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## The Pre-1972 Sound Recordings Landscape: A Need for a Uniform Federal Copyright Scheme

P. Dylan Jensen

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# The Pre-1972 Sound Recordings Landscape: A Need for a Uniform Federal Copyright Scheme

by P. DYLAN JENSEN\*

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## I. Introduction

With the growth of the Internet in the 1990s and into the 2000s, and further expansion of digital media, record companies have struggled to adapt to the rapidly growing technology offered by giants such as Apple. Meanwhile, technology companies have continued to refine their practices to function more efficiently, especially in the area of digital music sales. Apple, for instance, flourished in digital music sales on iTunes, and by February 2010, sold ten billion songs since its 2003 creation.<sup>1</sup> The biggest threat faced by record companies, however, was the free exchange of music on the Internet.<sup>2</sup> Though record companies ultimately defeated early file-sharing services such as Napster and Limewire, Internet entrepreneurs have continued to discover new ways to offer music online for free while obscuring the copyright infringement criteria.<sup>3</sup>

Many of these newly created services, such as MP3tunes, have avoided unfavorable judgments, shielding themselves with the safe harbor provision offered to Online Service Providers (“OSPs”), entities offering the transmission or providing connections for digital online communication, found in the Digital Millennium Copyright Act (“DMCA”).<sup>4</sup> Since these cases, however, record companies have changed legal tactics and have instead brought lawsuits targeting OSPs for use of pre-1972 sound recordings. This new line of cases has come to the forefront of pre-1972 sound recording litigation, asking whether the safe harbor provisions set forth in the DMCA limit the liability of OSPs that make pre-1972 sound

1. Andrew M. Pinchin, Comment, *Casting Common Law and the Music Industry Adrift: Pre-1972 Recordings Enter Federal Safe Harbors*, 91 OR. L. REV. 635, 637 (2012).

2. *Id.* at 638.

3. *Id.*

4. *Id.* at 639.

recordings available to third-party users without the permission of the copyright holder.<sup>5</sup>

A second line of cases involving pre-1972 recordings has also emerged, these under state and common law. The Sound Recordings Act of 1971 establishes that only sound recordings fixed on or after February 15, 1972, are protected under the U.S. Copyright Act.<sup>6</sup> Meanwhile, a web of varying state and common laws protect those recordings fixed prior to February 15, 1972.<sup>7</sup> The variances between these state and common laws, however, are decidedly noticeable, thus making it nearly impossible for rights holders and sound recording users to understand the scope of protection available to pre-1972 sound recordings. This means that sound recording users, particularly terrestrial radio stations like Sirius, might be infringing on the rights of copyright holders when they play pre-1972 sound recordings. Numerous record companies have thus brought suits in an effort to collect from such services, forcing federal and state courts to grapple with questions regarding royalties owed by digital broadcasting and streaming services for the use of pre-1972 sound recordings.

After briefly tracing a history of federal copyright law and musical compositions, specifically pre-1972 sound recordings, this note will address those cases dealing with the DMCA safe harbor provisions and attempt to understand not just the judgments themselves but also the underlying reasoning and considerations that help to form those judgments. This note will then turn to address the issue of royalties with regard to digital broadcasting and streaming services in order to better situate federal copyright law alongside state and common laws. Furthermore, this note will address the likelihood of future amendments to federal copyright law and the possible implications of such amendments, both on federal and state law and on the music industry. To conclude, this note will argue that such amendments are likely to and should be made in an attempt to protect what are now considered classic musical compositions and also to establish a uniform copyright scheme for sound recordings, so as to provide guidance to the courts and address the disparity between judgments.

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5. Leigh F. Gill et al., *Time to Face the Music: Current State and Federal Copyright Law Issues with Pre-1972 Sound Recordings*, 6 LANDSLIDE 60 (2014).

6. Sound Recording Act of 1971, Pub. L. No. 92-140, 85 Stat. 391 (1971).

7. Elizabeth Townsend Gard & Erin Anapol, *Federalizing Pre-1972 Sound Recordings: An Analysis of the Current Debate*, 15 TUL. J. TECH. & INTELL. PROP. 123, 132 (2012).

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## II. Brief History of Federal Copyright Law and Musical Compositions

### A. Origins of Copyright Protection

Copyright protection extends as far back as 1787, with the United States Constitution providing protection to certain expressed representations in order “to promote the Progress of Science and useful Arts.”<sup>8</sup> It was not until 1831, however, when musical compositions were brought within federal copyright protection under the Copyright Act of 1790.<sup>9</sup> The rights afforded to musical compositions, at the time, only extended to the publisher of the music and not the performer.<sup>10</sup> In 1909, Congress enacted the Copyright Act of 1909 in response to the Supreme Court’s decision in *White-Smith Music Pub. Co. v. Apollo Co.*<sup>11</sup> *White-Smith* held that piano player rolls, a form of music storage used for reproducing piano compositions, were not within existing copyright protections.<sup>12</sup> Though the Copyright Act of 1909 did not extend protection to sound recordings out of a fear for a music monopoly, Congress did establish a compulsory licensing agreement for sound recordings of musical compositions.<sup>13</sup>

### B. The Introduction of Analog Technology

With the onset of analog technology in the 1960s, and the possibility of piracy of recorded works, Congress was forced to enact the Sound Recordings Act in 1971.<sup>14</sup> The Sound Recordings Act added the exclusive right to “reproduce and distribute to the public by sale or other transfer of ownership, or by rental, lease or lending, reproductions of the copyrighted work if it be a sound recording.”<sup>15</sup> The protection offered by the Sound Recordings Act, however, did not extend to sound recordings created prior to 1972.<sup>16</sup> In this way, the Sound Recordings Act was solely prospective. Only sound recordings fixed on or after February 15, 1972, the date the 1971 amendment took effect, received federal protection.<sup>17</sup> This understanding was confirmed in *Goldstein v. California*, as the Supreme

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8. U.S. CONST. art. I, § 8, cl. 8.

