

S240649

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

FLO & EDDIE, INC.,
Plaintiff-Respondent,

v.

PANDORA MEDIA, INC.,
Defendant-Petitioner.

Questions Certified from the United States Court of Appeals for the
Ninth Circuit, Case No. 15-55287

APPLICATION OF *AMICI CURIAE*
YALE LAW SCHOOL INFORMATION SOCIETY PROJECT AND
SCHOLARS OF INTELLECTUAL PROPERTY AND FREE
EXPRESSION LAW FOR LEAVE TO FILE AN *AMICI CURIAE*
BRIEF; PROPOSED BRIEF OF *AMICI CURIAE* IN SUPPORT OF
DEFENDANT-PETITIONER PANDORA MEDIA, INC.

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ATTORNEYS FOR *AMICI CURIAE*

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APPLICATION FOR LEAVE TO FILE AN AMICI CURIAE BRIEF

Pursuant to Rule 8.520(f) of the California Rules of Court, the Information Society Project at Yale Law School (“ISP”) and Professors BJ Ard, Jack M. Balkin, Derek E. Bambauer, Mark Bartholomew, Annemarie Bridy, Shubha Ghosh, Robert Heverly, Mark A. Lemley, Ira Steven Nathenson, and Christina Spiesel—all of whom are scholars who research, write, or teach about intellectual property and its intersections with free expression—respectfully request leave to file the attached brief in support of the Petitioner Pandora Media, Inc, to be considered in the above-captioned matter.¹ This application is timely made pursuant to Rule 8.520(f)(2) of the California Rules of Court.

Interest of Amici Curiae

The ISP is an intellectual center addressing the implications of new information technologies for law and society, with a special interest in free speech, copyright, and media law and policy. *Amici* scholars are BJ Ard, Visiting Assistant Professor of Law at the University of Arizona James E.

¹ This brief has been prepared by individuals affiliated with the University of Arizona James E. Rogers College of Law and the University at Buffalo School of Law, and joined by an organization and individuals affiliated with Yale Law School, Albany Law School, University of Arizona James E. Rogers College of Law, University at Buffalo School of Law, University of Idaho College of Law, Stanford Law School, St. Thomas University School of Law, and Syracuse University College of Law. It does not, however, purport to present these schools’ institutional views, if any. *Amici* scholars participate in this case in their personal capacity; titles are used for purposes of identification only.

Rogers College of Law; Jack M. Balkin, Knight Professor of Constitutional Law and the First Amendment at Yale Law School and founder and director of the ISP; Derek E. Bambauer, Professor of Law at the University of Arizona James E. Rogers College of Law; Mark Bartholomew, Professor of Law at the University at Buffalo School of Law; Annemarie Bridy, Professor of Law at University of Idaho College of Law; Shubha Ghosh, Crandall Melvin Professor of Law and director of the Technology Commercialization Law Center at Syracuse University College of Law; Robert Heverly, Associate Professor of Law at Albany Law School; Mark A. Lemley, William H. Neukom Professor of Law at Stanford Law School and director of the Stanford Program in Law, Science and Technology; Ira Steven Nathenson, Professor of Law at St. Thomas University School of Law; and Christina Spiesel, Senior Research Scholar in Law at Yale Law School.

Amici have no financial interest in the outcome of this litigation. Our interest is in respecting the balance between the rights of authors to control their creative works and the public's interests in free expression.

Response of Amici

As set forth in greater detail in the accompanying brief, *Amici* argue that Respondent Flo & Eddie's aggressive reading of California Civil Code Section 980(a)(2) is untenable. The unfettered rights that Respondent claims under the statute would present serious First Amendment concerns

and impose practical burdens on the freedom of expression. The state legislature cannot plausibly have intended to enact a statute with these consequences. In answering the certified questions, we therefore urge the Court to reject any interpretation of California Civil Code Section 980(a)(2) that creates unnecessary and unwarranted conflict with the First Amendment or burdens on the public's expressive activity.

No party or counsel for any party, other than counsel for *Amici*, has authored the proposed brief in whole or in part or funded the preparation of the brief.

DATED this 12th day of January, 2018.

