No. 15-55287

IN THE

United States Court of Appeals for the Ninth Circuit

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

Plaintiff-Appellee,

v.

PANDORA MEDIA, INC., a Delaware corporation,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF OF PUBLIC KNOWLEDGE AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT PANDORA MEDIA, INC.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amicus curiae* Public Knowledge states that it has no parent corporation or publicly held corporation that holds 10% or more of its stock.

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INTEREST OF *AMICUS CURIAE*

Public Knowledge[1] is a non-profit organization that is dedicated to preserving the openness of the Internet and the public's access to knowledge, promoting creativity through balanced intellectual property rights, and upholding and protecting the rights of consumers to use innovative technology lawfully. Public Knowledge advocates on behalf of the public interest for a balanced copyright system, particularly with respect to new and emerging technologies.

Public Knowledge has previously served as *amicus* in key copyright cases. *E.g., Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351 (2013); *Golan v. Holder*, 132 S. Ct. 873 (2012); *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418 (2003); *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

[1]This brief is being tendered with a motion for leave to file this brief. Pursuant to Rule 29(c)(5), no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity, other than *amicus*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

In deciding the probability of Flo & Eddie's prevailing on the merits, the district court erroneously presumed that California's Civil Code section 980(a)(2) silently encompassed an exclusive public performance right in sound recordings. This grievous mistake both creates bad copyright precedent and opens the door to potentially absurd levels of liability relating to sound recordings. This Court must correct that error.

Section 980 states that the author of a sound recording fixed prior to 1972 "has an exclusive ownership therein." The rights that come with "exclusive ownership" are not defined by the statute. In view of that legislative silence and a dearth of attendant case law, the district court assumed that the California statute conferred upon sound recording authors "all ownership rights that could attach to intellectual property," other than one exception explicitly in the statute.

This Court should reverse the district court's broad sweep of rights in pre-1972 sound recordings for at least the following reasons.

1. Read literally, the district court's decision grants "all ownership rights," whether currently recognized by courts or not, to authors of sound recordings. Such a set of rights is unbounded, and clearly beyond the intent of the California legislature. A wide variety of exclusive rights never before recognized by California or the United States falls within this reading of section 980, potentially

creating problematic restrictions on speech and usage of sound recordings. This simply cannot be a proper interpretation of section 980.

2. In an attempt to save the district court from this absurdity, one might treat the decision's reference to "all ownership rights" to be implicitly limited to some sort of "natural" bundle of exclusive rights, such as those recognized under the federal Copyright Act. Unfortunately, this much more limited reading of the decision below still is flawed, and in any event this limited reading certainly excludes public performance from among that bundle of section 980 rights.

A review of the history of federally granted rights under the Copyright Act clearly shows that there has never been a universal bundle of rights applicable to all copyrighted works. Over the years, several exclusive rights, including the right of public performance, have been variously included and excluded from the scope of copyrights. Aside from the basic reproduction right, other exclusive rights—such as the rights of public performance, public display, and the broad preparation of derivative works—were not presumed parts of some *a priori* copyright common law, but instead were constructed individually and affirmatively by statute. The development of the Copyright Act demonstrates that there is no "natural" or "inherent" bundle of rights, as the district court may have wished to impute to section 980.

In particular, it is virtually impossible to justify including a public perfor-

mance right for sound recordings in any purported "natural" bundle of copyright privileges. Thus, section 980 should not encompass such a right. Federal copyright law did not provide any public performance right for sound recordings until more than a decade after section 980's creation—and even then, it created only a very limited, highly regulatory scheme that applied only to new technologies. Federal law explicitly restated its lack of a general public performance right in the Copyright Act of 1976, and the idiosyncratic public performance rights created for specific classes of works over the last two centuries proves that a broad, general public performance right for sound recordings under section 980 cannot reasonably trace its provenance to federal law.

Accordingly, the district court's strikingly expansive interpretation of section 980 cannot be justified either on its face or when cabined by the context of the federal Copyright Act. To avoid granting unbounded and unprincipled scope to ownership rights in sound recordings, this Court should reverse the decision of the district court.