9. Gill et al., *supra* note 5, at 60.

10. *Id.*

11. *Id.*

12. *White-Smith Music Pub. Co. v. Apollo Co.*, 209 U.S. 1, 18 (1908).

13. Gill et al., *supra* note 5, at 60.

14. *Id.*

15. Sound Recordings Act § 1(f), Pub. L. No. 92-140, 85 Stat. 391 (1971).

16. Gill et al., *supra* note 5, at 60.

17. *Id.*

Court held that federal law did not preempt state laws for pre-1972 sound recordings.<sup>18</sup> Essentially, the court concluded that if there is no federal law on the subject at issue then it could not occupy the field of that subject.<sup>19</sup> Therefore, state law applied.<sup>20</sup>

### C. Subsequent Amendments to Copyright Protection for Sound Recordings

Only a few years after the *Goldstein* decision, Congress enacted the 1976 Copyright Act (“the Copyright Act” or “the Act”), which remains in effect today.<sup>21</sup> The Act reinforced the 1971 amendment, further solidifying federal protection of post-1972 sound recordings.<sup>22</sup> But also as a result of the 1976 Copyright Act, state and common laws were deemed to exclusively govern pre-1972 sound recordings.<sup>23</sup> Section 301(c) of the Act explicitly exempts pre-1972 sound recordings from federal copyright law until February 15, 2067, at which time preemption will occur and protection will end.<sup>24</sup> Additionally, in 1995, Congress further extended copyright protection, amending Section 106 of the Act to include the exclusive right “in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.”<sup>25</sup>

## III. The Digital Millennium Copyright Act, Safe Harbors, and Their Relation to Pre-1972 Sound Recordings

Following the 1995 amendment to the Copyright Act, digital technology, and specifically OSPs, forced Congress to enact yet another piece of legislation. In 1998, Congress enacted the Digital Millennium Copyright Act (“DMCA”) in order to “preserve strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in a digital networked environment.”<sup>26</sup> The DMCA effectively represents Congress’s attempt to address the twenty-first century concerns regarding copyright issues in the modern Internet era.<sup>27</sup> Congress designed the DMCA so as to balance “the

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18. *Goldstein v. California*, 412 U.S. 546, 571 (1973).

19. *Id.*

20. *Id.*

21. Gill et al., *supra* note 5, at 60.

22. *Id.*

23. *Id.*

24. 17 U.S.C. § 301(c).

25. Digital Performance Right in Sound Recordings Act, Pub. L. No. 104-39, 109 Stat. 336 (1995) (codified at 17 U.S.C. § 106(6)).

26. *Capitol Records, LLC v. Vimeo, LLC*, 972 F.Supp.2d 500, 509 (S.D.N.Y. Sept. 18, 2013) (alteration in original) (quoting S. REP. NO. 105-190, at 20 (1998); H.R. REP. NO. 105-551(II), at 49 (1998)).

27. Pinchin, *supra*, note 1 at 641.

needs of modern consumers and suppliers with those of substantial copyright owners, such as record companies and movie studios.”<sup>28</sup> The DMCA, in turn, refined copyright protections available to rights holders whose works would be available in electronic mediums, while also considering the implications on entrepreneurship and technological innovation.<sup>29</sup>

In order to effectuate this balancing act between the competing interests of rights holders and OSPs, the DMCA offers safe harbor protection under section 512(c) that allows “qualifying [OSPs] to limit their liability for claims of copyright infringement.”<sup>30</sup> In other words, “the safe harbors provide a map for OSPs to defend themselves against indirect liability for the direct infringement of user-uploaded copyrighted material.”<sup>31</sup> Under section 512 of the Copyright Act, an OSP “will not be liable for infringement for 1) transitory digital network communications; 2) system caching; 3) information residing on systems at the direction of users; and 4) information location tools.”<sup>32</sup>

Prior to gaining the protection of the safe harbor provision under section 512, however, OSPs first have to satisfy a threshold inquiry.<sup>33</sup> The threshold inquiry under section 512(c) “is whether the OSP had actual knowledge of infringement by its subscribers, or if it subsequently became aware or should have become aware of circumstances making infringement apparent.”<sup>34</sup> Courts have described this as the “red flag” test.<sup>35</sup> If the OSP can show it had no knowledge of infringement, the OSP may only be found liable after receiving notice via the “notice and takedown” provisions of section 512(c).<sup>36</sup> “Prompt action to remove the alleged infringing material will restore the OSPs immunity.”<sup>37</sup> OSPs must also meet certain eligibility requirements before invoking DMCA safe harbors. Eligibility for OSPs is a “question of satisfactory adoption and implementation of account termination policies” for repeat copyright infringers.<sup>38</sup> Courts, therefore,

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28. *Id.*

29. *Id.*

30. *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 27 (2d Cir. 2012).

