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## Why the Copyright Act Expressly Preempts State-Level Public Performance Rights in Pre-1972 Recordings

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## NOTE

# WHY THE COPYRIGHT ACT EXPRESSLY PREEMPTS STATE-LEVEL PUBLIC PERFORMANCE RIGHTS IN PRE-1972 SOUND RECORDINGS

*James Fahringer*

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### ABSTRACT

*Over the past several years, two former bandmates in the 1960s rock group, The Turtles, have initiated several lawsuits against the popular music streaming services, Pandora and Sirius XM, arguing that the band owns common law copyrights in the sound recordings of its songs, and that these state-level copyrights grant the band an exclusive public performance right in its sound recordings. If accepted, this argument has the potential to significantly distort federal copyright policy because states would not be constrained by any of the balancing features of the Copyright Act, including Digital Millennium Copyright Act (DMCA) safe harbors for Internet Service Providers (ISPs), statutory licenses under 17 USC § 114, or even the limitations, such as fair use, in §§ 107 through 122.*

*In spite of how detrimental state-by-state copyright policymaking could be to Congress's policy choices embodied in the Copyright Act, federal courts have not applied any form of preemption that would prevent states from legislating at will in this area, because § 301(c) appears to contain a disavowal of preemption for any state law dealing with pre-1972 sound recordings. This note advances an interpretation of § 114(a) that would expressly preempt state-level public performance rights in pre-1972 sound recordings as well as an interpretation of § 301(c) that would greatly narrow the scope of the disavowal of preemption, allowing federal courts to strike down state laws that severely distort federal copyright policy.*

## TABLE OF CONTENTS

INTRODUCTION .....	272
PART I – COPYRIGHT IN THE MUSIC INDUSTRY .....	275
PART II – FEDERAL PREEMPTION GENERALLY .....	278
PART III – THE COPYRIGHT ACT EXPRESSLY PREEMPTS STATE LEVEL PUBLIC PERFORMANCE RIGHTS FOR PRE-1972 SOUND RECORDINGS .....	282
A. § 114(a) Should be Interpreted Broadly to Include State Copyrights .....	282
B. § 301(c) Should be Interpreted Narrowly to Include only State Laws in Existence in 1978 .....	284
PART IV – CONCLUSION .....	288

## INTRODUCTION

Since 2013, Flo & Eddie, Inc., a company founded by former bandmates in The Turtles, has initiated several copyright lawsuits against Pandora and Sirius XM for violating the band’s public performance rights in their songs, including their Billboard number one 1967 single, “Happy Together”.<sup>1</sup> Federal copyright law does not protect sound recordings created prior to February 15, 1972.<sup>2</sup> Furthermore, even for post-1972 sound recordings, federal law does not provide for a general public performance right<sup>3</sup> (the exclusive right of the copyright owner to perform a non-static work, for example, by singing a song or staging a play, in “any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered”<sup>4</sup>). So Flo & Eddie have, instead, relied on state law, arguing that state copyright statutes and common law copyright principles establish a public performance right in pre-1972 sound recordings.<sup>5</sup> The New York Court of Appeals and the Supreme Court of Florida have rejected this argument under New York and Florida common law, respectively,<sup>6,7</sup> and the 9th Circuit has recently certified the question to the Supreme Court of California.<sup>8,9</sup>

1. John M. Gatti et al., *Flo, Eddie and Pre-1972 Sound Recordings: Happy Together*, LEXOLOGY (June 1, 2017), <https://www.lexology.com/library/detail.aspx?g=85522619-4ef7-41df-bec0-791e8940b9cc>.

2. 17 U.S.C. § 301(c) (2018).

3. 17 U.S.C. § 114(a) (2018).

4. 17 U.S.C. § 101 (2018) (defining “publicly”).

5. First Amended Class Action Complaint at 1, *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 821 F.3d 265 (2d Cir. 2016) (No. 13CV05784), 2013 WL 6779974 at \*2.

6. *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 70 N.E.3d 936 (2016).

7. *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 229 So. 3d 305 (Fla. 2017).

8. *Flo & Eddie, Inc. v. Pandora Media, Inc.*, 851 F.3d 950 (9th Cir. 2016).

9. As of the final draft of this note, this certified question is still pending before the Supreme Court of California.

Flo & Eddie's argument builds on a 2005 case, *Capitol Records v. Naxos of America*,<sup>10</sup> which held that a sound recording that would have entered the public domain if it had been protected under the Copyright Act could still be protected by New York's common law copyright regime. The court found that only two limitations in the Copyright Act apply to state level copyright protection of sound recordings. The Copyright Act totally preempted state copyright for recordings created after 1972 and limited the duration of state copyright in pre-1972 sound recordings to 2067.<sup>11</sup> Extending this reasoning, the Copyright Act's denial of public performance rights to sound recordings would not prevent a state from extending such protection to sound recordings made prior to 1972. Indeed, none of the balancing features of federal copyright law would constrain state-level copyright protection.<sup>12</sup> So states can strike a completely different balance on almost every major policy consideration in copyright law, including duration, DMCA safe harbors, statutory licenses under §§ 114 and 115, and the limitations, such as fair use, in §§ 107 through 122. For this reason, the Copyright Office has noted that state copyright of pre-1972 sound recordings "has given rise to a number of significant policy concerns".<sup>13</sup>

In the case of public performance rights, one of the policy balances with the greatest market influence is that terrestrial radio stations do not have to pay the owner of the sound recording to play a new song.<sup>14</sup> Only the owner of the copyright in the musical composition can demand such compensation. If Flo & Eddie are successful in arguing for state protection of an exclusive public performance right in their sound recordings, then radio stations may be required to pay record labels (the typical owners of sound recording rights in the music industry), in addition to music publishers (the typical owners of the copyright in the musical composition), for any song recorded prior to 1972; including commercially important songs by artists such as the Beatles, the Supremes, the Beach Boys, and Jimi Hendrix. This could have a devastating impact on stations whose library consists of music mostly from this era.<sup>15</sup>

All of this depends, of course, on whether any states actually recognize a public performance right in sound recordings. In assessing the plausibility of states recognizing such a right, the robustness of Flo & Eddie's litigation strategy bears consideration. The duo have entered a partial settlement with

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10. *Capitol Records, Inc. v. Naxos of America, Inc.*, 830 N.E.2d 250 (N.Y. 2005).

