SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

CAPITOL RECORDS, LLC, a Delaware limited liability corporation; SONY MUSIC ENTERTAINMENT, a Delaware partnership; UMG RECORDINGS, INC., a Delaware corporation; WARNER MUSIC GROUP CORP., a Delaware corporation, and ABKCO MUSIC & RECORDS, INC., a New York corporation, Plaintiffs vs SIRIUS XM RADIO INC., a Delaware corporation; and DOES 1 through 10, inclusive, Defendant(s)	Case No. BC520981 COURT'S RULING ON SUBMITTED MATTER

HEARING DATE: August 27, 2014
DEPARTMENT: 311
JUDGE: Mary H. Strobel
SUBJECT: Plaintiffs' Motion for Jury Instruction

Ruling on Submitted Matter:

The Court heard the above-referenced motion on August 27, 2014 and took the matter under submission. On September 23, 2014, Plaintiffs requested judicial notice of the September 22, 2014 order in *Flo & Eddie Inc. v. Siruis XM Radio, Inc.* The court takes judicial notice of this order. Having considered the additional authority, the papers submitted and arguments of counsel, the court is persuaded that it should change its tentative ruling. The court grants the motion for a jury instruction as requested by Capitol Records.

Analysis

Plaintiffs Capitol Records, LLC, Sony Music Entertainment, UMG Recordings, Inc., Warner Music Group Corp., and ABKCO Music & Records, Inc. are record labels. They own the rights to numerous pre-1972 recordings. Defendant Sirius XM Radio Inc. is a satellite radio service. Plaintiffs claim Sirius XM wrongfully broadcasts these pre-1972 recordings without paying Plaintiffs for the rights. Plaintiffs ask the court to adopt this jury instruction:

> "The owner of a sound recording 'fixed' (*i.e.*, recorded) prior to February 15, 1972, possesses a property interest and exclusive ownership rights in that sound recording. This property interest and the ownership rights under California law include the exclusive right to publicly perform, or authorize others to publicly perform, the sound recording by means of digital transmission--whether by satellite transmission, over the Internet, through mobile smartphone applications, or otherwise." (Notice of Motion for Jury Instruction Regarding a Digital Performance Right in Sound Recordings Fixed Before February 15, 1972, p. 1.)

The parties dispute whether the record labels' ownership of pre-1972 recordings include the exclusive right to public performance of these recordings. Ownership rights in pre-1972 recordings are governed by state law, rather than the Federal Copyright Act. [See 17 USC Section 301(c), discussed further below.] Plaintiffs argue that both Civil Code §980 and California common law establish such a right. Civil Code §980, subdivision (a) (2) provides:

> "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 recapture the actual sounds fixed in such prior sound recording, but consists of an independent fixation of other sounds, even though such sounds imitate or simulate the sounds contained in the prior sound recording." (Civ. Code, § 980, subd. (a)(2).)

This motion for a jury instruction requires the court to interpret section 980, specifically, the meaning or scope of "exclusive ownership" of pre-1972 sound recordings. The court looks first to the definitions contained in the Civil Code itself.

The Civil Code provides: "The ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others. In this Code, the thing of which there may be ownership is called property." (Civ. Code, § 654.) Thus, Civil Code §980 creates property rights in pre-1972 sound recordings.

If the words of a statute are unambiguous, the court need not consider legislative history or other guides to interpretation. "[W]hen push comes to shove, inescapably plain text should prevail." (*J.A. Jones Construction Co. v. Superior Court* (1994) 27 Cal.App.4th 1568, 1575.) The court should consider the legislative intent only "[i]f something needs to be added or omitted to determine how the statute should apply in a given case." (*Id.* at 1576.) Plaintiffs argue that the language of the statute is unambiguous, and that ownership rights include the broadcasting of pre-1972 recordings. The court disagrees that the meaning of "ownership" in the statute is unambiguous.