31. Pinchin, *supra*, note 1 at 641.

32. *Id.* at 642 (quoting ALEXANDER LINDEY & MICHAEL LANDAU, LINDEY ON ENTERTAINMENT, PUBLISHING AND THE ARTS § 1:50.50 (3d ed. 2006))

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* (quoting Amanda Harmon Cooley, *A Contractual Deterrence Strategy for User-Generated Copyright Infringement and Subsequent Service Provider Litigation*, 64 SMU L. REV. 691, 699 (2011); *see also* *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1109 (9th Cir.

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first determine whether the OSP is eligible for DMCA safe harbors, and then ascertain whether the OSP has sufficiently complied with the DMCA such that safe harbor protections should apply.<sup>39</sup>

#### **IV. Do the Digital Millennium Copyright Act Safe Harbors Extend to Pre-1972 Sound Recordings?**

##### **A. An Introduction to the DMCA Landscape From the Perspective of OSPs and Copyright Holders**

Oddly, nothing in the DMCA explicitly states whether the safe harbor protection offered to qualifying OSPs extends to pre-1972 recordings. “As a result, record companies’ recent use of pre-1972 recordings as a pretext for taking DMCA safe harbors out of the equation is no surprise.”<sup>40</sup> This is because liability is much more likely for OSPs without safe-harbor protections. If the safe harbors were to apply to pre-1972 sound recordings, then OSPs that qualify are protected from legal claims, such as copyright infringement, for use of the recordings. On the other hand, if the DMCA safe harbors do not apply, then OSPs must consistently review and remove uses of unauthorized pre-1972 sound recordings so as to avoid any potential liability.

OSP s argue that the DMCA applies to pre-1972 sound recordings in accordance with the policy goals of the DMCA. Specifically, OSPs believe that the safe harbor provisions should apply to pre-1972 sound recordings in order to encourage cooperation between copyright owners and OSPs in seeking out and eliminating copyright infringement. Rights holders, on the other hand, argue that the safe harbor provisions do not apply because the DMCA does not extend protection to the recordings themselves. In other words, why should OSPs gain protection from infringement claims for use of pre-1972 sound recordings when federal law does not protect the recordings themselves?<sup>41</sup> The debate between these two sides has, in fact, made its way through the courts, but no precedent has been established that determines whether DMCA safe harbor provisions apply to pre-1972 sound recordings. On the contrary, courts have split on the decision, making it clear that litigation in the area is likely to continue as rights holders will continue to seek relief through copyright infringement claims.

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2007) (“We hold that a service provider ‘implements’ a policy if it has a working notification system, a procedure for dealing with DMCA-compliant notifications, and if it does not actively prevent copyright owners from collecting information needed to issue such notifications.”).

39. Pinchin, *supra* note 1, at 642.

40. *Id.* at 644.

41. *Id.*

## B. What Have Courts Held?

In *Capitol Records, Inc. v. MP3tunes, LLC*, the District Court of the Southern District of New York sided with OSPs holding that safe harbor defenses are available for use of pre-1972 sound recordings.<sup>42</sup> There, copyright owners in sound recordings, musical compositions, and images of album cover art brought an infringement action against MP3tunes, which owned websites allowing users to store music files in personal online storage “lockers,” and search for and transfer to their lockers free song files on the Internet.<sup>43</sup> The court reasoned that, although prior case law held that federal copyright protections do not limit state or common law rights with regard to pre-1972 sound recordings, it did not suggest that immunity could not be granted to qualifying OSPs.<sup>44</sup> Rather, the court held that excluding pre-1972 sound recordings from the DMCA would “eviscerate” its stated purpose.<sup>45</sup> The court noted, “where an examination of the state as a whole demonstrates that a party’s interpretation would lead to ‘absurd or futile results . . . plainly at variance with the policy of the legislation as a whole,’ that interpretation should be rejected.”<sup>46</sup> Consequently, the court took it upon itself to provide clarity for OSPs “in order to foster fast and robust development of the internet,” holding that “the DMCA applies to sound recordings fixed prior to February 15, 1972.”<sup>47</sup>

In *UMG Recordings, Inc. v. Escape Media Group, Inc.*, a New York state appeals court departed from the court in *MP3tunes*, where the court found no distinction between federal and state copyrights.<sup>48</sup> The court in *UMG Recordings* held that DMCA safe harbor provisions did not apply to pre-1972 sound recordings distributed by Grooveshark, a music streaming service, because application of the DMCA safe harbor provisions would directly conflict with section 301(c) of the DMCA.<sup>49</sup> In fact, further support for the proposition that pre-1972 sound recordings are exempt from DMCA safe harbor protection can be derived from the text of the Copyright Act itself, according to the court. Section 301(c) of the Copyright Act states:

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42. *Capitol Records, Inc. v. MP3tunes, LLC*, 821 F. Supp. 2d 627, 642 (S.D.N.Y. 2011).

43. *Id.* at 633.

44. *Id.* at 641.

45. *Id.*

46. *Id.* (citing *Yerdon v. Henry*, 91 F.3rd 370, 376 (2d Cir. 1996)).

47. *Id.* at 642.

48. *UMG Recordings, Inc. v. Escape Media Group, Inc.*, 964 N.Y.S.2d 106, 112 (N.Y. App. Div. 2013).