11. *Id.* at 263.

12. MARIA A. PALLANTE, U.S. COPYRIGHT OFFICE, FEDERAL COPYRIGHTS PROTECTION FOR PRE-1972 SOUND RECORDINGS 86 (Dec. 2011).

13. U.S. COPYRIGHT OFFICE, COPYRIGHT AND THE MUSIC MARKETPLACE 53 (Feb. 2015).

14. *See id.* at 13.

15. Kyle Prillman, Flo & Eddie, Inc. V. Sirius XM Radio, Inc.: Will Terrestrial Radio and Pre-1972 Sound Recordings Remain "Happy Together"?, 50 J. MARSHALL L. REV. 191, 214 (2016).

Sirius XM that allows them to continue pressing different cases in different states, so that they can enjoy a significant guaranteed payout, while also pursuing favorable precedents in state supreme courts across the country.<sup>16</sup> Even getting just a few victories out of fifty states could give pre-1972 performers an opportunity to substantially control the use of their songs by radio and internet broadcasters. Furthermore, as discussed above, none of the limitations on the federal copyright monopoly would apply to these state-level copyrights.

For these reasons, the proposals for addressing or averting the chaos that might befall the retro music industry if any states should establish a public performance right in pre-1972 sound recordings have generally dealt with changes to federal law, rather than counting on each and every state to reject such a right. The Copyright Office, for example, has suggested that Congress should extend federal copyright protection to pre-1972 sound recordings in order to guarantee that the limitations and exceptions in the Copyright Act will apply to these works.<sup>17</sup> While this note does not offer a suggestion for amending the Copyright Act, like the Copyright Office, it proposes a solution under federal law. This note asserts the following three textual arguments for interpreting the Copyright Act as expressly preempting state-level public performance rights in pre-1972 sound recordings:

- (1) the phrase in 17 U.S.C. § 114(a), “The exclusive rights of the owner of copyright in a sound recording are limited to the rights specified by clauses (1), (2), (3) and (6) of section 106”, refers to all copyrights, both federal and state;
- (2) in the first sentence of § 301(c), “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 phrase “the common law or statutes of any State” refers to law that existed at the time this language was added in 1978, not law that might be adopted in the future; and
- (3) the word “annulled” in § 301(c) means to cancel an existing right, rather than to prevent a new right from coming into existence.

Under these arguments, the Copyright Act would explicitly preempt state level public performance rights in pre-1972 sound recordings. Problems with the interpretation presented in this note include:

- (1) § 301(c) appears at first impression to entirely disavow preemption, nearly the opposite effect as proposed;

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16. See Gatti, *supra* note 1.

17. Pallante, *supra* note 12, at 120-22.

- (2) it places most of its force on a few key terms like “annulled” and “the common law or statutes of any State”; and
- (3) the word annulled is used in several different contexts in the same section.

Features of this interpretation include:

- (1) it would directly counter what may otherwise be interpreted as an explicit disavowal of preemption, a problem for the field preemption and dormant commerce clause arguments which would typically require congressional silence on preemption;
- (2) earlier in § 301, “the common law or statutes of any State” is modified by the phrase “whether created before or after that date and whether published or unpublished”, suggesting that the lack of this modifier in subsection (c) means that it is referring only to existing law; and
- (3) elsewhere in the Copyright Act, including § 1201, copyright is referred to as rights “under this title”, suggesting that the reference to copyright in § 114(a) is broader and includes state copyrights.

The following section, Part I will summarize music copyright to provide a general legal background for how the problem of state-level public performance rights in pre-1972 sound recordings came about. Part II will describe the different categories of preemption with the goal of showing why federal courts have so far found arguments for preemption of these laws unconvincing. Part III will advance an interpretation, outlined above, that the Copyright Act explicitly preempts these state laws. Part IV will conclude with a short summary outlining the primary advantages of this interpretation over the other approaches.

#### PART I – COPYRIGHT IN THE MUSIC INDUSTRY

In 1971, Congress amended the Copyright Act to extend, to musical performers, most of the exclusive rights in copyright.<sup>18</sup> Prior to the effective date of this amendment (February 15, 1972), federal copyright law protected only the musical composition written by the songwriter or composer, and not the sound recording created by the performers and audio engineers. Thus, state level copyright protection provided the only remedy to piracy for these artists.<sup>19</sup>

Since this change, federal copyright law recognizes two distinct copyrights for each new song – the copyright in the musical composition, initially owned by the composer, and usually sold to a music publisher, and the copy-

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18. Sound Recordings Act, PUB. L. No. 92-140, 85 Stat. 39 (1971).

