APPEAL NO. 15-13100-AA

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FLO & EDDIE, INC.,

Plaintiff-Appellant,

v.

SIRIUS XM RADIO, INC.,

Defendant-Appellee,

On Appeal from the United States District Court for the
Southern District of Florida
Case No. 13-23182-CIV

MOTION OF COPYRIGHT AND INTELLECTUAL PROPERTY LAW PROFESSORS FOR LEAVE TO FILE A BRIEF *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE SIRIUS XM RADIO, INC.

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October 13, 2015

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 and 26.1-3, *amici curiae* Copyright and Intellectual Property Law Professors hereby certify that set forth below is a list of the trial judge(s), attorneys, persons, associations of persons, firms, partnerships or corporations that have an interest in the outcome of the above-captioned appeal, including any publicly held corporation owning 10% or more of the party's stock, and other identifiable legal entities related to a party:

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MOTION OF COPYRIGHT AND INTELLECTUAL PROPERTY LAW PROFESSORS FOR LEAVE TO FILE A BRIEF *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE SIRIUS XM RADIO, INC.

Pursuant to Federal Rule of Appellate Procedure 29(b), counsel for prospective *amici curiae* respectfully moves for leave to file the attached Brief *Amici Curiae* of Copyright and Intellectual Property Law Professors in Support of Defendant-Appellee Sirius XM Radio, Inc. Defendant-Appellee has consented to the filing, but Plaintiff-Appellant has not.

Based on the background and interest of *amici*, counsel respectfully requests that the Court grant this motion. In support of the present motion, counsel states the following:

1. *Amici curiae*, whose names and institutional affiliations are listed in the Appendix to the proposed brief, are all professors at U.S. law schools who teach and write about copyright law or about intellectual property law in general. *Amici* are familiar with the history of copyright law and have published numerous books and articles about copyright law or intellectual property law.

2. *Amici* do not have any financial interest in the outcome of this litigation. The only interest that *amici* have in this litigation is a respect for the historical development of copyright law, and a commitment to the orderly development of copyright law in the future. The perspective of these seventeen unbiased observers is something that the Court cannot get from the parties to the case.

3. The legal standard for whether a motion for leave to file an *amicus curiae* brief should be granted is stated in Federal Rule of Appellate Procedure 29(b): the moving party should explain "why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case." As explained in the Committee Notes to the 1998 Amendments to Rule 29(b): "An *amicus curiae* brief which brings relevant matter to the attention of the Court that has not already been brought to its attention by the parties is of considerable help to the Court." (quoting U.S. Supreme Court Rule 37.1).

4. The proposed *amicus* brief brings to this Court's attention relevant material that was not cited either party in their briefs. In particular, the proposed *amicus* brief brings to the Court's attention evidence concerning the lack of public performance rights under state common law in 1941, at the time Florida passed former Florida Statute 543.02, which is relevant to what the state Legislature intended when it repealed that statute in 1977. The proposed *amicus* brief cites at least fourteen cases, six items of Congressional testimony, five law review articles, and a book on the history of music copyright in the United States that have not been brought to the attention of this Court by the parties.

4. *Amici* do not necessarily agree on the merits of a public performance right for sound recordings, but *amici* agree that 1) historically there has not been any public performance right in sound recordings under state law, and 2) the issue

should be addressed prospectively on a nationwide basis, by Congress, rather than on a piecemeal basis through state-by-state litigation.

WHEREFORE, the undersigned counsel respectfully requests that the Court grant its motion for leave to file the attached brief *amici curiae*.

Respectfully submitted,

Dated October 13, 2015

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CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25, I certify that, on this 13th day of October, 2015, I have served a copy of the foregoing documents electronically through the Court's CM/ECF system on all registered counsel who consented to such service.

I further certify that, on this 13th day of October, 2015, I served an electronic copy of the foregoing documents on the following counsel by e-mail, having obtained prior consent from them to serve copies by e-mail:

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I further certify that, on this 13th day of October, 2015, I served a printed copy of the foregoing document on the following counsel by mailing the document by first-class mail:

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INTEREST OF *AMICI CURIAE*

Amici curiae, whose names and institutional affiliations are listed in the Appendix, are all professors who teach and write about copyright law or about intellectual property law in general. *Amici* do not have any financial interest in the outcome of this litigation. The only interest that *amici* have in this litigation is a respect for the historical development of copyright law, and a commitment to the orderly development of copyright law in the future. *Amici* do not necessarily agree on the merits of a public performance right for sound recordings, but *amici* agree that 1) historically there has not been any public performance right in sound recordings under state law, and 2) the issue should be addressed on a nationwide basis, by Congress, prospectively, rather than on a piecemeal basis through state-by-state litigation.[1]