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STATEMENTS OF INTEREST OF THE AMICI CURIAE AND SOURCE OF AUTHORITY TO FILE

Pursuant to Rule 8.520(f) of the California Rules of Court, this brief is filed with an accompanying Application for Leave To File an *Amici Curiae* brief which sets forth *Amici*'s interest in this matter.

SUMMARY OF ARGUMENT

Copyright law seeks to maintain a balance between securing the rights of authors and protecting the public's interest in free expression. Copyright law—and, indeed, First Amendment law—has thus long placed limits on the monopoly granted to authors. Respondent discards these limits in its aggressive reading of California Civil Code Section 980(a)(2). Respondent asserts that this statute grants the “absolute right to possess, use, and dispose of the actual sounds fixed in [its] pre-1972 sound recordings” and “exclude all other persons from using them *in any way*.” Reply Brief at 24–25 (emphasis added). Unfettered statutory protection of this sort would unduly burden the public's First Amendment rights and a wide range of expressive activities, and it would also impair the distribution and preservation of existing works. *Amici* urge this Court to reject any interpretation of the statute that fails to give appropriate consideration to the First Amendment and the public's interests in free expression.

The questions certified to this Court concern the scope of the “exclusive ownership” right set forth at Section 980(a)(2), specifically,

whether it grants the exclusive right to public performance of sound recordings fixed prior to Feb. 15, 1972 (hereinafter “pre-1972 sound recordings”).² This provision, which is the result of a 1982 amendment to the state copyright statute, does not define the scope of “exclusive ownership,” and it provides only one express limitation on its coverage—a carve-out allowing others to re-record their own “cover” version of a sound recording. Respondent claims that, by explicitly including only this one exception, the enacting legislature implicitly rejected all other limitations on the scope of copyright protection in sound recordings, particularly any limits enumerated in the federal Copyright Act.

This approach to interpreting the statute is flawed. In discarding any limitations present in the federal Act, but not expressly enumerated in the state statute, it would eliminate the traditional contours of copyright—including fair use and the idea/expression dichotomy—which are required as a matter of First Amendment law. It would also create a new right unfettered by the many defenses and limitations that are required to make a

² The Ninth Circuit asks not only whether Section 980(a)(2) creates an exclusive right of public performance for pre-1972 sound recordings, but also whether state common law of property or tort grants comparable protection. The answer to the question of common-law protection nonetheless hinges on the statute: unless Section 980 creates a public performance right, it is unclear how there can be any common law claim for interference with that right. *Accord Sheridan v. iHeartMedia, Inc.*, 255 F. Supp. 3d 767, 775–776 (N.D. Ill. 2017) (finding no basis for a misappropriation claim in the absence of an established performance right).

public performance right workable without substantial interference with speech, including the first sale doctrine, statutory licensing schemes, and safe harbors for libraries, archives, and online service providers. Indeed, Respondent's unbounded claim to all rights other than the right to control cover recordings admits of no limiting principle. Even the innocent act of playing a lawfully acquired, non-counterfeit sound recording in one's own home would seem to infringe. This approach to interpreting the statute cannot be correct, and *amici* argue it should be rejected for two reasons:

First, Respondent's interpretation presents a constitutional problem under the First Amendment. The Supreme Court of the United States has held that the First Amendment requires that copyright statutes respect the "traditional contours of copyright," particularly the doctrine of fair use and the dichotomy between ideas, which cannot be copyrighted, and expression, which can. These limits are necessary to vindicate core First Amendment rights to engage in commentary, debate, parody, knowledge-creation, and other essential forms of expression. But if the California statute is understood to exclude all limitations enumerated in the federal Copyright Act (except the right to make "cover" versions), then it will have discarded these doctrines, rendering any unlicensed use of a pre-1972 sound recording unlawful even if embedded in creative works parody or criticism that are at the core of the fair use doctrine and the First Amendment.

The state legislature cannot plausibly have intended to create statutory rights so squarely in conflict with the First Amendment. Principles of constitutional avoidance therefore counsel this Court to reject this approach to the statute.

