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Subject: Submitted testimony for SB1287 on Feb 25, 2015 09:00AM
Date: Monday, February 23, 2015 9:15:17 PM

SB1287

Submitted on: 2/23/2015

Testimony for JDL/CPN on Feb 25, 2015 09:00AM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
Eric Gilliom	Individual	Comments Only	No

Comments: I am a Hawaii professional musician asking you to PLEASE SUPPORT THIS BILL!

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

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From: mailinglist@capitol.hawaii.gov
To: [JDLTestimony](#)
Cc:
Subject: *Submitted testimony for SB1287 on Feb 25, 2015 09:00AM*
Date: Tuesday, February 24, 2015 8:57:35 AM

SB1287

Submitted on: 2/24/2015

Testimony for JDL/CPN on Feb 25, 2015 09:00AM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
Kama Hopkins	Individual	Support	No

Comments:

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TESTIMONY OF KENNETH MAKUAKĀNE

HEARING DATE/TIME: Wednesday, February 25, 2015
9:00 a.m.
Conference Room 016

TO: Committee on Judiciary and Labor
Committee on Commerce and Consumer Protection

RE: Testimony in Support of SB1287

Dear Chairs, Vice-Chairs and Committee Members,

My name is Kenneth Makuakāne. I have been in the music industry for the past forty-three years. I am a record producer, recording engineer, record label, recording artist, songwriter, music director, and recipient of fourteen Nā Hōkū Hanohano awards. In May 2015, I will be receiving the Nā Hōkū Lifetime Achievement Award. To say the least, I derive my income from all aspects of the music industry.

American recording artists and their record labels, unlike their counterparts in most other developed nations, have never enjoyed a full public performance right in the sound recordings they create. (A limited public performance right does exist under federal law in connection with the digital transmission of sound recordings.) In the past this manifestly unfair treatment of recording artists and record labels was justified on the basis that free radio and other play essentially advertised the sale of records. However, that view is now archaic in light of recent technological advances and changes in how people access and enjoy recorded music. Today, record sales in the form of CDs are in steep decline and are anticipated to all but disappear in the years ahead. Digital downloads are following suit as consumers abandon “ownership” of copies of music in favor of convenient and cheap “access” to music. As a result, revenue from digital music “sales” continue to fall as a percent of total music revenues while “license fees” (both statutory and negotiated) from music subscription and non-subscription services are sharply rising. The

bottom line is that the old justification for not paying public performance fees in connection with sound recordings simply no longer exists.

It is now time to right a longstanding wrong and recognize, under Hawai`i law, that Sound Recordings carry the full panoply of copyright rights including the important full right of public performance. Passage of SB1287 would confirm that right.

I strongly support SB1287. This bill will right a long overdue wrong that has plagued recording artists and their record labels since the inception of the recording industry by making it clear that under Hawai`i law recording artists and their record labels enjoy a public performance right in their sound recordings like their counterparts in virtually every other developed nation and like all U.S. songwriters and their publishers.

Respectfully submitted,
Kenneth Makuakāne

Mark D. Bernstein

Attorney at Law
A Professional Corporation

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February 24, 2015

RE: Testimony of Mark D. Bernstein in support of SB1287
Hearing Date: February 25, 2015
Hearing Time: 9:00 a.m.
Hearing Place: Conference Room 016

To the Honorable Members of the Committee on Judiciary & Labor and
The Committee on Commerce and Consumer Protection

My name is Mark D. Bernstein and I have been a member of the Hawaii State Bar since 1980 and the California State Bar since 1978. My practice has had a focus on intellectual property matters, specifically the recording industry and music licensing. I have for over 30 years represented Hawaii's largest recording and record distribution company and have been named as one of America's Best Lawyers in the field of music licensing for the past 20 years.

Recorded music did not exist and was thus not protected by the United States Copyright Act of 1906 and was not even addressed by U.S. copyright law until limited copyright protection was finally afforded recordings in February 1972. Omitted from copyright protection was the right of public performance and even today, the public performance of a sound recording for profit, such as background music at a major hotel in Waikiki does not require any compensation be paid to either the recording artist or the record company.

In 1995, the Federal Government provided a limited right of public performance to sound recordings which are publicly performed on line. However, this right does not apply to recordings made before 1972. These recordings, which include a myriad of Hawaii's golden era of post war recordings, are protected solely by Hawaii State Law, specifically, HRS 482(c) which was enacted in 1975 to protect against record piracy. The law simply does not address nor confer on sound recordings, even by implication, a right of public performance. SB 1287 will correct this situation and allow recording artists and their record companies to benefit financially from the exploitation of their recorded works.

This is a critical time for the recording industry. Simply put, the need to purchase and

own sound recordings in order to enjoy music whenever and wherever a consumer wants is going away, if it is not already gone. In its place is streaming, either legally through services such as Pandora or Spotify or illegally through illegal downloading. The impact on recording artists and record companies is more than dramatic, it is monumental, as one Hawaiian recording artist had over 14,000,000 individual streams of his music in one year generate income of approximately \$14,500. Had that artist's recording sold 14,000,000 singles (not albums) on line, revenues over \$8,000,000 would have been generated. Had this recording been a 1972 recording, those 14,000,000 streams would have generated income of \$0.00. That's correct, absolutely nothing would have been paid.

This can be and should be changed here in Hawaii, which, even before 1972, had a vibrant recording industry with many iconic performers such as Don Ho, Gabby Pahinui and the Sons of Hawaii to name, but a few. SB 1287 will address this shortcoming in the law and the resulting injustice. Therefore I urge you to pass it, unanimously.

Thank you for your attention.

Very truly yours,

/S/Mark D. Bernstein, Esq.

February 23, 2015

Testimony in support of SB1287

Hearing Date: February 25, 2015

Hearing Time: 9:00 a.m.

Hearing Place: Conference Room 016

To the Honorable Members of the Committee on Judiciary & Labor and
The Committee on Commerce and Consumer Protection

My name is Jon de Mello. I am the son of Jack de Mello and since 1947 our family has been an integral part of Hawaii's music and recording industry, first through Music of Polynesia and then through the Mountain Apple Company. We own many sound recordings that were created before 1972 by some of Hawaii's most iconic recording artists. The protection of these important parts of Hawaii's cultural heritage is why I am writing to you today.

Recorded music has always been treated as copyright law's bastard step child. Our records had no copyright protection until 1972 and even then, not much and certainly not the same rights as were given to the authors of books or composers of music. Today if a major hotel wants to use our iconic recordings of Nina Keali'iwahamana or Ukulele Magic as background music for a \$1,000 a plate dinner, no permission need be requested nor compensation paid.

As it stands right now, federal law gives no meaningful protection for our pre 1972 recordings. They are only protected by Hawaii Law, HRS 482(c). That law was enacted to protect record companies such a mine from bootleggers who made illegal copies and then sold them at the swap meet. That law does not deal with the rights of the owners of sound recordings and therefore provides only protection from copying the physical manifestation of the recording, the records themselves. However, not many people are buying records anymore, since they can listen to them for free on line and the federal law concerning play records on line does not apply to these pre 1972 recordings.

SB 1287 will correct this situation and allow recording artists and their record companies to benefit financially from the exploitation of their recorded works. The current situation cannot possibly be considered fair or just. You have a chance to change that with SB 1287 and I strongly encourage you all to do so.

Thank you.

/S/Jon de Mello

CEO and founder, Mountain Apple Company

TESTIMONY OF WILLIAM G. MEYER, III

HEARING DATE/TIME: Wednesday, February 25, 2015
9:00 a.m.
Conference Room 016

TO: Committee on Judiciary and Labor
Committee on Commerce and Consumer Protection

RE: **Testimony in Support of SB1287**

Dear Chairs, Vice-Chairs and Committee Members:

My name is William G. Meyer, III. I have been practicing law in Honolulu since 1979. My practice focuses on intellectual property matters including entertainment law. Over the years I have had the pleasure and honor of representing many of Hawaii's top songwriters, recording artists and record labels.

I strongly support SB1287. This bill will right a long overdue wrong that has plagued recording artists and their record labels since the inception of the recording industry by making it clear that, under Hawaii law, recording artists and their record labels enjoy a public performance right in their sound recordings like their counterparts in virtually every other developed nation and like all U.S. songwriters and their publishers.

Recently, I have been assisting various local record labels, recording artists and others who control the copyright rights in and to sound recordings in negotiating license agreements with various types of music services which transmit, by digital transmission, performances of said sound recordings to the public. Many of these services, notably Pandora and Sirius XM, refuse to pay any royalties in connection with sound recordings produced prior to 1972. This refusal is based upon their position that they have the right to play sound recordings produced prior to February 15, 1972 without permission from and therefore without paying the owners of the copyrights in these recordings or the artists performing in those recordings. Pre-1972 recordings include some of the most commercially successful, and in the case of local music, some of the most culturally important records of all time.

A number of lawsuits filed on the mainland challenge Pandora's and Sirius XM's position on this issue and a recent decision in one of these cases (i.e. Flo & Eddie Inc. v. Sirius XM Radio Inc., 2:13-cv-05693-PSG-RZ (C.D. Cal. Sept. 22, 2014), has even broader implications and potential impact than whether these digital streaming services have to pay for pre-1972 recordings.

An Overview of the Legal Framework that Provides the Analytical Backdrop for Consideration of SB1287

Federal copyright law applies to sound recordings but only to those produced on or after February 15, 1972. Older recordings are protected by individual states' statutes or the common law. Pandora and Sirius argue that since federal law does not apply to such recordings the DPRA (Digital Performance Right in Sound Recordings Act of 1995), which created a right of public performance for sound recording when transmitted digitally, does not apply to pre-1972 recordings and that therefore, they do not need permission from the owners of the copyrights in such sound recordings or the artists who performed them in order to publicly perform said sound recordings. It is important to note that the state law statutes and most of the case law that applies to sound recordings pre-date the digital era. In the Flo & Eddie case, the plaintiffs successfully argued that a 1982 amendment to California's Civil Code provides statutory protection for pre-1972 recordings that includes a right to control the public performance of these sound recordings.

