

NO. 15-55287

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

PLAINTIFF-APPELLEE,

v.

PANDORA MEDIA, INC., a Delaware corporation,

DEFENDANT-APPELLANT.

On Appeal from the United States District Court
for the Central District of California, Los Angeles

Case No. 14-cv-07648-PSG-RZ

The Honorable Philip S. Gutierrez, District Court Judge

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

Mitchell Stoltz
Vera Ranieri
ELECTRONIC FRONTIER FOUNDATION
815 Eddy Street
San Francisco, CA 94109
Email: mitch@eff.org
Telephone: (415) 436-9333

Counsel for Amicus Curiae

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% or more of its stock.

**MOTION OF THE ELECTRONIC FRONTIER FOUNDATION FOR
LEAVE TO FILE AS AMICUS CURIAE IN SUPPORT OF DEFENDANT-
APPELLANT PANDORA MEDIA, 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 Pandora Media, Inc. EFF has notified counsel for all parties of its intention to file this brief. Defendant-Appellant Pandora Media, Inc. (“Pandora”) consents to the filing. Plaintiff-Appellee 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 it threatens to upend decades of settled law governing their use of recorded music. The impact of the district court’s decision on competition, 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, EFF respectfully requests leave to file the attached brief *amicus curiae*.

Dated: September 9, 2015

By: /s/ Mitchell L. Stoltz
Mitchell Stoltz
Vera Ranieri
ELECTRONIC FRONTIER FOUNDATION
815 Eddy Street
San Francisco, CA 94109-7701
Tel: (415) 436-9333
mitch@eff.org

*Counsel for the Electronic Frontier
Foundation*

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 Ninth Circuit by using the appellate CM/ECF system on September 9, 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: September 9, 2015

By: /s/ Mitchell L. Stoltz
Mitchell L. Stoltz

NO. 15-55287

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

PLAINTIFF-APPELLEE,

v.

PANDORA MEDIA, INC., a Delaware corporation,

DEFENDANT-APPELLANT.

On Appeal from the United States District Court
for the Central District of California, Los Angeles

Case No. 14-cv-07648-PSG-RZ

The Honorable Philip S. Gutierrez, District Court Judge

**BRIEF OF *AMICUS CURIAE* ELECTRONIC FRONTIER FOUNDATION
IN SUPPORT OF DEFENDANT-APPELLANT AND REVERSAL**

Mitchell Stoltz
Vera Ranieri
ELECTRONIC FRONTIER FOUNDATION
815 Eddy Street
San Francisco, CA 94109
Email: mitch@eff.org
Telephone: (415) 436-9333

Counsel for Amicus Curiae

**DISCLOSURE OF CORPORATE AFFILIATIONS AND
OTHER ENTITIES WITH A DIRECT FINANCIAL INTEREST IN
LITIGATION**

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% or more of its stock.

TABLE OF CONTENTS

DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER ENTITIES
WITH A DIRECT FINANCIAL INTEREST IN LITIGATION..... i

STATEMENT OF INTEREST..... 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT..... 4

 I. The District Court’s Decision Created A New Common-Law Right
 With Far-Reaching Effect..... 4

 II. The Presence Of A Statutory Exemption For Cover Recordings
 Does Not Imply That State Copyright Includes A Public Performance
 Right..... 5

 III. Expansions of Copyright Must Be Based on the Demonstrated
 Need For Incentives; Unjustified Expansions Harm Innovation and
 Access. 8

 A. Copyright in the U.S. is an Incentive Scheme, Not an Absolute
 Property Right. 8

 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. 10

 IV. The District Court Decision Harms Innovation and Competition in
 Music Distribution 12

 A. A Newly Announced, Common Law Right of Public Performance
 in All Pre-1972 Sound Recordings Harms Innovation..... 12

 B. Resolution of this Case in Favor of Flo & Eddie Will Privilege
 Pandora and Shut Out Competitors; Deference to the Legislature
 Avoids These Problems..... 15

CONCLUSION..... 17

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION,
TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS
PURSUANT TO FED. R. APP. P. 32(A)(7)(C) 18

