

WE CAN WORK IT OUT: WHY FULL FEDERALIZATION
OF PRE-1972 SOUND RECORDINGS IS NECESSARY TO
CLARIFY AMBIGUOUS AND INCONSISTENT STATE
COPYRIGHT LAWS

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INTRODUCTION

Imagine the following narrative from the perspective of a musician. Visualize spending a great amount of time putting together your new album. After many months of writing and recording songs, your investment of talent, labor, time, and money pays off. You release the album and feel a great sense of accomplishment as it shoots up the popular music charts and becomes a new fan favorite.

Do not celebrate too quickly though, there is some bad news, too: if you had waited just *one more day* to release your album, you would be entitled to an entirely new, exponentially growing stream of royalties for your work. Due to inconsistencies in federal copyright laws, only sound recordings on albums released after February 15, 1972 receive protection under the federal copyright regime.¹ This federal protection can translate into the right to collect royalties from digital webcasters and satellite radio for playing your recordings, potentially totaling a huge sum of money.²

Recording artist Neil Young actually experienced this misfortune, as his hit record *Harvest* was released on February 14, 1972—one day before the effective date of federal copyright protection for sound recordings.³ This arbitrary cut-off date illustrates the inconsistency of federal copyright law for sound recordings and how it can impact musicians, copyright holders, and the businesses and individuals that wish to use this music.

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¹ *A Study on the Desirability of and Means for Bringing Sound Recordings Fixed Before February 15, 1972, Under Federal Jurisdiction*, COPYRIGHT.GOV, <http://copyright.gov/docs/sound/> (last visited Feb. 28, 2016).

² See *General FAQ*, SOUNDEXCHANGE, <http://www.soundexchange.com/generalfaq/> (last visited Feb. 28, 2016).

³ Julia Cook, *RESPECT Hearing Comes to Dubious Conclusion*, PASTE (June 25, 2014), <http://www.pastemagazine.com/articles/2014/06/congressional-hearing-comes-to-dubious-conclusion.html>.

This Comment details the history leading up to and the present state of the debate about state law protection for pre-1972 sound recordings in a nontechnical style intended to illuminate this issue for a broad audience.⁴ It then proposes that the most efficient solution to the problems posed is to bring these sound recordings exclusively under federal law. Part I of this Comment explores the purpose and history of U.S. copyright law and will explain why sound recordings have their own unique set of copyright regulations. Part II introduces SoundExchange, the performance rights organization that administers sound recording copyright royalties in the United States. Part III surveys pending legal actions in various states concerning the nonpayment of royalties for the use of pre-1972 sound recordings and the conflicting decisions that those courts have reached regarding whether a general public performance right exists for pre-1972 sound recordings in their respective jurisdictions.

Part IV uses these recent cases to explore issues caused by the dual system of state and federal copyright protection for sound recordings and recommends short-term and long-term measures needed to turn the current dual state-federal system into a uniform system of federal copyright law that improves clarity and consistency in the law. Even after the cases surveyed in this Comment are eventually all settled or resolved, as long as pre-1972 sound recordings remain under state and not federal law, countless similar claims are sure to be filed against businesses in different states in the future.

I. COPYRIGHT LAW FOR SOUND RECORDINGS IN THE UNITED STATES

U.S. copyright law reaches back to the foundation of the federal government. Article I of the U.S. Constitution provides Congress the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”⁵ This clause is typically referred to as either “the Copyright and Patent Clause” or “the Progress Clause.”⁶ Copyright law grants “a limited duration monopoly” to the owner of the copyright.⁷ This means that, generally, an artist who creates a copyrightable work is granted

⁴ For the purposes of this Comment, the term “pre-1972” specifically refers to before February 15, 1972. See 17 U.S.C. § 301(c) (2012).

⁵ U.S. CONST. art. I, § 8, cl. 8.

⁶ ROBERT BRAUNEIS & ROGER E. SCHECHTER, COPYRIGHT: A CONTEMPORARY APPROACH 2-3 (2012).

⁷ DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 209 (8th ed. 2012).

the exclusive right to use, display, play, copy, and make other creations based on the work for a set amount of time.⁸

According to the Copyright Clearance Center, a major international copyright clearinghouse, the purpose behind copyright is “to encourage the development of culture, science and innovations, while providing a financial benefit to copyright holders for their works, and to facilitate access to knowledge and entertainment for the public.”⁹ Copyright law is a complex area of law that, among other functions, provides protection to musical works created by artists in the United States.

A. *What Is a Sound Recording?*

Every musical track has two distinct layers of copyrightable material: (1) the musical composition and (2) the sound recording.¹⁰ The notes and lyrics of a song make up the musical composition.¹¹ The musical composition can be thought of as the parts of the song that would actually be written down on paper. A sound recording is a performance of a piece of music by a specific artist (or artists) that is captured at a certain point in time in an audio medium.¹² The sound recording can be thought of as the audible performance of the song by one artist or band, recorded at a specific moment, and fixed in a medium that allows it to be listened to or played repeatedly.¹³ The sound recording is an artist’s audible, recorded performance of a musical composition.

⁸ 17 U.S.C. § 106 (describing these five fundamental rights as “the exclusive rights of reproduction, adaptation, publication, performance, and display”); *see also* PASSMAN, *supra* note 7, at 209-12. It should be noted, however, that exceptions to this monopoly exist, such as the Fair Use defense and compulsory licenses. 17 U.S.C. §§ 107, 115.

⁹ *Purpose of Copyright*, COPYRIGHT CLEARANCE CENTER, https://www.copyright.com/content/cc3/en/toolbar/education/get-the-facts/purpose_of_copyright.html (last visited Feb. 28, 2016).

¹⁰ Matthew S. DelNero, *Long Overdue? An Exploration of the Status and Merit of a General Public Performance Right in Sound Recordings*, 51 J. COPYRIGHT SOC’Y U.S.A. 473, 476-77 (2004).

¹¹ Michael Huppe, “*You Don’t Know Me, But I Owe You Money*”: *How SoundExchange Is Changing the Game on Digital Royalties*, 28 ENT. & SPORTS LAW., no. 3, Fall 2010, at 3, 4.

¹² *See* 17 U.S.C. § 101 (defining sound recordings as “works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied”).

¹³ A fundamental concept of U.S. copyright law is the idea that a work must be “fixed” in order to receive protection. As defined in 17 U.S.C. § 101:

A work is “fixed” in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is ‘fixed’ for purposes of this title if a fixation of the work is being made simultaneously with its transmission.

Id.

B. *Federal Protection for Sound Recordings*

Although both the musical composition and the sound recording come from the same piece of music, these two elements are given different protections under federal copyright law.¹⁴ Musical compositions have a long history of legal rights, as they have been protected under federal law since 1831.¹⁵ However, in contrast to the protections enjoyed by musical compositions, sound recordings have a long history of not receiving copyright protection.¹⁶

While sound recordings are a newer invention than books or paintings, they have been in existence since at least 1860.¹⁷ In the lead up to what would become the Copyright Act of 1909,¹⁸ the newly burgeoning record industry began to lobby Congress to include sound recordings among the works protected by federal copyright law.¹⁹ This lobbying effort was cut short by a United States Supreme Court decision opposing the record industry's positions.²⁰

In 1908, the Supreme Court issued a decision in *White-Smith Music Publishing Co. v. Apollo Co.*,²¹ a case involving self-playing pianos.²² These mechanical pianos could read perforations in a "piano roll" and use these perforations to play music out loud without an individual pressing the piano's keys.²³ The Court held that these piano rolls did not infringe the rights of the musical composition owner in transcribing the music onto the piano roll because the piano rolls were unreadable by humans.²⁴ Because humans could not look at a piano roll and reproduce the music by translating the perforations on the rolls, as was possible with sheet music, the Court believed that reproducing a musical composition onto the roll in the form of perforations did not infringe the rights of the musical composition copyright holder.²⁵ The record industry realized the parallels between a self-playing piano reading a piano roll and a phonograph playing a sound recording un-

¹⁴ DelNero, *supra* note 10, at 483.

¹⁵ Leigh F. Gill et al., *Time to Face the Music: Current State and Federal Copyright Law Issues with Pre-1972 Sound Recordings*, LANDSLIDE, July-Aug. 2014, at 60, 60.

¹⁶ U.S. COPYRIGHT OFFICE, FEDERAL COPYRIGHT PROTECTION FOR PRE-1972 SOUND RECORDINGS 7 (2011) [hereinafter COPYRIGHT OFFICE REPORT], <http://www.copyright.gov/docs/sound/pre-72-report.pdf>.

¹⁷ *Id.* at 7 n.17.

¹⁸ Ch. 320, 35 Stat. 1075, *repealed by* Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended in scattered sections of 17, 18, and 44 U.S.C.).

¹⁹ COPYRIGHT OFFICE REPORT, *supra* note 16, at 7-8.

²⁰ *Id.* at 8.

²¹ 209 U.S. 1 (1908), *superseded by statute*, Copyright Act of 1976.

²² *Id.* at 8-9.

²³ *See Id.* at 9-10; COPYRIGHT OFFICE REPORT, *supra* note 16, at 8.

²⁴ *White-Smith*, 209 U.S. at 17-18.

²⁵ *Id.*

readable to humans and ceased lobbying to expand federal protection to sound recordings, as apparently the industry did not believe it would be granted copyright in sound recordings after *White-Smith*.²⁶

After the failure to include sound recordings in the 1909 Copyright Act, federal law did not recognize copyright in sound recordings until 1971, when Congress enacted the Sound Recordings Act of 1971.²⁷ The Sound Recordings Act amended the 1909 Copyright Act and was a direct response by Congress to the flourishing record and cassette piracy occurring in the United States.²⁸ The Act provided the exclusive right to owners of sound recordings to “reproduce and distribute to the public by sale or other transfer of ownership, or by rental, lease or lending, reproductions of the copyrighted work if it be a sound recording.”²⁹ Thus, the Sound Recordings Act outlawed unauthorized physical duplication of sound recordings, such as bootlegged records and cassette tapes.³⁰

Before the enactment of the Sound Recordings Act, federal law did not prohibit the duplication of a sound recording, as long as the musical composition owner—as distinct from the owner of the sound recording—granted permission to do so or was paid royalties for the use of the musical composition under a statutory license.³¹ Congress established this statutory license in response to fears that companies in the music industry owning copyright in music could exercise monopoly-like control over the use of music by others.³² The terms of this statutory license required copyright holders to license their songs to other individuals wishing to reproduce the songs as long as those deals met the specific criteria laid out in section 1(e) of the 1909 Copyright Act.³³ However, because there was no independent copyright in sound recordings, this statutory license system meant that an individual could duplicate an entire album just by paying statutory royalties to the musical composition copyright holder alone.³⁴

This apparent loophole in copyright law led to an explosion of unauthorized album replications by people seeking to profit from the mismatch

²⁶ See COPYRIGHT OFFICE REPORT, *supra* note 16, at 8.

