No. 17-55844

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FLO & EDDIE, INC.,
Plaintiff-Appellee,
v.
SIRIUS XM RADIO INC.,
Defendant-Appellant.

On Appeal from the United States District Court for the Central District of California, Case No. CV-13-5693 PSG
The Honorable Philip S. Gutierrez

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF BROADCASTERS IN SUPPORT OF SIRIUS XM RADIO, INC. AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amicus curiae* National Association of Broadcasters states that it is a non-profit professional trade association incorporated in Delaware, and that it has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

Dated: June 30, 2020

Respectfully submitted,

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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. NAB's members include local, independent stations, as well as major radio conglomerates, some of whom have been defendants in lawsuits brought by other plaintiffs asserting similar rights in sound recordings fixed before February 15, 1972 ("pre-1972 recordings").

The claim of Plaintiff-Respondent Flo & Eddie, Inc. ("FEI") to a California property right in the public 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 resolution of SiriusXM's appeal.

INTRODUCTION AND SUMMARY

FEI has asked this Court—and various other courts around the country—to find that exclusive public-performance rights for pre-1972 sound recordings have

[1] 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. Both parties have consented to the filing of this brief.

existed for decades but have long gone unnoticed without anyone taking advantage of them. The highest courts of New York and Florida have rejected FEI's novel theory.

The district court in this case adopted FEI's theory by misconstruing the operative statute, California Civil Code § 980(a)(2), and its relationship to pre-existing law. The district court held that, as a matter of plain language, section 980(a)(2)'s recognition of an author's "exclusive ownership" of pre-1972 sound recordings grants the author all conceivable rights "that can attach to intellectual property," even rights (like public performance) never recognized previously by the common law or statute. ER76.

Nothing in the plain language of the statute supports the district court's conclusion. As this Court declared, "the statute does not define 'exclusive ownership' or 'ownership,'" *Flo & Eddie, Inc. v. Pandora Media, Inc.*, 851 F.3d 950, 955 (9th Cir. 2017) (hereinafter "*Pandora*")), and does not define the scope of the rights included therein. Moreover, the district court's conception that the statute grants authors (and their record company assignees) *all* rights of use or performance of a sound recording not only would exceed previously recognized rights under state law, but would effectively nullify the property rights of record purchasers and defy long-settled, uniformly accepted practices in the radio and recording industries. Section 980(a)(2) accomplishes nothing of the kind. To the

contrary, the Legislature enacted section 980(a)(2) in 1982 as technical amendments to repeal recently preempted state provisions and maintain property rights in sound recordings that authors may have held at the time. The statute did not create new rights.

California law did not recognize the unprecedented use and performance rights that FEI claims at the time of section 980(a)(2)'s enactment, and in particular radio airplay cannot be deemed to infringe the property rights of record companies. As Congress has long recognized in denying performance 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 long devoted 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 record companies encouraged for decades without ever claiming a property right or demanding royalties under state law. The California legislature sought to maintain, not revolutionize, the law of property rights in sound recordings that existed in 1982, and this Court should not create new rights by endorsing FEI's wildly broad interpretation of section 980(a)(2).

BACKGROUND

A. Record Companies Have Long Encouraged the Radio Broadcast of Sound Recordings, without Claim to Compensation Under State Law.

Record companies, not performing artists, "[a]lmost invariably" hold copyrights in sound recordings. Melville B. Nimmer & David Nimmer, 6 NIMMER ON COPYRIGHT § 30.03 (2019). Those companies have for decades given away sound recordings for free and expended enormous resources to promote radio airplay.

Early commercial radio primarily broadcasted original musical performances. *See* Robert L. Hilliard & Michael C. Keith, THE BROADCAST CENTURY AND BEYOND 56, 101 (5th ed. 2010). By the 1950's, television had eclipsed radio in providing such entertainment, and radio stations increasingly turned to having "disc jockeys" play records on the air. *See* Richard A. Peterson & David G. Berger, *Cycles in Symbol Production: The Case of Popular Music*, 40 AM. SOCIOLOGICAL REV. 158, 165 (1975); Hilliard & Keith, *supra*, at 137.

