

MOTION INFORMATION STATEMENT

Docket Number(s): 15-1164-cv Caption [use short title] \_\_\_\_\_

Motion for: Leave to file as amicus curiae in support of Flo & Eddie, Inc., v. Sirius XM Radio, Inc.  
Defendant-Appellant Sirius XM Radio, Inc.

Set forth below precise, complete statement of relief sought:  
Leave to file amicus curiae brief on behalf of  
Electronic Frontier Foundation.

MOVING PARTY: Electronic Frontier Foundation OPPOSING PARTY: Flo & Eddie  
 Plaintiff  Defendant  
 Appellant/Petitioner  Appellee/Respondent

MOVING ATTORNEY: Mitchell Stoltz OPPOSING ATTORNEY: Harvey Geller  
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Court-Judge/Agency appealed from: SDNY (New York City)

Please check appropriate boxes:  
Has movant notified opposing counsel (required by Local Rule 27.1):  
 Yes  No (explain): \_\_\_\_\_  
Opposing counsel's position on motion:  
 Unopposed  Opposed  Don't Know  
Does opposing counsel intend to file a response:  
 Yes  No  Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND  
INJUNCTIONS PENDING APPEAL:  
Has request for relief been made below?  Yes  No  
Has this relief been previously sought in this Court?  Yes  No  
Requested return date and explanation of emergency: \_\_\_\_\_

Is oral argument on motion requested?  Yes  No (requests for oral argument will not necessarily be granted)  
Has argument date of appeal been set?  Yes  No If yes, enter date: \_\_\_\_\_

Signature of Moving Attorney: /s/ Mitchell Stoltz Date: 8/5/2015 Service by:  CM/ECF  Other [Attach proof of service]

# 15-1164-CV

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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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

PLAINTIFF-APPELLEE,

v.

SIRIUS XM RADIO, INC., A DELAWARE CORPORATION,

DEFENDANT-APPELLANT,

DOES, 1 THROUGH 10,

DEFENDANTS.

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On Appeal From The United States District Court  
For The Southern District of New York (New York City)

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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.**

---

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August 5, 2015

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## **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 company owns 10% or more of its stock.

**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-Appellant Sirius XM Radio, Inc. (“Sirius XM”) consents to the filing. Plaintiff-Appellee Flo & Eddie, Inc. (“Flo & Eddie”) does not consent. Counsel for Flo & Eddie did not indicate whether Flo & Eddie intends to file a response to this motion.

**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 over 22,000 dues-paying members have a strong interest in assisting the courts and policymakers to help ensure 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 legitimate innovators 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 it threatens to upend decades of settled law governing their use of recorded music. The impact of the district court’s decision on competition, its implications for antitrust law, and on the encouragement of technological innovation for the benefit of the public were not considered in depth in the parties’ briefs to the district court. 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, EF respectfully requests leave to file the attached brief *amicus curiae*.

Respectfully submitted,

Dated: August 5, 2015

By: /s/ Mitchell Stoltz \_\_\_\_\_

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On Appeal From The United States District Court  
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**BRIEF OF *AMICUS CURIAE* ELECTRONIC FRONTIER FOUNDATION IN  
SUPPORT OF DEFENDANT-APPELLANT SIRIUS XM RADIO, INC.**

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August 5, 2015

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## STATEMENT OF INTEREST<sup>1</sup>

*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 over 22,000 dues-paying members have a strong interest in assisting the courts and policymakers to help ensure 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.

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<sup>1</sup> No party's counsel authored this brief in whole or in part. Neither any party nor any party's counsel contributed money that was intended to fund preparing or submitting this brief. No person other than *amicus*, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief.

parties to this case, EFF represents the interests of small innovators, who often lack the resources to litigate in federal court.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Copyright law does not include a general, exclusive right to publicly perform sound recordings—unless the district court’s decision in this case is affirmed. On an issue of first impression, the decision on appeal created a significant new component to state copyright law, one that potentially makes illegal the broadcasts and performances of recorded music done by thousands of radio stations, restaurants, and other businesses every day.

Although judicial expansions of copyright law were occasionally done in the early days of sound recording technology, when the means of broadcasting were in the hands of a few large, sophisticated entities, distribution today touches the legitimate activities of millions, in New York and beyond. At the federal level, at which most copyright law resides today, no general public performance right in sound recordings has ever been created. This Court should follow the considered, well-established example of federal law by reversing the district court’s creation of a new and unbounded public performance right.

The lessons of federal copyright law, which EFF believes the New York courts would apply here, are these: First, copyright is expanded only where needed to create incentives for creative work; second, such expansions are always coupled with appropriate limitations *ab initio*; and third, such expansions should not

preclude technological and market experimentation or raise barriers to entry for new music-based businesses.

