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

The Honorable Philip S. Gutierrez

District Court Case No. 14-cv-07648 PSG (RZx)

SIRIUS XM RADIO INC.'S MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT PANDORA MEDIA, INC. AND REVERSAL OF THE DISTRICT COURT'S ORDER

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Pursuant to Federal Rule of Appellate Procedure 29 and Circuit Rule 29-3, Sirius XM Radio Inc. ("Sirius XM") moves for leave to file the accompanying brief, attached hereto as Exhibit A, as *amicus curiae* in support of appellant Pandora Media, Inc.'s ("Pandora") appeal from the district court's February 23, 2015 order denying Pandora's anti-SLAPP motion. Sirius XM sought the consent of both parties prior to filing this motion. Although Pandora consented, appellee Flo & Eddie, Inc. ("Flo & Eddie") did not.

Sirius XM is a satellite radio broadcaster that—like digital broadcasters (including Pandora), terrestrial or "AM/FM" broadcasters, club DJs, restaurants, retail stores, and thousands of others—performs music for the public, including sound recordings fixed prior to February 15, 1972 ("pre-1972 recordings"). Since the dawn of radio broadcasting, pre-1972 recordings have been freely and widely performed without restriction. No law—federal or state—has ever given the purported owner of a pre-1972 recording any right to control or demand compensation for performances of that recording. The district court nonetheless held—both in the case below and in a parallel case Flo & Eddie filed against Sirius XM—that California Civil Code Section 980(a)(2), which provides merely that the owner of a pre-1972 recording has "exclusive ownership" therein, granted an unfettered, unconditional right to control all public performances of that recording—*i.e.*, when and where it is played, by whom, and for how much.

Sirius XM's proposed brief elaborates and expands on the fundamental error in the district court's interpretation of Section 980(a)(2). The district court first ruled that Section 980(a)(2) grants a so-called "performance right" to pre-1972 recording owners in the *Sirius XM* lawsuit (which remains pending). *Flo & Eddie, Inc. v. Sirius XM Radio Inc.*, 2014 WL 4725382, at *6, *9 (C.D. Cal. Sept. 22, 2014). Flo & Eddie then capitalized on that ruling by filing the lawsuit below against Pandora, which involves the same claims and was assigned to the same judge. The district court's order denying Pandora's anti-SLAPP motion reiterates its prior ruling from the *Sirius XM* case, but focuses primarily on Pandora's argument that, even if Section 980(a)(2) does grant a performance right, that right was lost when Flo & Eddie's pre-1972 recordings were distributed to the public. ER8-11. Pandora's opening brief likewise focuses on this "publication" argument.

Sirius XM's proposed brief focuses on the threshold question of whether Section 980(a)(2) in fact grants a performance right. Sirius XM addresses aspects of that question that were not developed in Pandora's brief—for example, that the district court's creation of a performance right in contravention of the Legislature's plain intent violates the settled principle that where, as here, the declaration of a right would dramatically alter the common law and affect the interests of competing stakeholders, it must be a matter of legislative judgment and discretion

rather than judicial fiat. *See, e.g.*, *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 694 (1988).

It is clear that *amici* may assist the Court by presenting "ideas, arguments, theories, insights, facts, or data that are not to be found in the parties' briefs." *Voices for Choices v. Ill. Bell Tel. Co.*, 339 F.3d 542, 545 (7th Cir. 2003); *Sierra Club, Inc. v. E.P.A.*, 358 F.3d 516, 518 (7th Cir. 2004) ("Courts value [*amicus*] submissions ... to learn about facts and legal perspectives that the litigants have not adequately developed."). That is particularly true where, as here, "the would-be amicus has a direct interest in another case that may be materially affected by a decision in this case." *Voices for Choices*, 339 F.3d at 545.

In addressing the district court's erroneous interpretation of Section 980(a)(2), Sirius XM also provides its perspective as the world's largest satellite broadcaster on the devastating impact the district court's ruling will have on the broadcasting industry, and ultimately the public, if it is not reversed. The district court's creation of a right that never previously existed under federal or state law substantially affects a number of stakeholders, including Sirius XM. *See, e.g.*, Tyler Ochoa, *A Seismic Ruling on Pre-1972 Sound Recordings and State Copyright Law*, Technology & Marketing Law Blog (Oct. 1, 2014), http://blog.ericgoldman.org (recognition of performance right would "wreak havoc with existing commercial practices" and "undo [a] 75-year-old consensus that state

law does not provide" such a right); *Flo & Eddie, Inc. v. Sirius XM Radio Inc.*, 62 F. Supp. 3d 325, 352 (S.D.N.Y. 2014) (recognition of performance right under New York law "will have significant economic consequences" and "could upend the analog and digital broadcasting industries"). Moreover, this Court's ruling could have precedential value in other cases—including cases currently pending in California district courts against Sirius XM, iHeart Media, CBS, and Cumulus. *See, e.g.*, *Flo & Eddie, Inc. v. Sirius XM Radio Inc.*, Case No. 13-CV-05693 PSG (C.D. Cal.); *Sheridan v. Sirius XM Radio Inc. & Pandora Media, Inc.*, Case No. 4:15-cv-04081 (N.D. Cal.); *Sheridan v. iHeartMedia, Inc.*, 15-CV-04067 PSG (C.D. Cal.); *ABS Entm't, Inc. v. iHeartMedia, Inc.*, No. 2:15-cv-06252-PSG (C.D. Cal.); *ABS Entm't, Inc. v. CBS Corp.*, No. 2:15-cv-06257-PA (C.D. Cal.); *ABS Entm't, Inc. v. Cumulus Media Inc.*, No. 2:15-cv-06269-PA (C.D. Cal.).