49. *Id.*

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With respect to sound recordings fixed before February 15, 1972, any rights or remedies under the common law or statutes of any state shall not be annulled or limited by this title until February 15, 2067 . . . no sound recording fixed before February 15, 1972 shall be subject to copyright under this title before, on, or after February 15, 2067.<sup>50</sup>

Courts have consequently read section 301(c) to provide that pre-1972 sound recordings are subject solely to state copyright laws (*see UMG Recordings, Inc.*). With this in mind, the text of the Copyright Act suggests that the Act will in no way apply to pre-1972 sound recordings; this includes both protection of the recordings themselves and protection offered to OSPs by the safe harbor provisions.

A judge in the Southern District of New York affirmed this understanding, also holding that the DMCA safe harbor provisions did not apply to pre-1972 sound recordings.<sup>51</sup> In *Capitol Records, LLC v. Vimeo, LLC*, online video sharing platform Vimeo was not offered protection from New York copyright law because the court did not feel comfortable applying the provisions to pre-1972 sound recordings without citing support from the explicit text of the DMCA.<sup>52</sup> The court reasoned that Congress was a more proper forum for such a decision than the courtroom.<sup>53</sup> Upon reconsideration, the court affirmed the decision not to apply the safe harbor provisions, but made sure to note its uncertainty.<sup>54</sup> The court explained that room for disagreement exists as to whether the DMCA safe harbor provisions should apply.<sup>55</sup>

Clearly, the applicability of DMCA safe harbor provisions to pre-1972 sound recordings remains unclear. With split decisions among courts, and the courts themselves noting uncertainty as to the law, litigation in this area is likely to remain as rights holders of pre-1972 sound recordings will continue to assert infringement claims against OSPs. For those rights holders, it seems the best route for succeeding on such a claim is to argue that safe harbor provisions do not apply to pre-1972 sound recordings because allowing them to apply would conflict with Section 301(c) of the DMCA. Alternatively, OSPs should continue to argue the uncertainty of the law, in addition to the need to further encourage cooperation between rights holders and OSPs in the current digital environment. Without clear

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50. 17 U.S.C. § 301(c).

51. *Capitol Records, LLC v. Vimeo, LLC*, 972 F.Supp.2d 500, 507 (2013).

52. *Id.* at 500.

53. *Id.* at 536.

54. *Id.*

55. *Id.*

resolution of this discrepancy, these issues will continue to be common in the courtroom.

## V. A Second Line of Cases: Digital Performance Rights Under State and Common Law

### A. An Introduction to *Flo & Eddie* and State Law Cases

As courts continue to grapple with whether DMCA safe harbor provisions apply to pre-1972 sound recordings, a separate line of cases is also making its way through state courts. Driven by Plaintiffs Howard Kaylan and Mark Volman (*Flo & Eddie*), original members of the classic rock group The Turtles, these cases are forcing courts to deal with a separate issue surrounding pre-1972 sound recordings—digital performance royalties.<sup>56</sup> In particular, these cases raise the issue of whether Internet Radio services, such as Pandora, and satellite services like SiriusXM, have the right to play pre-1972 sound recordings without any license and without paying royalties to the copyright owners.<sup>57</sup> This is especially important for SiriusXM and Pandora Inc., as pre-1972 sound recordings account for roughly five percent of plays at Pandora, and fifteen percent of plays at SiriusXM.<sup>58</sup> The issue presented in these cases, however, extends well beyond terrestrial and satellite radio services merely paying royalties to pre-1972 sound recording copyright holders.<sup>59</sup> Rather, should the courts side with *Flo & Eddie*, and cases similar to theirs, many other businesses and industries may also be impacted.<sup>60</sup>

### B. The *Flo & Eddie* Lawsuits

*Flo & Eddie* have brought four lawsuits; three against SiriusXM in California, New York, and Florida, and another recently filed against Pandora in California.<sup>61</sup> In perhaps the most significant of these suits (against Sirius XM in California) a federal court held that California Civil Code Section 980(a)(2) protects sound recordings fixed before 1972 against unauthorized public performance.<sup>62</sup> This holding goes against a “75-year-old consensus that state law does not provide public performance rights for

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56. Gill et al., *supra* note 5, at 61.

57. Paul Resnikoff, *What the Pre-1972 Decision Really Means for the Future of Radio*, DIGITAL MUSIC NEWS (Oct. 13, 2014), <http://www.digitalmusicnews.com/permalink/2014/10/13/pre-1972-decision-really-means-future-radio-2>.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 2014 WL 4725382, at \*9 (C.D. Cal. 2014).

sound recordings.”<sup>63</sup> In the case, SiriusXM failed to convince the court that the California law did not extend to public performance, but instead only to unauthorized reproduction and sale.<sup>64</sup> Such a holding is obviously a large victory for copyright owners of pre-1972 sound recordings, who can now receive royalty payments for public performance, but it is perhaps an even larger defeat for music broadcasters. This ruling will certainly be appealed to the U.S. Court of Appeals for the Ninth Circuit, but it is interesting to consider the possible implications the decision may have.<sup>65</sup> Unless the ruling is stayed, it can be expected that pre-1972 sound recordings will likely dissipate from SiriusXM.<sup>66</sup> But, it is also likely that other music broadcasters, such as television and AM/FM stations, will also be facing challenges in California courts over the use of pre-1972 sound recordings.<sup>67</sup>

