

Case No. 15-13100-AA

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

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

Plaintiff-Appellant,

v.

SIRIUS XM RADIO, INC., a Delaware Corporation,

Defendant-Appellee,

DOES 1 THROUGH 10,

Defendants.

On Appeal from the United States District Court
for the Southern District of Florida
The Honorable Darrin P. Gayles
Case No. 1:13-cv-23182-DPG

**MOTION OF ELECTRONIC FRONTIER FOUNDATION FOR LEAVE TO
FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANT-APPELLEE**

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CERTIFICATE OF INTERESTED PARTIES

Pursuant to FRAP 26.1 and 11th Cir. R. 26.1-1 and 26.1-3, undersigned counsel for *Amicus Curiae* Electronic Frontier Foundation certifies that the following is a list of all persons and entities having an interest in the outcome of this case, as well as all persons and entities listed on all certificates filed in the appeal prior to the filing date of this *amicus curiae* brief.

1. Bilzin Sumberg Baena Price & Axelrod, LLP, counsel for Defendant-Appellee
2. Barnett, Eleanor, counsel for Plaintiff-Appellant
3. Borkowski, George M., counsel for *Amicus Curiae* RIAA
4. Breuder, Drew, counsel for Defendant-Appellee
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7. Electronic Frontier Foundation, *Amicus Curiae*
8. Flo & Eddie, Inc., Plaintiff-Appellant
9. Gayles, Darrin P., U.S. District Judge, Southern District of Florida
10. Geller, Harvey, counsel for Plaintiff-Appellant
11. Gersten, David Michael, counsel for Defendant-Appellee
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35. Soto, Edward, counsel for Defendant-Appellee
36. Steinberg, Martin, counsel for Defendant-Appellee
37. Stoltz, Mitchell L., counsel for amicus Electronic Frontier Foundation
38. Turnoff, William, U.S. Magistrate Judge, Southern District of Florida

39. Volman, Mark
40. Waldman, Glenn, counsel for Plaintiff-Appellant
41. Weil Gotshal & Manges, LLP, counsel for Defendant-Appellee

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amicus Curiae* Electronic Frontier Foundation states that it does not have a parent corporation, and that no publicly held corporation owns 10 percent or more of its stock.

Dated: October 13, 2015

Respectfully submitted,

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**MOTION OF THE ELECTRONIC FRONTIER FOUNDATION FOR
LEAVE TO FILE AS AMICUS CURIAE IN SUPPORT OF DEFENDANT-
APPELLANT SIRIUS XM RADIO, INC.**

Pursuant to Federal Rule of Appellate Procedure 29(b), counsel for the Electronic Frontier Foundation (“EFF”) respectfully moves for leave to file the attached Brief of the Electronic Frontier Foundation in Support of Defendant-Appellant Sirius XM Radio, Inc. EFF has notified counsel for all parties of its intention to file this brief. Defendant-Appellee Sirius XM Radio, Inc. (“Sirius”) consents to the filing of the brief, while counsel for Plaintiff-Appellant Flo & Eddie, Inc. (“Flo & Eddie”) does not consent.

I. Interest of *Amicus Curiae*.

Amicus EFF is a nonprofit civil liberties organization that has worked for over 25 years to protect consumer interests, innovation, and free expression in the digital world. EFF and its members have a strong interest in ensuring that copyright law serves the interests of creators, innovators, and the general public. As part of its mission, EFF has often served as *amicus* in key copyright cases, including *Golan v. Holder*, No. 10-545 (U.S. Supreme Court, filed June 21, 2011, on behalf of the American Library Association and other *amici*); *Kirtsaeng v. John Wiley & Sons, Inc.*, No. 11-697 (U.S. Supreme Court, filed July 9, 2012); *Capitol Records, LLC v. Vimeo, LLC*, No. 14-1048-cv(L) (2d Cir., filed July 30, 2014); *Viacom Int’l Inc. v. YouTube, Inc.*, No. 13-1720-cv (2d Cir., filed Nov. 1, 2013); *Vernor v. Autodesk, Inc.*, No. 09-35969 (9th Cir., filed Feb. 11, 2010); and *Perfect 10, Inc. v. Google, Inc.*, No. 06-55406 (9th Cir., filed July 20, 2006). As an

independent non-profit public interest organization, EFF is not sponsored by any of the parties to this case.