Without a reversal of the district court's decision, any resolution of this case is likely to place Sirius XM and other large broadcasters with ample resources in a privileged position to continue broadcasting pre-1972 recordings. Any class action settlement or judicially mediated license to broadcast a large catalog of these recordings will likely be specific to Sirius XM and similarly situated music services. 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.

Because expansions of copyright law are, and should be, the province of the legislature, this Court should reverse the district court's decision.

## **ARGUMENT**

### **I. THE DISTRICT COURT'S DECISION CREATED A NEW COMMON-LAW RIGHT WITH FAR-REACHING EFFECT.**

The district court erred in its conclusion that this case is merely a "suit between private parties" in which the scope of copyright can be vastly expanded without reference to the "broader policy problems" whose likelihood is undisputed. SPA40. The district court's decision, if affirmed, effectively creates a new right under New York copyright law: a general, exclusive right of public performance in

all sound recordings that are subject to state law. This right has not previously been recognized under New York or federal law. *See RCA Mfg. Co., Inc. v. Whiteman*, 114 F.2d 86 (2d Cir. 1940) (finding no common law public performance right in sound recordings); 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 will require permission or payment for the first time if the decision is not 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, cafes, fairs, charitable events, music venues and others who use recorded music. And, if this case is any indication, the right would likely be retroactive.

There can be no serious dispute that the district court's decision is "unprecedented . . . and will have significant economic consequences." SPA39. Nor is it disputed that today's landscape of music production and distribution, including technologies 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.

This case is, in fact, a putative class action on behalf of thousands of recording artists concerning a use of their recordings that is made every day and

for decades by many thousands of businesses and individuals. Moreover, the law's present balancing of creative incentives, competition concerns, access to musical culture, and technological development—including the non-existence of a general public performance right in sound recordings—informs New York's common law and the likely decision of the New York courts. This Court can and must consider the negative impacts of announcing such a right for the first time.

## **II. NEW YORK COPYRIGHT LAW SHOULD BE INTERPRETED CONSISTENTLY WITH FEDERAL LAW.**

This case purportedly concerns a novel issue of New York law. But the issue is not really novel at all. This Court rejected the notion of a general public performance right 75 years ago in *Whiteman*. 114 F.2d 86. In addition, the questions raised in this case about the historical basis for a general right of public performance in sound recordings, the need for new rights with respect to decades-old recordings, and the ways in which any such rights are limited to preserve the rights and legitimate expectations of others, have been considered intensely and extensively in the context of federal copyright law.

Given that “a page of history is worth a volume of logic,” SPA17 (quoting *Capitol Records, Inc. v. Naxos of Am., Inc.*, 4 N.Y.3d 540, 546 (2005)), it is inconceivable that the New York courts would not look to the extensive work of Congress and the federal courts in defining and limiting performance rights in

post-1972 sound recordings to inform their interpretation of state common law. Yet the district court held that the very paucity of state law decisions on sound recording copyright means that the proper reach of New York common law “cannot be determined by reference to comparable federal protection.” SPA17.

That holding simply does not make sense. While it is of course true that the federal Copyright Act does not *mandate* the bounds of state law protection of pre-1972 sound recordings, federal law remains the best (and often the only) reconciliation of musicians’ and music producers’ rights with 21st-century technologies and markets in the U.S. Thus, in the absence of recent state precedent, New York courts should apply the principles of limited, empirically justified expansion of copyright from federal law. More generally, federal law counsels deference to the legislature in expanding copyrights, particularly for existing works.

The district court’s decision to ignore federal precedent on public performances was also inconsistent, given that the court referred to federal copyright law to inform other conclusions about the scope of New York law. For example, the district court drew its conclusion that “some of the alleged copies may not qualify as infringing reproductions” from this Court’s decision in *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 127-30 (2d Cir. 2008). SPA26. And the district court looked to federal antitrust law decisions as examples

of hypothetical future limitations on state copyright. SPA25. The court could hardly have avoided doing so, given the lack of state law decisions on these and other copyright issues. Having sensibly relied on federal law to inform its understanding of reproduction rights under New York law, the district court should have similarly looked to federal law for guidance on the existence and scope of performance rights.

Moreover, the decision introduces new confusion into music licensing. The majority of commercially significant sound recordings are now within the ambit of federal law (including foreign works given federal protection by the implementation of the Berne Convention), and it is relatively easy to license music catalogs based on established federal rights. But the creation of additional and much broader rights in state-protected, pre-1972 recordings makes the licensing of broad and varied music catalogs (such as through performing rights organizations) increasingly difficult, and potentially impossible for some users. Users may have to license recordings on a state-by-state basis, or simply avoid older recordings entirely.