STATEMENT OF ISSUES

1. Whether the District Court correctly held, as a matter of Florida law, that the common-law rights in a sound recording fixed before February 15, 1972, do not include any exclusive right of public performance, either because no such right

[1] Pursuant to Fed. R. App. P. 29(c)(5), *amici* certify that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund the preparation or submission of the brief; and no person other than amici contributed money intended to fund the preparation or submission of the brief.

is recognized under the common law of Florida, or because any such right was divested when phonorecords of the sound recording were first sold to the public.

2. Assuming this Court chooses to recognize an exclusive right of public performance in a sound recording under Florida common law for the first time, whether application of such a right to broadcasters whose signal can be received outside the boundaries of the state would violate the dormant Commerce Clause, by applying Florida law to performers and listeners located outside of Florida.

3. If the answer to either Question 1 or Question 2 is yes, whether temporary copies made solely to facilitate a lawful public performance of a sound recording are a fair use of that recording, within the meaning of Florida common law.

4. Whether the District Court correctly held, as a matter of Florida law, that Plaintiff-Appellant's claims for unfair competition, conversion, and civil theft, based on the public performance of sound recordings fixed before February 15, 1972, and the temporary copies made to facilitate those public performances, stand or fall together with its claim of common-law copyright infringement.

Amici agree that the District Court correctly resolved Issues 1, 3, and 4, and that its alternative holding on Issue 2 was incorrect. *Amici* will address only Issues 1 and 2 in this brief.

SUMMARY OF ARGUMENT

From the early days of radio, performers and record companies have sought to establish a public performance right for sound recordings. In 1940, the Second Circuit ruled that no such right existed or could be enforced under New York law. After the Supreme Court denied *certiorari*, a widespread consensus developed that broadcasters were free to play sound recordings without any obligation to pay royalties to the performers or record companies. During the past seven decades, proponents have repeatedly asked Congress to enact a public performance right for sound recordings. Each time, proponents contended that they did *not* have an existing public performance right in sound recordings, under either state or federal law. With one limited exception, Congress has repeatedly refused to enact a public performance right for sound recordings. Plaintiffs' frustration with Congressional inaction has resulted in this attempt to convince this Court to recognize a public performance right in sound recordings for the first time under Florida law. Such a ruling would improperly extend Florida law beyond the borders of Florida, as broadcasters are unable to limit their broadcasts to fit only within the borders of Florida. If public performance rights for sound recordings are to be recognized, it should be left to Congress to do so on a nationwide basis, as recommended by the Register of Copyrights, rather than through litigation on a state-by-state basis.

ARGUMENT

I. Statutory Background

Under the 1909 Copyright Act, an eligible work acquired federal copyright protection when it was published with proper copyright notice. Copyright Act of 1909, Pub. L. 60-349, ch. 320, § 9, 35 Stat. 1077.[2] (Proper copyright notice consisted of 1) the word "Copyright" or the abbreviation "Copr.," or in some cases the symbol ©; 2) the year of first publication; and 3) the name of the copyright owner. Copyright Act of 1909, Pub. L. 60-349, ch. 320, § 18, 35 Stat. 1079.[3]) If a work was published without proper notice, it immediately and irrevocably entered the public domain, meaning that it could be copied (and publicly performed) without restriction. *National Comics Publications, Inc. v. Fawcett Publications, Inc.*, 191 F.2d 594, 598 (2d Cir. 1951) (per L. Hand, J.) ("It is of course true that the publication of a copyrightable 'work' puts that 'work' into the public domain except so far as it may be protected by [federal statutory] copyright. That has been unquestioned law since 1774."); *Fleischer Studios, Inc. v. Ralph A. Freundlich, Inc.*, 73 F.2d 276, 277 (2d Cir. 1934) ("Publication with notice of copyright is the

[2] When the Copyright Act was codified in Title 17 in 1947, this section was renumbered as section 10. Therefore cases decided after 1947 concerning this section refer to it as section 10, rather than as section 9.