CERTIFICATE OF SERVICE 19

TABLE OF AUTHORITIES

Cases

<i>Authors Guild v. Google, Inc.</i> , 770 F. Supp. 2d 666 (S.D.N.Y. 2011)	11, 16, 17
<i>Broadcast Music, Inc. v. Columbia Broad. Sys., Inc.</i> , 441 U.S. 1 (1979)	13
<i>eBay Inc. v. MercExchange, L.L.C.</i> , 547 U.S. 388 (2006)	16
<i>Eldred v. Ashcroft</i> , 537 U.S. 186 (2003)	7, 9
<i>Flo & Eddie Inc. v. Sirius XM Radio Inc.</i> , No. CV 13-5693 PSG, 2014 WL 4725382 (C.D. Cal. Sep. 22, 2014).....	4, 7
<i>Golan v. Holder</i> , 132 S. Ct. 873 (2012)	9
<i>Sony Corp. of Am. v. Universal City Studios, Inc.</i> , 464 U.S. 417 (1984)	10
<i>United States v. ASCAP</i> , No. 41-1395 (WCC), 2001 WL 1589999 (S.D.N.Y. June 11, 2001).....	13
<i>United States v. Broadcast Music, Inc.</i> , 1996-1 Trade Cas. (S.D.N.Y. Nov. 18, 1994).....	14
<i>United States v. Broadcast Music, Inc.</i> , 426 F.3d 91 (2d Cir. 2005)	13
<i>Williams v. Bridgeport Music, Inc.</i> , No. LA CV13-6004, 2015 WL 4479500 (C.D. Cal. July 14, 2015)	16

Statutes

17 U.S.C. § 106.....	4
17 U.S.C. § 112.....	12
17 U.S.C. § 114.....	12, 14

Act of Feb. 3, 1831, ch. 16 § 1, 4 Stat. 436 10

Act of May 31, 1790, ch. 15, 1 Stat. 124 10

Cal. Civ. Code § 980(a)(2) *passim*

Cal. Civ. Code § 986..... 6

Cal. Civ. Code § 987..... 6

Computer Software Copyright Act, Pub. L. No. 96-517, 94 Stat. 3015
(Dec. 12, 1980)..... 11

Copyright Act of 1909, Pub. L. 60-349, 35 Stat. 1075 (Mar. 4, 1909) 11

Copyright Act of 1976, Pub. L. 94-553, 90 Stat. 2541 (Oct. 19, 1976) 11

Digital Performance Right in Sound Recordings Act, Pub. L. No. 104-39,
109 Stat. 336 (Nov. 1, 1995)..... 11, 14

Statute of Anne, 8 Ann., c. 19 (1710)..... 8

Constitutional Provisions

U.S. Const. art. 1, § 8, cl. 8..... 9

Legislative Materials

H.R. Rep. 92-487 (1971) 9

Other Authorities

Opening Brief, *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, No. 15-13100-AA
(11th Cir. Sep. 1, 2015)..... 7

Thomas Babington Macaulay, First Speech to the House of Commons on
Copyright (Feb. 5, 1841)..... 8

U.S. Copyright Office, Federal Copyright Protection for Pre-1972 Sound
Recordings, 20-49 (2011)..... 11

STATEMENT OF INTEREST¹

This brief is filed pursuant to Fed. R. App. Proc. 29(a).

The Electronic Frontier Foundation is a nonprofit, donor-supported 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 ensuring that copyright law serves the interests of creators, innovators, and the general public.

¹ 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.

INTRODUCTION AND 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 in this case, and in the closely related case of *Flo & Eddie v. Sirius XM*, threatens to upend that balance. The decision below is premised almost entirely on a logical fallacy: that the presence of a single statutory exemption in California's sound recording copyright statute, Cal. Civil Code § 980(a)(2), makes the scope of such copyrights otherwise infinite, covering "any use of a recording" to which a copyright holder might lay claim.

As a matter of pure statutory interpretation, the district court's conclusion was erroneous. In addition, it was inconsistent with the well-established trajectory of copyright law in the U.S.: that expansions of rights are always coupled to carefully considered limitations. Although judicial expansions of copyright were occasionally done in the early days of sound recording technology, when the means of broadcasting and other mass performances were in the hands of a few large, sophisticated entities, the regulation of performances of sound recordings today touches the legitimate activities of millions, in California and beyond. Expansions of copyright have broad ramifications for industry and the public, and are properly the domain of the legislature.

