

TURTLE POWER: THE CASE FOR COMMON LAW PROTECTION FOR PRE-1972 SOUND RECORDINGS

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A tangled mess of state statutes and common law governs ownership rights in sound recordings fixed in a tangible medium prior to February 15, 1972. This has been the case ever since Congress declined to make retroactive the Sound Recording Amendment of 1971, which brought sound recordings fixed after that date under the aegis of the federal Copyright Act. Two ex-members of the popular 1960s band the Turtles and their business entity Flo & Eddie, Inc. sued Internet and satellite radio services such as Pandora and Sirius XM over alleged unpaid public performance royalties based on this tangle of rights, with predictably inconsistent and confusing results. Federal district courts in New York¹ and California² have found public performance rights in pre-1972 recordings based on common law and statutory theories of state copyright, respectively, while a district court in Florida³ has rejected both theories. These rulings are now each on appeal to the Second, Ninth, and Eleventh Circuits. Additionally, Pandora and Sirius XM have each paid out multi-million dollar settlements to the three major record labels to resolve potential claims over rights to perform the labels' deep back catalogs of pre-1972 recordings.⁴

This Note outlines a middle way between the warring perspectives of the artist/rights holder versus the user/distributor in these cases. The only legitimate way for pre-1972 sound recording owners such as Flo & Eddie to assert the full bundle of rights that traditionally attach to copyright protection would be for Congress, not the courts, to bring those recordings

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1. Flo & Eddie Inc. v. Sirius XM Radio Inc., 62 F. Supp. 3d 325 (S.D.N.Y. 2014).

2. Flo & Eddie Inc. v. Sirius XM Radio Inc., No. CV 13-5693 PSG (RZx), 2014 WL 4725382 (C.D. Cal. Sept. 22, 2014).

3. Flo & Eddie Inc. v. Sirius XM Radio Inc., No. 13-23182-CIV, 2015 WL 3852692 (S.D. Fla. June 22, 2015).

4. See Bill Donahue, *Sirius XM Pays Labels \$210M to Settle Pre-1972 Fight*, LAW360 (June 26, 2015), <http://www.law360.com/articles/672913/sirius-xm-pays-labels-210m-to-settle-pre-1972-fight> [<https://perma.cc/9H5B-6T8D>]; Bill Donahue, *Pandora Pays Labels \$90M To Settle Pre-1972 Fight*, LAW360 (Oct. 22, 2015), <http://www.law360.com/articles/717696/pandora-pays-labels-90m-to-settle-pre-1972-fight> [<https://perma.cc/7XQY-ULRQ>].

under the wing of federal copyright protection. While this would be the ideal solution to the pre-1972 issue, the possibility of a legislative fix at the federal level remains unlikely in the immediate future. But this should not mean that zero rights attach to ownership of pre-1972 sound recordings—that they are in the public domain by default—or that there are no remedies available for artists to be compensated for unauthorized use of those recordings. The courts considering the current cases will have to act in the absence of any federal legislative action that may come down the line. Accordingly, this Note articulates a common law solution, tailored in its remedies but broadly applicable across state lines, that can serve to compensate owners of pre-1972 recordings while Congress sorts out the underlying statutory copyright issues. The common law doctrines of unfair competition, misappropriation, and conversion have been raised in all three jurisdictions at the district court level, with varying degrees of success.

These torts could offer a sufficiently analogous remedy for owners of pre-1972 sound recordings, assuming affected artists can assert an ownership right giving rise to liability for some portion of an unauthorized user's profits from performing the recordings for their commercial value. Courts have not been shy about fixing rates for compensation of this type in the past, from the ASCAP and BMI consent decrees to the Copyright Royalty Board. In the absence of federal statutory copyright protection, courts considering how to deal with protection for pre-1972 sound recordings should rely on the well-developed common law tradition that penalizes unauthorized use of another's property for commercial gain. This may afford pre-1972 sound recording owners only limited remedies, but would be preferable to the inconsistency and uncertainty that is already creeping between conflicting state law copyright traditions (where they exist at all) while Congress considers how best to harmonize protection for pre- and post-1972 recordings.

Part I of this Note surveys the history of state law protection for sound recordings, both preceding and following the Sound Recording Amendment of 1971. Part II examines the three cases the Turtles have brought against Sirius XM that are currently on appeal, and uses them as a means to evaluate the pros and cons of state statutory protection and common law copyright protection. Part III evaluates recent congressional efforts to address the pre-1972 problem. Part IV outlines a flexible common law solution that relies on neither state statutes nor common law copyright. Part V concludes by stressing both the importance and unlikelihood of federal action on this issue, and affirms the necessity of affording some type of state law protection to pre-1972 recordings that can work as consistently as possible across state lines.

I. HISTORICAL STATE LAW PROTECTION BEFORE AND AFTER 1972

State law bases for protection remain valid and highly relevant to the current cases on appeal. Sound recordings have never been protected as consistently as musical compositions under federal law, and to this day sound recordings still have only a limited federal statutory public performance right. Courts historically drew on both unfair competition/misappropriation law and federally rooted copyright doctrine in figuring out what to do with disputes over unauthorized uses of sound recordings not covered by the Copyright Act, both before and after sound recordings gained federal protection. The Sound Recording Amendment of 1971 changed the landscape of protection, and the compromise solution Congress ultimately devised was due more to powerful industry lobbying than any good legal or philosophical reasons.

A. RECORDINGS VS. COMPOSITIONS

At the outset of considering the evolution of protection for sound recordings at the state level, it is necessary to briefly address the historical differences in copyright protection for recordings as compared to musical compositions. While federal law has protected compositions since the nineteenth century, it took Congress decades longer to federalize copyright protection for sound recordings in the Sound Recording Amendment of 1971.⁵ In doing so, Congress elected not to make protection retroactive, and federal copyright protection has accordingly only extended to sound recordings fixed in a tangible medium after February 15, 1972.⁶ Additionally, Congress did not establish a public performance right in sound recordings until 1995, when it passed the Digital Performance Right in Sound Recordings Act.⁷ Even that amendment to the Copyright Act solely covered digital audio transmissions, not traditional broadcasts or other long-established types of performances. Thus, while musical compositions have long enjoyed the full bundle of rights that attach to federal statutory copyright protection, sound recordings have only had such rights vested in them for less than half a century, and those rights have been strictly limited.