Second, Respondent's interpretation of the statute creates substantial additional burdens on free expression that can and should be rejected. Under the interpretation Respondent advances, the statute would create an exclusive right to control performances of sound recordings that does not include the first sale doctrine, lacks any statutory licensing mechanisms, and does not include safe harbors for the historical preservation activities of libraries and archives or for online service providers' transmission of their users' speech. These omissions would impose innumerable burdens on the enjoyment, proliferation, and preservation of culture while securing unnecessary and unwarranted windfall benefits to recording artists. For example, in the absence of a first sale doctrine, the entire used-record market for pre-1972 recordings could be rendered illegal. Similarly, without a statutory licensing mechanism or other safe harbor, copyright owners would have unconstrained bargaining power to prevent public performances of old recordings or to discriminate among music platforms who wish to play old tracks. Libraries and archives would effectively be forbidden from creating archival copies of sound recordings for purposes of

historical preservation and existing archives would fall under a dark legal cloud.

Still worse, Respondent's interpretation would upend settled legal expectations by retroactively recognizing rights—which nobody previously thought existed—more than 40 years after the sound recordings in question were created. In many cases this would leave old works “orphaned” without an identifiable owner, making it impossible to obtain a license and thus discouraging anyone from publicly performing old sound recordings for fear of a surprise lawsuit. It would also disrupt long-held reliance interests in the music industry and among creators of derivative works, all of whom have been operating under the settled understanding that they do not need to locate and obtain licenses from owners of pre-1972 sound recordings. For example, Respondent's interpretation would give sound-recording owners a windfall against creators who have already incorporated pre-1972 sound recordings into new works, such as film soundtracks, and who obtained licenses for the underlying music itself but had no reason to think a separate license was required for the sound recording. In such cases, owners of the sound recording could demand extortionate royalties on threat of enjoining continued circulation of already-completed works.

This Court can and should take account of these free speech implications in interpreting section 980(a)(2). Respondent can, at most, establish that the statute is ambiguous: it does not expressly state whether it

conveys a right of public performance, and it is unclear what sort of defenses and limitations apply to any rights created. The court is empowered, in the face of this ambiguity, to consider extrinsic evidence including the policy implications of the statute.

The Court should thus reject Respondent's interpretation both to avoid constitutional difficulties and to avoid significant, unnecessary, and unwarranted disruption to the public's ability to enjoy the vast catalog of sound recordings published before 1972.

ARGUMENT

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

Respondent's interpretation of section 980(a)(2) violates the First Amendment insofar as it discards constitutionally prescribed limits on copyright, including the doctrine of fair use and the distinction between ideas and expression. Respondent's flawed interpretation, adopted previously by the Central District of California, posits that the only limit on this exclusive right is a single exception codified in the statute, which permits "cover" versions of a song. *See Flo & Eddie Inc. v. Sirius XM Radio Inc.*, CV 13-5693, 2014 WL 4725382, at * 5 (C.D. Cal. Sept. 22, 2014) ("[B]y finding it necessary to specify an excepted right to ownership in a sound recording, the legislature conveyed that limitations on ownership did not live within the concept itself, rather they required elucidation.").

This interpretation of the statute cannot stand because it appears to eliminate limitations and defenses required by the First Amendment. Any reading of section 980(a)(2) that omits these protections should be rejected due to the grave constitutional concerns it would raise. *See, e.g., People v. Engram*, 50 Cal. 4th 1131, 1161 (2010) (“Under well-established constitution precedent, of course, a statute must be construed, if reasonably possible, in a manner that avoids a serious constitutional question.”); *In re Smith*, 42 Cal. 4th 1251, 1269 (2008) (“Our common practice is to ‘construe[] statutes, when reasonable, to avoid difficult constitutional questions.’”) (alteration in original) (citation omitted); *see also, e.g., Johnson v. United States*, 135 S. Ct. 2551, 2578 (2015) (“When a statute’s constitutionality is in doubt, we have an obligation to interpret the law, if possible, to avoid the constitutional problem.”).

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

The First Amendment limits the scope of copyright protection. In particular, the United States Supreme Court has held that when legislative action “alter[s] the traditional contours of copyright protection,” it may run afoul of the Constitution’s protection of free speech. *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003); *accord Golan v. Holder*, 132 S. Ct. 873, 889–91 (2012). These “traditional contours” include the defense of fair use and the

idea/expression dichotomy. These principles are codified in federal copyright law, thereby incorporating and addressing the First Amendment’s requirements where federal copyright governs. *Golan*, 132 S. Ct. at 889–91; 17 U.S.C. § 102(b), 107, 109. But state copyright protection that omitted any one of these principles would be of dubious constitutionality.³