The dawn of rock-and-roll and the "Top 40" format in 1955 transformed the radio landscape and its relationship with the recording industry. "[B]oth 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*." *Id.* at 151

(emphasis added). Top 40 unleashed a competitive fury among record companies (including independents like FEI's predecessor-in-interest, White Whale Records) skirmishing for the airplay necessary to succeed in the lucrative teenage market.[2] The economics of record sales demanded that the record companies actively seek radio airplay:

> 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 ....

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

Promotional activity—including distribution of free promotional records—accelerated throughout the 1960's and 1970's. R. Serge Denisoff, SOLID GOLD, THE POPULAR RECORD INDUSTRY 253, 260-69 (1975); Fredric Dannen, HIT MEN 11-17 (1990). 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." *Id.* at 9. As the Third Circuit observed:

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[2] White Whale Records engaged in extensive radio promotion in developing The Turtles' hits in the 1960s. *See "Ex's" Striking It Rich on W. Coast*, BILLBOARD, Dec. 11, 1965, at 3 (discussing Turtles promotion activity); *Calif. Setting The Tempo in Sounds, Song, Style*, BILLBOARD, Apr. 9, 1966, at 1 (Turtles manager Bill Utley: "we still need disk jockey play on the East to get us on the Top 10 nationally").

> 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).

B. Congress Has Repeatedly Rejected Federal Copyright in Over-The-Air Radio Broadcasts of Sound Recordings Because of the Longstanding 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 of sound recordings. Until 1971, Congress afforded no copyright protection to sound recordings at all, despite repeated efforts of the record industry to secure it beginning in 1906.[3] In 1971, Congress established a limited copyright in the *reproduction* of sound recordings fixed after February 15, 1972 ("post-1972 recordings") to protect against piracy, but no *performance* rights. 17 U.S.C. §§ 106(1), 301(c); Pub. L. No. 92-140, 85 Stat. 391 (1971).

[3] U.S. Copyright Office, FEDERAL COPYRIGHT PROTECTION FOR PRE-1972 SOUND RECORDINGS: A REPORT OF THE REGISTER OF COPYRIGHTS 7-10 (2011); *see also* Linda A. Newmark, Performance Rights in Sound Recordings: An Analysis of the Constitutional, Economic, and Equitable Issues, 38 ASCAP COPYR. L. SYMP. 141, 142 n.9 (1992) (listing more than twenty failed bills between 1936 and 1981).

In 1976, Congress once again rebuffed the recording industry's attempts to obtain a sound recording performance right. Senators opposing the bill 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—for the first time—created a limited performance right in sound recordings, but only for certain digital transmissions that facilitated piracy and threatened the erosion of record sales. Digital Performance Rights in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (1995). "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).

As later amended, the Act 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), and created a complex compulsory licensing

scheme distributing royalties to copyright holders and musical artists. *Id.* § 114(g)(2). Congress created multiple exemptions to this novel right, including "nonsubscription broadcast transmission." *Id.* § 114(d)(1)(A). Congress granted only this "narrow" right to avoid "upsetting the longstanding business and contractual relationships among record producers and performers, music composers and publishers and broadcasters that have served all of these industries well for decades." S. Rep. No. 104-128, at 13 (1995). It refused to 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" and which (unlike subscription broadcasters) have public service obligations as license conditions. *Id.* at 15. Congress also ensured that all other analog performances—such as by restaurants, hotels, retail stores, and night clubs—remained untouched.