The decision on appeal effectively created a sweeping new right under state copyright law, one that potentially makes illegal the broadcasts and performances of recorded music done by thousands of radio stations, restaurants, websites, and

others every day. And the district court's interpretation of § 980(a)(2) as having no boundaries beyond the single statutory exemption could have damaging and unpredictable effects far beyond the facts of this case, unless the decision is reversed. The flawed logic of the district court's decision could 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 raises competition concerns. Without a reversal by this Court, any resolution of this case is likely to place Pandora and other large, well-funded performers of sound recordings in a privileged position to continue performing pre-1972 recordings. Any settlement or judicially mediated license to broadcast a large catalog of these recordings will likely be specific to Pandora. 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 law by reversing the district court's creation of a new and unbounded public performance right, leaving any such expansions to Congress or the state legislature.

ARGUMENT

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

The district court's decision, if affirmed, effectively creates a new right under California 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 California or federal law. *See* 17 U.S.C. § 106 (granting a public performance right in sound recordings, but only for performance via digital audio transmission).²

The public performances that may 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 and its recent decision in *Flo & Eddie v. Sirius XM Radio* are unprecedented. Nor is it disputed that today's landscape of music production and distribution, including technologies to transmit high-quality sound over numerous communications media

² The district court observed in its *Sirius XM* decision that "the breadth and specificity of cases acknowledging that exclusive ownership of a sound recording includes the right to publicly perform the recording are slight." *Flo & Eddie Inc. v. Sirius XM Radio Inc.*, No. CV 13-5693 PSG, 2014 WL 4725382, at *8 (C.D. Cal. Sep. 22, 2014). This is an exaggeration, as no case cited by any party here explicitly recognizes any such right.

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 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 of announcing a general public performance right for state-law-protected recordings for the first time.

II. THE PRESENCE OF A STATUTORY EXEMPTION FOR COVER RECORDINGS DOES NOT IMPLY THAT STATE COPYRIGHT INCLUDES A PUBLIC PERFORMANCE RIGHT.

The district court’s opinion is premised on a logical fallacy. The question the court was asked was whether “exclusive ownership,” as defined by California Civil Code § 980(a)(2), includes a right of public performance. In other words: what is the set of rights that is encompassed by ownership of a sound recording under § 980(a)(2)? The district court held that because the statute contains an explicit exception for certain uses, specifically “cover” recordings, all other conceivable uses must be part of the “exclusive ownership” rights. But this begs the question. Knowing what is not encompassed within “exclusive ownership” tells us little, if anything, about what is.

Consider a statute that refers to “all states except California” and a court that must decide whether the statute applies to Puerto Rico. Knowing that the statute excepts California tells us nothing about whether it applies to Puerto Rico. Indeed, a court would be incorrect if it asserted that because California is excepted, Puerto Rico must be a state.

So too with § 980(a)(2). Knowing that the right to make covers is explicitly excluded says nothing about whether public performance is a right in the first instance. As copyright is an intangible right that potentially attaches to any number of physical reproductions that are themselves chattels, there is simply no universal definition of “absolute ownership” of a copyright for a court to presume. Thus, the presence of an explicit exception for cover recordings does not implicitly establish the overall scope of copyright as otherwise infinite.

Indeed, the district court’s logic proves both too little and too much. It proves too little in that the exception for cover recordings is—at most—evidence that “exclusive ownership” includes the reproduction right, as a cover recording is a form of reproduction. The court’s reasoning also proves too much where it concludes that the California Legislature intended all possible rights to be given to owners of sound recordings except those carved out by an exception, even rights never before recognized or even conceived of. This could include such “rights” as a royalty on the resale of each copy or the right to prevent lawful purchasers from disposing of their copies. *Cf.* Cal. Civ. Code § 986 (granting the author of a work of fine art the right to collect a fee on resale); § 987 (granting the author of a work of fine art the right to prevent the destruction of the work).

Under the flawed reasoning of the district court, arguably 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. It would be unthinkable for the California Legislature to have created such a rule sub silentio and without any debate.

