

No. S240649

IN THE
Supreme Court of California

FLO & EDDIE, INC.,

Plaintiff and Respondent,

v.

PANDORA MEDIA, INC.,

Defendant and Appellant.

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

On Appeal from the United States District Court for the Central
District of California, Case No. CV14-7648-PSG

The Honorable Philip S. Gutierrez
Magistrate Judge Ralph Zarefsky

**APPLICATION OF PUBLIC KNOWLEDGE FOR LEAVE TO
FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF
IN SUPPORT OF DEFENDANT AND APPELLANT**

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January 12, 2018

**CERTIFICATE OF INTERESTED ENTITIES OR PERSONS
(C.R.C. Rule 8.208)**

The following application and brief are made by Public Knowledge. Public Knowledge is a non-profit organization and is not a party to this action. Public Knowledge is not aware of any entity or person who must be listed under (e)(1) or (2) of rule 8.208.

Dated: January 12, 2018

Respectfully submitted,

By:



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**APPLICATION OF PUBLIC KNOWLEDGE
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IN SUPPORT OF DEFENDANT-APPELLANT
PANDORA MEDIA, INC.**

Pursuant to California Rules of Court, rule 8.200, amicus curiae Public Knowledge respectfully requests that the attached brief in support of Defendant-Appellant Pandora Media be accepted for filing in this action.¹

Public Knowledge is a non-profit public interest organization that defends consumer rights in the emerging digital culture. Public Knowledge promotes balanced intellectual property policies that ensure that the public can access knowledge while protecting the legitimate interests of authors.

Public Knowledge is concerned in this case with the appropriate boundaries of the exclusive rights granted by

¹ No party or counsel for any party authored this brief, participated in its drafting, or made any monetary contributions intended to fund the preparation or submission of the proposed brief. (See Cal. Rules of the Court, rule 8.200(c)(3).)

copyright, ensuring that the power of copyright law be restrained from potential overreach and abuse by better defining its scope. Within Congress, a number of complex copyright issues are being actively debated, including the scope of sound recording rights; the potential federalization of pre-1972 sound recording copyrights; statutory licenses for musical works and sound recordings; and antitrust scrutiny of several industries in the sound recording business. Radically altering the scope of rights, as Respondents request, could upend many of the existing discussions and potential for reform.

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SUMMARY OF ARGUMENT

If a performance right falls in the woods, and no court or statute acknowledges it, does it still exist? This is the essence of the question before the court today; whether or not California's common law, by the sheer force of its silence on the matter, somehow grants a performance right for pre-1972 sound recordings. While it may be tempting to think of copyrights as natural phenomena, possessing immutable facets that courts merely "uncover" piecemeal, such a view flies directly in the face of the history of common law copyright and Congressional legislation of intellectual property rights.

The historical trajectory of common law copyright is one of narrow rights granted in response to highly specific social and policy concerns. In its original conception as a protection for incumbent printing houses, common law copyright only protected against verbatim copying of texts. Even as the purpose of the law evolved, courts steadfastly refused to expand its scope absent Congressional directive.

Neither is it reasonable to assume that Congress’s creation of a statutory right implies the corresponding existence of a common law right. Congress regularly legislates new rights without a preexisting basis in the common law. These rights arise in response to new technologies and new policy concerns, such as copying in the semiconductor industry, or the rise of digital streaming services.

This policy-driven model is even more dramatic in the case of public performance rights. Far from treating performance rights as a “natural” component of copyright, Congress assigns performance rights infrequently, to specific forms of media, and explicitly in response to specific policy concerns. This is a far cry from Respondents’ conception of performance rights as a “natural” aspect of copyright protection, inhering unless proven otherwise.

Because of the history (both legal and legislative) surrounding copyright and its specific sub-rights, this Court should adhere to centuries-long tradition, and find that California

common law does not grant public performance rights to pre-1972
sound recordings.

