

No. 15-55287

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FLO & EDDIE, INC.,
Plaintiff-Appellee,

v.

PANDORA MEDIA, INC.,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
Case No. 14-cv-7648-PSG-RZ
Honorable Philip S. Gutierrez, District Judge

MOTION FOR LEAVE TO FILE *AMICUS* BRIEF OF THE
YALE LAW SCHOOL INFORMATION SOCIETY PROJECT AND
AFFILIATED SCHOLARS OF INTELLECTUAL PROPERTY AND
FREE EXPRESSION LAW IN SUPPORT OF DEFENDANT-
APPELLANT PANDORA MEDIA, INC.

BJ Ard
Jonathan Manes
INFORMATION SOCIETY
PROJECT, YALE LAW SCHOOL
P.O. Box 208215
New Haven, CT 06520
Tel: (203) 432-9387
Fax: (203) 432-3034

Attorneys for Amici Curiae

INTRODUCTION

Pursuant to Rule 29(b) of the Federal Rules of Appellate Procedure and Circuit Rule 29-3, the Yale Law School Information Society Project and affiliated scholars of intellectual property and free expression law request leave to file the accompanying *amicus curiae* brief in support of Appellant Pandora Media, Inc. Appellant consents to the filing of this brief. Appellee did not respond to counsel's requests for consent.

IDENTITY AND INTERESTS OF THE AMICI CURIAE

Amici curiae are the Information Society Project at the Yale Law School, and its affiliated scholars Jack Balkin, BJ Ard, Robert Heverly, Molly Land, and Christina Spiesel, each of whom researches, writes, or teaches about intellectual property and its interaction with the freedom of expression. The Information Society Project is an intellectual center addressing the implications of new information technologies for law and society, with a special interest in free speech, copyright, and media law and policy.

The Information Society Project and its affiliated scholars have participated as *amici curiae* in many appeals raising important issues of intellectual property, communications law, and free speech, including: *American Broadcasting Cos. v. Aereo*, 134 S. Ct. 2498 (2014); *Golan v.*

Holder, 132 S. Ct. 873 (2012); *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307 (2012); and *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

**THE AMICUS BRIEF OF THE INFORMATION SOCIETY PROJECT
AND AFFILIATED SCHOLARS WILL ASSIST THE COURT IN
ASSESSING THE FREE SPEECH IMPLICATIONS OF THIS CASE**

“The classic role of [an] *amicus curiae*” is to “assist[] in a case of general public interest, supplement[] the efforts of counsel, and draw the court’s attention to law that escaped consideration.” *Miller-Wohl Co. v. Comm’r of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982); *accord Funbus Sys., Inc. v Cal. Pub. Utils. Comm’n*, 801 F.2d 1120, 1125 (9th Cir. 1986). *Amicus* briefs are routinely accepted “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.” *Ryan v. Commodity Futures Trading Comm’n*, 125 F.3d 1062, 1064 (7th Cir. 1997). *See also 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.”); *Mass. Food Ass’n v. Mass. Alcoholic Beverages Control Comm’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 . . .”).

This *amicus curiae* brief makes a unique contribution to the appeal because it focuses in particular on the speech implications of the questions before this Court. Counsel understand that other individuals and organizations will submit briefs exploring distinct issues raised in this case, including the history of state copyright laws, the legislative history of California Civil Code Section 980(a)(2) (“Section 980(a)(2)”), and potential conflicts between this statute and the federal Copyright Act. The present brief, however, focuses squarely on the First Amendment conflict raised by the district court’s interpretation and the expressive harms the public would suffer if Section 980(a)(2) were construed to create expansive rights in pre-1972 sound recordings.

The Yale Law School Information Society Project and its affiliated scholars are uniquely situated to alert the Court to these free speech issues. In their research, writing, and teaching, *amici* examine the balance between the rights of authors to control their creative expression and the interests of the public in free expression. Drawing on this experience, *amici* submit this brief to urge the Court to take First Amendment and free-speech concerns into account when construing the scope of any copyright protections established by Section 980(a)(2).

For the foregoing reasons, *amici* respectfully ask the Court to grant their motion for leave to file the attached *amicus curiae* brief in this case.

Dated: September 9, 2015

Respectfully submitted,

s/ BJ Ard

BJ Ard

Jonathan Manes

INFORMATION SOCIETY

PROJECT, YALE LAW SCHOOL¹

P.O. Box 208215

New Haven, CT 06520

Tel: (203) 432-9387

Fax: (203) 432-3034

bj.ard@yale.edu

Attorneys for Amici Curiae

¹ This motion and the accompanying brief have been prepared and joined by an organization and individuals affiliated with Yale Law School, but they do not purport to present the school's institutional views, if any.

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BJ Ard
Jonathan Manes
INFORMATION SOCIETY
PROJECT, YALE LAW SCHOOL
P.O. Box 208215
New Haven, CT 06520
Tel: (203) 432-9387
Fax: (203) 432-3034

Attorneys for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

None of the *amici* has a parent corporation and no corporation owns 10% or more of any of the *amici*'s stock.

STATEMENT OF COMPLIANCE WITH RULE 29(c)(5)

Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amici* certify that no party's counsel authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting this brief, and no person—other than *amici*, their members, or their counsel—contributed money that was intended to fund preparing or submitting this brief.

