "general publication."[41]

While restricting its inquiry to sound recordings fixed prior to February 15, 1972,[42] the *Goldstein* Court adopted an unexpectedly permissive view of the states' ability to prevent the copying of materials unprotected by congressional copyright legislation.[43] The Court neither applied the *Sears-Compco* preemption doctrine to copyright nor used the copying-unfair competition distinction to avoid the doctrine. The Court relegated to a footnote the issue of whether "publication" extinguishes the states' power to protect creative work, and observed that the term "publication" has no application to certain categories of writings, such as sound recordings, "which Congress has not brought within the scope of the [Copyright Act]."[44] The Court then charted its own course in determining the validity of the California statute.

The Court considered separately whether the statute violated either the copyright clause[45] or the supremacy clause.[46] The majority found that the "for limited Times" restriction of the copyright clause is a limitation only upon Congress,[47] and that the clause does not necessarily exclude by implication the concurrent exercise of state power.[48]

30, 31 (1970). The court observed: "Under the state statute, an innocent copier could be convicted of selling copies of a sound recording regardless of whether the master disc had been copyrighted." 344 F. Supp. at 55.

39. 344 F. Supp. at 54. The court declined to infer that the Florida statute incorporated by reference federal copyright law. *Id.* at 55.

40. This protection is discussed in note 18 *supra*.

41. 344 F. Supp. at 57.

42. 412 U.S. at 552 n.7.

43. *See The Supreme Court, 1972 Term,* 87 HARV. L. REV. 282 (1973). *See also* Goldstein, *supra* note 16, at 69.

44. 412 U.S. at 570 n.28. The Court reasoned that, for purposes of federal law, the principle that a writer forfeits his copyright upon a "general publication" of his work attaches only to "the legal relationships which Congress has adopted under the federal copyright statutes." Since the sound recordings in *Goldstein* were not protected by any federal copyright statute, the question of whether those recordings had been "published" under California law was irrelevant. *Id.* For earlier treatment of the publication issue, see notes 18, 22 & 23 and accompanying text *supra*.

45. The text of U.S. CONST. art. I, § 8, cl. 8, is provided in note 3 *supra*.

46. U.S. CONST. art. VI, cl. 2.

47. 412 U.S. at 560.

48. *Id.* at 554. The Court emphasized that use of the federal preemption argument to void all state copyright protection would depart from the rule of constitutional construction that powers granted to the federal government are concurrent unless granted in exclusive terms by the provision, or unless their exercise by a state would invariably conflict with the exercise of the federal power. *Id.* at 552-53.

The Court then concluded that Congress had intended the 1909 Copyright Act only to expand federal law, and not to delimit the permissible powers of states;[49] thus the supremacy clause did not require the voiding of the California statute. *Sears* and *Compco* were limited to the field of patent law,[50] and their preemption doctrine was discussed in terms of balance: with "regard to mechanical configurations, Congress had balanced the need to encourage innovation and originality of invention against the need to insure competition in the sale of identical or substantially identical products."[51] With regard to sound recordings, however, "Congress has drawn no balance; rather, it has left the area unattended, and no reason exists why the State should not be free to act."[52]

The Court's separate consideration of the copyright and supremacy clauses contrasts sharply with the more unified treatment of those clauses in *Sears* and *Compco*. Arguably, those decisions imposed a necessary constitutional restriction upon state powers in addition to congressional legislation.[53] Thus, the policy underlying the constitutional mandate of "for limited Times" would prevent the states from granting perpetual monopolies to creative ideas because of the balance implicit in the patent and copyright clause between the protection of these ideas and the necessity of ensuring a competitive economy.[54] However, *Goldstein* indicates that this balance can be struck only once Congress has acted. Thus the Court is required to interpret the meaning of congressional inaction, which could as well indicate a congressional intention to keep sound recordings completely free of copyright protection as a congressional permissiveness toward state legislation.[55] Had the Court instead considered only the California statute, it might have avoided such speculation and found the statute to afford greater

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49. *Id.* at 565-66.

50. *Id.* at 569.

51. *Id.*

52. *Id.* at 570.