It was not until the Music Modernization Act ("MMA"), Pub. L. No. 115-264 (2018), which was enacted *after* FEI filed its various lawsuits, that Congress extended federal rights of public performance that existed for post-1972 recordings to pre-1972 recordings (thus maintaining the above exemptions for public performance by over-the-air broadcasters). 17 U.S.C. § 1401(a), (*l*)(1). Congress also created an elaborate system of licensing; various exemptions; a royalty payment scheme; and carefully defined remedies for violations. *Id.* § 1401(b)-(d), (f). It also preempted certain state-law claims, and provided that "[n]othing in this

section may be construed to recognize or negate the existence of public performance rights in sound recordings under the laws of any State." *Id.* § 1401(e)(1), (3). Thus, although owners of pre-1972 recordings recently obtained a public performance right for certain digital audio transmissions under federal law, there is no public performance right for analog over-the-air radio broadcasts for any recordings (regardless of when those recordings were made), and there remains an exemption for the public performance of pre-1972 and post-1972 recordings by means of digital over-the-air radio broadcasts. *See* 17 U.S.C. § 1401(b).

FEI now seeks a novel and categorical state law property right in all public "performances" of sound recordings that bulldozes those carefully crafted distinctions; attaches liability to pre-1972 tracks not only on the radio but in any business or public accommodation; and remarkably would extend broader rights against radio broadcasts of pre-1972 recordings than federal law extends to digital transmission of the same works. FEI's claim has no foundation in California law.

ARGUMENT

I. SECTION 980(a)(2) DOES NOT CREATE NEW EXCLUSIVE PROPERTY RIGHTS IN THE PUBLIC PERFORMANCE OF SOUND RECORDINGS.

California law 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 the same sounds. Civ. Code § 980(a)(2).

In construing the statute, the district court determined 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." ER75. The court then held that the law broadly granted every conceivable right of ownership, regardless of whether it existed at the time of the statute's enactment in 1982: it held that the California legislature "intended ownership of a sound recording in California to include all rights that *can attach* to intellectual property" (save for the express statutory exception for "cover" recordings). ER76 (emphasis added).

The district court never grappled with the fundamental contradiction in its theory; its conception of an author's "exclusive right" of use of the recorded sounds would nullify the separate exclusive right of the phonorecord owner to use (*i.e.*, play) his property. *Cf.* 17 U.S.C. § 101 (defining "phonorecord" as material objects in which sounds are recorded and from which they can be communicated). The district court did not purport to recognize a right to control private performance, but did not explain on what basis it could distinguish private from public performance, when there was no antecedent legal basis of either performance right. Nor did it explain the boundaries of the public performance right purportedly granted by section 980(a)(2). For example, would exclusive

ownership include the right to prevent a person from playing a pre-1972 recording at a backyard barbeque with a number of guests in attendance? Could the owner of a barbershop play a pre-1972 CD to be enjoyed by himself and his two patrons? Could a bar owner play these recordings on a jukebox? Would it matter how many guests are at the bar? Would the rules be any different if the same pre-1972 recording were performed from a digital music file at a crowded nightclub? What if the recording were played for educational purposes in a classroom? Would over-the-air radio stations be subject to different rules or exceptions from those that apply to owners of nightclubs or persons holding private parties?

In 1982, neither federal nor state law recognized any public performance right in sound recordings. *See Flo & Eddie, Inc. v. SiriusXM Radio, Inc.*, 70 N.E.3d 936, 947 (N.Y. 2016) (hereinafter "*FEI New York*") ("[C]ommon-law copyright protection prevents only the unauthorized reproduction of the copyrighted work, but permits a purchaser to use copies of sound recordings for their intended purpose, namely, to play them."). Over time, Congress subsequently addressed the aforementioned questions under federal law—some in the affirmative and some in the negative. Some rights depend on compliance with statutory licensing provisions. Some performances are simply exempt. *See supra* at 6-9. It defies belief that in 1982 the California legislature peremptorily created a novel, blanket public performance right in the sound recording owner that overrode

the competing interests of the public, phonorecord owners, or other stakeholders (such as composers or performers), or alternatively authorized the courts to create judge-made exceptions on these quintessentially legislative matters without guidance.