ARGUMENT

I. The Origins and Development of Common Law Copyright in the United States Confirm That Common Law Copyright Should be Read in the Narrowest Possible Terms

To answer the questions certified by the Ninth Circuit to the California Supreme Court, it is necessary to understand the history and development of common law copyright. The historical and legal record, as well as the social context in which common law copyright arose, all point to an extremely limited right which courts actively resisted expanding until instructed to do so by legislatures.

A. Common-Law Copyright Originated as a Limited Protection Against Verbatim Reproductions of Text

Copyright generally—and common-law copyright in particular—was originally developed as a narrow right of protection against verbatim reproduction of an author’s works. The law developed in direct response to an increasingly crowded printing industry; “the rise of copyright [was] inextricably

intertwined with the development of printing.” (Walterscheid, *The Nature of the Intellectual Property Clause* (2002) p. 59.) Faced with legal and economic upheaval generated by easy access to printing technology, incumbent printing houses sought to protect their interests by restricting who could legally print copies of a given work. The prohibition on verbatim copying allowed incumbent houses to exercise a degree of control over the market for works they produced, while curtailing the free-rider problem presented by cheap and easy printing technology.

Because printers required protection from a very specific set of behaviors (competing reproduction of identical works), common law copyright was narrowly tailored to cover a similarly small range of acts. One of the first British courts to recognize a common law copyright took great pains to emphasize how narrowly it applied: one justice concluded that an exclusive right in “literary compositions” was permissible only if “this argument is confined to the manuscript”; extending the argument beyond that “seems to me very difficult, or rather quite wild.” (*Millar v. Taylor* (1769) 98

E.R. 201, 230.) Another justice concurred, agreeing that the purchaser “may improve upon [the manuscript], imitate it, translate it; oppose its sentiments,” but must stop short of “publish[ing] the identical work.” (*Id.* at 226.) A third justice, analogizing to the King’s common law exclusive right in the King James version of the Bible, likewise recognized the limited extent of copyright: “[The] whole right rests upon the foundation of property *in the copy* by the common law.” (*Id.* at 256 (emphasis added).)

The narrowness of common law copyright’s protection was a recurrent theme in British copyright jurisprudence. In the subsequent case of *Donaldson v. Becket* (1774 H.L.) 17 Parl. Hist. Eng. 953, the House of Lords observed the incompatibility of broad-scope copyright and the common law, and emphasized the conceptual challenges inherent in recognizing a literary property right: “When do [ideas] become *publici juris*? What if [one] speaks and lets them fly out in public discourse? Will he claim the breath, the air, the words in which his thoughts are clothed? Where does

this fanciful property begin, or end, or continue?” (*Id.* at 997.) The Law Lords determined that copyright was properly limited to the exact copying of printed texts, and therefore a common law action would only exist “for [ideas] that are marked in black and white, on parchment or paper.” (*Id.*)

Sixty years after *Donaldson*, the Supreme Court imported this rationale when considering the scope of common law copyright protection in the United States. The Court found itself grappling with the question: “If the common law right of authors were shown to exist in England, does the same right exist, and to the same extent, in this country?” (*Wheaton v. Peters* (1834) 33 U.S. 591, 658.)

Writing for the majority, Justice John McLean acknowledged a common law literary property right in unpublished works, but notably limited infringement to those who improperly “realize a profit *by its publication*.” (*Id.* at 657 [emphasis added].) The Court took care to identify the *object* of property, a “copy” of written texts, to avoid the boundless application of a labor theory of

property.² Even the dissent agreed that the literary property right was properly confined to exact copies of the written word: “The identity of a literary composition consists entirely in the sentiment and the language. The same conception, clothed in the same words, must necessarily be the same composition...and no other man, it has been thought, can have a right to exhibit it, especially for profit, without the author’s consent.” (*Id.* at 670.)

Like the British courts in *Millar* and *Donaldson*, the Supreme Court unanimously recognized the need to carefully ascribe narrow boundaries to common law copyright so as to avoid a limitless conception of intellectual property rights. The verbatim reproduction and reprint of text provided “a constructed object of property that could fit smoothly with traditional natural rights theory, [but which] also prescribed a restrictive scope to ownership.” (Bracha, *supra* note 2, p. 145.)