The court in Flo & Eddie based its ruling on the wording of the California sound recording copyright statute which provides that: "The author of an original work of authorship consisting of a sound recording initially fixed prior to February 15, 1972, has an exclusive ownership therein until February 15, 2047, as against all persons except one who independently makes or duplicates another sound recording that does not directly or indirectly recapture the actual sounds fixed in such prior recording, but consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate the sounds contained in the prior sound recording." Cal. Civ. Code § 980(a)(2).

The Court emphasized that there is nothing in the statutory language that would preclude performance rights in pre-1972 sound recordings. The Court held in relevant part: "...the Court infers that the legislature did not intend to further limit ownership rights, otherwise it would have indicated that intent explicitly," and concluded "that copyright ownership of a sound recording under § 980(a)(2) includes the exclusive right to publicly perform that recording."

This interpretation of California law makes the exclusive right of public performance in sound recordings apply to any public performance of a pre-1972 recording whether on a digital music service or otherwise, including performances via terrestrial radio or television broadcasts in nightclubs, restaurants, bars and any other public places. In other words, anyone publicly performing sound recordings would have to seek permission from the copyright owner of each pre-1972 recording – usually the record company or the recording artist.

What this Means for Hawaii's Recording Artists and Record Labels

The potential impact in Hawaii of the Flo & Eddie case, and similar cases, however, is a function of Hawaii's common and statutory law concerning pre-1972 concerning sound recordings. There is literally no Hawaii case law on the topic and unfortunately Hawaii's statute concerning "Copyrights in Sound Recordings," found at HRS Chapter 482(c), like the laws in a number of other states, only makes it a crime to engage in record piracy and does not create civilly protectable rights in sound recordings. To more fully appreciate the shortcomings of HRS Chapter 482(c) it is necessary to understand the historical basis of the Hawaii statute.

Chapter 482(c) was enacted in 1975 at a time when vinyl was king and analog tapes were becoming increasingly popular. With the exploding commercial record businesses came exploding record piracy. Chapter 482(c), like the laws in many states, was intended to strike back at record piracy. It was not intended to address the issues currently under consideration as no one in 1975 could have imagined the technological changes that have transformed the music industry over the last 40 years. Today, record sales in the form of CDs are in steep decline and are anticipated to all but disappear in the years ahead. Digital downloads are following suit as consumers abandon ownership of copies of music in favor of convenient and cheap access to music. As a result, revenue from digital music sales continue to fall as a percent of total music revenues while license fees (both statutory and negotiated) from music subscription and non-subscription services are rising sharply. The bottom line is that existing Hawaii law, in the form of Chapter 482(c) is woefully out of step with the modern era.

Based upon the foregoing, I support the adoption of the 1982 California statute in place of, or in addition to, Chapter 482(c). During so would clarify that the author of a sound recording enjoys exclusive ownership thereof and it would accordingly create a civil remedy for the unauthorized reproduction and distribution of pre-1972 sound recordings and extend state copyright law protection to cover the public performance right in all pre-1972 sound recordings. This would allow Hawaii's record labels and recording artists and their heirs to argue that any public performance of their sound recordings require their permission which can be conditioned upon the payment of a reasonable royalty fee.

U.S. songwriters have enjoyed a public performance right for generations and while most developed nations, other than U.S., have long recognized a public performance right in sound recordings, the powerful U.S. broadcast industry lobby has thus far successfully prevented sound recording copyright owners from enjoying this

important right. With record sales evaporating and music services taking the place thereof, record labels and artists are getting financially squeezed as a result of the lack of a full public performance right. While passing the proposed legislation cannot impact post-1972 recordings, due to federal preemption under the U.S. Copyright Act, it could provide a significant benefit to Hawaii's older recording artists and their heirs.

Due to the complexity of the underlying legal issues involved in this matter, I attach hereto as Exhibit "A" a Detailed Analysis of the Legal Framework that Provides the Analytical Backdrop for Consideration of SB1287.

Attached hereto as appendix "B" is a copy of the Court's decision in the Flo & Eddie case. Attached hereto as appendix "C" is a copy of the California statute.

Respectfully Submitted,

/S/ William G. Meyer, III

William G. Meyer, III

Attachments

Exhibit "A"

Detailed Analysis of the Legal Framework that Provides the Analytical Backdrop for Consideration of SB1287

Recorded Music Involves Two Copyrights

Recorded music involves two copyrights. The first is for the underlying musical composition and is usually owned by a songwriter and sometimes a music publisher. The second is for the sound recording, and is typically owned by a recording artist or record label.

Musical composition copyright owners have long enjoyed a "public performance" right that entitles them to a royalty when their songs are broadcasted on traditional AM/FM radio or otherwise performed publically – including, recently, digital broadcasts over the Internet, digital cable, and satellite radio. Because it was impossible for songwriters to keep track all of the public performances of their songs, in the first half of the 20th century three American performing rights organizations (PROs) emerged to act as the common agent for multiple musical composition copyright owners and a new industry was born. Today those organizations: ASCAP, BMI, and SESAC issue licenses, track performances and distribute licensing revenue (less costs and administrative fees) to songwriters and music publishers.

Today, broadcasters generally purchase a "blanket license" from each of the PROs that provides the rights to use all the music in the catalog of the PRO. Royalties paid by most audio broadcasters for music composition copyrights typically total in the range of 2 to 5% of gross revenue,¹ providing ASCAP, BMI, and SESAC with aggregate annual royalty payments totaling approximately \$2 billion.² All broadcasters must obtain a performance license for musical compositions and U.S. copyright law does not favor one technology over another. That is not the case for sound recording performance rights.

A Brief History of Sound Recording Copyright Law

1. **Quick Overview.** Congress brought sound recordings within the scope of federal copyright law for the first time on February 15, 1972. It provided protection on a prospective basis, leaving recordings first fixed before that date under the protection of state law. The issue was revisited during enactment of the 1976 Copyright Act, when Congress federalized protection for works that had been protected by state rather than federal copyright law but preserved the state law regime for pre-1972 sound recordings.³ But Congress did provide some limitations on state law protection for sound recordings: the Copyright Act provides that states are entitled to protect pre-1972 sound recordings until February 15, 2067.⁴ At that point, all pre-1972 sound recordings, no matter how old, will enter the public domain and the dual regimes of protection for sound recordings will disappear. As a consequence of this legal construct, there

¹ See Jonathan Cardi, *Über-Middleman: Reshaping the Broken Landscape of Music Copyright*, 92 IOWA L. REV., 835, 845-6 (2007), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=991553. See also Cassondra Anderson, *We Can Work It Out: A Chance to Level the Playing Field for Radio Broadcasters*, 11 N.C. J.L. & TECH. 72, 93 (2009), <http://www.ncjolt.org/system/files/Anderson.pdf>. Cardi cites a figure of "approximately two percent of a station's adjusted gross receipts" for ASCAP and BMI for radio and television. Anderson notes "the rate of 3% to 5% of revenue that all radio broadcasters pay to music publishers and songwriters through their licenses with ASCAP, BMI, and SESAC."

² Source: ASCAP. "Of the \$5-billion generated worldwide each year, the three U.S. organizations account for close to \$2 billion in collections." ASCAP, <http://www.ascap.com/music-career/articlesadvice/music-money/money-payments.aspx> (last visited July 22, 2012).

³ Until the effective date of the 1976 Copyright Act, unpublished works were protected by state common law copyright, which lasted until a work was published. As discussed below, state law (including common law copyright as well as other common law doctrines and statutes) also protected sound recordings, whether or not they were published.

⁴ See 17 U.S.C. § 301(c); see also *Capitol Records, Inc. v. Naxos of America, Inc.*, 830 N.E.2d 250 (N.Y. 2005).

is virtually no public domain in the United States for sound recordings and a 52 year wait before this will change.⁵

2. Federal Copyright Law. The 1909 Copyright Act, granted copyright owners of musical compositions rights with respect to mechanical reproductions of their compositions, for example, in records or piano rolls. Congress was concerned, however, that if musical composition owners had exclusive rights, record companies might be able to buy up the rights and monopolize the market with respect to particular musical compositions, so the mechanical right was made subject to a compulsory license. Once a music copyright owner authorized a mechanical reproduction of his composition, others could take advantage of the license to make their own mechanical reproductions, provided that they met the statutory requirements and paid the statutory rate.⁶ While the 1909 Act provided protection for copyright holders of musical compositions whose works were reproduced in sound recordings, it included no explicit protection for sound recordings per se.

In the absence of federal protection, states provided protection against duplication of sound recordings under common law theories, usually unfair competition or common law copyright.

As work began on a comprehensive revision of the 1909 Copyright Act, the possibility of protecting sound recordings received renewed attention. The thinking was that sound recordings would be included in the copyright revision law that was then under development,⁷ and copyright revision bills in the 1960s and early 1970s included protection for sound recordings, although the scope of that protection varied in the different bills.⁸ The general copyright revision process became stalled in the late 1960s and early 1970s. Congress, persuaded that the situation concerning sound recordings was becoming urgent, decided to bring sound recordings under the federal copyright law without waiting for the overall revision. On November 15, 1971 it passed the Sound Recording Amendment, which for the first time made sound recordings eligible for federal copyright.⁹

The effective date of the Sound Recording Amendment was February 15, 1972.¹⁰ It applied to sound recordings first fixed on or after that date. The law provided only a limited right with respect to sound recordings. Its principal provision was to grant sound recordings a reproduction right analogous to that provided for other works of authorship, thus giving record producers a new tool with which to combat outright duplication. However, the right to reproduce was “limited to the right to duplicate the sound recording in a tangible form that directly or indirectly recaptures the actual sounds fixed in the recording.”¹¹ Thus, the new law provided no protection against imitations of the performance. Moreover, it contained a significant temporal restriction: it had a “sunset provision” and protected only sound recordings first fixed on or after February 15, 1972 and before January 1, 1975.¹² Congress envisioned that protection for sound recordings would be folded into the copyright revision act then under consideration, making any extension of the sound recording amendment unnecessary.

The bill omitted any performance right for sound recordings, which had been a controversial issue in the revision process. At the same time, Congress refused to impose a compulsory license on sound recordings

⁵ A few individual states have explicitly set shorter terms of protection but no pre-1972 sound recordings are in the public domain throughout the United States unless they were published between February 15, 1972 and March 1, 1989 without notice and without mitigating circumstances, or unless their right holders have dedicated them to the public domain.