"Ownership" of a sound recording is not as easily defined as ownership of tangible property. For example, a person may purchase a tangible good such as an automobile and use it how he or she wishes- drive it, give it to their child, resell it- without violating the automobile manufacturer's rights. When an individual owns a sound recording and sells authorized copies of that sound recording to others, the issue of how those persons may use their authorized copies of the sound recording is more complicated. Can the purchaser play the recording for friends who did not purchase it? Can the purchaser broadcast it over an amplifying system at a party? Can it be digitally broadcast over the radio? Civil Code §980 does not explicitly address the issue of how purchasers of authorized copies of sound recordings may use those copies. The court must add something to the statute to determine how it should apply here. The court therefore considers the legislative intent.

In 1971 Congress enacted the Sound Recording Amendment to the Copyright Act, giving certain protections to sound recordings fixed after February 15, 1972. The Act gave owners of sound recordings the right "to reproduce the copyrighted work in copies or phonorecords;" and "to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending[.]" (Former 17 U.S.C. § 106, added by Pub.L. 94-553, Title I, § 101, Oct. 19, 1976 and replaced by Pub.L. 107-273, Div. C, Title III, § 13210(4)(A), Nov. 2, 2002.) The ownership rights in sound recordings did not "include any right of performance[.]" (Former 17 U.S.C. § 114, added by Pub.L. 94-553, Title I, § 101, Oct. 19, 1976 and replaced by Pub.L. 111-295, §§ 5(c), 6(b), (f)(1), Dec. 9, 2010.) The Amendment expressly provided that state common law or statutes regarding sound recordings fixed

before February 15, 1972 were not annulled or limited by the Amendment until February 15, 2067. 17 USC §301(c).

The California legislature amended Civil Code §980 in 1982, adding a provision directed to pre-1972 sound recordings. According to the legislative history, the amendment was adopted to "maintain rights and remedies in sound recordings fixed prior to February 15, 1972 until February 15, 2047 (the designated time for their preemption under 17 USC Section 301)." (Appendix of Non-California Authorities Cited in Support of Sirius XM's Opposition to Motion of Plaintiffs for Jury Instruction Regarding a Digital Performance Right in Pre-72 Sound Recordings, Exhibit 5, p. 2.)

Thus, the amendment to Section 980 regarding sound recordings was adopted in light of, and with knowledge of how Congress had chosen to treat rights in sound recording post-1972. In its tentative ruling, this court reasoned that the California legislature was aware of the public performance exception made in the Federal Copyright Act, and had it wished to give greater protection to pre-1972 recordings in California, it would have done so specifically. Further, the court noted in its tentative ruling that the legislative history of Section 980 indicated that the intent was to "maintain" rights and remedies, not to expand those rights. The court therefore considered what rights common law provided to pre-1972 recordings at the time of the amendment to Section 980.

Plaintiffs ask the court to take judicial notice of the order granting summary judgment in *Flo & Eddie Inc. v. Siruis XM Radio, Inc.* CV 13-5693 (RZx), a district court ruling entered after this motion was argued and under submission. The court grants the request for judicial notice. While a federal trial court opinion is not binding on this court, the court finds the logic applied in that order interpreting Civil Code §980 to be persuasive. Unlike *Blue Beat* and *Heilman* (discussed below), the *Flo & Eddie* decision squarely addresses the question of public performance rights in pre-1972 recordings.

In *Flo & Eddie*, the District Court judge analyzed Section 980 as it applied to Sirius FM's public performance of pre-1972 recordings by "broadcasting and streaming the content to end consumers and to secondary delivery and broadcast partners." The court concluded that Section 980's grant of "exclusive ownership" rights in pre-1972 recordings "against all persons" was not ambiguous and did not require interpretation or consideration of extrinsic evidence. While this court does not agree that "exclusive ownership" as stated in Section 980 is unambiguous, this court does find other parts of the district court's analysis to be compelling.

The *Flo & Eddie* court noted that Section 980 provided for one exception – that for an independent maker of another sound recording which does not directly or indirectly recapture the actual sounds fixed in the original recording. The *Flo & Eddie* court reasoned that had the legislature intended to limit the ownership rights in any other manner, it would have done so in the statute. Further, while finding consideration of extrinsic evidence unnecessary, the *Flo & Eddie* court considered the legislative history of Section 980 and concluded that the history supported the court's interpretation.

