No. 15-55287

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FLO & EDDIE, INC.,

Plaintiff-Appellee,

v.

PANDORA MEDIA, INC.,

Defendant-Appellant.

On Appeal from the United States District Court
for the Central District of California,
Civil Action No. 2:14-cv-07648-PSG-RZ (Gutierrez, J.)

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* THE ASSOCIATION FOR RECORDED SOUND COLLECTIONS IN SUPPORT OF DEFENDANT-APPELLANT

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Dated: September 9, 2015

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Amicus Curiae the Association for Recorded Sound Collections states that it does not have a parent corporation and that no publicly held company owns 10% or more of its stock.

MOTION OF THE ASSOCIATION FOR RECORDED SOUND COLLECTIONS FOR LEAVE TO FILE AS AMICUS CURIAE IN SUPPORT OF DEFENDANT-APPELLANT PANDORA MEDIA, INC.

Pursuant to Federal Rules of Appellate Procedure 29(b) and (e), the Association for Recorded Sound Collections ("ARSC") respectfully requests leave to file the attached amicus curiae brief in support of Defendant-Appellant Pandora Media, Inc. The ARSC has notified counsel for all parties of its intent to file this brief. Counsel for Plaintiff-Appellee Flo & Eddie did not respond to a request for a position on this motion, and did not indicate whether Flo & Eddie intends to file a response to this motion. Defendant-Appellant Pandora Media, Inc. consents to this filing.

The ARSC is a nonprofit organization dedicated to the preservation and study of sound recordings in all genres of music and speech, in all formats, and from all periods. It includes as members approximately one thousand archivists, librarians, and curators of the world's leading audiovisual repositories, along with record collectors, record dealers, researchers, historians, discographers, musicians, engineers, producers, reviewers, and broadcasters. ARSC has a strong interest in copyright law affecting sound recordings, and in particular those laws affecting historic recordings fixed before February 15, 1972. It advocates for law and policy that enables preservation of, and greater access to, the world's recorded sound

heritage. As an independent non-profit organization, ARSC is not sponsored by any of the parties to this case.

ARSC's proposed amicus brief will assist the Court in considering the important issues presented in this case. The brief explains that the district court's decision misconstrues California law, finding a right of public performance of sound recordings fixed before February 15, 1972, that no one acknowledged before recent litigations brought by Plaintiff-Appellee. ARSC's proposed amicus brief also points out that the decision below will have broad and unpredictable consequences on a variety of different types of music users. And it explains that the district court's decision prematurely terminates an ongoing legislative debate about the proper scope of protection that should be afforded to pre-1972 sound recordings. The ARSC's particular expertise in the preservation of sound recordings enables it to help the Court understand the broader implications of the district court's decision in this case, including for non-commercial entities.

For these reasons, ARSC respectfully requests leave to file the attached amicus brief.

Respectfully Submitted,

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September 9, 2015

CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Appellate Procedure 25, I certify that on September 9, 2015, I filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Joseph R. Wetzel
Joseph R. Wetzel

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STATEMENT OF INTEREST[1]

Amicus curiae the Association for Recorded Sound Collections, Inc. ("ARSC") is "a nonprofit organization dedicated to the preservation and study of sound recordings—in all genres of music and speech, in all formats, and from all periods."[2] It includes as members approximately one thousand archivists, librarians, and curators of the world's leading audiovisual repositories, along with "record collectors, record dealers, researchers, historians, discographers, musicians, engineers, producers, reviewers, and broadcasters."[3] ARSC has a strong interest in copyright law affecting sound recordings, and in particular those laws affecting historic recordings fixed before February 15, 1972 (so-called "pre-72 sound recordings"), and advocates for law and policy that enables preservation of, and greater access to, the world's recorded sound heritage.[4] As an independent non-profit organization, ARSC is not sponsored by any of the parties to this case.

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

[2] ARSC website is available at www.arsc-audio.org/about.html.

[3] *Id*.

[4] *See, e.g.*, Testimony of Tim Brooks, *A Study on the Desirability of and Means for Bringing Sound Recordings Fixed Before February 15, 1972, Under Federal Jurisdiction* (U.S. Copyright Office Jan. 28, 2011), *available at* http://www.copyright.gov/docs/sound/comments/initial/20110128-Tim-Brooks-ARSC.pdf.