EFF has a particular interest in a balanced copyright system that protects technological innovation and online free speech from the chilling effects of legal uncertainty and from outcomes that entrench incumbent businesses. Unlike the parties to this case, EFF represents the interests of small innovators, who often lack the resources to litigate in federal court.

II. *Amicus* Briefs Are Accepted Where They Can Assist the Court.

The standard for leave to file an *amicus* brief is simply whether it will assist the Court. *Neonatology Assocs., P.A. v. C.I.R.*, 293 F.3d 128, 133 (3d Cir. 2002) (Alito, J) (“[I]f a good brief is rejected, the merits panel will be deprived of a resource that might have been of assistance.”); *Ryan v. Commodity Futures Trading Comm’n*, 125 F.3d 1062, 1064 (7th Cir. 1997) (“An *amicus* brief should normally be allowed . . . when the *amicus* has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.”); *Massachusetts Food Ass’n v. Massachusetts Alcoholic Beverages Control Com’n*, 197 F.3d 560, 567 (1st Cir. 1999) (“[A] a court is usually delighted to hear additional arguments from able *amici* that will help the court toward right answers”); *see also Phillips v. AWH Corp.*, 376 F.3d 1382, 1383-84 (Fed. Cir. 2004) (“*Amicus curiae* briefs may be filed by bar associations, trade or industry associations, government entities, and other interested parties.”).

III. EFF's Brief Will Assist the Court By Providing Context on the Implications of this Case for Innovation and Competition.

This *amicus* brief will assist the Court in understanding the broad impact a ruling in Flo & Eddie's favor could have on creators, innovators, and consumers. This appeal is of vital importance to thousands of businesses and individuals who are not before the Court, as a reversal could upend decades of settled law governing their use of recorded music. The impact of Appellant Flo & Eddie's contentions on competition, and on the encouragement of technological innovation for the benefit of the public, were not considered in the parties' briefs. As discussed above, EFF has expertise on these issues and long experience in addressing the public interest in innovation. EFF's brief will assist the Court by placing the issues of this case in context.

Accordingly, EFF respectfully requests leave to file the attached brief *amicus curiae*.

Dated: October 13, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on October 13, 2015.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: October 13, 2015

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Electronic Frontier Foundation (“EFF”) is a non-profit, member-supported civil liberties organization working to protect innovation, free speech, and privacy in the digital world. EFF and its over 22,000 active donors have a strong interest in ensuring that copyright law serves the interests of creators, innovators, and the general public.

Pursuant to Federal Rule of Appellate Procedure 29(c)(5), no party’s counsel authored this brief in whole or in part, and neither any party, nor any party’s counsel, contributed money towards the preparation of this brief. No person other than *amicus*, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief.

Defendant-Appellee Sirius XM Radio, Inc. (“Sirius”) consents to the filing of the brief, while counsel for Plaintiff-Appellant Flo & Eddie, Inc. (“Flo & Eddie”) does not consent. Accordingly, EFF has concurrently filed a motion for leave to file this brief.

STATEMENT OF THE ISSUES

1. Whether recognizing a general, unlimited right of public performance in sound recordings under Florida law would constitute a restraint on alienation of personal property of the sort that is highly disfavored by the common law, without precedent or legislative guidance.
2. Whether recognizing a general, unlimited right of public performance in sound recordings under Florida law would be inconsistent with the weight of state and federal copyright law jurisprudence.
3. Whether recognizing a general, unlimited right of public performance in sound recordings under Florida law would give larger, established music services an anticompetitive advantage over new entrants to the market.

SUMMARY OF ARGUMENT

Copyright law has always struck a pragmatic balance between providing incentives for artistic expression and preserving access to and use of that expression by the public. The district court’s decision granting summary judgment to Sirius XM Radio, Inc. (“Sirius XM”) maintains that balance. A reversal of the district court’s decision would upend it, potentially granting “property rights” of infinite scope against those who lawfully purchased copies of works with the full expectation that they could enjoy them.

As a matter of common law, the district court’s conclusion was correct. It was consistent with the well-established trajectory of copyright law in the U.S. that does not grant unlimited rights to one party without carefully considered limitations.