ARGUMENT

"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." Cal. Civ. Code § 980(a)(2) (2015). In interpreting the term "exclusive ownership" in that statute, the district court erroneously attributed to that phrase "all ownership rights that could attach to intellectual property," including a public performance right.

There appear to be two ways to understand this sweeping concept of "all ownership rights," neither of which is justifiable under the law. First, it might be understood literally to encompass all possible exclusive rights of intellectual property; such a reading would render section 980 absurd and unworkable. Second, the district court might have intended "all ownership rights" to mean all rights recognized under the existing federal copyright law. This interpretation is more charitable but nevertheless still illogical in view of the history of the Copyright Act.

Accordingly, the district court's interpretation of section 980 must be flawed, and it should be reversed by this Court.

I. The District Court's Reading of Section 980 Potentially Creates an Unbounded and Impracticably Broad Set of Rights in pre-1972 Sound Recordings

The district court held that the rights of "exclusive ownership" under section 980 are essentially without bound, encompassing "all ownership rights that could attach to intellectual property. *Flo & Eddie, Inc. v. Pandora Media, Inc.*, CV 14-7648, 2015 U.S. Dist. LEXIS 70551, at *18 (C.D. Cal. Feb. 23, 2015). It reached that conclusion in part based on a rule of construction that "when exceptions are listed they are exhaustive." *Id.* at *17 (citing *Flo & Eddie Inc. v. Sirius XM Radio Inc.*, CV 13-5693, 2014 WL 4725382, at *13 (C.D. Cal. Sept. 22, 2014)). Because the sole exception in section 980 relates to soundalike recordings, the district court concluded that all other exclusive rights were within the purview of that statute. *See id.*

This sweeping interpretation of section 980 fails to articulate any limiting principles that would prevent the California statute from creating boundless liability for all manner of acts relating to pre-1972 sound recordings. Indeed, the district court asserted that section 980(a)(2) "includes all ownership rights that *could* attach to *intellectual property*," suggesting that rights far beyond even those granted by federal copyright might be within the realm of California law. *Id.* at *18 (emphasis added). This Court should reject this expansive interpretation by holding section 980 to the boundaries set by the common law.

A. Numerous Exclusive Rights Are Within the District Court's Interpretation of Section 980, Despite Being Beyond Any Reasonable Conception of Copyright

The district court's expansive interpretation of section 980 as encompassing "all ownership rights," read literally, could confer upon sound recording authors rights well beyond the bounds of ordinary expectation and reasonableness.

For example, public display of sound recordings could become an exclusive right under the district court's interpretation. Currently, neither federal law nor California law grants authors of sound recordings the right to prohibit public displays of their works. *See* 17 U.S.C. § 106(5) (2012) (granting the public display right to authors of literary, musical, dramatic, and choreographic works, as well as pantomimes and pictorial, graphic, or sculptural works, but not sound recordings). Yet section 980(a)(2) does not explicitly exclude the display right from the scope of authors' rights. Were such a right held to be inherent in the common law, as the district court found the public performance right, then California law might prohibit the display of vinyl records in a shop window, for example, when that same display would be perfectly permissible under federal copyright law. Such a right would prohibit common practice at record stores, contradict the evident intent of Congress, and simply violate common sense.

More strangely, *private* displays and performances could also become exclusive rights of sound recording authors. Federal copyright law limits the perfor-

mance and display rights granted to authors: performances and displays may be prohibited only if they are made *publicly*. *See* 17 U.S.C. § 106(4)–(6). But there is no apparent reason under the district court's holding to retain this limitation. Thus, section 980 could potentially prohibit *private* performances and displays. Such rights could easily attach to sound recordings: no text in the statute excludes such an ownership right from authors, and the judicial record is silent as to the existence of a state law "exception" for private performances of sound recordings. By this rationale, the author of a sound recording would have the right to prevent a lawful buyer of a record from merely playing the record at home.