² For further discussion, see Bracha, *Owning Ideas: The Intellectual Origins of American Intellectual Property* (2016) pp.136-146.

This limited conception of common law copyright remained a bedrock principle of American copyright law. Indeed, as late as the mid-nineteenth century, treatises on copyright explained that “the right to multiply copies of what is written or printed, and to take therefor whatever other possession mankind are willing to give in exchange, constitutes the whole claim of literary property.”

(Curtis, *A Treatise on the Law of Copyright* (1847) p. 11.)

B. Courts Have Consistently Resisted Expanding Common Law Copyright

After *Wheaton* was decided, American courts were repeatedly presented the opportunity to enlarge the scope of copyright protections beyond verbatim reproduction. (Bracha 179.)

Despite this, the only significant development prior to the Civil War was a re-entrenchment of the idea that common law copyright only protected a right of first publication. In *Wheaton*, Justice Thompson noted that at British common law, “an author had the sole right of *first printing* and publishing his work.” (33 U.S. 591 at 686 [emphasis in original]). Judge Joseph Story

recapitulated this principle in 1841, holding that “the author of any letter or letters...possess the sole and exclusive copyright therein; and that no persons...have any right or authority to publish the same upon their own account, or for their own benefit.” (*Folsom v. Marsh* (C.C.D. Mass 1841) 9 F.Cas. 342, 346.)

This doctrinal inertia was not for want of opportunity; courts routinely declined to create new rights when given the chance to do so. Unauthorized translations—a common subject of copyright litigation in the 19th and early 20th centuries—were never deemed infringements upon an author’s copyright in the original work, despite the frequent contention. (See *e.g.*, *Lawrence v. Dana* (C.C.D. Mass. 1869) 15 F. Cas. 26, 37 [“Copyright is not the title of the author to his production. It is the statute monopoly to multiply copies of the book.”]; *Stowe v. Thomas* (C.C.E.D. Pa. 1853) 23 F. Cas. 201, 208 [“A translation may, in loose phraseology, be called a transcript or copy of her thoughts or conceptions, but in no correct sense can it be called a copy of her book.”]; *Sarony v. Burrow-Giles Lithographic Co.* (C.C.S.D.N.Y.

1883) 17 F. 591, 594–95, [aff'd, 111 U.S. 53, 4 S. Ct. 279, 28 L. Ed. 349 (1884)] [“But it is now well settled that a translator may copyright his translation. It is no infringement of the copyright to translate a work which the author has already had translated into the same language, although he may have secured a copyright for that translation.”].) Courts likewise declined to find infringement in other transformative uses of textual works, such as abridgments or concordances. (*See, e.g., Schuberth v. Shaw* (C.C.E.D. Pa. 1879) 21 F. Cas. 738, 739 [“The maker of an abridgement, translation, dramatization, digest, index or concordance of a work of which he is not the author, may obtain a copyright for the product of his labor, thought and skill. So also one making material changes, additions, corrections, improvements, notes, comments, etc., in the unprotected work of another.”].)

Certainly the scope of copyright is not so limited today; modern copyright has been statutorily expanded to consider both translations and abridgements of original works to be potentially

infringing. But in expanding copyright's scope, legislatures have always taken the lead, and courts have followed closely to the precise scope of the legislative enactment.

Public Performance of Dramatic Works

Only once has an American court created, *sui generis*, a new common law copyright protection. The common law right of public performance for dramatic works, first articulated in *Ferris v. Frohman* (Ill. 1909) 87 N.E. 327 (aff'd. 223 US 424 (1912)), was designed to fill a perceived legislative gap similar to that which Respondents claim exists here; Congress had enacted a statutory performance right in 1853, but only for plays for which the script was published and registered. (See Act of Aug. 18, 1856, 11 Stat. 138.) The court in *Ferris* responded by creating a common law right of public performance for unpublished dramatic compositions. (See 87 N.E. 327 at 328 ["The public representation of a dramatic composition, not printed and published, does not deprive the owner of his common-law right, save by operation of statute. At common law, the public performance of the play is not

