UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 15-497 Caption [use short title]

Motion for: Leave to File Amicus Curiae Brief Sirius XM Radio, Inc. v. Flo & Eddie, Inc.

Set forth below precise, complete statement of relief sought:

The National Association of Broadcasters seeks leave to file an amicus curiae brief in support of Defendant-Appellant

MOVING PARTY: National Association of Broadcasters Amicus Curiae **OPPOSING PARTY:** Flo & Eddie, Inc.

☐ Plaintiff ☐ Defendant

☐ Appellant/Petitioner ☐ Appellee/Respondent

MOVING ATTORNEY: Stephen B. Kinnaird **OPPOSING ATTORNEY:** Henry Gradstein

[name of attorney, with firm, address, phone number and e-mail]

PAUL HASTINGS LLP
875 15th Street, NW, Washington, DC 20005
202-551-1799, stephenkinnaird@paulhastings.com

Gradstein & Marzano
6310 San Vicente Blvd Suite 510, Los Angeles, CA 90048
323-776-3100, hgradstein@gradstein.com

Court-Judge/Agency appealed from: United States District Court for the Southern District Court of New York Hon. Colleen McMahon, District Judge

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain):

Opposing counsel's position on motion:
☐ Unopposed ☑ Opposed ☐ Don't Know

Does opposing counsel intend to file a response:
☐ Yes ☐ No ☑ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? ☐ Yes ☐ No

Has this relief been previously sought in this Court? ☐ Yes ☐ No

Requested return date and explanation of emergency:

Is oral argument on motion requested? ☐ Yes ☑ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date:

Signature of Moving Attorney:
/s/ Stephen B. Kinnaird **Date:** 8/5/15 Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

Form T-1080 (rev. 12-13)

15-1164-cv

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FLO & EDDIE, INC., A CALIFORNIA CORPORATION, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED.
Plaintiff-Appellee,

V.

SIRIUS XM RADIO, INC., A DELAWARE CORPORATION,
Defendant-Appellant,

DOES 1 THROUGH 10,
Defendant.

On Appeal from the United States District Court
for the Southern District Court of New York
Hon. Colleen McMahon, District Judge

MOTION OF THE NATIONAL ASSOCIATION OF BROADCASTERS FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF SIRIUS XM RADIO, INC.

Stephen B. Kinnaird
PAUL HASTINGS LLP
875 15th Street, NW
Washington, DC 20005
(202) 551-1700
stephenkinnaird@paulhastings.com

Counsel for Amicus Curiae
National Association of Broadcasters

DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Nos. 15-497, *Sirius XM Radio Inc. v. Flo & Eddie Inc.*

Pursuant to FRAP 26.1, *amicus curiae* National Association of Broadcasters makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐YES☑NO

2. Does party/amicus have any parent corporations? ☐YES☑NO
   If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐YES☑NO
   If yes, identify all such owners:

4. Does this case arise out of a bankruptcy proceeding? ☐YES☑NO
   If yes, identify any trustee and the members of any creditors' committee:

Dated: August 5, 2015

By: /s/ Stephen B. Kinnaird
Stephen B. Kinnaird
Counsel for National Association of Broadcasters

Pursuant to Rules 27 and 29 of the Federal Rules of Appellate Procedure and this Court's Circuit Rule 29.1, the National Association of Broadcasters ("NAB") respectfully moves for leave to file the attached *amicus curiae* brief in support of Petitioner Sirius XM Radio, Inc. Counsel for *amicus* contacted counsel for all parties to this appeal prior to filing this motion. Petitioner consented to the filing of the proposed *amicus curiae* brief, but Respondent Flo & Eddie, Inc. did not.

IDENTITY AND INTERESTS OF THE *AMICUS CURIAE*

Amicus curiae NAB is a non-profit, incorporated association of radio and television stations and broadcasting networks. NAB represents the American broadcasting industry before Congress, the courts, the Federal Communications Commission, and other governmental entities. Many NAB members are not large entities; they are local, independent stations. The rulings below, unfounded in law, threaten substantial disruption to the radio broadcasting and related industries and the viability of certain musical formats. NAB and its members have a substantial interest in overturning the erroneous decision below.

RELEVANCE AND DESIRABILITY OF BRIEF BY *AMICUS CURIAE*

The proposed *amicus* brief will benefit the Court by providing it with perspectives, historical background, and legal arguments not fully set forth in Petitioner's principal brief.

First, NAB has distinctive interests from Sirius XM because the over-the-air broadcasting by its members is exempt from the federal copyright granted to owners of post-1972 sound recordings for certain digital transmissions. Congress has created that exemption because of the unique symbiosis of the recording and radio broadcast industries, which militates strongly against any recognition of the broad New York common-law copyright in performance of sound recordings sought by Flo & Eddie, Inc. for pre-1972 works. Indeed, record companies (like the predecessor-in-interest of Flo & Eddie, Inc.) have long promoted their records for free to radio stations and solicited airplay because that was the only way to create value in their sound recordings. The proposed *amicus* brief explains the evolution of that symbiosis and its implications for the questions presented to the court.

The brief also demonstrates that the district court's decision is contrary to precedents of this Court and the New York Court of Appeals, which recognize that common-law copyright protects against only the unauthorized reproduction of sound recordings. At common law, performing rights (playright) were distinct from copyright. The common-law rationales for protecting playright (that the author has the right to perform the work free from unauthorized competition) and copyright (that reproduction and selling copies is an act of inherent bad faith depriving the author of the value of the work) do not apply to public performance

of sound recordings because of the unique economic interrelationship of radio broadcasting and record sales. Radio broadcasting of sound recordings cannot be assimilated to the strict-liability tort recognized by the New York Court of Appeals for unauthorized *reproduction* of pre-1972 sound recordings.

Additionally, the brief argues that this Court should not retroactively create amorphous property rights in public performance of sound recordings because of the chaos and uncertainty that would result. The radio industry is not susceptible to patchwork regulation under state common-law, and there is no warrant for the radical expansion of the common law that Flo & Eddie, Inc. proposes. NAB's unique perspective would aid the Court in resolving the important questions presented.

CONCLUSION

For these reasons, *amicus curiae* the NAB respectfully requests that this Court grant leave to file the attached *amicus* brief.