[3] When the Copyright Act was codified in Title 17 in 1947, this section was renumbered as section 19.

essence of compliance with the statute, and publication without such notice amounts to a dedication to the public sufficient to defeat all subsequent efforts at copyright protection.").[4]

Before a work was published, it could be protected by state law, which provided only a common-law right to publish (reproduce and distribute) the work. Once the work was published, however, state-law protection was forfeited, and unless the plaintiff took steps to secure a federal statutory copyright, the work entered the public domain. *See Caliga v. Inter Ocean Newspaper Co.*, 215 U.S. 182, 188 (1909) ("At common law, the exclusive right to copy existed in the author until he permitted a general publication. Thus, when a book was published in print, the owner's common-law right was lost.").

A work was "published" when copies of the work were distributed or offered to the general public. *Brown v. Tabb*, 714 F.2d 1088, 1091 (11th Cir. 1983); *American Vitagraph, Inc. v. Levy*, 659 F.2d 1023, 1027 (9th Cir. 1981).[5] Whether distribution of a work in the form of a "phonorecord" similarly divested a work of its common-law copyright was for many years a contested issue. Some

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[4] This principle was carried forward from previous copyright acts. *See Mifflin v. Dutton*, 190 U.S. 265, 265 (1903); *Louis DeJonge & Co. v. Breuker & Kessler Co.*, 235 U.S. 33, 35-37 (1914).

[5] Again, this case law carried forward the definition that applied under pre-1909 Act case law. *See Holmes v. Hurst*, 80 F. 514 (2d Cir. 1897), *aff'd*, 174 U.S. 82, 88 (1899).

courts held that distribution of phonorecords divested the common-law copyright in the musical works contained in that recording. *See Shapiro, Bernstein & Co. v. Miracle Record Co.*, 91 F. Supp. 473, 475 (N.D. Ill. 1950); *Mills Music, Inc. v. Cromwell Music, Inc.*, 126 F. Supp. 54, 69-70 (S.D.N.Y. 1954); *McIntyre v. Double-A Music Corp.*, 166 F .Supp. 681, 682-83 (S.D. Cal. 1958). Other courts, noting that the Supreme Court had defined a "copy" of a musical work as "a written or printed record of it in intelligible notation," *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1, 17 (1908), held that distribution of "phonorecords" containing sound recordings of musical works did *not* constitute a publication of the musical works contained on those recordings. *Rosette v. Rainbo Record Mfg. Corp.*, 354 F. Supp. 1183, 1188-92 (S.D.N.Y. 1973), *aff'd*, 546 F.2d 461 (2d Cir. 1976). For musical works, Congress eventually resolved the question in favor of the latter view. 17 U.S.C. § 303(b). Unlike a musical work, however, a sound recording can *only* be perceived through hearing, rather than by sight. Consequently, there is no persuasive reason why the same definition of publication (limited to the public distribution of "copies") should be applied to sound recordings. Indeed, under the 1976 Copyright Act, the definition of "published" specifically includes the public distribution of "phonorecords" as well as "copies." 17 U.S.C. § 101. Consequently, a state remains free to hold that public distribution of phonorecords completely or partially divests a common-law copyright in those recordings.

II. For 75 Years, It Has Been Considered Settled Law That There Is No Common-Law Public Performance Right for Sound Recordings.

Since the dawn of radio broadcasting, performers and record companies have sought to establish a right to exclude others from publicly performing their sound recordings. *See generally* Kevin Parks, MUSIC AND COPYRIGHT IN AMERICA: TOWARD THE CELESTIAL JUKEBOX 101-137 (ABA 2012). In two suits brought by bandleader Fred Waring, Pennsylvania recognized a common-law right of public performance, *see Waring v. WDAS Broadcasting System*, 194 A. 631 (Pa. 1937), and a federal district court predicted that North Carolina would likewise do so. *Waring v. Dunlea*, 26 F. Supp. 338 (E.D.N.C. 1939). In 1940, however, the Second Circuit (per Judge Learned Hand) decided *RCA Mfg. Co. v. Whiteman*, 114 F.2d 86 (2d Cir. 1940), *cert. denied*, 311 U.S. 712 (1940), which questioned the existence of a common-law right of public performance, and held that even assuming such a right existed, any such right was divested when the sound recordings were first sold to the public, nowithstanding the restrictive legend on some of the records "Not Licensed for Radio Broadcast." 114 F.2d at 88.[6]

[6] "[T]he monopoly of the right to reproduce the compositions of any author—his 'common-law property' in them— was not limited to words; . . . and for the purposes of this case we shall assume that it covers the performances of an orchestra conductor. . . . [If so, w]e think that the 'common-law property' in these performances ended with the sale of the records and that the restriction did not save it; and that if it did, the records themselves could not be clogged with a servitude." *Id.* at 88.

