No. 15-55287

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FLO & EDDIE, INC.,
Plaintiff-Appellee,

v.

PANDORA MEDIA, INC.,
Defendant-Appellant.

On Appeal from the United States District Court for the Central District of California
Case No. CV14-7648 PSG

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF BROADCASTERS IN SUPPORT OF PANDORA MEDIA, INC.

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CORPORATE DISCLOSURE STATEMENT

The National Association of Broadcasters is a non-profit professional trade association incorporated in Delaware. There is no parent corporation and no publicly held corporation that owns ten percent or more of its stock.

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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. Plaintiff-Appellee Flo & Eddie, Inc.'s claim to a California property right in the performance of pre-1972 sound recordings, including radio broadcasts, is unfounded in law, and threatens 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

Defendant-Appellant Pandora Media, Inc. has appealed the district court's denial of its anti-SLAPP motion to strike the lawsuit brought against it by Flo & Eddie, Inc. as a "strategic lawsuit against public participation" under California Code of Civil Procedure § 425.16, and in particular challenges the district court's determination that Flo & Eddie's claims are "meritorious enough to withstand the anti-SLAPP motion." D.I. 28 at 14. NAB confines its participation as *amicus*

[1]Appellant consented to this brief, but Appellee Flo & Eddie, Inc. did not respond to the request for consent. No counsel for a party authored this brief in whole or in part, and no entity other than *amicus*, its members, or its counsel has made a monetary contribution intended to fund the preparation or submission of this brief.

curiae to a single issue relevant to that inquiry: namely, whether, regardless of publication, California law recognizes an exclusive property right in the public performance (including radio performance) of pre-1972 sound recordings.

The district court fundamentally misconceived the operative statute, California Civil Code § 980(a)(2), and its relationship to pre-existing law. It ruled that as a matter of plain language section 980(a)(2)'s recognition of the author's "exclusive ownership" in original works of sound recordings fixed before February 1972 "inclu[ded] the exclusive right to publicly perform a recording," and found no conflict with California common law because "no court applying California law had ever excluded public performance rights from sound recording ownership." D.I. 28 at 8. But section 980(a)(2) does not define the scope of exclusive ownership or what rights are included therein, and was only meant to maintain whatever property rights in sound recordings that might have existed at the time of its enactment in 1982.

There is no basis, either in 1982 or today, to recognize a record company's exclusive right in the performance of sound recordings that would encompass (among other things) radio broadcasting. 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, radio airplay *creates* economic value in sound recordings and fame for the performers, 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. The California legislature sought to maintain, not revolutionize, the law of property rights in sound recordings, and the district court's wildly broad interpretation of section 980(a)(2) cannot stand.

BACKGROUND

Certain background facts are essential for this Court to determine what property rights may exist in sound recordings, and understand the untenability of the district court's statutory construction.

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

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 and subsequent transfers. D.I. 24 ¶¶ 4-7 (Volman Declaration). 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.

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

[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.

(2010). 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 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.

Hilliard & Keith, *supra*, 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[3]) 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,

[3] White Whale founder Ted Feigin attributed The Turtles' first hit single partly to his and his co-founder's ability, as "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").

promotional efforts by the labels only increased.[4] Each big record company had "promotion men" on staff in every region of the country to call on stations, distribute free samples and artist literature, and urge them to play new singles. Fredric Dannen, HIT MEN 7 (1990); 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).

[4] "[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).

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 & 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.[5]

[5] The same dynamic exists today. 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*

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

The economic benefit of radio promotion to record companies is evident from its longevity. As Gregory Sidak, a noted economist, 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 record companies. A Nielsen Company study evaluating 2012-13 data reported a significant and immediate impact of radio airplay upon song sales.[6]

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).

[6] *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

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.[7] 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 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 the effects of new technologies that were reducing record 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.

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[7] 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.

No. 92-140, 85 Stat. 391, Congress established a limited copyright in the reproduction of sound recordings to protect against piracy, but 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. *Id.* § 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 sound-recording owner 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, balancing 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." 17 U.S.C. § 114(d)(1)(C)(ii), (iv).

Flo & Eddie, Inc. now seeks a categorical state-law property right in all public "performances" of sound recordings that bulldozes those carefully crafted distinctions, and sweeps in the playing of pre-1972 tracks not only on the radio but in any business or public accommodation.

ARGUMENT

I. SECTION 980(A)(2) DOES NOT CREATE AN EXCLUSIVE PROPERTY RIGHT IN THE PUBLIC PERFORMANCE OF SOUND RECORDINGS.

A. The Plain Language of Section 980(a)(2) Does Not Resolve The Scope of Exclusive Rights in Sound Recordings.

California Civil Code § 980(a)(2) provides that "[t]he author of an original work of authorship consisting of a sound recording initially fixed prior to February 15, 1972, has an exclusive ownership therein until February 15, 2047, as against all persons except one who independently" fixes rather than captures the same sounds. Cal. Civ. Code § 980(a)(2).