⁶ An Act to Amend and Consolidate the Acts Respecting Copyright, Pub. L. No. 60-349, 35 Stat. 1075, § 1(e) (1909).

⁷ See Report of the Register of Copyrights on the General Revision of the Copyright Law at 18 (1961).

⁸ See, e.g., Copyright Law Revision, Part 3, Preliminary Draft for Revised U.S. Copyright Law § 10 (Sept. 1964); S. 543, 91st Cong. (1st Sess. 1969); H.R. 2512, 90th Cong. (1st Sess. 1967); S. 597, 90th Cong. (1st Sess. 1967).

⁹ Pub. L. No. 92-140, § 3, 85 Stat. 391, 392 (1971).

¹⁰ Pub. L. No. 92-140, § 3, 85 Stat. 391, 392 (1971).

¹¹ Id. § 1(a).

¹² See id. § 3.

analogous to the one contained in the law for musical compositions, something that the bill's opponents had sought. In both cases, Congress observed that those issues could be revisited in the general revision of the copyright law.¹³ There was no discussion of Congress's decision to protect sound recordings only on a prospective basis.

Shortly after the 1971 Sound Recording Amendment was enacted, its constitutionality was challenged in Shaab v. Kleindienst.¹⁴ A three-judge district court rejected the plaintiff's main argument that sound recordings do not qualify as the "writings" of "authors."

The following year, the Supreme Court put to rest the question whether states could regulate pre-1972 sound recordings. In Goldstein v. California,¹⁵ the Supreme Court held that California's record piracy law as it applied to pre-1972 sound recordings was not preempted by federal copyright law or the Constitution under its decision in Sears and Roebuck. The Court concluded that Congress had left the area of sound recordings "unattended," and states were free to act with respect to the regulation of pre-1972 sound recordings.¹⁶ The Goldstein case led to the passage of many more state anti-piracy laws with respect to pre-1972 recordings,¹⁷ and its rationale extended as well to state civil protection.

By the end of 1974 the copyright revision bill still had not become law, so Congress removed the January 1, 1975 sunset date for federal copyright protection of sound recordings.¹⁸

The Copyright Revision Act was passed on October 19, 1976. It included sound recordings among the categories of protectable subject matter, although the scope of protection for sound recordings continued to be more limited than that for other works. The reproduction right was (and continues to be) limited to duplication of the actual sounds in the recording.¹⁹ Sound recordings were granted no public performance right in the 1976 Copyright Act, although later enactments provided them with a performance right with respect to certain digital transmissions.²⁰

Thus, sound recordings fixed on or after February 15, 1972 were secure in their eligibility for federal copyright protection. The fate of pre-1972 sound recordings, however, was addressed separately in the law.

To create a unitary system of copyright, Congress in the 1976 Act preempted state law that provided rights equivalent to copyright. Specifically, section 301(a) of the Copyright Act provides:

On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

¹³ See H.R. REP. NO. 92-487 at 5; S. REP. NO. 92-72 at 3 (1971).

¹⁴ 345 F. Supp. 589 (D.D.C. 1972).

¹⁵ 412 U.S. 546 (1973).

¹⁶ *Id.* at 569-70.

¹⁷ See Sidney A. Diamond, *Sound Recordings and Phonorecords: History and Current Law*, 1979 U. ILL. L. F. 337, 349 (1979).

¹⁸ Pub. L. No. 93-573, 88 Stat. 1873 (Dec. 31, 1974).

¹⁹ See 17 U.S.C. § 114(b). There is a similar limitation with respect to the derivative work right in sound recordings. See *id.*

²⁰ Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (1995), as amended by the Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860, 2905 (1998) (codified at 17 U.S.C. § 114).

Congress exempted pre-1972 sound recordings from this general preemption provision and treated them separately under section 301(c) of the Copyright Act, which currently provides:

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

3. State Law Production for Pre-1972 Sound Recordings.

The states provide protection for pre-1972 sound recordings through a patchwork of criminal laws, civil statutes and common law. Early cases relied on common law, principally the tort of unfair competition, to protect sound recordings from unauthorized duplication and sale.²¹ By the 1950s, record piracy had become a serious problem, with pirates openly competing with record companies.²² For that reason, attention shifted to legislation imposing criminal sanctions starting in the 1960s.

Currently, nearly all states have criminal record piracy laws applicable to pre-1972 sound recordings.²³ Most state criminal laws prohibit, at a minimum, duplication and sale of recordings done knowingly and willfully with the intent to sell or profit commercially from the copies.²⁴ This is the approach taken in HRS Chapter 482(c).

Concerning civil law, some states have statutes that address the unauthorized use of pre-1972 sound recordings. In most states, common law torts provide protection. Where the basis is unfair competition or misappropriation, the claims that can be brought under state law may be more limited than those that could be brought under federal copyright law, particularly in a state that still requires competition or passing off as part of the tort. The requirement in unfair competition cases that commercial harm to the right holder (and/or commercial benefit to the user) be established also limits possible claims. Furthermore, as a practical matter, many sound recordings will lose protection over time as their commercial value diminishes, even though state law can theoretically protect sound recordings until 2067.

²¹ See, e.g., *Victor Talking Mach. Co. v. Armstrong*, 132 F. 711 (S.D.N.Y. 1904).

²² Glenn M. Reisman, *The War Against Record Piracy: An Uneasy Rivalry Between the Federal and State Governments*, 39 ALB. L. REV. 87, 89 (1974).

²³ 2 NIMMER ON COPYRIGHT, § 8C.03[C] at 8C-8 to -9; JASZI STUDY at 8. According to a survey prepared by the Association of Research Libraries and supplemented and revised by the Copyright Office, only Indiana and Vermont do not have some form of statute criminalizing piracy of sound recordings. See <http://www.copyright.gov/docs/sound/>.

²⁴ State laws generally also protect against creation and distribution of bootleg recordings – sometimes in the same statute that prohibits unauthorized duplication and distribution of existing sound recordings, and sometimes in a separate provision. See, e.g., BESEK UNPUBLISHED SOUND RECORDINGS STUDY, App. A. However, those laws, which relate to the recording of live performances without authorization, are not the focus of this Report.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 13-5693 PSG (RZx) Date September 22, 2014
Title Flo & Eddie Inc. v. Sirius XM Radio Inc., et al.

Present: The Honorable Philip S. Gutierrez, United States District Judge

Wendy Hernandez

Not Reported

Deputy Clerk

Court Reporter

Attorneys Present for Plaintiff(s):

Attorneys Present for Defendant(s):

Not Present

Not Present

Proceedings (In Chambers): **Order GRANTING Plaintiff's Motion for Summary Judgment**

Before the Court is Plaintiff Flo & Eddie Inc.'s ("Flo & Eddie") motion for summary judgment as to liability on all claims. Dkt. # 69 (originally filed as Dkt. # 65). After considering the arguments in the moving, opposing, and reply papers, and the parties' oral arguments on September 15, 2013, the Court GRANTS the motion on all causes of action, but only on the basis of public performance conduct.

I. Background

Flo & Eddie is a corporation created in 1971 that is owned and exclusively controlled by Howard Kaylan ("Kaylan") and Mark Volman ("Volman"), two of the founding members of the music group "The Turtles." *Plaintiff's Statement of Uncontroverted Facts ("PSUF")* ¶¶ 2, 7. The Turtles recorded a number of hit songs in the 1960s, including the iconic song "Happy Together." *Id.* ¶ 4. Today, Flo & Eddie owns all rights to The Turtles' master sound recordings. *Id.* ¶ 7. Over the last four decades, Flo & Eddie has been exploiting The Turtles' master recordings by licensing the rights to make and sell records and licensing the rights for use of the recordings in movies, TV shows, and commercials. *Id.* ¶ 8. However, Flo & Eddie has never licensed a radio station, digital or otherwise, to publicly perform its recordings. *Defendant's Statement of Genuine Issues of Material Fact ("DSGF")* ¶ 8.

Sirius XM Radio Inc. ("Sirius XM") is a company that operates both a subscription based nationwide satellite radio service as well as a subscription based internet radio service. *Id.* ¶ 11. The company claims that it is the largest radio broadcaster in the United States, measured by revenue, and has over 25.8 million paying subscribers. *Id.* ¶ 10. In exchange for monthly fees, subscribers can access, among other things, Sirius XM's broadcasts of commercial-free music. *Id.* ¶ 12. Through its network of satellites, ground based terrestrial repeaters, and command and control earth stations, Sirius XM's satellite radio service broadcasts over 135 full-time channels. *Id.* ¶ 13. Sirius XM also streams music over the Internet to its subscribers. *Id.* ¶ 14. Its music

UNITED STATES DISTRICT COURT
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offerings include a number of channels devoted solely to playing “oldies” music recorded prior to 1972, such as “40s on 4,” “50s on 5,” and “60s on 6.” *Id.* ¶ 13.

Through its satellite and Internet radio services, Sirius XM has publicly performed 15 separate pre-1972 sound recordings that are exclusively owned by Flo & Eddie. *Id.* ¶ 23. Flo & Eddie has not licensed Sirius XM to use these recordings in its radio services and Sirius XM performs these sound recordings without paying royalties to Flo & Eddie. *Id.* ¶ 24. Flo & Eddie has been aware that Sirius XM plays songs by The Turtles for over seven years. *Id.* ¶ 77. Prior to commencing this lawsuit, Flo & Eddie had never asked Sirius XM to stop performing its recordings or to acquire a license from Flo & Eddie for its performances. *Id.* ¶ 78.

Ever since the songs owned by Flo & Eddie were recorded in the 1960s and 1970s, terrestrial (AM/FM) radio stations have played the recordings and Flo & Eddie has been aware of this practice. *Id.* ¶ 86. Radio stations have never obtained licenses to perform these recordings from Flo & Eddie or otherwise. *Id.* ¶ 87. However, Flo & Eddie has also never contacted a radio station to request compensation for public performances of its tracks or sued any radio station these performances. *Id.* ¶ 90.