Although *Whiteman* was technically decided as a matter of New York law, "when the Supreme Court refused to hear the case on December 16, 1940, it became official: Judge Hand's opinion was [accepted as] the last word on the legality of broadcasting sound recordings." Parks, at 121. *See also* Robert L. Bard & Lewis S. Kurlantzick, *A Public Performance Right in Recordings: How to Alter the Copyright System Without Improving It*, 43 Geo. Wash. L. Rev. 152, 155 (1974) ("The last reported case involving purported common law performing rights was *R.C.A. Mfg Co. v. Whiteman*."); Harry P. Warner, *Unfair Competition and the Protection of Radio and Television Programs (Part II)*, 1950 Wash. U. L.Q. 498, 512 (*Whiteman* "for all practical purposes sounded the death knell of NAPA," the National Association of Performing Artists); *id.* at 514 ("The *Whiteman* case was NAPA's last attempt to secure a court adjudication via the common law.") Instead, "performers refocused their efforts from the courts to Congress. No fewer than six bills were introduced between 1942 and 1951; they were designed to bring recordings under the copyright statute." Parks, at 123. All such efforts failed. Indeed, by the 1950s, the economics of the music industry were such that record companies paid broadcasters to play their recordings, rather than vice versa, in order to promote the sales of records. *Id.* at 137; Bard & Kurlantzick, 43 Geo. Wash. L. Rev. at 155.

Plaintiffs contend that *Whiteman* was overturned by subsequent New York case law, especially *Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Co.*, 101 NY.S.2d 483 (Sup. Ct. 1950), *aff'd*, 107 N.Y.S.2d 795 (App. Div. 1951). In that case, the Met had sold the exclusive right to make phonograph records of its performances to CBS and had sold the exclusive right to broadcast its live performances to ABC. The defendant recorded broadcast performances off the air and sold records made from those recordings. The N.Y. Supreme Court granted an injunction, which was affirmed by the Appellate Division, on the ground that broadcasting live performances was not a "publication" of those performances, and therefore the common-law right in such performances was preserved. 101 N.Y.S.2d at 498-99. This is entirely consistent with *Whiteman*, in which the Second Circuit specifically stated:

> [I]f a conductor played over the radio, and if his performance was not an abandonment of his rights, it would be unlawful without his consent to record it as it was received from a receiving set and to use the record. Arguendo, we shall also assume that such a performance would not be an abandonment, just as performance of a play, or the delivery of a lecture is not; that is, that it does not 'publish' the work and dedicate it to the public.

Whiteman, 114 F.2d at 88. *Metropolitan Opera* involved only the right to create, reproduce and sell phonograph records of broadcast performances; it did *not* involve the right to publicly perform recordings which had been lawfully made and sold to the general public.

Capitol Records, Inc. v. Mercury Records Corp., 221 F.2d 657 (2d Cir. 1955), is also distinguishable from *Whiteman* and from this case. That case involved competing claims to the exclusive right to reproduce and distribute in the United States certain recordings made by Telefunken in Germany during the Nazi regime. The Second Circuit held that: 1) the sound recordings could not themselves receive a federal statutory copyright under the 1909 Copyright Act, *id.* at 659-62; 2) as between the two parties, Capitol Records held the contractual right to reproduce and sell the recordings in the United States, even if Mercury retained a contractual right to reproduce and sell the recordings in Czechoslovakia, *id.* at 662-63; and 3) the sale of phonograph records to the public did not divest Capitol of its common-law right to exclude others from reproducing and selling copies of those recordings, *id.* at 663.[7] Specifically, the court characterized *Whiteman* as holding in part that "the common-law property in the performances of musical artists which had been recorded ended with the sale of the records and that thereafter anyone might *copy* them and use them as he pleased," *Id.* at 663 (emphasis added), and it stated that "the quoted statement from the *RCA* case is not the law of the State of New York." *Id.* It reasoned that under the *Metropolitan Opera* case, "where the originator, or the assignee of the originator, of records of

[7] Judge Hand agreed with the first two holdings but dissented on the third, on the ground that federal law, rather than state law, should determine whether a work had been "published." 221 F.2d at 665-67 (L. Hand, J., dissenting).

performances by musical artists puts those records on public sale, his act does not constitute a dedication of *the right to copy and sell the records*." *Id.* at 663 (emphasis added).[8] As the emphasized language indicates, *Capitol Records v. Mercury Records* involved only "the right to copy and sell" recordings that had been lawfully made. It said nothing about whether the common-law property right in such recordings included a public performance right. *RCA v. Whiteman* itself had distinguished the right to reproduce and sell from the right of public performance:

> Copyright . . . consists only in the power to prevent others from reproducing the copyrighted work. [Defendant] has never invaded any such right of Whiteman; they have never copied his performances at all; they have merely used those copies which he and [RCA] made and distributed.