Indeed, the district court's conception of "exclusive ownership" as including all rights that "can attach" to intellectual property is irreconcilable with copyright law. "A copyright, like other intellectual property, comprises a series of carefully defined and carefully delimited interests to which the law affords correspondingly exact protections[,]" and "has never accorded the copyright owner complete control over all possible uses of his work." *Dowling v. United States,* 473 U.S. 207, 216-17 (1985) (internal quotation marks omitted); *FEI New York,* 70 N.E. 3d at 941.[4]

The legislative history confirms that section 980(a)(2) did not create new rights. The California legislature enacted section 980(a)(2) as technical amendments to conform state law to the Federal Copyright Act of 1976 (which generally preempted state copyright in unpublished works) while "maintain[ing]

[4] As SiriusXM explains, the district court also misplaced reliance on the exception to exclusive ownership for an "independent fixation" of sounds (*i.e.*, cover recordings), Civ. Code § 980(a)(2); that is simply a limitation on the right of reproduction. SiriusXM Br. 43-44, 48-49; *cf.* 17 U.S.C. § 114(b) (explaining that exception applies to right of reproduction and derivative works under 17 U.S.C. § 106(1), (2)); *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 883 (9th Cir. 2016). Furthermore, as this Court noted, "[t]he exception … does not establish what 'ownership' rights are included in the first instance." *Pandora*, 851 F.3d at 956.

rights and remedies in sound recordings fixed prior to February 15, 1972," ER193. *See* SiriusXM Br. at 11-13. The technical 1982 amendments, to which opposition was "unknown," ER195, were hardly the radical reshaping of the property relations of the recording and radio industries that FEI claims. California courts are reluctant to construe statutes to have "substantially changed the law" to increase the liability of persons when the bill purports only to make "a technical and conforming change" and drew "no significant opposition." *Jones v. Lodge at Torrey Pines P'ship*, 42 Cal.4th 1158, 1169-70 (2008). Section 980(a)(2) simply preserved the ownership rights in sound recordings that authors had under existing California law—it did not create a broad new right never before recognized under state or federal law.

The true question is whether, in the unique context of sound recordings, the author's exclusive ownership of the work limits the rights of the owners of authorized copies of a sound recording to use their property (including playing it publicly). Because California "statutes are not presumed to alter the common law unless expressly stated," *Borg-Warner Protective Servs. Corp. v. Super. Ct.*, 75 Cal. App. 4th 1203, 1207-08 (1999), a court must resort to background principles of the California law of copyright to resolve the question.

II. THE EXCLUSIVE RIGHTS PRESERVED IN SECTION 980(a)(2) DO NOT INCLUDE THE RIGHT TO CONTROL PUBLIC PERFORMANCE OF SOUND RECORDINGS.

California has never by statute or in common law recognized the extraordinary rights claimed by FEI that would allow a record company to control all uses of a sound recording by the owner of phonorecords, including public performances on the radio and otherwise.

A. The Common Law Never Recognized Public-Performance Rights in Sound Recordings.

Common law copyright redresses only the "unauthorized *reproduction* of the work protected by the copyright . . . ." *Capitol Records, Inc. v. Naxos of Am., Inc.*, 830 N.E.2d 250, 266 (N.Y. 2005) (emphasis added); 2 NIMMER ON COPYRIGHT § 8.02[A] ("the act of copying … is essential to, and constitutes the very essence of all copyright infringement."). At common law, copyright was but a right of first publication: "'[C]ommon-law rights are limited to unpublished works, and all common-law property rights therein are lost on a publication." *Stanley v. Columbia Broad. System, Inc.*, 35 Cal.2d 653, 661 (1950); *FEI New York*, 70 N.E.3d at 941. California codified the common law, which merely "confers on the owner of an intellectual production the exclusive right to make first publication of it, that is, *the right to copy it in the first instance* …." *Stanley*, 35 Cal.2d at 661 (internal quotation marks omitted).