Even further, the district court's holding could potentially confer an exclusive right to prevent destruction of copies of recordings. Such a right of preservation is provided to visual artists (to prevent, for example, destruction of the sole copy of a painting once sold), meaning that it is a "right that could attach to intellectual property." *See* 17 U.S.C. § 106A. Reading such a right into section 980 could allow sound recording authors to prevent buyers from disposing of their old albums, CDs, mobile phones, or computers.

These remarkable possibilities prove that the term "exclusive ownership" under section 980 cannot encompass every "right that could attach to intellectual property." The better interpretation, which this Court should adopt, is that rights like the various public performance rights are specific inventions of Congress

and not ordinary incidents of "exclusive ownership." Such rights therefore do not automatically fall within the scope of section 980.

B. The District Court's Interpretation of Section 980 Would Undermine Basic Traditional Boundaries of Copyrights

The district court's broad interpretation of section 980 also potentially eliminates many of the traditional limitations on copyright recognized in federal statutes and case law. These limitations are as much the lifeblood of a functioning copyright system as the exclusive rights themselves. This Court should reject an interpretation of section 980 that fails to account for such limitations.

For example, procedures, processes, systems, and methods of operation are all amenable to intellectual property protection—namely patent protection—but are typically excluded from copyright protection. *See* 17 U.S.C. § 102(b). Allowing exclusive rights on functional aspects of sound recordings under section 980 would potentially run afoul of federalism and the Constitution. *See Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 152 (1989).

Also, federal government works do not receive copyright protection. *See* 17 U.S.C. § 105. But without a parallel exception in section 980, the district court would make the federal government the copyright holder of all of its pre-1972 sound recordings. This would have serious and undesirable consequences for the public domain of government works.

More pressingly, the fair use and first sale doctrines might be lost in following the district court's sweeping interpretation of section 980.[2] Fair use is a critical limitation on copyright law, being "built-in First Amendment accommodations" that prevent the restrictions inherent in copyrights from interfering with more critical civic and free speech activities. *Golan*, 132 S. Ct. at 890 (quoting *Eldred*, 537 U.S. at 219). The first sale doctrine likewise vitally protects the personal property interests of readers, listeners, and other consumers, and also protects the public from anticompetitive resale restrictions. *See Kirtsaeng*, 133 S. Ct. at 1364–66; *see also* Molly Shaffer Van Houweling, *The New Servitudes*, 96 Geo. L.J. 885 (2007); Aaron Perzanowski & Jason Schultz, *Digital Exhaustion*, 58 UCLA L. Rev. 889, 894–901 (2011); Ariel Katz, *The First Sale Doctrine and the Economics of Post-Sale Restraints*, 2014 BYU L. Rev. 55, 64–70 (2014); Brief of Public Knowledge et al. as *Amici Curiae* in Support of Appellant Impression Products at 13–17, *Lexmark Int'l, Inc. v. Impression Prods., Inc.*, No. 14-1617 (Fed. Cir. June 19, 2015), *available at* URL *supra* p. iv.

[2]Though both fair use and first sale have roots in the common law, their evolution since their creation has been shaped by statute. For instance, § 109, which implements the first sale doctrine in federal law, explicitly creates an exception to the public display right—an exception underdeveloped in the common law predating the 1976 Act for the simple reason that the display right was only introduced in that Act. There is consequently no reason to believe for certain that any common-law development of section 980 interpretation would automatically incorporate the fair use and first sale doctrines.

There is thus a concrete danger in construing section 980's "exclusive ownership" as unboundedly as the district court did. Without limiting principles, the district court *sub silentio* would create an array of rights never before recognized in any legislation or judicial opinion. More than that, the undefined nature of the district court's phrase "all ownership rights that could attach to intellectual property" allows the California statute to overrun nearly any limits that the common law and copyright statutes have placed upon copyright's scope. Reversing this alarming expansion of intellectual property is essential to the proper functioning of copyright.