Restating the rationale of its prior decision in *Flo & Eddie Inc. v. Sirius XM Radio Inc.*, No. CV 13–5693 PSG (RZx), 2014 WL 4725382 (N.D. Cal. Sept. 22, 2014) ("*Sirius*"), the district court purported to resolve the scope of section 980(a)(2) as a matter of plain language. D.I. 28 at 8. Noting that "[t]he California legislature defines 'ownership' generally in the Civil Code in a manner consistent with the word's usual and ordinary meaning – 'the right of one or more persons to possess and use [a thing] to the exclusion of others,'" the district court reasoned that "[t]he plain meaning of having 'exclusive ownership' in a sound recording is having the right to use and possess the recording to the exclusion of others." *Sirius*, 2014 WL 4725382, at *4 (quoting Cal. Civ. Code § 654). Thus, the district court concluded, "the legislature intended ownership of a sound recording in

California to include all rights that can attach to intellectual property, save the singular, expressly stated exception for making 'covers' of a recording." *Id.* at *5. According to the district court, such rights would include "public performance" of the sound recording, including over the radio. D.I. 28 at 8.

The district court's analysis does not withstand scrutiny, and the scope of section 980(a)(2) cannot be resolved on the simplistic concept that ownership generally entails a right of use. Performance of a sound recording (by a radio station or otherwise) invariably involves "use" of a *copy*, not of the master recording itself. If section 980(a)(2) truly created an exclusive right in the author to "use" all copies of sound recordings, no purchaser could even play his own CD or downloaded copy, even for private use. The authorized alienation of copies of sound recordings (whether by sale or unencumbered gift, including promotion) necessarily conveys rights of use to the initial and all subsequent transferees. Nor did the district court contemplate all of the longstanding limitations and exceptions to exclusive rights that have been recognized. *See, e.g.*, 17 U.S.C. §§ 108, 110.

The true question is whether the author's exclusive ownership of the *intellectual property* in the sound recording under Section 980(a)(2) limits the rights of the owner of a copy of a sound recording to use its property in a certain way (here, to play it publicly to an audience). To resolve this question, a court must resort to background principles of the California law of copyright and

playright. Indeed, it was clearly the intent of the California Assembly to "*maintain* rights and remedies in sound recordings fixed prior to February 15, 1972," D.I. 22-3 (Leg. Assemb. B. 3483, 1981-82 Reg. Sess., at 14, 23, 28, 44 (Cal. 1982) (emphasis added)), and section 980(a)(2) did no more than "make[] technical and minor policy changes in the State copyright laws in order to conform with Federal laws," *id.* at 47.

The district court did not undertake the proper inquiry of determining what intellectual property rights in sound recordings existed under California law in 1982. Instead, led astray by its incorrect plain-language analysis, the district court determined only that its statutory interpretation "did not conflict with California common law in 1982 (when the legislature passed § 980(a)(2)) because no court applying California law had ever excluded public performance rights from sound recording ownership." D.I. 28 at 8.

Section 980(a)(2) does not to extend to performance rights for three reasons: (1) California courts have only protected sound recordings from misappropriation by piratical reproductions; (2) the common law has always drawn sharp distinctions between copyright and performing rights (playright), and prior to 1982 California only afforded statutory protection to performing rights for dramatic works and operas, and *not* sound recordings; and (3) the traditional rationales for

granting exclusive copyright and playright to authors of works do not extend to sound recordings.

B. California Law Has Only Provided Remedies against the Unauthorized Reproduction, Not Public Performance, of Sound Recordings.

California law prior to 1982 provides no support for the district court's expansive construction of section 980(a)(2). The limited California precedent prior to 1982 recognized state-law protection of intellectual property rights in a sound recording against unfair competition and conversion, but only where unauthorized reproduction was involved.

In *Capitol Records, Inc. v. Erickson*, 2 Cal. App. 3d 526 (Cal. Ct. App. 1969), the defendant was "admittedly in the business" of making and selling copies of Capitol Records' recordings without permission. *Id.* at 528, 537. There, the court approved of a state remedy "where deceptive or fraudulent competitive practices are conducted, such as circumstances where one palms off his products as those of his competitor, or where he unfairly appropriates to his profit the valuable efforts of his competitor." *Id.* at 537-38. Because those cases involved more than copying, they were not preempted by federal copyright law. *Id.* at 537-38. No public performance was involved.