The United States Supreme Court has held that the defense of fair use is not simply good policy, but one of the copyright regime’s “built-in First Amendment accommodations.” *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003); see *Golan*, 132 S. Ct. at 890; *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985). Fair use is a crucial protection for freedom of speech because it preserves the public’s right to use otherwise copyrighted works in a range of critical, transformative, and educational expression. In the absence of fair use protection, copyright would inhibit “‘scholarship and comment,’” “parody,” and other forms of expression vital to our democracy, including “‘criticism . . . news reporting,

³ See 5 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright*, §19E.06[C][2][b] (Rev. Ed. 2015) (“The negative corollary [of *Golan*] is that a law that failed to respect ‘traditional contours’ would fall afoul of the First Amendment (or at least require the appropriate level of scrutiny dictated by the capacious body of free speech jurisprudence).”); Neil Weinstock Netanel, *First Amendment Constraints on Copyright After Golan v. Holder*, 60 UCLA L. Rev. 1082, 1102-03 (2013) (“[A] Copyright Act amendment that simply eliminated or substantially weakened the First Amendment protections embodied in the idea/expression dichotomy or fair use defense as generally applied in copyright law would not withstand First Amendment scrutiny.”).

and teaching.’” *Eldred*, 537 U.S. at 220 (quoting *Harper & Row*, 471 U.S. at 560). Accordingly, any law purporting to grant copyright-like protection must recognize a fair use defense or risk violating the First Amendment.

Likewise, the United States Supreme Court has repeatedly indicated that the idea/expression dichotomy is required by the First Amendment. This doctrine provides that copyright cannot be asserted to protect “ideas” themselves, and only applies to author’s “expression” thereof. “Due to this distinction, every idea, theory, and fact in a copyrighted work becomes instantly available for public exploitation at the moment of publication.” *Eldred*, 537 U.S. at 219. As the Supreme Court explained in *Harper & Row*, the “idea/expression dichotomy strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author’s expression.” *Harper & Row*. 471 U.S. at 556 (internal quotation marks omitted).

Without the idea/expression dichotomy, copyright would utterly thwart the development of knowledge and creativity by granting individual copyright-holders the exclusive right to control the dissemination and use of ideas and facts themselves. That possibility is, of course, anathema to the principles of free speech embodied in the First Amendment. The idea/expression dichotomy respects copyright’s aim of rewarding authors for original expression while at the same time leaving ideas to the public as material to fuel future creation. *Fogerty v. Fantasy, Inc.*, 510 U.S. 517

(1994); *see also Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349–50 (1991) (“To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work.”).

B. This Court Should Reject Any Interpretation That Would Discard These Constitutional Requirements

Section 980(a)(2) does not codify any of these constitutionally prescribed limits on copyright. Respondent argues that because the statute, by its terms, includes only a single exception, its silence with respect to all other limits recognized in federal copyright law means that the legislature intended for no such limits to exist. *See* Reply Brief at 26–27. This logic leads to the conclusion that the state statute omits the fair use defense because it does not include an analogue to the federal fair use provision codified at 17 U.S.C. § 107, and that it omits the idea/expression dichotomy because it does not include a provision like 17 U.S.C. § 102(b). Whether or not this interpretive methodology is sound on its own terms—which is doubtful⁴—it must be rejected as a matter of First Amendment law because it would utterly eliminate the traditional contours of copyright.

⁴ Both fair use and the idea/expression dichotomy arose as common law limitations to the scope of copyright protection under the Copyright Act of 1790. *See Baker v. Selden*, 101 U.S. 99 (1879) (idea/expression dichotomy); *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (fair use). While Congress neglected to codify either of these limitations when it later enacted the Copyright Act of 1909, it would be absurd to conclude that

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

The First Amendment does not allow this Court to endorse so sweeping a view of section 980(a)(2). In fact, federal district courts in other cases dealing with section 980(a)(2) have specifically contemplated fair use defenses; in doing so they have implicitly recognized that there must be defenses and limitations other than the express defense for cover bands. *See Kramer v. Thomas*, No. CV 05-8381, 2006 WL 4729242, at *12 (C.D. Cal.