114 F.2d at 88. *See also* Benjamin Kaplan, *Performer's Right and Copyright: The* Capitol Records *Case*, 69 Harv. L. Rev. 409, 435-36 (1956) (distinguishing a "right to prevent unlicensed broadcast" from "physical duplication of records" and concluding "[t]he *RCA* case may be right in result without necessarily calling for the denial of relief in *Capitol Records*"); Bard & Kurlantzick, 43 Geo. Wash. L. Rev. at 154 (same). If, as plaintiffs contend, the *Capitol Records* case overturned *RCA v. Whiteman* in its entirety, such that they had an enforceable common-law

[8] Judge Hand expressly agreed that if New York law controlled the issue in question, then the *Metropolitan Opera* case should be followed. 221 F.2d at 665-66 (L. Hand, J. dissenting).

public performance right in sound recordings in New York, why did recording companies publicly complain for six decades afterward that they did *not* have a public performance right in their recordings? Their silence in asserting such a right, and their vehement public protests about the unfairness of not having such a right, ought to be conclusive on the question of whether such a right existed.

Similarly, *Capitol Records, Inc. v. Naxos of America, Inc.*, 797 N.Y.S.2d 352 (2005), only involved Capitol's right to prevent Naxos from *reproducing and selling* recordings that had been released to the public. The issue was whether the New York common-law right expired at the same time as the statutory right in England, where the recordings were made. The New York Court of Appeals held that the common-law right did *not* follow the "rule of the shorter term," but instead persisted until preempted by federal law on February 15, 2067. *Id.* at 366-67. *Capitol Records v. Naxos* said nothing about whether the state common-law right in sound recordings did or did not include a right of public performance.

Until the trial court decisions last year in two companion cases in New York and California, no court had recognized a common-law public performance right in pre-1972 sound recordings since before the *Whiteman* case was decided in 1940. The lack of a public performance right under state law is confirmed by the long history of record companies seeking (and failing) to enact such a right in Congress.

III. Proponents Have Repeatedly Denied The Existence of Public Performance Rights When Seeking Relief From Congress.

"The fact that sound recordings constitute the only class of copyrightable subject matter that is denied a performance right is not merely the result of Congressional oversight. Numerous legislative attempts to amend the Copyright Act to include performance rights in sound recordings have failed after receiving tremendous opposition from lobbying groups supported mainly by the broadcasting industry." Linda A. Newmark, *Performance Rights in Sound Recordings: An Analysis of the Constitutional, Economic, and Ethical Issues*, 38 Copyr. L. Symp. (ASCAP) 141, 142 (1992). At least twelve bills were rejected between 1936 and 1951, and another twelve were rejected between 1967 and 1981. *Id.* at 142-43 n.9 (listing bills). While many commentators supported enactment of such a right, and many opposed it, the one thing that all commentators agreed on was that *there was no existing public performance right in sound recordings* under either state or federal law. *See, e.g.*, *id.* at 142; Steven J. D'Onofrio, *In Support of Performance Rights in Sound Recordings*, 29 UCLA L. Rev. 168, 168 (1978); Bard & Kurlantzick, 43 Geo. Wash. L. Rev. at 154-56. If such a right was existed under state law, why were so many sophisticated people wasting so much effort lobbying for and against a public performance right under federal law?

In 1971, as a condition of getting federal copyright protection against unauthorized duplication and sale of recordings made on or after February 15, 1972, record companies grudgingly accepted the fact that such federal protection would likewise *not* include any public performance right. *See* Sound Recording Amendments Act of 1971, Pub. L. No. 92-140, § 1, 85 Stat. 391. Congress expressly had considered enacting a public performance right for sound recordings; a previous version of the bill "encompass[ed] a performance right so that record companies and performing artists would be compensated when their records were performed for commercial purposes," but the public performance right was deliberately removed from the final legislation. H.R. Rep. 92-487, at 3 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1566, 1568. This restriction was later codified in Section 114(a) of the 1976 Copyright Act: "The exclusive rights of the owner of copyright in a sound recording . . . do not include any right of performance under section 106(4)." 17 U.S.C. § 114(a). Had record companies believed at the time that they had a right of public performance under state law, it is highly doubtful that they would have accepted a federal law that divested them of any such rights for sound recordings made on or after February 15, 1972.