This disparity is partially because the recording industry did not come into its own as a major commercial force until the middle of the twentieth

5. See MELVILLE B. NIMMER & DAVID NIMMER, 1 NIMMER ON COPYRIGHT §§ 2.05, 2.10 (Matthew Bender, rev. ed. 2015).

6. See *id.* at § 2.10.

7. See *id.* at § 8.14.

century. While the earliest known sound recording device was patented in 1857 in France⁸ (Thomas Edison invented the phonograph in 1877 and the wax-cylinder record a decade later⁹), mass-producing sound recordings on a meaningful commercial scale would not become possible until the rise of 78 RPM discs and, later, vinyl records in the early twentieth century.¹⁰ By the time Columbia Records introduced the 33 1/3 RPM long-playing vinyl record in 1948, which would become the industry standard format for the next several decades, the production of sound recordings had matured into a major industry.¹¹ In the post-World War II years this industry grew spectacularly, thanks in part to improved technology, inexpensive vinyl, expanded spending power in the ascendant middle class, and the rise of youth culture. As the industry developed, market forces contributed to extensive piracy and unauthorized use of sound recordings, which had become extremely valuable where popular music was concerned. Throughout this period, courts were often at odds with each other as they reckoned with the legal challenges posed by these developments.

B. EARLY UNAUTHORIZED BROADCAST AND PIRACY CASES

Once technology made it feasible to mass-produce sound recordings, courts grappled with whether and how to apply common law notions of property or federally-derived copyright principles to this newly ascendant type of creative work. In 1937, the Pennsylvania Supreme Court held that a broadcaster's commercial use of phonograph recordings of an orchestra's concert performances (which were stamped with the phrase "Not licensed for Radio Broadcast") constituted a violation of the orchestra's ownership rights in its recorded performances.¹² The court held that even though the orchestra's recordings were not subject to federal copyright protection, the orchestra's property rights in the recordings as artistic works subsisted under common law on substantially the same basis as title to any other type of property.¹³ The court asserted that this common law tradition predates even the first copyright statute ever enacted: England's 1709 Statute of Anne.¹⁴

The Pennsylvania court further held that the broadcaster was liable for unfair competition, and the orchestra was accordingly entitled to equitable

8. GARETH MURPHY, *COWBOYS AND INDIES: THE EPIC HISTORY OF THE RECORD INDUSTRY* 1 (2014).

9. *Id.* at 7.

10. *See id.* at 12–28.

11. *See id.* at 83–84.

12. *Waring v. WDAS Broad. Station, Inc.*, 327 Pa. 433 (1937).

13. *Id.* at 439.

14. *Id.*

relief.¹⁵ The court looked to the landmark case *International News Service v. Associated Press*,¹⁶ in which the U.S. Supreme Court upheld the tort of misappropriation to provide a remedy for violation of the AP's ownership rights in the breaking news it gathered.¹⁷ The Pennsylvania court ruled:

[W]hile, generally speaking the doctrine of unfair competition rests upon the practice of fraud or deception, the presence of such elements is not an indispensable condition for equitable relief, but, under certain circumstances, equity will protect an unfair appropriation of the product of another's labor or talent. In the present case, while defendant did not obtain the property of plaintiff in a fraudulent or surreptitious manner, it did appropriate and utilize for its own profit the musical genius and artistry of plaintiff's orchestra in commercial competition with the orchestra itself.¹⁸

The Pennsylvania court's ruling was not widely followed by other states, some of which enacted statutes in the wake of the ruling to expressly state that the type of protections Pennsylvania had afforded to sound recordings did not exist in their jurisdictions.¹⁹ A few years after *Waring*, the Second Circuit (in an opinion authored by the great copyright jurist Judge Learned Hand) addressed the same issue and declined to follow Pennsylvania's example.²⁰ The court ruled that the orchestra's common law property rights in the recordings were extinguished upon the sale of the recordings to the broadcaster.²¹ The court ruled: "Any relief which justice demands must be found in extending statutory copyright to such works, not in recognizing perpetual monopolies, however limited their scope."²² The court stated that the *International News Service* case "cannot be used as a cover to prevent competitors from ever appropriating the results of the industry, skill, and expense of others."²³ On the claim of unfair competition, the court held that if the plaintiffs could not bring themselves within common law copyright, there was no reason to justify granting them any continuing control over the activities of the public to whom they had dedicated their recordings.²⁴

15. *Id.* at 455–56.

16. 248 U.S. 215 (1918).

17. *Waring*, 327 Pa. at 449–52.

18. *Id.* at 452–53.

19. *See, e.g.*, N.C. GEN. STAT. c. 66 §§ c.–28 (1943); S.C. CODE § 6641 (1942); FLA. STAT. ANN. §§ 543.02, 543.03 (1943).

20. *RCA Mfg. Co. v. Whiteman*, 114 F.2d 86 (2d Cir. 1940).

21. *Id.* at 88.

22. *Id.* at 89.

23. *Id.* at 90.

24. *Id.*

The Second Circuit overruled its own *RCA v. Whiteman* decision fifteen years after it was handed down, in a case involving the unauthorized reproduction and sale of phonograph records.²⁵ The court in that case, *Capitol Records v. Mercury Records Corp.*, found that the plaintiff's act of putting its records on sale did not destroy its exclusive right to reproduce and sell the records under New York law.²⁶ The court cited as justification an intervening case between *RCA v. Whiteman* and the dispute at bar, *Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp.*²⁷ In that case, a lower New York court held that an opera association had sufficiently pled an unfair competition cause of action in relation to the defendant's recording and reselling of radio broadcasts of an opera performance.²⁸ The defendants, without paying anything to the opera association for the benefit of its "extremely expensive" performances, and without any cost comparable to that incurred by the association's record label in making its records, were selling recordings of the opera broadcast performances to the public.²⁹ This constituted unfair competition, the Metropolitan Opera court ruled, stating:

The New York courts have applied the rule in the International News Service case in such a wide variety of circumstances as to leave no doubt of their recognition that the effort to profit from the labor, skill, expenditures, name and reputation of others which appears in this case constitutes unfair competition which will be enjoined.³⁰

Judge Learned Hand unsurprisingly dissented from the majority's ruling in the 1955 *Capitol Records v. Mercury Records* case, arguing that sound recordings should clearly be under the purview of the federal Copyright Act, but since they are not, there could be no infringement-style recovery from the defendants.³¹ Judge Hand also stated that the majority's grant of rights in the recordings threatened to create a perpetual monopoly in those recordings, contrary to the intentions and purposes of the Copyright Act and the intellectual property clause of the Constitution itself.³² Finally, Judge Hand asserted that national uniformity was one of the goals the framers of the Constitution had in mind in enacting the intellectual

25. *Capitol Records v. Mercury Records Corp.*, 221 F.2d 657 (2d Cir. 1955).

26. *Id.* at 663.

27. 101 N.Y.S.2d 483 (N.Y. Sup. Ct. 1950).

28. *Id.* at 492.

29. *Id.*

30. *Id.*

31. 221 F.2d at 664.