The district court acknowledged these exact problems, but believed them “unlikely . . . since such behavior could well cause broadcaster[s] to lose interest in playing their recordings.” SPA40. However, it offered no practical basis for that conclusion. In fact, a sharp reduction in the broadcast of pre-1972 recordings (except perhaps the most popular and acclaimed ones) is the likely result of an affirmance.

The district court’s refusal to construe New York’s common law in harmony with federal law was both puzzling and dangerous. It should be reversed.

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

The district court relied on two theories to justify expanding copyright to cover pre-1972 sound recordings: a “common law copyright” theory and an “unfair competition” theory. Neither theory works.

#### **A. Copyright in the U.S. Is an Incentive Scheme, Not an Absolute Property Right.**

The district court’s reliance on common law copyright is misplaced for the simple reason that it is fundamentally inconsistent 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 Anne, c. 19 (1710); *see also* Thomas Babington Macaulay, First Speech to the House of Commons on Copyright (Feb. 5, 1841) (*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. 1, § 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.<sup>2</sup> 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”).

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<sup>2</sup> *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.

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, as Sirius XM, Internet radio services, and traditional radio stations have a long history of disseminating pre-1972 recordings, a function that the district court concluded may be hindered by its decision.

**B. The District Court’s Application of Unfair Competition Conflicts With Copyright Law’s Reservation Of Valuable Rights to the Public.**

The district court’s use of the “misappropriation” theory as a purported alternative to copyright was also erroneous.<sup>3</sup> As with common law copyright, no prior precedent holds that the public performance of another’s sound recordings constitutes unfair competition. Nonetheless, the district court concluded that because Sirius XM had “taken and used” the recordings, and because “competitive injury” to Flo & Eddie was purportedly established as “a matter of economic common sense,” unfair competition had occurred. SPA33-34.

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<sup>3</sup> The finding appears to apply to all of Sirius XM’s conduct, including both reproductions and performances of the recordings at issue.

The district court's approach is problematic for two reasons. First, it bypasses the limitations of copyright law. The *absence* of a right of public performance for sound recordings is the result of a policy choice that neither Congress nor the New York Legislature has seen fit to disturb. The finding that unfair competition—a broadly stated, general species of business tort—condemns conduct that the more specific provisions of copyright law permit, ignores the importance of copyright's bounds and limitations.<sup>4</sup> Because copyright comprises a balance between the rights of the author and those of the public, what it omits is as important as what it includes. *See Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 526 (1994) (“[T]he policies served by the Copyright Act are more complex, more measured, than simply maximizing the number of meritorious suits for copyright infringement.”); *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349-50 (1991) (although “[i]t may seem unfair that much of the fruit of the [plaintiffs'] labor may be used by others without compensation,” this is “not ‘some unforeseen byproduct of a statutory scheme.’”) (citation omitted); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (“The immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.”).

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<sup>4</sup> Conversely, if New York copyright law contained a right of public performance, a finding of unfair competition would be superfluous.

Second, the finding of unfair competition presumes that the public performance of sound recordings without permission is wrongful (a form of “commercial immorality”) merely because the licensing of such performances may be valuable. Copyright law has never assigned all potentially valuable uses of creative work to the rightsholder on that basis alone. Copyright’s purpose to promote both the creation of and access to creative works means that some potentially valuable uses may nonetheless go uncompensated. Copyright *could* have included an exclusive right to listen to a sound recording privately, or to transfer or resell a recording. Such rights could no doubt be licensed for valuable compensation, but that potential for value alone did not justify creating such rights, let alone cause them to arise automatically.

This Court has held that in cases relating to the use of creative work, common law misappropriation “based on amorphous concepts such as ‘commercial immorality’ or society’s ‘ethics’” is “virtually synonymous for wrongful copying and [is] in no meaningful fashion distinguishable from infringement of a copyright.” *Nat’l Basketball Ass’n v. Motorola, Inc.*, 105 F.3d 841, 851 (2d Cir. 1997).<sup>5</sup> Thus, as copyright does not define a particular use of a creative work as wrongful based solely on the potential value of that use, neither should a finding of

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<sup>5</sup> While state law copyrights in pre-1972 recordings, unlike the copyright claims in the *NBA* case, are not yet subject to federal preemption, this Court’s observation in *NBA* that misappropriation and copyright infringement have the same elements is equally relevant here.

misappropriation be based on “potential licensing fees” that have never been collected or expected before. SPA34.

For these reasons, the application of unfair competition to this case, which is fundamentally a copyright case, is a circumstance in which “such an amorphous cause of action is capable of mischievous application.” *Roy Exp. Co. Establishment of Vaduz, Liechtenstein v. Columbia Broad. Sys., Inc.*, 672 F.2d 1095, 1105 (2d Cir. 1982). The Court should apply copyright law, rather than sidestep it by declaring Sirius XM’s conduct to be unfair competition.