INTRODUCTION

The district court erred in reaffirming its interpretation of Cal. Civ. Code § 980(a)(2) in *Flo & Eddie Inc. v. Sirius XM Radio Inc.*, No. 2:13-cv-05693-PSG-RZ, 2014 WL 4725382 (C.D. Cal. Sept. 22, 2014), in this case. If left uncorrected, the district court's mistake would have broad and pernicious consequences. The district court's opinion would ossify its earlier mistake in *Sirius XM* and leave innumerable others exposed to a litany of infringement claims for engaging in practices that no one in the recorded music industry thought to challenge during the first century of its existence. Pandora is just one of countless businesses and individuals who relied on the universally held, decades-old understanding that there is no recognized public performance right in pre-72 sound recordings. And, under the district court's ruling, ARSC members and other users of these recordings would become the predictable next targets of the sound recording industry. The second wave of pre-72 litigations is already underway, this time against large terrestrial radio companies. *See Sheridan v. iHeartMedia, Inc.*, No. 2:15-cv-04067-RSG-GJS (C.D. Cal. filed May 29, 2015); *ABS Entm't, Inc. v. CBS Corp.*, No. 2:15-cv-06257-PA-AGR (C.D. Cal. filed Aug. 17, 2015); *ABS Entm't, Inc. v. Cumulus Media Inc.*, No. 2:15-cv-06269-PA-AGR (C.D. Cal. filed Aug. 17, 2015); *ABS Entm't, Inc. v. iHeartMedia, Inc.*, No. 2:15-cv-06252-PSG-GJS (C.D. Cal. filed Aug. 17, 2015). Under the status quo, there is no end in sight.

No one in 1982 California believed in the existence of a public performance right in sound recordings. It was not until 1995 that *anyone* recognized a public performance right in sound recordings, and that limited right established by Congress is a far cry from the unbounded right created by the district court in *Sirius XM*. The district court's reading of Section 980(a)(2) renders at least three decades, and as much as a century, of industry practice inexplicable. If left unchecked, it could irreparably harm countless businesses and activities, including the educational and preservationist activities of ARSC members, in the near term. Worse, the district court's opinion could squelch decades of debate and doom any possibility of sensible federal legislation that would balance the concerns of rights holders with those of the general public.

A. The District Court's Decision Created an Unprecedented Right Under California Law.

The district court erred in creating new copyright rights in *Sirius XM* and compounded that error in the decision below. ARSC agrees with Defendant-Appellant Pandora's legal arguments regarding the appropriate construction of Section 980(a)(2) and offers the following additional insights of an organization with substantial interest in the scope of copyright protection afforded to historical sound recordings.

After acknowledging that Pandora's "logic is sound" to consider the state of the law before 1982 because the purpose of Section 980(a)(2) was to "maintain

rights for sound recordings," the district court resorted to common law as the original source of maintained protection for public performances of published, pre-72 sound recordings. *Flo & Eddie Inc. v. Pandora Media, Inc.*, No. 2:14-cv-7648-PSG-RZ, Order at 12-13 (C.D. Cal. Feb. 23, 2015). But ARSC members, including libraries, archives, and museums have relied on the industry understanding that common-law ownership rights in pre-72 sound recordings are extinguished with the first sale of the sound recording. Libraries, for example, rely on this understanding in order to lend pre-72 recordings in their collections.[5] Museums rely on this understanding to include public performances of pre-72 sound recordings as part of exhibitions, as do archivists and researchers in the conduct and presentation of their research. Once extinguished, common law rights in sound recordings cannot supply the basis for an unspoken public performance right under California law. Accepting that Section 980(a)(2) only maintained and thus did not establish new rights begs the conclusion that California has never recognized a public performance right in sound recordings.

The recorded music industry's silence on the issue before *Sirius XM* confirms the universal pre-*Sirius XM* understanding that there was no historical recognized California public performance right in sound recordings. If pre-72 California law recognized public performance rights in sound recordings, the 1971

[5] Federal law allows libraries to lend recordings fixed on or after February 15, 1972. *See* 17 U.S.C. § 109.

Sound Recording Act would have had the effect of *eliminating* public performance rights for sound recordings fixed on or after February 15, 1972, by bringing those works under federal protection without then recognizing any federal public performance right in those works. *See* Sound Recording Act of 1971, Pub. L. No. 92-140, 85 Stat. 391. Yet no one complained. Not one sound recording company batted an eye as Congress supposedly extinguished their state law public performance rights by bringing sound recordings under federal copyright protection.