In addition to broadcasting and streaming Flo & Eddie’s sound recordings to its subscribers, Sirius XM has allegedly engaged in some copying of Flo & Eddie’s sound recordings in the operation of its business. *Id.* ¶¶ 16, 19, 20-22, 24. This reproduction conduct involves copying recordings to databases and libraries, using small segments of songs in the creation of voice transitions, copying to “play out servers,” “buffering” songs, and authorizing third party copying of broadcasts. *Id.*

Flo & Eddie filed its Complaint in Los Angeles Superior Court on August 1, 2013, alleging violations of California Civil Code § 980(a)(2) and California’s Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, *et seq.* (“UCL”), conversion, and misappropriation. Dkt. # 1. Sirius XM filed a timely Notice of Removal and the case was removed on August 6, 2013. *Id.* Flo & Eddie now seek summary judgment on liability as to all of its causes of action. *See* Dkt. # 69.

II. Legal Standard

Federal Rule of Civil Procedure 56(a) provides that a “court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). An issue of fact is genuinely disputed and material if it cannot be reasonably resolved in favor of either party and

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may affect the outcome of the suit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 238 (1986); *In re Barboza*, 545 F.3d 702, 707 (9th Cir. 2008).

The party moving for summary judgment bears the initial burden of showing that there is no genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). “[M]ere allegation and speculation do not create a factual dispute for purposes of summary judgment.” *Nelson v. Pima Cmty. Coll.*, 83 F.3d 1075, 1081-82 (9th Cir. 1996) (citation omitted). A party asserting that a fact cannot be genuinely disputed must support that assertion by citing to “materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials.” Fed. R. Civ. P. 56(c)(1)(A).

If the non-movant will bear the burden of proof on an issue at trial, the moving party can satisfy its summary judgment burden by “‘showing’—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party’s case.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The non-moving party must then “come forth with evidence from which a jury could reasonably render a verdict in the non-moving party’s favor.” *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010). The non-moving party must set forth specific evidence showing that there is a genuine issue for trial, and “may not rest upon the mere allegations or denials of his pleading.” *Anderson*, 477 U.S. at 256.

On summary judgment, the Court may not weigh conflicting evidence or make credibility determinations. *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007). It must draw all reasonable inferences in the light most favorable to the non-moving party. *Anderson*, 477 U.S. at 255; *Soremekun*, 509 F.3d at 984.

III. Discussion

Flo & Eddie argues that Sirius XM is liable for two distinct unauthorized uses of its sound records: (1) *publicly performing* Flo & Eddie’s recordings by broadcasting and streaming the content to end consumers and to secondary delivery and broadcast partners, and (2) *reproducing* Flo & Eddie’s recordings in the process of operating its satellite and Internet radio services. *Mot.* 9:7-15, 7:8-10. Flo & Eddie claims that each of these unlicensed uses violates California copyright law and constitutes misappropriation, conversion, and an unlawful and unfair business practice under the UCL. *Mot.* 20:3-4, 9-11. The Court will examine each use in turn.

A. Public Performance

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On the public performance use, the parties do not dispute any of the materials facts regarding whether Sirius XM publicly performed Flo & Eddie's sound recordings. *See DSGF* ¶ 23. Sirius XM does not deny that it routinely publicly performs Flo & Eddie's sound recordings in the course of its business; rather, it argues that the bundle of rights that attaches to copyright ownership of a pre-1972 sound recording does not include the exclusive right to publicly perform the recording. *See Opp.* 6:15-19. Accordingly, once Sirius XM has lawfully purchased a copy of a Flo & Eddie recording, it broadcasts and streams that recording to paying audiences without first obtaining permission from Flo & Eddie to do so. *Mot.* 20:19-21. Flo & Eddie contends that, in California, copyright ownership of a pre-1972 sound recording includes the exclusive right to publicly perform the recording; therefore, if anyone wishes to publicly perform such a recording, they must first seek authorization from the recording's owner. *Id.* 10:20-23. To discern whether ownership of a pre-1972 sound recording includes the exclusive right to publicly perform the recording, the Court will look to copyright law.

i. *The Relationship Between Federal and State Copyright Law with Respect to Sound Recordings*

The Federal Copyright Act exclusively governs rights attendant to works of authorship in many areas; however, it explicitly leaves certain segments of copyright law open to state regulation. *See generally*, 17 U.S.C. § 301 (the Federal Copyright Act's preemption section). When Congress passed the Federal Copyright Act in 1976, it carved out pre-1972 sound recordings as a limited area of copyright law unaffected by the new federal law and within the domain of the states: "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[.]" *Id.* § 301(c). Accordingly, California statutory and common law presently governs the rights that attach to pre-1972 sound recordings because the Federal Copyright Act does not apply to those earlier recordings and explicitly allows states to continue to regulate them. *Id.* Flo & Eddie's sound recordings were fixed prior to February 15, 1972 (*DSGF* ¶¶ 4,7); therefore, its rights to those recordings depend solely on whatever rights are afforded to sound recording owners under California law.

ii. *Copyright Protection of Sound Recordings Under California Law*

California's copyright statute contains a provision that directly addresses pre-1972 sound recordings. *See Cal. Civ. Code* § 980(a)(2). Section 980(a)(2) provides:

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

Id. Sirius XM does not claim that it falls into the statutory exception as an independent maker of another sound recording, thus the crucial point of statutory interpretation for this case is whether “exclusive ownership” of a sound recording carries within it the exclusive right to publicly perform the recording. *See Opp.* 6:20-7:4. If so, Sirius XM is infringing on Flo & Eddie’s sound recording ownership rights by public performing the recordings without Flo & Eddie’s authorization.

a. The Text of § 980(a)(2)

The role of the courts in construing statutes is “to ascertain the intent of the drafters so as to effectuate the purpose of the law.” *Esberg v. Union Oil Co.*, 28 Cal. 4th 262, 268 (2002) (citing *Preston v. State Bd. Of Equalization*, 25 Cal. 4th 197, 213 (2001)). “Because the statutory language is generally the most reliable indicator of legislative intent, [courts] first examine the words themselves, giving them their usual and ordinary meaning and construing them in context.” *Id.* (citing *People v. Lawrence*, 24 Cal. 4th 219, 230 (2000)). And “[w]hen statutory language is clear and unambiguous, “there is no need for construction and courts should not indulge in it.”” *Id.* (citing *People v. Benson*, 18 Cal. 4th 24, 30 (1998), quoting *People v. Overstreet*, 42 Cal. 3d 891, 895 (1986)).

Accordingly, the Court begins its interpretation with the text of § 980(a)(2), giving the words their usual and ordinary meanings. What does it mean to have “exclusive ownership” in a sound recording “as against all persons”? Cal. Civ. Code § 980(a)(2). Commonly, to have “exclusive ownership” in something is to possess and control it and to not share that right to possess and control with others. *See THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE* 619, 1260 (Houghton Mifflin Harcourt, 5th ed. 2011) (defining “exclusive” and “ownership”). The California legislature defines “ownership” generally in the Civil Code in a manner consistent with the word’s usual and ordinary meaning—“the right of one or more persons to possess and use [a thing] to the exclusion of others.” Cal. Civ. Code § 654. Thus, at base, Flo & Eddie has the right to possess and use its sound recordings and prevent others from possessing and using them. The plain meaning of having “exclusive ownership” in a sound recording is having the right to use and possess the recording to the exclusion of others. There is

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nothing in that phrase to suggest that the legislature intended to exclude any right or use of the sound recording from the concept of “exclusive ownership.”

The legislature does include a limitation on the ownership right in the statute’s text, “the most reliable indicator of legislative intent.” *See Esberg*, 28 Cal. 4th at 268. An author has exclusive ownership in his or her sound recording “against all persons *except* one who independently makes or duplicates another sound recording that does not directly or indirectly recapture the actual sounds fixed in such prior recording, but consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate the sounds contained in the prior sound recording.” Cal. Civ. Code § 980(a)(2) (emphasis added). In other words, ownership of a sound recording does not include the exclusive right to make “covers” (i.e., recording the song with new instruments) – any person can make a sound recording based on a copyrighted recording, without the permission of the owner, so long as they produce the sounds independently rather than recapture the actual sounds in the copyrighted recording.

Construing the meaning of “exclusive ownership” in context with the rest of § 980(a)(2), which lists the above exception to the ownership right, the Court infers that the legislature did not intend to further limit ownership rights, otherwise it would have indicated that intent explicitly. Because the statute lists an exception, the Court should enlist the “familiar rule of construction...[that] where exceptions to a general rule are specified by statute, other exceptions are not to be implied or presumed.” *Geertz v. Ausonio*, 4 Cal. App. 4th 1363, 1370 (1992) (citing *In re Michael G.*, 44 Cal. 3d 283, 291 (1988)). Courts should “presume the Legislature included all the exceptions it intended to create.” *Id.* (citing *Reynolds v. Reynolds*, 54 Cal. 2d 669, 681 (1960)). If § 980(a)(2) had granted “exclusive ownership” in sound recordings without a listed exception, the argument that some limitations on property rights were already inherent in the concept of sound recording ownership might have been more persuasive to the Court. *See Opp.* 6:21-7:4, 8:25-9:2. However, by 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.

Accordingly, the Court’s textual reading of § 980(a)(2), giving the words “their usual and ordinary meaning and construing them in context[,]” is that the legislature intended ownership of a sound recording in California to include all rights that can attach to intellectual property, save the singular, expressly-stated exception for making “covers” of a recording.

b. Departure from the Common Law

In California, a different and “well-established” rule of statutory construction applies when a statute conflicts with existing common law. *See Borg-Warner Protective Servs. Corp. v.*

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Super. Ct., 75 Cal. App. 4th 1203, 1207-08 (1999). “[S]tatutes are not presumed to alter the common law unless expressly stated.” *Id.* (citing *Saala v. McFarland*, 63 Cal. 2d 124, 130 (1965)) (emphasis added). Sirius XM appeals to this rule to argue that the Court can only construe § 980(a)(2) as inclusive of a right to public performance if the text of the statute expressly specifies that right, which it does not. *See Opp.* 8:19-24. Sirius XM reasons that this heightened rule of statutory construction applies because California common law in 1982 (when the legislature passed § 980(a)(2)) did not afford owners of sound recordings the exclusive right to publicly perform their recordings. *Id.* 7:20-23. As a statute including that right would necessarily conflict with common law jurisprudence denying it, the Court can only interpret § 980(a)(2) as inclusive of a public performance right if the legislature expressly stated the existence of the right.