Congress intended this omission as an implied rejection. Congress’s choice to expressly limit copyright protection in other ways under the 1909 Act—including a compulsory license that enables “covers” by permitting artists to record a musical composition without permission of the copyright owner, Copyright Act of 1909, ch. 320, § 1(e), 35 Stat. 1075, 1075–76—did not indicate that it meant these express limits to be exclusive. The state legislature’s choice to adopt an express limitation for cover recordings is likewise no bar to applying the fair use defense or the idea/expression dichotomy.

Sept. 28, 2006); *Bridge Publ'ns, Inc. v. Vien*, 827 F. Supp. 629 (S.D. Cal. 1993). This Court should make it unmistakably clear that traditional First Amendment limits on copyright apply to section 980(a)(2), even in the absence of any express provision codifying them.

II. THE CREATION OF UNFETTERED OWNERSHIP RIGHTS IN SOUND RECORDINGS WOULD SUBSTANTIALLY BURDEN EXPRESSION

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

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

The first sale doctrine has been a fixture of domestic copyright law for over 100 years. In *Bobbs-Merrill Co. v. Strauss*, the United States Supreme Court made clear that a copyright owner's exclusive distribution right does not restrict the public's right to re-sell or lend a lawfully acquired copy. *See* 210 U.S. 339 (1908); *see also* 17 U.S.C. § 109 (codifying this principle). It is this principle that allows used-record stores and libraries to distribute lawfully acquired phonorecords to the public. *See Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351, 1364 (2012) (recognizing the doctrine's centrality for "libraries, used-book dealers, technology companies, consumer-goods retailers and museums"). These distribution channels play an important role in the proliferation of culture and ideas: the continued circulation of older works allows users to tap into our shared cultural heritage even after new copies are no longer in production. Secondhand markets and library-lending likewise aid in the diffusion of culture by reducing the price that consumers must pay to explore new works.

First sale rights also existed under California law prior to the passage of the 1982 amendment. All protection under the old section 980 terminated once the sound recording was published, meaning that the owner would lose all further control over re-distribution. *See* Cal. Civ. Code § 983(a)

(1949); *see also* 2 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 8C.02 (Rev. Ed. 2015) (“[G]enerally (although not necessarily) an initial sale constitutes a general publication, that in turn divests all common law rights.”). The state’s criminal copyright law—codified at Cal. Penal Code Section 653h—likewise restricted its scope to unlawful copies and imposed no limits on a party’s re-distribution of a lawfully purchased copy.

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

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

The creation of a new public performance right would require any party that wishes to broadcast a sound recording—from the largest radio station to the smallest online service—to negotiate a license with the owner of that sound recording.⁵ Copyright owners could impose disadvantageous rates on would-be broadcasters with less negotiating power, or they could unilaterally refuse to license their works to innovative new streaming services.⁶ The result would be a system that privileged established

⁵ As terrestrial broadcasters, radio stations owe no royalties under federal copyright law for the public performance of any sound recording. When Congress created limited performance rights for post-1972 sound recordings, it extended this right only to digital transmission and exempted radio broadcasters. *See* Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336.

Recognition of a public performance right under section 980 would therefore lead to an anomalous situation where terrestrial radio broadcasters would be required by state law to pay royalties on pre-1972 recordings by artists like The Turtles, but still exempt under federal law from paying royalties on newer recordings by artists like Taylor Swift and Jay Z. As the New York Court of Appeals has recognized, moreover, “the public and the artists could be harmed by the recognition of a right of public performance” that extends to radio broadcasts: “if deterred by the costs of paying to play older songs, radio services may choose to limit or cease their broadcasts of pre-1972 music.” *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 28 N.Y. 3d 583, 606 (2016).

⁶ These concerns are reflected in the history of music licensing for radio. ASCAP and BMI—two entities who handle licensing for the public performance of musical compositions (but not sound recordings)—were the target of Department of Justice antitrust actions for their anticompetitive licensing practices in the late 1930s and 1940s, and these actions culminated in consent decrees that remain in effect today. *See United States*

incumbents over smaller operations and new entrants, promoting centralization rather than diversity in the media marketplace. *See* Kristelia A. Garcia, *Penalty Default Licenses: A Case for Uncertainty*, 89 N.Y.U. L. Rev. 1117, 1136 (2014) (“In the absence of a statutory licensing regime, smaller, less powerful licensees could be denied access to a licensor’s intellectual property.”).