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INTERESTS OF THE AMICI CURIAE

Amici curiae are the Information Society Project at the Yale Law School (“ISP”) and scholars affiliated with the ISP, each of whom researches, writes, or teaches about intellectual property and its intersections with free expression.¹ The ISP is an intellectual center addressing the implications of new information technologies for law and society, with a special interest in free speech, copyright, and media law and policy. *Amici* scholars are Jack M. Balkin, Knight Professor of Constitutional Law and the First Amendment at Yale Law School and founder and director of the ISP; BJ Ard, Ph.D. candidate in law at Yale Law School and ISP resident fellow; Robert Heverly, Associate Professor of Law at Albany Law School and ISP faculty affiliate fellow; Molly Land, Professor of Law and Human Rights at University of Connecticut School of Law and ISP faculty affiliate fellow; and Christina Spiesel, Senior Research Scholar in Law at Yale Law School, Adjunct Professor of Law at Quinnipiac University School of Law, and ISP faculty affiliate fellow.

¹ *Amici curiae* seek leave of the Court to file this brief pursuant to Federal Rule of Appellate Procedure 29(b). This brief has been prepared and joined by an organization and individuals affiliated with Yale Law School, and joined by individuals affiliated with Albany Law School, University of Connecticut School of Law, and Quinnipiac University School of Law, but it does not purport to present these school’s institutional views, if any. *Amici* scholars participate in this case in their personal capacity; titles are used for purposes of identification only.

Amici have no financial interest in the outcome of this litigation. Our interest is in respecting the balance between the rights of authors to control their creative expression and the public's interests in free expression. We urge the Court to consider both the First Amendment and the practical consequences for speech when construing state copyright law, and on the basis of these considerations we urge the Court to reject the district court's reading of California Civil Code Section 980(a)(2) insofar as it makes an unnecessary and unwarranted departure from copyright law's longstanding commitment to balancing authors' rights and the public's speech interests.

SUMMARY OF ARGUMENT

Copyright law seeks to maintain a balance between securing the rights of authors and protecting the public's interest in free expression. Providing authors with an unfettered right to prevent others from using creative works, including sound recordings, would burden all manner of valuable expression, including parodies and other social commentary as well as the mere distribution and preservation of existing works. Copyright law and, indeed, First Amendment law, has thus long placed limits on the monopoly granted to authors. The Appellee's interpretation of the California statute at issue here, apparently adopted by the district court, would effectively discard these limits and protections. *Amici* urge this Court to reverse the court below

and to adopt an interpretation of the statute that gives appropriate consideration to the public's interest in free expression.

This appeal concerns the scope of the “exclusive ownership” right set forth at California Civil Code Section 980(a)(2), specifically whether this provision creates an exclusive right to the public performance of sound recordings fixed prior to Feb. 15, 1972 (hereinafter “pre-1972 sound recordings”). This provision, which is the result of a 1982 amendment to the state copyright statute, does not define the scope of the “exclusive ownership” right, and it provides only one express limitation on its coverage—a carve-out allowing others to re-record their own “cover” version of a sound recording. Appellee argues that, by explicitly including only this one exception, the enacting legislature implicitly rejected all other limitations on the scope of copyright protection in sound recordings, particularly any limits enumerated in the federal Copyright Act. The district court appears to have agreed with this approach. It held that the statute grants a public performance right in pre-1972 sound recordings because—unlike the federal Copyright Act—the state law does not expressly deny this right. The district court's approach to the statute likewise appears to read out traditional defenses to copyright, such as the doctrines of fair use and first sale, because

they too are included in the federal act but not at section 980(a)(2). This reading of the statute should be rejected for two reasons:

First, the district court's interpretation presents a constitutional problem under the First Amendment. The Supreme Court has held that the First Amendment requires that copyright statutes respect the "traditional contours of copyright," particularly the doctrine of fair use and the dichotomy between ideas, which cannot be copyrighted, and expression, which can. These limits are necessary to vindicate core First Amendment rights to engage in commentary, debate, parody, knowledge-creation, and other essential forms of expression. But if the California statute is understood to exclude all limitations enumerated in the federal Copyright Act (except the right to make "cover" versions), then it will have rejected these doctrines and completely departed from copyright's traditional contours. Principles of constitutional avoidance counsel this Court to reject any approach to the statute that would set it so squarely in conflict with the First Amendment.

Second, the district court's interpretation of the statute would impose substantial burdens on free expression. The California statute, under the interpretation Appellee advances, creates an exclusive right to control performances of sound recordings that does not include the first-sale

doctrine, contains no statutory licensing mechanisms, and has no safe harbors for the activities of libraries and online service providers. Providing an unfettered monopoly in performances of pre-1972 sound recordings would impose substantial burdens on the enjoyment and proliferation of culture while securing few benefits to recording artists or the broader public. The retroactive recognition of these rights would, moreover, leave many old works orphaned without an identifiable owner and disrupt long-held reliance interests in the music industry and among creators of derivative works.

This Court can and should take account of the statute's speech implications in interpreting section 980(a)(2). The statute is ambiguous: the undefined "exclusive ownership" provision does not expressly say whether the statute conveys a public performance right, and it is unclear what sort of defenses and limitations apply to any rights created. Appellee's aggressive reading is subject to doubt, moreover, in light of the contemporaneous understandings of the statute demonstrated through industry conduct. Recording artists did not sue radio broadcasters following the 1982 amendment even though the exclusive performance right that Flo & Eddie allege would have rendered the continued broadcast of pre-1972 tracks unlawful without a license. Indeed, no sound recording owner appears to

have sued any radio broadcaster on this theory prior to Flo & Eddie's recent assertion of the performance right.