²⁷ See Gill et al., *supra* note 15, at 60.

²⁸ H.R. REP. NO. 92-487, at 2 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1566, 1567 (1971).

²⁹ Gill et al., *supra* note 15, at 60 (quoting Sound Recordings Act, Pub. L. No. 92-140, sec. 1(a), § 1(f), 85 Stat. 391, 391 (1971), *repealed by* Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541). The force of this language is now captured in 17 U.S.C. § 106.

³⁰ For a discussion of the history leading to the creation of the Sound Recordings Act of 1971, see James H. Napper, III, *Life As Art: How Technology and the Infusion of Music into Daily Life Spurred the Sound Recordings Act of 1971*, 12 TUL. J. TECH. & INTELL. PROP. 161 (2009).

³¹ PASSMAN, *supra* note 7, at 335-37.

³² *Id.* at 212-13.

³³ See Copyright Act of 1909, ch. 320, § 1(e), 35 Stat. 1075, 1075-76, *repealed by* Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 254. The current mandatory licensing terms are listed in 117 U.S.C. § 115.

³⁴ PASSMAN, *supra* note 7, at 335-37.

in rights afforded to musical compositions and sound recordings.³⁵ When their sound recordings were used in these piracy schemes, performers were denied not only royalties, but also contributions to benefit plans such as pension and welfare funds.³⁶ Record and cassette piracy also caused the federal and state governments to lose tax revenues from legitimate sales.³⁷ This flourishing piracy industry helped prompt the creation of a copyright interest in sound recordings, enshrined in the Sound Recordings Act.³⁸

The Sound Recordings Act became effective on February 15, 1972.³⁹ While the Act did afford sound recording copyright holders more rights than ever before, it was only applicable going forward; works already recorded at the time of the enactment were not eligible for protection.⁴⁰ The statute had a hard cut-off date which left recordings made before February 15, 1972 outside the realm of the statute and, thus, unprotected by federal law.⁴¹

A few years after the Sound Recordings Act, Congress overhauled federal copyright law in the Copyright Act of 1976,⁴² specifically reinforcing the notion that federal copyright law does not protect sound recordings recorded prior to February 15, 1972.⁴³ While Congress desired to create a uniform system of copyright regulations under the 1976 Act by preempting most state copyright laws, it is unclear why the Act does not extend federal protections to pre-1972 sound recordings by preempting state laws covering pre-1972 sound recordings.⁴⁴

A report by the United States Copyright Office mentions two possible theories of why Congress instituted a dual system for sound recordings by applying state laws to pre-1972 recordings and federal laws to post-1972 recordings.⁴⁵ One possibility is that copyright protections introduced for new categories of works, such as photographs, have historically been ex-

³⁵ Unauthorized album duplication, also known as record piracy, developed into a “multimillion-dollar industry,” and these unauthorized manufacturers often used pirate terminology and symbols in their names and logos. *Id.* at 336.

³⁶ H.R. REP. NO. 92-487, at 2 (1971).

³⁷ *Id.* The House Report notes that music piracy revenue was estimated to exceed \$100 million per year, while legitimate cassette tape sales were generating \$300 million in revenue per year. *Id.*

³⁸ *Id.*

³⁹ Elizabeth Townsend Gard & Erin Anapol, *Federalizing Pre-1972 Sound Recordings: An Analysis of the Current Debate*, 15 TUL. J. TECH. & INTELL. PROP. 123, 131 (2012).

⁴⁰ Gill et al., *supra* note 15, at 60.

⁴¹ *Id.*

⁴² Pub. L. No. 94-553, 90 Stat. 2541.

⁴³ 17 U.S.C. § 301(c) (2012) (“[N]o sound recording fixed before February 15, 1972, shall be subject to copyright under this title before, on, or after February 15, 2067.”).

⁴⁴ COPYRIGHT OFFICE REPORT, *supra* note 16, at 14-17; see also Gary Pulsinelli, *Happy Together? The Uneasy Coexistence of Federal and State Protection for Sound Recordings*, 82 TENN. L. REV. 167, 173-74 & n.34 (2014) (“[T]he legislative history on this point is essentially nonexistent”).

⁴⁵ COPYRIGHT OFFICE REPORT, *supra* note 16, at 14-17.

tended only prospectively, and Congress was simply complying with precedent.⁴⁶

A second theory proposed in the Copyright Office's report about why pre-1972 sound recordings were not brought under federal protection is that Congress simply made a "mistake" by misinterpreting how the Copyright Act of 1976 would apply to sound recordings.⁴⁷ In 1975, the Department of Justice attended hearings on the 1976 Copyright Act and advised that bringing pre-1972 sound recordings under federal law would nullify antipiracy laws passed by states and result in a new wave of music piracy.⁴⁸ It appears that section 301(c) of that Act, exempting pre-1972 sound recordings from federal jurisdiction, was added as a result of the DOJ's concerns.⁴⁹

A third theory behind the failure to extend federal copyright protection to pre-1972 sound recordings is the introduction of termination rights in the 1976 Copyright Act.⁵⁰ Congress included a thirty-five-year termination right as an option for artists to recapture copyright in their works if they had assigned these rights to others.⁵¹ If federal copyright protection had been extended to all sound recordings, this termination right would then also apply to all sound recordings. If the termination right applied to all sound recordings, this would mean that some sound recordings would immediately be candidates for termination by their original artists.⁵² It is possible that the recording industry wanted to avoid immediate terminations of sound recording copyrights and persuaded Congress not to bring pre-1972 sound recordings under federal law, instead leaving them under the exclusive jurisdiction of state law.⁵³

However, there is still no consensus on exactly where some of the misunderstandings over the ramifications of the 1976 Copyright Act originated.⁵⁴ Extending the scope of federal copyright law to include pre-1972 sound recordings might invalidate state laws protecting those recordings, but it appears they would then be protected under the federal scheme of

⁴⁶ *Id.* at 16-17.

⁴⁷ *Id.* at 15.

⁴⁸ *Id.*

⁴⁹ *Id.* at 15-16. The Report also notes that the Recording Industry Association of America ("RIAA") and the U.S. Copyright Office supported the DOJ's views that bringing pre-1972 sound recordings into the federal scheme would make them vulnerable to bootlegging by invalidating state antipiracy laws. *Id.*

⁵⁰ Steve Gordon & Anjana Puri, *The Current State of Pre-1972 Sound Recordings: Recent Federal Court Decisions in California and New York Against Sirius XM Have Broader Implications Than Just Whether Satellite and Internet Radio Stations Must Pay for Pre-1972 Sound Recordings*, 4 N.Y.U. J. INTELL. PROP. & ENT. L. 336, 343 (2015).

⁵¹ 17 U.S.C. §304(c) (2012).

⁵² Gordon & Puri, *supra* note 50, at 343.

⁵³ *Id.*

⁵⁴ See COPYRIGHT OFFICE REPORT, *supra* note 16, at 17.

copyright law.⁵⁵ Regardless of its origination, this misunderstanding ultimately resulted in legislation that did not provide federal protection for pre-1972 sound recordings.

C. *State Law Protection for Sound Recordings*

While federal law does not protect these pre-1972 sound recordings, they can be given additional protection by state law.⁵⁶ In the 1973 case *Goldstein v. California*,⁵⁷ the Supreme Court affirmed states' ability to further protect sound recordings after a challenge to the constitutionality of California's antipiracy legislation.⁵⁸

While states are given direct jurisdiction over pre-1972 sound recordings, this does not mean that all states take advantage of this power.⁵⁹ State protection for pre-1972 sound recordings is uneven and inconsistent, as some states explicitly protect these recordings while others do not.⁶⁰ Some states have passed statutes dealing directly with the issue of pre-1972 sound recordings, while other states may protect sound recordings under misappropriation, conversion, or unfair competition.⁶¹ And yet, others may afford no rights at all to these pre-1972 sound recording copyright holders.⁶²

As an example of a state statute directly addressing the issue of sound recording copyright protection for pre-1972 works, the California legislature enacted California Civil Code section 980(a)(2) to cover these works. That provision states that

⁵⁵ *Id.* at 15-16 (citing 1 MELVIN B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.10[B], at 2-178.4 (2011)).

⁵⁶ Federal law will not preempt states wishing to protect pre-1972 sound recordings with additional legal remedies. Under 17 U.S.C. § 301(c), states are free to enact laws providing more protection than federal laws for pre-1972 sound recordings. The statute reads as follows:

With respect to sound recordings fixed before February 15, 1972, any rights or remedies under the common law or statutes of any State shall not be annulled or limited by this title until February 15, 2067. The preemptive provisions of subsection (a) shall apply to any such rights and remedies pertaining to any cause of action arising from undertakings commenced on and after February 15, 2067. Notwithstanding the provisions of section 303, no sound recording fixed before February 15, 1972, shall be subject to copyright under this title before, on, or after February 15, 2067.

17 U.S.C. § 301(c).

⁵⁷ 412 U.S. 546 (1973).

⁵⁸ *Id.* at 571 (discussing California's constitutional rights to enact protections for pre-1972 sound recordings and stating that these protections are not preempted by federal law).

⁵⁹ Eva E. Subotnik & June M. Besek, *Constitutional Obstacles? Reconsidering Copyright Protection for Pre-1972 Sound Recordings*, 37 COLUM. J.L. & ARTS 327, 331-32 (2014).

⁶⁰ *See id.* at 331-32 (summarizing problems posed by a system of state-by-state copyright protection, including the ambiguity created in states that do not explicitly protect pre-1972 sound recordings).

⁶¹ *Id.* at 331.

⁶² *See id.*; *see also* COPYRIGHT OFFICE REPORT, *supra* note 16, at 20-49 (discussing the differences in state laws and legal remedies regarding pre-1972 sound recording protection).