32. *Id.* at 667.

property clause, and the majority's decision to allow New York law to govern the plaintiff's rights in the recordings ran contrary to that goal, opening the door to massively inconsistent results across state jurisdictions.³³

In 1955, the same year as the *Capitol Records v. Mercury Records* decision, Congress instructed the U.S. Copyright Office to conduct studies in preparation for a comprehensive revision of federal copyright law, which would ultimately result in the Copyright Act of 1976.³⁴ Along the way, the Sound Recording Amendment of 1971 brought sound recordings under the umbrella of federal copyright protection for the first time.

C. THE SOUND RECORDING AMENDMENT OF 1971

In a 1957 study conducted pursuant to Congress's request, the U.S. Copyright Office's Barbara Ringer³⁵ described the state of common law protection for sound recordings in the context of unauthorized duplication.³⁶ While she found that there was "essentially no statutory protection for sound recordings in the United States" at that time, Ringer articulated potential state law bases for protection (described in Section I.B above) by drawing the very distinction between common law copyright and unfair competition that would play out decades later in the Turtles cases.³⁷ She noted that both theories provided for potentially unlimited duration of protection for the sound recording owner,³⁸ echoing the concerns Judge Learned Hand articulated in his *Capitol Records v. Mercury Records* dissent.

By the mid-1960s, much of the copyright revision had been ironed out, with the notable exception of how to handle jukebox operators. Sound recordings lay at the crux of this dilemma, with powerful broadcasting interests weighing against the enthusiastic advocacy of the Recording Industry Association of America, each focusing their fire primarily on whether or not to grant a public performance right in recordings.³⁹ The Register of Copyrights at that time, Abraham Kaminstein, offered a

33. *Id.*

34. WILLIAM F. PATRY, 1 PATRY ON COPYRIGHT § 1:72 (Mar. 2016 update).

35. Ringer was a major contributor to the development of the 1976 Act, and would later become the first woman to serve as the Register of Copyrights in the U.S. Copyright Office. *See* Barbara Ringer, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/about/registers/ringer/ringer.html> [<https://perma.cc/UWT5-VMMY>].

36. BARBARA RINGER, STUDY NO. 26, THE UNAUTHORIZED DUPLICATION OF SOUND RECORDINGS (1957), *reprinted in* 2 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY, at ix (George S. Grossman ed., 2001).

37. *Id.* at 20.

38. *Id.*

39. *See, e.g.,* Dorothy Schraeder, *Sound Recordings: Protection under State Law and under the Recent Amendment to the Copyright Code*, 14 ARIZ. L. REV. 689, at 704–05 (1972).

statement during the September 1965 hearings on the copyright revision process, which sheds light upon the state of this contentious debate as it was playing out at that point.⁴⁰ He asserted that sound recordings should receive copyright protection, with rights of reproduction and distribution, but should not receive public performance rights. He viewed this as a necessary compromise. Kaminstein believed that the chances of enacting a new U.S. copyright law recognizing any right of public performance in sound recordings was “so remote as to be nonexistent.”⁴¹ He continued:

You have seen no towering wave of opposition to these proposals simply because there is a general feeling that they will not get anywhere; but, if genuine fears were to be aroused on this score, I am sure you would see a wave of protest that would be likely to tear this bill apart.⁴²

Kaminstein’s oracular pronouncement finds support in the contemporaneous testimony before Congress of powerful entities like the National Broadcasting Company, Inc. In a 1967 hearing on the copyright revision, NBC said of the potential public performance right in recordings: “Such a grant would be at the expense of all those entities, including broadcasting stations, that use sound recordings; and it would be to the great detriment of the public.”⁴³ In a 1966 House report on a proposed copyright revision bill, the Committee on the Judiciary said it was clear that any serious effort to amend the bill to recognize even a qualified right of public performance in sound recordings would be met with concerted opposition.⁴⁴ The committee wrote: “This conclusion in no way disparages the creativity and value of the contributions of performers and record producers to sound recordings, or forecloses the possibility of a full consideration of the question by a future Congress.”⁴⁵

Ultimately, the urgency of addressing the problem of rampant record piracy in the music industry convinced Congress to act faster to extend

40. *Copyright Law Revision: Hearing on H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835 Before the Subcomm. No. 3 of the Comm. on the Judiciary* (Sept. 2, 1965), reprinted in 7 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY, at 1851 (George S. Grossman ed., 2001).

41. *Id.* at 1863.

42. *Id.*

43. *Copyright Law Revision: Hearing on S. 597 Before the Subcomm. on Patents, Trademarks, and Copyrights of the Comm. on the Judiciary* (1967), reprinted in 9 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY, at 868 (George S. Grossman ed., 2001).

44. H.R. NO. 89-2237, reprinted in 11 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY, at 94 (George S. Grossman ed., 2001).

45. *Id.*

federal protection to sound recordings.⁴⁶ This took place at the behest of the record industry, which was content to live without a public performance right because radio airplay provided such valuable promotion for record sales, the essence of the recording industry at that time.⁴⁷ The Sound Recording Amendment of 1971 extended a limited federal copyright to sound recordings going forward, and changed section 301 of the federal Copyright Act to read:

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, 2067.⁴⁸

The House of Representatives report on the amendment contains little to no information about why Congress decided not to extend protection retroactively, apart from a single comment from Deputy Attorney General Richard G. Kleindienst, recognizing the ambiguity created by making the amendment solely forward-looking.⁴⁹ Some commentators have suggested that the exemption of preemption in § 301(c) was rooted in Department of Justice concerns that “preemption would abrogate state antipiracy laws, aggravating the growing piracy problem.”⁵⁰ Others have attributed this exemption primarily to intense lobbying efforts on the part of various music industry players with conflicting interests, especially broadcasters.⁵¹

46. See PATRY, *supra* note 34, at § 1.70.

47. See Steve Gordon & Anjana Puri, *The Current State of Pre-1972 Sound Recordings: Recent Federal Court Decisions in California and New York Against Sirius XM Have Broader Implications than Just Whether Satellite and Internet Radio Stations Must Pay for Pre-1972 Sound Recordings*, 4 N.Y.U. J. INTELL. PROP. & ENT. L. 336, 340–42 (2015).

48. 17 U.S.C. § 301(c) (2012).

49. Statement of the Office of the Deputy Attorney General (June 29, 1971), House Report on the Sound Recording Amendment of 1971, *reprinted in* MELVILLE B. NIMMER & DAVID NIMMER, 9 NIMMER ON COPYRIGHT Appendix 18 (Matthew Bender, rev. ed. 2015).