### C. Record Companies Have Challenged SiriusXM and Pandora Media, Inc. Under State and Common Law

Capitol Records, UMG Recordings, Sony Music Entertainment, Warner Music Group, and ABKCO Music and Records also pursued SiriusXM in their own case.<sup>68</sup> The record companies sued SiriusXM in September 2013, alleging the improper use of pre-1972 sound recordings.<sup>69</sup> In October 2014, a California state judge ruled in favor of the record companies, siding with their argument that SiriusXM reproduced recordings from artists, including the Beatles, Simon and Garfunkel, and Aretha Franklin, and copied them to its servers for transmission to subscribers, while refusing to pay royalties for their public performance.<sup>70</sup> Following the lead of the California federal court in *Flo & Eddie*, the court here noted that since the legislature adopted only one exception with regard to exclusive ownership rights for recording covers (which was almost identical to that in the Federal Copyright Act), the legislature must have meant for section 980 to include public performance rights for copyright

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63. Tyler Ochoa, *A Seismic Ruling on Pre-1972 Sound Recordings and State Copyright Law—Flo & Eddie v. Sirius XM Radio (Guest Blog Post)*, TECH. & MARKETING L. BLOG (Oct. 1, 2014), <http://blog.ericgoldman.org/archives/2014/10/a-seismic-ruling-on-pre-1972-sound-recordings-and-state-copyright-law-flo-eddie-v-sirius-xm-radio-guest-blog-post.htm>.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. Dave McNary, *Record Labels Win Key Ruling Over Sirius XM's Airplay of Pre-1972 Songs*, VARIETY (Oct. 15, 2014), <http://variety.com/2014/music/news/record-labels-win-key-ruling-over-sirius-xms-airplay-of-pre-1972-songs-1201331348/>.

69. *Id.*

70. Eriq Gardner, *SiriusXM Dealt New Blow in RIAA's Lawsuit Over Older Music*, HOLLYWOOD REP. (Oct. 15, 2014), <http://www.hollywoodreporter.com/thr-esq/siriusxm-dealt-new-blow-riaas-741177>.

holders.<sup>71</sup> In other words, it appeared to the court that the legislature actively chose to include public performance rights.<sup>72</sup>

Those same labels have taken their argument out of California and also recently filed suit in April 2014 against Pandora in New York state court.<sup>73</sup> The labels are accusing Pandora Media of violating the state's common law-copyright protections through its misuse of pre-1972 sound recordings.<sup>74</sup> Noting that federal copyright protections are not afforded to pre-1972 sound recordings, the labels argue that state common law requires Pandora to seek a license or pay royalties for their copying and public performance.<sup>75</sup> The labels state, "Pandora appropriates plaintiffs' valuable and unique property, violates New York law and engages in common law copyright infringement and misappropriation and unfair competition."<sup>76</sup> There is New York common law support for these claims in *Capitol Records, LLC v. Harrison Greenwich, LLC*, in which the court held a restaurant owner liable for copyright infringement when he uploaded and played a pre-1972 sound recording on the restaurant's website.<sup>77</sup> The current suit, however, has yet to be determined, but the list of artists involved—The Beatles, Hank Williams, Aretha Franklin, Bob Dylan, James Brown, and the Rolling Stones—and the legal issues at hand ensure that the decision will have a significant impact on pre-1972 sound recording copyright holders.<sup>78</sup>

Though digital performance rights for pre-1972 sound recordings exist in some states, they do not exist in all. Terrestrial and satellite radio services must, consequently, be cautious of the laws in the states in which they operate. As *Flo & Eddie* illustrates, California courts have found public performance rights to exist in section 980 of the California Civil Code. New York will likely be deciding this question as well, and radio services like Pandora and SiriusXM should not be surprised if similar suits arise in other states across the country, as pre-1972 copyright holders will

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71. *Id.*

72. *Id.*

73. Ben Sisario, *Big Labels Take Aim at Pandora on Royalties*, N.Y. TIMES (Apr. 17, 2014), <http://www.nytimes.com/2014/04/18/business/media/lawsuit-against-pandora-seeks-royalties-for-golden-oldies.html>.

74. *Id.*

75. *Id.*

76. *Id.*

77. Nicole Grimm & Ann Palma, *Capitol Records, LLC v. Pandora Media, Inc.: Future of Digital Music May Depend on State Copyright Protection of Pre-1972 Sound Recordings*, LAW.COM (Aug. 29, 2014), <http://www.law.com/sites/jdsupra/2014/08/29/capitol-records-llc-v-pandora-media-inc-future-of-digital-music-may-depend-on-state-copyright-protection-of-pre-1972-sound-recordings/?sreturn=20150106233438>.

78. *Id.*

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continue to pursue litigation. Should New York and other states' courts align with California's recent holdings, terrestrial and satellite radio services will be dramatically affected. Pandora has even acknowledged the impact licensing and royalties may have on their business, stating:

If we are required to obtain licenses from individual sound recording copyright owners for the reproduction and public performance of pre-1972 sound recordings, then the time, effort, and cost of securing such licenses could be significant and could harm our business and operating results. If we are required to obtain licenses for pre-1972 sound recordings to avoid liability and are unable to secure such licenses, then we may have to remove pre-1972 sound recordings from our service, which could harm our ability to attract and retain users.<sup>79</sup>

As it has been stated before, litigation with regard to pre-1972 sound recordings will continue until the distinction between pre- and post-1972 sound recordings has been minimized, and the law has been clarified so as to provide guidance for copyright owners and terrestrial and satellite radio services.