53. Dissenting in *Goldstein*, Justice Douglas observed: "*Sears* and *Compco* make clear that the federal policy expressed in Art. I, § 8, cl. 8, is to have 'national uniformity in patent and copyright laws,' . . . a policy bolstered by Acts of Congress . . . ." 412 U.S. at 573. Perhaps a more accurate assessment of those cases is that they considered the clause and statutes together to comprise a single "federal policy . . . of allowing free access to copy whatever the federal patent and copyright laws leave in the public domain." 376 U.S. at 237.

54. *See* Kurtlantzick, *The Constitutionality of State Law Protection of Sound Recordings*, 5 CONN. L. REV. 204, 222-28 (1972). *Cf.* Goldstein, *The Competitive Mandate: From* Sears *to* Lear, 59 CALIF. L. REV. 873, 875, 878-79 (1971). *See also* Capitol Records, Inc. v. Mercury Records Corp., 221 F.2d 657, 667 (2d Cir. 1955) (Hand, J., dissenting).

55. *See The Supreme Court, 1972 Term*, 87 HARV. L. REV. 282, 287 & n.39 (1973).

protection than the "limited Times" language of the copyright clause allows.[56]

Perhaps *Goldstein* can be limited to its narrow holding: for sound recordings fixed before February 15, 1972, statutes identical to California penal code section 653h[57] do not conflict with federal copyright protection. However, the Court's novel treatment of copyright law as a whole leaves several important problems in its wake. The most obvious of these is whether states can constitutionally protect sound recordings fixed after February 15, 1972. Responding to this specific issue, the court in *International Tape* invalidated a Florida statute similar to the California anti-piracy law because the court found an extensive conflict between the statute and the federal Sound Recording Amendments.[58] Language in *Goldstein* suggests that the Supreme Court could reach a similar result.[59] That result seems compelled by Congress' stated purpose in enacting the Amendments, to create "a limited copyright in sound recordings."[60] Presumably, Congress' decision to provide sound recordings with copyright clause protection will necessitate balancing the encouragement of innovation against the assurance of

56. Even after the Court found that *Sears* and *Compco* did not require total preemption of state law, the Court still could have found that CAL. PENAL CODE § 653h (West 1970) provided the equivalent of copyright protection of unlimited duration, in violation of the "for limited Times" restriction of the copyright clause as well as the durational limitations for copyrighted works in the federal Copyright Act. *See* 17 U.S.C. § 24 (1970); *cf.* note 37 *supra.*

57. The text of CAL. PENAL CODE § 653h (West 1970) is provided in part in note 2 *supra.*

58. 344 F. Supp. at 53-54; *see* notes 37-39 and accompanying text *supra.* Florida has considered eliminating this possible conflict. During its 1974 session the Florida Legislature proposed several major changes to FLA. STAT. § 543.041 (1973). *See* Fla. H.R. 3056 (1974). The proposed changes would have exempted from coverage under the statute all copying operations which comply with federal copyright law. Compliance would ensure that such copying would not constitute an unfair or deceptive trade practice. Fla. H.R. 3056, § 2 (1974). The legislature did not act on this bill during the 1974 session.

In *International Tape* the court expressed doubt that incorporation by reference of federal law would save the state law. 344 F. Supp. at 55. If the federal law is construed to preempt state regulation completely, such a savings provision would seem at the very least to render the proposed Florida statute meaningless.

59. For example, the Court concluded its opinion by emphasizing that its decision does not take into account the Sound Recording Amendments of 1971. The Court stated:

> [O]ur decisions in *Sears* and *Compco,* which we reaffirm today, have no application in the present case, since Congress has indicated neither that it wishes to protect, nor to free from protection, recordings of musical performances fixed prior to February 15, 1972.

412 U.S. at 571. Since Congress has indicated it wishes to protect recordings subsequent to that date, presumably the dicta in *Sears* and *Compco* applying its preemption doctrine to copyrights would now be applicable. The most recent analysis of these decisions by the Court indicates a further weakening of them. *See* Kewanee Oil Co. v. Bicron Corp., 94 S. Ct. 1879 (1974).