II. Even Limiting Section 980 to Some "Natural" Bundle of Rights Is Still Untenable, in View of the Historical Development of Copyright Law

One might wish to render the district court's unbounded definition of "exclusive ownership" more palatable by suggesting that when the court spoke of "all ownership rights," it was really only referring to some standard or natural bundle of rights associated with copyright, rather than all rights thinkable. For example, the district court may have intended section 980 to encompass only the rights currently available in § 106. But this attempt to rescue the district court's decision also fails, because there is no such standard array of rights attendant to copyright, and in any event an exclusive right of public performance is certainly not part of any purported standard array.

The concept of a natural bundle of rights is inconsistent—indeed, it is incompatible—with copyright law as it has been embodied in the history of the Copyright Act.[3] Were there an expansive set of exclusive rights that predated the statutory protections, the Copyright Act's language and fundamental structures would have been markedly different.

No United States Copyright Act has ever defined the list of exclusive rights of copyright as being a "traditional" bundle with carve-outs specific to particular types of works. On the contrary, each statute has provided, by positive law, limited privileges to limited types of works.[4]

This *ad hoc* development of the Copyright Act, assigning particular and limited exclusive rights to specific types of works, demonstrates that copyright law

[3]The history of copyright law in the United States is written primarily in statute; the first Copyright Act was passed in 1790, not long after the formation of the federal government itself. *See* Copyright Act of 1790, ch. 15, 1 Stat. 124 (repealed 1831). State common law protections also remain on the margins, but the federal statutes have been so expansive and preemptive of the field that the history of those statutes largely defines the general philosophies and principles behind American copyright law.

[4]The current Act grants, to all types of copyrighted works, the exclusionary rights "(1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending." § 106. Section 106 then gives additional affirmative rights to particular types of works—for example, some types of works, but not others, have a public performance right or a public display right. § 106(4)–(5). And sound recordings in particular have only a special, limited right to "perform the copyrighted work publicly by means of a digital audio transmission." § 106(6).

is crafted to meet the immediate needs of the public, and not a reflection of some set of unwritten yet universal schema. It would thus be a mistake to think that section 980's reference to "exclusive ownership" implicitly invoked some sort of natural set of rights, and even more of a mistake to assume, as the district court did, that such a purported set of rights included public performance. This Court should reverse that error of the district court.

A. The History of the Sound Recordings Act of 1971 Shows that Exclusive Rights Are Not Naturally Bundled Together

The history of the Sound Recordings Act, Pub. L. No. 92-140, 85 Stat. 391 (1971), demonstrates that public performance rights are not inherently part of the common law, but rather are only granted to a particular type of work when Congress decides to make it so.

Prior to 1971, sound recordings lacked any kind of federal copyright protection at all, let alone a public performance right. The Sound Recordings Act set out "a limited copyright in sound recordings for the purpose of protecting against unauthorized duplication and piracy of sound recordings." S. Rep. No. 92-72, at 1 (1971). The Act was thus designed to narrowly accommodate record producers in the music industry who wanted to prevent others from making and selling unauthorized physical copies of sound recordings. *See* Sound Recordings Act § 1 (granting the right "[t]o 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").

Congress specifically did not create a public performance right in the Sound Recordings Act. An early, rejected version of the bill would have "extended that protection to encompass a performance right so that record companies and performing artists would be compensated when their records were performed for commercial purposes." S. Rep. No. 92-72, *supra*, at 3. But because granting the performance right would not have stopped the unauthorized reproduction of sound recordings, Congress omitted such a right from the 1971 Act. *See id.*

In addition, far-reaching and detailed limitations and exceptions to the rights granted in the Sound Recordings Act indicate the lack of a preexisting common-law bundle of rights. The exclusive rights of reproduction and distribution created by the Sound Recordings Act were further limited in two ways.

First, the sound recording's copyright owner cannot prevent "sound-alike" recordings. Sound Recordings Act § 1(a) ("[T]his right does not extend to the making or duplication of another sound recording that is an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording . . . ."). This restriction, emulated by California's section 980, indicates a far more restrictive scope than would seem to accrue from a natural right. By contrast, whether a copyist reproduces a musical work

via technological means or with a handwritten transcription, the law still considers the resulting copy an infringing reproduction.