When Congress introduced digital performance rights in 1995, it accounted for such risks by simultaneously establishing a statutory licensing scheme for digital performances: 17 U.S.C. § 114 establishes mechanisms whereby non-interactive webcasters can avail themselves of common rates established by an administrative panel. Section 980(a)(2) of course creates no comparable licensing arrangement. The performance rights that Respondent seeks under the statute would therefore give copyright owners unconstrained bargaining power in the licensing of older recordings. While overtly discriminatory practices might be regulated through antitrust lawsuits, the expense and uncertainty of this approach to music licensing would favor large incumbents with resources to mount a major legal challenge—including traditional radio broadcasters and perhaps well-funded online services like Apple’s recently launched “Apple

v. ASCAP, No. 41-1395 (WCC), 2001 WL 1589999 (S.D.N.Y. June 11, 2001); *United States v. Broadcast Music, Inc.*, No. 64 CIV 3787, 1994 WL 901652 (S.D.N.Y. Nov. 18, 1994).

Music”—at the expense of new entrants, small players, and non-profit media operations.

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

Libraries and archives serve an important role in protecting our cultural heritage beyond merely circulating existing works (as facilitated by the first sale doctrine, *see supra* Section II.A). They also advance our cultural heritage by preserving works to ensure their availability to future generations, a task that involves the creation of archival copies and the creation of duplicates for circulation to the public when an original work is no longer commercially available, in fragile condition, or fixed in an obsolete recording format. Both federal and California law make allowances for these activities: section 108 of the Copyright Act sets forth a series of special privileges and immunities for libraries and archives, *see* 17 U.S.C. § 108, and the California criminal copyright statute provides express exemptions for certain educational and library uses, *see* Cal. Penal Code § 653h(h), and for archival by broadcasters, *see id.* § 653h(g).

Respondent’s expansive reading of section 980(a)(2)—which affords no safe harbor for library and archival activities—therefore threatens to disrupt the preservation of our cultural heritage. These difficulties are compounded further to the extent that the statute is read to exclude fair use or the first sale principle, and to the extent it creates an orphaned works

problem (*see infra* Section II.E). It is implausible that the state legislature would exempt libraries and archives from criminal liability for the unlicensed duplication of sound recordings only to create implicit civil liability for the same sorts of preservation activities.

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

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

infringing copies. *See* Jane C. Ginsburg, *Putting Cars on the “Information Superhighway”: Authors, Exploiters, and Copyright in Cyberspace*, 95 Colum. L. Rev. 1466, 1494 (1995).

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

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

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

Section 980(a)(2) provides no comparable safe harbor. The expansive rights that Respondent claims therefore create potential liability for online service providers whenever a user copies or distributes a pre-1972 sound recording. *See* Register of Copyrights, *Federal Copyright Protection for Pre-1972 Sound Recordings* 131–32 (2011), available at <http://www.copyright.gov/docs/sound/pre-72-report.pdf> (concluding that the DMCA safe harbor does not apply to pre-1972 sound recordings); *UMG Recordings, Inc. v. Escape Media Group, Inc.*, 107 A.3d 51, 58–59 (N.Y. App. Div. 2013) (same). *But see* *Capitol Records, Inc. v. MP3Tunes, LLC*, 821 F. Supp. 2d 627, 642 (S.D.N.Y. 2011) (reaching the opposite conclusion). This would return online service providers to the

uncomfortable position they faced under federal law prior to the passage of the DMCA: to avoid liability, they would need to either restrict users' communications or implement costly and invasive filtering mechanisms. In either case, the public's interest in free expression would be impaired.

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

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

The rights that Respondent seeks to establish would create an orphaned-works problem. At least 45 years have passed from the time pre-1972 works were first recorded to the present assertion of public performance rights. Given that copyright protection for sound recordings was not recognized in federal or state law at that time, it may often be unclear whether contemporary contracts would have assigned these residual rights to the record label, the performing artists, or the recording engineer. Records of rights ownership, moreover, may simply be incomplete or may have become lost in the interim. The problem is particularly acute for obscure sound recordings that are no longer in commercial circulation, including non-music radio programming from the early twentieth century. *Cf.* H.R. Rep. 110-231, 110th Cong., 1st sess. (2008) (recognizing that the great majority of our nation's audio, film, and video heritage sits deteriorating in archives).