Performance rights have always been distinct from reproduction rights, and very limited. As the New York Court of Appeals stated in 1872 in the context of dramatic works, "[t]he right publicly to represent a dramatic composition for profit, and the right to print and publish the same composition to the exclusion of others, are entirely distinct, and the one may exist without the other." *Palmer v. DeWitt*, 47 N.Y. 532, 542 (N.Y. 1872).[5] Furthermore, the law has never given blanket protection to all forms of performance rights. 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." MacGillivray, *supra*, at 122 (emphasis added). As the New York Court of Appeals analyzed its early decision in *Palmer* in rejecting FEI's claims:

> We noted that the exclusive right of first publication existed at common law, but that the right to control public performance was created by statute; in fact, the common law permitted anyone to perform a play from

[5] *See also* E.J. MacGillivray, A TREATISE UPON THE LAW OF COPYRIGHT IN THE UNITED KINGDOM AND THE DOMINIONS OF THE CROWN, AND IN THE UNITED STATES OF AMERICA 120 (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); Eaton S. Drone, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES 553-54 (1879) ("The exclusive right of multiplying copies is called copyright. But this does not embrace the right of representation," which is "wholly distinct in nature").

> memory or from a legally procured script, without paying royalties to perform it. *Palmer* was an early example of the principle that a copyright owner can have separate rights addressing copying and performing, with the former based in common law and the latter based in statute. We did not recognize a single, inseparable bundle of rights.

FEI New York, 70 N.E.3d at 942 (citation omitted).

The legal paths of reproduction rights and performance rights have long diverged, and legislatures have extended different protections to limited types of works. The first English copyright act, the Statute of Anne in 1709, did not protect performance rights. "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." *Palmer*, 47 N.Y. at 542. Indeed, Congress did not vest a right of public performance of dramatic compositions in the copyright owner until 1856. Act of Aug. 18, 1856, ch. 169, 11 Stat. 138. Despite having granted musical composers copyright in 1831, *see* Act of Feb. 3, 1831, ch. 16, 4 Stat. 436; Drone, *supra* at 90, Congress did not grant them a right of public performance until 1897. MacGillivray, *supra*, at 287. The exclusive public-performance rights now granted to musical composers are subject to numerous statutory exceptions (including many performances by educational, governmental, retail, veterans, fraternal, and charitable organizations). 17 U.S.C. §§ 106(4), 110(1)-(7), (9). As noted above, copyright "has never accorded the

copyright owner complete control over all possible uses of his work." *Dowling,* 473 U.S. at 216-17 (internal quotation marks omitted); *FEI New York,* 70 N.E.3d at 941.

When Congress finally did grant performance rights to the owners of copyrights in sound-recordings, the protections were much narrower than those afforded to other works, reflecting the special considerations applicable to sound recordings. The author of a sound recording only has the right "to perform the copyrighted work publicly by means of a digital audio transmission[,]" 17 U.S.C. § 106(6), with exclusions for nonsubscription radio broadcasting and for transmissions within or to business establishments, among others, *id.* § 114; *supra* at 6-9. The author holds no right to control non-digital public performances of any kind. Moreover, even this limited federal right is not effectively absolute; given the compulsory licensing provisions, the owner of the copyright in a sound recording generally has only a statutory right to compensation. 17 U.S.C. § 114(d)(2) & (3).