Second, the statute protected "reproductions made by transmitting organizations exclusively for their own use." Sound Recordings Act § 1(a). This limitation ensured that the rights of transmitting organizations, such as public television and radio stations, would remain unchanged by the Act. H.R. Rep. No. 92-487, at 8 (1971). It thus gave wide latitude to nonprofit broadcasters to make physical copies of sound recordings, because the exception for transmitting organizations "extends to programs produced, duplicated, distributed and transmitted by or through more than one public broadcasting agency or entity so long as exclusively for educational use." *Id.* These specific limitations to the scope of the sound recording right indicate congressional intent to achieve a particular policy end, rather than a desire to recognize an existing common law or natural right.

The Sound Recordings Act's effect on post-1972 sound recordings further points away from an exclusive right of public performance being a natural incident of copyright. As discussed above, that federal statute specifically provided that no public performance right would inhere in a sound recording fixed on or after February 15, 1972. If, as the district court thought, state common law inherently included a public performance right (that has gone unenforced for nearly a century), then the Sound Recordings Act would have had to *extinguish* that right

for post-1972 recordings. It is unlikely that Congress would have deprived future musicians of such a valuable right if it existed—certainly not without any record of discussion or debate on the matter. The more reasonable interpretation, which strongly cuts against the district court's view, is that there was no recognized common law public performance right, and the Sound Recordings Act created a new right out of whole cloth.

The legislative history of the Sound Recordings Act demonstrates that there was no *a priori* exclusive right over public performances. That law was narrowly tailored to solve the economic harms caused by the unauthorized reproduction and sale of sound recordings. Giving the public performance right to sound recordings would not have solved this problem, so it was not granted. The Act thus contradicts any view that a public performance right is inherently or naturally part of copyright.

B. The Federal Digital Performance Right Further Undermines the View of the Public Performance Right as Inherent in the Common Law

Much like the Sound Recordings Act, the enactment of the Digital Performance Right in Sound Recordings Act of 1995 (DPRA), Pub. L. No. 104-39, 109 Stat. 336, strongly points away from the district court's theory that the public performance right has existed in the common law since time immemorial. Rather, the statute exemplifies Congress's construction of a new right from scratch.

First, the DPRA creates a highly technical, regulatory scheme of rights and a complex mechanism by which those rights can be exercised. *See, e.g., id.* sec. 3, § 114(d)(1)(B)(i) (exempting retransmissions of nonsubscription radio broadcast transmissions "not willfully or repeatedly retransmitted more than a radius of 150 miles from the site of the radio broadcast transmitter"). Such complexity is not the hallmark of codification of the common law; it is better understood as Congress's creation of a wholly novel system of regulation.

Additionally, the language used to describe the statute demonstrates a general view that, prior to the statute, no exclusive right of digital performance previously existed; Congress was well aware that it was creating a brand new right, not codifying or limiting an existing one. The Committee Reports abound with such phrases as "[the Act] *creates* a carefully crafted and narrow performance right, applicable only to certain digital transmissions of sound recordings," "[t]he limited right *created* by this legislation reflects changed circumstances," and so on. H.R. Rep. No. 104-274, at 12, 14 (1995) (emphasis added). Contemporaneous media accounts of the bill agree that the digital performance right was newly formed. The *New York Times* noted that the statute "established for the first time that the performers of a song and the copyright holder of the recording would be paid a special royalty separate from those paid to songwriters and publishers." Ben Sisario, *Old Songs Generate New Cash for Artists*, N.Y. Times (Dec. 28, 2004),

URL *supra* p. v. The *Times* further quoted John Simson, then executive director of SoundExchange, as saying: "This is a brand-new right . . . A lot of artists are unaware of it, and we're working against 80 years of a music industry without a performance right." *Id.*

C. Public Performance Rights Have Been Granted Only to Certain Specific Types of Works

The overall history of public performance rights further reveals that public performance is not a common law right.