[t]he author of an original work of authorship consisting of a sound recording initially fixed prior to February 15, 1972, has an exclusive ownership therein until February 15, 2047, as against all persons except one who independently makes or duplicates another sound recording that does not directly or indirectly recapture the actual sounds fixed in such prior recording, but consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate the sounds contained in the prior sound recording.⁶³

This California statute provides “exclusive ownership” to pre-1972 sound recording owners, illustrating how a state can use the jurisdiction provided by the 1976 Copyright Act to enact broad protections for this set of works.⁶⁴

In contrast to the California statute establishing broad rights for the owner of a pre-1972 sound recording, North Carolina has a statute restricting the rights of pre-1972 sound recording copyright holders.⁶⁵ The North Carolina statute reads:

When any phonograph record or electrical transcription, upon which musical performances are embodied, is sold in commerce for use within this State, all asserted common-law rights to further restrict or to collect royalties on the commercial use made of such recorded performances by any person is hereby abrogated and expressly repealed. When such article or chattel has been sold in commerce, any asserted intangible rights shall be deemed to have passed to the purchaser upon the purchase of the chattel itself, and the right to further restrict the use made of phonograph records or electrical transcriptions, whose sole value is in their use, is hereby forbidden and abrogated.

Nothing in this section shall be deemed to deny the rights granted any person by the United States copyright laws. The sole intentment of this enactment is to abolish any common-law rights attaching to phonograph records and electrical transcriptions, whose sole value is in their use, and to forbid further restrictions of the collection of subsequent fees and royalties on phonograph records and electrical transcriptions by performers who were paid for the initial performance at the recording thereof.⁶⁶

The North Carolina statute explicitly restricts state rights afforded to pre-1972 sound recording copyright holders by extinguishing any common law protections that might exist for these pre-1972 sound recordings.⁶⁷ As interpreted by the U.S. Copyright Office, this North Carolina statute “denies any common law performance right in sound recordings.”⁶⁸ This statute restricts rights for pre-1972 sound recordings in North Carolina, although these rights exist under federal law for post-1972 recordings in the state.⁶⁹

Regardless of the scope of rights afforded to sound recordings by different states, under this current scheme of exclusive state law protection, all pre-1972 sound recordings will fall into the public domain on the same

⁶³ CAL. CIV. CODE § 980(a)(2) (West 2007).

⁶⁴ Sections III.A-C discuss § 980(a)(2) in much greater detail, but it is mentioned here to provide an introduction to state-specific copyright statutes.

⁶⁵ COPYRIGHT OFFICE REPORT, *supra* note 16, at 28-29.

⁶⁶ N.C. GEN. STAT. § 66-28 (2014).

⁶⁷ *Id.*

⁶⁸ COPYRIGHT OFFICE REPORT, *supra* note 16, at 29. The “public performance” right is explained in detail later in this Comment.

⁶⁹ N.C. GEN. STAT. § 66-28.

date.⁷⁰ On February 15, 2067, pre-1972 recordings will be brought under the federal copyright regime as prescribed by section 301(c) of the 1976 Copyright Act.⁷¹ When brought under federal law, the copyright in these sound recordings will expire, and all pre-1972 sound recordings will enter the public domain—on February 15, 2067.⁷²

D. *Sound Recordings and Their Limited Public Performance Right Under Federal Law*

In addition to lacking federal protection for sound recordings fixed before 1972, copyright owners of sound recordings do not receive the exclusive right to publicly perform their works under federal law.⁷³ This right to public performance has been detailed as a major dividing line between musical compositions and sound recordings.⁷⁴

The owner of a musical composition receives the exclusive right of public performance of the work.⁷⁵ This right to control the public performance of the work comes from 17 U.S.C. § 106(4), stating that “the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: . . . in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual

⁷⁰ When music or other works are not covered by copyright protection or the copyright protection covering a work expires, these works can be used for free by the public. PASSMAN, *supra* note 7, at 319. This selection of works not covered by copyright is referred to as the “public domain.” *Id.*

⁷¹ 17 U.S.C. § 301(c) (2012); *see also* COPYRIGHT OFFICE REPORT, *supra* note 16, at 5.

⁷² *See* 17 U.S.C. § 301(c). The copyright expiration date in 2067 is 95 years from 1972.

⁷³ *See id.* § 106(4).

⁷⁴ Rachael Stack, *Streaming into the Future: Why Legislation and Technology Have Opened Pandora’s Box for the Recording Industry and the Webcasting Services*, 13 J. MARSHALL REV. INTELL. PROP. L. 649, 653 (2014); *see also* 17 U.S.C. § 114(a) (“The exclusive rights of the owner of copyright in a sound recording are limited to the rights specified by clauses (1), (2), (3) and (6) of section 106, and do not include any right of performance under section 106(4).”). Subsection (b) elaborates:

The exclusive right of the owner of copyright in a sound recording under clause (1) of section 106 is limited to the right to duplicate the sound recording in the form of phonorecords or copies that directly or indirectly recapture the actual sounds fixed in the recording. The exclusive right of the owner of copyright in a sound recording under clause (2) of section 106 is limited to the right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality. The exclusive rights of the owner of copyright in a sound recording under clauses (1) and (2) of section 106 do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording. The exclusive rights of the owner of copyright in a sound recording under clauses (1), (2), and (3) of section 106 do not apply to sound recordings included in educational television and radio programs (as defined in section 397 of title 47) distributed or transmitted by or through public broadcasting entities (as defined by section 118 (f)): *Provided*, That copies or phonorecords of said programs are not commercially distributed by or through public broadcasting entities to the general public.

Id. § 114(b).

⁷⁵ DelNero, *supra* note 10, at 479.

works, to perform the copyrighted work publicly.”⁷⁶ This public performance right commonly includes broadcasts of musical compositions on the Internet, radio, and television, live performances, and transmitting these works in other places generally open to the public, such as bars, restaurants, and stadiums.⁷⁷ A public performance can be thought of as “playing” the work where additional people other than a few members of a group of family or friends would see or hear the work.

As opposed to the general public performance right afforded to musical compositions, the only public performance right that sound recordings receive is the exclusive right to perform the work on digital audio sources.⁷⁸ This limited digital public performance right for sound recordings was first enacted by Congress through the Digital Performance Right in Sound Recordings Act of 1995,⁷⁹ and later modified in 1998 by the Digital Millennium Copyright Act.⁸⁰ As stated in 17 U.S.C. § 106(6), the copyright holder of a sound recording exclusively owns a limited right “to perform the copyrighted work publicly by means of a digital audio transmission.”⁸¹

This limited right means that only sound recording copyright holders can authorize the performance, or transmission, of their sound recordings over digital audio sources, or else a statutory royalty must be paid to them.⁸² However, when sound recordings are performed through other mediums, such as terrestrial AM/FM radio, the sound recording copyright owner does not have the authority to revoke permission to perform the song or to request royalties for this performance because the sound recording copyright owner is not granted an enforceable right in any medium except for digital audio.⁸³

⁷⁶ 17 U.S.C. § 106(4). Section 101 clarifies the definition of public performance:

To perform or display a work “publicly” means—

(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or

(2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

Id. § 101.

⁷⁷ DelNero, *supra* note 10, at 479-80.

⁷⁸ Compare 17 U.S.C. § 106(4) (general right to perform musical “works” publicly), with *id.* § 106(6) (specific right to perform sound recordings via “digital audio transmission”).

⁷⁹ Pub. L. No. 104-39, 109 Stat. 336 (codified as amended at 17 U.S.C. §§ 101, 106, 114, 115 (2012)).

⁸⁰ Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified in scattered sections of 17 U.S.C.); see also *Laws and Regulations*, SOUNDEXCHANGE, <http://www.soundexchange.com/advocacy/federal-copyright-protection/regulations/> (last visited Mar. 14, 2016).

⁸¹ 17 U.S.C. § 106(6).

⁸² See *Id.*

⁸³ See 17 U.S.C. § 106(4), (6). There is a large body of literature devoted to the lack of a public performance right in sound recordings and whether that right should be established; however, that issue

II. SOUNDEXCHANGE AND THE WEBCASTERS: THE ADMINISTRATOR AND USERS OF THE COMPULSORY LICENSE FOR SOUND RECORDINGS

Sound recording copyright owners are entitled to the exclusive right of public performance over digital audio.⁸⁴ SoundExchange, a nonprofit performing rights organization (“PRO”),⁸⁵ was established to mediate the practical implications of this right.⁸⁶ The Copyright Act defines a “performing rights society” as “an association, corporation, or other entity that licenses the public performance of nondramatic musical works on behalf of copyright owners of such works.”⁸⁷

SoundExchange was first established in 2000 as a branch of the Recording Industry Association of America (“RIAA”).⁸⁸ The RIAA is the trade association representing the major record labels and distributors in the United States.⁸⁹ In September 2003, SoundExchange broke off from the RIAA and became an independent entity.⁹⁰ A board of directors oversees SoundExchange to monitor the activities and practices of the organization.⁹¹

SoundExchange has the authority to collect statutory royalties from digital noninteractive audio services using the statutory license defined in the Copyright Act.⁹² The statutory license administered by SoundExchange

is beyond the scope of this Comment to cover in detail. See DelNero, *supra* note 10, for an excellent and thoroughly researched exploration of the history and debate surrounding the lack of a public performance right for sound recordings in the United States.

⁸⁴ 17 U.S.C. § 106(6).

⁸⁵ The terms “performing rights organizations,” “performance rights organizations,” and “performing rights society” are all generally used interchangeably.

⁸⁶ See *General FAQ*, SOUNDEXCHANGE, <http://www.soundexchange.com/about/general-faq/> (last visited Mar. 14, 2016).

⁸⁷ 17 U.S.C. § 101. The statute notes that other PROs include “the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and SESAC, Inc.” *Id.*; see also *General FAQ*, SOUNDEXCHANGE, <http://www.soundexchange.com/about/general-faq/> (last visited Mar. 14, 2016) (explaining that these PROs administer different rights, as SoundExchange collects and distributes royalties for digital audio transmissions of sound recordings, while ASCAP, BMI, and SESAC administer royalties for musical compositions).

⁸⁸ Eric Blouw, *Just Asking for A Little “Respect”: Radio, Webcasting & the Sound Recording Performance Right*, 5 CYBARIS INTELL. PROP. L. REV. 353, 389-90 (2014).

⁸⁹ *About RIAA*, RECORDING INDUSTRY ASS’N AM., http://www.riaa.com/aboutus.php?content_selector=about-who-we-are-riaa (last visited Mar. 14, 2016).

⁹⁰ Peter DiCola & Matthew Sag, *An Information-Gathering Approach to Copyright Policy*, 34 CARDOZO L. REV. 173, 230 (2012).

⁹¹ Huppe, *supra* note 11, at 5 (explaining that the board governing SoundExchange is comprised of an equal proportion of musicians’ advocates and music label representatives from both small and large labels and that this balance of representatives is meant to ensure the organization acts in the collective interest of the members it pays royalties to).