19. Pallante, *supra* note 12, at 5.

right in the sound recording, initially owned by the performers and audio engineers and usually transferred to a record label.<sup>20</sup> Thus, in order to include Whitney Houston's cover of "I Will Always Love You" in a DVD release of the 1992 film *The Bodyguard*, one would need to pay for two copyright licenses: first to Dolly Parton (who retained the rights to underlying music)<sup>21</sup> for a license to produce copies of her original composition, and second to RCA Music Group (whose sub-label Arista produced the original soundtrack to *The Bodyguard*)<sup>22</sup> for a license to copy the sound recording of Whitney Houston's version of the song. RCA might then pay some of its licensing fee to Houston's estate, depending on her recording contract. By comparison, in order to record a new version of the song, one would only need to pay Parton for the rights to the musical composition. This is because the copyright in sound recordings only protects artists against direct copying of the copyrighted recording, not against making new, very similar recordings.<sup>23</sup>

In order to play Whitney Houston's version of the song over the sound system in a department store, one would need only to pay Parton, because the right to publicly perform a work (established by § 106(4)) does not include sound recordings.<sup>24</sup> "Public performance" is generally defined to include any performance located in a "place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances [are] gathered".<sup>25</sup> This definition also includes performances transmitted to multiple locations, such as through television, radio, or the internet.<sup>26</sup> Therefore, an in-store radio station playing Whitney Houston's cover of "I Will Always Love You" would only have to pay Dolly Parton for the right to perform her musical composition because the Copyright Act makes clear that the general public performance right does not apply to sound recordings, such as Houston's recording of Parton's composition. The Copyright Act clarifies that there is no general public performance right in sound recordings by explicitly stating so in § 114(a). "The exclusive rights of the owner of copyright in a sound recording are limited to the rights specified by clauses (1), (2), (3) and (6) of section 106, and do not include any right of performance under section 106(4)." (emphasis added).<sup>27</sup>

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20. See U.S. COPYRIGHT OFFICE, *Musical Compositions and Sound Recordings*, <https://www.copyright.gov/register/pa-sr.html> (last visited Mar. 4, 2018).

21. Matt Alpert, *The Surprising Backstory of Dolly Parton's 'I Will Always Love You'*, <http://www.wideopencountry.com/the-greatest-country-love-song-of-all-time/> (last visited Mar. 1, 2018).

22. INTERNET MOVIE DATABASE, *The Bodyguard Soundtracks*, <http://www.imdb.com/title/tt0103855/soundtrack>.

23. 17 U.S.C. § 114(b).

24. 17 U.S.C. § 114(a).

25. 17 U.S.C. § 101 ("publicly" (1)).

26. See 17 U.S.C. § 101 ("publicly" (2)).

27. 17 U.S.C. § 114(a) (emphasis added).

Therefore owners of the rights in sound recordings cannot demand payment, under federal law, for the use of their sound recordings on terrestrial radio, in-store radio, or at public events.<sup>28</sup>

This fact – that most public performances would only require a music licensee to pay the composer – is the feature of federal copyright policy subject to attack by Flo & Eddie’s recent litigation. In September 2014, the United States District Court for the Central District of California ruled that California’s state copyright law (Cal. Civ. Code § 980(a)(2)) granted recording artists a public performance right in their sound recordings.<sup>29</sup> Since then, courts in three states have addressed the issue of whether their states grant a public performance right in sound recordings. The highest courts of New York and Florida determined that the common law does not grant a public performance right to the owners of sound recordings,<sup>30,31</sup> while the Supreme Court of California has accepted certified questions on the issue.<sup>32</sup>

If any state court rules in favor of a public performance right for sound recordings, the consequences will extend well beyond Pandora and Sirius XM. It would likely mean that terrestrial radio stations and large events would have to pay record labels as well as music publishers.<sup>33</sup> Most strikingly, record labels would be able to negotiate without any of the limitations in the Copyright Act.<sup>34</sup> Unlike Pandora’s and Sirius XM’s non-interactive subscription music streaming services, terrestrial radio stations would not be able to rely on the statutory license in § 114.<sup>35</sup> The special provisions for archivists and librarians in § 108 also would not apply.<sup>36</sup> Even a fair use of a sample from a pre-1972 song in a YouTube video or a classroom would not be protected by § 107.<sup>37</sup> Because this is a state law question, none of the balancing features of federal copyright law would apply.

For these reasons, federal courts interpreting state law have approached the issue with caution, with all three federal circuit courts addressing it send-

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28. There is a limited public performance right for public performance by means of digital audio transmission under 17 U.S.C. § 106(6). So rights holders can demand payment from Pandora and Sirius XM. The existence of this limited right also bolsters the conclusion that there is no general public performance right in the Copyright Act.

29. Flo & Eddie Inc. v. Sirius XM Radio Inc., No. CV 13–5693 PSG (RZx), 2014 WL 4725382, at \*4 (C.D. Cal. 2014 Sept. 22, 2014).

30. See Flo & Eddie, Inc. v. Sirius XM Radio, Inc., 70 N.E.3d 936, 937 (N.Y. 2016).

31. See Flo & Eddie, Inc. v. Sirius XM Radio, Inc., 229 So. 3d 305, 319 (Fla. 2016).

32. Flo & Eddie, Inc., v. Pandora Media, Inc., No. S240649, 2017 Cal. LEXIS 3691 (May, 17 2017).

33. PALLANTE, *supra* note 13, at 13.

34. PALLANTE, *supra* note 12, at 263.

35. 17 U.S.C. § 114(d).

36. PALLANTE, *supra* note 12, at 86.

37. *Id.*



ing certified questions on the issue to the relevant state supreme court.<sup>38</sup> Meanwhile, commentators, including the Copyright Office, have treated the prospect of state level protection of a public performance right in pre-1972 sound recordings as a problem that needs to be solved.<sup>39</sup> These commentators have argued that state action in this area falls under some theory of preemption,<sup>40</sup> or have proposed amending the Copyright Act to federalize copyright in pre-1972 sound recordings. The different theories of federal preemption, and their application to these cases, will be discussed in the following section, Part II. Part III will then present this note's theory of express preemption under § 114(a).