California never granted performance rights (except for a statute prohibiting unauthorized performances of opera that was repealed in 1982, ER 192); with respect to sound recordings, the only state-law rights not preempted by the Federal Copyright Act of 1976 were the anti-piracy protections against unauthorized

copying that arose from the law of unfair competition. *See* SiriusXM Br. 11-15.[6] But California never gave statutory protection against unauthorized public performance of sound recordings prior to 1982, and there is no basis to find that the California legislature created such rights in section 980(a)(2). *See Ponderosa Twins Plus One, v. IHeartMedia, Inc.*, No. 16-cv-05648-VC, 2020 WL 3481737, at *1 (N.D. Cal. June 26, 2020) (finding, in anti-SLAPP case brought by an internet radio defendant against a sound-recording owner, that "it is unlikely that [the sound-recording owner] will be able to state a claim that the defendants infringed on any California copyrights, either under the common law or under section 980(a)(2)," for there is "no indication that [the common law] included a right to prevent others from publicly playing a sound recording").

B. The Other Courts to Consider FEI's Claims Have Held That There Is No Public-Performance Right in Sound Recordings.

FEI has also pursued claims similar to those asserted in the district court in New York and Florida. It was unsuccessful. Those courts each concluded that there is no public-performance right for sound recordings at common law.

The New York Court of Appeals ruled "that common-law copyright of sound recordings 'consists only in the power to prevent others from *reproducing* the copyrighted work'; that limited right does not include control over other rights

[6] As this Court has recognized, pre-1982 precedent recognizing rights against unauthorized *reproduction* (*i.e.*, piracy) do not shed any light on whether a right of public performance existed. *Pandora*, 851 F.3d at 956 & n.8.

in the work, such as public performance." *FEI New York*, 70 N.E.3d at 943 (quoting *RCA Mfg. Co. v. Whiteman,* 114 F.2d 86, 88 (2d Cir. 1940)) (citation omitted). "*[C]opy*right prevents *copying* of a work, but does not prevent someone from using a copy, once it has been lawfully procured, in any other way the purchaser sees fit." *Id.* at 947. Indeed, "it would be illogical to conclude that the right of public performance would have existed for decades without the courts recognizing such a right as a matter of state common law, and in the absence of any artist or record company attempting to enforce that right in this state until now." *Id.* at 948.

The Supreme Court of Florida likewise declared that "Florida common law has never previously recognized an exclusive right of public performance for sound recordings." *Flo & Eddie, Inc. v. SiriusXM Radio, Inc.*, 229 So.3d 305, 315-16 (Fla. 2017) (hereinafter "*FEI Florida*"). Recognition of the "unfettered" right claimed by FEI would flout history:

> [I]f this exclusive right of public performance has existed all along under the common law, then one would have to conclude that Congress actually took away that common law right for post–1972 recordings, on a going-forward basis, when enacting the Act of 1971—an act that recognized solely the right of reproduction in post–1972 sound recordings. See Act of 1971, § 1, 85 Stat. 391. And one would have to conclude that Congress then only partially restored that right when enacting the Act of 1995—an act that recognized the right of public performance in post–1972 recordings, but only in the context of digital transmissions. See Act of 1995, § 2,

> 109 Stat. 336. We decline to reach the conclusion that, despite decades of industry lobbying, Congress eventually granted a right in 1972 that was significantly less valuable than the right Flo & Eddie claims has existed all along under the common law in Florida and elsewhere.

Id. at 316-17.

This Court should join the New York Court of Appeals and the Supreme Court of Florida in rejecting FEI's claims. Like New York and Florida, California did not historically recognize performance rights of the kind claimed by FEI, and reproduction rights and performance rights constitute "distinct rights [that] have been treated differently." *FEI New York,* 70 N.E.3d at 947. Performance rights are the legislature's domain, for it can balance competing public and private interests as common-law courts cannot. *Id.* at 949.

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 Legislature.

III. THIS COURT SHOULD NOT EXTEND STATE-LAW COPYRIGHT TO RADIO BROADCAST OF SOUND RECORDINGS.

A finding that section 980(a)(2) grants an absolute and exclusive public performance right, as FEI advocates, would not only be contrary to California law, but it would have far-reaching adverse consequences, including a devastating impact on the radio broadcast industry.