It is well-settled that *amici* can assist the Court by shedding light on issues of public importance that affect other stakeholders and other cases. *See Miller-Wohl Co. v. Comm'n of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982) ("the classic role of *amicus curiae* [is] ... assisting in a case of general public interest"); *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997) (*amici* may offer "unique information or perspective"); *C&A Carbone, Inc. v. Cnty. of Rockland*, 2014 WL 1202699, at *4 (S.D.N.Y. Mar. 24, 2014) (where

disposition of an appeal could affect other cases, the court should consider "various interests" to ensure "a complete and plenary presentation of difficult issues").

For the foregoing reasons, the Court should grant Sirius XM's motion and consider the accompanying *amicus curiae* brief.

Dated: September 9, 2015

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EXHIBIT A

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 29(c)(1), undersigned counsel states as follows:

1. Sirius XM Radio Inc. is a wholly owned subsidiary of Sirius XM Holdings Inc., a publicly held corporation.

2. Liberty Media Corporation possesses an ownership interest of 10 percent or more in Sirius XM Holdings Inc.

Dated: September 9, 2015

By: /s/ Daniel M. Petrocelli

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Sirius XM Radio Inc. ("Sirius XM") respectfully submits this brief as *amicus curiae* in support of appellant Pandora Media, Inc.'s ("Pandora") appeal from the district court's February 23, 2015 order denying Pandora's anti-SLAPP motion.[1] Sirius XM submits this brief together with a motion for leave to file pursuant to Federal Rule of Appellate Procedure 29(b).

STATEMENT OF INTEREST

Sirius XM is a satellite radio broadcaster that—like digital broadcasters (including Pandora), terrestrial or "AM/FM" broadcasters, club DJs, restaurants, retail stores, and thousands of others—performs music for the public, including sound recordings fixed prior to February 15, 1972 ("pre-1972 recordings"). Sirius XM submits this brief to address the district court's fundamental error in interpreting California Civil Code Section 980(a)(2), which provides that the owner of a pre-1972 recording has "exclusive ownership" therein. The court misconstrued the statute as granting the owner an unfettered, unconditional right to control all public performances of that recording—*i.e.*, when and where it is played, by whom, and for how much.

[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), Sirius XM states that this brief was not authored in whole or in part by any party's counsel, and no party, party's counsel, or other person (other than Sirius XM) contributed money to the preparation and submission of this brief.

In addressing the district court's erroneous interpretation of Section 980(a)(2), Sirius XM also provides its perspective on the devastating impact the district court's ruling will have on the broadcasting industry, and ultimately the public, if it is not reversed. The district court's creation of a right that never previously existed under federal or state law substantially affects a number of stakeholders and could have precedential value in other cases—including a case that appellee Flo & Eddie, Inc. ("Flo & Eddie") filed against Sirius XM in the same district court below. The district court first ruled that Section 980(a)(2) grants a so-called "performance right" to pre-1972 recording owners in the *Sirius XM* case. Because that ruling is not yet ripe for appeal, Pandora's appeal presents the first opportunity for this Court to review the district court's interpretation of Section 980(a)(2).

INTRODUCTION

Since the dawn of radio broadcasting in the 1920s, pre-1972 recordings have been freely and widely performed without restriction. Sirius XM, like others who perform music for the public, has always paid royalties to the owners of *musical compositions*, because the federal Copyright Act grants composers the right to receive compensation for performances of their songs, pursuant to a statutory compulsory licensing scheme. 17 U.S.C. § 106(4). But Sirius XM, like others, has never paid royalties to the purported owners of pre-1972 *recordings*, because no

law—federal or state—gives those owners the right to control or demand compensation for performances of their recordings.

The district court recognized that there is *no* case anywhere in the country holding that owners of pre-1972 recordings have any right to control public performances. The court erroneously concluded, however, that the California Legislature created a performance right, *sua sponte* and without any debate, when it amended Section 980(a)(2) in 1982. The Legislature did no such thing. Yet, in the stroke of a pen, the district court's ruling converted thousands of broadcasters, DJs, and others—everyone who plays a record made before 1972—into serial infringers, miring the broadcasting industry in chaos and uncertainty.

The district court fundamentally misunderstood Section 980(a)(2). The statute's legislative history, along with the broader history of rights afforded to sound recording owners under both federal and California law, make clear that it was a technical "clean up" amendment to conform to Congress's overhaul of the federal Copyright Act in 1976, and did not create or confirm any state performance right. Section 980(a)(2) provides that the owner of a pre-1972 recording has an "exclusive ownership therein." Unlike the federal Copyright Act, however, Section 980(a)(2) does not define "ownership" or the bundle of rights it includes. The district court reasoned that because the statute does not expressly *exclude* a performance right, it must include one. But a performance right has never been a

right inherent in ownership of a sound recording, and was not contemplated by the Legislature in 1982. To the contrary, the express purpose of Section 980(a)(2) was to make "technical and minor changes" to conform California law to the federal Copyright Act and to "maintain" existing rights, which only included the right to prevent unauthorized copying and distribution (*i.e.*, bootlegging)—*not* the right to control any and all public performances.

The district court's recognition of a performance right that the Legislature never intended to create was an improper usurpation of the legislative function. California law is clear that where, as here, the declaration of a right would dramatically alter the common law and profoundly affect the interests of many competing stakeholders, that is a matter of legislative judgment and discretion, not judicial fiat. *See Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 694 (1988).

The reason for this principle is clear: the creation of a controversial new right by courts rather than legislatures engenders widespread policy and administrative problems. After decades of debate, Congress enacted the Digital Performance Right in Sound Recordings Act ("DPRA") in 1995, which established a limited digital performance right restricted to post-1972 recordings. The DPRA includes key exemptions—such as a carve-out for AM/FM radio—as well as a compulsory licensing scheme to balance the interests of recording owners on the one hand, with the many countervailing interests on the other, including the

interests of music composers in having their works widely heard and appreciated, the interests of broadcasters and others in performing post-1972 recordings with minimal restrictions, and the interests of the public in enjoying music in both public and private venues. *See* H.R. REP. NO. 104-274 (1995); S. REP. NO. 104-128 (1995). The district court's ruling contains none of these policy limitations or administrative mechanisms. It draws no distinction between satellite and AM/FM broadcasters, provides no limits on the ability of recording owners to hold broadcasters hostage by refusing rights or charging unreasonable royalties, and contains no protections for broadcasters, composers, or the public.