⁹² See *General FAQ*, SOUNDEXCHANGE, <http://www.soundexchange.com/about/general-faq/> (last visited Mar. 14, 2016).

is codified in sections 112 and 114 of the Copyright Act.⁹³ As potentially prohibitively high transaction costs would exist if every digital webcaster were required to negotiate individual deals with every music copyright holder, Congress established a compulsory license to provide a method for webcasters and digital radio broadcasters to legally play music that they do not hold the rights to.⁹⁴ This compulsory license allows qualifying services to play any commercially released sound recording without the need for the recording copyright holder to expressly grant permission for the service to use the recording.⁹⁵

SoundExchange collects royalties from services using the compulsory license and distributes these funds to artists and copyright holders under a specific royalty breakdown: 50 percent of performance royalties are distributed to the copyright holder of the sound recording, 45 percent of performance royalties are distributed to the featured artist or artists, and the remaining 5 percent of performance royalties are distributed to nonfeatured artists via a fund for back-up vocalists, session musicians, and other non-prominent musicians who have contributed to the track.⁹⁶

Under the Copyright Act, there is a difference between royalty payments for interactive and noninteractive webcasting services.⁹⁷ Interactive

⁹³ Huppe, *supra* note 11, at 5; *see also* *Frequently Asked Questions*, U.S. COPYRIGHT OFF., <http://copyright.gov/licensing/faq.html> (last visited Mar. 14, 2016) (explaining that the terms “statutory” and “compulsory” are interchangeable when referring to licenses); *Laws and Regulations*, SOUNDEXCHANGE, <http://www.soundexchange.com/advocacy/federal-copyright-protection/regulations/> (last visited Mar. 14, 2016).

⁹⁴ *Licensing 101*, SOUNDEXCHANGE, <http://www.soundexchange.com/service-provider/licensing-101/> (last visited Mar. 14, 2016).

⁹⁵ Huppe, *supra* note 11, at 4-6.

⁹⁶ *About Digital Royalties*, SOUNDEXCHANGE, <http://www.soundexchange.com/artist-copyright-owner/digital-royalties/> (last visited Mar. 14, 2016); *see also* PASSMAN, *supra* note 7, at 147 (explaining (1) how SoundExchange’s unique system of royalties is beneficial to artists because a share of the royalties are paid directly to the performing artist or artists and cannot be claimed by the artist’s record label as repayment for advances and (2) that this system of “recoupment” is a common arrangement in the recording industry, where a record label provides funding up front to develop a recording artist and then claims any royalties earned by the artist until the advance is repaid); *SoundExchange Answers Questions We Have Received About Direct License Offers*, SOUNDEXCHANGE, <http://www.soundexchange.com/pr/statement-soundexchange-answers-to-questions-we-have-received-about-direct-license-offers/> (last visited Mar. 14, 2016) (noting that artists receive the 50 percent share of performance royalties from SoundExchange regardless of whether the artist owns the copyright to the master recordings).

⁹⁷ An “interactive service” is defined in the Copyright Act as a service

that enables a member of the public to receive a transmission of a program specially created for the recipient, or on request, a transmission of a particular sound recording, whether or not as part of a program, which is selected by or on behalf of the recipient. The ability of individuals to request that particular sound recordings be performed for reception by the public at large, or in the case of a subscription service, by all subscribers of the service, does not make a service interactive, if the programming on each channel of the service does not substantially consist of sound recordings that are performed within 1 hour of the request or at a time designated by either the transmitting entity or the individual making such request. If an entity

services are not eligible to use the statutory license administered by SoundExchange.⁹⁸ The Copyright Act does not define “noninteractive services” but they can be loosely described as those digital streaming services that act like traditional terrestrial radio in the sense that the user does not exert much control over the music played by the service.⁹⁹ According to SoundExchange, to qualify as a noninteractive webcasting service, generally “the users may not choose the specific track or artist they wish to hear, but are provided a pre-programmed or semi-random combination of tracks, the specific selection and order of which remain unknown to the listener (i.e. no pre-published playlist).”¹⁰⁰ Noninteractive services using the compulsory license to stream music include satellite radio broadcaster Sirius XM and webcaster Pandora.¹⁰¹

Although it was established only fifteen years ago, SoundExchange has continually paid out more money each year, as the growing popularity of digital audio leads to increasing digital music royalties.¹⁰² In 2013, SoundExchange distributed \$590 million in royalty payments to musicians and record labels.¹⁰³ These sound recording royalties made up 8.4 percent of all music industry revenue in the United States that year.¹⁰⁴ SoundExchange’s role in collecting and distributing royalties to artists and rights holders makes the organization a major player in the current debate over sound recording copyright protection.

offers both interactive and noninteractive services (either concurrently or at different times), the noninteractive component shall not be treated as part of an interactive service.

17 U.S.C. § 114(j)(7).

⁹⁸ See *Arista Records, LLC v. Launch Media, Inc.*, 578 F.3d 148, 150-51 (2d Cir. 2009) (discussing the differences between interactive and noninteractive services and the licensing requirements of each).

⁹⁹ PASSMAN, *supra* note 7, at 323.

¹⁰⁰ *Licensing 101*, *supra* note 94.

¹⁰¹ *Services That Have Paid SoundExchange Through Q3 2014*, SOUNDEXCHANGE, <http://www.soundexchange.com/wp-content/uploads/2014/11/2014-Q3-Licensee-Count-10-05-2014.pdf> (last visited Mar. 14, 2016). For documents listing the services that submit royalties to SoundExchange, as well as royalty statistics, financial reports, and annual reviews of the organization, see *Facts & Figures*, SOUNDEXCHANGE, <http://www.soundexchange.com/about/our-work/facts-figures/> (last visited Mar. 14, 2016).

¹⁰² *Digital Radio Report Q3 2014*, SOUNDEXCHANGE, <http://digitalradioreport2014q3.soundexchange.com/> (last visited Mar. 14, 2016). This report notes that SoundExchange paid \$267 million in royalties during the third quarter of 2014, the largest quarterly payment in history. *Id.* In the third quarter of 2013, SoundExchange paid out \$153.7 million in royalties. *Id.* Comparing the same quarters in two subsequent years, royalty payments increased 74 percent year-over-year from the third quarter of 2013 to the third quarter of 2014. *Id.*

¹⁰³ *Id.* In 2013, SoundExchange distributed \$590.4 million in royalties. *Id.* Accounting only for January through September of 2014, SoundExchange has distributed \$590.6 million in royalties. *Id.* This figure surpasses the total royalties distributed for the previous year in nine months. *Id.*

¹⁰⁴ *SoundExchange Represents 8.4% of Total U.S. Music Industry Revenues*, SOUNDEXCHANGE (Mar. 18, 2014), <http://www.soundexchange.com/soundexchange-represents-8-4-of-total-u-s-music-industry-revenues/> (stating that music industry revenues totaled \$7 billion in the United States in 2013).

III. PENDING CASES

Recently, lawsuits have been filed against satellite radio broadcaster Sirius XM for failing to pay royalties to either SoundExchange or directly to the sound recording copyright holder for the use of pre-1972 sound recordings. At first, these cases seemed focused on the relatively narrow issue of withholding digital music royalties for the use of pre-1972 sound recordings.

However, it soon became clear that an opinion and a ruling issued by two California courts—in *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*¹⁰⁵ and *Capitol Records, LLC v. Sirius XM Radio, Inc.*¹⁰⁶ respectively—could have wide-ranging and unprecedented implications, as both courts suggest that a general public performance right exists for pre-1972 sound recordings under California state law. This general public performance right in sound recordings has never before been recognized in any state, nor on the federal level. These recent cases suggesting a general public performance right—only for the narrow category of sound recordings fixed before February 15, 1972 and used in the state of California—highlight the need for a standardized, federal system of sound recording rights in order to reduce uncertainty and provide consistency in copyright law nationwide.

A. *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*

In 1971, two founding members from the 1960s band The Turtles created the corporation Flo & Eddie, Inc. (“Flo & Eddie”).¹⁰⁷ Under leadership of these two musicians, Howard Kaylan and Mark Volman, Flo & Eddie filed suit against Sirius XM in California state court on August 1, 2013; Sirius XM removed the action to federal district court five days later.¹⁰⁸ Flo & Eddie’s claim was premised on the nonpayment of royalties, as Sirius XM has broadcast The Turtles’ pre-1972 sound recordings without permission from Flo & Eddie, and without paying royalties to the group via

¹⁰⁵ No. CV13-5693 PSG (RZx), 2014 WL 4725382 (C.D. Cal. Sept. 22, 2014).

¹⁰⁶ Ruling Granting Plaintiff’s Motion for Jury Instruction, *Capitol Records, LLC v. Sirius XM Radio, Inc.*, No. BC520981 (Cal. Super. Ct. Oct. 14, 2014) [hereinafter Ruling on Capital Records’ Motion for Jury Instruction], 2014 WL 7387972.

¹⁰⁷ *Flo & Eddie*, 2014 WL 4725382, at *1. The Turtles’ song “Happy Together” was a hit in the 1960s. *Id.*

¹⁰⁸ Defendant Sirius XM Radio Inc.’s Notice of Removal, *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, No. CV13-5693 (C.D. Cal. Aug. 6, 2013). The original state complaint is available at <http://www.lommen.com/pdf/SXSW-2014/CA-Flo-Eddie-v-Sirius-XM-Radio.aspx>. Flo & Eddie have also filed similar lawsuits in New York and Florida. Austin Siegemund-Broka, *Sirius XM Has Good Week in Important Legal Battle over Pre-1972 Music*, HOLLYWOOD REP. (Aug. 28, 2014), <http://www.hollywoodreporter.com/thr-esq/siriusxm-has-good-week-important-728643>.

SoundExchange.¹⁰⁹ Because Sirius XM does not pay royalties to SoundExchange when it plays music by The Turtles, it cannot take advantage of the compulsory license provisions offered by SoundExchange under sections 112 and 114 of the Copyright Act.¹¹⁰

Flo & Eddie's situation is somewhat unusual for the music industry, in which record labels are the typical owners of the master performances of songs, because Flo & Eddie actually owns the rights to its master recordings.¹¹¹ Flo & Eddie gained these rights when The Turtles' old record label, White Whale, declared bankruptcy and Flo & Eddie bought back the rights to the master recordings as well as the right to use the name "The Turtles."¹¹² Flo & Eddie alleged that Sirius XM was transmitting sound recordings by The Turtles to Sirius XM listeners without paying royalties for the use of these recordings, therefore violating Flo & Eddie's exclusive right to public performance of these recordings under the California statute.¹¹³

In its complaint, Flo & Eddie specifically pleaded conversion, misappropriation, unfair competition, and violation of California Civil Code section 980(a)(2).¹¹⁴ Flo & Eddie eventually moved for summary judgment, arguing that Sirius XM was liable for copyright infringement for two unauthorized uses of its sound recordings: "(1) *publicly performing* Flo & Eddie's recordings by broadcasting and streaming the content to end consumers and to secondary delivery and broadcast partners, and (2) *reproducing* Flo & Eddie's recordings in the process of operating its satellite and Internet radio services."¹¹⁵

¹⁰⁹ See *Flo & Eddie*, 2014 WL 4725382, at *2.