In *A & M Records, Inc. v. Heilman*, 75 Cal. App. 3d 554 (Cal. Ct. App. 1977), the California Court of Appeals likewise upheld an action for "record

piracy" against the defendant "for duplicating without consent *performances* embodied in A & M Records' recording" because it was "independent of any action . . . for copyright infringement." *A & M Records, Inc. v. Heilman*, 75 Cal. App. 3d 554, 564 (Cal. Ct. App. 1977). The defendant there "without authorization . . . duplicated performances . . . in order to resell them for profit," which the court called "a classic example of the unfair business practice of misappropriation of the valuable efforts of another." *Id.* *A & M Records* did not address any issue relating to the performance of sound recordings.

Similarly, in *Lone Ranger Television, Inc. v. Program Radio Corp.*, 740 F.2d 718 (9th Cir. 1984), a case involving the duplication and distribution of Lone Ranger tapes, this Court acknowledged the existence of state law causes of action apart from copyright "[o]n the basis of *A & M Records*," which, as discussed above, was an action against unauthorized reproduction. *Id.* at 726. This Court also noted that *Capitol Records* recognized "a common law intangible property interest in 'the product itself—performances embodied on the records,'" *id.* at 725 (quoting *Capitol Records*, 2 Cal. App. 3d at 538), and therefore upheld summary judgment on a claim of common-law conversion for the plaintiff.

Those three cases make clear that a person may have an intangible property interest in performances embodied in a sound recording, and thus may have a cause of action against the unauthorized reproduction of those works only if the

defendant's conduct otherwise meets the elements of unfair competition or conversion (or other state tort). That is the exclusive ownership preserved by section 980(a)(2), which is why a statute designed to "maintain" those rights and remedies stirred no controversy at its passage. But nothing in California law remotely suggests that before 1982 an owner of a sound recording had the exclusive right to control *use* (including performance) by the original or subsequent transferee of authorized copies that were first sold or given away by the record company. That would have been a radical transformation of rights and upended the radio broadcast industry, which was never the intention of the California Assembly.

The district court purported to find a public performance right in sound recordings as "implicit[] or in dicta" of two recent California decisions. *Sirius*, 2014 WL 4725382, at *7. One of the cases cited, *Capitol Records, LLC v. BlueBeat, Inc.*, 765 F. Supp. 2d 1198 (C.D. Cal. 2010), involved a defendant who admitted that it "reproduced, sold, and publicly performed the pre-1972 Recordings without proper authorization." *Id.* at 1206. The court cited *A & M Records* for the "holding that when a defendant duplicates, sells, and performs without authorization works owned by plaintiff, this is 'a classic example' of misappropriation, unfair competition, and conversion." *Id.* But the court's off-

hand inclusion of "performs" in that statement was in error, as *A & M Records* involved no claims of unlawful performance.

The second case relied on by the district court, *Bagdasarian Prods., LLC v. Capitol Records, Inc.*, No. B217960, 2010 WL 3245795 (Cal. Ct. App. Aug. 18, 2010) (unpublished/noncitable), an unpublished decision which cannot be cited in California courts, involved a dispute over which rights had been transferred in a contract permitting manufacturing and distribution of sound recordings. *Id.* at *8. The court noted that the contract did not transfer any right to perform the recording publicly, *id.* at *11, and thus the court had no occasion to opine on the existence, status, or scope of that right. Neither the district court's inexplicable misstatement in *BlueBeat* nor the noncitable *Bagdasarian* decision provide any aid to this Court in its task "to apply California law as we believe the California Supreme Court would apply it." *Intel Corp. v. Hartford Acc. & Indem. Co.*, 952 F.2d 1551, 1556 (9th Cir. 1991). Nothing in pre-1982 California law supports the district court's expansive construction of section 980(a)(2).

C. Exclusive Ownership of Creative Works Embodied in a Sound Recording Does Not Extend to Public Performance, Including Performance by Radio.

The district court's assumption that public performance rights must be a part of "exclusive ownership" of authorial works also disregards the historic distinction between copyrights and performing rights (playrights), which have traditionally

received less protection. And the district court ignored that neither common-law copyright nor playright is kindred to the broad "performance right" in sound recordings that Flo & Eddie, Inc. asserts.

1. The Law Only Grants Limited Performance Rights for Certain Kinds of Authorial Works.

"The 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 v. DeWitt*, 47 N.Y. 532, 542 (1872); *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 have long diverged. 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. Congress has granted only very limited performance rights in sound recordings that do not extend to over-the-air radio broadcasting or the playing of tracks by business establishments. *Supra* at 10-13.