First, a performance right in sound recordings would adversely affect other copyright holders. Sound recordings generally involve either reproductions of, or derivative works based upon, copyrighted musical compositions. *Cf.* 17 U.S.C. § 101 (definition of "derivative work"). Recording artists and companies may have a license to use those compositions, 17 U.S.C. § 115(a); 2 NIMMER ON COPYRIGHT § 8.04, but composers retain the exclusive rights to public performance of their compositions (subject to certain exceptions), 17 U.S.C. § 106(4); 2 NIMMER ON COPYRIGHT § 8.14[A]. Giving the sound recording owner the exclusive right to control public performances potentially restricts composers' ability to profit from their creations. *See FEI New York,* 70 N.E.3d at 949 ("if the sound recording copyright holder has control over whether and when a recording of that song is played, the composer could lose royalties"). Congress mitigated the conflict for post-1972 recordings when it granted digital public performance rights by requiring compulsory licensing that allocates royalties to various stakeholders, 17 U.S.C. § 114(d)(2), (3), but a common-law court has no such power.

Legislatures, not courts, should balance the competing interests of property owners in recorded music. *FEI New York*, 70 N.E.3d at 952.

Second, as noted above, the physical embodiments of sound recordings ("phonorecords," 17 U.S.C. § 101) are, unlike unpublished manuscripts for which performance rights were recognized, commercially distributed products that are the property of their owners (including radio stations). Any recognition of a sound recording owner's exclusive and unbounded right of use would *pro tanto* diminish the separate right of the phonorecord owner to use (*i.e.*, play) his property, whether for public or private purposes. Nothing in the common law of copyright justifies such a restriction. *See FEI New York*, 70 N.E.3d at 947.

Third, even an exclusive right limited to a public performance of a sound recording, *see* 17 U.S.C. § 101 (defining "publicly"), would upset societal expectations and reliance interests. For decades, owners of legitimately purchased or gifted phonorecords—not just radio stations, but also restaurants, night clubs, retail outlets, festivals, colleges and universities, amusement parks, and private persons hosting gatherings of friends, among others—have used their property to perform sound recordings publicly. Record companies have never asserted any common-law copyright or demanded a license or compensation for such recordings thereunder. This Court should not grant a novel categorical common-law right of

public performance rendering all these established usages unlawful for pre-1972 sound recordings.

Recognition of a broad public-performance right encompassing radio broadcasting would be particularly inappropriate. Broadcasting does not implicate the interests that justified the limited common-law protection for reproduction or performance rights of unpublished manuscripts. An action in copyright, for which there is strict liability, 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." *Capitol Records, Inc.*, 830 N.E.2d at 266 (citations omitted). Performance rights developed to protect the dramatist from competitive performances that might prevent or diminish economic gain from using the unpublished manuscript in his own performances, or impair his ability to derive revenue from other potential performers.

Radio broadcasting causes no comparable detriment to record companies or performing artists. Recording artists and record companies are not licensed to perform their own radio broadcasts, and there is no market for licensing tracks to radio broadcasters. 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 stations by record companies. *Supra* at 4-6.

Congress has consistently refused to create any federal property right in over-the-air radio broadcast of sound recordings because of the unique, longstanding economic symbiosis of the radio and record industries. *Supra* at 6-9. For the same reason, the New York Court of Appeals and the Supreme Court of Florida have rejected FEI's entreaties to create a broad common-law exclusive right of the public performance of sound recordings. "[T]he record companies and artists had a symbiotic relationship with radio stations, and wanted them to play their records to encourage name recognition and corresponding album sales." *FEI New York,* 70 N.E.3d at 939, 948 (citations omitted). Because "those participants have coexisted for many years and, until now, were apparently 'happy together,'" the changing technological environment "do[es] not now warrant the precipitous creation of a common-law right that has not previously existed." *Id.* at 949.