an abandonment of it to the public use.”].) Significantly, the court bucked precedent and relied explicitly (and exclusively) on the treatise of journalist Eaton Drone. (*See Drone, A Treatise on the Law of Property in Intellectual Productions* (1879).) Drone’s work was largely aspirational, envisioning a “natural law” copyright scheme that included—as a moral imperative—a performance right. (*See Litman, The Invention of Common Law Play Right* (2010) 25 Berkeley Tech. L. J. 1381, 1424 [“Instead of deriving legal principles from statutes and judicial decisions, [Drone] created his legal principles out of whole cloth.”].)

The fallout from *Ferris* was, appropriately, dramatic; while Drone and his supporters saw themselves as protecting the labors of playwrights, the practical effect of the common law dramatic performance right was actually to *entrench* the dominant producers and performance houses, to the point of raising serious antitrust concerns. (Litman at 1421.) Playwrights themselves saw little benefit from the change in law. (*Id.*) Fortunately, *Ferris* and the “play right” line of cases have proven to be an anomaly in the

history of common law copyright, and courts have steered clear of granting such “aspirational” rights. (See Litman at 1424 [“The Drone-ish form of common law copyright has entirely died out.”].)

While a common law right in public performances of sound recordings is certainly valuable to artists like Flo & Eddie, their proper recourse is with Congress and the California legislature, who are in the best position to craft an appropriate right. In the absence of this, courts are best served to heed the words of Judge Cadwalader, who, like many before him, declined to expand common law copyright beyond its historically narrow boundaries: “[Judges cannot] create or define rights merely because, in their opinion, such rights ought, according to justice, propriety, and convenience, to exist.” (*Keene v. Wheatley* (C.C.E.D. Pa. 1861) 14 F. Cas. 180, 192.) To the contrary, “rules of decisions on the subject of literary property must be sought in doctrines of the common law, or must be traced in principles from which its rules appear to have been derived. (*Id.*)

II. Public Performance Rights do not Arise from Common Law, but are Created by Statute

A. Congress Regularly Creates Copyright Protections *Sui Generis*

Congress regularly legislates copyright protections with no precedent in the common law, as it did with the Semiconductor Chip Protections Act of 1984, codified at 17 U.S.C. §§ 901–914. Congress created the statute to help new firms combat chip copying, basing the right on a clearly articulated policy need, and *not* upon any preexisting common law practice:

In the semiconductor industry, innovation is indispensable; research breakthroughs are essential to the life and health of the industry. But research and innovation in the design of semiconductor chips are threatened by the inadequacies of existing legal protection against piracy and unauthorized copying. This problem, which is so critical to this essential sector of the American economy, is addressed by the Semiconductor Chip Protection Act of 1984.

(S. REP. NO. 98-425, 1 (1984) [quoted in *Brooktree Corp. v.*

Advanced Micro Devices, Inc. (Fed. Cir. 1992) 977 F.2d 1555,

1562].)

Even more saliently, in the Digital Performance Rights in Sound Recordings Act (1995) Pub. L. No. 104-39, 109 Stat. 336, Congress “create[d] a carefully crafted and narrow performance right, applicable only to certain digital transmissions of sound recordings”—a “limited right ... [that] reflects changed circumstances.” (H.R. REP. NO. 104-274 (1995) at 12, 14 [emphasis added].) Media outlets such as the N.Y. Times correctly described the digital performance right was a new form of protection for copyright holders. (Sisario, *Old Songs Generate New Cash for Artists*, N.Y. Times (Dec. 28, 2004), <http://www.nytimes.com/2004/12/28/arts/music/old-songs-generate-new-cash-for-artists.html>.)