60. H.R. REP. No. 487, 92d Cong., 1st Sess. 2 (1971).

competition in order to assess the degree of state protection that will be tolerated.[61]

Even assuming that the 1971 Amendments totally preempt state legislation concerning sound recordings fixed after February 15, 1972, a substantial number of recordings—those fixed before that date—remain unprotected by federal law. Recording companies conceivably could decrease this number drastically by reissuing older recordings and then claiming they had been fixed after February 15, 1972. An attempt to gain federal protection for sound recordings originally excluded from the Amendments, however, would seem to conflict with Congress' intentional limitation of the Amendments to an experimental three-year period before considering permanent legislation.[62]

The Court has not specified what degree of protection is available for recordings in states lacking an anti-piracy law similar to the California statute. Even so, dicta in *Goldstein* indicating approval of *INS* suggest that such states may still be able to fashion protection from unfair competition principles.[63] Already courts have found authority in *Goldstein* for allowing unfair competition remedies.[64] In other jurisdictions, however, the pirates themselves have taken the offensive. The 1909 Copyright Act gave persons the right to record the recording of a copyright owner's original musical composition once the recorder paid the owner a two-cent royalty per record and once both parties complied with certain notice requirements.[65] Several courts have allowed pirates to make legal copies of sound recordings fixed before February 15, 1972, simply by following these compulsory-royalty provisions.[66] Al-

61. *See* notes 51 & 52 and accompanying text *supra*.

62. The Sound Recording Amendments of 1971 limited protection to those recordings fixed between February 15, 1972, and January 1, 1975, in order that the effect of this protection might be assessed before enactment of a more permanent amendment of the Copyright Act of 1909. *See* H.R. REP. No. 487, 92d Cong., 1st Sess. 1 (1971). To allow the recording companies merely to reissue older recordings during this period for the sole purpose of obtaining federal copyright protection would seem to be outside the scope of the original intent of Congress. *See generally* 58 MINN. L. REV. 316, 321 (1973).

63. The *Goldstein* Court indicated that the California statute did not restrain the use of an idea or concept, since other parties could record the same composition "from scratch." However, the statute gave the recordings themselves "attributes of property." 412 U.S. at 571. This reading is very similar to the finding by the *INS* Court of a quasi-property right in the process of gathering news, which could be protected by the common law doctrine of unfair competition even though news content itself was uncopyrightable. *See* 248 U.S. at 234, 236-40.

64. *See* Jondora Music Publishing Co. v. Melody Recordings, Inc., 362 F. Supp. 494 (D.N.J. 1973) (dictum); United Artists Records, Inc. v. Eastern Tape Corp., 198 S.E.2d 452 (N.C. Ct. App. 1973).

65. *See* 17 U.S.C. § 1(e) (1970); 17 U.S.C. § 101(e) (1970), *as amended*, (Supp. I, 1971), discussed in note 12 *supra*. *See also* M. NIMMER, *supra* note 17, § 108.

66. *See, e.g.*, Jondora Music Publishing Co. v. Melody Recordings, Inc., 351 F. Supp. 572 (D.N.J. 1972) (memorandum opinion), 362 F. Supp. 488 (D.N.J.) (opinion), 362

though this approach has met resistance,[67] until the issue is settled pirates may have found a gaping hole in the wall of protection afforded the legitimate recording industry. Nonetheless, one post-*Goldstein* court has indicated that this absence of protection will effect only federal, not state law remedies.[68]

Finally, the effectiveness of any state protection of pre-February 15, 1972, sound recordings authorized by *Goldstein* remains in doubt. One author concludes that since that date state regulation has been ineffective.[69] The tape pirates appear to be using their mobility and their marketing organizations to evade state protective legislation. For example, many tape copying operations have located in New Jersey, with no anti-piracy statute and in close proximity to the mass-markets of New York and Pennsylvania, which do have state legislation protecting sound recordings.[70] Attacks upon the copying operators under New Jersey unfair competition laws have generally failed.[71] Enforcing the Pennsylvania and New York statutes against the tape retailers is difficult because of the large number of separate retail outlets involved in the mass merchandizing of the pirated recordings. Other manufacturers use the United States Postal Service to sell pirated recordings directly to consumers residing in states having protective legislation. These manufacturers establish copying operations in states with no protective legislation and then advertise their pre-February 15, 1972, sound recordings in national publications. Since the actual sale takes place at the manufacturer's offices, the state statutes prohibiting sales within the state of destination may be ineffective.[72]

F. Supp. 494 (D.N.J. 1973) (memorandum and order); Marks Music Corp. v. Colorado Magnetics, Inc., 357 F. Supp. 280 (W.D. Okla. 1973). For support of this position, see M. NIMMER, *supra* note 17, § 108.4621. *See also* H.R. REP. No. 487, 92d Cong., 1st Sess. 2 (1971).