Respectfully submitted,

By:

/s/ Stephen B. Kinnaird

Stephen B. Kinnaird
PAUL HASTINGS LLP
875 15th Street, N.W.
Washington, DC 20005
Telephone: (202) 551-1700
Facsimile: (202) 551-1705
stephenkinnaird@paulhastings.com

Counsel for Amicus Curiae
National Association of Broadcasters

DATED: August 5, 2015

PROPOSED AMICUS CURIAE BRIEF

15-1164-cv

United States Court of Appeals

for the

Second Circuit

FLO & EDDIE, INC., A California Corporation, individually and on behalf of all others similarly situated,

Plaintiff-Appellee,

– v. –

SIRIUS XM RADIO, INC., A Delaware Corporation,

Defendant-Appellant,

DOES, 1 THROUGH 10,

Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR *AMICUS CURIAE* THE NATIONAL ASSOCIATION OF BROADCASTERS IN SUPPORT OF APPELLANT

RICK KAPLAN
NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street, NW
Washington, DC 20036
(202) 429-5430

STEPHEN B. KINNAIRD
PAUL HASTINGS LLP
875 15th Street, NW
Washington, DC 20005
(202) 551-1700

Attorneys for Amicus Curiae National Association of Broadcasters

DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Nos. 15-497, *Sirius XM Radio Inc. v. Flo & Eddie Inc.*

Pursuant to FRAP 26.1, *amicus curiae* National Association of Broadcasters makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐YES☑NO

2. Does party/amicus have any parent corporations? ☐YES☑NO
   If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐YES☑NO
   If yes, identify all such owners:

4. Does this case arise out of a bankruptcy proceeding? ☐YES☑NO
   If yes, identify any trustee and the members of any creditors' committee:

Dated: August 5, 2015

By: /s/ Stephen B. Kinnaird
Stephen B. Kinnaird
Counsel for National Association of Broadcasters

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes

Other Authorities

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

INTEREST OF *AMICUS CURIAE*[1]

The National Association of Broadcasters (NAB) is a non-profit, incorporated association of radio and television stations and broadcasting networks. NAB represents the American broadcasting industry before Congress, the courts, the Federal Communications Commission, and other governmental entities. Many NAB members are not large entities; they are local, independent stations. The rulings below, unfounded in law, threaten substantial disruption to the radio broadcasting and related industries and the viability of certain musical formats. NAB and its members have a substantial interest in overturning the erroneous decision below.

INTRODUCTION AND SUMMARY

The district court impermissibly recognized a retroactive common-law copyright under New York law in the public performance of pre-1972 sound recordings. The district court contravened decisions of this Court and the New York Court of Appeals recognizing that common-law copyright protects only against the unauthorized reproduction of sound recordings.

Although the district court stopped short of holding that common-law copyright in the performance of pre-1972 sound recordings is "broader than the

[1]Petitioner consented to this brief, but respondent Flo & Eddie, Inc. refused consent. No counsel for a party authored this brief in whole or in part, and no entity other than *amici*, its members, or its counsel has made a monetary contribution intended to fund the preparation or submission of this brief.

right legislated by Congress" for post-1972 recordings, so as to encompass over-the-air broadcasting, SPA-24-25, this Court should reject the ruling below and eliminate any doubt. At common law, performing rights (playright) were distinct from copyright. The common-law rationales for protecting playright (that the author has the right to perform the work free from unauthorized competition) and copyright (that reproduction and selling copies is an act of inherent bad faith depriving the author of the work's value) do not apply to radio broadcast of sound recordings. As Congress has long recognized in denying such rights under federal law, the recording and radio industries grow symbiotically. Radio airplay *creates* economic value in sound recordings, which is why record companies (the predominant holders of copyright in sound recordings) have expended (and continue to expend) vast resources to promote free radio broadcast of their recordings. It would be ironic to award record companies damages for a use—radio airplay—that those companies assiduously urged for decades, without ever claiming a property right or demanding royalties.

This Court should not retroactively create amorphous property rights in radio broadcast of sound recordings, given that adaptation of New York common law in light of technological and economic changes must "reach just and realistic results." *Capitol Records, Inc. v. Naxos of Am., Inc.*, 4 N.Y.3d 540, 555 (N.Y. 2005) (*Naxos II*). Affirming the rule below would invite chaos and uncertainty and

threaten reliance interests. This Court should limit any common-law copyright in sound recordings to the reproduction rights recognized in *Naxos II*. Finally, no broadcaster can be liable for unfair competition; radio airplay does not constitute bad-faith misappropriation to compete against uses of the plaintiff's own property. *Roy Exp. Co. v. Columbia Broad. Sys., Inc.*, 672 F.2d 1095, 1105 (2d Cir. 1982).

BACKGROUND

A. Record Companies Are the Primary Holders of Copyright in Sound Recordings.

Although the district court conceived the original copyright here as belonging to The Turtles, SPA-15, record companies, not performing artists, almost always hold any copyrights in sound recordings.

> Copyright ownership of the physical embodiment of the performance of a musical composition (e.g., a master recording) … usually is the subject of an overall contractual relationship between its performers and a record company. *Almost invariably, the record company becomes the proprietor in any physical embodiment of the artist's performance created during the term of the recording agreement*.

6 NIMMER ON COPYRIGHT § 30.03 (2015) (emphasis added). Indeed, The Turtles originally assigned their rights to White Whale Records, and Flo & Eddie, Inc. only recovered those rights in a litigation settlement. SPA-15; Gerba Decl. Ex. 2 (Kaylan Tr. 36:16-24, 44:5-7). Although, depending on contract terms, some

artists may receive residuals, in the main record companies stand to profit from the expansive rule established below.[2]

B. Record Companies Have Long Encouraged the Radio Broadcast of Sound Recordings, without Any Claim of Compensation, So As To Maximize Record Sales.

Notwithstanding their new enthusiasm for asserting common-law copyright in the radio broadcast of recordings, record companies have for decades given away sound recordings for free and expended enormous resources to promote airplay, without ever demanding licenses or compensation.