Respondents argue that the existence of a statutory right is persuasive proof of broad, yet heretofore invisible, common law rights. This is a flawed argument for a number of reasons. First, when Congress does codify a common law right, it often acknowledges that fact within the statutory text. (See, e.g., H.R. REP. NO. 94-1733 (1976) (Conf. Rep.) at 70 [“The Senate bill, in section 107, embodied express statutory recognition of the judicial

doctrine that the fair use of a copyrighted work is not an infringement of copyright.”] [emphasis added]; H.R. REP. NO. 94-1476 (1976) at 79 [“Section 109(a) restates and confirms the principle that, where the copyright owner has transferred ownership of a particular copy or phonorecord of a work, the person to whom the copy or phonorecord is transferred is entitled to dispose of it by sale, rental, or any other means... [T]his principle ... has been established by the court decisions...”].)

Second, the existence of a statutory right does not *by itself* imply a preceding common law right. Just as courts may not presume that the “design of a vessel, hull and deck, including a plug or mold” was protected by common law prior to the passage of the Vessel Hull Design Protection Act (VHDPA), neither can courts presume that the existence of a digital performance right for post-1972 works implies a common law rights for the digital public performance of sound recordings for pre-1972 works. (*See* 17 U.S.C. § 1301; Vessel Hull Design Protection Act, 105 Pub. L. No. 304, § 1301, 112 Stat.2860, 2905 (1998) (effective Oct. 28,

1998); *id.* § 1332 [“Protection under this chapter shall not be available for any design that has been made public under section 1310(b) before the effective date of this chapter.”].)

Besides being facially absurd (and precedentially incorrect, as noted above), this concept that “if statutory right, then common law right” would result in both bad law and policy. By this reasoning, the common law must be understood to include every imaginable right by default, with legislation existing to only limit those rights. In the case of copyright, this scenario is, in fact, inverted—the only component of copyright law that might be considered a “customary” right is the reproduction right. *See The Mikado Case*, 25 F. 183, 185 (C.C.S.D.N.Y. 1885) (“Strictly, the only invasion of a copyright consists in the multiplication of copies of the author’s production without his consent. Any other use of it, such as for the purpose of public reading or recitation, is not piracy.”).

B. Performance Rights are Statutory, Rare, and Policy-Focused

Unlike “core” copyright protections (such as the rights of reproduction and distribution), public performance rights are not granted uniformly across all copyrighted works. When Congress does create such a right, they do so infrequently, to specific mediums, and with particular policy goals in mind.

1. Congress Grants Performance Rights Only Infrequently

Were public performance rights as “obvious” as Respondents argue, one might expect to see them expressly issued as a matter of general protection. This could not, however be farther from the case. No public performance rights existed at all under U.S. copyright law prior to 1856, when Congress created a performance right for dramatic works. (*See* Act of Aug. 18, 1856, ch. 169, § 1, 11 Stat. 138, 139 [granting, “along with the sole right to print and publish,” a right “to act, perform, or represent the same, or cause it to be acted, performed, or represented, on any stage or public place....”].) Far from a watershed moment, it was another four decades before Congress created the nation’s second public

performance right, this time for musical compositions. (*See Act of Jan. 6, 1897, ch. 4, 29 Stat. 481.*)

Decades—or even centuries—could lapse between the original grant of copyright protection and the addition of a performance right. This was true even in cases where a performance right would seem most obvious: motion pictures, though protected in their own right since 1912, did not enjoy a public performance right until 1976. (*See Townsend Amendment (1912) Pub. L. No. 62-303, 37 Stat. 488 [providing copyright protection to “Motion-picture photoplays”]; Copyright Act of 1976, Pub. L. No. 94-553, § 106(4), 90 Stat. 2541, 2546.*) Even literary works, a foundational category of work which has enjoyed copyright protection under U.S. law since 1790, were only granted a public performance right in 1952, a whopping *162 years* after their initial protection. (*See Act of July 17, 1952 ch. 923, 66 Stat. 752.*)

Not only does Congress infrequently create new performance rights, it actively avoids doing so when offered the opportunity.

Congress specifically declined to include a public performance right in the Sound Recordings Act because granting such a right would not have prevented unauthorized reproduction of sound recordings, and would have fallen within the broader ambit of copyright reform. S. REP. NO. 92-72, at 3 (1971).