While Sirius XM’s statement of the rule of statutory construction is accurate, it is inapplicable here because there is no pre-1982 (or post-1982) body of California common law denying sound recording owners the exclusive right to publicly perform their recordings. Sirius XM cannot point to a single case in which a judge considered facts implicating this right or even theorized on the right then decided that the right of public performance does not attach to ownership of sound recordings in California. The Court cannot extrapolate a common law rule regarding public performance rights in sound recordings if the facts that would prompt a court to rule on the issue have simply never been presented in a California court. In this judicial void, the rule of statutory construction requiring express statements to alter the common law does not apply because, when the legislature passed § 980(a)(2), there was no common law rule in California rejecting public performance rights in sound recording ownership.

c. *Beyond the Text of § 980(a)(2)*

“When statutory language is clear and unambiguous, there is no need for construction and courts should not indulge in it.” *Esberg*, 28 Cal. 4th at 268 (internal citations omitted); *see also In re Steele*, 32 Cal. 4th 682, 694 (2004) (“[a]lthough legislative history often can help interpret an ambiguous statute, it cannot change the plain meaning of clear language”). As indicated above, in light of (1) the clarity of the plain and ordinary meaning of § 980(a)(2)’s “exclusive ownership...as against all persons” and (2) the legislature’s choice to specify one use of recordings to exclude from the grant of ownership, the Court finds that the statute is clear and unambiguous as to the rights that attach to ownership in a sound recording. Under § 980(a)(2), the owner of a sound recording has the exclusive right to possess and use the recording for all purposes, necessarily including the exclusive right to publicly perform the recording, except that the owner does not have the exclusive right to record and duplicate “covers.”

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Sirius XM's attempts to insert ambiguity into the textual language fail because Sirius XM relies on information outside the statutory language to find that ambiguity in the first place. *See Opp.* ¶ 7:5-19, 16:20-17:4; *see People v. Hagedorn*, 127 Cal. App. 4th 734, 743 (2005) ("Courts generally resort to legislative history to resolve ambiguities, not to create them"). Regardless, the legislative history of § 980(a)(2) is consistent with the Court's textual reading of the statute.

Sirius XM explains that the legislative history of § 980(a)(2) "makes abundantly clear that the 1982 revision was motivated by the preemption provisions of Section 301(c) of the Copyright Act, which, as of 1978, had made much of Section 980 'obsolete'; consequently, the law needed amendment to clarify what state-level protections *remained*[" *Opp.* 7:5-10. The version of § 980(a) of the California copyright law that existed prior to the 1982 amendment was broad and did not distinguish between different types of copyrightable property: "The author or proprietor of any composition in letters or art has an exclusive ownership in the representation or expression thereof as against all persons except one who originally and independently creates the same or a similar composition." Stats. 1947, c. 1107, p.2546, § 1. In response to Congress' preemption of the majority of state copyright law in the 1970s, the California legislature rewrote its sweeping provision to narrow it to the areas of the law that it still had the authority to regulate. Therefore, it replaced the above subsection with § 980(a)(1), pertaining to works "not fixed in any tangible medium of expression," and § 980(a)(2), pertaining to pre-1972 sound recordings. *See* Cal. Civ. Code §§ 980(a)(1-2). This narrowing of state-regulated subject matter tracked the Federal Copyright Act's preemption provisions. *See* 17 U.S.C. § 301(a) ("On and after January 1, 1978, all legal and equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright...in works of authorship that are *fixed in a tangible medium of expression*...are governed exclusively by this title") (emphasis added); *see also id.* § 301(c) (leaving pre-1972 sound recording protection to the states). Accordingly, the legislature did not expand or limit ownership rights in sound recordings by its 1982 amendment, rather, it excluded works of authorship in other mediums of expression from the law because it no longer had authority to regulate copyrights of those works.

As the California legislature clearly considered the Federal Copyright Act when drafting its 1982 amendment, § 980(a)(2)'s similarities to and differences from the federal law can further reveal the legislature's intent regarding sound recording rights. As discussed above, § 980(a)(2) contains one explicit limitation on sound recording ownership rights. That same limitation is found in the Federal Copyright Act's "Scope of exclusive rights in sound recordings," nearly word-for-word. *See* 17 U.S.C. § 114(b) ("The exclusive rights of the owner of copyright in a sound recording...do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted recording). Section 114 contains other expressly stated limitations, including "[t]he exclusive rights of the owner of copyright in a

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sound recording...do not include any right of performance[.]” See 17 U.S.C. § 114(a). The California legislature was thus likely aware of this manner of excluding performance rights from sound recording ownership, as well as other limitations listed in the Federal Copyright Act, yet chose to incorporate only one exception into its revised § 980(a)(2). The legislative history of § 980(a)(2) and its comparison to the Federal Copyright Act actually bolsters the Court’s plain textual reading of the statute that sound recording ownership is inclusive of all ownership rights that can attach to intellectual property, including the right of public performance, excepting only the limited right expressly stated in the law.

d. Case Law After § 980(a)(2)

The Court finds further support for its textual reading of the statute as inclusive of the right of public performance from the only two courts that have ruled on or discussed this right under § 980(a)(2). See *Capital Records, LLC et al. v. BlueBeat, Inc. et al.*, 765 F. Supp. 2d 1198 (C.D. Cal 2010); see also *Bagdasarian Prods., LLC v. Capitol Records, Inc.*, No. B217960, 2010 WL 3245795 (Cal. Ct. App. August 18, 2010). These courts agreed that the right exists, albeit either implicitly or in dicta.

In *BlueBeat*, the court was squarely presented with facts implicating a public performance right attendant to sound recording ownership. *Capital Records v. BlueBeat*, 765 F. Supp. 2d at 1200-01. Defendant operated a commercial website that enabled users to download songs (reproduction and distribution of a sound recording) as well as “stream” songs without a download (isolated public performance of a sound recording). *Id.* at 1200-03, 1206 (noting “BlueBeat does not dispute that...it reproduced, sold, and publicly performed the pre-1972 Recordings” without approval from the Recordings’ copyright owners). Plaintiffs had alleged “misappropriation in violation of California Civil Code 980(a)(2)” and the court held that for BlueBeat’s actions (offering songs for download and for live streaming), it was liable for misappropriation. *Id.* at 1206. Although applying § 980(a)(2), the court does not analyze the “streaming conduct” or public performance allegation any differently than the reproduction and distribution charges related to the downloading function. Thus, the court’s treatment of the statute when confronted with public performance facts suggests that the court interpreted “exclusive ownership” under the statute’s text to include the right of public performance so unambiguously that the issue did not even warrant analysis beyond repeating the statutory language. See *id.* at 1205.

While the California appellate court in *Bagdasarian Prods.*, did not rule on facts that isolated the public performance right in sound recordings, the court assumed the existence of such a right in its dicta. *Bagdasarian Prods.*, 2010 WL 3245795, at *11. The parties in the case had executed a sales contract regarding certain sound recording rights in pre-1972 Alvin and the

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Chipmunks songs. *Id.* at *1. Their dispute concerned which rights had been sold in that contract. *Id.* at *2. The court’s analysis consisted largely of contract interpretation, not statutory interpretation, but the court acknowledged that it was operating in a copyright landscape governed by § 980(a)(2) by citing to the statute when explaining property rights in sound recordings under California law. *Id.* at *7. Examining the parties’ contract, the court asked whether the agreement granting Defendant “all rights of every kind” in the physical master recordings “together with such rights to use and control...the performances embodied thereon for the purposes of manufacture and distribution” included conveyance of the right to license the recordings for purposes other than manufacture and distribution, specifically, for use as background music in film and television. *Id.* at *1, 15. While licensing for film and television does not implicate the isolated public performance right like use for radio broadcast does, the court’s reasoning suggested that the exclusive right to publicly perform a sound recording was one of the intangible property rights that attaches to a recording. *Id.* at *11. The court summarized that the contract granted Defendant “the right to exploit the intellectual property embodied in the master recordings only for the purpose of ‘manufacture and distribution’ of reproductions and records” and explained that other rights remained that Plaintiff had never granted to Defendant. *Id.* “Uses not involving the manufacture or distribution of reproductions or records—for example, publicly performing the records, as would occur if a recording of one of the songs was played during a live stage play—are not within [the contract’s] grant of rights.” *Id.* By mentioning public performance as an example of a property right that Plaintiff had not transferred to Defendant, the court conveyed that a sound recording owner’s bundle of intellectual property rights included the exclusive right to publicly perform the recording. *Id.*

Although the breadth and specificity of cases acknowledging that exclusive ownership of a sound recording includes the right to publicly perform the recording are slight, Defendant has not directed the Court to a single case cutting against the right to public performance, even implicitly or in dicta. Therefore, the limited but unopposed case law referencing § 980(a)(2) in a public performance context supports the Court’s interpretation of legislative intent based on the text of the statute – that the legislature intended ownership of a sound recording to include the exclusive right to any use of a recording (other than the singular listed exception), including the right to publicly perform it.