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

51. See Schraeder, *supra* note 39, at 705 (“The recording industry wisely refrained from providing any significant target to possible opposition, and effectively isolated the admittedly unauthorized duplicators as the sole opposition.”); *see also* Gordon & Puri, *supra* note 47, at 341–42. *But see* Michael Erlinger Jr., *An Analog Solution in a Digital World*:

The amendment included various strict limitations on and exceptions to the newly created copyright in sound recordings. These included the conscious omission of any public performance right notwithstanding the grant of reproduction and distribution rights, and an allowance for broadcasters to make copies of copyrighted sound recordings for transmission.⁵²

In its 1973 *Goldstein v. California* decision, the U.S. Supreme Court affirmed the amendment's principle of state protection, ruling that absent further Congressional action on pre-1972 recordings, a California state law designed to combat record piracy could be enforced against acts of piracy that occurred prior to February 15, 1972.⁵³ The Court explicitly declined to apply the limits it laid out in a pair of landmark 1964 cases⁵⁴ on the preemption of state misappropriation and unfair competition law by the federal intellectual property statutory regime (via the Constitution's Supremacy Clause).⁵⁵

Congressional hearings following the 1971 amendment and the *Goldstein* case, in the immediate moment leading up to the enactment of the 1976 Act, reveal consternation about the dilemma created by the amendment's failure to extend federal protection retroactively. The Department of Justice offered testimony at a May 1975 hearing on the copyright revision on how to amend § 301 to preserve state law protection for pre-1972 recordings, expressing concern about the possibility that the revision would make it impossible to enforce existing record piracy statutes.⁵⁶ In a December 1975 hearing, Barbara Ringer (who was by then serving as the Register of Copyrights) acknowledged the Department of Justice's concerns and suggested that a date of preemption should be set in

Providing Federal Copyright Protection for Pre-1972 Sound Recordings, 16 UCLA ENT. L. REV. 45, 58 (2009) ("Tradition' and 'mistake' are the two strongest theories for the creation and survival of the pre-1972 distinction.").

52. See Schraeder, *supra* note 39, at 706–07.

53. 412 U.S. 546, 571 (1973).

54. See *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964); *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964). These two cases concerned patent protection, but while the Court made clear in both that it intended its holdings on preemption to apply to federal copyright law as well, the *Goldstein* Court disclaimed the applicability of those decisions to creative works not covered by the federal copyright statute.

55. *Goldstein*, 412 U.S. at 569–70.

56. *Copyright Law Revision: Hearing on H.R. 2223 Before the H. Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the Comm. of the Judiciary* (May 8, 1975), reprinted in 14 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY 119, at 138 (George S. Grossman ed., 2001).

2047 for the expiration of all protection for pre-1972 recordings, to avoid the possibility of a perpetual monopoly.⁵⁷

In the wake of the 1971 amendment, some states, like California, enacted statutes to explicitly protect pre-1972 recordings, while others, like New York, relied on existing common law doctrine.⁵⁸ The merits of—and problems with—each of these approaches can be seen clearly in the context of the current cases on appeal.

II. THE TURTLES CASES ON APPEAL

The three Turtles-related federal district court decisions that are currently on appeal to their respective circuits provide a useful vantage point on the pros and cons of the varying approaches to state law sound recording protection. These approaches are now more relevant than ever, thanks to changing economic and technological forces that have freshly unearthed the issue of pre-1972 recording rights decades after the recordings were made. The California court's decision in favor of Flo & Eddie correctly found liability for use of the Turtles' recordings based on unfair competition, misappropriation, and conversion.⁵⁹ However, the state statutory framework that exists in California is an insufficient solution to the issue, especially where other states and nationwide use of recordings are concerned. The New York court was similarly correct in its decision in favor of Flo & Eddie, but nevertheless, common law copyright is also an insufficient ground to establish broad-based, consistent protection for pre-1972 recordings.⁶⁰ Finally, the Florida court incorrectly threw out Flo & Eddie's unfair competition, misappropriation, and conversion claims on the basis of the vacuum of precedent in Florida law, which recognizes neither statutory ownership rights nor common law copyright in pre-1972 recordings.⁶¹

A. THE CURRENT CASES HAVE ARISEN FROM ECONOMIC AND TECHNOLOGICAL CHANGES IN THE INDUSTRY

The gap of over forty years between the enactment of the Sound Recording Amendment of 1971 and the rash of lawsuits Flo & Eddie have

57. *Copyright Law Revision: Hearing Before the H. Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the Comm. of the Judiciary* (Dec. 4, 1975), reprinted in 16 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY 1901, at 1901 (George S. Grossman ed., 2001). This date of expiration was ultimately set to 2067 in the final version of the statute that passed into law. See 17 U.S.C. §301(c) (2012).

58. See, e.g., Cal. Civ. Code § 980(a)(2).

59. See *infra* Section II.B.

60. See *infra* Section II.C.

61. See *infra* Section II.D.

filed in the last few years begs the question: Why has it taken so long for the courts to take up the issue of state law protection for pre-1972 recordings? Have pre-1972 sound recording owners simply been sleeping on their rights for decades, only to awaken in a drastically changed musical landscape like a litigious Rip Van Winkle, their long-dormant rights surging from the grave like “zombie copyrights,” as Pandora has labeled them?⁶² The answer lies in examining: (1) who owns pre-1972 recordings; (2) who stands to benefit from their use; and (3) what ultimately makes these (or any) recordings valuable in the Internet era.

First, in terms of ownership, Flo & Eddie represent the rare example of pre-1972 recording artists who actually own their master recordings. The Turtles’ career was emblematic of the dishonest practices endemic in the recording industry in the mid-twentieth century, with the band losing out in unfavorable recording and management agreements many times over.⁶³ However, they later made the prescient decision to obtain the rights to their own masters, as few artists of that era have managed to do.⁶⁴ The vast majority of pre-1972 sound recordings are owned by the three major record labels, which have by and large opted to settle their potential claims over the performance of those recordings rather than litigate over murky rights that may or may not exist.⁶⁵

Second, the parties who benefit from using pre-1972 recordings without restriction include both digital and traditional broadcasters.⁶⁶ Traditional broadcasters have not been hit with lawsuits like those against Pandora and Sirius XM because the public performance right in sound recordings has historically applied only to digital audio transmissions, and not terrestrial radio.⁶⁷ But the recent rulings in favor of Flo & Eddie open up the possibility that state law, at least in artist-friendly jurisdictions like California and New York, could provide for a general public performance right in pre-1972 recordings that does not exist in federal law (or at least not yet). This has raised the stakes significantly for many of the parties involved, on both the rights holder and distributor sides of the equation:

62. Brief for Appellant at 2, *Flo & Eddie, Inc. v. Pandora Media, Inc.*, No. 15-55287 (9th Cir. Sept. 2, 2015) [hereinafter Brief for Pandora].

63. See Chris Casady, *Turtles*, YOUTUBE (June 12, 2006), <https://www.youtube.com/watch?v=5JHN5HaUg28> [<https://perma.cc/28BG-VCQV>].

64. See Flo & Eddie, *supra* note 1, at 330–31; see also Flo & Eddie, *supra* note 2, at *11.

65. See, e.g., Donahue, *supra* note 4.

66. While libraries and archives seeking to preserve such recordings for posterity also figure into the overall pre-1972 calculus, their activities have little or no bearing on the disputes on appeal.