This Court is empowered in the face of ambiguity to consider extrinsic factors, including considerations of policy, to discern the legislature's intent. The Court should thus reject Appellee's interpretation both to avoid constitutional difficulties and to avoid significantly disrupting the public's ability to enjoy the vast catalogue of sound recordings published before 1972.

ARGUMENT

I. THE DISTRICT COURT'S INTERPRETATION OF SECTION 980(a)(2) CREATES UNNECESSARY CONFLICT WITH THE FIRST AMENDMENT

The interpretation of section 980(a)(2) adopted by the district court violates the First Amendment insofar as it discards constitutionally prescribed limits on copyright, including the doctrine of fair use and the distinction between ideas and expression. While the district court's principal holding is that the 1982 amendment to section 980 codified an exclusive right to publicly perform pre-1972 sound recordings, it also appears to have held that the only limit on this exclusive right is a single exception codified in the statute, which permits "cover" versions of a song. As the court asserted in a related opinion: "The California legislature was . . . likely

aware of [Congress’s] manner of excluding performance rights from sound recording ownership, *as well as other limitations* listed in the Federal Copyright Act, yet chose to incorporate only one exception into its revised § 980(a)(2).” *See Flo & Eddie Inc. v. Sirius XM Radio Inc.*, CV 13-5693, 2014 WL 4725382, at * 7 (C.D. Cal. Sept. 22, 2014) (emphasis added); *see also* ER at 8 (“[B]y finding it necessary to specify an excepted right to ownership in a sound recording, the legislature conveyed that limitations on ownership did not live within the concept itself, rather they required elucidation.”).²

By recognizing the statutorily enumerated exception for cover recordings as the only limitation on section 980(a)(2), the court below appears to have eliminated the traditional defense of fair use and the fundamental dichotomy between ideas, which are not subject to copyright, and expression, which is. But, as discussed presently, these limits are required by the First Amendment because they play a key role in reconciling the monopoly granted by copyright with the public’s free-speech interests. Any reading of section 980(a)(2) that omits these protections should be rejected due to the grave constitutional concerns it would raise. *See, e.g., In re Smith*, 42 Cal. 4th 1251, 1269 (2008) (“Our common practice is to ‘construe[] statutes, when reasonable, to avoid difficult constitutional

² The abbreviation “ER” refers to Appellant’s excerpts of record.

questions.”) (alteration in original) (citation omitted); *see also, e.g., Johnson v. United States*, 135 S. Ct. 2551, 2578 (2015) (“When a statute’s constitutionality is in doubt, we have an obligation to interpret the law, if possible, to avoid the constitutional problem.”).

A. The First Amendment Requires States To Respect the “Traditional Contours of Copyright Protection,” Including the Doctrine of Fair Use and the Idea/Expression Dichotomy

The First Amendment limits the scope of copyright protection. In particular, the Supreme Court has held that when legislative action “alter[s] the traditional contours of copyright protection,” it may run afoul of the Constitution’s protection of free speech. *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003); *accord Golan v. Holder*, 132 S. Ct. 873, 889-91 (2012). These “traditional contours” include the defense of fair use and the idea/expression dichotomy. These principles are codified in federal copyright law, thereby incorporating and addressing the First Amendment’s requirements where federal copyright governs. *Golan*, 132 S. Ct. at 889-91; 17 U.S.C. § 102(b), 107, 109. But a state-law copyright that omitted any one of these protections would be of dubious constitutionality.³

³ *See* 5 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright*, §19E.06[C][2][b] (Rev. Ed. 2015) (“The negative corollary [of *Golan*] is that a law that failed to respect ‘traditional contours’ would fall afoul of the First Amendment (or at least require the appropriate level of scrutiny

It is now well-established that the defense of fair use is not simply good policy, but one of the copyright regime’s “built-in First Amendment accommodations.” *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003); see *Golan*, 132 S. Ct. at 890; *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985). Fair use is a crucial protection for freedom of speech because it preserves the public’s right to use otherwise copyrighted work in a range of critical, transformative, and educational expression. In the absence of fair use protection, copyright would inhibit ““scholarship and comment,” “parody,” and other forms of expression vital to our democracy, including ““criticism . . . news reporting, and teaching.”” *Eldred*, 537 U.S. at 220 (quoting *Harper & Row*, 471 U.S. at 560). Accordingly, any law purporting to grant a copyright must recognize a fair use defense or risk violating the First Amendment.

Likewise, the Supreme Court has repeatedly indicated that the idea/expression dichotomy is prescribed by the First Amendment. This doctrine provides that copyright cannot be asserted to protect “ideas”

dictated by the capacious body of free speech jurisprudence.”); Neil Weinstock Netanel, *First Amendment Constraints on Copyright After Golan v. Holder*, 60 UCLA L. Rev. 1082, 1102-03 (2013) (“[A] Copyright Act amendment that simply eliminated or substantially weakened the First Amendment protections embodied in the idea/expression dichotomy or fair use defense as generally applied in copyright law would not withstand First Amendment scrutiny.”).

themselves, and only applies to author's "expression" thereof. "Due to this distinction, every idea, theory, and fact in a copyrighted work becomes instantly available for public exploitation at the moment of publication." *Eldred*, 537 U.S. at 219. As the Supreme Court explained in *Harper & Row*, the "idea/expression dichotomy strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression." *Harper & Row*. 471 U.S. at 556 (internal quotation marks omitted).