In interpreting section 980 in its tentative ruling, this court failed to focus on the fact that the legislature had provided an exception to exclusive ownership rights in the statute itself. The "cover" exception found in Section 980 is similar to one found in the Federal Copyright Act. See 17 U.S.C. §114(b). As the district court found significant, this court finds significant that the California legislature specifically adopted one exception to exclusive ownership for recording "covers" found in federal copyright law, "nearly word-for-word" but did not specifically adopt the other exception found in that law for public performance rights [Former 17 U.S.C. § 114] Thus this court concludes that the legislature intended the only limitation on ownership rights of pre-1972 recordings to be the "cover" exception. The court concludes that the exclusive ownership right in pre-1972 recordings includes a public performance right, as not specifically excluded.

As an alternative basis for decision, Plaintiffs ask the court to consider the common law rights established in pre-1972 recordings. The parties have cited two cases regarding the scope of state law property rights in pre-1972 sound recordings: *Capitol Records, Inc. v. Erickson* (1969) 2 Cal.App.3d 526, and *A & M Records, Inc. v. Heilman* (1977) 75 Cal.App.3d 554. As discussed in the tentative ruling, in neither of these cases does the court expressly rule on the issue of public performance rights in pre-1972 recordings. However, the cases do support the proposition that the exclusive ownership in pre-1972 recordings consists of more than the mere ownership in the physical recording itself.

In *Capitol Records, Inc. v. Erickson* (1969) 2 Cal.App.3d 526, the court concluded that a company that purchased records and tapes of musical performance, made 'master' recordings from those records and tapes, and used the master recordings to produce tape cartridges which it sold to the general public was engaged in unfair competition. The court found that the defendant "unfairly appropriates artistic performances produced by Capitol's efforts, and Phoenix profits thereby to the

disadvantage of Capitol. Such conduct by Phoenix is unfair competition[.]" (*Capitol Records, Inc. v. Erickson* (1969) 2 Cal.App.3d 526, 537.)

In *A & M Records, Inc. v. Heilman* (1977) 75 Cal.App.3d 554, the court held that an individual who "without authorization . . . duplicated performances owned by [a record label] in order to resell them for profit" was liable for the "unfair business practice of misappropriation of the valuable efforts of another[,]" which "unquestionably constitutes unfair competition[.]" (*A & M Records, Inc. v. Heilman* (1977) 75 Cal.App.3d 554, 564.)

Plaintiffs also rely on *Capitol Records, LLC v. BlueBeat, Inc.* (C.D.Cal. 2010) 765 F.Supp.2d 1198. In that case, the court considered a website, which permitted "anyone who set up a free, anonymous membership account" to "purchase and download any track" in its music library, as well as providing free "'streaming,' i.e. on-demand digital performance, of any sound recording" in its library. (*Capitol Records, LLC v. BlueBeat, Inc.* (C.D.Cal. 2010) 765 F.Supp.2d 1198, 1200-1201.) The court noted that the website did not dispute that "it reproduced, sold, and publicly performed the pre–1972 Recordings without proper authorization[,]" and concluded that it was "liable for misappropriation, unfair competition, and conversion." (*Id.* at 1206.)

These authorities support the proposition that common law rights in pre-1972 sound recordings included protections against unauthorized duplication and distribution of recordings. Plaintiffs have not cited any authority specifically finding that common law rights in pre-1972 sound recordings included rights in public performance of the sound recordings. It is also true that the parties have not presented to the court any case which specifically limited ownership rights in pre-1972 recordings.

The *Flo & Eddie* court found some support for its decision in *Bagdasarian Productions, LLC v. Capitol Records, Inc.*, an unpublished California court of appeal decision. This court does not in any way rely on unpublished court of appeal decisions, nor does this court find that the *Bagdasarian* opinion has any precedential value. The District Court found the *Bagdasarian* opinion to be consistent with its determination that a sound recording owner's bundle of intellectual property included the exclusive right to publicly perform the recording.

Plaintiffs also rely on *International News Service v. Associated Press* (1918) 248 U.S. 215 for the proposition that a person may not "reap where it has not sown[.]" (*International News Service v. Associated Press* (1918) 248 U.S. 215, 240.) While it is unnecessary in light of the court's interpretation of Section 980 to consider the common

law, the court finds that the *INS* proposition is too broadly stated to support a conclusion regarding misappropriation here. The court cannot conclude Sirius XM's performance of sound recording amounts to common law misappropriation on the factual record currently before the court. Plaintiffs have not demonstrated, for example, that Sirius XM has injured Plaintiffs as a matter of law.