67. See Gordon & Puri, *supra* note 47, at 341–42.

broadcast radio has historically never had to pay for the use of sound recordings at all, whether pre- or post-1972.⁶⁸

Third, and most importantly, the landscape of media consumption in the Internet era has dramatically changed the relative values of the exclusive rights in the copyright bundle. The reproduction and distribution rights once reigned paramount in a world where the sale of physical copies of recordings formed the backbone of the music industry. In the wake of the cataclysmic collapse of record sales over the last fifteen years—thanks to Napster and its progeny, and the even more recent rise of streaming services as the fastest-growing mode of music consumption (which many see as the future of the industry)—the public performance right has become the most valuable right in the domain of music copyright.⁶⁹ Record companies were once content to live without a public performance right, given that they viewed broadcast radio primarily as a deeply valuable means of promotion to encourage record sales.⁷⁰ Today, however, steam is building in Congress and elsewhere to implement a full public performance right in sound recordings that would sweep in traditional broadcasters as well as digital-only services.⁷¹ The stage has thus been set for a proxy war in a greater restructuring of the music industry to account for the ways the Internet has changed music consumption (or for a paroxysm of an emaciated business model in its death throes, depending on who you ask).

B. THE CALIFORNIA CASE AND THE PROS AND CONS OF STATE STATUTORY PROTECTION

In 1982 California amended its state statute protecting artistic and literary works to provide:

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,

68. *Id.*

69. *See, e.g.*, STEPHEN WITT, HOW MUSIC GOT FREE: THE END OF AN INDUSTRY, THE TURN OF THE CENTURY, AND THE PATIENT ZERO OF PIRACY 260–61 (2015); *see also* MURPHY, *supra* note 8, at 342–47.

70. Indeed, as the mid-twentieth century payola scandals vividly demonstrated, record labels were once so desperate for radio airplay for their songs that they were willing to pay broadcasters handsomely to obtain it. *See* Gordon & Puri, *supra* note 47, at 340–41.

71. *See infra* Part III.

even though such sounds imitate or simulate the sounds contained in the prior sound recording.⁷²

Prior to the 1982 amendment, California courts protected against the unauthorized reproduction and distribution of sound recordings primarily on the basis of conversion.⁷³ In one representative case applying section 980(a)(2), a California federal court found a website owner liable to Capitol Records, LLC for misappropriation, unfair competition, and conversion in reproducing and selling pre-1972 sound recordings.⁷⁴ BlueBeat, the website owner, did not dispute that it reproduced, sold, and publicly performed the pre-1972 recordings (as well as post-1972 recordings covered by the federal act) without proper authorization, and those actions sufficed to find BlueBeat liable for all three state law tort claims, with the misappropriation claim directly based on its violation of section 980(a)(2), the court ruled.⁷⁵

The Central District of California found in favor of the Turtles' business entity Flo & Eddie in its case against Sirius XM in September 2014 based on ownership rights established under section 980(a)(2).⁷⁶ The court indicated that the crucial point of statutory interpretation for the case was whether exclusive ownership of a sound recording under California law implies an exclusive public performance right akin to that enshrined in the federal Copyright Act.⁷⁷ The court found that the California legislature intended via section 980(a)(2) to have ownership of a pre-1972 sound recording in California "include all rights that can attach to intellectual property," except for a single statutory exception for recording covers of such a sound recording.⁷⁸ The court ruled that this bundle of rights necessarily includes the exclusive right to public performance, despite the federal act's lack of a full public performance right for sound recordings.⁷⁹ Accordingly, the court granted summary judgment to Flo & Eddie on its copyright infringement claim as to public performance of the recordings at issue.⁸⁰

72. Cal. Civ. Code § 980(a)(2).

73. MELVILLE B. NIMMER & DAVID NIMMER, 2 NIMMER ON COPYRIGHT § 8C.03[C] (Matthew Bender, rev. ed. 2015).

74. Capitol Records, LLC v. BlueBeat, Inc., 765 F. Supp. 2d 1198 (C.D. Cal. 2010).

75. *Id.* at 1205–06.

76. Flo & Eddie Inc. v. Sirius XM Radio Inc., No. CV 13-5693 PSG (RZx), 2014 WL 4725382, at *4 (C.D. Cal. 2014).

77. *Id.*

78. *Id.* at *5.

79. *Id.* at *6.

80. *Id.* at *9.

The court denied Flo & Eddie summary judgment on its claim that Sirius XM violated its reproduction right in the sound recordings.⁸¹ However, the court also found in favor of Flo & Eddie on its claims for violations of California's Unfair Competition Law (UCL), conversion, and misappropriation.⁸² Borrowing from the finding of a violation of section 980(a)(2), the court found that Sirius XM's unlawful conduct also constituted a violation of the UCL.⁸³ The court also found that 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.⁸⁴ The court noted that the federal Copyright Act preempts much of California misappropriation law in the realm of intellectual property, but found that preemption is not at issue here because the act explicitly leaves protection of pre-1972 sound recordings entirely up to the states until 2067.⁸⁵ Accordingly, the court ruled that the same grounds justifying Flo & Eddie's unfair competition and conversion claims give rise to a valid misappropriation claim, since at a minimum, Flo & Eddie was injured by Sirius XM's conduct in the form of licensing or royalty payments that Sirius XM should have paid for publicly performing Flo & Eddie's recordings.⁸⁶

The advantages of state statutory protection include clear guidance and notice to users of pre-1972 recordings, based on Congress's express authorization in the 1971 amendment. Disadvantages, however, include the paucity of actual statutes on the books in other states, giving rise to potential inconsistency in decisions involving the same recordings across state lines. Additionally, the text of section 980(a)(2) makes no reference to copyright, referring instead to "exclusive ownership" in recordings, leaving ambiguity as to the scope of the purported ownership rights.⁸⁷ The absence of the term "copyright" in the statute may also lead to conflicts with states like New York that protect pre-1972 recordings on the basis of a common law copyright.

81. *Id.* at *10.

82. *Id.* at *11.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. Cal. Civ. Code § 980(a)(2).