## PART II – FEDERAL PREEMPTION GENERALLY

Federal preemption of state law falls into three broad categories: express preemption, conflict preemption, and field preemption.<sup>41</sup> In express preemption, a federal statute will directly and explicitly say that some defined set of state law is being preempted.<sup>42</sup> Such preemption can also be inferred from the structure and purpose of a statute.<sup>43</sup> A state law will be preempted under conflict preemption when it interferes with the objects of federal law,<sup>44</sup> or when an otherwise law-abiding citizen or company cannot possibly adhere to both laws.<sup>45</sup> Field preemption applies when Congress has not expressly stated that only federal law governs a particular issue, but has enacted such a broad and specific regulatory scheme that allowing states to alter that scheme would disrupt Congress's intended policy choices.<sup>46</sup> Federal law may also field preempt state law when national nature of the interests involved "imperatively requires that federal power in the field [ . . . ] be left entirely free from local interference".<sup>47</sup> Express preemption generally requires a direct statement that state law will not apply. There is no simple formula for determining whether Congress has explicated its desire to supersede all state laws on a particular subject matter.<sup>48</sup> All that is required is that a "provision provides a reliable indicium of congressional intent with respect

38. *Flo & Eddie, Inc v. Sirius XM Radio, Inc.*, 821 F.3d 265 (2d Cir. 2016); *Flo & Eddie, Inc v. Pandora Media, Inc.*, 851 F.3d 950 (9th Cir. 2016); *Flo & Eddie, Inc v. Pandora Media, Inc.*, 827 F.3d 1016 (11th Cir. 2016).

39. *See generally* PALLANTE, *supra* note 12.

40. *See e.g.*, Gary Pulsinelli, *Happy Together? The Uneasy Coexistence of Federal and State Protection for Sound Recordings*, 82 TENN. L. REV. 167 (2014).

41. *Arizona v. U.S.*, 567 U.S. 387, 399 (2012).

42. *Pac. Gas and Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 203 (1983).

43. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

44. *See Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

45. *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963).

46. *Fidelity Fed. Sav. & Loan Ass'n. v. De la Cuesta*, 458 U.S. 141, 153 (1982) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

47. *Davidowitz*, 312 U.S. at 63.

48. *Goldstein v. California*, 412 U.S. 546, 561 (1973).

to state authority”.<sup>49</sup> As a useful example, however, consider the express preemption clause in § 301(a) which states:

On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.<sup>50</sup>

The essential characteristic here is that the preemption statute refers directly to a defined set laws and clarifies that such laws will have no effect, or that they will not apply toward a certain end or in a certain context. In the above example, laws that grant rights with the same scope, and that cover the same subject matter, as the Copyright Act, are expressly preempted beginning January 1, 1978.

Under conflict preemption, a particular state law may also be preempted to the extent that it interferes or conflicts with federal law. In such cases, the task “is not to pass judgment on the reasonableness of state policy”, but rather, “to decide if a state rule conflicts with or otherwise stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the federal law.”<sup>51</sup> Conflict preemption analysis “turns on the actual content of [the state’s] policy and its real effect on federal rights.”<sup>52</sup> Conflict preemption also occurs when “compliance with both federal and state regulations is a physical impossibility.”<sup>53</sup>

Note how conflict preemption is particularized to an individual state policy. Conflict preemption, unlike express preemption, does not create a blanket prohibition on a defined set of state law. It looks at a specific state law and its interaction with federal policy.<sup>54</sup> So a precedent that an analogous law in another state was preempted does not immediately establish that a given state law is conflict preempted. It might make for an easy case, but the precedent only settled that the analogous law was preempted. Thus, the

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49. *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 517 (1992) (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 505 (1978)) (internal quotation omitted).

50. 17 U.S.C. § 301(a).

51. *Livadas v. Bradshaw*, 512 U.S. 107, 120 (1994) (quoting *Brown v. Hotel Employees*, 468 U.S. 491, 501 (1984)) (internal quotation marks and citation omitted).

52. *Id.* at 119.

53. *Fla. Lime & Avocado Growers*, 373 U.S. at 142-43.

54. *See e.g.*, *Brown v. Hotel & Rest. Emps. & Bartenders Int’l Union Local 54*, 468 U.S. 491, 104 S. Ct. 3179 (1984) (“certain state disqualification requirements are compatible with §7. This is particularly true in the case of New Jersey’s disqualification criteria”).

difference between express preemption and conflict preemption can be delineated by how a case finding each type of preemption would frame its holding. An express preemption case will have a holding to the effect that Federal Statute X is interpreted as saying that all state laws in category Y are null and void.<sup>55</sup> A conflict preemption case will have a holding to the effect that Statute X in State Y is preempted because of how it interferes with the policy embodied in Federal Statute Z.<sup>56</sup> Because this only resolves a dispute about a particular law in a particular state, other state laws, even very similar ones, need to be litigated separately.

Like conflict preemption, field preemption is based on the policy that federal interests should supersede state law. But, like express preemption, field preemption has the effect of nullifying state laws wholesale (as described in the previous paragraph). Under field preemption, the intent to void state law may be evidenced by a “scheme of federal regulation [. . .] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.”<sup>57</sup> Alternatively, “the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.”<sup>58</sup> Like conflict preemption, field preemption infers incompatibility from the presumed policy goals of a federal statutory scheme; but like express preemption, it applies that incompatibility – as a blanket prohibition – against all state laws within a defined category.<sup>59</sup>

In deciding preemption cases, courts “start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”<sup>60</sup> Observe that there is a condition on this presumption. The Court in *Santa Fe Elevator* prefaced its application of the presumption against preemption by explaining that “Congress legislated here in a field which the States have traditionally

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55. See e.g. *Cipollone*, 505 U.S. at 524 (Petitioner’s claims are pre-empted to the extent that they rely on a state-law “requirement or prohibition. . . with respect to. . . advertising or promotion.”) (quoting the Public Health Cigarette Smoking Act of 1969, PUB. L. No. 91-222, 84 Stat. 88 (1969)).

56. See *Pub. Util. Comm’n of State of Cal. v. U.S.*, 355 U.S. 534, 543-44 (1958) (“It also seems clear that under s 530 of the California Public Utilities Code this discretion of the federal officers may be exercised and reduced rates used only if the Commission approves. The question is whether California may impose this restraint or control on federal transportation procurement. . . Here the conflict between the federal policy of negotiated rates and the state policy of regulation of negotiated rates seems to us to be clear”).

57. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

58. *Id.*

59. *Pac. Gas and Elec. Co.*, 461 U.S. at 212 (“the federal government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the states.”).

60. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

occupied.”<sup>61</sup> The reasoning in *Santa Fe Elevator* does not extend to fields that states have not typically governed.<sup>62</sup> When “Congress has legislated in the field from the earliest days of the Republic, creating an extensive federal statutory and regulatory scheme [. . .] [n]o artificial presumption aids us in determining the scope of appropriate local regulation.”<sup>63</sup> Indeed, an almost opposite presumption underlies cases dealing with fields predominantly regulated by the federal government. The Supreme Court “has repeatedly decline[d] to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law.”<sup>64</sup> In such a case, the narrowly construed saving clause will “not bar the ordinary working of conflict preemption principles.”<sup>65</sup>

Even without a presumption against preemption, the difficulty with applying conflict preemption or field preemption to pre-1972 sound recordings is that Congress has spoken. § 301(c) clarifies that the Copyright Act is compatible with at least some (and possibly all) state laws governing copyright for such works.<sup>66</sup> Therefore, arguing for either conflict preemption or field preemption will necessarily depend on a reading of § 301(c) that does not totally disavow preemption in all pre-1972 sound recording cases. Express preemption also depends on such an understanding of § 301(c). This note advances such an interpretation of § 301(c) in Part III-B, presenting the case that the disavowal of preemption only applies to state laws that existed at the time this section was added to the Copyright Act in 1978. So the argument for the other forms of preemption substantially depends on the viability of this note’s case for narrowly construing the disavowal of preemption § 301(c).

The several state and federal courts adjudicating the Flo & Eddie cases have generally treated preemption arguments suspiciously. The 2nd Circuit responded to the defendant’s dormant commerce clause argument (a principle that somewhat overlaps with field preemption by constraining states from enacting policies that would compromise Congress’s exclusive authority to regulate interstate commerce) by noting that “the dormant Commerce

Clause is not something we can adjudicate without knowing what, if any, limitations New York places on” the public performance right.<sup>67</sup> The 11th Circuit described all pre-1972 sound recordings as falling into “one of the limited areas in which state common law copyright may continue to op-

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61. *Santa Fe Elevator Corp.*, 331 U.S. at 230.

62. *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 310 n.13 (1988) (“That case, however, involved a field of regulation that, unlike the regulation of natural gas company securities issuances, “the States ha[d] traditionally occupied.””) (internal citation omitted).

63. *United States v. Locke*, 529 US 89, 108 (2000).

64. *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 870 (2000) (quoting *United States v. Locke*, 529 US 89, 106 (2000)) (internal quotation marks omitted).

65. *Id.*, at 869 (internal emphasis omitted).

66. 17 U.S.C. § 301(c) (2012).

67. *Flo & Eddie, Inc v. Sirius XM Radio, Inc.*, 821 F.3d 265, 272 (2d Cir. 2016).

erate”, citing only § 301(c).<sup>68</sup> Similarly, the 9th Circuit simply states that “the 1976 Act left the common law in place to protect pre-1972 sound recordings”, again with reference to only § 301(c).<sup>69</sup> Given this very limited treatment, courts are not currently treating preemption as a significant possibility. That is a perfectly reasonable initial response to § 301(c). The position taken by this note is not initially the easier position to defend based on this line of cases. Nevertheless, given the many problems created by state recognition of public performance rights in pre-1972 sound recordings, it is worth making the case for preemption.

PART III – THE COPYRIGHT ACT EXPRESSLY PREEMPTS STATE LEVEL  
PUBLIC PERFORMANCE RIGHTS FOR PRE-1972 SOUND RECORDINGS

A. *§ 114(a) Should be Interpreted Broadly to Include State Copyrights.*

§ 114(a) reads “The exclusive rights of the owner of copyright in a sound recording are limited to the rights specified by clauses (1), (2), (3) and (6) of section 106, and do not include any right of performance under section 106(4).”<sup>70</sup> The copyright act does not define the word “copyright”,<sup>71</sup> and although it defines “copyright owner”, it only states that the term “refers to the owner of [a] particular right”, not specifying any limitation on the source of that right.<sup>72</sup> Without a statutory definition, the word “copyright” here could have a few different meanings. It could mean all of the rights granted under Title 17 of the US Code, all such rights referred to within Title 17 as copyright, or any rights that it would be legally accurate to refer to as copyrights, thus including state level copyrights. If § 114(a) has the last meaning here, then owners of copyrights in sound recordings, whether federal or state in origin, would only enjoy the exclusive right to make copies and derivative works, distribute the work publicly, and publicly perform the work by means of digital audio transmission.

Under this interpretation, § 114(a) would also explicitly deny them the general exclusive right to control public performances of their works. Note that, although it overlaps significantly with conflict preemption, this is an express preemption theory. Even though it does not directly refer to state statutes as such, it does refer to a defined set of law that contains state statutes and common law, and then specifies that this law will not apply toward a particular end. The reading of § 114(a) presented here is equivalent to a provision that reads “no copyright in sound recordings, no matter the source, grants public performance rights”. With that phrasing, it is “no matter the source” that references state law, whereas, under the theory presented in this

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68. *Flo & Eddie, Inc v. Sirius XM Radio, Inc.*, 827 F.3d 1016, 1019 (11th Cir. 2016).

69. *Flo & Eddie, Inc v. Pandora Media, Inc.*, 851 F.3d 950, 953 (9th Cir. 2017).

70. 17 U.S.C. § 114(a).

71. *See* 17 U.S.C. § 101 (2012).

72. *Id.* at “copyright owner”.

note, it is a broad interpretation of the word “copyright”, inclusive of state copyrights, that references state law.