Without the idea/expression dichotomy, copyright would utterly thwart the development of knowledge and creativity by granting individual copyright-holders the exclusive right to control dissemination and use of ideas and facts themselves. That possibility is, of course, anathema to the principles of free speech embodied in the First Amendment. The idea/expression dichotomy respects copyright's aim of rewarding authors for original expression while at the same time leaving ideas to the public as material to fuel future creation. *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994); *see also Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349-50 (1991) ("To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work."). This principle has accordingly been a

fixture of copyright law since even before the Supreme Court’s decision in *Baker v. Selden*, where the Court held that the principle was such an “evident” part of copyright “that it require[d] hardly any argument to support it.” 101 U.S. 99, 102 (1879). A state copyright regime that fails to respect the idea/expression dichotomy thus raises grave constitutional problems.

B. This Court Should Reject Any Interpretation That Reads These Constitutional Requirements Out of the Statute

Section 980(a)(2) does not codify any of these constitutionally prescribed limits on copyright. It appears that the district court held that because the statute, by its terms, includes only a single exception, its silence with respect to all other limits recognized in federal copyright law means that the legislature intended for no such limits to exist. *See* ER at 8; *Flo & Eddie Inc. v. Sirius XM Radio Inc.*, CV 13-5693, 2014 WL 4725382, at * 7 (C.D. Cal. Sept. 22, 2014). This logic leads to the conclusion that the state statute omits the fair use defense because it does not include an analogue to the federal fair use provision codified at 17 U.S.C. § 107, and that it omits the idea/expression dichotomy because it does not include a provision like 17 U.S.C. § 102(b). Whether or not the district court’s interpretive methodology is sound on its own terms, it must be rejected as a matter of First Amendment law because it would utterly eliminate the traditional contours of copyright.

If the district court's apparent approach to section 980(a)(2) were entrenched, the consequences for free expression would be dire. Individuals seeking to comment on, parody, or criticize pre-1972 sound recordings would do so at their own risk because they would have no fair use doctrine to rely on. Without the guidance of the idea/expression dichotomy, moreover, users would have no reliable metric to delineate those expressive components of sound recordings protected by state copyright law from the ideas, facts, and tropes that they could freely use in the creation of new works.

The First Amendment does not allow this Court to endorse so sweeping a view of section 980(a)(2). And it is not at all clear that such a reading is required. In fact, district courts in this circuit have specifically contemplated fair use defenses to claims under section 980(a)(2). *See Kramer v. Thomas*, No. CV 05-8381, 2006 WL 4729242, at *12 (C.D. Cal. Sept. 28, 2006); *Bridge Publ'ns, Inc. v. Vien*, 827 F. Supp. 629 (S.D. Cal. 1993). This Court should make it unmistakably clear that traditional First Amendment limits on copyright apply to section 980(a)(2), even in the absence of a provision codifying them.

II. THE CREATION OF UNFETTERED OWNERSHIP RIGHTS IN SOUND RECORDINGS WOULD IMPOSE SUBSTANTIAL BURDENS ON EXPRESSION

The district court's ruling also imposes unnecessary burdens on free expression. Appellee's approach to interpreting the statute appears to discard traditional state-law protections such as the first sale doctrine, creating barriers to the circulation and preservation of existing works. The creation of new performance rights in the absence of any sort of statutory licensing scheme, moreover, threatens media diversity insofar as the regime would privilege established broadcasters, who have more negotiating power, at the expense of smaller firms and new entrants. The retroactive creation of performance rights over 40 years after these works were first recorded also gives rise to orphaned works, creates difficulties for important First Amendment institutions including libraries and online speech platforms, and disrupts significant reliance interests on the part of broadcasters and derivative-works creators. It is implausible to think the state legislature intended any of these results when it amended section 980 in 1982.

A. Discarding the First-Sale Doctrine for Sound-Recordings Would Impede the Proliferation of Culture and Ideas

The first sale doctrine has been a fixture of domestic copyright law for over 100 years. In *Bobbs-Merrill Co. v. Strauss*, the Supreme Court made clear that a copyright owner's exclusive distribution right does not restrict

the public’s right to re-sell or lend a lawfully acquired copy. *See* 210 U.S. 339 (1908); *see also* 17 U.S.C. § 109 (codifying this principle). It is this principle that allows used-record stores and libraries to distribute lawfully acquired phonorecords to the public. *See Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351, 1364 (2012) (recognizing the doctrine’s centrality for “libraries, used-book dealers, technology companies, consumer-goods retailers and museums”). These distribution channels play an important role in the proliferation of culture and ideas: the continued circulation of older works allows users to tap into our shared cultural heritage even after new copies are no longer in production. Secondhand markets and library lending likewise aid in the diffusion of culture by reducing the price that users must pay to explore new works.

First sale rights also existed under California law prior to the passage of the 1982 amendment. All protection under the old section 980 terminated once the sound recording was published, meaning that the owner would lose all further control over re-distribution. *See* Cal. Civ. Code § 983(a) (1949); *see also* 2 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 8C.02 (Rev. Ed. 2015) (“[G]enerally (although not necessarily) an initial sale constitutes a general publication, that in turn divests all common law rights.”). The state’s criminal copyright law—codified at Cal. Penal Code

Section 653h—likewise restricted its scope to unlawful copies and imposed no limits on a party’s re-distribution of a legally purchased copy.