An important, controversial, and historically significant right like that claimed here cannot be created by implication and in contravention of a stated legislative intent. The district court's ruling was erroneous and should be reversed.

FACTUAL BACKGROUND

In August 2013—before the lawsuit below was filed—Flo & Eddie, which claims to own pre-1972 recordings of songs by The Turtles, filed a lawsuit against Sirius XM in the same district court below asserting that California law gives pre-1972 recording owners an unfettered, unconditional right to control all public performances of their recordings. *Flo & Eddie, Inc. v. Sirius XM Radio Inc.*, Case No. 13-CV-05693 PSG (RZx) (C.D. Cal.) (the "*Sirius XM* case"). The major record companies filed a parallel lawsuit against Sirius XM in Los Angeles

Superior Court. *Capitol Records, LLC et al. v. Sirius XM Radio Inc.*, Case No. BC520981 (Cal. Super. Ct.) (the "*Capitol Records* case").

On August 27, 2014, the state court in the *Capitol Records* case issued a tentative order denying the record companies' motion for a jury instruction declaring the existence of a performance right, concluding that neither California common law nor Section 980(a) "convey[s] an exclusive right to performance in pre-1972 sound recordings." Case No. BC520981, slip op. at 7 (Cal. Super. Ct. Aug. 27, 2014).

Three weeks later, on September 22, 2014, the *Sirius XM* court reached the opposite conclusion. The court acknowledged that there is no case recognizing a common law performance right. 2014 WL 4725382, at *6 (C.D. Cal. Sept. 22, 2014). The court concluded, however, that the California Legislature created a performance right when it amended Section 980(a)(2) in 1982 to provide that the owner of a pre-1972 recording has an "exclusive ownership therein." *Id.* at *4-*5. The court reasoned that the statute necessarily includes a performance right because it does not explicitly exclude such a right. *Id.* at **5-*7. The court thus granted partial summary judgment for Flo & Eddie. *Id.* at *9, *12. The *Sirius XM* case remains pending in the district court.[2]

[2] Earlier this year, the district court granted Flo & Eddie's motion for class certification, but—recognizing that its certification ruling involved unsettled and

Thereafter, the *Capitol Records* court reversed its tentative order, concluding that, after reviewing the *Sirius XM* court's ruling, "Section 980 must be interpreted to recognize exclusive ownership rights as encompassing public performance rights in pre-1972 sound recordings." Case No. BC520981, slip op. at 8 (Cal. Super. Ct. Oct. 14, 2014). The court recognized, however, that there are "reasonable arguments on both sides" of the performance-right issue, and "the judicial silence on this issue and the broadcasting industry's practice of not paying royalties for public performance of sound recordings creates a scenario ripe for difference of opinion." Case No. BC520981, slip op. at 7 (Cal. Super. Ct. Dec. 5, 2014). The court thus certified its ruling for interlocutory appeal. The record companies opposed Sirius XM's petition for interlocutory appeal on the ground that, *inter alia*, appeal was premature because the court's ruling was made in the context of a jury instruction, which is inherently provisional. Case No. B260717 (Cal. Ct. App. Dec. 26, 2015). The Court of Appeal summarily denied Sirius XM's petition, and the *Capitol Records* case later settled out of court.

On October 2, 2014—ten days after the *Sirius XM* court's summary judgment ruling—Flo & Eddie filed the lawsuit below against Pandora, which

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significant questions of class action law—stayed trial court proceedings pending resolution of Sirius XM's Rule 23(f) petition to this Court. This Court denied Sirius XM's Rule 23(f) petition on August 10, 2015. Sirius XM filed a petition for rehearing or reconsideration *en banc* on August 24, 2015, which remains pending. *Flo & Eddie, Inc. v. Sirius XM Radio Inc.*, Appeal No. 15-80102, Dkt. 5 (9th Cir.).

involves the same claims as the *Sirius XM* lawsuit, and was assigned to the same judge. Pandora filed an anti-SLAPP motion to dismiss, which the district court denied on February 23, 2015. ER14. The district court's order reiterates its ruling from the *Sirius XM* case—*i.e.*, that Section 980(a)(2) grants a performance right in pre-1972 recordings—although the order focuses primarily on Pandora's argument that, even if such a performance right exists, it was extinguished when Flo & Eddie's pre-1972 recordings were published in the 1960s and 1970s. ER8-11.

Pandora's appeal presents the first opportunity for this Court (or any other court) to consider whether the California Legislature's 1982 amendment of Section 980(a)(2) created an absolute, unfettered performance right in pre-1972 recordings that had never before existed under state or federal law. As noted in Pandora's brief and explained more fully here, it did not.

ARGUMENT

I. SECTION 980(A)(2) DID NOT GRANT A PERFORMANCE RIGHT TO OWNERS OF PRE-1972 RECORDINGS.

In 1982, the California Legislature amended California Civil Code Section 980(a)(2), which now provides:

> The *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 makes or duplicates another sound recording that does not directly or indirectly recapture the actual sounds fixed in such prior sound recording, but consists entirely of an

> independent fixation of other sounds, even though such sounds imitate or simulate the sounds contained in the prior sound recording. (Emphasis added.)