Since 1971, the Register of Copyrights has consistently advocated that Congress enact a public performance right for sound recordings. *See* Report of the Register of Copyrights, *Performance Rights in Sound Recordings* 3-7 (June 1978);

Report of the Register of Copyrights, *Copyright Implications of Digital Audio Transmission Services* 156-57 (Oct. 1991); Report of the Register of Copyrights, *Copyright and the Music Marketplace*, 135-39 (Feb. 2015). The Register has also recommended that Congress bring pre-1972 sound recordings within the federal copyright system. Report of the Register of Copyrights, *Federal Copyright Protection for Pre-1972 Sound Recordings* (Dec. 2011). Summarizing the legal situation in 2011, the Register concluded: "In general, state law does not appear to recognize a performance right in sound recordings." *Id.* at 44; *see also id.* at 45 ("Until 1995 there was no public performance right in sound recordings under federal law, and it does not appear that, in practice, pre-1972 sound recordings had such protection.").

Each time the issue arose, record industry executives testified that they did not have any existing right to collect royalties for unauthorized public performances. For example, in 1961, Herman Kenin, President of the American Federation of Musicians, testified: "It is a shocking crime that people like Mr. Leopold Stokowski or Leonard Bernstein, or Louis Armstrong, or whoever the artist may be, are denied the right to receive additional fees, when money is made with his product." Economic Conditions In the Performing Arts, Hearings Before the Select Subcommittee on Education of the House Committee on Education and Labor, 87th Cong., 1st and 2d Sess., at 17 (1962). In 1967, Alan W. Livingston,

President of Capitol Records, testified: "It must shock one's conscience that the playing of the delayed performance of a phonograph recording artist, however, results in no compensation to the person who made that phonograph record." Copyright Law Revision, Hearings Before the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary, 90th Cong., 1st Sess., pursuant to S. Res. 37 on S. 597, Part 2, at 498 (1967).[9] Jazz pianist Stan Kenton, in his role as Chairman of the National Committee for the Recording Arts, testified that unlike composers and publishers, a recording artist "receives nothing for the commercial playing of his record[,] even though the user may be reaping great profits with it." *Id.* at 542. Erich Leinsdorf, conductor of the Boston Symphony Orchestra, testified: "According to the present laws only the composer and the publisher of a musical work gets a financial benefit when the recorded work is played on the radio or on the television. The artists who recorded the work get nothing." *Id.*, Part 3, at 820.

In 1978, Barbara A. Ringer, Register of Copyrights, testified: "Broadcasters and other commercial users of recordings have performed them without permission or payment for generations." Performance Rights in Sound Recordings, Hearings

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[9] This occurred 12 years after the *Capitol Records v. Mercury Records* case supposedly overturned the ruling in *RCA v. Whiteman*. If that was the correct interpretation of *Capitol Records*, then Capitol was *already* entitled under state law to demand compensation for the playing of its sound recordings, and the testimony of Mr. Livingston, Capitol's president, would have been meaningless.

Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, 95th Cong., 2d Sess., at 116 (1978). Victor W. Fuentealba, President of the American Federation of Musicians, asked: "Why, alone, are radio stations and others who use our music without our consent, exempt from paying for the product on which they base their business?" *Id.* at 11. The Recording Industry Association of America submitted a statement: "Under existing law, broadcasters pay the composer and publisher of the song that is played over the air in a sound recording. But the performers and record company whose artistry and skill brought that composition to life in a recorded performance . . . are paid nothing." Report of the Register of Copyrights, *Performance Rights in Sound Recordings* 726 (June 1978).

In 1991, the RIAA reaffirmed that "[c]urrently, [broadcasters] do not pay anything for the creative efforts of the musicians, artists and recording companies that produce records." Report of the Register of Copyrights, *Copyright Implications of Digital Audio Transmission Services*, Appendix at 15 (Oct. 1991). "[T]he performance royalty stream that results from the airplay and other public exposure of a hit song benefits only the composer and the music publisher; not the performing artist, not the musicians, not the record company." *Id.* at 17.[10] The

[10] That the RIAA was referring to pre-1972 sound recordings as well as more recent ones is demonstrated by the example that it chose to illustrate the issue: Bing Crosby's classic 1942 recording of "White Christmas." *Id.* at 17.