Expansions of copyright have broad ramifications for industry and the public, and are properly the domain of the legislature. The decision on appeal recognized that what Flo & Eddie was advocating for was a judicially created, sweeping new right that potentially makes illegal the broadcasts and performances of recorded music done by thousands of radio stations, restaurants, websites, and others every day. Flo & Eddie’s flawed logic could also be interpreted to repeal even the most basic limitations on the scope of a copyright, such as fair use, the first sale doctrine, and the exemption of purely private performances—limitations that arise from the common law and the U.S. Constitution.

The district court’s decision also properly recognized the competition concerns that would result from a ruling in Flo & Eddie’s favor. Without an

affirmance by this Court, any resolution of this case is likely to place Sirius XM and other large, well-funded performers of sound recordings in a privileged position to continue performing pre-1972 recordings. Unlike with a statutory license such as those available under federal copyright, new music services, including those using new technologies with the potential to create new markets and opportunities for music distribution, will not have access to such licenses, and face a significant competitive disadvantage.

At the federal level, where most copyright law resides today, no general public performance right in sound recordings has ever been created, all rights granted to copyright holders are explicit and limited, and access to works by new competitors is facilitated by statutory licenses. This Court should follow the considered, well-established example of federal copyright law by affirming the district court's refusal to create a new and unbounded public performance right, and leave any such expansions to Congress.

ARGUMENT

I. COMMON LAW HAS LONG REJECTED THE DEAD-HAND CONTROL OF GOODS THAT FLO & EDDIE SEEK TO HAVE RECOGNIZED FOR THE FIRST TIME.

The ability of a seller of property to control the “use” of copy of a work, once lawfully sold, has consistently been rejected in common law. Almost four centuries ago, Sir Edward Coke, Lord Chief Justice, described the jurisprudential disapproval of restraints on post-sale use of property. Lord Coke¹ wrote that a post-sale restraint on alienability is void because it unnecessarily impinges on the free exchange of goods. 1 Edward Coke, *Institutes of the Lawes of England* § 360, at 223 (1628). The rule against perpetuities, the rule in *Shelley’s case*, and the general common law rules against restraints on alienation of real property all reflect a general aversion of the law toward attempts by property sellers to maintain a dead hand of control after a sale. See George L. Haskins, *Extending the Grasp of the Dead Hand: Reflections on the Origins of the Rule Against Perpetuities*, 126 U. Pa. L. Rev. 19, 20, 31 n.42 (1977).

As performance is a “use” of chattels, common law counsels for a rule that the author of a work loses any ability to control performances of that copy of the work after a lawful sale. As explained by Judge Learned Hand in the seminal Second Circuit decision rejecting a common law right of public performance in

¹ American jurisprudence has conventionally used the appellation “Lord Coke” at all times, even though according to English practice, Sir Edward Coke held the title of “Lord” only while on the bench. The American convention is followed in this brief.

sound recordings: “Restrictions upon the uses of chattels once absolutely sold are at least prima facie invalid; they must be justified for some exceptional reason, normally they are ‘repugnant’ to the transfer of title.” *RCA Mfg. Co. v. Whiteman*, 114 F.2d 86, 89 (2d Cir. 1940). Indeed, “[Copyright] protection has never accorded the copyright owner complete control over all possible uses of his work.”² *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 432 (1984).

Thus Flo & Eddie’s argument suffers from a failure to recognize that an appeal to common law “property rights” counsels *against* Flo & Eddie having any ability to restrict the use of copies lawfully sold to the public. As Flo & Eddie argued in their opening brief:

The scope of common law property rights in Florida is extraordinarily broad. Indeed, the “proverbial bundle of property rights” consists of “*all* of the sticks or incidents of ownership.” *Costa Del Sol Ass’n v. Dep’t of Bus. & Prof’l Regulation, Div. of Fla. Land Sales, Condos., & Mobile Homes*, 987 So. 2d 734, 736 (Fla. 3d DCA 2008) (emphasis added). As the Florida Supreme Court has made clear, the “right to own, hold and enjoy property is nearly absolute.” *Dep’t of Ins. v. Dade Cnty. Consumer Advocate’s Office*, 492 So. 2d 1032, 1039 n. 3 (Fla. 1986) (quoting *Liquor Store, Inc. v. Cont’l Distilling Corp.*, 40 So. 2d 371, 374 (Fla. 1949)).