## VI. Proposal

### A. Likelihood of Future Amendments to Federal Law

#### 1. Support for Federalization

In recent years, scholarly groups seeking to preserve pre-1972 sound recordings have urged for those recordings to be brought under federal copyright protection. In response to this input, and considering the confusion of pre-1972 sound recordings' position in the legal framework, Congress asked the U.S. Copyright Office to evaluate the implications of bringing such recordings under federal jurisdiction.<sup>80</sup> In 2009, the U.S. Copyright Office issued its report on federal copyright protection for pre-1972 sound recordings, which surveyed the effects of federal coverage on the preservation of the sound recordings, the effects on public access, and the economic impact on rights holders.<sup>81</sup> The study also considered the best means for achieving federalization.<sup>82</sup> Unsurprisingly, the Copyright

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79. Complaint, *Capitol Records, LLC v. Pandora Media, Inc.*, 2014 WL 1760624 (N.Y. Sup. Ct. 2014) (No. 651195/2014).

80. Pinchin, *supra*, note 1 at 667.

81. Gard & Anapol, *supra* note 7, at 134.

82. *Id.*

Office concluded that such an amendment is ideal because it would provide greater certainty as to the law and more opportunity to increase public access to pre-1972 sound recordings.<sup>83</sup> The Copyright Office noted that bringing pre-1972 sound recordings into the federal copyright regime would complete the work Congress began in 1976 when it brought most works protected under state and common law into the federal scheme.<sup>84</sup> According to the report, federalization would also best serve the interests of preservationists, such as libraries and archives, which could, in turn, increase the availability of pre-1972 sound recordings to the public.<sup>85</sup>

Similar support for pre-1972 sound recordings has emerged in the form of the Respecting Senior Performers as Essential Cultural Treasures Act, or the RESPECT Act, which was recently introduced into the House of Representatives.<sup>86</sup> Introduced by Rep. John Conyers Jr. (D-Mich.) and George Holding (R-N.C.), the Act has gained support from a number of high-profile musicians, including Roger McGuinn of The Byrds, Richie Furay of Buffalo Springfield, and Karla Redding, the daughter of Otis Redding.<sup>87</sup> The Act proposes an amendment that would require noninteractive streaming services to pay royalties for their use of pre-1972 sound recordings.<sup>88</sup> It provides a remedy under which performance royalties for the transmission of those recordings may be recovered in a civil action in federal court if the music service does not make royalty payments to the rights holders.<sup>89</sup> The Act would, therefore, grant undisputed protection to copyright holders of pre-1972 sound recordings, and a clear line for music transmitters would be established, thereby allowing for an easy determination of whether copyright infringement has occurred.<sup>90</sup>

## 2. *Opposition to Federalization*

Opposition still remains with regard to the federalization of copyright protection for pre-1972 sound recordings. Opponents to federal protection, such as the National Association of Broadcasters, fear a disruption to their

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83. Pinchin, *supra*, note 1 at 668.

84. *Id.*

85. *Id.*

86. Gill et al., *supra* note 5, at 61.

87. Christine Conetta & Ibrahim Balkhy, *Music Legends Push Respect Act for Unpaid Digital Royalties*, HUFFINGTON POST (June 24, 2014), [http://www.huffingtonpost.com/2014/05/29/musicians-digital-royalties\\_n\\_5413124.html](http://www.huffingtonpost.com/2014/05/29/musicians-digital-royalties_n_5413124.html).

88. *Id.*

89. *Id.*

90. *Id.*

traditional business practices.<sup>91</sup> Some broadcasters and publishers believe they will face significant economic effects should federalization occur, and are arguing for the system to remain the same.<sup>92</sup> Such concerns are not unwarranted, however, as economic and other impacts are likely to be felt. Should pre-1972 sound recordings be afforded the same copyright protection as post-1972 sound recordings, broadcasters, like SiriusXM and Pandora, will indubitably be forced to either to choose to pay licensing fees or simply not play pre-1972 music.<sup>93</sup> Either option will have a tremendous impact not just on a purely economic basis, but also on their listeners, marketing strategies, and identity in the market. Similarly, opponents are concerned that federalization could create “doubt about rights ownership, scope of protection, and remedies.”<sup>94</sup> Confusion in these areas would force broadcasters to adapt to the new federal policies, and completely restructure their business practices.<sup>95</sup>

These concerns are not new, however.<sup>96</sup> Should the legislature side with the opposition and decline federalization, broadcasters will still face many of the same issues present in the current pre-1972 sound recording landscape.<sup>97</sup> Pre-1972 sound recordings will continue to be governed by a confusing patchwork of common laws and statutory provisions that vary substantially from state to state. This will force broadcasters and similar businesses to continue to adopt different business strategies depending on the legal climate of the state in which they are operating.<sup>98</sup> Furthermore, “the scope of protection and what would constitute acceptable use have to be tested due to the lack of detailed precedent.”<sup>99</sup> Essentially, broadcasters would rather continue operating under the same disjointed business structures, and take the risk of facing copyright infringement suits under state law, as opposed to subjecting themselves to almost certain licensing fees under a federal scheme.