Indeed, it is significant that before 1982, California only granted selective statutory protection against unauthorized performances of certain types of works,

and chose not to extend such rights to owners of intellectual property in sound recordings. California's Business and Professional Code declared it a misdemeanor for "[a]ny person who causes publicly to be performed or represented for profit an unpublished or undedicated dramatic composition or dramatic musical composition known as an opera, and without consent of its owner or proprietor," or knowingly to participate in such an unauthorized performance or representation. D.I. 22-3 (Leg. Assemb. B. 3483, 1981-82 Reg. Sess. at 58) (quoting Cal. Bus. & Prof. Code § 14720). The 1982 law provided for the repeal of that provision, among others, and the legislative history noted that upon repeal, "[t]here would be no California law prohibiting the unauthorized performance or sale of an unpublished dramatic [composition] or dramatic-musical composition known as an opera." *Id.* at 27.

The legislative history thus demonstrates that the 1982 amendments were intended to remove what little statutory public-performance protection there was, which extended only to certain forms of traditional playright. It would be nonsensical to think that the legislature at the same time enacted retroactive protection for other previously unrecognized and unprotected public performance rights in sound recordings. The district court's expansive reading of "exclusive ownership" in the statute conflicts with the state of California statutory law in 1982 and the legislative history of § 980(a)(2).

2. California Law Does Not Protect Public Performance of Sound Recordings.

The district court's assumption that "exclusive ownership" in "a sound recording," California Civil Code § 980(a)(2), protects every conceivable use of intellectual labor unless the legislature expressly carves out a right for exemption, even if such exclusive rights were never previously recognized in California law, is untenable. Even if *arguendo* section 980(a)(2) were not limited to previously recognized exclusive rights, the rationales that have justified common-law and statutory protections of copyright and playright do not extend to all public performances of sound recordings, and particularly not radio broadcasts.[8]

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 copyright or playright. Common-law copyright is premised on "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."

[8] At common law, courts protected traditional 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 v. Halleck*, 133 Mass. 32, 46 (1882) (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).

Capitol Records, Inc. v. Naxos of Am., Inc., 4 N.Y.3d 540, 563 (N.Y. 2005). 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. No such concerns surround radio broadcasting. 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 pre-1972 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 3-10. It would have been economic suicide for record companies to have demanded payment, 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 10-13. This Court should reach the same conclusion—that the California legislature, in a

statute explicitly intended to "maintain[] rights and remedies in sound recordings fixed prior to February 15, 1972," D.I. 22-3 (Leg. Assemb. B. 3483, 1981-82 Reg. Sess., at 14), could not have intended to expand historic rights far beyond what had previously been recognized.[9]

D. Prudential Factors Militate Against an Expansive Construction of Section 980(a)(2).

Even if section 980(a)(2) were ambiguous, this Court should not interpret the rights it grants to include radio broadcast of sound recordings. 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 10-13. Expanding state law into radio broadcast rights is especially treacherous, given the diverse and increasingly interstate character of radio, which is not readily susceptible to patchwork state regulation. One cannot conclude that the California legislature intended to do so without contrary evidence.

[9] New York law (unlike California law) has recognized common law copyright in sound recordings, but the New York Court of Appeals has limited that right to unauthorized reproductions, holding 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." *Naxos*, 4 N.Y.3d at 563 (emphasis added). An erroneous district court decision that extends New York common-law copyright to performance of subscription broadcasting (while leaving the question open of whether it encompasses performances by over-the-air broadcasting) is on appeal to the Second Circuit. *See Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 62 F. Supp. 3d 325 (S.D.N.Y. 2014), *appeal filed*, (2d Cir. Apr. 15, 2015).

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. 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 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) (appeal pending). 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.

Radio stations also would be unable to predict what payments would be owed and in what amount, or to whom they would be paid. 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). Nor can there be a single federal court consent decree to create a uniform system to establish royalties; these schemes for publishers and composers arose from government antitrust actions against the licensing organizations. *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). Radio defendants would likely face the vagaries of state law class actions, with the possibility that owners of valuable assets may opt out. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810-11 (1985). Chaos would reign.

The high litigation costs and unpredictability of determining 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. Those factors militate against dramatically expanding state-law rights.

Finally, even if this Court were inclined to extend section 980(a)(2) to encompass some form of performance right, that right should not exceed federal statutory copyright in *post-1972* recordings. Congress has repeatedly analyzed the longstanding 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). Thus, at most, the right conferred of "exclusive ownership" should extend no farther than the public performance rights in pre-1972 sound recordings as exists under the federal copyright for post-1972 recordings. That at least would be more fitting with the California Legislature's enactment of § 980(a)(2) in order to align California law with the recently enacted federal statutory scheme. *See* D.I. 22-3 (Leg. Assemb. B. 3483, 1981-82 Reg. Sess., at 23). Were that premise adopted, no performance right in sound recordings would apply to over-the-air broadcasts under California 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 extend to over-the-air radio broadcasts.

CONCLUSION

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

Respectfully submitted,

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September 9, 2015

CERTIFICATE OF COMPLIANCE
PURSUANT TO FED. R. APP. P. 29(d)

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(d) because this brief contains 6,971 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.

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 9, 2015.

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