It is possible, as Plaintiffs complain, that Sirius XM "refuses to pay the artists who created those cultural treasures, and those who own the rights to them, any portion of the millions of dollars Sirius XM makes each year from those Pre-1972 Recordings." (Motion for Jury Instruction Regarding a Digital Performance Right in Sound Recordings Fixed Before February 15, 1972, p. 1.) It is also possible, as Sirius XM contends, that its public performances do not deter sales of Plaintiffs' recordings, and might actually encourage sales to listeners hearing the recordings for the first time. (See Sirius XM's Opposition to Motion for Jury Instruction, pp. 17-18.) To claim that pre- 1972 sound recordings were protected by common law misappropriation concepts at the time Section 980 was adopted, without any case so holding, begs the question. In any event, the jury instruction requested depends on a threshold interpretation of the statutory protection of pre-1972 sound recordings embodied in Section 980.

Sirius XM contends that Plaintiffs' motion "relies on various policy rationales that are as unproven as they are one-sided." (Sirius XM's Opposition to Motion for Jury Instruction, p. 18.) The court may consider public policy in interpreting an ambiguous statute. (*Nolan v. City of Anaheim* (2004) 33 Cal.4th 335, 340.) Public policy considerations do not assist the court in interpreting Civil Code section 980, however, as competing public policy considerations weigh in favor of both Plaintiffs and Sirius XM. For example, as Plaintiffs point out, public policy weighs in favor of compensating those who own the rights to creative works. (See Motion for Jury Instruction Regarding a Digital Performance Right in Sound Recordings Fixed Before February 15, 1972, p. 13.) However, as Sirius XM points out, the recording industry existed, and, according to Plaintiffs, produced "cultural treasures," before 1972, when the federal Copyright Act first afforded any protections to sound recordings. The recording industry nonetheless actively sought out radio play as a marketing tactic. (See Sirius XM's Opposition to Motion for Jury Instruction, p. 21.) To read Civil Code §980 to permit record companies to profit from performances of sound recordings when they did not expect such payments at the time they created or obtained the rights to the sound recordings also contravenes public policies in favor of fairness. However, it is not necessary for the court to reach the public policy issue, in light of the court's interpretation of Civil Code §980.

Sirius XM argues that the Commerce Clause of the United States Constitution prohibits the court from ruling that Civil Code §980 conveys an exclusive right to performance in pre-1972 sound recordings. It does not. The Commerce Clause does not prohibit state action where Congress authorizes state action. The federal and state legislatures "were not forbidden to cooperate or by doing so to achieve legislative consequences, particularly in the great fields of regulating commerce and taxation, which, to some extent at least, neither could accomplish in isolated exertion." (*Prudential Ins. Co. v. Benjamin* (1946) 328 U.S. 408, 439.) Here, Congress specifically permitted the states to regulate pre-1972 recordings. (17 U.S.C. 301(c).) Civil Code section 980 thus cannot violate the Commerce Clause.

Finally, Sirius XM argues that the grant of public performance rights in sound recordings should be approached carefully, and requires detailed rules for implementation similar to those embodied in the Digital Performance Right in Sound Recordings Act of 1995 which granted certain public performance rights in post-1972 sound recordings. While it is true that courts should refrain from ruling in a way that usurps the legislative role, the court must nevertheless interpret Section 980 as it was written. This court has concluded that Section 980 must be interpreted to recognize exclusive ownership rights as encompassing public performance rights in pre-1972 sound recordings. The court is bound to interpret the statute in that manner even if more detailed legislation regarding implementation would have been preferable.

Plaintiff argued at the hearing that the jury instruction requested does not require a finding of liability on the part of Siruis. Capitol noted that Siruis may have defenses to Capital's claim and that the court does not have the type of factual record before it that it would have in a motion for summary judgment. The court agrees. The court's decision is limited to its finding that the requested jury instruction is consistent with law.