The primary textual reason to adopt this meaning is that, in other sections, the Copyright Act refers specifically to federal copyrights using some qualifier attached to the word “copyright”. In § 1201, copyright is referred to as rights “under this title”.<sup>73</sup> § 201 similarly expressly limits its reference to copyright to only include “[c]opyright in a work protected under this title”.<sup>74</sup> The definition of “work of visual art” also modifies “copyright protection” with “under this title”.<sup>75</sup> For comparison, the definition of “United States work” refers to copyright protection granted by foreign countries.<sup>76</sup> So the Copyright Act appears to envision that “copyright” may refer to copyrights other than those granted by the United States federal government. The distinctively unmodified usage in § 114(a) suggests that “copyright”, without any limitation as to the source, is meant to apply to any kind of copyright, either federal or state.

The potential for policy conflict between a narrow interpretation of § 114(a) and the other subsections of § 114 offers another compelling reason to broadly interpret § 114(a)’s rejection of public performance rights in sound recordings. § 114(b) creates special definitions, applied only to sound recordings, for the exclusive rights in § 106. Copying a sound recording, for example, does not include mimicking the sounds therein, but only transferring the data directly to a new fixed medium. The right to make derivative works similarly does not include fixing new, but similar, sounds into a new recording. It only includes remixing and rearranging the original sounds as fixed in the original recording.<sup>77</sup> This is why cover artists are only required to pay composers (or their transferees) and not the original performing artists and sound engineers. § 114(d-f) creates a complicated system of statutory licensing for digital audio transmissions of sound recordings, including adjudicative proceedings in front of Copyright Royalty Judges.<sup>78</sup> If states can protect certain sound recordings independently of the limitations of § 114, this entire system of regulation is bypassed for such recordings. Accepting that states can do this means accepting that, in 1976, when it enacted § 301, Congress intended to override its own policies in §114(b) with respect to all then existing sound recordings except those created in the previous four years. All of this absurdity can be avoided simply by taking the word “copyright” as used in § 114(a) to mean both federal and state copyrights.

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73. 17 U.S.C. § 1201(a) (1999).

74. 17 U.S.C. § 201(a) (2012).

75. 17 U.S.C. § 101 (“work of visual art”).

76. *Id.* at “United States Work”.

77. 17 U.S.C. § 114(b).

78. *Id.* at (d-f).

B. *§ 301(c) Should be Interpreted Narrowly to Include only State Laws in Existence in 1978.*

The first and most immediate problem with the above interpretation of § 114(a) is that § 301(c) contains a disavowal of preemption of state level copyright law covering pre-1972 sound recordings. The relevant part reads “[w]ith 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.”<sup>79</sup> To severely understate the matter, this provision means that at least some state laws with respect to pre-1972 sound recordings are not preempted by anything in the Copyright Act. Arguably, this includes any state laws, no matter when enacted, dealing with pre-1972 sound recordings.

But how broadly should we understand the phrase “the common law or statutes of any State”? Should it include all state laws, no matter when enacted and no matter how adverse to federal policy? On the one hand, reading it expansively has many undesirable policy consequences. On the other hand, the broader reading appears to accord with the phrase’s ordinary meaning, which courts should prefer.<sup>80</sup> § 301(c) refers to “any rights or remedies under the common law or statutes of any State”, and the Court has stated that “[r]ead naturally, the word ‘any’ has an expansive meaning”, which includes all nonempty sets “indiscriminately of whatever kind”.<sup>81</sup> This suggests that the passage should be read very broadly. “Any”, however, modifies “rights or remedies” not “the common law or statutes”. The text of this provision thus leaves us without clarification as to the breadth of the phrase “the common law or statutes of any State”. If the phrase “the common law or statutes of any State” is limited in some fashion that is not immediately apparent, then, since § 301(c) only applies to “any rights or remedies under the common law or statute of any State”, then the disavowal of preemption of those rights and remedies would have that same limitation.

One of the most important places to look for guidance on possible non-obvious limitations in § 301(c) is the rest of § 301. Here, § 301(a) provides a compelling reason to think that Congress used the phrase “the common law or statutes of any State” to refer only to law that existed at the time this language was added. § 301(a) expressly preempts state copyright protections with the same scope and subject matter as the Copyright Act. In describing the intended preemption, Congress clarifies that it applies to state common law and statutes “whether created before or after that date [January 1, 1978] and whether published or unpublished”.<sup>82</sup> The lack of this modifier for the phrase “the common law or statutes of any State” in § 301(c) suggests that

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79. 17 U.S.C. 301(c).

80. *Smith v. United States*, 508 US 223, 228 (1993).

81. *U.S. v. Gonzales*, 520 U.S. 1, 5 (1997).

82. 17 U.S.C. § 301(a)

Congress intended only to shield then existing state laws from preemption. “[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”<sup>83</sup> In § 301(c), if Congress wanted the carve out from the preemption to apply to future state laws, it could have added the same modifying phrase it added to preemption itself in § 301(a). The rule in *Russello* would even extend this reasoning to other sections “of the same Act”. Applying it here, where the modifier is present in one clause but absent in another within the same section, with both clauses dealing exclusively with the extent of preemption, is much more straightforward. The drafters of § 301 would have failed to see an obvious difference in nearby clauses if this distinction were accidental. So it seems reasonable to apply the interpretive principle in *Russello* and ascribe meaning to Congress’s omission of the phrase “whether created before or after that date” in § 301(c), thus bolstering the conclusion that it only applies to then existing state law.