The Court finds that copyright ownership of a sound recording under § 980(a)(2) includes the exclusive right to publicly perform that recording. *See* Cal. Civ. Code § 980(a)(2). Accordingly, the Court GRANTS summary judgment on copyright infringement in violation of § 980(a)(2) in favor of Flo & Eddie.¹

¹ Sirius XM’s argument that state regulation of sound recording performances would violate the Commerce Clause is without merit. *See Opp.* 21:12-14. “Where state or local government action is specifically authorized by Congress, it is not subject to the Commerce Clause even if it

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B. Reproduction

Much of the facts surrounding Sirius XM's alleged copying are still disputed at this point in the case. As the moving party, Flo & Eddie bears the burden of showing that there are no genuine disputes as to any facts material to the outcome of the case. Fed. R. Civ. P. 56(a); *Anderson*, 477 U.S. at 238. Flo & Eddie argues that the following conduct by Sirius XM constitutes unlawful reproduction of its sound recordings:

- (1) copying Flo & Eddie's recordings in creating and backing up libraries and databases (*Mot.* 7:10-18; *DSGF* ¶¶ 16, 18);
- (2) copying "tips and tails" of sound recordings to programmers' workstations to add voice transitions then transferring copies of those sequences—tips, tails, and voice transitions—back to Sirius XM's music libraries (*Mot.* 8:7-15; *DSGF* ¶ 19);
- (3) copying sound recordings to "play out" servers each time it broadcasts a song (*Mot.* 8:17-20; *DSGF* ¶ 20);
- (4) copying sound recordings as "buffer copies" after being transmitted from the "play out" server but before the recording is heard by Sirius XM subscribers (*Mot.* 8:21-24; *DSGF* ¶ 21);
- (5) authorizing a third party company, Quickplay Media, to copy all of Sirius XM's broadcasts to maintain a 5-hour cache to enable later on-demand listening (*Mot.* 9:1-3; *DSGF* ¶ 22).

The evidence offered in support of all of this conduct is the deposition transcript of Terrence Smith, a high-ranking Sirius XM officer.

Sirius XM disputes aspects of each of these factual representations, supporting its contestations with evidence of its own. In response to assertions regarding libraries and databases, "play out" servers, buffering, and Quickplay "caching," Sirius XM presents evidence

interferes with interstate commerce." *White v. Mass. Council of Constr. Emp'rs, Inc.*, 460 U.S. 204, 213 (1983); see also *S. Pac. Co. v. State of Ariz. ex rel. Sullivan*, 325 U.S. 761, 769 (1945) ("Congress has undoubted power to redefine the distribution of power over interstate commerce. It may...permit the states to regulate the commerce in a manner which would otherwise not be permissible"). Because Congress specifically authorized protection of pre-1972 sound recording rights by the states in 17 U.S.C. § 301(c), the California statute protecting those rights is not subject to the Commerce Clause.

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that none of this activity as it relates to Flo & Eddie's sound recordings has occurred in California. *Opp.* 6:7-10; *DSGF* ¶¶ 16, 51-54, 58-61, 20-22. Flo & Eddie only counters this showing with evidence that the Quickplay operations are located in San Diego, California, which is not conclusive as to where the alleged acts of copying took place. *Reply* 12:2-3. The location of copying is disputed by the parties and is material to the case because pre-1972 sound recordings are protected by California law alone and "a copyright granted by a particular State has effect only within its boundaries. If one State grants such protection, the interests of States which do not are not prejudiced since their citizens remain free to copy within their borders those works which may be protected elsewhere." *See Goldstein v. Cal.*, 412 U.S. 546, 558 (1973). Thus, for these four types of copying conduct where there is disagreement as to the location of the copying, the Courts find a genuine dispute as to material facts and will deny summary judgment on claims arising from this conduct.

Regarding "tips and tails" copying, the parties characterize the conduct differently. "Tips and tails" are the beginnings and endings (just a few seconds) of recordings that are used by Sirius XM's programmers to bracket the voice transitions that it broadcasts between songs. *Mot.* 8:9-11; *DSGF* ¶ 19. Flo & Eddie allege that these recording segments are copied onto Sirius XM workstations then the copy is transferred to and stored in Sirius XM's libraries and databases for later use. *Mot.* 8:11-15; *DSGF* ¶ 19. Sirius XM disputes which portion of the "tip and tail sequence" is copied and retained. *See DSGF* ¶19. Sirius XM describes the conduct as "caching" the recording segments on a workstation on a very temporary basis, just to make the voice transitions, then only the voice tracks are copied and retained in its libraries and databases. *Id.* The parties genuinely dispute the mechanics of the characterization of the "tips and tails" recordation and storage process. The details as to what is reproduced and retained by Sirius XM is material to the case as it is precisely the conduct that Flo & Eddie argues constitutes unlawful reproduction. Accordingly, the Court will deny summary judgment on Flo & Eddie's claims related to "tips and tails" copying.

At this point in the case, Flo & Eddie has not met its burden to show that material facts as to Sirius XM's reproductions of Flo & Eddie's sound recordings are not genuinely disputed by the parties; therefore, the Court DENIES summary judgment as to any claim premised on Sirius XM's alleged reproduction conduct.

C. The UCL

The UCL prohibits unfair competition, including unlawful, unfair, or fraudulent business acts. *See Bus. & Prof. Code* §§ 17200 et seq.; *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1143 (2003). "Section 17200 'borrows' violations from other laws by making them independently actionable as unfair competitive practices." *Korea Supply*, 29 Cal. 4th at

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1134 (citing *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (1999)). Flo & Eddie argue that Sirius XM's unauthorized public performance of Flo & Eddie's sound recordings in the course of its business violates the UCL. *Mot.* 20:3-8.

A threshold issue, disputed by Sirius XM, is whether Flo & Eddie has standing to bring this claim. *See Opp.* 15:4-5. Actions under the UCL may be maintained by a corporation that "has suffered injury in fact and has lost money or property as a result of the unfair competition." *See Bus. & Prof. Code* §§ 17201, 17204; *see also Kwikset Corp. v. Super. Ct.*, 41 Cal. 4th 310, 323 (2011) ("lost money or property-economic injury-is itself a classic form of injury in fact"). "There are innumerable ways in which economic injury from unfair competition may be shown." *Id.* For example, standing is established if a plaintiff was "deprived of money or property to which he or she has a cognizable claim." *Id.*; *see also Clayworth v. Pfizer*, 49 Cal. 4th 758, 789 (2010) (warning parties not to "conflate the issue of standing with the issue of the remedies to which a party may be entitled. That a party may ultimately be unable to prove a right to damages...does not demonstrate that it lacks standing to argue for its entitlement to them"). Flo & Eddie has standing under the UCL because it has an exclusive right to publicly perform its sound recordings and every time Sirius XM played those recordings, it used them without paying Flo & Eddie for that use. *DSGF* ¶¶ 23-24. Thus, at minimum, Flo & Eddie suffered economic harm in the form of foregone licensing or royalty payments for the unauthorized performances of its sound recordings.

Having established standing, Flo & Eddie has also proven that Sirius XM's conduct violates the UCL. On undisputed facts, Sirius XM publicly performs Flo & Eddie's sound recordings without authorization to do so. *Id.* The Court found that such public performance constitutes a violation of Cal. Civ. Code § 980(a)(2). Borrowing the violation of § 980(a)(2), the Court finds that this unlawful conduct also constitutes a violation of the UCL and grants Flo & Eddie's motion for summary judgment on UCL liability.

D. Conversion

"In California, conversion has three elements: ownership or right to possession of property, wrongful disposition of the property right and damages." *G.S. Rasmussen & Assocs., Inc. v. Kalitta Flying Serv., Inc.*, 958 F.2d 896, 906 (1992) (citing *Tyrone Pac. Int'l, Inc. v. MV Eurychili*, 658 F.2d 664, 666 (9th Cir. 1981)). Flo & Eddie has an ownership interest in the right to publicly perform its sound recordings under § 980(a)(2). *PSUF* ¶ 7. There was wrongful disposition of that property right every time Sirius XM publicly performed the recordings without Flo & Eddie's permission, in violation of California copyright law. *DSGF* ¶¶ 23-24; *see Cal. Civ. Code* § 980(a)(2); *Capital Records v. BlueBeat*, 765 F.Supp.2d at 1206; *see also Joe Hand Promotions, Inc. v. Albright*, No. CV 11-2260 WBS (CMKx), 2013 WL 2449500 (E.D.

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Cal. June 5, 2013), at *8 (finding conversion where the owner of a bar intercepted a satellite broadcast of a sporting event and showed it at his bar without Plaintiff's authorization, thus misappropriating plaintiff's exclusive right to distribute the broadcast). On the element of damages, Sirius XM contends that there are none because Flo & Eddie cannot identify a single sale or lost or diminished license fee that it has suffered as a result of Sirius XM's performance of its sound recordings. *See Opp.* 14:2-4. But Sirius XM's unauthorized performances alone establish conversion damages in the form of license fees that Sirius XM should have paid Flo & Eddie in order to publicly perform its recordings. *DSGF* ¶¶ 23-24. Thus, the Court grants Flo & Eddie's motion for summary judgment on conversion liability.

E. Misappropriation

"Common law misappropriation presents a final legal theory under the broad unfair competition umbrella." *Balboa Ins. Co. v. Trans Global Equities*, 218 Cal. App. 3d 1327, 1342 (1990). The cause of action has three elements: (1) the plaintiff has invested substantial time and money in development of its...property; (2) the defendant has appropriated the [property] at little or no cost; and (3) the plaintiff has been injured by the defendant's conduct. *Id.* (internal citation omitted). Much of California misappropriation law regarding intellectual property has been preempted by the Federal Copyright Act, but preemption is not at issue here because the Federal Copyright Act leaves copyright protection of pre-1972 sound recordings entirely up to the states until 2067. *See Summit Mach. Tool Mfg. Corp. v. Victor CNC Sys., Inc.*, 7 F.3d 1434, 1439-40 (9th Cir. 1993) (explaining preemption of common law misappropriation); 17 U.S.C. § 301(c). Regarding Flo & Eddie's investment in the development of the sound recordings, the two individuals who own and control Flo & Eddie, Kaylan and Volman, are former band members who performed on recordings. *DSGF* ¶¶ 2-4. In a 1970 litigation settlement, Kaylan, Volman, and other band members obtained ownership rights in The Turtles' master recordings from the band's record company in exchange for foregoing a large amount of underpaid royalty payments. *Id.* ¶¶ 3, 5. Subsequently, Kaylan and Volman purchased exclusive ownership rights in the sound recordings from the other band members and transferred the rights to their corporation, Flo & Eddie. *Id.* ¶¶ 6-7. By performing on the recordings, foregoing royalties, and making pay-outs to acquire exclusive rights to the sound recordings, Flo & Eddie has demonstrated that it invested substantial time and money in the development of the recordings. Moreover, Sirius XM appropriated the sound recordings at little cost - it simply purchased a first copy of each Flo & Eddie sound recording that it uses in its radio business and performs it as often as it wishes without paying any additional licensing or royalty fees. *Id.* ¶ 24; *see A&M Records, Inc. v. Heilman*, 75 Cal. App. 3d 554, 564 (1977) (finding that duplicating performances owned by plaintiff in order to resell them for profit "presents a classic example of the unfair business practice of misappropriation of the valuable efforts of another"). Flo & Eddie has proven injury to itself by this conduct in that same manner that it demonstrated

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damages under conversion and the UCL. At minimum, Flo & Eddie was injured by Sirius XM's conduct in the form of foregone licensing or royalty payments that Sirius XM should have paid before publicly performing Flo & Eddie's recordings. Thus, the Court grants Flo & Eddie's motion for summary judgment on misappropriation liability.