In the early days of commercial radio, networks broadcasted live musical entertainment featuring singers, pop bands, and symphony orchestras. *See* Robert L. Hilliard & Michael C. Keith, *The Broadcast Century and Beyond* 56, 101 (2010). Networks generally refused to broadcast prerecorded music because of poor sound quality until the late 1940s. *Id.* at 111. But the rapidly emerging television industry soon eclipsed radio in the early 1950s as the medium for original musical entertainment. *See* Richard A. Peterson & David G. Berger, *Cycles in Symbol Production: The Case of Popular Music*, 40 AM. SOCIOLOGICAL

[2] Recording contracts often provide minimal compensation even to successful artists. *See* PBS Newshour, *Music Revolt* (July 4, 2002) (Don Henley, The Eagles: "Most artists don't see a penny of profit until their third or fourth album because of the way the business is structured."), *available at* http://www.pbs.org/newshour/bb/entertainment-july-dec02-musicrevolt_7-4.

REV. 158, 165 (1975). Radio stations adapted by having "disk jockeys" play records on air. *Id.*; Hilliard & Keith, *supra*, at 137.

Beginning in 1955, coincident with the dawn of rock-and-roll, many stations began adopting a "Top 40" format that transformed the radio landscape and its relationship with the record industry:

> This would mark the intensification of the long and intimate relationship (some would call it a marriage) between the radio medium and the recording industry, as both relied on each other for their well-being and continued prosperity. The recording industry manufactured the popular, youth-oriented music radio wanted and needed, and *the latter provided the exposure that created a market for the product*. From the perspective of the recording industry, radio was the perfect promotional vehicle for showcasing its established, as well as up-and-coming, artists.

Id. at 151 (emphasis added).

Top 40 (with its short playlists) unleashed a competitive fury among record companies skirmishing for the airplay necessary to success in the lucrative teenage market for rock-and-roll records. *See* Joeri Mol & Nachoem Wijnberg, *Competition, Selection and Rock and Roll: The Economics of Payola and Authenticity*, 41 J. ECON. ISSUES 701, 707-708 (2007); Peterson & Berger, *supra*, at 165. Not only the major labels fought for airplay. Smaller independent record companies (like Flo & Eddie Inc.'s predecessor-in-interest White Whale Records) aggressively pitched their new songs to local radio stations. *See* Mol & Wijnberg,

supra, at 708. Local radio stations provided a springboard for gaining national popularity because other stations would pick up on successful songs. *Id.* at 709.

Record labels placed such high economic value upon airplay that they gave "payola" to disk jockeys and others to play their music, leading Congress to outlaw the practice in 1960 unless disclosed to the audience. *See* Adam D. Renhoff, *The Consequences of "Consideration Payments"*: *Lessons from Radio Payola* 134 (2010). Nonetheless, the economics of record sales remained unchanged:

> The average rack capacity in a department store was about a hundred albums and the top 40 singles. To get on the racks it was necessary to be on the charts. In order to be on the charts, it was necessary to have rack space. The only way onto this ever-revolving carousel was radio, which became an increasingly critical factor in the manufacture of hits.

Marc Eliot, ROCKONOMICS: THE MONEY BEHIND THE MUSIC 172-73 (1989).

As Nobel laureate Ronald Coase observed, "[t]o sell music on a large scale it is necessary that people hear it," and thus once Congress restrained payola, promotional efforts by the labels only increased.[3] Each big record company had "promotion men" on staff in every region of the country to call on stations and

[3] "[I]t is to be expected that it would lead firms to increase other forms of promotional activity, trade press advertising, mailings, visits by salesmen, personal appearances by performers and, in general, all other forms of 'plugging.' ... We have seen that shortly after payola became illegal, there was apparently an increased activity by the promotion departments of record companies." *See* Ronald H. Coase, *Payola in Radio and Television Broadcasting*, 22 J.L. & ECON. 269, 316, 317 (1979).

urge them to play new singles. Fredric Dannen, HIT MEN 7 (1990). Promotion departments made visits and calls and distributed artist biographies and free samples to induce airplay. *See* R. Serge Denisoff, SOLID GOLD, THE POPULAR RECORD INDUSTRY 260 (1975); *cf.* Michael C. Keith, THE RADIO STATION 106 (8th ed. 2010) ("radio stations seldom pay for their music" because "recording companies send demos of their new product to most stations"). They also distributed mini-albums and mass mailings to radio personnel, and bought radio advertising spots that would feature album cuts. Denisoff, *supra*, at 264, 269. United Artists spent $100,000 buying spot advertising for Don McLean's "American Pie" to circumvent program directors, making it the biggest record of 1971. *Id.* at 268. Solicitation of target stations was intended to induce airplay throughout the industry, as stations in the same and different markets follow the lead of highly rated stations. G. Sidak & D. Kronemeyer, *The 'New Payola' and the American Record Industry: Transactions Costs and Precautionary Acts For Illicit Services*, 10 HARV. J.L. & PUB. POL'Y 521, 526 (1987).

The "buckshot" economic model of record companies—releasing many records so that a few would attain commercial success—contributed to the competitive frenzy for airplay. Mol and Wijnberg, *supra*, at 710; Denisoff, *supra*, at 97-98. Record companies showered radio stations with approximately 7,000 singles each year. Denisoff, *supra*, at 253. Radio promotional spending

accelerated throughout the 1970s, and companies increasingly turned to powerful independent promoters. Dannen, *supra*, at 11-17. Because record companies only made money from hits, and "[p]eople did not buy pop music they never heard," "promotion, the art and science of getting songs on the air, drove the record business.… Even the best A&R—artist and repertoire—couldn't save you if radio gave you the cold shoulder." *Id.* at 9.[4]

Unsurprisingly, White Whale Records engaged in extensive radio promotion in developing The Turtles' hit records in the 1960s. Former Turtle Howard Kaylan