The dearth of any effort to assert pre-72 public performance rights in California before 2014 should guide the outcome here.

B. The District Court's Ruling Would Disrupt Settled Understandings About the Scope of Copyright Protection and Cut Off An Ongoing, Healthy Legislative Debate.

Aside from getting the proper interpretation of Section 980(a)(2) wrong, the decision below would create potentially unmanageable problems for ARSC and other copyright holders. It would expose a vast array of businesses and individuals to copyright liability, disrupting their settled expectations regarding pre-1972 sound recordings. And it would abruptly end the robust and ongoing legislative debate about the proper scope of copyright protection afforded to pre-72 sound recordings.

The district court's ruling would apply far beyond the circumstances of this case, sweeping in countless additional uses of pre-72 sound recordings in California. For example, if the district court were correct that Section 980(a)(2)'s reference to "exclusive ownership" covers performances of pre-72 sound recordings, there would be no readily apparent limit to the types of performances that might suddenly result in claims of copyright infringement. Federal law creates infringement liability only for "public" performances of copyrighted works, and the federal courts have carefully explained what it means to perform a work publicly. *See, e.g., United States v. ASCAP (In re Application of RealNetworks)*, 627 F.3d 64, 71-75 (2d Cir. 2010) (holding that a digital download did not constitute a public performance under the Copyright Act); *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F. 3d 121 (2d Cir. 2008) (holding that transmission of unique recordings to cable subscribers from a remote digital video recording server operated by cable operator did not constitute a public performance); *American Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014) (holding that service designed to allow for remote capture and recording of over-the-air television broadcasts for streaming to individual users infringed television broadcasters' public performance rights).

But California law is not so well-developed; neither the California Legislature nor the California courts have outlined the contours of what constitutes

a "public" performance under California law. The district court's decision thus raises troubling questions about the scope of infringement risk that do not arise under federal law. Could a newly-minted copyright holder sue a homeowner who plays a pre-1972 sound recording at a neighborhood barbecue? What about a teacher who plays a pre-1972 sound recording in the classroom? Under the district court's decision, it is impossible to find a limiting principle.

The district court's decision also undermines the future of recording collection, scholarship, and preservation. Under federal law, the exclusive right to distribute a work is limited to the first authorized transfer of each copy of a work, subject to certain further limitations. 17 U.S.C. § 109(a). This so-called "first sale doctrine" allows a library, for example, to lend sound recordings without the fear of incurring copyright infringement liability.[6] As discussed above, libraries, museums, archivists, and researchers rely heavily on this doctrine to conduct their daily business. The decision below thoroughly undermines that reliance.

It would be impossible for ASRC members to license all of the pre-72 sound recordings in their collections, potentially on a state-by-state basis, both from a financial perspective and as a matter of practicability. Under the district court's decision, therefore, countless entities might have to rely on the fact-bound and

[6] Although California provides a library exception to its criminal statutes, there is no comparable exception in the civil statute, and ARSC is aware of no California decision establishing such an exception.

unpredictable common law fair use doctrine in order to loan pre-1972 sound recordings, resort to constitutional arguments in an effort to define a never-before-recognized state law copyright interest, or forego the use of pre-1972 sound recordings altogether.

It is unclear what new rights may have been conferred in pre-72 sound recordings by the decision below. Does the California right now go beyond federal copyright law in conferring, for example, a "making available" right, or "moral" rights? Does it recognize public performances of sound recordings embodied in audiovisual works? Archives making their pre-72 works available to researchers could face unprecedented legal challenges. Parodists may need to raise First Amendment challenges to assertions of moral rights in pre-72 sound recordings. And the decision poses an existential threat to the record collection and resale industry, which relies on a pre-*Sirius XM* understanding of federal and state copyright law for the validity of its practices.

The decision below also prematurely cuts off a robust legislative debate about the appropriate scope of copyright protection for pre-72 sound recordings. When Congress declined to extend federal copyright protection to pre-72 sound recordings, the result was an arbitrary disparity in the treatment of sound

recordings.[7] After observing this disparity in practice, parties representing a wide variety of interests—including major stakeholders representing the recording industry,[8] libraries and archives,[9] broadcasters,[10] and the public interest[11]—have supported retroactively incorporating pre-72 sound recordings into federal law. And at Congress's direction, the United States Copyright Office conducted a

[7] There is evidence, as Professor Nimmer points out, that it is an anomaly born out of a mistaken belief that federalizing copyright in pre-1972 sound recording would bring all such recordings into the public domain. Reply Comments of the Music Library Association, *NOI: Federal Copyright Protection of Sound Recordings Fixed Before February 15, 1972* (U.S. Copyright Office Jan. 31, 2011), *available at* http://copyright.gov/docs/sound/comments/reply/041211-MLA.pdf (citing Michael Erlinger, Jr., *An Analog Solution in a Digital World: Providing Federal Copyright Protection for Pre-1972 Sound Recordings*, 16 UCLA Ent. L. Rev. 45, 58 (2009)).