Appellee’s approach to the statute would nonetheless read the first sale doctrine out of section 980(a)(2). Because first sale is expressly set forth at section 109 of the federal Copyright Act but not mentioned in the 1982 amendment, the thrust of Flo & Eddie’s interpretation is that the legislature implicitly rejected the defense. Such an outcome would impede the proliferation of cultural works. This interpretation is implausible, moreover, because it would lead to the absurd result of transforming every used-record store into a hotbed of piracy. *See People v. Jenkins*, 10 Cal. 4th 234 (1995) (instructing courts to “avoid an interpretation that would lead to absurd consequences”). The legislature cannot have intended to ruin the used-record market or to brand the multitude of honest citizens who frequented these stores as infringers. Any interpretation that reads the first sale doctrine out of the statute should therefore be rejected.

B. Performance Rights Unaccompanied by Statutory Licenses Would Reduce Diversity in Radio and Online Broadcasting

The creation of a new public performance right would require any party that wishes to broadcast sound recordings—from the largest radio station to the smallest online service—to negotiate a license with the owner

of the sound recording.⁴ Copyright owners could impose disadvantageous rates on would-be broadcasters with less negotiating power, or they could unilaterally refuse to license their works to innovative new streaming services.⁵ The result would be a system that privileged established incumbents over smaller operations and new entrants, promoting centralization rather than diversity in the media marketplace. *See* Kristelia A.

⁴ As terrestrial broadcasters, radio stations owe no royalties under federal copyright law for the public performance of any sound recording: Congress expressly limited performance rights in post-1972 sound recordings to digital transmission, exempting radio broadcasters. *See* Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336. Recognition of a public performance right under section 980 would therefore lead to an anomalous situation where terrestrial radio broadcasters would be required by state law to pay royalties on pre-1972 recordings by artists like The Turtles, but still exempt under federal law from paying royalties on newer recordings by artists like Taylor Swift and Jay Z. Sound recording owner ABS Entertainment, Inc. has seized on this implication and filed a series of class action suits alleging section 980 violations by radio broadcasters who play pre-1972 sound recordings. *See* Class Action Complaint, *ABS Entm't, Inc. v. Cumulus Media, Inc.*, No. 2:15-cv-6269 (C.D. Cal. Aug. 18, 2015) (alleging a violation of section 980 for both radio broadcast and digital transmission); Class Action Complaint, *ABS Entm't, Inc. v. CBS Corp.*, No. 2:15-cv-6257 (C.D. Cal. Aug. 17, 2015) (same); Class Action Complaint, *ABS Entm't, Inc. v. iHeartMedia, Inc.*, No. 2:15-cv-6252 (C.D. Cal. Aug. 17, 2015) (same).

⁵ These concerns are reflected in the history of music licensing for radio. ASCAP and BMI—two entities who handle licensing for the public performance of musical compositions (but not sound recordings)—were the target of Department of Justice antitrust actions for their anticompetitive licensing practices in the late 1930s and 1940s, and these actions culminated in consent decrees that remain in effect today. *See United States v. ASCAP*, No. 41-1395 (WCC), 2001 WL 1589999 (S.D.N.Y. June 11, 2001); *United States v. Broadcast Music, Inc.*, No. 64 CIV 3787, 1994 WL 901652 (S.D.N.Y. Nov. 18, 1994).

Garcia, *Penalty Default Licenses: A Case for Uncertainty*, 89 N.Y.U. L. Rev. 1117, 1136 (2014) (“In the absence of a statutory licensing regime, smaller, less powerful licensees could be denied access to a licensor’s intellectual property.”).

When Congress introduced digital performance rights in 1995, it accounted for these risks by simultaneously establishing a statutory licensing scheme for digital performances: 17 U.S.C. § 114 establishes mechanisms whereby non-interactive webcasters can avail themselves of common rates established by an administrative panel. Section 980(a)(2) cannot be read to establish any comparable licensing arrangement. Appellee’s reading of the statute would therefore give copyright owners unconstrained bargaining power in the licensing of older recordings. While overtly discriminatory practices might be regulated through antitrust lawsuits, the expense and uncertainty of this approach to music licensing would favor large incumbents with resources to mount a major legal challenge—including traditional radio broadcasters and perhaps well-funded online services like Apple’s new “Apple Music”—at the expense of new entrants, small players, and non-profit media operations.

C. Unfettered Ownership Rights Would Interfere with Libraries' and Archives' Efforts To Preserve and Share Our Cultural Heritage

Libraries and archives play an important cultural role beyond merely circulating existing works (as facilitated by the first sale doctrine, *see supra* Section II.A). They also advance our cultural heritage through preservation work, a task that involves the creation of archival copies and the creation of duplicates for circulation to the public when an original work is out of print, in fragile condition, or fixed in an obsolete recording format. Both federal and California law make allowances for these activities: section 108 of the Copyright Act sets forth a series of special privileges and immunities for libraries and archives, and the California criminal copyright statute provides express exemptions for certain educational and library uses, *see* Cal. Penal Code § 653h(h), and for archival by broadcasters, *see id.* § 653h(g).

Appellee's expansive reading of section 980(a)(2)—which has no express safe harbor for library and archival activities—therefore threatens to interfere with the preservation of our cultural heritage. These difficulties are compounded further to the extent that the statute is read to exclude fair use or the first sale principle, and to the extent it creates an orphaned works problem (*see infra* Section II.E). It is implausible that the state legislature would exempt libraries and archives from criminal liability for the

unlicensed duplication of sound recordings only to create implicit civil liability for the same sorts of preservation activities.