Since many of these pre-1972 works will have no identifiable rights owner, the works would be held hostage by the rights that Respondent seeks. The uncertainty surrounding ownership would restrict socially beneficial expressive activity not only by terrestrial and digital broadcasters, but also by creators who would incorporate earlier sound recordings into derivative works and the musical libraries, archives, and other types of memory institutions that make older works available for educational, scholarly, and creative purposes. *See* Jennifer Urban et al., *Report on*

Orphan Works Challenges for Libraries, Archives, and Other Memory Institutions (2013), available at

http://www.cmsimpact.org/sites/default/files/documents/report_on_orphan_works_challenges.pdf (explaining the challenges that orphaned works pose for digitization projects that would serve preservation and public-access goals). Rather than securing remuneration to recording artists, recognizing a public performance right may in many cases simply result in a loss of public access to the affected works.

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

Several industries have substantial reliance interests in the present regime, where owners of pre-1972 sound recordings possess no exclusive performance right. Terrestrial and digital music broadcasters reasonably expect to be able to play pre-1972 tracks without fear of liability so long as they pay to license the underlying copyright in the music itself. Recognition of new performance rights would give sound-recording owners the power to demand additional rents.

The situation is worse for creators who have already incorporated pre-1972 sound recordings into their own derivative works. Filmmakers who paid to license a musical composition, for example, reasonably expected that they could include the associated pre-1972 recordings in their film's soundtrack without fear of liability. Modern remix artists share the

same expectations when they pay to sample from a pre-1972 track. To recognize a public performance right after the fact would be highly disruptive. Sound-recording owners could demand extortive royalties on the threat of enjoining the continued circulation of these already-completed works.

Congress has previously recognized the importance of these kinds of reliance interests, as demonstrated through its efforts to protect such interests each time it has expanded federal protection for sound recordings. When Congress first extended copyright protection to sound recordings in 1972, it expressly refused to protect works created prior to the effective date of the enacting legislation. Pub. L. No. 92-140, § 3, 85 Stat. 391, 392 (1971) (specifying that federal protection “shall apply only to sound recordings fixed, published, and copyrighted on and after the effective date of this Act”). In 1984, when Congress restricted the rental or lending of phonorecords, it refused to extend this new restriction to any work purchased prior to the legislation’s effective date. Record Rental Amendment of 1984, Pub. L. No. 98-450, § 4(b), 98 Stat. 1727, 1728. And in 1995, when Congress recognized a public performance right in sound recordings, it extended these rights only to the new practice of digital audio transmission and in so doing refused to disrupt traditional radio broadcasters’ longstanding reliance interests. *See* Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336.

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

To recognize a public performance right in section 980(a)(2) today would disrupt the reliance interests of entire industries. Even in 1982, retroactive recognition of this right would have posed serious difficulties for radio broadcasters and for filmmakers who had already incorporated pre-1972 sound recordings into their soundtracks. Retroactive recognition of this right would also disrupt the interests of innumerable parties who have utilized these sound recordings in the three decades since the revision of section 980.

Congress’s consistent accommodation of reliance parties suggests that the state legislature would likely have considered accommodations of its own if it understood the amendment to disrupt established reliance interests in these ways. The lack of legislative attention to these reliance

parties therefore casts doubt on the proposition that the state legislature intended to enact expansive new performance rights.

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

Section 980(a)(2) is ambiguous on its face because it neither expressly includes nor excludes the public performance right that Respondent now asserts. *See Hughes v. Bd. of Architectural Exam'rs*, 17 Cal. 4th 763, 776 (1998) (“A statute is regarded ambiguous if it is capable of two constructions, both of which are reasonable.”).⁷ Flo & Eddie’s suit therefore requires the Court to consider factors beyond the text to determine whether the legislature intended to create this new right. *See Hughes*, 17 Cal. 4th at 776. The statute likewise takes no express position on whether defenses and limitations such as fair use or first sale apply. This Court must

⁷ This ambiguity is confirmed in the statute’s legislative history. The recognition of a public performance right in sound recordings in 1982 would have been unprecedented. Yet, as Appellant argues in its opening brief, the legislative history suggests that the state legislature meant only to “maintain” the rights and remedies in sound recordings that existed prior to the amendment. *See* Opening Brief at 17–18. The district court erred by attempting to construe “exclusive ownership” in a vacuum rather than by considering the scope of state copyright law as it existed prior to the 1982 amendment as a baseline for understanding the legislature’s meaning. *Cf. Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (“The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.”).

therefore also decide whether the legislature's intent is better effectuated by the retention of these defenses or their implicit rejection.