AFL-CIO, American Federation of Musicians, and American Federation of Television and Radio Artists (AFTRA) stated: "We have long been concerned about the exploitation of sound recordings by broadcasters and others without compensation to those responsible for creating the recordings. No other kind of copyrighted work lacks a performance right." *Id.* at 72.

Plaintiffs would have this Court believe that each of these people testified with their fingers crossed behind their backs, silently thinking: "When I testified that recording artists and record companies did not receive any money from public performances of sound recordings, I only meant that no such right existed under federal law. Such as right exists, and has always existed, under state law. We simply chose voluntarily for decades not to rely on those state-law rights to which we were legally entitled." The notion is highly implausible. For 75 years, performers and record companies alike accepted *Whiteman* as the law and testified in Congress that they lacked a public performance right in sound recordings. With one limited exception, Congress has resisted all invitations to enact a public performance right in sound recordings. It is only dissatisfaction with Congress' judgment that has led sound recording copyright owners to try once again to get this Court to recognize a public performance right under state law.

IV. The Florida Legislature Specifically Blocked Recognition of a Public Performance Right Under State Law in 1941, and It Found No Such Right Existed When It Repealed That Statute in 1977.

Florida left no doubt as to where it stood regarding the *Whiteman* case. In 1941, the Florida Legislature enacted Senate Bill No. 268, ch. 20868, later codified at Florida Statutes §§ 543.02 and 543.03, which expressly prohibited recognition of any purported common-law right in recorded performances and any attempt to collect royalties for the public performance of those recorded performances. Those sections read as follows:

> 543.02. When any phonograph record or electrical transcription, upon which musical performances are embodied, is sold in commerce for use within this State, all asserted common law rights to further restrict or to collect royalties on the commercial use made of any such recorded performances by any person is hereby abrogated and expressly repealed. When such article or chattel has been sold in commerce, any asserted intangible rights shall be deemed to have passed to the purchaser upon the purchase of the chattel itself, and the right to further restrict the use made of phonograph records or electrical transcriptions, whose sole value is in their use, is hereby forbidden and abrogated.
>
> 543.03. Nothing in this Act shall be deemed to deny the rights granted by any person by the United States Copyright laws. The sole intendment of this enactment is to abolish any common law rights attaching to phonograph records and electrical transcriptions, whose sole value is in their use, and to forbid further restrictions or the collection of subsequent fees and royalties on phonograph records and electrical transcriptions by performers who were paid for the initial performance at the recording thereof.

Although some of the language of the statutes could be read to implicitly recognize the prior existence of such a right ("abrogated" and "repealed"), the reason the statutes were worded that way is because the language was identical to a statute previously enacted in North Carolina,[11] which was specifically designed to overturn the *Waring v. Dunlea* decision in that state. It is undisputed that there was no such preexisting common-law decision in Florida.

Thus, at the time the recordings at issue in this case were made, a Florida statute specifically prohibited the recognition of any public performance right under Florida common law. The only issue is whether, when these statutes were repealed in 1977, the Florida Legislature intended to create or revive a common-law right of public performance that had never previously been recognized to exist in Florida. If that was what the repeal was intended to accomplish, one would have expected record companies and performers to try to enforce their newly-created or revived common-law rights shortly after the repeal. No such effort occurred, for good reason. The legislative history of the repeal reveals that the Florida Legislature believed that no such common-law right existed in Florida.

When Florida repealed former Florida Statutes §§ 543.02 and 543.03, it repealed all of chapter 543 except for one statute: former Florida Statute §

[11] *See* N.C. Gen. Stat. Ann. § 66-28. South Carolina also enacted such a statute. S.C. Code § 39-3-510. Both of these statutes are still in effect.