Together, the report offered by the U.S. Copyright Office and the RESPECT Act suggest that future amendments addressing the distinction between pre- and post-1972 sound recordings are, in fact, likely to occur. Despite opposition from broadcasters, federalization of copyright

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91. Avonne Bell, *Federalization of Pre-1972 Sound Recordings: A Debate About Uncertainty and Public Access*, PUB. KNOWLEDGE (June 22, 2011), <https://www.publicknowledge.org/news-blog/blogs/federalization-pre-1972-sound-recordings-deba>.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

protection will provide a more uniform system that rights holders and music broadcasters can easily understand and abide by. Furthermore, given the amount of litigation, and the uncertainty of courts in applying both state and common laws and the DMCA provisions to pre-1972 sound recordings, the legislature has even more of a reason to adopt a uniform federal scheme by which to fairly regulate copyrighted musical compositions. Such a scheme will minimize the amount of litigation in the area, free judicial resources, and allow for clear standards in cases that do go to trial. Ultimately, however, it simply makes more sense for pre-1972 sound recordings to be as sufficiently protected as modern recordings under the federal scheme. Given the willingness of broadcasters to challenge any copyright infringement claims in attempt to avoid liability, and their opposition to the RESPECT Act, it seems clear that pre-1972 sound recordings hold a value equal to (if not greater than) post-1972 sound recordings.

## **B. Potential Implications of Federal Protection of Pre-1972 Sound Recordings**

### *1. Direct Changes to the Treatment of Pre-1972 Sound Recordings*

The legal changes that should be expected if Congress chooses to pass legislation such as that proposed by the U.S. Copyright Office and the proponents of the RESPECT Act will be dramatic. For one, federal copyright protection will, for the first time, be extended to pre-1972 sound recordings. This will effectively balance any distinctions between pre- and post-1972 sound recordings, providing for a more clear and consistent set of rights to copyright holders, including rights to reproduction, adaptation, distribution, public performance for digital transmissions, and public display.<sup>100</sup> Furthermore, OSPs and terrestrial radio stations such as SiriusXM will, likewise, have a uniform set of laws to abide by nationally, as opposed to on a state-by-state basis. Such companies will, consequently, be better suited to understand and properly operate within a statutory scheme that will treat pre- and post-1972 sound recordings equally. This change will dramatically decrease the amount of copyright infringement litigation plaguing pre-1972 copyright holders, OSPs, and terrestrial radio stations. Judicial resources will, therefore, be relieved, and only worthy claims will reach trial.

Pre-1972 sound recordings would likely see a change in the term of protection if they were brought under federal copyright protection.<sup>101</sup> According to the report produced by the U.S. Copyright Office, the term of

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100. June Besek & Eva Subotnik, *Constitutional Obstacles? Reconsidering Copyright Protection for Pre-1972 Sound Recordings*, 37 COLUM. J.L. & ARTS 327, 336–37 (2014).

101. *Id.* at 335.

production for pre-1972 sound recordings should be 95 years from publication or, if the work had not been published prior to the date of legislation federalizing protection, 120 years from fixation.<sup>102</sup> The report did state, however, that in no case would protection extend beyond February 15, 2067.<sup>103</sup> The report goes on to state that, in instances where protection would expire prior to 2067, a right holder may obtain extended protection by making the pre-1972 sound “recording available to the public at a reasonable price and, during a transition period of several years, notifying the Copyright Office of its intention to secure extended protection.”<sup>104</sup>

Opponents to federalization claim that bringing pre-1972 sound recordings under the federal copyright scheme would wreak havoc on existing ownership rights.<sup>105</sup> As state and federal laws differ on the determination of ownership, opponents are concerned that federalization would result in numerous transfers of ownership, some of which may be difficult to complete given the possible distances and locations of certain rights holders.<sup>106</sup> Opponents fear this would upset traditional business practices.<sup>107</sup> The report offered by the U.S. Copyright Office, however, suggests that such ownership issues might be resolved by determining initial ownership of the federal copyrights to pre-1972 sound recordings according to who had ownership under state law just prior to when the federal law becomes effective.<sup>108</sup> This would minimize the number of transfers, and allow for a smooth transition from the patchwork of state ownership and copyright laws to the federal scheme.

The movement of pre-1972 sound recordings into the federal copyright scheme will also implicate remedies to copyright infringement. “Federal copyright law provides that an infringer of copyright is liable for the actual damages suffered by the copyright owner, as well as any profits of the infringer attributable to the infringement to the extent they have not been taken into account in determining actual damages.”<sup>109</sup> The law also allows plaintiffs that have registered their copyright in a timely manner to opt for statutory damages.<sup>110</sup> Statutory damages are typically not available under

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102. REGISTER OF COPYRIGHTS, FEDERAL PROTECTION FOR PRE-1972 SOUND RECORDINGS (2011), <http://www.copyright.gov/docs/sound/pre-72-report.pdf> [hereinafter *Copyright Office Report*].

103. *Id.*

104. *Id.*

105. Besek & Subotnick, *supra* note 100, at 340.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 341.

110. *Id.*

state law, where punitive damages may be awarded.<sup>111</sup> Similarly, federal copyright law allows for the recovery of attorney's fees and costs, while state laws do not.<sup>112</sup>

### 2. *Possible Exceptions to Protection of Pre-1972 Sound Recordings*

Federalization of pre-1972 sound recordings will also impact certain exceptions with regard to potential copyright infringement claims. Federal copyrights are subject to the exceptions laid out in Sections 107 to 122 of the Act.<sup>113</sup> Those include, among others, exceptions for fair use, exceptions for libraries and archives, and educational exceptions for classroom use.<sup>114</sup> Under state and common law, on the other hand, exceptions and limitations to copyright protection of pre-1972 sound recordings are often unclear and vary by state.<sup>115</sup> Many of the exceptions offered under the federal scheme are not available under certain state or common laws, including library exceptions and fair use.<sup>116</sup> Therefore, by bringing pre-1972 sound recordings under the federal umbrella, these exceptions will become available nationally, to all pre-1972 sound recordings, and not be limited to certain states. This will increase access to older musical compositions, and relieve worries by archivists and educators about potential liability from unauthorized use of such recordings. Consequently, this will align with Congress' original intentions when it brought most works from under state and common law protections into the federal realm.