2. Congress Grants Performance Rights in Response to Specific Policy Goals

When Congress created the first performance right (for dramatic works), it did so explicitly in response to market pressures unique to the genre, “[r]ecognizing the nature of dramatic works as ones that were not sold in copies but rather provided remuneration to their creators through performance.” (Loren, *The Evolving Role of “For Profit” Use: Lessons From the 1909 Act*, in *Copyright Law: Volume II: Application to Creative Industries in the 20th Century* (Fitzgerald edit., 2017) pp. 407, 411.)

The second performance right—for musical compositions—was similarly responsive to Congressional policy concerns; ten years after its creation, Congress revisited and curtailed the right

by limiting it to instances where the performance was for profit. By doing so, legislators expressed a need to not “unduly restrict the free enjoyment of music and thus interfere with legitimate public interests.” (Varmer, *Study No. 16: Limitations on Performing Rights*, in 2 *Studies on Copyright* (Copyright Society of the U.S.A. edit., 1963) pp. 835, 838 [citing *Hearings Before the House and Senate Committees on Patents on S. 6330 and H.R. 19853*, 59th Cong. (1906)] ; *See also* ch. 320, § 1(e), 35 Stat. 1075.) This specific act of tailoring performance rights to stated policy objectives illustrates that Congress does not view, and has never viewed, public performance rights as unqualified, “natural” rights that inhere with any copyrighted work.

C. The Existence of a Statutory Right Does Not Imply the Existence of a Preceding Common Law Right

Where Congress codifies a common law right, it typically acknowledges, in the statutory text, the common law developments that precipitated the codification. (*See, e.g.*, H.R. REP. NO. 94-1733, at 70 (1976) (Conf. Rep.) [“The Senate bill, in

section 107, embodied express statutory recognition of the judicial doctrine that the fair use of a copyrighted work is not an infringement of copyright.”] [emphasis added]; H.R. REP. NO. 94-1476, at 79 (1976) [“Section 109(a) restates and confirms the principle that, where the copyright owner has transferred ownership of a particular copy or phonorecord of a work, the person to whom the copy or phonorecord is transferred is entitled to dispose of it by sale, rental, or any other means... [T]his principle ... has been established by the court decisions...”].)

However, the existence of a statutory right does not *by itself* imply a preceding common law right. Just as courts may not presume that the “design of a vessel, hull and deck, including a plug or mold” was protected by common law prior to the passage of the Vessel Hull Design Protection Act (VHDPA), neither can courts presume that the existence of a digital performance right for post-1972 works implies a common law rights for the digital public performance of sound recordings for pre-1972 works. (See 17 U.S.C. § 1301; Vessel Hull Design Protection Act, 105 Pub. L.

No. 304, § 1301, 112 Stat.2860, 2905 (1998) (effective Oct. 28, 1998); *id.* § 1332 [“Protection under this chapter shall not be available for any design that has been made public under section 1310(b) before the effective date of this chapter.”].)

Conclusion

For the foregoing reasons, this Court should resolve the presented question in favor of Defendant-Appellant Pandora Media, Inc.

January 12, 2018

PUBLIC KNOWLEDGE
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WORD COUNT

I certify, pursuant to Rule 8.204(c) of the California Rules of Court, that the length of the foregoing Brief, including footnotes but excluding Caption, Tables of Contents and Authorities and the Proof of Service attached to the Brief, as measured by the word count macro of the computer program used to prepare the brief, contains 4211 words.

Dated: January 12, 2018

PROOF OF SERVICE

I am a citizen of the United States and employed in Washington, District of Columbia. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 1818 N St. NW, Suite 410, Washington, D.C. 20036.

On January 12, 2018, I served a correct copy of the within document(s): APPLICATION OF PUBLIC KNOWLEDGE FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANT-APPELLANTS

(X) BY MAIL, by placing a true copy thereof, in a sealed envelope to the addressees below, and depositing the same into the United States mail at the United States Post Office at 1800 M Street Northwest, Washington, D.C. 20036: **[SEE ATTACHED LIST]**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on January 12, 2018.



MEREDITH ROSE

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