C. THE NEW YORK CASE AND THE PROS AND CONS OF STATE
COMMON LAW COPYRIGHT PROTECTION

In 2005 the Court of Appeals of New York issued a lengthy opinion on the history of state common law copyright in New York for works not protected under the federal statute, specifically in the context of sound recordings.⁸⁸ The court found that musical recordings created before 1972 were entitled to copyright protection under New York common law until the 2067 effective date of federal preemption outlined in § 301 of the federal act.⁸⁹ The court also held that the causes of action Capitol Records asserted for copyright infringement and unfair competition can coexist under New York law.⁹⁰ Accordingly, the defendant Naxos of America could not escape Capitol's claim for infringement of common law copyright in the pre-1972 recordings at issue, the court said.⁹¹ Naxos has become enormously influential in the current Turtles disputes. As Professor Nimmer wrote, "This decision, the first in decades in which a state's high court canvasses the terrain of continuing protection within its borders for sound recordings, robustly reaffirms protection. Other state courts can be anticipated to think long and hard before rejecting such protection within their own domains."⁹²

In the Turtles' current New York case, the Southern District of New York found in favor of Flo & Eddie against Sirius XM in rulings in November 2014⁹³ and January 2015.⁹⁴ The district court based its analysis on a common law copyright theory rather than an explicit state statute like the one on the books in California.⁹⁵ The district court extensively cited the seminal 2005 Naxos decision and strongly reaffirmed the right to common law copyright in New York.⁹⁶ The district court rejected a range of public policy arguments Sirius advanced in support of its position. The court stated:

Sirius may well be correct that a legislative solution would be best. But the common law, while a creature of the courts, exists to protect the property rights of the citizenry. And courts are hardly

88. Capitol Records, Inc. v. Naxos of Am., Inc., 830 N.E.2d 250, 263–64 (N.Y. 2005).

89. *Id.*

90. *Id.* at 266.

91. *Id.* at 267.

92. NIMMER, *supra* note 73, § 8C.03[D].

93. Flo & Eddie Inc. v. Sirius XM Radio Inc., 62 F. Supp. 3d 325 (S.D.N.Y. 2014).

94. Flo & Eddie Inc. v. Sirius XM Radio Inc., 80 F. Supp. 3d 535 (S.D.N.Y. 2015).

95. *Flo & Eddie*, 62 F. Supp. 3d at 338–40.

96. *See id.*

powerless to craft the sort of exceptions and limitations Congress has created, or to create a mechanism for administering royalties.⁹⁷

The court pointed to the ASCAP and BMI consent decrees that govern musical composition licensing as an example of a judicially fashioned royalty scheme.⁹⁸

The court made a strong case for the existence of common law copyright in New York absent any statute comparable to California Civil Code § 980(a)(2). The court said:

In short, general principles of common law copyright dictate that public performance rights in pre-1972 sound recordings do exist. New York has always protected public performance rights in works other than sound recordings that enjoy the protection of common law copyright. Sirius suggests no reason why New York—a state traditionally protective of performers and performance rights—would treat sound recordings differently.⁹⁹

The court also found for Flo & Eddie on their common law claim of unfair competition based on misappropriation.¹⁰⁰ The court ruled that public performance is a form of distribution of the recordings that can give rise to a misappropriation claim, and the existence of actual competition between the parties is no longer required to sustain a misappropriation claim.¹⁰¹

In February 2015 the district court certified an interlocutory appeal on the common law copyright issue to the Second Circuit, which agreed in April 2015 to take the appeal.¹⁰² The question certified was whether, under New York law, the holders of common law copyrights in pre-1972 sound recordings have, as part of the bundle of rights attached to that common law copyright, the right to exclusive public performance of the recordings.¹⁰³

97. *Id.* at 344.

98. *Id.*

99. *Id.*

100. *Id.* at 349.

101. *Id.*

102. *Flo & Eddie Inc. v. Sirius XM Radio Inc.*, No. 15-1164 (2d Cir. 2015).

103. *Flo & Eddie Inc. v. Sirius XM Radio Inc.*, No. 13 Civ. 5784 (CM), 2015 WL 585641 (S.D.N.Y. 2015). In April 2016, as this Note was going to press, the Second Circuit itself in turn certified the district court's question to the New York Court of Appeals, stating "[T]his question is important, its answer is unclear, and its resolution controls the present appeal . . ." *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, No. 15-1164, 2016 WL 1445100 (2d Cir. 2016) at *1.

D. THE FLORIDA CASE

Meanwhile, despite Flo & Eddie's previous wins in California and New York, the Southern District of Florida in June 2015 granted summary judgment to Sirius XM on the Turtles' claims, ruling that there is no common law copyright in Florida.¹⁰⁴ The court found that whereas California and New York have statutes or well-developed case law addressing property rights in artistic creations, Florida does not.¹⁰⁵ The district court found that neither Florida legislation nor case law could answer whether there is a common law copyright in the state that includes an exclusive right of public performance.¹⁰⁶ The court stated that finding in favor of Flo & Eddie would create a new property right in Florida as opposed to interpreting the law.¹⁰⁷ The court said the issue of whether copyright protection for pre-1972 recordings should include the exclusive right to public performance would be more properly addressed to the Florida legislature.¹⁰⁸ The court further ruled that Flo & Eddie's claims for unfair competition, conversion, and civil theft were all based on its alleged common law copyright, and because Sirius did not infringe any of Flo & Eddie's nonexistent copyrights, those claims were necessarily without merit.¹⁰⁹ Flo & Eddie appealed the district court's decision to the Eleventh Circuit in July 2015.¹¹⁰

As these three divergent cases illustrate, the question of what to do about pre-1972 sound recordings has understandably generated much hand-wringing as well as some well-meaning but as yet unrealized congressional attempts to harmonize the sound recording copyright regime.

III. POTENTIAL LEGISLATIVE SOLUTIONS

Congress and the U.S. Copyright Office both believe that federalizing pre-1972 recording protection should be made a priority, and several bills have been advanced in recent years that would have dealt with the situation. These efforts, if successful, would be the best solution to the pre-1972 issue, but the failure of both recent bills and the lack of motion in the current

104. Flo & Eddie, Inc. v. Sirius XM Radio, Inc., No. 13-23182-CIV, 2015 WL 3852692 (S.D. Fla. 2015).

105. *Id.* at 4.

106. *Id.*

107. *Id.* at 5.

108. *Id.*

109. *Id.* at 6.

110. Flo & Eddie Inc. v. Sirius XM Radio Inc., No. 15-13100 (11th Cir. 2015).

Congress are strong evidence that no federal solution will be forthcoming in the near future.

A. THE COPYRIGHT OFFICE REPORT AND RECOMMENDATIONS OF DECEMBER 2011

In 2011 the Copyright Office issued a report on federal protection for pre-1972 sound recordings at the request of Congress and ultimately recommended that Congress should bring these recordings under the federal Copyright Act.¹¹¹ The report stated that federalization would also be in the best interests of libraries and archives “in preserving old sound recordings and in increasing the availability to the public of old sound recordings.”¹¹²

Bringing pre-1972 recordings under the federal act has thus become an administrative and legislative priority, sparking two notable Congressional efforts in the last few years to provide some measure of federal protection.