While hesitance to apply a non-explicit limitation of § 301(c) to existing state law is understandable, a further reason to avoid such hesitance is that assumptions about temporality of statutory language are not without precedent. Courts regularly refuse to apply a statute retroactively even when its express terms do not contain such a limitation. In *Landgraf v. USI Film Products*, the Supreme Court refused to retroactively apply the Civil Rights Act of 1991 (Pub. L. 102-166), even though it found that the petitioner met all of the express limitations of the relevant section of the act, and the act never explicitly specified that this section could not be applied retroactively and there was no controversy over whether Congress could have constitutionally applied the act retroactively.<sup>84</sup> In effect, the tense of relevant provision in the 1991 Civil Rights Act was determined not by any explicit language or by constitutional avoidance, but by the “[e]lementary considerations of fairness”<sup>85</sup> that underlie the presumption against retroactivity that the Court utilized in that case. So, although there may be some benefit in taking statutory grammar choices at face value, it does not appear to be strictly required under the plain meaning rule.<sup>86</sup>

Applying this to a case interpreting a disavowal of preemption, consider if Congress had written “No State statute providing copyright protection to pre-1972 sound recordings conflicts with this Act.” Such a statutory declaration might be treated as irrefutably true, even if some existing state law stood directly at odds with the policies underlying several sections of the

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83. *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal quotation and citation omitted).

84. *Landgraf v. USI Film Products*, 511 U.S. 244 (1994).

85. *Id.* at 265.

86. Although not related to temporality, courts can also fill in a missing “or” to make a statute make sense. *See e.g.*, *Lamie v. U.S. Tr.*, 540 US 526 (2004).



Copyright Act, simply because Congress enacted a law on point, and it is Congress's policy that preemption is meant to protect. If, however, states subsequently enacted new statutes, with policies that directly conflicted with those of the Copyright Act in ways that Congress could not have foreseen, should this declaration continue to enjoy an irrefutable presumption of being true? Probably not, since the possibility of a self-defeating tolerance of conflicting state law is one of the motivations for narrowly construing savings clauses.<sup>87</sup> Courts would be justified in inferring a temporal reference to only those state laws in existence at the time this language was added.

Admittedly, the above example is hypothetical. Nevertheless, the same kind of implied temporal reference could just as reasonably be found in "any rights or remedies under the common law or statutes of any State shall not be annulled", because the inference stems from the impossibility for Congress to determine in advance that no future state law would ever conflict with the policies embodied in the Copyright Act. A state legislature could enact a copyright statute that specifies that it is not limited by fair use, and § 301(c), if applied to future statutes, would prevent the application of § 107 of federal copyright law to limit the rights granted by the state.

Conceivably, Congress could make that strong of a commitment to state autonomy in a given field. It could spell out that all existing and future state laws, no matter how distorting they are of federal policy, should be given priority over any apparently conflicting federal statute. Without a clearer statement to that effect, however, as in *Geier v. American Honda Motor Co.*, which similarly construed a disavowal of preemption narrowly, "there is no reason to believe Congress has done so".<sup>88</sup> There were state laws that protected sound recordings in 1976,<sup>89</sup> and it could be the case that Congress simply looked at these laws, did not see any significant policy conflicts, and sought to protect those state laws from its updates to federal copyright policy. The language of § 301(c) would then shield these laws from preemption, but not necessarily any future law no matter how perverse to federal policy. In interpreting § 301(c), it makes far more sense to avoid imposing on Congress a blind commitment to protect potentially conflicting future state laws, unless the statute makes clear that it envisions such a commitment.

Another reason to suspect that "the common law or statutes of any State" referred to existing law is the use of the word "annulled". In the definition relevant to questions of legal rights, "annul" generally means to cancel an existing right rather than to prevent a new right from coming into

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87. *Geier*, 529 U.S. at 872.

88. *Id.*

89. See Steven L. Sparkman, *Tape Pirates: the New "Buck"-aneer*, 21 COPYRIGHT L. SYMP. 98, 119 (1974).

existence.<sup>90</sup> If future statutes were envisioned, § 301(c) could have used a verb with less of a temporal connotation, such as “overruled”.

Alternatively, strictly interpreting “annulled” to refer only to cancellation of existing rights would lead to the same outcome as offered in this note. That is, accepting that “the common law or statutes of any State” refers to both existing and future laws, a section of the Copyright Act (§ 114(a), for example) can still prevent new rights from coming into existence under a newly adopted state law. If a newly adopted state law, within the field of pre-1972 sound recording copyrights, falls under a preemption imposed by some section of the Copyright Act, then the rights that it purports to create are not actually established. This is because state provisions in conflict with federal law are “without effect”.<sup>91</sup> Therefore, no right is annulled when a state statute is preempted under § 114(a), because no legal right ever existed. The other predicate in this sentence is “limit”, as in “any rights or remedies under the common law or statutes of any State shall not be annulled or limited by this title”.<sup>92</sup> This would also not apply to preempting future state laws, since “limit” means “to confine or restrict”, rather than “to eliminate or displace”.<sup>93</sup>

A further indication that “annulled” has the meaning ascribed above is that an essential problem for Congress when it enacting the 1976 Copyright Act was that existing owners of state copyrights had a property interest in their copyrights. Congress did not want to take away existing rights due to concerns with the Takings Clause of the Fifth Amendment.<sup>94</sup> So it selected a word that, with respect to legal rights, means to cancel an existing right. Thus, Congress adheres to its constitutional obligations under the Takings Clause without making an absurd commitment to future state laws that it could not possibly predict.

Finally, narrowly construing the preemption carve-out in the first sentence of § 301(c) renders the second sentence less redundant. The second sentence reads, “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.”<sup>95</sup> Without the construction suggested by this note, the first sentence says that nothing in the copyright act preempts any state protection for pre-1972 sound recordings until 2067, whereas the second says that § 301(a) only preempts state protection of pre-1972 sound recordings beginning in 2067. The second sentence would be completely unnecessary. This note’s construction of § 301(c) does

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90. *Annul*, AMERICAN HERITAGE DICTIONARY (5th ed. 2017).

91. *Maryland v. Louisiana*, 451 U.S. 725, 746 (1982). (“It is basic to this constitutional command that all conflicting state provisions be without effect.”).