67. *See, e.g.*, Dutchess Music Corp. v. Stern, 458 F.2d 1305 (9th Cir.), *cert. denied*, 409 U.S. 847 (1972); Fame Publishing Co. v. S&S Distributors, Inc., 363 F. Supp. 984 (N.D. Ala. 1973).

68. *See* Jondora Music Publishing Co. v. Melody Recordings, Inc., 362 F. Supp. 488, 493 (D.N.J. 1973).

69. Hiemenz, *Recording Pirates*, STEREO, Spring 1974, at 25, 26-27.

70. *See* N.Y. GEN. BUS. LAW § 561 (McKinney 1968); PA. STAT. ANN. tit. 18, § 4116 (1973).

71. Hiemenz, *supra* note 69, at 27. *See also* Jondora Music Publishing Co. v. Melody Recordings, Inc., 351 F. Supp. 572 (D.N.J. 1972) (memorandum opinion), 362 F. Supp. 488 (D.N.J.) (opinion), 362 F. Supp. 494 (D.N.J. 1973) (memorandum and order); Columbia Broadcasting Sys. v. Melody Recordings, Inc., 306 A.2d 493 (N.J. Super. Ct. 1973) (pre-*Goldstein*).

72. The shipment of pirated sound recordings in interstate commerce is not expressly classified as a federal crime. However, if the pirated recording is misrepresented by its label to be a product of the legitimate recording company which produces the same recording, the recording then is termed counterfeit. 18 U.S.C. § 2318 (1970) makes the shipment of counterfeit tapes in interstate commerce a federal crime. *See* United States

Despite these difficulties, states have at least attempted to solve a serious economic problem[73] which Congress, until recently, has ignored. In an area so strongly affected by mass communications and mass merchandizing, however, it is inconceivable that any protection can be either effective or appropriate without the national uniformity that only Congress can impose. Considering the legal and practical problems of state sound protection, as well as current congressional consideration of comprehensive revisions of the Copyright Act of 1909,[74] perhaps the *Goldstein* Court would have been wiser to have invalidated the state protective legislation and to have left the consideration of any future protection to Congress. In 1908 the Supreme Court[75] used similar tactics to prod Congress into passing the Copyright Act of 1909.[76] While the legitimate recording industry would not receive immediate relief from their predatory competitors, the long-term effect of strong federal copyright protection for sound recordings could far outweigh any adverse short-term consequences.

Estate Tax—DEDUCTIONS—POST-DEATH EVENTS RELEVANT TO DEDUCTIBILITY OF CLAIMS AGAINST THE ESTATE PURSUANT TO SECTION 2053 (a) OF THE INTERNAL REVENUE CODE.—*Estate of Hagmann,* 60 T.C. No. 51 (1973), *aff'd,* 492 F.2d 796 (5th Cir. 1974).

Frank G. Hagmann died on November 8, 1965, owing $54,360 to various creditors. None of the creditors, however, filed claims against Hagmann's estate pursuant to the Florida nonclaim statute.[1]

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v. Shultz, 482 F.2d 1179 (6th Cir. 1973). The recordings at issue in *Goldstein* were merely pirated recordings since there was no misrepresentation of their source. 412 U.S. at 549-50 n.4.

73. The House Judiciary Committee, reporting on the Sound Recording Amendments of 1971, stated that the estimated volume of recording piracy exceeded $100 million per year. *See* H.R. REP. No. 487, 92d Cong., 1st Sess. 2 (1971).

74. *See* Copyright Law Revision Bill, S. 1361, 93d Cong., 1st Sess. (1973).

75. *See* White-Smith Music Publishing Co. v. Apollo Co., 209 U.S. 1 (1908).

76. *See* notes 10-12 and accompanying text *supra.*

1. FLA. STAT. § 733.16 (1973), *as amended,* Fla. Laws 1974, ch. 74-106, § 1. At the time Hagmann's estate was administered, § 733.16 provided in pertinent part:

> (1) No claim or demand, whether due or not, direct or contingent, liquidated or unliquidated . . . shall be valid or binding upon an estate . . . unless the same shall be in writing . . . and be filed in the office of the county judge granting