B. RECENT PROPOSED FEDERAL LEGISLATION

The 2014 Respecting Senior Performers as Essential Cultural Treasures Act bill (RESPECT Act), which did not pass into law, would have required that royalties be paid for public performances of pre-1972 recordings under all existing statutory licenses as well as for reproductions of the same, and limited the civil remedy for not doing so to payment of royalties owed.¹¹³ The bill would have barred infringement actions for any alleged public performance right violations that occurred in the context of a statutory licensing scheme (applying the same standards and schemes that govern post-1972 recording licensing to pre-1972 recordings) in which royalties were in fact paid.¹¹⁴ However, the bill would not have extended the full suite of copyright protection to such recordings. It contained an explicit clause stating:

This subparagraph does not confer copyright protection under this title upon sound recordings that were fixed before February 15, 1972. Such sound recordings are subject to the protection available under the laws of the States, and except as provided in clause (iii),

111. U.S. COPYRIGHT OFFICE, FEDERAL COPYRIGHT PROTECTION FOR PRE-1972 SOUND RECORDINGS (2011) [hereinafter COPYRIGHT OFFICE REPORT].

112. *Id.* at viii. The recommendations also included numerous provisions to address copyright ownership, terms of protection, termination of transfers, and copyright registration, but those provisions are not as central to the concerns of this Note.

113. H.R. 4772, 113th Cong. (2014).

114. *Id.* at § 2(iii).

are not subject to any limitation of rights or remedies, or any defense, provided under this title.¹¹⁵

The 2015 sound recording copyright reform bill, introduced in the House of Representatives as the Fair Play Fair Pay Act, takes a more complex and expansive approach than the RESPECT Act did to both the issue of federalization for pre-1972 recordings and the sound recording public performance right at large.¹¹⁶ Section 7 of the Fair Play Fair Pay Act essentially co-opts the entirety of the language of the 2014 RESPECT Act's section 2, requiring payment of performance royalties for sound recordings fixed before 1972 in the same manner as royalties for sound recordings fixed after that date.¹¹⁷ The Copyright Royalty Board would be tasked with ensuring parity in licensing rates and terms across all music distribution platforms, while retaining distinctions between the different types of distribution services currently in operation.

Most notably, though, the Fair Play Fair Pay Act would extend a sound recording copyright owner's rights to include an exclusive public performance right by means of any audio transmission.¹¹⁸ This would (for the first time in the history of recorded music) require terrestrial AM/FM broadcast radio stations that play copyrighted sound recordings to pay royalties for their non-digital audio transmissions of the recordings.

Unfortunately, the lack of any productive motion or initiative in the current Congress on any issues, let alone on copyright and sound recordings, renders unrealistic any expectation that a reform effort specifically targeted at sound recordings could pass into law anytime soon. The prospects for a comprehensive copyright reform effort are even bleaker. In the meantime, courts must figure out how to address this thorny issue.

IV. TOWARD A COMMON LAW SOLUTION

Unfair competition and misappropriation law are the best ways to protect owners of pre-1972 sound recordings from unauthorized use of those recordings, in the absence of federal action. The International News Service case provides a valuable set of first principles for the legal and philosophical structure of this doctrine. The historical unauthorized broadcast and record piracy cases demonstrate the utility of this doctrine in practical terms. The key underlying goal of using this tort doctrine to protect pre-1972 recordings is to compensate recording owners, not exclude

115. *Id.* at § 2(iv).

116. H.R. 1733, 114th Cong. (2015).

117. *Id.* at § 7.

118. *Id.* at §§ 2(b), (c).

others from using those recordings entirely. Using unfair competition and misappropriation law to solve the problem of what to do with pre-1972 sound recordings is not a perfect solution, but remains the best of a far-from-ideal set of judicial options.

A. THE RELEVANCE OF *INTERNATIONAL NEWS SERVICE V. ASSOCIATED PRESS* IN THE TWENTY-FIRST CENTURY

The International News Service misappropriation case remains a vital touchstone in understanding how to manage rights in intangible products of human creativity and industriousness that are not covered by the federal statutory intellectual property regime.¹¹⁹ While the decision itself is no longer good law in the wake of *Erie Railroad Co. v. Tompkins*,¹²⁰ which dismantled the general federal common law, it was nevertheless massively influential on state courts' development of state misappropriation common law well beyond Erie. International News Service can thus provide a set of first principles for how states can apply misappropriation law in realms that are not (as of yet) preempted by the federal Copyright Act.

The International News Service court considered the news material at issue to be both the plaintiff and the defendants' "stock in trade, to be gathered at the cost of enterprise, organization, skill, labor, and money, and to be distributed and sold to those who will pay money for it, as for any other merchandise."¹²¹ The court ruled:

[I]f that which complainant has acquired fairly at substantial cost may be sold fairly at substantial profit, a competitor who is misappropriating it for the purpose of disposing of it to his own profit and to the disadvantage of complainant cannot be heard to say that it is too fugitive or evanescent to be regarded as property. It has all the attributes of property necessary for determining that a misappropriation of it by a competitor is unfair competition¹²²

Similarly here, in the context of sound recordings, the digital radio defendants in the Flo & Eddie cases have been appropriating the fruits of the Turtles' labor, skill, time, and money to their own economic advantage, at the disadvantage of the sound recording creators/owners. This type of conduct has been the core of the tort of unfair competition and misappropriation for nearly one hundred years, and the doctrine remains both robust enough at the state level and flexible enough in practice to provide a remedy for the unauthorized use of pre-1972 sound recordings.

119. 248 U.S. 215 (1918).

120. 304 U.S. 64 (1938).

121. *International News Service*, 248 U.S. at 236.

122. *Id.* at 240.

B. REVISITING THE RECORD PIRACY AND UNAUTHORIZED BROADCAST CASES

Cases such as the *Waring v. WDAS* unauthorized broadcast decision in Pennsylvania preceding the Sound Recording Amendment of 1971 and the Supreme Court's *Goldstein v. California* record piracy decision immediately following the enactment of the amendment should provide important guideposts to the circuit courts currently tackling the issue of pre-1972 recordings. The recent district court decisions in the Flo & Eddie cases in California and New York rely too heavily on the framework of the federal copyright bundle of rights in recordings, judicially creating a previously nonexistent public performance right allowing infringement claims that can only really be enshrined in law by legislative action. The unauthorized broadcast and record piracy cases, on the other hand, offer a path forward based on traditional common law doctrine that is more limited than copyright infringement but, for that very reason, would be superior to judicially extending the full suite of copyright benefits to pre-1972 recordings.