Op. Br. at 20-21.

² A common law right to control the creation of *new* copies, without the right to control the *use* of lawfully sold and purchased copies, is not inconsistent. New copies of works are *new property*, as opposed to *existing property* whose title has been lawfully transferred to another. Common law may grant the right to create new property to the original author. See *CBS, Inc. v. Garrod*, 622 F. Supp. 532, 533-34 (M.D. Fla. 1985). However, it does not follow that common law grants the right to restrict a purchaser from using existing, lawfully sold property.

Based on Flo & Eddie’s own citations, its claim must fail. Indeed, Flo & Eddie’s flawed reasoning shows just how far its request strays from common law principles. Under Flo & Eddie’s theory of complete dead-hand control, the lawful owner of a copy of a sound recording—such as one embodied in a compact disc—*has no rights whatsoever* to use and enjoy that copy but for the grace of the sound recording author. A Beatles fan could one day find Paul McCartney on her doorstep demanding the return of a lawfully purchased CD, under a claim that the artist owns “all rights” in the work.

Flo & Eddie rely on a criminal bootlegging statute to claim that “ownership” allows it to exert dead-hand control over copies of works it has sold. But the statute itself disclaims any support or relevance to Flo & Eddie’s argument. Not only does the statute say it does not apply to Sirius XM, *see* Fla. Stat. § 540.11(6)(a) (2015) (excluding radio broadcasters from liability), it explicitly states: “This section *shall neither enlarge nor diminish the right of parties in private litigation.*” Fla. Stat. § 540.11(5) (2015) (emphasis added).

Moreover, there are constitutional concerns implicated by Flo & Eddie’s argument. The fair use limitation brings copyright law into compliance with the First Amendment’s guarantee of free speech. Any copyright regime that does not allow for fair use would be constitutionally suspect. *See Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) (citing *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985)) (noting that “copyright law contains built-in First Amendment accommodations” including fair use).

Given these common law traditions, and the absence of any statute derogating from these traditions, the Court should reject Flo & Eddie's proposal of an unbounded copyright that would exert a dead hand of control over copies lawfully made and purchased.

II. THE DISTRICT COURT'S DECISION CORRECTLY REJECTED A NEW COMMON-LAW RIGHT THAT WOULD HAVE FAR-REACHING EFFECT.

A reversal of the district court's decision would effectively create a new right under Florida copyright law: a general, exclusive right of public performance in all sound recordings that are subject to state law. This is a right that has not previously been recognized under Florida or federal law. *See Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, No. 13-23182-CIV, 2015 WL 3852692, at *5 (S.D. Fla. July 13, 2015); 17 U.S.C. § 106 (granting a public performance right in sound recordings, but only for performance via digital audio transmission).

The public performances that might require permission or payment for the first time if the district court decision is reversed include the broadcasts of hundreds of AM and FM radio stations including high school, college, and religious broadcasters, thousands of Internet radio stations, and tens of thousands of restaurants, cafés, fairs, charitable events, music venues, and others who use recorded music.

There can be no serious dispute that what Flo & Eddie is asking for is unprecedented. There also can be no dispute that today's landscape of music

production and distribution, and technologies developed to transmit high-quality sound over numerous communications media to many kinds of devices, evolved in a world where sound recordings were understood by all *not* to carry a general right of public performance. *See* U.S. Copyright Office, Federal Copyright Protection for Pre-1972 Sound Recordings, 20-49 (2011). In addition, this case concerns uses of sound recordings that are made every day and for decades by many thousands of businesses and individuals. This Court can and must consider the negative impacts that would flow from reversing the district court and announcing a new general public performance right for state-law-protected recordings.