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

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

right.⁸ *Cf. Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 28 N.Y. 3d 583, 605 (2016) (finding that the dearth of lawsuits supports the conclusion there is no such right under New York state common law). In similar fashion, the lack of suits against used-record stores belies the position that the legislature implicitly rejected the first sale doctrine and other such unstated limits on “exclusive ownership.”

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

⁸ If section 980 created an unfettered public performance right in pre-1972 sound recordings, then terrestrial radio broadcasters would have infringed this right whenever they played 1960s hits like The Turtles’ “Happy Together” without first obtaining a license for the sound recording.

To be sure, Congress designed the federal regime so that only digital audio transmissions require a sound-recording license; terrestrial radio broadcasts are exempt under the Copyright Act. *See* 17 U.S.C. § 106(6); *see generally* Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336. But the California legislature in 1982 could not have drawn such a distinction because digital audio transmission did not yet exist. Because there are no reported cases of recording artists suing radio broadcasters immediately following the 1982 enactment—or indeed any time prior to Flo & Eddie’s assertion of an expansive performance right—the clear implication is that the contemporary recording artists whose interests were at stake did not recognize the 1982 act as creating an enforceable public performance right in their sound recordings.

This would be a different case if the state legislature had clearly expressed an intent to create expansive public performance rights in sound recordings. Faced with a clearly worded statute, this Court would have no choice but to engage with difficult questions of the statute's constitutionality under the First Amendment. *See supra* Part I. It would likewise be forced to confront several concerns beyond those raised in this brief: Reliance parties might be entitled to bring Fourteenth Amendment claims arguing a violation of due process following the disruption of their entitlements, *cf. Golan*, 132 S. Ct. at 892 n.33 (explaining that Congress perceived the Fifth Amendment's takings clause as a potential check on its ability to restore protection to works in the public domain); 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 1.11 n.11 (Rev. Ed. 2015) (explaining that a "taking" at the state level may be cognizable as a Fourteenth Amendment injury); and, as other scholars have argued, state performance rights might be preempted by the federal Copyright Act, given their potential conflict with the uniformity goals of the federal regime, or by the Dormant Commerce Clause, given their potential burden on interstate commerce. *See* Gary Pulsinelli, *Happy Together? The Uneasy Coexistence of Federal and State Protection for Sound Recordings*, 82 Tenn. L. Rev. 167, 204–35 (2014) (analyzing these issues by way of a proposed Tennessee law). In the face of ambiguity, however, the Court need not reach these questions. Indeed, each of these objections provides

further reason to doubt that the state legislature intended to implement such drastic changes to the state copyright regime.

CONCLUSION

For the foregoing reasons, this Court should answer the certified questions in the negative. Respondent's reading of the statute, which the Central District of California adopted, would unnecessarily cast aside copyright's longstanding speech protections and impose substantial new burdens on expressive activity without advancing the public's interests in the creation, distribution, or preservation of expressive works.

DATED this 12th day of January, 2018.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. Pursuant to California Rule of Court 8.520(c)(1), I hereby certify that the number of words contained in the foregoing Application for Leave To File an *Amici Curiae* Brief and the accompanying brief, including footnotes but excluding the Table of Contents, Table of Authorities, this Certificate, and signature blocks, is 7609 words as calculated using the word count feature of the program used to prepare this brief. I further certify that the foregoing documents are printed on recycled paper.

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A handwritten signature in blue ink, appearing to read "BJ Ard", written over a horizontal line.

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PROOF OF SERVICE

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APPLICATION OF *AMICI CURIAE* YALE LAW SCHOOL
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INTELLECTUAL PROPERTY AND FREE EXPRESSION
LAW FOR LEAVE TO FILE AN *AMICI CURIAE* BRIEF;
PROPOSED BRIEF OF *AMICI CURIAE* IN SUPPORT OF
DEFENDANT-PETITIONER PANDORA MEDIA, INC.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

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