¹¹⁰ *Licensing 101*, *supra* note 94 (explaining the steps a webcaster must take to qualify for a statutory license); cf. *Non-Waiver of Rights*, SOUNDEXCHANGE, <http://www.soundexchange.com/non-waiver-of-rights/> (last visited Mar. 14, 2016) (clarifying that SoundExchange does not certify services as eligible to take advantage of the statutory license, or as operating in compliance with the statutory license terms, and that sending payments to SoundExchange does not by itself verify a service to be in compliance with the law or protect a service from liability).

¹¹¹ Les Black, *Happy Together? 7 Things You Need to Know About Flo & Eddie Inc. v. Sirius XM Radio Inc.*, ROCK AROUND THE WEB (Sept. 25, 2014), <http://rockaroundtheweb.com/tag/flo-eddie/>.

¹¹² *Id.*

¹¹³ Complaint at 1, *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, BC517032 (Cal. Super. Ct. Aug. 1, 2013), <http://www.lommen.com/pdf/SXSW-2014/CA-Flo-Eddie-v-Sirius-XM-Radio.aspx>. This complaint was attached as "Appendix A" to Sirius XM's Notice of Removal.

¹¹⁴ *Id.* at 7-10.

¹¹⁵ *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, No. CV13-5693 PSG (RZx), 2014 WL 4725382, at *3 (C.D. Cal. Sept. 22, 2014). While the issue of "reproducing" the master recordings is an important factor, it is not the focus of this Comment and will not be addressed in detail. Section 106(1) defines the reproduction right as the exclusive right of the copyright owner to "reproduce the copyrighted work in copies or phonorecords." 17 U.S.C. § 106(1) (2012). Further, the Copyright Act defines "copies" as "material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." *Id.* § 101.

On September 22, 2014, Judge Gutierrez of the U.S. District Court for the Central District of California issued an order granting Flo & Eddie's motion for summary judgment on the issue of public performance.¹¹⁶ The court examined the issue of public performance of sound recordings under California law because there is currently no federal protection for pre-1972 sound recordings, emphasizing that pre-1972 sound recording copyright regulation is exclusively within the jurisdiction of the states.¹¹⁷

As owner of the master recordings of its songs, Flo & Eddie sued under California Civil Code section 980(a)(2).¹¹⁸ Section 980(a)(2) states:

The author of an original work of authorship consisting of a sound recording initially fixed prior to February 15, 1972, has an exclusive ownership therein until February 15, 2047, as against all persons except one who independently makes or duplicates another sound recording that does not directly or indirectly recapture the actual sounds fixed in such prior recording, but consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate the sounds contained in the prior sound recording.¹¹⁹

The exception listed in the statute deals with artists who perform a cover of a sound recording and expressly does not include the performance of a cover version of an original work of authorship.¹²⁰

The court reasoned that “the crucial point of statutory interpretation for this case is whether ‘exclusive ownership’ of a sound recording carries within it the exclusive right to publicly perform the recording.”¹²¹ The court explored the meaning of the California statute by examining the plain meaning of the phrase through dictionary definitions, textual construction, and linguistic canons.¹²² Ultimately, it concluded that, by mentioning only one exception to “exclusive ownership” in the ability to make cover versions, the legislature did not intend for any other exceptions to apply.¹²³ Because the legislature demonstrated that it knew how to include exceptions in the statute, the court reasoned that the legislature did not intend to create any other exceptions on the assumption that any intended exceptions would have also been included in the statute.¹²⁴ Therefore, if the right of public performance were to be excluded from the “exclusive ownership” under the statute, the legislature would have made this explicit.¹²⁵

¹¹⁶ *Flo & Eddie*, 2014 WL 4725382, at *12.

¹¹⁷ *Id.* at *3 (quoting 17 U.S.C. § 301(c)).

¹¹⁸ Complaint, *supra* note 113, at 7.

¹¹⁹ CAL. CIV. CODE § 980(a)(2) (West 2007).

¹²⁰ *Flo & Eddie*, 2014 WL 4725382, at *5.

¹²¹ *Id.* at *4 (quoting CAL. CIV. CODE § 980(a)(2)).

¹²² *Id.* at *4-6.

¹²³ *Id.* at *5 (quoting CAL. CIV. CODE § 980(a)(2)).

¹²⁴ *Id.*

¹²⁵ *Id.*

Conversely, Sirius XM argued that the right to publicly perform must not exist because it was not specifically enumerated in the statute and has not been affirmed by a California court.¹²⁶ Sirius XM's legal argument was premised on the theory that the right to publicly perform pre-1972 sound recordings does not exclusively belong to the owner of the sound recording.¹²⁷ As Sirius XM argued that pre-1972 sound recordings do not receive public performance protection under the law, the company did not find it necessary to deny that it does regularly play The Turtles' songs over its satellite radio channels.¹²⁸

In response to this argument, the court noted that "Sirius XM [could not] point to a single case in which a judge considered facts implicating this right or even theorized on the right then decided that the right of public performance does not attach to ownership of sound recordings in California."¹²⁹ In other words, just because a California court has never expressly affirmed a general public performance right in sound recordings in a ruling does not mean that this right does not exist.¹³⁰

Next, the court explored two previous cases in which the right of public performance under section 980(a)(2) had been discussed and decided that these cases implied a right of public performance.¹³¹ The court then assessed Sirius XM's arguments against a public performance right and stated that, while there are not many cases addressing the right of public performance in a sound recording, "[Sirius XM] has not directed the Court to a single case cutting against the right to public performance, even implicitly or in dicta."¹³² Accordingly, the court granted Flo & Eddie's motion for summary judgment on Sirius XM's liability for copyright infringement under section 980(a)(2).¹³³

The court next assessed the other charges against Sirius XM.¹³⁴ Regarding Sirius XM's liability under California's unfair competition stat-

¹²⁶ *Flo & Eddie*, 2014 WL 4725382, at *5-7.

¹²⁷ *Id.*

¹²⁸ *Id.* at *3.

¹²⁹ *Id.* at *6.

¹³⁰ *See Id.*

¹³¹ *Id.* at *7-8. The court first discussed *Capitol Records, LLC v. BlueBeat, Inc.*, 765 F. Supp. 2d. 1198 (C.D. Cal. 2010), and its treatment of section 980(a)(2), suggesting that the court in that case "interpreted 'exclusive ownership' under the statute's text to include the right of public performance so unambiguously that the issue did not even warrant analysis beyond repeating the statutory language." *Id.* at *7 (citing *Capitol Records*, 765 F. Supp. 2d. at 1205). The court also discussed *Bagdasarian Productions, LLC v. Capitol Records, Inc.*, 2010 WL 3245795 (Cal. Ct. App. Aug. 18, 2010), which interpreted a contract dispute under California copyright law, stating that, "[b]y mentioning public performance as an example of a property right that Plaintiff had not transferred to Defendant, the court conveyed that a sound recording owner's bundle of intellectual property rights included the exclusive right to publicly perform the recording." *Id.* at *8 (citing *Bagdasarian Prods.*, 2010 WL 3245795, at *11)

¹³² *Flo & Eddie*, 2014 WL 4725382, at *8.

¹³³ *Id.* at *9.

¹³⁴ *Id.* at *9-11.

ute,¹³⁵ the court found that Sirius XM had violated this law by causing economic harm to Flo & Eddie in its unauthorized use of the group's sound recordings.¹³⁶ The court also found Sirius XM liable for conversion of Flo & Eddie's sound recordings by playing the recordings without paying license fees.¹³⁷ Finally, the court found that, by purchasing one copy of each sound recording by The Turtles and playing it "as often as it wishes without paying any additional licensing or royalty fees," Sirius XM was liable for misappropriation of Flo & Eddie's sound recordings.¹³⁸ While these claims of unfair competition, conversion, and misappropriation are secondary in importance to the liability for public performance, these legal theories serve as other important examples of how state law can protect pre-1972 sound recordings.¹³⁹

Flo & Eddie is groundbreaking in that it seemingly establishes a general public performance right for pre-1972 sound recordings in the state of California.¹⁴⁰ By granting Flo & Eddie's motion for summary judgment for copyright infringement as a result of unauthorized public performance of its sound recordings, the court explicitly confirmed that a new category of right exists in the scheme of copyright law in California for owners of pre-1972 sound recordings. The permanence of this new right remains to be seen, however, as Sirius XM has since appealed the ruling to the U.S. Court of Appeals for the Ninth Circuit.¹⁴¹

B. *Capitol Records, LLC v. Sirius XM Radio, Inc.*

At the same time that *Flo & Eddie* was being litigated in federal court in Los Angeles, another case against Sirius XM was proceeding in California state court.¹⁴² In *Capitol Records, LLC v. Sirius XM Radio, Inc.*, multiple major record labels ("the record labels") alleged that Sirius XM infringed the record labels' rights by broadcasting pre-1972 sound recordings without paying royalties.¹⁴³

¹³⁵ CAL. BUS. & PROF. CODE § 17200 (West 2007).

¹³⁶ *Flo & Eddie*, 2014 WL 4725382, *10-11.

¹³⁷ *Id.* at *11.

¹³⁸ *Id.*

¹³⁹ *Id.* at *10-11.

¹⁴⁰ See Gordon & Puri, *supra* note 50, at 345.

¹⁴¹ See Bill Donahue, *Judge Hits Pause On Pre-1972 Case For 9th Circ. Appeal*, LAW360 (June 9, 2015, 1:36 PM), <http://www.law360.com/articles/665388/judge-hits-pause-on-pre-1972-case-for-9th-circ-appeal>.

¹⁴² *Second California Court Rules in Favor of Pre-1972 Public Performance Royalties*, WASH. INTERNET DAILY, Oct. 17, 2014, Lexis Advance [hereinafter *Second California Court*].