III. EXPANSIONS OF COPYRIGHT MUST BE BASED ON THE DEMONSTRATED NEED FOR INCENTIVES; UNJUSTIFIED EXPANSIONS HARM INNOVATION AND ACCESS

A. Copyright in the U.S. is an Incentive Scheme, Not an Absolute Property Right.

The district court's interpretation of Florida's common law copyright is consistent with copyright's historical purpose. Copyright, in U.S. law and the broader Anglo-American legal tradition, is intended to foster the spread of knowledge and culture by creating incentives for artistic production while avoiding, as much as possible, state-granted monopolies over those products. Thus, the first modern copyright statute, the Statute of Anne, was prefaced as "An Act for the Encouragement of Learning." 8 Ann., c. 19 (1710); *see also* 56 Parl. Deb., H.C. (3d ser.) (1841) 341, 34* (statement of Thomas Babington Macaulay), *available at* <http://www.thepublicdomain.org/2014/07/24/macaulay-on-copyright/>

("[M]onopoly is an evil. For the sake of the good we must submit to the evil; but the evil ought not to last a day longer than is necessary for the purpose of securing the good."). This purpose was reflected in the Constitutional language granting Congress the power to make copyright law "to promote the Progress of Science and useful Arts." U.S. Const. art. I, § 8, cl. 8.

Consistent with that principle, courts and legislators have declined to expand copyright absent some showing that further incentives are required, and then only to the extent needed to create such incentives.³ For example, federal law recognized a copyright in sound recordings only after the sale of recorded music had become a primary source of income for musicians, and those copyrights did not include a right of public performance (or were not understood by anyone to include such a right). *See* H.R. Rep. 92-487, at 2-3 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1566, 1567 (purpose of 1971 grant of copyright in sound recordings was to provide a remedy against "widespread unauthorized reproduction of phonograph records and tapes.").

Expanding the scope of copyright in recordings made before February 15, 1972 does not create incentives for the production of new works, as new recordings are subject to federal law exclusively. To the extent that copyright is intended to create incentives to "disseminate" creative work, *Eldred v. Ashcroft* 537 U.S. 186, 205-06 (2003), no such incentives are needed here. Sirius XM, other

³ *Golan v. Holder*, 132 S. Ct. 873, 887 (2012) concerned an expansion of copyright done to comply with a treaty. No such reason is presented in this case.

Internet and satellite radio services, and traditional radio stations have a long history of disseminating pre-1972 recordings, a function that would likely be hindered if Flo & Eddie's position is adopted.

B. Expansions of Copyright Are Coupled With Limitations; A Lack of Statutory Limitations on Performance Rights Suggests an Absence of Intent to Create Such Rights.

The district court's decision appropriately declines to expand the scope of copyright in sound recordings beyond the limits established by Congress and the Florida legislature. This makes it consistent with historical practice as well as legislative intent.

Historically, the bundle of rights comprising copyright has been limited to particular categories. For example, when Congress enacted the first copyright statute in 1790, it limited protection to narrow categories of works and granted narrow exclusive rights over those works. *See* Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124, 124 (repealed 1831) (granting copyright only to books, maps, and charts, and only for a set of four exclusive rights conditioned on compliance with formalities). Through the years, the scope of what is considered copyrightable has expanded, but concurrently with that expansion, courts and legislatures have recognized limits on those rights in order to preserve the public benefits of the law. *See, e.g.*, Act of Feb. 3, 1831, ch. 16 § 1, 4 Stat. 436, 436 (repealed 1870) (granting a copyright in musical compositions, but not granting a right of public performance of those compositions).

Expansions of public performance rights involve balancing the rights of recording artists, broadcasters, and the public, taking into account the broader impacts of new technologies. *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (“[I]t is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors or to inventors in order to give the public appropriate access to their work product.”); *Authors Guild v. Google, Inc.*, 770 F. Supp. 2d 666, 680 (S.D.N.Y. 2011) (Chin, J) (“The Supreme Court has recognized that courts should encroach only reluctantly on Congress’s legislative prerogative to address copyright issues presented by technological developments.”).

Thus, for example, expansion of copyright to cover secondary transmissions of TV signals was coupled with a statutory license, as was expansion of federal copyrights in sound recordings to cover performances by digital transmission. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (Oct. 19, 1976); Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (Nov. 1, 1995). In 1980, with the emerging consensus that copyright applied to computer software, Congress created an exemption for certain reproductions that are necessary to the ordinary operation of software. Computer Software Copyright Act of 1980, Pub. L. No. 96-517, 94 Stat. 3015 (Dec. 12, 1980). As early as 1909, Congress coupled an expansion of copyright to mechanical reproductions of music with a statutory mechanism for obtaining such rights. Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075 (Mar. 4, 1909).