F. Laches

Sirius XM briefly argues that the equitable defense of laches bars this action in its entirety due to Flo & Eddie's delay in making demands for compensation or bringing suit to enforce its rights. *See Opp.* 4:12-14, 9:12-13. "Laches is an unreasonable delay in asserting an equitable right, causing prejudice to an adverse party so as to render the granting of relief to the other party inequitable." *Wells Fargo Bank v. Bank of America*, 32 Cal. App. 4th 424, 439 (1995) (citing *Conti v. Bd. of Civil Serv. Comm'rs*, 1 Cal. 3d 351, 359 (1969)). Sirius XM reasons that Flo & Eddie and Sirius XM have been "happy together" for years without any licensing or royalty arrangements, and Flo & Eddie cannot disrupt this practice that Sirius XM has built its "oldies" business around after Flo & Eddie had allowed it for so long. *See Opp.* 9:12-13. It is undisputed that Flo & Eddie has been aware of Sirius XM's public performance of its sound recordings for over seven years and has never demanded payment or sued Sirius XM regarding the performances prior to this lawsuit. *DSGF* ¶¶ 77-78. However, "the laches defense is unavailable in an action at law for damages 'even [if] combined with the cumulative remedy of declaratory relief.'" *Id.* (quoting *Abbott v. City of L.A.*, 50 Cal. 2d 438, 462 (1958)); *see also Unilogic v. Burroughs Corp.*, 10 Cal. App. 4th 612, 619 (1992) ("The equitable doctrine of laches has a legal equivalent in the statutes of limitations. To allow a laches defense in a legal action would be to override a time limit mandated by the Legislature"). This case is, in part, an action at law for damages (*Compl.* 11:23-24); therefore, before reaching the issue of prejudice, the laches defense fails because it is unavailable to Sirius XM in this action.

IV. Conclusion

For the reasons above, Flo & Eddie's motion for summary judgment is GRANTED on all causes of action, but only so far as the claims are premised on Sirius XM's public performance of Flo & Eddie's recordings, not its alleged reproductions.

IT IS SO ORDERED.

CIVIL CODE

SECTION 980-989

980. (a) (1) The author of any original work of authorship that is not fixed in any tangible medium of expression has an exclusive ownership in the representation or expression thereof as against all persons except one who originally and independently creates the same or similar work. A work shall be considered not fixed when it is not embodied in a tangible medium of expression or when its embodiment in a tangible medium of expression is not sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration, either directly or with the aid of a machine or device.

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

(b) The inventor or proprietor of any invention or design, with or without delineation, or other graphical representation, has an exclusive ownership therein, and in the representation or expression thereof, which continues so long as the invention or design and the representations or expressions thereof made by him remain in his possession.

981. (a) Unless otherwise agreed, an original work of authorship not fixed in any tangible medium of expression and in the creation of which several persons are jointly concerned, is owned by them in equal proportion.

(b) Unless otherwise agreed, an invention or design in the production of which several persons are jointly concerned is owned by them as follows:

- (1) If the invention or design is single, in equal proportions.
- (2) If it is not single, in proportion to the contribution of each.

982. (a) The owner of any rights in any original works of authorship not fixed in any tangible medium of expression may transfer the ownership therein.

(b) The owner of any invention or design, or of any representation or expression thereof, may transfer his or her proprietary interest in it.

(c) Notwithstanding any other provision in this section, whenever a work of fine art is transferred, whether by sale or on commission or otherwise, by or on behalf of the artist who created it, or that artist's heir, legatee, or personal representative, the right of reproduction thereof is reserved to such artist or such heir,

legatee, or personal representative until it passes into the public domain by act or operation of law, unless that right is expressly transferred by a document in writing in which reference is made to the specific right of reproduction, signed by the owner of the rights conveyed or that person's duly authorized agent. If the transfer is pursuant to an employment relationship, the right of reproduction is transferred to the employer, unless it is expressly reserved in writing. If the transfer is pursuant to a legacy or inheritance, the right of reproduction is transferred to the legatee or heir, unless it is expressly reserved by will or codicil. Nothing contained herein, however, shall be construed to prohibit the fair use of such work of fine art.

(d) As used in subdivision (c):

(1) "Fine art" means any work of visual art, including but not limited to, a drawing, painting, sculpture, mosaic, or photograph, a work of calligraphy, work of graphic art (including an etching, lithograph, offset print, silk screen, or a work of graphic art of like nature), crafts (including crafts in clay, textile, fiber, wood, metal, plastic, and like materials), or mixed media (including a collage, assemblage, or any combination of the foregoing art media).

(2) "Artist" means the creator of a work of fine art.

(3) "Right of reproduction", at the present state of commerce and technology shall be interpreted as including, but shall not be limited to, the following: reproduction of works of fine art as prints suitable for framing; facsimile casts of sculpture; reproductions used for greeting cards; reproductions in general books and magazines not devoted primarily to art, and in newspapers in other than art or news sections, when such reproductions in books, magazines, and newspapers are used for purposes similar to those of material for which the publishers customarily pay; art films; television, except from stations operated for educational purposes, or on programs for educational purposes from all stations; and reproductions used in any form of advertising, including magazines, calendars, newspapers, posters, billboards, films or television.

(e) The amendments to this section made at the 1975-76 Regular Session shall only apply to transfers made on or after January 1, 1976.

983. If the owner of any invention or design intentionally makes it public, a copy or reproduction may be made public by any person, without responsibility to the owner, so far as the law of this state is concerned.

984. If the owner of an invention or design does not make it public, any other person subsequently and originally producing the same thing has the same right therein as the prior inventor, which is exclusive to the same extent against all persons except the prior inventor, or those claiming under him.

985. Letters and other private communications in writing belong to the person to whom they are addressed and delivered; but they cannot be published against the will of the writer, except by authority of law.

986. (a) Whenever a work of fine art is sold and the seller resides in California or the sale takes place in California, the seller or

the seller's agent shall pay to the artist of such work of fine art or to such artist's agent 5 percent of the amount of such sale. The right of the artist to receive an amount equal to 5 percent of the amount of such sale may be waived only by a contract in writing providing for an amount in excess of 5 percent of the amount of such sale. An artist may assign the right to collect the royalty payment provided by this section to another individual or entity. However, the assignment shall not have the effect of creating a waiver prohibited by this subdivision.

(1) When a work of fine art is sold at an auction or by a gallery, dealer, broker, museum, or other person acting as the agent for the seller the agent shall withhold 5 percent of the amount of the sale, locate the artist and pay the artist.

(2) If the seller or agent is unable to locate and pay the artist within 90 days, an amount equal to 5 percent of the amount of the sale shall be transferred to the Arts Council.

(3) If a seller or the seller's agent fails to pay an artist the amount equal to 5 percent of the sale of a work of fine art by the artist or fails to transfer such amount to the Arts Council, the artist may bring an action for damages within three years after the date of sale or one year after the discovery of the sale, whichever is longer. The prevailing party in any action brought under this paragraph shall be entitled to reasonable attorney fees, in an amount as determined by the court.

(4) Moneys received by the council pursuant to this section shall be deposited in an account in the Special Deposit Fund in the State Treasury.

(5) The Arts Council shall attempt to locate any artist for whom money is received pursuant to this section. If the council is unable to locate the artist and the artist does not file a written claim for the money received by the council within seven years of the date of sale of the work of fine art, the right of the artist terminates and such money shall be transferred to the council for use in acquiring fine art pursuant to the Art in Public Buildings program set forth in Chapter 2.1 (commencing with Section 15813) of Part 10b of Division 3 of Title 2, of the Government Code.

(6) Any amounts of money held by any seller or agent for the payment of artists pursuant to this section shall be exempt from enforcement of a money judgment by the creditors of the seller or agent.

(7) Upon the death of an artist, the rights and duties created under this section shall inure to his or her heirs, legatees, or personal representative, until the 20th anniversary of the death of the artist. The provisions of this paragraph shall be applicable only with respect to an artist who dies after January 1, 1983.

(b) Subdivision (a) shall not apply to any of the following:

(1) To the initial sale of a work of fine art where legal title to such work at the time of such initial sale is vested in the artist thereof.

(2) To the resale of a work of fine art for a gross sales price of less than one thousand dollars (\$1,000).

(3) Except as provided in paragraph (7) of subdivision (a), to a resale after the death of such artist.

(4) To the resale of the work of fine art for a gross sales price less than the purchase price paid by the seller.

(5) To a transfer of a work of fine art which is exchanged for one or more works of fine art or for a combination of cash, other property, and one or more works of fine art where the fair market value of the property exchanged is less than one thousand dollars (\$1,000).

(6) To the resale of a work of fine art by an art dealer to a

purchaser within 10 years of the initial sale of the work of fine art by the artist to an art dealer, provided all intervening resales are between art dealers.

(7) To a sale of a work of stained glass artistry where the work has been permanently attached to real property and is sold as part of the sale of the real property to which it is attached.

(c) For purposes of this section, the following terms have the following meanings:

(1) "Artist" means the person who creates a work of fine art and who, at the time of resale, is a citizen of the United States, or a resident of the state who has resided in the state for a minimum of two years .

(2) "Fine art" means an original painting, sculpture, or drawing, or an original work of art in glass.

(3) "Art dealer" means a person who is actively and principally engaged in or conducting the business of selling works of fine art for which business such person validly holds a sales tax permit.

(d) This section shall become operative on January 1, 1977, and shall apply to works of fine art created before and after its operative date.