Expanding the state common law into radio broadcast rights is especially treacherous, given the diverse and increasingly interstate character of radio. The United States has over 15,000 radio stations, FCC, Broadcast Station Totals as of December 31, 2019 (Jan. 3, 2020), *available at* https://docs.fcc.gov/public/attachments/DOC-361678A1.pdf, many of which broadcast to multiple states. *See generally* Keith, *supra*, at 23-29, 313-17.

Patchwork common-law copyright regulation of modern radio would invite utter confusion. First, 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 (particularly where an out-of-state programmer distributes to multiple states). *Cf. Capitol Records, Inc. v. Mercury Records Corp.*, 221 F.2d 657, 662 (2d Cir. 1955) (applying law of state of infringing acts). Second, in a common-law system, liability for playing any particular song would be indeterminate until fixed by individual settlement or jury trial. There is no single compulsory licensing scheme as exists under federal law (much less one rewarding musicians and artists rather than only record companies), or expert body like the Copyright Royalty Board to set rates. *See* 17 U.S.C. § 114(g)(2). Third, radio defendants could face the vagaries of class actions; plaintiffs can always opt out of a class (and owners of valuable rights very well may do so). *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810-11 (1985). Radio stations cannot achieve business certainty through litigation, and chaos would reign.

The high litigation costs and unpredictability of determining common-law liability and damages would deter stations from playing pre-1972 tracks, or at least playing them as much, to the detriment of many stakeholders. The New York Court of Appeals recognized that "the public and the artists could be harmed by the recognition of a right of public performance" for this very reason; less airplay of

pre–1972 music would diminish public interest in this music, and would "potentially result[] in decreased revenue to the performers from record sales and from live concerts, festivals and merchandise which, in many instances, have replaced record sales as the performers' primary sources of income." *FEI New York*, 70 N.E.3d at 949. Those factors militate against dramatically expanding performance rights. There is certainly no warrant for creating broader state-law rights than those Congress granted for post-1972 recordings or digital transmission of pre-1972 recordings.

It would be fundamentally unfair for the recording industry to encourage airplay actively for decades without claim of compensation under state law, deriving enormous economic benefits therefrom, and then demand retroactive compensation from broadcasters for conduct that has always been understood to be free and indeed authorized. Radio stations, particularly those that have invested substantial resources in developing oldies and classic-rock formats, have strong reliance interests that should be protected. There are about 1,850 such stations, many small. Mark R. Fratrik, *How Will the Radio Industry Be Affected by Pre-1972 Music Performers' Fees* 7 (July 27, 2015), *available at* http://www.biakelsey.com/pdf/impactofpre72musicroyalties.pdf. The economic model of those stations is built on the accepted framework that no compensation was owed to record companies for airplay. For many such stations, common-law

copyright liability for all pre-1972 spins may destroy the format's economic viability. Indeed, many broadcasters may respond to such a new liability by stopping playing pre-1972 recordings altogether and removing them from their on-air libraries. A decision in FEI's favor would generate negative effects beyond FEI's narrow, private interests in this case.

As the New York Court of Appeals concluded, there is no reason to recognize the exclusive right FEI seeks that would have "extensive and far-reaching" consequences, "upset settled expectations," and impact the "many competing interests at stake." *FEI New York,* 70 N.E.3d at 949. The Supreme Court of Florida agreed, declining "to recognize an unworkable common law right in pre–1972 sound recordings that is broader than any right ever previously recognized in any sound recording[,]" even under federal law. *FEI Florida*, 229 So.3d at 316. This Court should likewise reject FEI's claims. If such a right were to be recognized, it should be through comprehensive legislation, not recognition of a new right by the courts, or the unwarranted construction of a 1982 law that merely maintained existing state law rights and remedies.

CONCLUSION

For all the foregoing reasons, this Court should reverse the judgment below.

Respectfully submitted,

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June 30, 2020

CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2020, I electronically filed the foregoing document with Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system which will send a Notification of Electronic Filing to all parties in this case.

Dated: June 30, 2020

/s/ Stephen B. Kinnaird
Stephen B. Kinnaird

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