### 3. *Effects on Broadcasters and Rights Holders*

Outside of the legal community, various other industries will be impacted by the federalization of pre-1972 sound recordings, the most obvious being the broadcast industry. OSPs and terrestrial radio stations will be forced to decide whether to pay licensing fees for use of pre-1972 sound recordings or, rather, to not play pre-1972 sound recordings altogether. This decision will have tremendous economic implications on the broadcasting industry, which has already voiced these concerns in the recent state and lower federal court decisions in New York and California. Alternatively, however, broadcasters will now have the ability to develop more cohesive networks because the uniform federal system would preempt the patchwork of state and common laws currently addressing pre-

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111. *Id.*

112. *Id.*

113. *Id.* at 338.

114. *Id.*

115. *Id.*

116. *Id.*

1972 sound recordings.<sup>117</sup> Aside from the initial decision to choose to pay licensing fees, broadcasters will have more freedom to play their recordings, without the concern of violating a particular state's copyright laws.<sup>118</sup>

On the other hand, rights holders will also see certain benefits from federalization. Most clearly, rights holders of pre-1972 sound recordings will receive all the protections that post-1972 sound recordings copyright holders receive.<sup>119</sup> This means that rights holders will be compensated through licensing agreements or they will have a legitimate cause of action for violation of the federal copyright.<sup>120</sup> Ideally, such compensation, and the exceptions offered by federalization to libraries and archives, will allow for the preservation, restoration, and further performance of the pre-1972 sound recordings. Federalization, therefore, levels the legal treatment of the recordings, but it also recognizes the value of the recordings themselves.

### C. Reasons for Future Amendments

#### 1. *Uniformity of Laws and Protection in the United States*

Perhaps the most obvious reason for the federalization of pre-1972 sound recordings is the uniformity it will provide with regard to copyright law and musical compositions. Currently, confusion surrounds not just the applicability of DMCA safe harbor provisions to pre-1972 sound recordings but also the varying state common law and statutory provisions that govern pre-1972 sound recordings. Under a uniform regime, this confusion will be entirely eliminated. Broadcasters, though they will likely see substantial increases in licensing fees, will be able to implement more efficient and coherent practices, and will have a clear understanding of how those systems must operate. Likewise, rights holders of classic musical compositions will be afforded compensation for their work, and have a clearer understanding of the rights associated with their copyrights.

#### 2. *Reduce Disparity Between Treatment of Foreign and Domestic Pre-1972 Sound Recordings*

Currently, certain foreign pre-1972 sound recordings are protected under federal copyright law.<sup>121</sup> These sound recordings are said to have

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117. Bell, *supra* note 91.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Copyright Office Report, supra* note 102.

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had their copyrights restored.<sup>122</sup> Bringing all pre-1972 sound recordings under the federal copyright regime would place all pre-1972 sound recordings on equal footing with these foreign pre-1972 sound recordings, both legally and culturally. Pre-1972 sound recording copyright holders would receive the same compensation, and value judgments would not have to be made with regard to which pre-1972 sound recordings qualify of restoration.

### 3. *Scholarly Use and Preservation*

Under the current protection of state and common laws, libraries and educators face difficulties in preserving and allowing access to pre-1972 sound recordings due to concerns of possible infringement.<sup>123</sup> These sound recordings include a wide range of early offerings, such as “ragtime, jazz, and rhythm and blues, as well as classical and spoken word works,” that represent important components of various cultures and communities.<sup>124</sup> Under a uniform federal system, with the capabilities of modern digital technology, libraries and educators would not face the same fears.<sup>125</sup> The federal copyright regime offers explicit exceptions for libraries, archives, and classroom use.<sup>126</sup> These exceptions would allow for a much freer flow of pre-1972 sound recordings, and could be used in a multitude of educational settings. Further, it would enable archivist to better catalogue and preserve pre-1972 sound recordings using digital technology without concerns of possibly infringing a copyright.

## VII. Conclusion

The legal landscape currently surrounding pre-1972 sound recordings is very much in flux. Without a formal resolution as to the protections afforded to pre-1972 sound recordings, litigation in the area will undoubtedly continue. It is for this reason that pre-1972 sound recordings should be brought within the federal statutory scheme. Doing so will allow for a clearer understanding of copyright law not just for the rights holders but also for the OSPs and terrestrial radio services that continually innovate. Legislation would afford protection to rights holders of pre-1972 sound recordings, thereby recognizing and compensating classic artists. Furthermore, it would considerably minimize the number of copyright infringement claims in the courts by providing a specific determination as

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122. *Id.*

123. Bell, *supra* note 91.

124. *Id.*

125. *Id.*

126. Besek & Subotnick, *supra* note 100, at 341.

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to the law governing sound recordings. Such an amendment does not seem unlikely either, especially considering the report presented to Congress by the U.S. Copyright Office and the RESPECT Act, both of which propose legislation that will equalize pre- and post-1972 sound recordings. Ultimately, Congress must determine whether such legislation will go forward, or else the courts should expect to see further copyright infringement litigation.

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