(e) If any provision of this section or the application thereof to any person or circumstance is held invalid for any reason, such invalidity shall not affect any other provisions or applications of this section which can be effected, without the invalid provision or application, and to this end the provisions of this section are severable.

(f) The amendments to this section enacted during the 1981-82 Regular Session of the Legislature shall apply to transfers of works of fine art, when created before or after January 1, 1983, that occur on or after that date.

987. (a) The Legislature hereby finds and declares that the physical alteration or destruction of fine art, which is an expression of the artist's personality, is detrimental to the artist's reputation, and artists therefore have an interest in protecting their works of fine art against any alteration or destruction; and that there is also a public interest in preserving the integrity of cultural and artistic creations.

(b) As used in this section:

(1) "Artist" means the individual or individuals who create a work of fine art.

(2) "Fine art" means an original painting, sculpture, or drawing, or an original work of art in glass, of recognized quality, but shall not include work prepared under contract for commercial use by its purchaser.

(3) "Person" means an individual, partnership, corporation, limited liability company, association or other group, however organized.

(4) "Frame" means to prepare, or cause to be prepared, a work of fine art for display in a manner customarily considered to be appropriate for a work of fine art in the particular medium.

(5) "Restore" means to return, or cause to be returned, a deteriorated or damaged work of fine art as nearly as is feasible to its original state or condition, in accordance with prevailing standards.

(6) "Conserve" means to preserve, or cause to be preserved, a work of fine art by retarding or preventing deterioration or damage through appropriate treatment in accordance with prevailing standards in order to maintain the structural integrity to the fullest extent

possible in an unchanging state.

(7) "Commercial use" means fine art created under a work-for-hire arrangement for use in advertising, magazines, newspapers, or other print and electronic media.

(c) (1) No person, except an artist who owns and possesses a work of fine art which the artist has created, shall intentionally commit, or authorize the intentional commission of, any physical defacement, mutilation, alteration, or destruction of a work of fine art.

(2) In addition to the prohibitions contained in paragraph (1), no person who frames, conserves, or restores a work of fine art shall commit, or authorize the commission of, any physical defacement, mutilation, alteration, or destruction of a work of fine art by any act constituting gross negligence. For purposes of this section, the term "gross negligence" shall mean the exercise of so slight a degree of care as to justify the belief that there was an indifference to the particular work of fine art.

(d) The artist shall retain at all times the right to claim authorship, or, for a just and valid reason, to disclaim authorship of his or her work of fine art.

(e) To effectuate the rights created by this section, the artist may commence an action to recover or obtain any of the following:

(1) Injunctive relief.

(2) Actual damages.

(3) Punitive damages. In the event that punitive damages are awarded, the court shall, in its discretion, select an organization or organizations engaged in charitable or educational activities involving the fine arts in California to receive any punitive damages.

(4) Reasonable attorneys' and expert witness fees.

(5) Any other relief which the court deems proper.

(f) In determining whether a work of fine art is of recognized quality, the trier of fact shall rely on the opinions of artists, art dealers, collectors of fine art, curators of art museums, and other persons involved with the creation or marketing of fine art.

(g) The rights and duties created under this section:

(1) Shall, with respect to the artist, or if any artist is deceased, his or her heir, beneficiary, devisee, or personal representative, exist until the 50th anniversary of the death of the artist.

(2) Shall exist in addition to any other rights and duties which may now or in the future be applicable.

(3) Except as provided in paragraph (1) of subdivision (h), may not be waived except by an instrument in writing expressly so providing which is signed by the artist.

(h) (1) If a work of fine art cannot be removed from a building without substantial physical defacement, mutilation, alteration, or destruction of the work, the rights and duties created under this section, unless expressly reserved by an instrument in writing signed by the owner of the building, containing a legal description of the property and properly recorded, shall be deemed waived. The instrument, if properly recorded, shall be binding on subsequent owners of the building.

(2) If the owner of a building wishes to remove a work of fine art which is a part of the building but which can be removed from the building without substantial harm to the fine art, and in the course of or after removal, the owner intends to cause or allow the fine art to suffer physical defacement, mutilation, alteration, or destruction, the rights and duties created under this section shall apply unless the owner has diligently attempted without success to notify the artist, or, if the artist is deceased, his or her heir, beneficiary, devisee, or personal representative, in writing of his

or her intended action affecting the work of fine art, or unless he or she did provide notice and that person failed within 90 days either to remove the work or to pay for its removal. If the work is removed at the expense of the artist, his or her heir, beneficiary, devisee, or personal representative, title to the fine art shall pass to that person.

(3) If a work of fine art can be removed from a building scheduled for demolition without substantial physical defacement, mutilation, alteration, or destruction of the work, and the owner of the building has notified the owner of the work of fine art of the scheduled demolition or the owner of the building is the owner of the work of fine art, and the owner of the work of fine art elects not to remove the work of fine art, the rights and duties created under this section shall apply, unless the owner of the building has diligently attempted without success to notify the artist, or, if the artist is deceased, his or her heir, beneficiary, devisee, or personal representative, in writing of the intended action affecting the work of fine art, or unless he or she did provide notice and that person failed within 90 days either to remove the work or to pay for its removal. If the work is removed at the expense of the artist, his or her heir, beneficiary, devisee, or personal representative, title to the fine art shall pass to that person.

(4) Nothing in this subdivision shall affect the rights of authorship created in subdivision (d) of this section.

(i) No action may be maintained to enforce any liability under this section unless brought within three years of the act complained of or one year after discovery of the act, whichever is longer.

(j) This section shall become operative on January 1, 1980, and shall apply to claims based on proscribed acts occurring on or after that date to works of fine art whenever created.

(k) If any provision of this section or the application thereof to any person or circumstance is held invalid for any reason, the invalidity shall not affect any other provisions or applications of this section which can be effected without the invalid provision or application, and to this end the provisions of this section are severable.

988. (a) For the purpose of this section:

(1) The term "artist" means the creator of a work of art.

(2) The term "work of art" means any work of visual or graphic art of any media including, but not limited to, a painting, print, drawing, sculpture, craft, photograph, or film.

(b) Whenever an exclusive or nonexclusive conveyance of any right to reproduce, prepare derivative works based on, distribute copies of, publicly perform, or publicly display a work of art is made by or on behalf of the artist who created it or the owner at the time of the conveyance, ownership of the physical work of art shall remain with and be reserved to the artist or owner, as the case may be, unless such right of ownership is expressly transferred by an instrument, note, memorandum, or other writing, signed by the artist, the owner, or their duly authorized agent.

(c) Whenever an exclusive or nonexclusive conveyance of any right to reproduce, prepare derivative works based on, distribute copies of, publicly perform, or publicly display a work of art is made by or on behalf of the artist who created it or the owner at the time of the conveyance, any ambiguity with respect to the nature or extent of the rights conveyed shall be resolved in favor of the reservation of rights by the artist or owner, unless in any given case the federal copyright law provides to the contrary.

989. (a) The Legislature hereby finds and declares that there is a public interest in preserving the integrity of cultural and artistic creations.

(b) As used in this section:

(1) "Fine art" means an original painting, sculpture, or drawing, or an original work of art in glass, of recognized quality, and of substantial public interest.

(2) "Organization" means a public or private not-for-profit entity or association, in existence at least three years at the time an action is filed pursuant to this section, a major purpose of which is to stage, display, or otherwise present works of art to the public or to promote the interests of the arts or artists.

(3) "Cost of removal" includes reasonable costs, if any, for the repair of damage to the real property caused by the removal of the work of fine art.

(c) An organization acting in the public interest may commence an action for injunctive relief to preserve or restore the integrity of a work of fine art from acts prohibited by subdivision (c) of Section 987.

(d) In determining whether a work of fine art is of recognized quality and of substantial public interest the trier of fact shall rely on the opinions of those described in subdivision (f) of Section 987.

(e) (1) If a work of fine art cannot be removed from real property without substantial physical defacement, mutilation, alteration, or destruction of such work, no action to preserve the integrity of the work of fine art may be brought under this section. However, if an organization offers some evidence giving rise to a reasonable likelihood that a work of art can be removed from the real property without substantial physical defacement, mutilation, alteration, or destruction of the work, and is prepared to pay the cost of removal of the work, it may bring a legal action for a determination of this issue. In that action the organization shall be entitled to injunctive relief to preserve the integrity of the work of fine art, but shall also have the burden of proof. The action shall commence within 30 days after filing. No action may be brought under this paragraph if the organization's interest in preserving the work of art is in conflict with an instrument described in paragraph (1) of subdivision (h) of Section 987.

(2) If the owner of the real property wishes to remove a work of fine art which is part of the real property, but which can be removed from the real property without substantial harm to such fine art, and in the course of or after removal, the owner intends to cause or allow the fine art to suffer physical defacement, mutilation, alteration, or destruction the owner shall do the following:

(A) If the artist or artist's heir, legatee, or personal representative fails to take action to remove the work of fine art after the notice provided by paragraph (2) of subdivision (h) of Section 987, the owner shall provide 30 days' notice of his or her intended action affecting the work of art. The written notice shall be a display advertisement in a newspaper of general circulation in the area where the fine art is located. The notice required by this paragraph may run concurrently with the notice required by subdivision (h) of Section 987.

(i) If within the 30-day period an organization agrees to remove the work of fine art and pay the cost of removal of the work, the payment and removal shall occur within 90 days of the first day of the 30-day notice.

(ii) If the work is removed at the expense of an organization, title to the fine art shall pass to that organization.

(B) If an organization does not agree to remove the work of fine art within the 30-day period or fails to remove and pay the cost of removal of the work of fine art within the 90-day period the owner may take the intended action affecting the work of fine art.

(f) To effectuate the rights created by this section, the court may do the following:

(1) Award reasonable attorney's and expert witness fees to the prevailing party, in an amount as determined by the court.

(2) Require the organization to post a bond in a reasonable amount as determined by the court.

(g) No action may be maintained under this section unless brought within three years of the act complained of or one year after discovery of such act, whichever is longer.

(h) This section shall become operative on January 1, 1983, and shall apply to claims based on acts occurring on or after that date to works of fine art, whenever created.

(i) If any provision of this section or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of this section which can be given effect without the invalid provision or application, and to this end the provisions of this section are severable.