Section 980(a)(2) does not define "ownership" or the bundle of rights it includes. The *Capitol Records* court rightly recognized that the meaning of "ownership" is ambiguous, and begs the question of what rights it includes and "how [other] persons may use their authorized copies" of recordings. Case No. BC520981, slip op. at 3 (Cal. Super. Ct. Oct. 14, 2015). The district court below reasoned—incorrectly—that because the statute does not expressly *exclude* a right to control performances, it necessarily *includes* such a right. 2014 WL 4725382, at *5-*7. That analysis wrongly presumes that "ownership" of property is absolute.

It is not. Any rights in property are always limited by "the legitimate interests of others." *See* Joseph Singer, PROPERTY § 1.1.2 (4th ed. 2014); *accord Steward Machine Co. v. Davis*, 301 U.S. 548, 581 (1937). For example, the owner of a land parcel has no inherent right to build a skyscraper or drill into the ground. *See* Richard Posner, ECONOMIC ANALYSIS OF LAW §§ 3.2, 3.8, 3.9 (7th ed. 2007) (right to build structures, extract oil, and use water may be limited to protect other stakeholders). Likewise, the mere fact that one claims "ownership" of a pre-1972 recording does not itself define the particular rights attendant to that ownership claim—especially whether it includes the right to control how someone else uses a lawfully obtained copy of that recording.

Even taken on its own terms, the district court's categorical "property ownership" theory makes no sense. Because the theory does not (and cannot) define and distinguish among the specific rights that come with ownership, it necessarily would allow the owner of a pre-1972 recording to prohibit a consumer who lawfully purchased a recording from playing it at a private party, listening to it in the car with the windows down, or re-selling it to a used record store. Obviously no precedent or sound policy supports that result. As the court in a parallel Florida action recently recognized, general principles of property law do not provide an "unqualified property right" that allow pre-1972 recording owners to "control everything related to the performance of [their] sound recordings." *Flo & Eddie, Inc. v. Sirius XM Radio Inc.*, 2015 WL 3852692, at *5 (S.D. Fla. June 22, 2015) (holding that Florida law does *not* grant a performance right to pre-1972 recording owners and granting judgment for Sirius XM).

Because the meaning of "ownership" in Section 980(a)(2) is ambiguous, and does not define the bundle of rights encompassed by ownership, the Court must look to the statue's legislative history for guidance. *See O'Grady v. Super. Ct.*, 139 Cal. App. 4th 1423, 1461 (2006). That history is unambiguous: the purpose of Section 980(a)(2) was to "*maintain rights and remedies* in sound recordings fixed prior to February 15, 1972." Assemb. Comm. on Judiciary, AB 3483 (Katz), as introduced 3/12/82 (Cal. Comm. Print. 1982) (emphasis added). In other words,

the statute was intended to maintain whatever rights recording owners already possessed as of 1982. As explained below, neither federal nor California law recognized a performance right in sound recordings at that time.

A. As Of 1982, Recording Owners Had No Performance Right Under Federal Law.

The extensive history and debate concerning a performance right under federal law is detailed in Pandora's brief, *see* Dkt. 18-1 at 6-12, and summarized only briefly here. Prior to the federal Copyright Act of 1976, the protection of published works (like the sound recordings at issue here) was primarily the domain of federal copyright law. California common law copyright protected only *unpublished* works. *See Stanley v. CBS, Inc.* 35 Cal. 2d 653, 660-61 (1950); *Klekas v. EMI Films, Inc*., 150 Cal. App. 3d 1102, 1108-09 (1984). Thus, Section 980's predecessor statute granted ownership rights to the "author of any product of the mind," but its corollary, Section 983, provided that such rights terminated upon publication. *See* CAL. CIV. CODE §§ 980, 983 (1947).

Federal law did not recognize any performance right in sound recordings. To the contrary, between 1909 and 1971, Congress repeatedly refused to recognize *any* rights in sound recordings at all. *See Performance Rights in Sound Recordings: Subcomm. on Courts, Civ. Liberties, & the Admin. of Justice of the H. Comm. on the Judiciary*, 95th Cong., 29-52 (Comm. Print 1978). Congress

understood that the relationship between record companies (who typically own sound recordings) and broadcasters is symbiotic, in that record companies benefit from the free publicity afforded by airplay and broadcasters benefit from the advertising revenue generated by popular recordings, and that recognizing a copyright in sound recordings could upset that relationship. *See id.*

The advent of new technology in the 1950s and 1960s made it possible for pirates to copy recordings, which deprived the record companies of sales. All stakeholders recognized the threat record piracy posed to the established equilibrium. The record companies introduced various measures to Congress addressing record piracy, but those measures repeatedly failed to pass because they included a performance right in addition to an anti-copying right. *See id.* at 42-50. While there was widespread support for an anti-copying right, the proposed performance right was "explosively controversial," as it would amount to a windfall to record companies at the expense of composers and performing artists (because any restrictions on performances would decrease the number of times their songs are played and the consequent publishing royalties and publicity they receive) as well as broadcasters and users (who would face increased costs and decreased access to recordings). SUPP. REGISTER'S REP. ON THE GENERAL REVISION OF U.S. COPYRIGHT LAW 38 (Comm. Print 1965).

In the 1971 Sound Recording Act, Congress created a limited copyright in *post*-1972 recordings that protected against unauthorized *copying and distribution* only. Pub. L. No. 92-140, 85 Stat. 391 (1971). Congress did not subject pre-1972 recordings to the new regulatory system. The 1976 Copyright Act reaffirmed the limited anti-copying right for post-1972 recordings and expressly rejected a performance right. 17 U.S.C. § 114.

B. As Of 1982, Recording Owners Had No Performance Right Under California Law.

The evolution of California common law before 1982 largely tracked federal law. As the district court recognized, there is not a single case recognizing a common law performance right. 2014 WL 4725382, at *6. The *only* case to address the existence of a common law performance right, *RCA Mfg.Co. v. Whiteman*, 114 F.2d 86 (2d Cir. 1940), held flatly that there was none.