92. 17 U.S.C. § 301(c).

93. *Limit*, AMERICAN HERITAGE DICTIONARY (5th ed. 2017).

94. H.R. REP. NO. 94-1476, 139, 1976 U.S.C.C.A.N. 5659, 5755.

95. 17 U.S.C. § 301(c).

not have this problem because the temporal inference in the first sentence of § 301(c) comes from limiting “under the common law or statutes of any state” to previously enacted state laws. Since the second sentence does not contain this modifying phrase for “any such rights and remedies pertaining to any cause of action”, it could refer to rights and remedies under both existing and future state laws.

“Any *such* rights” does, however, include a modifier, one that explicitly refers to the “rights or remedies” in the previous sentence. So the “rights and remedies” of the second sentence must pertain to those of the first. The antecedent of the adjective “such” could, however, be any limiter in the previous sentence. That is, the accurate paraphrase replacing “such” could be “The preemptive provisions of subsection (a) shall apply to any rights and remedies, *with respect to sound recordings fixed before February 15, 1972*, pertaining to any cause of action arising from undertakings commenced on and after February 15, 2067.” “Such” rights and remedies, according to this paraphrasing, are simply those dealing with pre-1972 sound recordings. Under this paraphrasing of the second sentence, and this note’s interpretation of the first, the second sentence has a different effect than the first. It completely exempts state laws dealing with pre-1972 sound recordings, whether enacted before or after 1978, from the preemption in § 301(a). The first sentence exempts only state laws created before 1978, but applies to all types of preemption under any section of the Copyright Act. An added benefit of this outcome is that states are not prevented from enacting new laws protecting pre-1972 sound recordings. Only those protections that run counter to some provision in the Copyright Act, other than § 301(a), are excluded. This, once again, most closely matches Congress’s purpose in writing the carve out to preemption in § 301(c). § 301(c) guarantees that states are not wholly barred from protecting sound recordings by § 301(a), but it does not guarantee far more than that – a carve out from all preemption theories under all sections of the Copyright Act for any future state laws dealing with pre-1972 sound recordings.

#### PART IV – CONCLUSION

Interpreting § 114(a) as applying to all copyrights, federal and state, works textually because elsewhere in the Copyright act it refers to copyright with the limiting phrase “work protected under this title”.<sup>96</sup> Secondly, a narrower reading of “copyright” in § 114(a) would mean that the other subsections of § 114, including a complicated system for creating statutory licenses, would have been completely overridden for almost all sound recordings in existence at the time Congress added § 301.

While a broader reading of the saving clause in § 301(c) would make this interpretation of § 114(a) impossible, since all state action related to pre-

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96. *E.g.*, 17 U.S.C. § 1201(A).

1972 sound recordings would be protected from any preemption theory, a narrower reading is justified on several grounds. As a matter of policy, it makes little sense to think that Congress intended to make the only surviving scope of state copyright immune to every balancing feature of the Copyright Act, even fair use. The use of the modifier “whether created before or after that date” in § 301(a) also implies that Congress only meant “the common law or statutes of any State” in § 301(c) to refer to state law that existed in 1978. Since the narrower interpretation only requires inferring a temporal reference – a not unheard-of practice of statutory construction<sup>97</sup> – courts should not assume that Congress intended to permit any state copyright law governing pre-1972 sound recordings, no matter how much in conflict with federal policy. This is especially so considering that Congress’s purpose in allowing a temporary continuance of some state copyrights was to avoid unconstitutionality under the Takings Clause of the Fifth Amendment.<sup>98</sup> Finally, this interpretation of the first sentence of § 301(c) prevents the second sentence from being redundant, giving the latter the unique role of shielding all state created rights in pre-1972 sound recordings, regardless of when they were enacted, from the total preemption of § 301(a).

The conflict preemption and field preemption approaches to this problem both suffer from the same difficulty of § 301(c)’s carve out as the express preemption theory presented in this note. If the narrow construction suggested here fails, then these preemption theories fair no better than express preemption. Indeed, field preemption might fail even under the narrower construction of § 301(c), because the theory of field preemption is that Congress’s regulatory scheme is so delicate that no state regulation is permitted.<sup>99</sup> As strongly as it argues for a limited interpretation of § 301(c), even this note admits that the clause must permit some state protections of pre-1972 sound recordings. Since field preemption is even stricter than that, it is hard to square with § 301(c).

Compared to conflict preemption, express preemption does not necessarily have a significant advantage in terms of the validity of the arguments for why it should apply. Indeed, many of the arguments presented above – including the potential sidestepping of fair use and DMCA safe harbors and the near irrelevance of the § 114 statutory licenses – are readily applicable to conflict preemption. Certain state laws would interfere so greatly with Congress’s copyright policy, that it would be unreasonable to think that Congress intended to shield them from preemption.

The express preemption theory does have one significant advantage – the robustness of the outcome that it would establish. Unlike conflict preemption, it broadly and proactively restrains states from enacting statutes

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97. See *e.g.* U.S. v. Locke, 529 U.S. 89.

98. *E.g.*, H.R. REP. 94-1476, at 139, 1976 U.S.C.C.A.N. 5659, 5755.

99. *Rice*, 331 U.S. at 230.

that distort federal copyright policy, rather than dealing with each potential conflict on a case-by-case basis.<sup>100</sup> Express preemption is also justified by the text of § 114(a), as long as the reference to copyright includes state copyrights,<sup>101</sup> a position with compelling statutory evidence.

For these reasons, Federal courts adjudicating pre-1972 sound recording cases should seriously consider overturning any state laws that would grant a public performance right in such recordings, holding that these laws are expressly preempted by § 114(a) of the Copyright Act.

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100. Compare *Cipollone*, 505 U.S. at 524, with *Pub. Utils. Comm'n of State of Cal.*, 355 U.S. at 543-44.

101. 17 U.S.C. § 114(a) (2012).