[4] The same dynamic exists today. Notwithstanding the district court's factually incorrect suggestion that terrestrial radio may be a "dying" industry, Doc. 88-1 at 24, more than 245 million people, an "all-time high" (comprising over 91% of those 12 or older), listen to radio each week. Nielsen, *State of the Media: Audio Today*, *available at* http://www.nielsen.com/us/en/insights/reports/2015/state-of-the-media-audio-today-a-focus-on-black-and-hispanic-audiences.html. Radio remains critical to music discovery. *See* Edison Research and Triton Digital, *The Infinite Dial 2015*, at 33, 36 (national survey of people aged 12 and older who said it was important to keep up-to-date with music finding that more respondents (69%) used AM/FM radio for keeping up with music than used YouTube, Pandora, Facebook, Apple iTunes, Spotify, iHeartRadio, music TV channels, satellite radio, music blogs or in-store information/displays; AM/FM radio also reported to be the source used *most*), *available at* http://www.edisonresearch.com/the-infinite-dial-2015; Nate Rau, *Sony Nashville CEO Talks Importance of Country Radio*," THE TENNESSEAN (Feb. 25, 2015) ("'If you're not on country radio, you don't exist.'"), *available at* http://www.tennessean.com/story/money/industries/music/2015/02/20/sony-nashville-ceo-talks-importance-country-radio/23768711/; *In Re: Determination of Royalty Rates and Terms for Ephemeral Recording and Digital Performance of Sound Recordings (Web IV)*, Docket No. 15-CRB-0001-WR (Copyright Royalty Board), Hearing Tr. 966:16-23 (April 30, 2015) (testimony of Aaron Harrison, Senior Vice President, UMG Recordings, Inc., characterizing "[t]errestrial radio" as "a platform where we can break artists and get the DJs … to pump up artists" so that listeners "migrate from terrestrial radio to actually purchasing" the music).

testified that promotion of Turtles records was important when they came out. "My gosh, yes, that was everything when they came out. *And radio was the only forum for it at the time*. So, yes, it was vital in the '60s." Gerba Decl. Ex. 2 (Kaylan Tr. 70:22-24) (emphasis added). White Whale founder Ted Feigin attributed The Turtles' first hit single partly to the ability of him and his co-founder, both "former promotion men," "'to call on their collective experiences with distributors and disk jockeys.'" *"Ex's" Striking It Rich on W. Coast*, BILLBOARD at 3 (Dec. 11, 1965); *Calif. Setting The Tempo in Sounds, Song, Style*, BILLBOARD at 1 (Apr. 9, 1966) (Turtles manager Bill Utley: "we still need disk jockey play on the East to get us on the Top 10 nationally"); D.I. 114, at 4 (undisputed that Turtles members Klayman and Volman have hosted terrestrial radio programs playing Turtles tracks).

Flo & Eddie and its predecessors have known for nearly fifty years that terrestrial radio stations have played their songs. See Gerba Decl. Ex. 4 (RFA Response No. 9). They have never demanded any license or compensation from them to play Turtles songs. Gerba Decl. Ex. 2 (Kaylan Tr. 99:1-100:4); Ex. 3 (Cohen Tr. 165:7-168:12); Ex. 4 (RFA Response No. 10).

C. Record Companies Have Reaped Enormous Economic Benefits from Radio Airplay.

The economic benefit of radio promotion to record companies is evident from the duration of the practice. As noted economists Gregory Sidak and David

Kronemeyer explain, "Radio airplay is advertising for prerecorded music. It notifies the consumer of the availability of a new product and enables him to sample that product before purchase; it is generally believed to be the greatest stimulant to sales of a particular pop album." Sidak & Kronemeyer, *supra*, at 526. "[A] primary objective of record company promotion efforts is to induce some minimum sufficient number of highly rated radio stations to add a record to their playlists so that the record is reported in the hit singles charts of weekly trade publications like *Billboard* and *Radio & Records*." *Id.* at 528.

Recent studies commissioned by NAB confirm the economic benefits of free radio airplay to the record companies. A Nielsen Company study evaluating 2012-13 data reported a significant and immediate impact of radio airplay upon song sales.[5] A study by economist Dr. James Dertouzos attributed a significant portion of industry sales of albums and digital tracks (between 14-23 percent, potentially $1.5-2.4 billion annually) to radio airplay.[6] As the Third Circuit observed:

> The recording industry and broadcasters existed in a sort of symbiotic relationship wherein the recording industry recognized that radio airplay was free advertising that

[5] *The Power of Radio: Nielsen Study Show Radio Drives Music Sales*, Inside Radio (Oct. 29, 2012 – Oct. 27, 2013); Nielsen, *Radio Airplay and Music Sales 2013*, *available at* http://www.nab.org/documents/newsRoom/pdfs/Nielsen_Airplay_Sales_Study.pdf

[6] James N. Dertouzos, *Radio Airplay and the Record Industry: An Economic Analysis* (2008), *available at* https://www.nab.org/documents/resources/061008_Dertouzos_Ptax.pdf.

> lured consumers to retail stores where they would purchase recordings. And in return, the broadcasters paid no fees, licensing or otherwise, to the recording industry for the performance of those recordings.

Bonneville Int'l Corp. v. Peters, 347 F.3d 485, 487-88 (3d Cir. 2003) (footnote omitted).

D. Congress Has Denied Federal Copyright in Over-The-Air Radio Broadcasts of Sound Recordings because of the Historical Symbiosis of the Recording and Radio Industries.

Conscious of this mutually beneficial relationship, Congress has repeatedly considered, but never granted, copyright in over-the-air broadcasts (analog or digital) of sound recordings, and beginning in 1995 established only a narrow right in certain other digital transmissions necessary to combat piracy and reduced sales.

Until 1971, Congress afforded no copyright protection to sound recordings. *Bonneville*, 347 F.3d at 487. In the Sound Recording Amendment of 1971, Pub. L. No. 92–140, 85 Stat. 391, Congress established a limited copyright in the reproduction of sound recordings to protect against piracy. Rather than act retroactively, Congress applied the right only to recordings fixed on or after February 15, 1972. 17 U.S.C. § 301(c). Moreover, Congress in 1976 permitted broadcasters to make certain incidental copies of sound recordings. 17 U.S.C. § 112(a).

Although musical composers had long enjoyed federal copyright in radio broadcast of their compositions, *see* 17 U.S.C. § 106(4), Congress continued to

rebuff the recording industry's attempts to obtain the same. Congress considered, and rejected, a sound recording performance right in 1976. Opposing senators explained:

> For years, record companies have gratuitously provided records to stations in the hope of securing exposure by repeated play over the air. The financial success of recording companies and artists who contract with these companies is directly related to the volume of record sales, which, in turn, depends in great measure upon the promotion efforts of broadcasters.

S. Rep. No. 93-983, at 225-26 (1974) (minority views of Messrs. Eastland, Ervin, Burdick, Hruska, Thurmond, and Gurney).

In 1995, Congress first created a limited performance right in sound recordings only for certain digital transmissions to prevent piracy from eroding record sales.