543.041, which was retained , amended, and renumbered Florida Statute 540.11. Why did Florida repeal the rest of the chapter? Because "Owners of copyrights [in sound recordings] are now protected under the Federal Copyright Law." Staff Report, House Bill 1780, April 27, 1977, at 2. Why did Florida retain and amend one section? Because "if section 543.041 is repealed, the owners of the rights to [sound recordings] fixed before February 15, 1972, *will not be protected under any law, state or federal*." *Id.* (emphasis added). In other words, the Florida Legislature believed that *there were no common-law rights in sound recordings in Florida at all,* and that the *only* protection for sound recordings in Florida was statutory. Section 540.11, the amended statute that Florida retained, prohibits only the duplication and sale of sound recordings, and does *not* provide any exclusive right of public performance. Indeed, section 540.11(6)(a) expressly allows broadcasters to make the copies necessary to facilitate their broadcasts.

In light of this legislative history, it would be inconsistent for this Court to recognize a public performance right in pre-1972 sound recordings under Florida law. The Florida Legislature made it clear in 1977 that it believed that no such common-law right existed. Had the Florida Legislature thought that any such common-law rights did exist, it would not have been necessary to retain and amend former section 543.041. The Legislature also recognized that it was up to state law to protect sound recordings fixed before February 15, 1972, and it chose to

retain *only* a statutory right to prohibit duplication and sale of such recordings. It could have enacted a public performance right at the time, but it did not do so. It repealed its express prohibition against recognition of such a right, but only because it thought it was no longer necessary, given that Federal law expressly did not recognize a public performance right in sound recordings. 17 U.S.C. § 114(a).

V. Applying a Public Performance Right to Broadcasters and Listeners Located Outside of Florida Would Violate the Dormant Commerce Clause.

If this Court were to recognize a public performance right under Florida law for the first time, there is no legal principle that would limit its ruling to digital audio transmission. Every radio and television network, and every local television or radio station whose signal can be received in Florida, would be obligated to pay royalties to sound recording copyright owners as well, for the first time in their history. But broadcast signals cannot be confined to the borders of a particular state, and Sirius XM and other satellite, Internet, radio, and television broadcasters are unable to tailor their signal so that it reaches only listeners who live outside of Florida.[12] In order to comply with Florida law, broadcasters would be required to refrain from performing pre-1972 sound recordings, which would interfere with

[12] Indeed, Sirius XM is *required* by FCC regulations to transmit the same programming to all of its subscribers in the 48 contiguous states. 47 C.F.R. § 25.144(a)(3)(1), § 25.144(e)(4) (2014).

their First Amendment rights to communicate with listeners who live outside of California. A radio station located in Mobile, Alabama, could not broadcast pre-1972 sound recordings to listeners in Alabama without violating Florida law. As the Ninth Court recently recognized in *Sam Francis Foundation v. Christie's, Inc.*, 784 F.3d 1320 (9th Cir. 2015) (*en banc*), application of a state law to transactions located wholly outside of the state violates the dormant Commerce Clause. *See also Whiteman*, 114 F.2d at 89-90 (refusing to issue an injunction based on Pennsylvania law, because broadcast signals could not be confined to Pennsylvania); Bard & Kurlantzick, 43 Geo. Wash. L. Rev. at 157 ("since radio and television broadcasters are the predominant public performers of recorded music[,] the disruption of interstate commerce attributable to state recognition of a record public performance right would be considerably more severe than that to be expected from state anti-piracy legislation.").

CONCLUSION

As the district court in the companion case in New York acknowledged, "the conspicuous lack of any jurisprudential history confirms that not paying royalties for public performances of sound recordings was an accepted fact of life in the broadcasting industry for the last century." *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 62 F. Supp. 3d 325, 340 (S.D.N.Y. 2014). Imposing an obligation to pay such

royalties now, retroactively, on a state-by-state basis, would be incredibly disruptive to the broadcast industry, and would improperly extend Florida law outside of the borders of Florida. If such a drastic change in the *status quo* is to occur, it should be done prospectively, on a nationwide basis, by Congress, as the Register of Copyrights has recommended. Report of the Register of Copyrights, *Federal Copyright Protection for Pre-1972 Sound Recordings* (Dec. 2011). Plaintiffs' frustration with Congressional inaction is not a sufficient reason to recognize public performance rights under Florida common law retroactively, eight decades after broadcasting was invented.

Respectfully submitted,

Dated October 13, 2015

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and Fed. R. App. P 32(a)(7)(b)(ii) because this brief contains 6,071 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25, I certify that, on this 13th day of October, 2015, I have served a copy of the foregoing documents electronically through the Court's CM/ECF system on all registered counsel who consented to such service.

I further certify that, on this 13th day of October, 2015, I served an electronic copy of the foregoing documents on the following counsel by e-mail, having obtained prior consent from them to serve copies by e-mail:

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