The district court’s conclusion that § 980(a)(2) grants sound recording owners an “exclusive right to any use of a recording” also implies that Flo & Eddie can prevent fair uses of their recordings. *Flo & Eddie Inc. v. Sirius XM Radio Inc.*, 2014 WL 4725382, at *8. Indeed, Flo & Eddie recently argued to the Eleventh Circuit in a related case that fair use does not “limit the common law rights of the owners of pre-1972 recordings.” Plaintiff-Appellant Flo & Eddie, Inc. Opening Brief at 34, *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, No. 15-13100-AA (11th Cir. Sep. 1, 2015). This cannot be. Because the fair use limitation brings copyright law into compliance with the First Amendment’s guarantee of free speech, any copyright that does not allow for fair use would be constitutionally suspect. *See Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) (noting that “copyright law contains built-in First Amendment accommodations” including fair use). As a copyright that covers “any use of a recording” would constitute a violation of the First Amendment, a court cannot construe § 980(a)(2) to be free of all implicit boundaries.

Finally, the district court’s interpretation raises uncertainties for all users of pre-1972 recordings. Construing § 980(a)(2) to include “all rights that can attach to intellectual property” gives no guidance as to which rights are included. *Flo & Eddie Inc. v. Sirius XM Radio Inc.*, 2014 WL 4725382, at *5. Would newly created rights in other jurisdictions automatically come into force in California? Would rights never before recognized in any jurisdiction, such as a right to control purely

private listening, become enforceable at a rightsholder's request? This interpretation will undoubtedly invite years of litigation. In addition, this uncertainty is likely to suppress access to older recordings, accelerating their fade into obscurity.

Given these deleterious effects, the California legislature could not have intended to create an absolute, unbounded copyright lacking only a right to control reproductions in cover 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 §980(a)(2) is 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 Ann., 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.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. Pandora, other Internet and satellite radio services, and traditional radio stations have a long history of disseminating pre-1972 recordings, a function that will likely be hindered by the district court’s decision.

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.

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 would make the scope of copyright in sound recordings far broader than any that Congress or the California legislature have created, applying without distinction to all forms of broadcasting. This conflicts with historical practice, further suggesting that it was not the legislature's 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 Stat. 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).

Such expansions 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. 94-553, 90 Stat. 2541 (Oct. 19, 1976); Digital Performance Right in Sound Recordings Act, 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, 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. 60-349, 35 Stat. 1075 (Mar. 4, 1909).

Consistent with this position, until recently, courts and legislatures—including Congress when it enacted the 1976 Copyright Act—were unified in the understanding that sound recording copyrights did 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.

When it enacted § 980(a)(2), the California legislature was aware of this history: 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. That the statute makes no mention of any limitations on a supposed right of public performance is thus an indicator, contrary to the district court's interpretation, that the legislature did not intend to create such a right.

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, Pandora needs licenses for the rights in the underlying musical compositions, which it typically obtains through performance rights organizations (ASCAP, BMI, and SESAC). In addition, Pandora 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. 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);

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.

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, 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 decision on appeal here did not address the collusive behavior and licensing difficulties that will likely result from the creation of a new 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 of sound recordings can obtain public performance rights will chill the introduction of new innovations in music broadcasting and distribution. New businesses, digital or

⁵ 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 /](http://www.soundexchange.com/about/) (last visited Sep. 8, 2015).

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 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 Pandora 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 Pandora in a privileged position.

Pandora, and others with significant resources for litigation, will become the sole entities able to publicly perform older recordings under the newly-created right. If Pandora 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. Alternatively, the parties may establish an ongoing royalty under court supervision as an alternative to 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 and small retail businesses may have to cease performing pre-1972 recordings completely. 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 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 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

For the foregoing reasons, this Court should reverse the district court’s erroneous expansion of California copyright law.

Respectfully submitted,

Dated: September 9, 2015

By: /s/ Mitchell L. Stoltz
Mitchell L. Stoltz
Vera Ranieri
ELECTRONIC FRONTIER
FOUNDATION
815 Eddy Street
San Francisco, CA 94109
Telephone: (415) 436-9333
mitch@eff.org

*Counsel for Amicus Curiae Electronic
Frontier Foundation*

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE
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 Amici Curiae Electronic Frontier Foundation In Support of Defendant-Appellant complies with the type-volume limitation, because this brief contains 4,238 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 font in Times New Roman font.

Dated: September 9, 2015

By: /s/ Mitchell L. Stoltz
Mitchell L. Stoltz

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 Ninth Circuit by using the appellate CM/ECF system on September 9, 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: September 9, 2015

By: /s/ Mitchell L. Stoltz
Mitchell L. Stoltz