¹⁴³ Ruling on Capitol Records' Motion for Jury Instruction, *supra* note 106, at 2. Plaintiffs included Capitol Records, Sony Music Entertainment, UMG Recordings, Warner Music Group, and Abkco Music & Records, all of which own pre-1972 recordings. *Id.*

In August 2014, Judge Strobel of the Los Angeles Superior Court issued a tentative ruling indicating that she was not persuaded by the record labels' arguments that California law protected pre-1972 sound recordings.¹⁴⁴ However, shortly thereafter, the U.S. District Court for the Central District of California issued its decision in *Flo & Eddie*, declaring that section 980(a)(2) afforded the exclusive right of public performance to pre-1972 sound recording copyright holders.¹⁴⁵

The record labels then petitioned the California state court to take notice of the federal court's ruling in *Flo & Eddie*.¹⁴⁶ The *Flo & Eddie* decision led Judge Strobel to reconsider her tentative ruling in light of this new authority, noting that “[w]hile a federal trial court opinion is not binding on this court, the court finds the logic applied in that order interpreting Civil Code § 980 to be persuasive.”¹⁴⁷ On October 14, 2014, Judge Strobel issued a new decision affirming the record labels' proposed jury instructions, which specified that “exclusive ownership” under section 980(a)(2) includes the right to public performance.¹⁴⁸ In reaching its decision, the court decided the statute's application to public performance rights was ambiguous, and it decided to examine the legislative intent behind the statute.¹⁴⁹ In interpreting legislative history and intent, the court noted that the California legislature adopted section 980(a)(2) in 1982 “in light of, and with knowledge of how Congress had chosen to treat rights in sound recordings post-1972.”¹⁵⁰

Section 980(a)(2) contains only one exception to “exclusive ownership” in the right of noncopyright holders to make cover songs, an exclusion similar to the exception for covers found in section 114(b) of federal Copyright Act.¹⁵¹ The court reasoned that, in adopting only one of the exceptions found in the federal Copyright Act, the California legislature was deliberate in not adopting the federal exception for public performance rights.¹⁵² The court concluded that, by explicitly including only one excep-

¹⁴⁴ Siegemund-Broka, *supra* note 108.

¹⁴⁵ *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, No. CV13-5693 PSG (RZx), 2014 WL 4725382, at *5-7 (C.D. Cal. Sept. 22, 2014).

¹⁴⁶ Ruling on Capital Records' Motion for Jury Instruction, *supra* note 106, at 1.

¹⁴⁷ *Id.* at 4.

¹⁴⁸ *Id.* at 1-2. The plaintiffs' proposed jury instructions stated:

The owner of a sound recording “fixed” (*i.e.*, recorded) prior to February 15, 1972, possesses a property interest and exclusive ownership rights in that sound recording. This property interest and the ownership rights under California law include the exclusive right to publicly perform, or authorize others to publicly perform, the sound recording by means of digital transmission—whether by satellite transmission, over the Internet, through mobile smartphone applications, or otherwise.

Id. at 2.

¹⁴⁹ *Id.* at 3.

¹⁵⁰ *Id.* at 4.

¹⁵¹ *Id.* at 5.

¹⁵² Ruling on Capital Records' Motion for Jury Instruction, *supra* note 106, at 5.

tion to the “exclusive ownership” rule, the legislature demonstrably did not intend to create any other exceptions on the assumption that any additional intended exceptions would have also been included in the statute.¹⁵³ Therefore, ownership in pre-1972 sound recordings includes a public performance right in California.¹⁵⁴

After interpreting the meaning of section 980(a)(2), the court then explored additional arguments raised by Sirius XM.¹⁵⁵ First, Sirius XM claimed that the record labels are not harmed economically from its use of their sound recordings because promotional play may increase album sales.¹⁵⁶ Sirius XM also contended that the recording industry historically has embraced unpaid radio airplay as a mechanism to spread music to a wider audience and market.¹⁵⁷ The court took note of these arguments but declared that it was not necessary for it to decide these issues in the ruling on jury instructions presently before it.¹⁵⁸

The court’s ruling on proposed jury instructions asserts that California law establishes a public performance right in sound recordings, as it declares that the record labels’ proposed jury instructions of “ownership rights under California law include the exclusive right to publicly perform, or authorize others to publicly perform, the sound recording by means of digital transmission—whether by satellite transmission, over the Internet, through mobile smartphone applications, or otherwise”—are consistent with California law.¹⁵⁹ Therefore, the court’s affirmation of the record labels’ requested jury instructions in *Capitol Records* makes it the second court in California to find that section 980(a)(2) includes the right to public performance.¹⁶⁰

In June 2015, the record labels and Sirius XM announced a settlement in this case—with Sirius XM agreeing to pay the record labels \$210 million.¹⁶¹ This settlement covered all past uses of the labels’ pre-1972 sound recordings, as well as the future use of these recordings through 2017.¹⁶² After this time period expires, Sirius XM will negotiate individually with

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 8. While the court’s affirmation of jury instructions is significant for pre-1972 sound recordings, it should be noted that the court did not find Sirius XM liable for using these recordings. *Id.*

¹⁵⁵ *Id.* at 5-8. The court also explored both parties’ arguments under California case law, the Commerce Clause of the United States Constitution, and general public policy rationales. *Id.*

¹⁵⁶ *Id.* at 7.

¹⁵⁷ *Id.*

¹⁵⁸ Ruling on Capital Records’ Motion for Jury Instruction, *supra* note 106, at 7.

¹⁵⁹ *Id.* at 2, 5.

¹⁶⁰ *Second California Court, supra* note 142.

¹⁶¹ Bill Donahue, *Sirius XM Pays Labels \$210M to Settle Pre-1972 Fight*, LAW 360 (June 26, 2015), <http://www.law360.com/articles/672913/sirius-xm-pays-labels-210m-to-settle-pre-1972-fight> [hereinafter Donahue, *Sirius Pays \$210M*].

¹⁶² *Id.*

each label for a new deal to last through 2022.¹⁶³ The parties have agreed to binding arbitration if a deal cannot be reached in the extension negotiations.¹⁶⁴ Sirius XM states that the pre-1972 sound recordings owned by the major record labels account for approximately 80 percent of the pre-1972 music it has used in the past.¹⁶⁵

C. *Implications of California Cases*

The two California cases to squarely deal with the issue of public performance rights in pre-1972 sound recordings under California Civil Code section 980(a)(2) both ultimately concluded that this right exists for the sound recording copyright owner.¹⁶⁶ In a motion for interlocutory appeal, Sirius XM argued that the decision in *Flo & Eddie* is unprecedented because no other court in California has interpreted California law to establish a public performance right in pre-1972 sound recordings.¹⁶⁷ Sirius XM also warned that this decision could create “liability for the many thousands of entities that make public performances of sound recordings in California.”¹⁶⁸ Sirius XM has urged an immediate review by the Ninth Circuit to settle this question of California law.¹⁶⁹

While Sirius XM wants the Ninth Circuit to immediately review the Central District of California’s *Flo & Eddie* decision, *Flo & Eddie* contends that Sirius XM no longer has standing for an interlocutory appeal.¹⁷⁰ *Flo & Eddie* claims that, with the Superior Court’s reversal of its tentative *Capitol Records* ruling, Sirius XM no longer has “substantial grounds” for a difference of opinion that is required for an interlocutory appeal.¹⁷¹ While the two California courts initially came to different conclusions on whether California law established a public performance right in pre-1972 sound recordings, because the Superior Court reversed its initial opinion, *Flo & Eddie* claims that Sirius XM should not be granted an interlocutory appeal.¹⁷²

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ See *Second California Court*, *supra* note 142.

¹⁶⁷ See Kat Greene, *Sirius Wants 9th Circ. ’s Eye On Turtles’ Infringement Win*, LAW360 (Oct. 15, 2014), <http://www.law360.com/articles/587442/sirius-wants-9th-circ-s-eye-on-turtles-infringement-win>.

¹⁶⁸ *Id.*

¹⁶⁹ See *id.* This case continues because the district court’s grant of summary judgment only went “so far as the claims [were] premised on Sirius XM’s public performance of *Flo & Eddie*’s recordings, not its alleged reproduction,” which is still an issue in controversy. *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, No. CV13-5693 PSG (RZx), 2014 WL 4725382, at *12 (C.D. Cal. Sept. 22, 2014).

¹⁷⁰ Bill Donahue, *Turtles Say Sirius Can’t Go to 9th Circ. Over Pre-1972’s*, LAW 360 (Nov. 4, 2014), <http://www.law360.com/articles/593276/turtles-say-sirius-can-t-go-to-9th-circ-over-pre-1972s>.

¹⁷¹ *Id.*

¹⁷² See *id.*

While the case between Sirius XM and the major labels was ultimately settled, this settlement affects only a narrow segment of parties and claims.¹⁷³ This settlement only accounts for the use of pre-1972 sound recordings owned by the major labels that are party to the settlement.¹⁷⁴ While these labels own approximately 80 percent of the pre-1972 music played by Sirius XM, there is still around 20 percent of pre-1972 music used by Sirius XM that is not covered by the settlement.¹⁷⁵ This other 20 percent is therefore still vulnerable to claims from sound recording copyright holders.¹⁷⁶ Indeed, this 20 percent figure includes the sound recordings owned by Flo & Eddie, illustrating that this deal does not affect the class action filed by Flo & Eddie in California.¹⁷⁷ While this settlement applies to approximately 80 percent of the pre-1972 music played by Sirius XM, there remains a considerable amount of music that Sirius XM may still face liability for using.

Despite the pending motion for interlocutory appeal and ultimate settlement of *Capitol Records*, the importance of these courts' declarations that California law contains a public performance right for sound recording copyright holders cannot be overstated. The *Hollywood Reporter's* legal blog declared the *Flo & Eddie* decision a "legal earthquake in the music industry."¹⁷⁸ These two California cases are important because they imply that a general public performance right for sound recordings exists in California, and this right did not exist prior to the cases.¹⁷⁹ *Flo & Eddie* and *Capitol Records* were not decided on narrow grounds; rather, the courts in these cases broadly proclaimed "an all-encompassing right in sound recordings," including a general public performance right, which had not been recognized before.¹⁸⁰

D. Cases in New York and Florida

While this Comment primarily focuses on the California pre-1972 sound recording cases, Flo & Eddie also filed suit against Sirius XM in

¹⁷³ See Donahue, *Sirius Pays \$210M*, *supra* note 161.

¹⁷⁴ *See id.*

¹⁷⁵ *See id.*

¹⁷⁶ *See id.*

¹⁷⁷ *Id.*

¹⁷⁸ Eriq Gardner, *Sirius XM Suffers Crushing Loss in High-Stakes Courtroom Battle*, HOLLYWOOD REP. (Sept. 23, 2014), <http://www.hollywoodreporter.com/thr-esq/siriusxm-suffers-crushing-loss-high-734981>.

¹⁷⁹ *See Second California Court*, *supra* note 142.