> The advance of digital recording technology and the prospect of digital transmission capabilities created the possibility that consumers would soon have access to services whereby they could pay for high quality digital audio transmissions (subscription services) or even pay for specific songs to be played on demand (interactive services). The recording industry was concerned that the traditional balance that had existed with the broadcasters would be disturbed and that new, alternative paths for consumers to purchase recorded music (in ways that cut out the recording industry's products) would erode sales of recorded music.

Bonneville, 347 F.3d at 488 (footnote omitted). Congress accordingly enacted the Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104–39,

109 Stat. 336, which gave the owner of sound recordings the exclusive right "to perform the copyrighted work publicly by means of a digital audio transmission." 17 U.S.C. § 106(6). Congress provided a compulsory licensing scheme distributing royalties 50% to copyright holders and 50% to three classes of musical artists. 17 U.S.C. § 114(g)(2). Congress created multiple exemptions to this novel digital performance right, including "nonsubscription broadcast transmission." 17 U.S.C. § 114(d)(1)(A). Congress thus ensured that the Act would not impose "new and unreasonable burdens on radio and television broadcasters, which often promote, and appear to pose no threat to, the distribution of sound recordings." H.R. Rep. No. 104–274, at 14 (1995). Congress also ensured that all other analog performances—such as by restaurants, hotels, retail stores, and night clubs—remained untouched by federal copyright.

With the advent of Internet streaming and webcasting, "the recording industry became concerned that technology would erode recording sales by providing alternative sources of high quality recorded performances." *Bonneville*, 347 F.3d at 489. In 1998 Congress passed the Digital Millennium Copyright Act, Pub. L. No. 105–304, 112 Stat. 2860 (1998), expanding the class of transmissions available for statutory licensing, but leaving intact the exemption for over-the-air broadcasting. H.R. Conf. Rep. No. 105–796, at 80 (1998).

Thus, accounting for public and private interests, Congress has woven a highly reticulated scheme granting only a limited performance right in certain digital transmissions with numerous exemptions. Congress has excluded not only over-the-air broadcast transmissions, but also certain retransmissions thereof; transmissions incidental to an exempt transmission; certain retransmissions of multichannel video program distributors; "a transmission within a business establishment, confined to its premises or the immediately surrounding vicinity"; and certain transmissions "to a business establishment for use in the ordinary course of its business." *Id.* § 114(d). Plaintiff now seeks a categorical state common-law copyright in all "performances" of sound recordings that bulldozes those carefully crafted distinctions.

ARGUMENT

I. THERE IS NO NEW YORK COMMON LAW OF COPYRIGHT IN RADIO BROADCASTS OF SOUND RECORDINGS.

A. Common Law Copyright Is Limited To Reproduction.

The New York Court of Appeals has characterized the protection of common-law copyright as "very slight at the best." *Palmer v. DeWitt*, 47 N.Y. 532, 539 (1872) (discussing traditional protection of unpublished manuscripts). Even as extended to sound recordings, a "'common law copyright' … means protection against *copying* …." *Capitol Records, Inc. v. Naxos of Am., Inc.*, 372 F.3d 471, 479 (2d Cir. 2004) (emphasis added) (*Naxos I*); *RCA Mfg. Co. v.*

Whiteman, 114 F.2d 86, 88 (2d Cir. 1940) (common-law copyright "consists only in the power to prevent others from *reproducing* the copyrighted work") (emphasis added), *overruled on other grounds by Capitol Records Inc. v. Mercury Records Corp.*, 221 F.2d 657 (2d Cir. 1955).

The New York Court of Appeals has likewise limited common-law copyright to unauthorized reproduction. In *Naxos II*, the Naxos record company produced records of restored Gramophone recordings of famous classical musicians, even though Capitol Records owned Gramophone's rights. In extending common-law copyright to reproductions of a sound recording, the New York Court of Appeals emphasized that, despite early references to deceptive or fraudulent intent, courts arrived at the "view that bad faith was *inherent in the act of copying and selling a work without permission* from a competitor because this would deprive the true owner of the work's value." 4 N.Y.3d at 563 (emphasis added). The Court of Appeals noted that the 1786 New York copyright statute preserved "'the rights, which any person may have, to the *printing or publishing* of any book or pamphlet, at common law, in cases not mentioned in this act,'" *id.* at 550 (citing L 1786, ch 54, § IV) (emphasis added), and accordingly held that "[a] copyright infringement cause of action in New York consists of two elements: (1) the existence of a valid copyright; and (2) *unauthorized reproduction* of the work protected by the copyright." *Id.* at 563 (emphasis added).

B. Copyright Does Not Encompass Performance Rights, Much Less Any Claimed Exclusive Right in Radio Broadcasts of Sound Recordings.

The district court noted that New York common law also protects performance rights (citing *Palmer* among other cases), and leapt from that fact to the untenable conclusion that any property right derived from artistic labor is *ipso facto* copyright. SPA-17. Historical performing rights are not kindred to "performance rights" in sound recordings, *infra* at 19-20, and the district court disregarded *Palmer*'s teaching that "[t]he right publicly to represent a dramatic composition for profit, and the right to print and publish the same composition to the exclusion of others, are entirely distinct, and the one may exist without the other." *Palmer*, 47 N.Y. at 542; *see also* E.J. Macgillivary, A TREATISE UPON THE LAW OF COPYRIGHT IN THE UNITED KINGDOM AND THE DOMINIONS OF THE CROWN, AND IN THE UNITED STATES OF AMERICA 122 (1902) ("In a dramatic or musical work, the two rights—the copyright and the performing right—exist side by side; but they are quite distinct from one another, and may pass into different hands. *The copyright can only be infringed by copying*, the performing right by representation or performance.") (emphasis added).

An author's right to control performance of an unpublished dramatic work came to be known as "playright," as distinct from copyright. *See* Eaton S. Drone, A TREATISE ON THE LAW PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT

BRITAIN AND THE UNITED STATES 553-554 (1879) ("Playright defined") ("The exclusive right of multiplying copies is called copyright. *But this does not embrace the right of representation*," which is "wholly distinct in nature," and "playright means the right to play a drama," and also "the right of performing a musical composition") (emphasis added); *see also Ferris v. Frohman*, 223 U.S. 424, 432 (1912) (enforcement of "playright"). Indeed, "[a]t common law there was no performing right in the proper sense of the term, but an unpublished manuscript was protected from performance as from any other invasion of the author's exclusive right to it." Macgillivary, *supra*, at 122; *Palmer*, 47 N.Y. at 538 ("This property in a manuscript is not distinguishable from any other personal property.")