D. Unfettered Ownership Rights Would Interfere with Online Service Providers' Transmission of User Speech

The advent of the Internet and related digital communications technology has created unprecedented opportunities for citizens to express themselves. Historically, Internet communications have also created difficult questions of copyright liability. There was substantial uncertainty in the 1990s regarding whether online service providers—ranging from those who provided us with Internet service, to those that provided email, to those who hosted online message boards—were liable under contemporary copyright law for their users' infringement. *Compare, e.g., Playboy Enters., Inc. v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993) (holding that a service provider's ignorance of infringing activity was no defense to liability for users' posting of copyrighted pictures), *with Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc.*, 907 F. Supp. 1361, 1375 (N.D. Cal. 1995) (holding that an online service provider can be held liable only where it knowingly contributes to the infringing conduct). If a user uploaded a copyrighted audio file, then the online service could be implicated in the infringement insofar as its servers literally produced and distributed infringing copies. *See* Jane C. Ginsburg, *Putting Cars on the "Information*

Superhighway”: *Authors, Exploiters, and Copyright in Cyberspace*, 95 Colum. L. Rev. 1466, 1494 (1995).

If online service providers were saddled with liability for their users’ infringements, the result would be an Internet with fewer outlets for free expression. The regime might discourage providers from carrying users’ speech at all, pushing these services to provide only their own content or that which they had licensed. *See* Niva Elkin-Koren, *Copyright Law and Social Dialogue on the Information Superhighway: The Case Against Copyright Liability of Bulletin Board Operators*, 13 *Cardozo Arts & Ent. L.J.* 345, 406 (1995). Those services that allowed user speech would need to invade users’ privacy to carry out the unwieldy task of screening and filtering messages for potentially infringing materials. *See id.* at 404-07. This invasion could deter users from sending private messages that they would prefer third parties not read.

Imposing liability on these intermediaries would also push them to err on the side of censorship when there was any doubt as to whether a message conveyed infringing material. *See* Jack M. Balkin, *The Future of Free Expression in a Digital Age*, 36 *Pepp. L. Rev.* 427, 435 (2009) (“[I]ntermediary liability produces a phenomenon called collateral censorship: Threats of liability against Party A (the conduit or online service

provider) give them reasons to try to control or block the speech of party B (the online speaker).”). The private censor might, for example, be inclined to choose the safe path of simply prohibiting users from uploading sound recordings rather than analyze whether any particular file was subject to copyright protection or whether the user had engaged in fair use. *Cf.* Elkin-Koren, 13 *Cardozo Arts & Ent. L.J.* at 405-06 (describing the factual and legal complexity involved). Congress anticipated and countered these risks by enacting the section 512 “safe harbor” as part of the Digital Millennium Copyright Act (“DMCA”), insulating online service providers from paying any damages for their users’ infringement so long as they complied with the Act’s requirements, most notably its notice-and-takedown process. *See* 17 U.S.C. § 512.

Section 980(a)(2) provides no comparable safe harbor. Appellee’s expansive reading of the statute therefore creates potential liability for online service providers whenever a user copies or distributes a pre-1972 sound recording. *See* Register of Copyrights, *Federal Copyright Protection for Pre-1972 Sound Recordings* 131-32 (2011), available at <http://www.copyright.gov/docs/sound/pre-72-report.pdf> (concluding that the DMCA safe harbor does not apply to pre-1972 sound recordings); *UMG Recordings, Inc. v. Escape Media Group, Inc.*, 107 A.3d 51, 58-59 (N.Y.

App. Div. 2013) (same). *But see Capitol Records, Inc. v. MP3Tunes, LLC*, 821 F. Supp. 2d 627, 642 (S.D.N.Y. 2011) (reaching the opposite conclusion). This would put online service providers in the uncomfortable position they faced under federal law prior to the passage of the DMCA: to avoid liability they would need to either restrict users' communications or implement costly and invasive filtering mechanisms.

E. Retroactive Recognition of Performance Rights in Older Works Would Render Many of These Works Orphaned

An orphaned works problem arises when “the owner of a copyrighted work cannot be identified and located by someone who wishes to make use of the work in a manner that requires permission of the copyright owner,” which prevents follow-on uses of works. Register Of Copyrights, *Report On Orphan Works* 1 (2006), available at <http://www.copyright.gov/orphan/orphan-report-full.pdf>. Orphaned works create problems for the copyright regime because the inability to locate owners makes it difficult for would-be users to secure the rights to broadcast a work, to use it to create derivative works, or to duplicate it for preservation purposes. *See generally id.*; see also Register of Copyrights, *Report on Orphan Works and Mass Digitization* 2 (2015), available at <http://copyright.gov/orphan/reports/orphan-works2015.pdf> (noting that “anyone using an orphan work does so under a legal cloud” and “many will

choose to forego use of the work entirely rather than risk the prospect of expensive litigation”).