In *Whiteman*, a record company and orchestra leader brought a common law copyright infringement claim under New York common law against a radio network that broadcast their records. That claim raised the question whether the performer and/or the record company "had any musical property at common-law in the records" that was infringed when the radio network played the records on air. 114 F.2d at 87. Judge Learned Hand's opinion for the Court held that the radio performance of the recordings did not infringe any property right because common

law rights in the recording "consist[] only in the power to prevent others from *reproducing* the copyrighted work." *Id.* at 88 (emphasis added). By simply playing the records on air, the radio network "never invaded any such right of [the performer]"—indeed, they "never *copied* his performances at all," but instead "merely used those copies which he and the [record company] made and distributed." *Id.* (emphasis added). The radio network thus could not be held liable under New York common law for broadcasting the records.

Whiteman remains good law on this point,[3] and established a longstanding "consensus that state law does not provide a public performance right for sound

[3] Pandora's brief incorrectly assumes that *Whiteman* was overruled by *Capitol Records, Inc. v. Mercury Records Corp.*, 221 F.2d 657 (2d Cir. 1955), and *Capitol Records, Inc. v. Naxos of Am., Inc.*, 4 N.Y.3d 540 (2005). Pandora misreads *Mercury Records* and *Naxos*, which were record piracy cases involving the *unauthorized reproduction and distribution* of bootleg copies, and had nothing to do with the relevant issue in *Whiteman*—*i.e.*, the right to control *performances*.

Mercury Records and *Naxos* did reject dictum in *Whiteman* that is irrelevant to this case. In *Whiteman*, Judge Hand considered whether the sale of a record constituted a "publication" that extinguished its common law copyright under federal preemption principles, and opined that after a record's sale, "anyone may copy it who chances to hear it, and may use it as he pleases." 114 F.2d at 89. *Mercury Records* held that this statement "is not the law of the State of New York," because in that state the "public sale" of a record "does not constitute a dedication of the right to *copy and sell* the record[]." 221 F.2d at 663 (emphasis added); *see Naxos*, 4 N.Y.3d at 553-55. This rejection of *Whiteman*'s dictum has no relevance either to *Whiteman*'s central holding or to this case, both of which are about the *performance* of recordings lawfully obtained, not *copying and selling* them without permission. As commentators have consistently recognized—including *after Mercury Records* and *Naxos*—*Whiteman* remains good law on the public

recordings." Prof. Tyler Ochoa, *A Seismic Ruling on Pre-1972 Sound Recordings & State Copyright Law*, TECHNOLOGY & MARKETING BLOG (Oct. 1, 2014), http://blog.ericgoldman.org; *see* Steven Seidenberg, *US Perspectives: Courts Recognise New Performers' Rights*, INTELL. PROP. WATCH (Nov. 24, 2014), http://www.ip-watch.org ("As a result [of *Whiteman*], it has been settled since 1940 that there is no performance right in a sound recording."); Lauren Kilgore, *Guerrilla Radio: Has the Time Come for a Full Performance Right in Sound Recordings?*, 12 VAND. J. ENT. & TECH. L. 549, 559-60 (2010) (*Whiteman* "helped put radio on solid legal ground to play records without compensating performers for the next seventy years"); Ralph Brown, Symposium, *The Semiconductor Chip Protection Act of 1984 and its Lessons: Eligibility for Copyright Protection: A Search for Principled Standards*, 70 MINN. L. REV. 579, 585-86 (1986) (*Whiteman* "turned the tide against judges creating" a "common law performers' right"); Douglas Baird, *Common Law Intellectual Property & the Legacy of Int'l News Serv. v. Assoc. Press*, 50 U. CHI. L. REV. 411, 419 n.35 (1983) (the "law did not (and in fact still does not) give a performer the right to control radio broadcasts of his performances"); U.S. COPYRIGHT OFFICE, FEDERAL COPYRIGHT PROTECTION FOR PRE-1972 SOUND RECORDINGS: A REPORT OF THE REGISTER OF COPYRIGHTS

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performance issue. *See* Kilgore, *supra*, at 572, 559-60 (*Mercury Records* overruled *Whiteman* on a different issue); *supra* at 14-15.

44-45 (2011) (citing *Whiteman* and explaining that, although states *could* interpret common law as providing a performance right, "state law does not appear to recognize a performance right in sound recordings"); June Besek & Eva Subotnik, *Constitutional Obstacles? Reconsidering Copyright Protection for Pre-1972 Sound Recordings*, 37 COLUM. J.L. & ARTS 327, 338 (2014) ("states do not appear to recognize a right of public performance in pre-1972 sound recordings"); Steven Seidenberg, *Pay to Play: State Copyright Law Now Gives Musicians Performance Rights*, A.B.A.J. (Apr. 2015) (state law "did not provide performers or record labels with public performance rights … according to the seminal case of [*Whiteman*]"); Richard Posell, *'60s on 6' May Be in Sirius Trouble*, DAILY J. (Apr. 29, 2015) (district court's ruling "challenges the common understanding of state copyrights since at least 1940").

Consistent with the reasoning of *Whiteman* and California's statutory restriction providing common law copyright only in unpublished works, no California decision has *ever* recognized a common law performance right. To the contrary, California cases decided in the *Whiteman* era were wholly consistent with its reasoning. The only contemporaneous California decision to cite *Whiteman* did so favorably, finding that a composer lost any common law rights in his "musical laugh" by broadcasting it over the radio and recording it for sale to the public. *See Blanc v. Lantz*, 1949 WL 4766, at * 8 (Cal. Super. 1949) (explaining that

Whiteman holds that "following the sale of [records], a radio station did not infringe any common law copyright by broadcasting them over its radio system"). Similarly, a federal court interpreting California law concluded that a plaintiff had *no* property interest in a unique "arrangement" of a recorded song. *Supreme Records, Inc. v. Decca Records, Inc.*, 90 F. Supp. 904, 908-09 (S.D. Cal. 1950) ("I do not think that a mere recording of an arrangement of a musical composition by one who is not the author of the composition is a property right which should be given recognition in equity.").