The legal paths of copyright and playright diverged, both in statutory and common law. The Statute of Anne in 1709 extended protection to copyright and not playright. "Until the passage in England of the statutes 3 and 4 William IV (chap. 15), an author could not prevent anyone from publicly performing on the stage any drama in which the author possessed the copyright. He could only prevent the publication of his work by multiplication of copies of it." *Palmer*, 47 N.Y. at 542. Neither Britain nor the United States granted statutory protection to the performance of musical compositions until the late 19th century. Macgillivary, *supra*, at 122-23; SPA-21 n.3.

The law reflects that infringement of common law copyright is graver than infringement of playright. Unauthorized reproduction misappropriates the work itself; unauthorized performance by contrast *may* misappropriate an opportunity to profit from the work. Moreover, misappropriation would frequently arise where the defendant had paid to attend an authorized performance, and then by surreptitious notes or memory had obtained the wherewithal to conduct unauthorized performances. *See* Drone, *supra*, at 553-75; *Tompkins v. Halleck*, 133 Mass. 32, 36-46 (1882). Accordingly, courts protected common-law playright against piracy and like misappropriation, breach of implied contract, and unfair competition. *See Ferris*, 223 U.S. at 437 (enjoining performance of a "piratical composition"); *Tompkins*, 133 Mass. at 46 (holding that performing a witnessed play violated the spectator's implied license and deprived the author of his rights); *Metro. Opera Ass'n v. Wagner-Nichols Recorder Corp.,* 101 N.Y.S.2d 483, 492-93 (N.Y. Sup. Ct. 1950), *aff'd*, 107 N.Y.S.2d 795 (N.Y. App. Div. 1951) (finding unfair competition in the capture of broadcast to make competitive recordings); *Roy Exp. Co.*, 672 F.2d at 1098, 1105 (upholding verdict of copyright infringement for use of Charlie Chaplin film clips in a CBS Chaplin biography, and unfair competition for CBS's broadcast of that biography). Although some lower courts have elided the distinction between common-law copyright and playright, *see, e.g.*, *Roberts v. Petrova*, 213 N.Y.S. 434, 434-37 (N.Y. Sup. Ct. 1925), the Court of

Appeals has definitively held that infringement of common-law copyright requires unauthorized reproduction as an element of a strict-liability tort. *Naxos II*, 4 N.Y.3d at 563. This crucial element is absent from the radio broadcast of a sound recording.

C. This Court Should Not Extend Common-Law Copyright To Radio Broadcast of Sound Recordings.

The district court conceived that common-law copyright protects every emerging use of intellectual labor, until the legislature expressly carves out a right for exemption. SPA-20-21. It wove that theory from whole cloth; to the contrary, the New York Court of Appeals has admonished that determinations of common-law rights in light of technological and economic changes must "reach just and realistic results." *Naxos II*, 4 N.Y.3d at 555 (internal quotation marks omitted).

That radio broadcast may in some sense be deemed a "performance" of a sound recording, *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 398-99 & n.23 (1968), does not mean that it can be assimilated to common-law playright. Playright protects the dramatist from competitive performances that may prevent or diminish economic gain from his own performances, or impair his ability to derive revenue from other potential performers. But in the economic and technological era of radio broadcasting of sound recordings, nothing of the kind existed. Record companies were not licensed to perform their own radio broadcasts, and there was no market for licensing tracks to radio broadcasters. As

demonstrated above, the economic value of sound recordings lay in their commercial sale; only hits generated profit; and no songs became hits without radio airplay (*i.e.*, "performance"). Radio stations in turn derived value through the sale of advertising from the sound recordings freely provided (and ardently promoted to radio) by the record companies. *Supra* at 4-11. The district court found it "inexplicable" that in this era record companies never demanded broadcast royalties under common law, SPA-18, but only because it disregarded the economic nature and value of the putative right. It would have been economic suicide for record companies to have done so, for they would have destroyed their investment in the sound recording. As a practical reality, at the time Flo & Eddie's sound recordings were created, sound recordings had little or no *independent* economic value, and gained value only by their repeated performance by radio broadcasters. Congress has resisted ever recognizing any exclusive federal property right in over-the-air radio broadcast of sound recordings because of the unique, historical economic symbiosis of the radio and record industries. *Supra* at 11-14. This Court should reach the same conclusion under the common law.

At a minimum, this Court should not recognize any such right as common-law *copyright*, the infringement of which is actionable as a strict-liability tort. The New York Court of Appeals has limited that tort to unauthorized reproduction. *Naxos II*, 4 F.3d at 563. The rationale for strict liability is that "bad faith was

inherent in the act of copying and selling a work without permission from a competitor because this would deprive the true owner of the work's value." *Id.* (emphasis added). There is no inherent bad faith in radio stations' giving tracks the airplay that their owners have uniformly begged the stations to provide. And radio broadcasting *creates* value in the work for the owners, rather than depriving them of it.

D. Equitable Factors Militate against Expanding the Common Law Rights Retroactively or beyond the Rights in Post-1972 Sound Recordings under Federal Law.

Determining new "performance rights" is an inherently legislative task. *See Chamberlain v. Feldman*, 300 N.Y. 135, 139-40 (1949). Congress has grappled with the intricacies of defining exclusive statutory transmission rights and crafted numerous exemptions and compulsory licenses. 17 U.S.C. § 114(d); *supra* at 11-14. Expanding the state common law into radio broadcast rights is especially treacherous, given the diverse and increasingly interstate character of radio, which is not readily susceptible to patchwork common-law state regulation.

The United States has over 15,000 radio stations, Press Release, FCC, Broadcast Station Totals as of June 30, 2015 (July 8, 2015), *available at* https://www.fcc.gov/document/broadcast-station-totals-june-30-2015, many of which broadcast to multiple states. Many are small and independent, but others participate in radio networks broadcasting a common radio format in syndication

or simulcast nationally. Some are noncommercial. Broadcast of sound recordings may occur via cable or television networks, satellite radio, webcasting, and Internet streaming, all of which are interstate in character. *See generally* Keith, *supra*, at 23-29, 313-17.