**C. Modern Expansions Of Copyright Are Coupled With Limitations; This Is A Task For The Legislature.**

The district court acknowledged that its ruling is broader than any that Congress has created, applying without distinction to all forms of broadcasting. While acknowledging the “specter of administrative difficulties” such an unlimited right will cause, and even that it may “make broadcasts of pre-1972 recordings altogether unavailable,” the district court dismissed these serious issues by suggesting that courts in future litigation can, in theory, craft limitations and exceptions to the newly created right. SPA24. The problem with this approach is that new rights may affect the market dramatically and immediately, while judicially created exceptions and limitations will likely take decades to develop.

Creating rights independently of limitations that protect access, preserve competition, and allow breathing room for innovation is contrary to decades of careful legislative practice. When lawmakers expand copyrights, they have consistently tied those expansions to appropriate limitations. SPA19. Indeed, this is one reason to leave this matter to lawmakers; legislatures are best equipped to balance the rights of recording artists, broadcasters, and the public, and to consider 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.”).

#### **IV. THE DISTRICT COURT DECISION HARMS INNOVATION AND COMPETITION IN MUSIC DISTRIBUTION**

##### **A. A Newly Announced, Common Law Right of Public Performance in All Pre-1972 Sound Recordings Harms Innovation.**

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 rights in the 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.<sup>6</sup>

Both of these licensing mechanisms arose over the course of decades to address problems of scale and transaction costs for both rightsholders and users. 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 1940s, ASCAP and BMI have operated under antitrust consent decrees in order to

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<sup>6</sup> 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.

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 SoundExchange<sup>7</sup> 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, Pub. L. No. 104-39 (1995) (creating both the limited right of public performance in digital sound recordings and a statutory licensing scheme).

The decision on appeal here brushed aside the collusive behavior and licensing difficulties that will likely result from the creation of a common-law

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<sup>7</sup> SoundExchange is the “nonprofit performance rights organization that collects and distributes digital performance royalties” pursuant to 17 U.S.C. § 114(e). *See* SoundExchange, About, <http://www.soundexchange.com/about/> (last visited Aug. 4, 2015).

public performance right. Yet these difficulties are precisely *why* the district court should not have recognized a new right.

Significantly, the uncertainty created by the district court as to how users can obtain public performance rights will chill the introduction of new innovations in music broadcasting and distribution. New businesses, digital or otherwise, will face massive transaction costs and uncertainty from the creation of a general public performance right, given that there will be no effective way to license pre-1972 recordings. The mechanisms simply do not exist.

The risk of litigation will 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 will likely be additional class action litigation. But the risk and cost of such litigation will likely prevent small innovators from entering the market, as the specter of uncertain damages and legal costs will loom.

In order to prevent this chilling of new innovation, if any right is to be recognized, it should be done after careful consideration through the legislative process.

**B. Resolution of this Case in Favor of Flo & Eddie Will Privilege Sirius XM and Shut Out Competitors; Deference to the Legislature 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—until the district court’s decision—they thought themselves lawfully able to perform.

Without a reversal of that decision, any resolution of this matter—be it through settlement or judgment—will likely place Sirius XM in a privileged position. Sirius XM, and others with significant resources for litigation, will become the sole entities able to publicly perform newly-created rights. If Sirius XM settles this case following an affirmance of the district court’s decision, presumably it will do so with the ability to continue to perform pre-1972 works. Even if it does not settle, the parties will likely establish an ongoing royalty under court supervision instead of an injunction. *See, e.g., Williams v. Bridgeport Music, Inc.*, No. LA CV13–6004, 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 may find that the district court's decision threatens to completely destroy their businesses. They will have 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 affirmed, we may see the consolidation of any market for the performance of pre-1972 sound recordings to a privileged few. That outcome should give the Court pause, and counsel against creating a sweeping new right through common-law adjudication.

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).

This is precisely a concern here. Because of litigation risk and transaction costs, small broadcasters will be forced to remove pre-1972 works from their

repertoires. They will 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 reversing the decision below.

### **CONCLUSION**

This Court should reverse the district court's improper expansion of New York copyright law. On this issue of first impression, New York courts should look to principles of federal law, the only comprehensive attempt to reconcile U.S. copyright with the last half century of technological development. That body of statutory law counsels that rights should not be created without a demonstrated need for creative incentives, and that new rights always be balanced by appropriate limitations. Evaluating that need, and crafting the right response thereto, if any, is a task for a legislature, not a court.

Dated: August 5, 2015

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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME  
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REQUIREMENTS PURSUANT TO FED. R. APP. P. 32(A)(7)(C)**

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

1. This Brief of *Amicus Curiae* Electronic Frontier Foundation in Support of Defendant-Appellant Sirius XM Radio, Inc. complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,517 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 2010, the word processing system used to prepare the brief, in 14 point font in Times New Roman font.

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