[8] Comments of Recording Industry of America (RIAA) and American Association of Independent Music (A2IM), *NOI: Federal Copyright Protection of Sound Recordings Fixed Before February 15, 1972* (U.S. Copyright Office Jan. 31, 2011), *available at* http://www.copyright.gov/docs/sound/comments/initial/20110131-RIAA-and-A2IM.pdf ("RIAA Pre-72 Comments").

[9] Comments of Society of American Archivists, *NOI: Federal Copyright Protection of Sound Recordings Fixed Before February 15, 1972* (U.S. Copyright Office Jan. 31, 2011), *available at* http://www.copyright.gov/docs/sound/comments/initial/20110124-Society-of-American-Archivists.pdf.

[10] National Association of Broadcasters Reply Comments, *NOI: Federal Copyright Protection of Sound Recordings Fixed Before February 15, 1972* (U.S. Copyright Office Jan. 31, 2011), *available at* http://www.copyright.gov/docs/sound/comments/reply/041413nab.pdf.

[11] Comments of EFF, *NOI: Federal Copyright Protection of Sound Recordings Fixed Before February 15, 1972* (U.S. Copyright Office Jan. 31, 2011), *available at* http://www.copyright.gov/docs/sound/comments/initial/20110131-Abigail-Phillips-Electronic-Freedom-Foundation.pdf.

thorough study and issued a substantive report that recommends removing pre-1972 sound recordings from state jurisdiction.

Although there appears to be a consensus that Congress should federalize copyrights in pre-1972 sound recordings, not all stakeholders agree about how Congress should go about it. The music library community, for example, has argued for federalization because federal law provides clear limits to the scope of copyrights. *See* Comments of Eric Harbeson for the Music Library Association, *NOI: Federal Copyright Protection of Sound Recordings Fixed Before February 15, 1972* (U.S. Copyright Office Jan. 31, 2011), *available at* http://www.copyright.gov/docs/sound/comments/initial/20110131-Eric-Harbeson-Music-Library-Ass%27n.pdf. The music library community has taken this position even though federalizing the copyright in pre-1972 sound recordings would deprive it of more favorable rules applied in some states. *See id.*

For its part, the Recording Industry Association of America ("RIAA") initially expressed concern over federalization, raising concerns about chain of title, the loss of copyright over recordings that will enter the public domain, and the shortening of their copyright term. *See* RIAA Pre-72 Comments. But more recently, the RIAA has endorsed the federalization of copyrights in pre-72 sound recordings, recognizing the benefits that come with the introduction of statutory damages, extensive criminal copyright protections, and a more comprehensive

slate of exclusive rights. *See* Comments of the Recording Industry Association of America at 33, *Music Licensing Study: Notice and Request for Public Comment* (U.S. Copyright Office May 23, 2014), *available at* http://copyright.gov/policy/musiclicensingstudy/comments/Docket2014_3/Recording_Industry_Association_of_America_MLS_2014.pdf.

The decision below cuts this debate off, awarding all the spoils to the sound recording industry. By doing so, the district court's decision undermines Congress's efforts to strike an appropriate balance between the sound recording industry and the public. The district court's decision should be reversed, and the question of the copyright status of pre-1972 sound recordings should be returned to Congress.

CONCLUSION

The district court's decision should be reversed.

Respectfully submitted,

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September 9, 2015

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure Rule 32(a)(7)(C), I certify that this amicus brief complies with the length limitations set forth in Rule 32(a)(7)(B)(ii) because it contains 2,347 words, as counted by Microsoft Word, not counting the items that may be excluded under Federal Rule 32(a)(7)(B)(iii).

/s/ Joseph R. Wetzel
Joseph R. Wetzel

CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Appellate Procedure 25, I certify that on September 9, 2015, I filed this amicus brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Joseph R. Wetzel
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