Patchwork copyright regulation of modern radio under state law would invite utter confusion and uncertainty. Radio entities could never predict with certainty when an interstate broadcast would be deemed an "infringing" performance in a particular state, and which state laws apply. *Capitol Records*, 221 F.2d at 662 (applying law of state of infringing acts). Under federal law, radio broadcasting is deemed a public performance to a "great, though unseen and widely scattered, audience," *Jerome H. Remick & Co. v. Am. Auto. Accessories Co.*, 5 F.2d 411, 412 (6th Cir. 1925), but a multistate broadcast performance creates no complication for a federal statutory right. In a patchwork system of common-law state regulation, however, it would be uncertain which states have regulatory jurisdiction over a multistate performance, and therefore whether playing any song will create liability. Florida, for example, does not recognize common-law copyright in radio broadcasts. *See Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, No. 13-23182-CIV, 2015 WL 3852692 (S.D. Fla. June 22, 2015). Moreover, there is uncertainty whether an out-of-state programmer distributing to a

network could be deemed liable in states where any participating station is located.[7]

Radio stations also cannot predict what payments would be owed and in what amount, or to whom they would be paid. In a common-law system, liability for playing any particular song would be indeterminate until fixed by individual settlement or jury trial. There is no single compulsory licensing scheme as exists under federal law (much less one rewarding musicians and artists rather than only record companies), or expert body like the Copyright Royalty Board to set rates. *See* 17 U.S.C. § 114(g)(2).

There also can be no single federal court consent decree to establish a uniform system to collect royalties (such as ASCAP or BMI for publishers and composers). *See United States v. Am. Soc'y of Composers, Authors and Publishers*, No. CIV.A. 42-245, 1950 WL 42273 (S.D.N.Y. Mar. 14, 1950); *United States v. Broad. Music Inc.*, No. 64 CIV. 3787, 1994 WL 901652 (S.D.N.Y. Nov. 18, 1994). The district court suggested that the New York courts could fashion comparable consent decrees, SPA-25, but overlooked that those were U.S. government antitrust actions *against licensing organizations* for alleged anticompetitive activities. Radio defendants would likely face the vagaries of New

[7] Sirius XM has demonstrated that the Commerce Clause bars state common-law copyright regulation of interstate broadcasts, Sirius Br. 36-48; even if *arguendo* New York could regulate infringing acts of "performance" in the state, the district court identified none. SPA-2-9.

York class actions, with the possibility that owners of valuable assets may opt out. *Colt Indus. S'holder Litig. v. Colt Indus. Inc.*, 77 N.Y.2d 185, 194 (N.Y. 1991) (noting that courts may permit opt-out). It is also not clear that any multi-plaintiff or multi-defendant class action could be certified, given that individualized implied-license and equitable-estoppel defenses of radio stations may predominate over common questions. *See* N.Y. C.P.L.R. 901(a)(2). Chaos would reign.

The high litigation costs and unpredictability of determining common-law liability and royalties will deter stations from playing pre-1972 tracks, or at least playing them as much, to the detriment of many stakeholders. Songwriters and publishers who derive royalties from broadcast of pre-1972 songs under federal law will be injured by reduced airplay. Lack of airplay may erode public interest in pre-1972 music, harming recording artists who still derive income from licensing, concert tours, or album sales. And the district court conceded that variable state regulation "could upend the analog and digital broadcasting industries." D.I. 88-1, at 40. Those factors militate against dramatically expanding common-law rights.

In all events, this Court should not recognize such unforeseen rights retroactively. Especially here, the common law is not "a brooding omnipresence in the sky" in which courts merely discover the law. *S. Pac. Co. v. Jensen*, 244 U.S. 202, 222 (1917) (Holmes, J., dissenting). Although common-law decisions are

typically retroactive, "where there has been such a sharp break in the continuity of law that its impact will wreak more havoc in society than society's interest in stability will tolerate," a court may deny retroactivity to "an issue of first impression whose resolution was not clearly foreshadowed" where retroactivity would be inequitable. *Gurnee v. Aetna Life & Cas. Co.*, 55 N.Y.2d 184, 191-92 (1982) (internal quotation marks omitted).

It would be fundamentally unfair for the entire recording industry to induce airplay actively for decades without claim of compensation, deriving enormous economic benefits therefrom, and then to demand retroactive compensation from broadcasters for conduct that has always been understood to be free and indeed authorized. Radio stations, particularly those who have invested substantial resources in developing oldies and classic-rock formats, have strong reliance interests that should be protected. There are about 1,850 such stations, many small. Mark R. Fratrik, *How Will the Radio Industry Be Affected by Pre-1972 Music Performers' Fees* 7 (July 27, 2015), *available at* http://www.biakelsey.com/pdf/ImpactOfPre72MusicRoyalties.pdf. For many, common-law copyright liability for all pre-1972 spins may destroy the format's economic viability, and stations cannot always readily switch formats in competitive markets. This Court should not retroactively recognize new property rights in pre-1972 recordings.

Finally, if this Court were to recognize such a right, that right should parallel federal statutory copyright in *post-1972* recordings. A common-law court is ill-equipped to make independently the inherently legislative judgments of allocating copyrights in radio broadcasts. Congress has investigated the longstanding and economic symbiosis between the recording and radio industries, and has struck a careful balance in limiting copyright in transmissions of sound recordings. *See* 17 U.S.C. § 114(d). Recognizing that "'[i]n general, the rights under common law copyright ... are at least co-extensive with the rights commanded under the Copyright Act," SPA-16 (quoting NIMMER ON COPYRIGHT § 8[C][2]), the district court suggested that New York courts fashioning equitable relief could "recogniz[e] only such public performance rights in pre-1972 sound recordings as conform to rights statutorily conferred on holders of statutory copyright in post-1972 recordings," *id.* at 25. Were that premise adopted, no performance right in sound recordings would apply to over-the-air broadcasts under New York state law, as none exists under federal law for post-1972 sound recordings. Thus, this Court at most should recognize a right that parallels the rights under federal law, and does not apply to over-the-air radio broadcasts.

II. RESPONDENT ABANDONED ANY RADIO BROADCAST RIGHT IN PRE-1972 RECORDINGS BY EXTENSIVE SOLICITATION OF AIRPLAY.

Abandonment requires "(1) an intent by the copyright holder to surrender rights in the work; and (2) an overt act evidencing that intent." *Naxos I*, 372 F.3d at 483 (assuming New York would apply this standard).