The continuing relevance and usefulness of state unfair competition and misappropriation law in the realm of sound recordings becomes even clearer in post-Sound Recording Amendment cases such as *A & M Records, Inc. v. Heilman*.¹²³ In that case, the defendant freely admitted that he duplicated performances owned by the plaintiff without authorization in order to resell them for profit.¹²⁴ The court found that this conduct was inarguably unfair competition, saying: "This conduct presents a classic example of the unfair business practice of misappropriation of the valuable efforts of another."¹²⁵

In the more recent *Capitol Records, LLC v. BlueBeat, Inc.* case,¹²⁶ the court laid out a three-factor test for a successful California state law misappropriation claim: the plaintiff must have invested substantial time and money in development of its property, the defendant must have appropriated that property at little or no cost, and the plaintiff must have been injured by the defendant's conduct.¹²⁷ The court similarly defined the essence of an unfair competition claim under the California Business and Professions Code (as opposed to relying solely on the section 980(a)(2) pre-1972 recording ownership statute) as including any "unlawful, unfair or

123. 75 Cal. App. 3d 554 (1977).

124. *Id.* at 564.

125. *Id.*

126. 765 F. Supp. 2d 1198 (C.D. Cal. 2010).

127. *Id.* at 1205.

fraudulent business act or practice.”¹²⁸ Finally, the court stated that to succeed on a state law conversion claim, a plaintiff must show “ownership or right to possession of property, wrongful disposition of the property right and damages.”¹²⁹ These definitions carried the day for the sound recording owner plaintiffs in this case, and will continue to serve as valuable touchstones for courts in California and elsewhere considering unfair competition, misappropriation, and conversion claims regarding pre-1972 recordings.

C. LIABILITY RULES VERSUS PROPERTY RULES

Courts seeking to resolve these disputes should look to liability rules rather than property rules; the right to be compensated must trump the right to exclude. Misappropriation, unfair competition, and conversion law offer a potential liability rule more limited in its possible remedies than infringement (which is based on the right to exclude), and this is a good thing. Remedies under these doctrines for unauthorized use of recordings can be more appropriately tailored to the specific circumstances of each case, depending on what the unauthorized use of the recording may be and whether it is done for profit. The variances in state laws would also be easier for all parties to navigate if liability was based on common law misappropriation rather than common law copyright infringement, because nearly every state recognizes the related torts of misappropriation and unfair competition.¹³⁰ These tort doctrines are applied far more consistently across the different states than state law copyright.

The Copyright Office’s 2011 report on pre-1972 recordings offers valuable insight into how courts across many jurisdictions have adapted unfair competition and misappropriation to provide protection for these recordings without directly implicating copyright law.¹³¹ Historically, the tort of unfair competition involved three elements: the parties had to act in competition with each other, the defendant must have “appropriated a business asset that plaintiff had acquired by the investment of skill, money, time and effort,” and the defendant must have falsely “passed off” its product as the plaintiff’s.¹³² Over time, though, drawing in large part on the logic of the International News Service case, courts considering the tort in the context of sound recordings generally rolled back the requirement of passing

128. *Id.*

129. *Id.*

130. COPYRIGHT OFFICE REPORT, *supra* note 111, at 40.

131. *Id.* at 35.

132. *Id.* at 35–36.

off, and some also eliminated the requirement of actual competition between the parties, leaving misappropriation as the core of the tort.¹³³ Accordingly, some courts refer to the tort as unfair competition, and some simply as misappropriation, while some states recognize both as distinct independent torts. The Copyright Office ultimately concluded: “Not all states have civil statutes or reported cases dealing specifically with the unauthorized use of sound recordings, but states generally recognize unfair competition torts, so presumably a cause of action could lie in appropriate circumstances.”¹³⁴

Potential drawbacks of applying this tort doctrine include the unpredictability of a purely tort-based regime, the potential for increased litigation compared to a statutory licensing scheme, and persistent problematic differences in the laws of different states. All of these issues, however, are less damaging to long-held expectations and new business models than having courts extend new state-by-state versions of formal copyright protection in the absence of legislative action.

V. CONCLUSION

The federal Copyright Act 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.”¹³⁵ This wording explicitly leaves the door open for theories such as those that succeeded in the Turtles’ California and New York cases, while imposing a hard cutoff date to avoid the potential for perpetual monopoly. If the decisions in favor of Flo & Eddie are upheld on appeal, two scholars wrote, they could ignite “a revolution in music licensing in the United States by resulting in terrestrial radio stations paying for the performance of any sound recording for the first time in the history of the U.S.”¹³⁶

Beyond terrestrial radio, any venue that plays sound recordings, such as a nightclub, could be potentially affected by the expansion of this public performance right.¹³⁷ Federalizing protection for pre-1972 recordings could also potentially raise constitutional due process and Fifth Amendment

133. *Id.* at 36.

134. *Id.* at 40.

135. 17 U.S.C. § 301(c) (2012).

136. Gordon & Puri, *supra* note 47, at 358.

137. *Id.*

takings issues.¹³⁸ The assertion of public performance rights based on a mishmash of state statutes and common law theories, meanwhile, threatens to create a regime of “zombie copyrights” that could result in an industry-crushing awakening of hundreds of millions of dollars in potential unpaid royalties for rights that were previously thought to have been extinguished, as Pandora has argued in its opening brief in the Ninth Circuit.¹³⁹ Historically, a pre-1972 sound recording lost its California copyright protection when it was “published,” meaning distributed in commerce with the rights holder’s permission, according to Pandora.¹⁴⁰

In the current cases, the questions of how to proceed in the here and now, under existing state law, remain paramount above the possibility of the extension of federal protection. Accordingly, the three appellate courts considering the issue of whether state statutory or common law copyright protection extends to pre-1972 sound recordings should find that absent such federal protection, applying the traditional framework of copyright law on a state-by-state basis is inadequate to manage the ownership rights that should still be recognized in such recordings. Courts historically expanded the torts of misappropriation, unfair competition, and conversion in the context of sound recordings to provide a way of dealing with record piracy in the absence of copyright protection, in the years both before and after the Sound Recording Amendment of 1971 passed.¹⁴¹ Courts have long used these doctrines to address unauthorized use of pre-1972 recordings, and they remain a vital, flexible tool in the judicial arsenal. Utilizing these three tort doctrines offers a sensible judicial solution while federal protection is considered in Congress.¹⁴² Beyond that, cases relying on this tort doctrine could even provide a potential framework for repurposing familiar principles of liability rules as a supplement to copyright law in general, given the difficulty of applying the traditional bundle of copyright rights to both recordings and other types of works in the context of the Internet.

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

139. Brief for Pandora, *supra* note 62, at 2.

140. *Id.* at 1.

141. See generally NIMMER, *supra* note 73, § 8C.03[B]; *Goldstein v. California*, 412 U.S. 546 (1973); Donald Marcucci, *Sound Recordings’ Copyright: The Disc Dilemma*, 36 U. PITT. L. REV. 887 (1975); Schrader, *supra* note 39.

142. See Fair Play Fair Pay Act of 2015, H.R. 1733, 114th Cong. (2015) (introduced April 13, 2015); see also Respecting Senior Performers as Essential Cultural Treasures Act, H.R. 4772, 113th Cong. (2014) (introduced May 29, 2014).