During this time, however, record piracy began to thrive. Relying on the fact that sound recordings were uncopyrightable under federal law and unprotected by state law, bootleggers began openly copying and selling records produced by others. In California, piracy spurred both the passage of a state statute criminalizing record piracy, *see* CAL. PENAL CODE § 653h (2015), and two Court of Appeal decisions holding unauthorized copying unlawful, *see Capitol Records, Inc. v. Erickson*, 2 Cal. App. 3d 526, 537 (1969); *A&M Records, Inc. v. Heilman*, 75 Cal. App. 3d 554, 564 (1977).

Erickson and *Heilman* were not based on copyright law. Rather, those cases held that the unauthorized copying of sound recordings constituted "unfair competition." The courts relied on a long line of authority holding that "misappropriation of unpatentable *or uncopyrightable* property by a competitor

constituted unfair competition." *Erickson*, 2 Cal. App. 3d at 533-34 (emphasis added). In so doing, the courts recognized a "personal property" interest separate and apart from copyright. *Heilman*, 75 Cal. App. 3d at 570; *accord Lone Ranger Television, Inc. v. Program Radio Corp.*, 740 F.2d 718, 726 (9th Cir. 1984) (noting that unfair competition "lies outside copyright"). *Erickson* and *Heilman* were thus consistent with the longstanding rule that only unpublished works were subject to state copyright protection. And, consistent with federal law, those cases merely protected against unauthorized *copying* of recordings, not unauthorized *performances*.[4]

[4] The district court found that two cases from 2010 appear to suggest a performance right "implicitly or in dicta," 2014 WL 4725382, at *7, but neither case directly addresses the existence of a performance right (let alone the state of the law as of 1982).

Capitol Records, LLC v. BlueBeat, Inc., 765 F. Supp. 2d 1198 (C.D. Cal. 2010), involved a service that sold unlicensed downloads of songs (*i.e.*, pirated copies) and also allowed users to stream songs. Plaintiffs argued that BlueBeat's "reproduction, distribution, and public performance" of pre-1972 songs constituted misappropriation, unfair competition, and conversion. *Id.* at 1203. The court summarily adopted this argument, without distinguishing between BlueBeat's bootlegging and streaming activities, and relying solely on *Heilman*, which did *not* recognize a performance right in sound recordings. *Id.* at 1206.

In *Bagdasarian Prods., LLC v. Capitol Records, Inc.*, 2010 WL 3245795 (Cal. Ct. App. Aug. 18, 2010), a contractual interpretation case, the court merely noted in dicta that the plaintiff's contract did not appear to grant rights to "publicly perform[] the records," but included no analysis or holding on this point. *Id.* at *11.

C. The Purpose Of Section 980(a)(2) Was To "Maintain" Then-Existing Rights—Not To Create A Broad New Performance Right That Never Existed Under Federal Or State Law.

This was the state of the law in 1982, when the California Legislature amended Section 980(a). The purpose of the amendment was to make "technical and minor policy changes" to "conform California copyright law to ... the Federal Copyright Act of 1976." Cal. Dept. of Fin., Enrolled Bill Rep. on AB 3483 (1981-1982 Reg. Sess.) (Aug. 17, 1982); Assemb. Comm. on Judiciary, *supra*, at 1. Specifically, the 1976 Copyright Act (1) eliminated the historical distinction between published and unpublished works, making all works "fixed in any tangible medium of expression" copyrightable under federal law and preempting Section 980 and 983, and (2) maintained the limited anti-copying right for post-1972 recordings, but left protection for pre-1972 recordings subject to state law. 17 U.S.C. §§ 102, 301(c). It was thus necessary for the Legislature to amend Section 980 to conform California law to federal law and ensure that pre-1972 recordings remained protected against copying.

The legislative history of Section 980 makes clear that the Legislature sought only to "maintain rights and remedies" then in existence. Assemb. Comm. on Judiciary, *supra*, at 2. As explained above, those "rights and remedies" did *not* include a performance right. Given its limited purpose, Section 980 passed with no significant debate. Indeed, the legislative reports for the amendment state that

there "is no known opposition to the bill." Governor's Off., Dept. Legal Affairs, Enrolled Bill Rep. on AB 3483 (1981-1982 Reg. Sess.) (Aug. 13, 1982).

Nothing in this short legislative history remotely suggests that the Legislature intended, through the "technical and minor" changes it made to Section 980, to create a radical expansion of rights never previously created under California or federal law. Yet that is what the district court held.

The court reasoned that because the Legislature specified one exception for "covers" in Section 980(a)(2), it "did not intend to further limit ownership rights, otherwise it would have indicated that intent explicitly." 2014 WL 4725382, at *5. The court was also persuaded by the fact that Section 980(a)(2)'s "covers" exception tracked the federal Copyright Act, yet the Copyright Act expressly excludes a public performance right while Section 980(a)(2) does not. *Id.* at *7. The court's reasoning was rooted in the statutory canon of *expressio unius est exclusio alterius*—the expression of one thing in a statute ordinarily implies the exclusion of other things. That canon has no application here.

First, the *expressio unius* canon does not apply where "its operation would contradict a discernible and contrary legislative intent." *In re JW*, 29 Cal. 4th 200, 209 (2002). The district court overlooked the legislative history of Section 980(a)(2), which contains *no* discussion of a performance right or the provision of the 1976 Copyright Act on which the court placed such weight. The court also

ignored the legislative history of the 1976 Copyright Act, which almost failed to pass due to the "explosively controversial" issue of whether to create a performance right—and thus had a clear and distinct basis for including language specifically addressing that issue.