Consistent with this position, courts and legislatures—including Congress when it enacted the 1976 Copyright Act—have been nearly unanimous in the understanding that sound recording copyrights do not include a right of public performance, except where explicitly granted by statute. *See* U.S. Copyright Office, *Federal Copyright Protection for Pre-1972 Sound Recordings*, 20-49 (2011) (discussing how state law generally provides causes of action against unauthorized reproductions and distributions of sound recordings, but not public performances). Thus when Congress passed copyright statutes through the years, including the 1996 act which created a public performance right in federally protected sound recordings for digital transmissions only, Congress did not consider placing limitations on any other rights of public performance in sound recordings. It didn't need to: the rights did not exist.

The Florida legislature was surely aware of this history when it enacted various copyright statutes, including Fla. Stat. § 540.11 (2015). The district court's decision is consistent with this history, in which grants of rights under copyright are enacted concurrently (or nearly so) with explicit limitations on those rights, and no general right of public performance in sound recordings had ever been recognized. Nothing in Florida law is to the contrary.

IV. RECOGNIZING AN UNLIMITED RIGHT OF PUBLIC PERFORMANCE IN SOUND RECORDINGS WOULD HARM INNOVATION AND COMPETITION IN MUSIC DISTRIBUTION.

A. A New Law Right of Public Performance in All Pre-1972 Sound Recordings Would Harm Innovation.

The district court rightly recognized that “many unanswered questions and difficult regulatory issues” would flow from recognizing a new, unlimited public performance right in sound recordings as Flo & Eddie request. *Flo & Eddie, Inc.*, 2015 WL 3852692, at *5. One of those issues is the potential anti-competitive effect of creating licensing and royalty rate norms through piecemeal litigation.

In order to engage in public performance of music, Sirius XM needs licenses for the rights in the underlying musical compositions, which it typically obtains through performance rights organizations (ASCAP, BMI, and SESAC). In addition, Sirius XM must obtain licenses for the public performance of post-1972 sound recordings, typically through a statutory license. *See* 17 U.S.C. §§ 112, 114. Licenses would be needed by any party, whether a new startup or an established player, if it wants to operate a music service that makes public performances.⁴

Both of these licensing mechanisms arose over the course of decades to address problems of scale and transaction costs for both rightsholders and users.

⁴ To be sure, a party could also directly license from rightsholders. However, for those engaging in the public performance of large collections of music, for example a radio station or restaurant, direct licensing is impractical to the point of being an illusory option.

For example,

ASCAP and the blanket license developed together out of the practical situation in the marketplace: thousands of users, thousands of copyright owners, and millions of compositions. Most users want unplanned, rapid, and indemnified access to any and all of the repertory of compositions, and the owners want a reliable method of collecting for the use of their copyrights. Individual sales transactions in this industry are quite expensive, as would be individual monitoring and enforcement, especially in light of the resources of single composers. Indeed . . . the costs are prohibitive for licenses with individual radio stations, nightclubs, and restaurants, and it was in that milieu that the blanket license arose.

Broadcast Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 20 (1979) (internal citation omitted). But the formation of ASCAP and BMI resulted in “disproportionate power over the market for music rights.” *United States v. Broadcast Music, Inc.*, 426 F.3d 91, 93 (2d Cir. 2005). Consequently, since the 1950s, ASCAP and BMI have operated under antitrust consent decrees in order to realize the benefits of collective licensing while at the same time minimizing anticompetitive behavior. *See United States v. ASCAP*, No. 41-1395 (WCC), 2001 WL 1589999 (S.D.N.Y. June 11, 2001) (amending the ASCAP consent decree); *United States v. Broadcast Music, Inc.*, 1996-1 Trade Cas. ¶ 71, 378 (S.D.N.Y. Nov. 18, 1994) (amending the BMI consent decree).

Comparably, when Congress created public performance rights for digital audio transmissions of post-1972 recordings, it recognized the practical difficulties licensees would face in needing to contract with myriad diverse (and often unknown) rightsholders as well as the risk of collusive, anticompetitive behavior.