The rights that plaintiff-appellant seeks to establish would yield an orphaned works problem. At least 43 years have passed from the time pre-1972 works were first recorded to the present assertion of public performance rights. Given that copyright protection for sound recordings was not recognized in federal or state law at that time, it may often be unclear regarding whether contemporary contracts would have assigned these residual rights to the record label, the performing artists, or the recording engineer. Records of rights ownership, moreover, may simply have become lost or incomplete in the interim. The problem is particularly acute for obscure sound recordings that are no longer in commercial circulation, including non-music radio programming from the early twentieth century. *Cf.* H.R. Rep. 110-231, 110th Cong., 1st sess. (2008) (recognizing that the great majority of our nation’s audio, film, and video heritage sits deteriorating in archives).

Since many of these pre-1972 works will have no identifiable rights owner, the works will be held hostage by copyright—no longer commercially available but not available for future use. The resulting ambiguity of ownership would restrict socially beneficial expressive activity

not only by terrestrial and digital broadcasters, but also by creators who would incorporate earlier sound recordings into derivative works and the musical libraries, archives, and other types of memory institutions who make older works available for educational, scholarly, and creative purposes. *See* Jennifer Urban et al., *Report on Orphan Works Challenges for Libraries, Archives, and Other Memory Institutions* (2013), available at http://www.cmsimpact.org/sites/default/files/documents/report_on_orphan_works_challenges.pdf (explaining the challenges that orphaned works pose for digitization projects that would serve preservation and public-access goals). Rather than securing remuneration to recording artists, recognizing a public performance right may in many cases simply result in a loss of public access to the affected works.

F. Retroactive Recognition of New Sound-Recording Rights Would Disrupt the Reliance Interests of Those Who Use Pre-1972 Sound Recordings

Several industries have substantial reliance interests in the status quo regime, where pre-1972 sound recordings enjoy no exclusive performance right. Terrestrial and digital music broadcasters reasonably expect to be able to play pre-1972 tracks without fear of liability so long as they pay to license the underlying copyright in the music itself. Recognition of new

performance rights would give sound-recording owners the power to demand additional rents.

The situation is worse for creators who have already incorporated pre-1972 sound recordings into their own derivative works. Filmmakers who paid to license a musical composition, for example, reasonably expected that they could include older recordings in their film's soundtrack without fear of liability. Modern remix artists share the same expectations when they pay to sample from a pre-1972 track. To recognize a public performance right after the fact would be highly disruptive. Sound-recording owners could demand extortive royalties on the threat of enjoining the continued circulation of these already-completed works.

Congress has recognized the significance of these kinds of reliance interests, as it has demonstrated through its efforts to protect such interests each time it has expanded protection for sound recordings. When Congress first recognized a copyright interest for sound recordings in 1972, it expressly refused to protect works created prior to the effective date of the enacting legislation. Pub. L. No. 92-140, § 3, 85 Stat. 391, 392 (1971) (specifying that federal protection “shall apply only to sound recordings fixed, published, and copyrighted on and after the effective date of this Act”). In 1984, when Congress restricted the rental or lending of phonorecords, it

refused to recognize the new limitations on distribution for any work purchased prior to the legislation's effective date. Record Rental Amendment of 1984, Pub. L. No. 98-450, § 4(b), 98 Stat. 1727, 1728. And in 1995, when Congress recognized a public performance right in sound recordings, it extended these rights only to the new practice of digital audio transmission and in so doing refused to disrupt traditional radio broadcasters' longstanding reliance interests as an industry. *See* Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336.

The Uruguay Round Agreements Act (“URAA”)—which restored protection to foreign works that had fallen into the public domain, *see* Pub. L. No. 103-465, § 514, 108 Stat. 4809, 4976-81 (1994)—likewise demonstrated solicitude for parties' reliance interests. “Reliance parties” who had used or acquired a restored work prior to the enactment of the URAA could continue to exploit the work until the owner provided notice of its intent to enforce its restored right. 17 U.S.C. § 104A(c), (d)(2). Reliance parties who had incorporated a restored work into their own derivative work could continue exploiting the derivation so long as they paid “reasonable compensation” to the owner. *Id.* § 104A(d)(3).

To recognize a public performance right in section 980(a)(2) today would disrupt not only the reliance interests already formed at the time of its

enactment in 1982, but also the interests of innumerable reliance parties who have begun to utilize pre-1972 sound recordings in the three decades that have followed given the prevailing understanding that neither state nor federal law recognized a public performance right in these works. Congress's consistent solicitude in accommodating reliance parties suggests that the state legislature would likely have considered accommodations of its own if it understood the amendment to disrupt established reliance interests. Because Appellee's reading of the statute would disrupt the reliance interests of entire industries—even at the time of passage it would have created serious difficulties for radio broadcasters and for filmmakers who incorporated pre-1972 sound recordings into their soundtracks—the lack of such accommodations casts doubt on the proposition that the state legislature intended to enact expansive new performance rights.

III. THIS COURT CAN AND SHOULD CONSIDER THE PRACTICAL CONSEQUENCES FOR EXPRESSION WHEN INTERPRETING AN AMBIGUOUS STATUTE LIKE SECTION 980(a)(2)

Section 980(a)(2) is ambiguous on its face because it neither expressly includes nor excludes the public performance right that Appellee now asserts. *See Hughes v. Bd. of Architectural Exam'rs*, 17 Cal. 4th 763, 776 (1998) (“A statute is regarded ambiguous if it is capable of two constructions, both of

which are reasonable.”).⁶ Flo & Eddie’s suit therefore requires the Court to consider factors beyond the text to determine whether the legislature intended to create this new right. *See Hughes*, 17 Cal. 4th at 776. The statute likewise takes no express position on whether defenses and limitations such as fair use or first sale apply. This Court must therefore also decide whether the legislature’s intent is better effectuated by the implicit retention of these defenses or their implicit rejection.