No public performance right—for any type of work—was recognized statutorily until 1856. The Copyright Act of 1790 conferred upon authors only the exclusive rights to "print, reprint, publish, or vend" works; protected works were limited to books, maps, and charts. Ch. 15, § 1, 1 Stat. 124, 124 (repealed 1831). Composers were first granted copyright protection for musical works in 1831, but then only for "printing, reprinting, publishing, and vending." *See* Copyright Act of 1831, ch. 16, § 1, 4 Stat. 436.

Public performance rights were introduced gradually and on an *ad hoc* basis, inconsistent with a theory that such rights were inherent in the common law. The first such rights appeared in 1856, when dramatic works were granted copyright protection for both a reproduction right and a public performance right. *See* Act of Aug. 18, 1856, ch. 169, § 1, 11 Stat. 138, 139 (granting, "along with

the sole right to print and publish," a right "to act, perform, or represent the same, or cause it to be acted, performed, or represented, on any stage or public place . . . ."). Notably, however, Congress declined to create a similar protection for musical works, though they were clearly recognized and given exclusive rights equivalent to reproduction and distribution. *See id.* It took more than forty years before musical compositions received a public performance right. *See* Act of Jan. 6, 1897, ch. 4, 29 Stat. 481. Motion pictures first received the public performance right in 1976, *see* Copyright Act of 1976, Pub. L. No. 94-553, § 106(4), 90 Stat. 2541, 2546, even though motion pictures were initially copyright-eligible under the federal statute as "photographs" and later explicitly given copyright protection against unauthorized reproduction, *see* Townsend Amendment, Pub. L. No. 62-303, 37 Stat. 488 (1912) (providing copyright protection to "Motion-picture photoplays"). Literary works were first granted copyright protection in 1790, but were not granted a public performance right as a whole until over a century later in 1952. *See* Act of July 17, 1952, ch. 923, 66 Stat. 752.

The frequent limitations on public performance rights contradict a theory that such rights come from a common law characterized by broad, generalized rules. The Copyright Act of 1909, for instance, granted musical works a public performance right, but only if the performance was for profit. *See* ch. 320, § 1(e), 35 Stat. 1075. This refined the performance right granted to musical works just a

few years before. *See* Act of Jan. 6, 1897. The for-profit limitation remained until the 1976 Act. *See* Copyright Act of 1976 § 106(4). Such intricacies are not commonplace in common law concepts, again suggesting that the public performance right of the Copyright Act was not a natural right of the common law.

The evolution of public performance rights demonstrates that the district court's public performance right is newly minted, not a mere confirmation of the traditional common law. If anything can be called a "traditional" right inherent in copyright law, it is the reproduction right. *See The Mikado Case*, 25 F. 183, 185 (C.C.S.D.N.Y. 1885) ("Strictly, the only invasion of a copyright consists in the multiplication of copies of the author's production without his consent. Any other use of it, such as for the purpose of public reading or recitation, is not piracy."). The evolution of copyright protection in sound recordings also supports this assertion, as does the statutory creation of the limited digital public performance right in sound recordings.

D. The District Court's Analysis of Case Law Fails to Render the Public Performance Right Consistent with the Common Law

The district court supported its newly devised state-law public performance right with reference to two trial court cases and a perplexing logical argument about the interpretation of the absence of evidence. None of these supports the theory that a public performance right is found in the common law.

To support its holding of the existence of a public performance right, the court made reference to a companion case, *Flo & Eddie Inc. v. Sirius XM Radio Inc.*, which cited two cases supposedly finding such a common law public performance right. *See* CV 13-5693, 2014 WL 4725382, at *19 (C.D. Cal. Sept. 22, 2014). Neither cited case is good precedent for that proposition. The first case, *Capitol Records, LLC v. BlueBeat, Inc.*, merely found infringement under section 980 where the defendant had reproduced and distributed a copyrighted work; the defendant's performing activity was never treated as a separate act of infringement. *See* 765 F. Supp. 2d 1198, 1206 (C.D. Cal. 2010).[5] The second case, *Bagdasarian Productions, LLC v. Capitol Records, Inc.*, is a non-precedential unpublished state law case, not citable by the rules of the issuing court; moreover the case merely suggests a public performance right in hypothetical dicta. No. B217960, 2010 WL 3245795, at *11 (Cal. Ct. App. Aug. 18, 2010).[6] Neither of these cases justifies the district court's