To address these issues, Congress simultaneously provided a mechanism that would minimize licensing difficulties and limit collusive behavior by authorizing SoundExchange⁵ to collect and distribute royalties at a statutory rate set by an administrative tribunal. *See* 17 U.S.C. §§ 114(e), (f); Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (Nov. 1, 1995) (creating both the limited right of public performance in digital sound recordings and a statutory licensing scheme).

The collusive behavior and licensing difficulties that would likely result from the creation of a new public performance right further justify the district court's refusal to create such a right. A new, unlimited right of public performance would chill the introduction of new innovations in music broadcasting and distribution. New businesses, digital or otherwise, would face massive transaction costs and uncertainty, as a decision in favor of Flo & Eddie would leave no effective way to license pre-1972 recordings. The mechanisms simply do not exist.

⁵ SoundExchange is the “independent nonprofit collective management organization that collects and distributes digital performance royalties” pursuant to 17 U.S.C. § 114 (e). *See* About, SoundExchange, <http://www.soundexchange.com/about> (last visited Oct. 9, 2015).

The risk of litigation would also chill innovation. Without a statutory license and accompanying antitrust supervision, the only cost-effective way to collectively license the new rights created by the district court would likely be additional litigation. But the risk and cost of such litigation would likely prevent small innovators from entering the market, as the specter of uncertain damages and legal costs would loom.

In order to prevent this chilling of new innovation, new performance rights should be recognized, if at all, only after careful consideration through the legislative process.

B. Resolution of this Case in Favor of Flo & Eddie Would Privilege Sirius XM and Shut Out Competitors; The District Court's Decision Avoids These Problems.

Radio stations, restaurants, live music venues, and online performers of music have long thought themselves able to publicly perform pre-1972 music without needing any sort of license from the performers of that music. These businesses have conducted themselves accordingly, having never made payments for music that they thought themselves lawfully able to perform.

A reversal of the district court, followed by inevitable resolution of the matter—be it through settlement or judgment—would likely place Sirius XM in a privileged position. Sirius XM, and others with significant resources for litigation, would become the sole entities able to publicly perform older recordings under the newly-created right. If Sirius XM settled this case following a reversal of the district court's decision, presumably it would do so with the ability to continue to

perform pre-1972 works. Alternatively, the parties might establish an ongoing royalty under court supervision as an alternative to an injunction. *See, e.g., Williams v. Bridgeport Music, Inc.*, No. 13–6004, 2015 WL 4479500, at *42-45 (C.D. Cal. July 14, 2015) (denying a permanent injunction against infringer of sound recording, as any injury could be remedied through an ongoing royalty); *see generally eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006) (applying traditional four-factor injunction test to claims for patent infringement). Unfortunately, many others such as college or religious broadcasters and small retail businesses would likely have to cease performing pre-1972 recordings completely, having neither a collective license available to them nor the resources to establish one through litigation.

As a result, if the district court’s decision is reversed, we would likely see the consolidation of any market for the performance of pre-1972 recordings to a privileged few. That outcome should give the Court pause, and counsel against creating a sweeping new right.

The risk to competition has generated concern in the courts in analogous situations. In *Authors Guild v. Google, Inc.*, for example, then-district court Judge Chin refused to approve a proposed class action settlement, where it would have given substantial market power to the defendant. 770 F. Supp. 2d 666 (S.D.N.Y. 2011). Judge Chin recognized the valid objections by many parties, and noted that “[t]he seller of an incomplete database . . . cannot compete effectively with the seller of a comprehensive product.” *Id.* at 682 (quoting the Department of Justice Statement of Interest 24, Sept. 18, 2009, ECF No. 720).

The same concern applies here. Because of litigation risk and transaction costs, small broadcasters could be forced to remove pre-1972 works from their repertoires. They would be unable to compete with those who have the financial and business clout to either survive litigation or establish a collective license, harming small broadcasters and denying the public the benefits of robust competition.

EFF urges this Court to remove that risk by affirming the decision below.

CONCLUSION

For the foregoing reasons, the district court's grant of summary judgment for Sirius XM was correct, and the Court should affirm it.

Dated: October 13, 2015

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE
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Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify as follows:

1. This Brief of *Amicus Curiae* Electronic Frontier Foundation complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,319 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

2. 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 Word 2011, the word processing system used to prepare the brief, in 14 point, Times New Roman font.

Dated: October 13, 2015

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on October 13, 2015.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: October 13, 2015

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