Several canons of interpretation compel the Court to resolve these ambiguities against the Appellee’s aggressive reading of the statute. As noted above, the constitutional avoidance canon compels this Court to avoid interpretations that would be open to First Amendment challenge for discarding the traditional contours of copyright. *See supra* Part I; *see also In re Smith*, 42 Cal. 4th 1251, 1269 (2008) (invoking the avoidance canon).

⁶ This ambiguity is confirmed in the statute’s legislative history. The recognition of a public performance right in sound recordings in 1982 would have been unprecedented. Yet, as Appellant argues in its opening brief, the legislative history suggests that the state legislature meant only to “maintain” the rights and remedies in sound recordings that existed prior to the amendment. *See* Opening Brief at 20. The district court erred by attempting to construe “exclusive ownership” in a vacuum rather than by considering the scope of state copyright law as it existed prior to the 1982 amendment as a baseline for understanding the legislature’s meaning. *Cf. Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (“The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.”).

This Court also ought to resist interpretations that diverge sharply from contemporaneous understandings of the bill as evidenced by the conduct of the affected industries. *See People v. S. Pac. Co.*, 209 Cal. 578, 594-95 (1930) (“[A] contemporaneous interpretation long acquiesced in by all persons who could possibly have an interest in the matter, has been held to be sufficient to justify a court in resolving any doubt it might have as to the meaning of ambiguous language employed by the Legislature, in favor of sustaining such long unquestioned interpretation.”). The conspicuous lack of suits against radio broadcasters suggests that the interested parties in 1982 did not understand the amendment to create a public performance right.⁷ In similar fashion, the lack of suits against used-record stores belies the position that the legislature implicitly rejected the first sale doctrine and

⁷ If section 980 created an unfettered public performance right in pre-1972 sound recordings, then terrestrial radio broadcasters would have infringed this right whenever they played 1960s hits like The Turtles’ “Happy Together” without first obtaining a license for the sound recording. To be sure, Congress designed the federal regime so that only digital audio transmissions require a sound-recording license; terrestrial radio broadcasts are exempt under the Copyright Act. *See* 17 U.S.C. § 106(6); *see generally* Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336. But the California legislature in 1982 could not have drawn such a distinction because digital audio transmission did not yet exist. Because there are no reported cases of recording artists suing radio broadcasters immediately following the 1982 enactment—or indeed any time prior to Flo & Eddie’s assertion of an expansive performance right—the clear implication is that the contemporary recording artists whose interests were at stake did not recognize the 1982 act as creating an enforceable public performance right in their sound recordings.

other such unstated limits on “exclusive ownership.” This Court is also empowered to consider the policy concerns raised by Flo & Eddie’s interpretation, including the burdens that this reading of the statute would impose on the public’s interests in free expression. *See Coal. of Concerned Cmty’s., Inc. v. City of Los Angeles*, 34 Cal.4th 733, 737 (2004) (endorsing judicial recourse to extrinsic aids including considerations of “public policy”).

This would be a different case if the state legislature had clearly expressed an intent to create expansive public performance rights in sound recordings. Faced with a clearly worded statute, this Court would have no choice but to engage with difficult questions of the statute’s constitutionality under the First Amendment. *See supra* Part I. It would likewise be forced to confront several concerns beyond those raised in this brief: Reliance parties might be entitled to bring Fourteenth Amendment claims arguing a violation of due process following the disruption of their entitlements, *cf. Golan*, 132 S. Ct. at 892 n.33 (explaining that Congress perceived the Fifth Amendment’s takings clause as a potential check on its ability to restore protection to works in the public domain); 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 1.11 n.11 (Rev. Ed. 2015) (explaining that a “taking” at the state level may be cognizable as a Fourteenth Amendment

injury); and, as other scholars have argued, state performance rights might be preempted by the federal Copyright Act, given their potential conflict with the uniformity goals of the federal regime, or by the Dormant Commerce Clause, given their potential burden on interstate commerce. *See* Gary Pulsinelli, *Happy Together? The Uneasy Coexistence of Federal and State Protection for Sound Recordings*, 82 *Tenn. L. Rev.* 167, 204-35 (2014) (analyzing these issues by way of a proposed Tennessee law). In the face of ambiguity, however, the Court need not reach these questions. Indeed, each of these objections provides further reason to doubt that the state legislature intended to implement such drastic changes to the state copyright regime.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's decision. Appellee's reading of the statute, which the district court adopted, would unnecessarily cast aside copyright's longstanding speech protections and impose substantial new burdens on expressive activity without advancing the public's interests in the creation, distribution, or preservation of expressive works.

Dated: September 9, 2015

Respectfully submitted,

s/ BJ Ard

BJ Ard

Jonathan Manes

YALE INFORMATION SOCIETY
PROJECT, YALE LAW SCHOOL⁸

P.O. Box 208215

New Haven, CT 06520

Tel: (203) 432-9387

Fax: (203) 432-3034

bj.ard@yale.edu

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

This brief complies with the type-volume limitation of Rule 29(d) of the Federal Rules of Appellate Procedure because it is 6963 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type-style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2011, in 14-point Times New Roman font.

Dated: September 9, 2015

s/ BJ Ard _____

BJ Ard

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 Sept. 9, 2015.

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Dated: September 9, 2015

s/ BJ Ard _____

BJ Ard