¹⁸⁰ Bill Donahue, *Sirius Ruling on Pre-72s Leaves Big Questions*, LAW 360 (Sept. 24, 2014), <http://www.law360.com/articles/580798/sirius-ruling-on-pre-72s-leaves-big-questions> [hereinafter Donahue, *Sirius Ruling Leaves Big Questions*].

New York and Florida.¹⁸¹ The U.S. District Court for the Southern District of New York ruled in favor of Flo & Eddie.¹⁸² Unlike the California courts, which were interpreting a specific state statute addressing pre-1972 sound recordings, the New York court instead relied on state common law.¹⁸³ As a major arts and entertainment hub, New York has a well-developed body of copyright case law, and this case law supported a determination that Flo & Eddie possessed the exclusive right to publicly perform their pre-1972 sound recordings.¹⁸⁴ This case has been certified for interlocutory appeal to the U.S. Court of Appeals for the Second Circuit, as the district court acknowledged the issue of pre-1972 sound recordings is “a difficult legal question about which reasonable minds can differ.”¹⁸⁵ The Second Circuit has agreed to review the case.¹⁸⁶

In addition, Flo & Eddie also filed suit in the U.S. District Court for the Southern District of Florida.¹⁸⁷ However, unlike the two courts in California and the court in New York that all found for Flo & Eddie, the Florida court ruled against Flo & Eddie, holding that Florida state law does not provide a general public performance right in pre-1972 sound recordings.¹⁸⁸ In denying Flo & Eddie’s motion for summary judgment, the court stated that “[i]f this Court adopts Flo & Eddie’s position, it would be creating a new property right in Florida as opposed to interpreting the law. The Court declines to do so.”¹⁸⁹ The court pointed out differences between the cases in the other states, noting that California has a specific statute regarding pre-1972 sound recordings and New York has developed case law on the subject, but determined that “neither Florida legislation nor Florida case law answers the question of whether Florida common law copyright includes an exclusive right of public performance.”¹⁹⁰

¹⁸¹ See Bill Donahue, *2nd Circ. Takes On Sirius Pre-1972 Appeal*, LAW 360 (Apr. 15, 2015, 3:40 PM), <http://www.law360.com/articles/643556/2nd-circ-takes-on-sirius-pre-1972-appeal> [hereinafter Donahue, *2nd Circ. Takes Sirius Appeal*].

¹⁸² Flo & Eddie, Inc. v. Sirius XM Radio, Inc., 62 F. Supp. 3d 325, 353 (S.D.N.Y. 2014).

¹⁸³ *Id.* at 338-39.

¹⁸⁴ *Id.* at 339.

¹⁸⁵ Flo & Eddie, Inc. v. Sirius XM Radio, Inc., No. 13 Civ. 5784(CM), 2015 WL 585641, at *2 (S.D.N.Y. Feb. 10, 2015).

¹⁸⁶ Sirius XM Radio, Inc. v. Flo & Eddie, Inc., No. 15-497, 2015 WL 3478159 (2d Cir. May 27, 2015); see also Donahue, *2nd Circ. Takes Sirius Appeal*, *supra* note 181.

¹⁸⁷ Flo & Eddie, Inc. v. Sirius XM Radio, Inc., No. 13-23182-CIV, 2015 WL 3852692, at *6-7 (S.D. Fla. June 22, 2015). Flo & Eddie asserted claims for common law copyright infringement, unfair competition, conversion, and civil theft of its sound recordings, claiming that Sirius XM publicly performed the sound recordings and reproduced the sound recordings in back-up and buffer copies. *Id.* at *2.

¹⁸⁸ *Id.* at *5.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at *4.

The Florida case also explored further issues, such as the difficulties and ambiguities of implementing a state-level public performance right.¹⁹¹ Some of the additional issues recognized by the court included the practicalities of administering licenses for pre-1972 sound recordings and setting licensing rates, ownership questions when the recording's owner or artist is dead or the original record company has gone out of business, and the existence of exceptions to the public performance right and what these exceptions might be.¹⁹² The court cited these issues as additional evidence against finding for Flo & Eddie.¹⁹³ In holding that Florida does not recognize a general public performance right for pre-1972 sound recordings, the Southern District of Florida became the first court in the string of recent cases not to recognize a public performance right in pre-1972 sound recordings.¹⁹⁴

E. *Implications of All Pre-1972 Sound Recording Cases*

These cases could have huge implications for any organization or company that uses pre-1972 sound recordings in the United States.¹⁹⁵ SoundExchange estimates that 10-15 percent of Sirius XM's streaming music was recorded before 1972 and that Sirius XM has failed to pay somewhere between \$50 to \$100 million in pre-1972 royalties from 2007-2012.¹⁹⁶ These figures demonstrate the huge impact that the California and New York rulings could have on the financial viability and business model of satellite radio broadcasters and webcasters, along with other businesses that use pre-1972 sound recordings.

In fact, in light of these ongoing cases, webcaster Pandora has recently announced a settlement with the RIAA and five record labels over the use of pre-1972 sound recordings.¹⁹⁷ Prominent entertainment lawyer Dina LaPolt believes that Pandora recognized that Sirius XM's lawsuits left it liable to facing similar pre-1972 sound recording suits, and Pandora decid-

¹⁹¹ David Oxenford, *Understanding the Murky State of the Performance Right in Pre-1972 Sound Recordings—Florida Court Rejects the Right yet Sirius XM Settles With the Record Labels*, BROADCAST L. BLOG (July 1, 2015), <http://www.broadcastlawblog.com/2015/07/articles/understanding-the-murky-state-of-the-performance-right-in-pre-1972-sound-recordings-florida-court-rejects-the-right-yet-sirius-xm-settles-with-the-record-labels/>.

¹⁹² *Flo & Eddie*, 2015 WL 3852692, at *5.

¹⁹³ *Id.*

¹⁹⁴ See *supra* Section I.D.

¹⁹⁵ Gardener, *supra* note 178.

¹⁹⁶ Hannah Karp, *Sirius Is Sued Over Music Royalties for Pre-1972 Recordings*, WALL ST. J. (Aug. 26, 2013), <http://online.wsj.com/news/articles/SB10001424127887324591204579037260890310376>.

¹⁹⁷ *Pandora's \$90 Million Settlement on Pre-1972 Performance Royalties Likely Has National Implications*, WASH. INTERNET DAILY (Oct. 26, 2015), Lexis Advance.

ed to settle with the major labels rather than face these potential claims.¹⁹⁸ Pandora has agreed to pay \$90 million to the labels in order to resolve the company's nationwide use of pre-1972 sound recordings.¹⁹⁹ This settlement resolves only the company's past use of pre-1972 sound recordings, although Pandora now has until the end of 2016 to negotiate deals with the record labels for the continued use of their pre-1972 sound recordings.²⁰⁰

The major record labels have recently announced settlements with both Sirius XM and Pandora over the use of pre-1972 sound recordings.²⁰¹ However, these deals do not settle the current and potential claims of independent copyright owners, such as Flo & Eddie, and independent labels.²⁰² Even if Pandora and Sirius XM were to settle with all independent pre-1972 sound recording copyright holders, innumerable other businesses that use pre-1972 sound recordings would have to consider their potential liability under individual state law for the use of these recordings.²⁰³ In states where courts recognize a general public performance right for pre-1972 sound recordings, "not only would radio and television stations have to pay for the performance of music recordings, but so would every bar, restaurant, nightclub, retail store, mall, amusement park, bowling alley, and any other public establishment that plays music."²⁰⁴ An innumerable number of businesses in different states could be affected by the finding of a general public performance right in pre-1972 sound recordings.

IV. ISSUES CAUSED BY THE DUAL SYSTEM OF STATE AND FEDERAL LAWS AND TWO POTENTIAL SOLUTIONS

By allowing states to pass their own laws protecting pre-1972 sound recordings, Congress has created a dual system of protections for sound recordings.²⁰⁵ However, within the state law sphere, the protections bestowed upon sound recordings vary wildly by state.²⁰⁶ This difference in state protection has been demonstrated by the different legal theories and outcomes of the *Flo & Eddie* cases in California, New York, and Florida.²⁰⁷ There are two opposing solutions that could accommodate a finding of a public performance right for pre-1972 sound recordings in a given state:

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.* ABKCO Music, Capitol Records, Sony, Universal Music Group, and Warner Music Group are the five major labels that are parties to both the Pandora and Sirius settlements.

²⁰² Oxenford, *supra* note 191.

²⁰³ *Id.*

²⁰⁴ Gordan & Puri, *supra* note 50, at 354.

²⁰⁵ *See supra* Part I.

²⁰⁶ *See supra* Section I.C.

²⁰⁷ *See supra* Part III.

either (1) creating a state system to administer royalties stemming from the general public performance right or (2) bringing all pre-1972 sound recordings exclusively under federal law.

A. *California Can Institute a State System to Administer the General Public Performance Right in Pre-1972 Sound Recordings*

If a general public performance right in pre-1972 sound recordings is upheld in California or New York, these rights would fall outside the scope of federal compulsory licenses.²⁰⁸ However, compulsory licensing schemes are intended to limit monopoly control or high transaction costs that can jeopardize the use and dissemination of music.²⁰⁹ The lack of a compulsory license in California or New York for these pre-1972 recordings could give sound recording copyright holders the ability to withhold the right to use their songs in any capacity or to ask for extremely high rates for the use of their recordings.²¹⁰

Without a compulsory licensing scheme, there would also be no mechanism to use a sound recording when the owner is unknown to the party looking to license the recording.²¹¹ If a party wishing to license a recording could not locate the sound recording copyright holder, the party would either have to forego using the music or risk liability for using the sound recording without obtaining permission from the unknown owner.²¹² For post-1972 sound recordings covered by federal law, parties playing songs over digital mediums can obtain the rights to use this music automatically by complying with certain terms under the compulsory license and sending royalty payments to the designated organization.²¹³

If Sirius XM decided not to broadcast pre-1972 sound recordings in California and New York, it would either have to play no music at all on channels currently playing pre-1972 music, or it would have to replace the pre-1972 music it currently broadcasts with post-1972 music. It does not appear that blocking channels playing pre-1972 music from broadcasting in California or New York would be a viable option for Sirius XM. According to the court in the *Flo & Eddie* case in Florida, “Due to Sirius’ licenses with the Federal Communications Commission and technological restraints on its satellite delivery systems, Sirius broadcasts identical programming to its

²⁰⁸ Donahue, *Sirius Ruling Leaves Big Questions*, *supra* note 180.

²⁰⁹ PASSMAN, *supra* note 7, at 212-13.