If *arguendo* White Whale Records held any common-law rights in the radio broadcast of its sound recordings, it (like most record companies) abandoned them during its admittedly extensive solicitation of radio stations to play The Turtles' records in the 1960s, without ever asking for a license or compensation. This is not mere failure to enforce rights, *see National Comics Publ'ns, Inc. v. Fawcett Publ'ns, Inc.*, 191 F.2d 594, 598 (2d Cir. 1951), but undeniable overt action to encourage any radio station to broadcast the promoted tracks freely, coupled with 50 years of indifference to the putative right. *Supra* at 8-9. Limited abandonment is proper under New York common law since copyright and performing rights are distinct rights. *Supra* at 16-17. Flo and Eddie, Inc. may retain its common-law copyright to reproduce records, but not radio broadcast rights.

III. THE DISTRICT COURT ERRED IN ANALYZING THE REQUISITES OF COPYRIGHT INFRINGEMENT AND UNFAIR COMPETITION.

The district court made three critical errors in analyzing liability for the putative performance right it recognized. Sirius XM does not challenge these

rulings in its appeal brief, but this Court should either correct these errors *sua sponte* or at least expressly withhold approval of the rulings below. *See Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205 (1996) ("the appellate court may address any question fairly included within the certified order").

A. Broadcasting Is Not a Distribution of Sound Recordings Actionable Under *Naxos II.*

The district court erred in holding that Sirius XM can be liable for common-law copyright infringement for broadcasting sound recordings. The district court appeared to recognize that *Naxos II* limited common-law copyright infringement to "unauthorized reproduction" of sound recordings, SPA-26, but then inexplicably held that (to the extent distribution is actionable under *Naxos II*) "publicly performing sound recordings is an act of distribution." SPA-27. Performance is a distinct concept from distribution in copyright law. *See* 17 U.S.C. § 106(1) (reproduction), (3) (distribution), (4) & (6) (performance). Broadcasting is performance, *Fortnightly Corp.*, 392 U.S. at 398-99; 17 U.S.C. § 101 ("perform"), not distribution (which refers to the dissemination of copies). There is simply no justification for this attempt to bootstrap the public performance at issue here into the *Naxos II* strict-liability requirements by recharacterizing it as "distribution."

B. Unfair Competition Requires Bad Faith and Special Damages

The district court also erred in failing correctly to apply the elements of an unfair-competition tort. First, as a tort of commercial immorality, *Roy Exp. Co.*,

672 F.2d at 1105, "[s]ome element of bad faith" is "central" to a claim of unfair competition by misappropriation. *Saratoga Vichy Spring Co., Inc. v. Lehman*, 625 F.2d 1037, 1044 (2d Cir. 1980); *see also, e.g.*, *Camelot Assocs. Corp. v. Camelot Design & Dev. LLC*, 750 N.Y.S.2d 155, 156 (N.Y. App. Div. 2002) ("a cause of action in unfair competition requires the plaintiff to prove some element of bad faith" (internal quotation marks omitted)); *LoPresti v. Massachusetts Mut. Life Ins. Co.*, 820 N.Y.S.2d 275, 277 (N.Y. App. Div. 2006) (same). Indeed, in *Naxos I*, this Court held that "Capitol cannot prevail on a cause of action for unfair competition" because it "has not provided evidence to raise a genuine issue of material fact concerning bad faith on the part of Naxos," even though it used Capitol's property in sound recordings for its own gain. 372 F.3d at 482. Clarification of this point is critical to NAB's members, for no radio station can be deemed to misappropriate a record company's property in bad faith when radio stations have always been understood to be free to broadcast songs; when record companies (including the plaintiff) for decades have actively solicited and authorized radio airplay without claiming compensation; and when radio broadcasting has always inured to the record companies' benefit.

Second, as the district court recognized, SPA-33-34, unfair competition requires proof of special damages in the form of "direct financial loss, lost dealings, or an accounting of the profits caused by the anticompetitive acts at

issue." *CA, Inc. v. Simple.com, Inc.*, 621 F. Supp. 2d 45, 54 (E.D.N.Y. 2009) (internal quotation omitted). The district court's concept that a plaintiff suffered special damages by not receiving licensing fees in a market that "is not yet extant," SPA-34, is a nonsequitur; regardless, injury must be caused by Sirius's infringement, and its sporadic broadcasting of old Turtles tracks does nothing to prevent such a market from forming. That market does not exist because radio broadcasters dispute any obligation to pay, especially given historical practice. Radio stations cannot be liable in unfair competition because they do not deprive record companies of potential uses of their property. *Roy Exp. Co.*, 672 F.2d at 1105.

The second category of "potential" injury the district court recognized was lost sales of pre-1972 sound recordings, on the theory that public performance of those recordings substitutes for record sales. SPA-32, 34. The district court deemed this "common sense," but nothing in the record supports such a conclusion. If anything, broadcast of a sound recording to an audience that would otherwise not be exposed to the track would *spur* record sales rather than substitute for them. As discussed above, record companies promoted radio play to increase demand. The district court relied on no evidence that consumers forego song purchases because of airplay, and indeed, its conclusion on this point contravenes both the record and common sense.

CONCLUSION

For any or all of the foregoing reasons, the district court's order should be reversed.

Respectfully submitted,

/s/ Stephen B. Kinnaird

Rick Kaplan
NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street, NW
Washington, DC 20036
(202) 429-5430

Stephen B. Kinnaird
PAUL HASTINGS LLP
875 15th Street, NW
Washington, DC 20005
(202) 551-1700
stephenkinnaird@paulhastings.com

Counsel for Amicus Curiae
National Association of Broadcasters

August 5, 2015

CERTIFICATE OF COMPLIANCE
PURSUANT TO FED. R. APP. P. 29(d) AND
CIRCUIT RULE 29(c)(7)

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(d) because this brief contains 6,993 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 Times New Roman 14-point font.

By:

/s/ Stephen B. Kinnaird
Stephen B. Kinnaird
PAUL HASTINGS LLP
875 15th Street N.W.
Washington, D.C. 20005
Telephone: (202) 551-1700
stephenkinnaird@paulhastings.com

Counsel for *Amicus Curiae*

DATED: August 5, 2015