If the Legislature had intended to enlarge rights in sound recordings to include a performance right, such a radical change would have attracted widespread attention from industry stakeholders, many of whom would have asserted the same vigorous objections that have been rampant in the heated debate over proposals to create a performance right in sound recordings at the federal level. *See* Dkt. 18-1 at 9-12. There is nothing comparable in Section 980(a)(2)'s legislative history—to the contrary, there was *no* opposition to the amendment. Governor's Off., Dept. Legal Affairs, *supra*. That silence speaks much more loudly than the *expressio unius* canon in this context.

Second, the *expressio unius* canon provides only that where a statute grants an affirmative power and then carves out certain elements of that power, only those specified elements are carved out. *See Geertz v. Ausonio*, 4 Cal. App. 4th 1363, 1370 (1992). Here, it is not the carve-outs that are ambiguous, but the original grant—*i.e.*, what rights are included in "ownership" of a pre-1972 recording. The federal Copyright Act sets forth the entire "bundle of rights" granted to every owner of a federal copyright, which includes a performance right. 17 U.S.C.

§ 106. In Section 114, which governs rights in sound recordings, Congress had to expressly exclude a performance right to distinguish sound recordings from other copyrighted works. *Id.* § 114. Because neither California common law nor Section 980(a) had a "bundle of rights" counterpart to Section 106 of the Copyright Act, there was no need or reason for the Legislature to include a similar carve-out.

An important, controversial, and historically significant property right like that at issue here cannot be created by implication and in contravention of a stated legislative intent to make only minor, technical changes. *See In re JW*, 29 Cal. 4th at 213 ("In the end, a court must adopt the construction most consistent with the apparent legislative intent and most likely to promote rather than defeat the legislative purpose and to avoid absurd consequences."). The district court's interpretation of Section 980(a)(2) was error.

II. ONLY THE LEGISLATURE, NOT THE COURTS, CAN CREATE A PERFORMANCE RIGHT IN PRE-1972 RECORDINGS.

The history is clear: there was *no* performance right in pre-1972 recordings under federal or state law as of 1982, and the Legislature did not intend to create such a right when it amended Section 980(a)(2). The first time *any* performance right was created—at a federal or state level—was in 1995, 13 years after Section

980(a)(2)'s enactment, when Congress enacted the DPRA and created a limited, carefully circumscribed performance right only for certain sound recordings.[5]

The differences between the careful legislative balancing conducted by Congress in the DPRA and the "wild west" created by the district court's ruling are stark. The DPRA was enacted after dozens of witnesses testified about the competing policy considerations, after committees produced multiple reports detailing their findings, and after Congress revised the proposed legislation to address each issue. *See* H.R. REP. NO. 104-274 (1995); S. REP. NO. 104-128 (1995). On the one hand, Congress wanted to protect recording owners, who claimed that the advent of new digital technologies cut into their profits. *See* S. REP. NO. 104-128, at 15 (1995); H.R. REP. NO. 104-274, at 13-14 (1995). On the other hand, Congress sought to protect broadcasters and maintain their symbiotic

[5] As the legislative history of the DPRA confirms, recording owners were well aware that, under then "existing law," they had "no right to authorize or be compensated for public performance of the sound recording." *Digital Performance Right in Sound Recordings Act of 1995: Hearings Before the Subcomm. on Courts and Intellectual Property of the H. Comm. on the Judiciary on H.R. 1506*, 104th Cong. 31 (1995) (statement of Jason S. Berman, Chairman and CEO, Recording Industry Association of America); *see also* Julie Ross, *[Un]happy Together: Why the Supremacy Clause Preempts State Law Digital Performance Rights in Radio-Like Streaming of Pre-1972 Sound Recordings*, J. COPYRIGHT SOC'Y U.S.A. 18 (forthcoming 2015), *available at* http://scholarship.law.george town.edu/facpub/1478/ (legislative history of DPRA confirms "the assumption by Congress, the Copyright Office, and all interested parties … that the [DPRA] created a new, narrowly-defined performance right that simply had not existed for sound recordings under either federal or state law").

relationship with the recording industry. *See* S. REP. NO. 104-128, at 15 (intent to avoid "imposing new and unreasonable burdens on ... broadcasters, which often promote, and appear to pose no threat to, the distribution of sound recordings"); *id.* at 16 (intent to avoid making it "economically infeasible for some transmitters to continue certain current uses of sound recordings"); 141 CONG. REC. S945-02, at 948 (daily ed. Jan. 13, 1995) (DPRA's sponsor rejecting unlimited performance right because the "long-established business practices within the music and broadcasting industries represent a highly complex system of interlocking relationships … and should not be lightly upset").

The DPRA thus includes an exemption for AM/FM radio and a complex compulsory licensing scheme, which ensures that digital and satellite broadcasters like Sirius XM and Pandora can obtain a statutory license to perform a post-1972 recording at a reasonable royalty rate. S. REP. NO. 104-128, at 15-16. The DPRA also includes a requirement that the recording owner share one-half of the compulsory license fees with performing artists, instead of pocketing the money for itself. H.R. REP. NO. 104-274, at 14-15, 24.