²¹⁰ Donahue, *Sirius Ruling Leaves Big Questions*, *supra* note 180.

²¹¹ *See id.*

²¹² *See id.*

²¹³ *Licensing 101*, *supra* note 94. Note that the use of sound recordings over terrestrial radio mediums does not require a license.

subscribers in every state in the continental United States.”²¹⁴ If the California rulings stand, this means Sirius XM would effectively have to cease broadcasting pre-1972 sound recordings in all states because the company cannot modify its programming on a state-specific level.²¹⁵ The other option of replacing the pre-1972 music with post-1972 music would still cost Sirius XM in compulsory music royalties owed to SoundExchange.²¹⁶ Sirius XM may instead desire to continue broadcasting pre-1972 music and ensure that it properly licenses this music and pays the correct royalties required under the new California and New York court rulings.

One solution for Sirius XM and others wanting to use pre-1972 sound recordings in California and New York would be to strike deals with individual copyright holders. This is the path that Sirius XM has taken so far, via its settlement with the major record labels.²¹⁷ By negotiating with record labels holding the copyright to many pre-1972 sound recordings, Sirius XM could ensure that it can still legally play enough songs to fill its channels dedicated to “oldies” music. Transaction cost problems threaten this model, however, as Sirius XM would have to know or find out who owns the sound recording copyright in certain songs and then seek out these copyright holders to strike deals—by negotiating prices and terms for use. Nonetheless, a prominent company has shown recently that this model is not impossible.

Well-known technology company Apple recently launched iTunes Radio, a streaming radio service.²¹⁸ Instead of using the compulsory license like Sirius XM or Pandora, iTunes Radio negotiates directly with record labels for the rights to play songs.²¹⁹ The existence of a compulsory licensing scheme does not mean it is mandatory that music services use the license; rather, it is mandatory for sound recording rights owners to allow others to use their works under this license.²²⁰ Music services may strike individual deals with rights holders outside the compulsory license if they wish.²²¹

While some large, established companies like Apple might have little trouble independently striking deals with copyright holders, smaller com-

²¹⁴ *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, No. 13-23182-CIV, 2015 WL 3852692, at *1 (S.D. Fla. June 22, 2015).

²¹⁵ Stephen Carlisle, *Flo and Eddie Lose Florida Lawsuit against Sirius XM*, NOVA SE. U. (June 26, 2015), <http://copyright.nova.edu/flo-and-eddie-lose-against-sirius-xm/>.

²¹⁶ See *supra* Part II.

²¹⁷ However, it is important to remember that this settlement covers only pre-1972 sound recordings owned by the major record labels that were party to the agreement. Donahue, *Sirius Pays \$210M*, *supra* note 161.

²¹⁸ Michelle Davis, *How Does iTunes Radio Pay Artists?* FUTURE MUSIC COALITION (Nov. 9, 2014), <https://futureofmusic.org/blog/2013/10/17/how-does-itunes-radio-pay-artists>.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

panies or venues unfamiliar with music licensing might find this task daunting.²²² Another model would be to establish a PRO like SoundExchange to administer the newfound public performance right in each state. These organizations could compile a database of rights holders to facilitate deals between parties by lowering information costs. By creating and maintaining a database of songs and the corresponding sound recording copyright holders—and perhaps even listing rates that sound recording copyright owners are willing to license their songs for—these organizations could provide the information needed for businesses to ensure that they have permission to play music and are remitting the collected royalty payments to the correct parties. One downside to this option is that the start-up costs of establishing such an organization could potentially be prohibitively high.

Also, these organizations would not have the benefit of a federal compulsory license like SoundExchange does, so if certain rights owners could not be located, then those sound recordings could not be licensed legally. However, this issue could be addressed through legislation. For example, the California legislature might find it favorable to amend its statute to provide for a compulsory license for pre-1972 sound recording copyright use. If the public performance right was also applicable to terrestrial AM/FM radio, bars, restaurants, and other public places, these facilities could benefit from a state-run PRO acting like SoundExchange to facilitate transactions.

B. *Federalizing Pre-1972 Sound Recordings*

While it appears possible to institute a state-specific scheme in states like California and New York to administer the general public performance right for sound recordings, encouraging a patchwork of state-specific rights and royalties would not be efficient in this situation. Even if the general public performance rights in California and New York are ultimately overturned on appeal, these recent cases have highlighted the problems that can arise with maintaining a dual system of copyright law.²²³

To remedy the inconsistency between state and federal copyright law, Congress should fix the underlying inequalities in the federal copyright scheme for music. This disparity between protections for musical works recorded on either side of the arbitrary February 15, 1972 cut-off date should be remedied by bringing sound recordings fixed before February 15, 1972 under federal copyright protection. Businesses operating nationally would greatly benefit from the simplicity of a single sound recording copy-

²²² See Donahue, *Sirius Ruling Leaves Big Questions*, *supra* note 180.

²²³ See *supra* Part III.

right regime. This singular system could also discourage forum shopping or the strategic relocation of businesses based on local copyright laws.²²⁴

As the extension of federal copyright protection to pre-1972 works would take time to research, debate, draft, and implement, an immediate, yet temporary, measure is needed to restore the payment of royalties in the interim. On April 13, 2015, a bipartisan group of Congressmen introduced the Fair Play Fair Pay Act of 2015.²²⁵ This Act would provide a definitive rule on the issue of digital streaming of pre-1972 sound recordings by mandating that satellite radio broadcasters and webcasters using the statutory license pay royalties when they use sound recordings fixed before February 15, 1972.²²⁶ This proposal has received bipartisan support from both Republicans and Democrats in the House of Representatives.²²⁷ The Fair Play Fair Pay Act would provide a quick and direct fix to the immediate problem of satellite broadcasters and webcasters withholding royalties and could begin the process of amending federal law.

A long-term strategy to fix this dual system of laws has also been proposed. In 2009, Congress directed the Copyright Office to conduct a study on the feasibility of implementing the extension of federal copyright protection to sound recordings fixed before 1972.²²⁸ The Copyright Office's thorough report recommends extending federal protection to pre-1972 sound recordings and cites numerous benefits that this plan would provide.²²⁹

While a revision of the federal copyright law could be a long and contentious process, this solution would ultimately provide a more clear and efficient system of copyright law for *all* sound recordings. It could also help alleviate the uncertainty faced by businesses such as Sirius XM and Pandora when assessing their ability to use pre-1972 music under a patchwork of state-specific copyright protections. A uniform federal regime would be especially helpful in resolving the ambiguity in states that have not yet settled the issue of pre-1972 sound recording copyright protection under any applicable state law.

While artists in California and New York might initially protest the loss of a state-specific public performance right for pre-1972 sound record-

²²⁴ See *supra* Part IV.

²²⁵ Fair Play Fair Pay Act of 2015, H.R. 1733, 114th Cong. (2015).

²²⁶ *Id.* § 7.

²²⁷ *Cosponsors: H.R.1733—114th Congress (2015-2016)*, CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/house-bill/1733/cosponsors> (last visited Mar. 16, 2016); see also Peter Webber, *Death to Pandora? A Guide to the Looming Music Copyright War*, THE WEEK (July 10, 2014), <http://theweek.com/article/index/264453/death-to-pandora-a-guide-to-the-looming-music-copyright-war> (discussing a related predecessor bill, The RESPECT ACT).

²²⁸ COPYRIGHT OFFICE REPORT, *supra* note 16, at 1.

²²⁹ COPYRIGHT OFFICE REPORT, *supra* note 16, at ix-x (serving as an excellent point of reference for the problems and potential solutions raised by the extension of federal copyright to pre-1972 sound recordings); see also U.S. COPYRIGHT OFFICE, COPYRIGHT AND THE MUSIC MARKETPLACE 140-42 (2015), <http://copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf>.

ings, gaining a broad set of federal rights for these recordings will counteract this loss. By bringing pre-1972 sound recordings under federal copyright protection, Congress can eliminate this arbitrary cut-off date and help clarify the law for both artists looking to receive their rightful royalties and businesses that wish to use these sound recordings without risking noncompliance with complicated, inconsistent state sound recording copyright laws.

CONCLUSION

Standardized, consistent legal protection of sound recordings is needed to ensure that, for example, the estate of singer-songwriter John Denver will receive a proportionately equivalent amount of royalties for his *Poems, Prayers and Promises* album, released on March 1, 1971, as for his album *Rocky Mountain High*, released on November 15, 1972.²³⁰ Under the current system, federal and state copyright laws treat the sound recordings on these two albums completely differently, even though they were released roughly a year and a half apart.

The songs on November 1972's *Rocky Mountain High* enjoys federal protection that is consistent across all states and clearly defined in the Copyright Act. The estate of John Denver can also expect to receive sound recording performance royalties from SoundExchange when any track from *Rocky Mountain High* is played on digital music players, such as Sirius XM and Pandora, across the country. However, the 1971 *Poems, Prayers and Promises* is subject to an entirely different set of copyright protections, which can differ from state to state. When this 1971 album is played by satellite radio broadcasters, digital webcasters, and other streaming services, John Denver's estate cannot ensure that it will receive performance royalties.

While John Denver's estate currently does not receive digital audio transmission royalties for *Poems, Prayers and Promises*, the fact that pre-1972 sound recordings are subject to state-specific copyright laws demonstrates the potential for complications under this date-delineated dual system of state and federal protections. Recent court decisions in California and New York have raised the possibility that John Denver's estate might even receive additional state rights in those states for his pre-1972 sound recordings that do not exist under federal law for post-1972 sound recordings. The unequal treatment of two albums by the same artist, recorded less than two years apart, illustrates why Congress should bring pre-1972 sound recordings under federal copyright law.

²³⁰ *Gold & Platinum: John Denver*, RECORDING INDUSTRY ASS'N AM., https://www.riaa.com/gold-platinum/?tab_active=default-award&se=John+Denver#search_section (last visited Mar. 16, 2016).

The recognition of a legal public performance right in California and New York for pre-1972 sound recordings highlights that the system of two separate spheres of copyright protection (with the state sphere actually further potentially fragmented into different regimes in each state) is complicated, complex, and ultimately a burden on businesses and individuals trying to play and pay for the use of these sound recordings without fearing liability. Even when the specific litigation discussed in this Comment concludes, this issue will continue to crop up over and over in different states in the future. Various businesses and organizations in different states will continue to face potential lawsuits and liability from their use of pre-1972 sound recordings, as unresolved litigation and unclear, or nonexistent, state statutes governing sound recordings contribute to the unstable legal environment. The continued threat of potential liability combined with the lack of uniformity and consistency in the law demonstrates why pre-1972 sound recordings must be brought under federal law.