[5]*Capitol Records* relied on *A & M Records, Inc. v. Heilman*, 75 Cal. App. 3d 554 (Cal. Ct. App. 1977), to state that performance fell within section 980. *See Capitol Records*, 765 F. Supp. 2d at 1206. That is a misreading of *Heilman*, which held that a defendant's reproduction of the plaintiff's performance constituted an infringement, but said nothing about an act of performance by the *defendant*. *See* 75 Cal. App. 3d at 560–61. The exclusive rights of copyright proscribe only acts of defendants, not the acts of copyright owners, of course, meaning that *Heilman* says nothing about an exclusive performance right.

[6]Of note, the *Sirius XM* court's reasoning about *Bagdasarian* is particularly unclear. *Bagdasarian* merely concluded that a public performance of a music recording was not an act of "manufacture or distribution" by the terms of a private contract. *See* 2010 WL 3245795, at 11. The *Sirius XM* court deduced that because the contract otherwise granted "all rights of every kind" the public performance

finding that section 980 includes a public performance right.

Faced with a lack of reliable precedent to support this newly minted public performance right, the district court, at Appellee's urging, reasoned that such a right must be within the ambit of the common law *because no district court had yet rejected that right.* Because "there is no . . . body of California common law *denying* sound recording owners the exclusive right to publicly perform their recordings," the district court inferred that such an exclusive right must exist in the common law. *Sirius XM*, 2014 WL 4725382, at *14 (emphasis added). This Court should not approve such bend-over-backwards logic: the lack of cases on this point far more clearly indicates the *absence* of the right, especially in view of the federal legislative text and history discussed above.

Thus, public performance is not included within the scope of "exclusive ownership" covered by section 980(a)(2). Such a right cannot be found within federal or California common law; nor can it be inferred from the history of copyright law. To the contrary, that history proves that public performance rights are not part of some natural bundle of exclusive rights, but rather must be affirmatively created by some operation of law—one which is missing from the common law.

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hypothetical must be one such right, and because the contract was "operating in a copyright landscape governed by § 980(a)(2)," the hypothetical situation must be a section 980 right. But these enormous logical leaps are unnecessary to explain *Bagdasarian*: more likely, the judge picked public performance as an example of an act that fell outside the contract language, regardless of its section 980 status.

* * *

The district court presumed the existence of a public performance right in sound recordings, despite the lack of any reliable source of law for those rights. Instead, the court noted that, while federal law explicitly lacks such a right, California law remains silent. From this silence, and the misapplication of a maxim of statutory construction, the district court used tenuous logic to support its presupposition that the common law includes an inherent "default" bundle of exclusive rights, one of which is for the public performance of sound recordings.

The district court is incorrect. The bundle of rights that copyright grants to authors has never been universal or uniform. The exclusive rights we are accustomed to under federal copyright law are neither necessary nor comprehensive for all systems of copyright. Aside from the exclusive right to reproduce works, the iterations of the federal Copyright Act have variously included or excluded certain rights for various different types of creative works. Other potential exclusive rights have never been recognized for *any* creative work.

Nothing prevents the California legislature from creating a public performance right in pre-1972 sound recordings, or Congress from doing the same for all sound recordings. However, neither body has done so, and the common law recognizes no such right. The district court's attempt to manufacture such a right judicially was in error.

CONCLUSION

For the foregoing reasons, this Court should reverse the District Court and hold that California law does not recognize an exclusive public performance right in sound recordings made prior to February 15, 1972.

Respectfully submitted,

Dated: September 9, 2015

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains **5,541** words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: September 9, 2015

s/Charles Duan
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **Brief of Public Knowledge as *Amicus Curiae* in Support of Defendant-Appellant Pandora Media, Inc.** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on **September 9, 2015**.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: September 9, 2015 *s/Charles Duan*
Charles Duan
Counsel for amicus curiae