There has been no judicial counterpart to this carefully reticulated legislative process—nor could there have been. The district court's creation of a performance right from whole cloth encompasses AM/FM radio and contains none of the other exemptions of the DPRA. The right obviously does not include a compulsory

licensing scheme—no court could impose that kind of regulatory solution—thus leaving all broadcasters and others seeking to perform pre-1972 recordings at the mercy of recording owners, who can demand exorbitant royalty rates or refuse to license their recordings altogether. [6]

The performance right created by the district court leaves many questions unanswered as well. For example, how will a broadcaster identify the recording owner with whom a license must be negotiated? Who will resolve ownership disputes? What happens if the parties are unable to agree on a royalty rate? Even if they are, how will royalties be distributed? Must a recording owner share the royalties with the performing artists? These and other administrative difficulties

[6] In a parallel case in New York, the court recognized that the creation of a performance right by a court, rather than a legislature, would "upset … settled expectations," have "significant economic consequences" that could "upend the analog and digital industries," and create huge "administrative difficulties in the imposition and collection of royalties," which would ultimately increase consumer costs, shut down many broadcasters, and decrease access to pre-1972 recordings. *Flo & Eddie, Inc. v. Sirius XM Radio Inc.*, 62 F. Supp. 3d 325, 344, 352 (S.D.N.Y. 2014). The court ultimately concluded that New York common law does provide a performance right in pre-1972 recordings—though it recognized this was a "thorn[y] question … of first impression" as to which there are substantial grounds for difference of opinion and certified its ruling for interlocutory appeal. *Id.* at 338; 2015 WL 585641, at *2-*3 (S.D.N.Y. Feb. 10, 2015). The Second Circuit granted Sirius XM's request for interlocutory appeal, which is currently pending.

would ultimately increase the costs consumers pay to hear broadcasts, and potentially make broadcasts of pre-1972 recordings altogether unavailable.[7]

As a federal court sitting in diversity, the district court's role was to interpret California law. *Hawthorne Sav. F.S.B. v. Reliance Ins. Co.*, 421 F.3d 835, 841 (9th Cir. 2005). Its role was not to create a controversial new performance right in pre-1972 recordings that has never existed at common law, that is far broader than that legislated by Congress for post-1972 recordings, and that creates major economic and administrative difficulties. The district court violated the settled principle that the common law must "evolve[] incrementally" to avoid encroachment on the legislative branch. *People v. Schmitz*, 55 Cal. 4th 909, 930 n.22 (2012); *see also People v. Sandoval*, 41 Cal. 4th 825, 856 (2007) (evolution of the common law must be "incremental"). This principle has particular force where expanding the common law would "affect[] social policies and commercial relationships," such as the competing stakeholder interests at issue here. *Foley*, 47 Cal. 3d at 694.

[7] The Copyright Office recently issued a report discussing the *Sirius XM* case, noting the policy problems that result from creating a state performance right, and advocating for federal regulation, which can offer "uniform protection … as well as appropriate exceptions and limitations for the benefit of users." U.S. COPYRIGHT OFFICE, COPYRIGHT & THE MUSIC MARKETPLACE 53-55, 85-87 (2015); *see also* Comments of SoundExchange, Inc., *Music Licensing Study: Notice and Request for Public Comment* (May 23, 2014) (comments of SoundExchange, the organization that administers royalties under the DPRA, to Copyright Office: *Sirius XM* rulings "will not lead to a sensible regime for licensing" and "do not provide the simplicity and efficiency that Congress contemplated [in the DPRA]").

That distinctively legislative function is not one for which the judicial branch is well suited. "[W]here significant policy judgments affecting commercial relationships are implicated, the determination is better suited for legislative decision making." *Harris v. Atl. Richfield Co.*, 14 Cal. App. 4th 70, 82 (1993). The Legislature, "in making such policy decisions, [has] the ability to gather empirical evidence, solicit the advice of experts, and hold hearings at which all interested parties may present evidence and express their view." *Foley*, 47 Cal. 3d at 694-95 n.31. There is no judicial counterpart to this process. Thus, "only the Legislature is qualified to make the significant policy judgments affecting commercial relationships required to justify expansion of [law]." *Harris*, 14 Cal. App. 4th at 82. Indeed, for a court to create laws requiring the complex balancing of policy interests "usurp[s] the Legislature's role in determining policy." *FNB Mortg. Corp. v. Pac. Gen. Grp.*, 76 Cal. App. 4th 1116, 1134 (1999); *see also Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 431 (1984) (noting judiciary's "reluctance to expand the protections afforded by copyright without explicit legislative guidance …. Sound policy, as well as history, supports our consistent deference to Congress," which has the "authority and the institutional ability to accommodate fully the varied permutations of competing interests").

For these very reasons, in the *Sirius XM* Florida case, the district court declined to recognize a performance right in pre-1972 recordings. There is no

Florida case holding that ownership of pre-1972 recordings includes the right to control the performance of recordings lawfully obtained. 2015 WL 3852692, at *4. The Florida court acknowledged that if it were "to recognize and create this broad right in Florida, the music industry—including performers, copyright owners, and broadcasters—would be faced with many unanswered questions and difficult regulatory issues including: (1) who sets and administers the licensing rates; (2) who owns a sound recording when the owner or artist is dead or the record company is out of business; and (3) what, if any, are the exceptions to the public performance right." *Id.* at *5. A legislative body "is in the best position to address these issues" and determine "whether copyright protection for pre-1972 recordings should include the exclusive right to public performance." *Id.* A court, by contrast, can say only what the law is, and Florida law clearly had not recognized such a right. *Id.* at *4-*5. The same is true in California.

In California, state law copyright has been governed by statute for nearly 150 years. If California is going to adopt policies similar to those embraced by the DPRA, it is up to the Legislature to do so—along with a legislative scheme for implementing and enforcing those policies. But unlike in 1982, when the Legislature specifically acted to update California law to conform to the new federal scheme enacted in 1976, in 1995 the Legislature took no action in response

to the DPRA. The district court erred in creating and affirming a new—and unbounded—right the Legislature never considered or intended.

CONCLUSION

For the foregoing reasons, and those set forth in Pandora's briefing, the district court's order should be reversed.

Dated: September 9, 2015

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B)(i) because it contains 6,940 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2015, I caused the foregoing to be electronically filed with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit through the CM/ECF system. All participants are registered CM/ECF users, and will be served by the appellate CM/ECF system.

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