IN THE SUPREME COURT OF FLORIDA

CASE No. SC16-1161

FLO & EDDIE, INC., et al,

Appellant,

v.

SIRIUS XM RADIO, INC., et al.,

Appellees,

ON CERTIFIED QUESTIONS FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT CASE NO. 15-13100

BRIEF OF *AMICUS CURIAE* ELECTRONIC FRONTIER FOUNDATION IN SUPPORT OF APPELLEES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

Legislative Materials

Other Authorities

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus Electronic Frontier Foundation is a nonprofit civil liberties organization that has worked for more than 26 years to protect consumer interests, innovation, and free expression in the digital world. EFF and its tens of thousands of active donors have a strong interest in ensuring that copyright law serves the interests of creators, innovators, and the general public. As part of its mission, EFF has often served as *amicus* in key copyright cases, including *Golan v. Holder*, No. 10-545 (U.S. Supreme Court, filed June 21, 2011, on behalf of the American Library Association and other *amici*); *Kirtsaeng v. John Wiley & Sons, Inc.*, No. 11-697 (U.S. Supreme Court, filed July 9, 2012); *Capitol Records, LLC v. Vimeo, LLC*, No. 14-1048-cv(L) (2d Cir., filed July 30, 2014); *Viacom Int'l Inc. v. YouTube, Inc.*, No. 13-1720-cv (2d Cir., filed Nov. 1, 2013); *Vernor v. Autodesk, Inc.*, No. 09-35969 (9th Cir., filed Feb. 11, 2010); and *Perfect 10, Inc. v. Google, Inc.*, No. 06-55406 (9th Cir., filed July 20, 2006). EFF has a particular interest in a balanced copyright system that protects technological innovation and competition from the chilling effects of legal uncertainty and from outcomes that entrench incumbent businesses. Unlike the parties to this case, EFF represents the interests of small innovators, who often lack the resources to litigate in federal court.

No party's counsel authored this brief in whole or in part, and neither any party, nor any party's counsel, contributed money towards the preparation of this brief. No person other than *amicus*, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

In this certified question, the Court is being asked to create new exclusive rights under Florida common law copyright—in particular, an exclusive right of public performance in sound recordings made before February 15, 1972. Public performance rights for sound recordings are a rarity in the United States, and for good reason: they are complicated to administer and prone to anti-competitive abuse. At the federal level, where most copyright law resides today, Congress has created only a limited public performance right, with government-administered statutory licenses to deter abuse. This case, in contrast, is a blunt instrument of policymaking. Judicial creation of a new exclusive right for works that have been publicly performed without restriction for more than 40 years will put Florida at odds with federal policy and that of most other states, complicating the business of digital music delivery. Accommodating the numerous stakeholders and interests involved is a task for the legislature, not the courts.

Creating a new public performance right would also tend to entrench the dominant position of large, incumbent music services like appellee Sirius XM Radio, Inc. Without a legislative framework for gaining access to a catalog of copyrighted recordings, only large services will be able to

negotiate access, either privately or as part of a court-supervised class action settlement.

This Court should follow the example of federal law, which has grappled extensively with the rise of digital music services, by declining to create a broad new right of public performance in sound recordings.

ARGUMENT

A. Federal Law Has Never Recognized a General Public Performance Right in Sound Recordings.

Since the federal Copyright Act of 1976 preempted state copyright law for the vast majority of creative works, copyright jurisprudence has occurred primarily at the federal level. Even before that Act went into effect, the protection of *published* works was primarily under the domain of federal copyright law. And at the federal level, no general public performance right in sound recordings has ever been recognized or created. In fact, Congress recognized no rights in sound recordings whatsoever between 1909 and 1971. *See Performance Rights in Sound Recordings: Subcomm. On Courts, Civ. Liberties, & the Admin. Of Justice of the H. Comm. On the Judiciary*, 95th Cong., 29-52 (Comm. Print 1978).

When Congress first extended copyright protections to sound recordings in 1971, it declined to include a right of public performance. Sound Recording Act of 1971, Pub. L. No. 92-140 § 1(a), 85 Stat. 391

("SRA of 1971") (SXM Vol. 1, Doc. 81- 16). The legislative history of that Act explained that the purpose of the "limited copyright" was "protecting against unauthorized duplication and piracy of sound recordings . . . ." *See* 117 Cong. Rec. 2002 (daily ed. Feb. 8, 1971) (Add-5). Congress sought to bring uniformity to the patchwork of "record piracy" laws and eliminate the confusion between proliferating state laws on the issue. *See* S. Rep. No. 92-72, at 4 (1971) (Add-107); H.R. Rep. No. 92-487, at 2-3 (1971).

The 1971 Sound Recording Amendment, which only applies to sound recordings made on or after February 15, 1972, provided only limited rights with respect to those sound recordings. Its principal provision was to grant sound recordings a reproduction right equivalent to that provided for other works of authorship, and the right to reproduce was "limited to the right to duplicate the sound recording in a tangible form that directly or indirectly recaptures the actual sounds fixed in the recording." *See id.* It created no right of public performance. *See also* 17 U.S.C. § 114. The Act created a limited copyright sound recordings that protected against unauthorized *copying* and *distribution* only. Pub. L. No. 92-140, 85 Stat. 391 (1971).

In 1995, Congress created a limited digital public performance right in post-February 1972 sound recordings under federal law. Digital Performance Right in Sound Recordings Act, Pub. L. No. 104-39, 109 Stat. 336. Its

purpose was to alleviate the "effects" that "new technologies" had on the recording industry. *See* H.R. Rep. No. 104-274, at 12. That right covers only performances via "digital audio transmission," and is subject to a statutory license for many radio equivalents, including Sirius XM's satellite radio service. *See* 17 U.S.C. § 114 (d)(2).

Given that copyrights in most works of authorship are in the exclusive domain of federal law, and that federal law has never conferred a general right of public performance in sound recordings, the near-total absence of state law copyright precedent on the question of public performance rights in recorded music is no mystery.

B. Florida Law Should Look To Federal Law As a Guidepost, By Declining To Recognize a General Right of Public Performance in Sound Recordings.

Florida law should be interpreted consistently with well-developed federal law, because federal law is the only body of law in the United States that has thoroughly addressed the issue of digital audio performances. Because digital audio services cross state lines (and indeed, national borders), divergence from federal policy in this area raises complex jurisdictional and economic problems.

The United States Copyright Office observed in a report to Congress that "uniform national application has been a hallmark of copyright law

since the first copyright law was enacted in 1790." *Federal Copyright Protection For Pre-1972 Sound Recordings: A Report of the Register of Copyrights* 82 (H.R. 1105; Public Law 111–8) (December 2011), *available at* http://www.copyright.gov/docs/sound/pre-72-report.pdf. The report noted that "sound recordings in 1976 became the single inconsistency in what was intended to be a seamless national system of copyright protection." *Id.* The Office's recommendation was for Congress to bring pre-1972 recordings under exclusive federal copyright. *Id.* at 175. The same policy concerns should lead this Court to interpret Florida common law consistently with Federal law by declining to recognize an unqualified right of public performance in sound recordings.

C. Creating New Rights Under Copyright Should Be Left to the Legislature.

In its order in this case, the United States District Court for the Southern District of Florida mentioned that Florida Statutes § 540.11, which governs the unauthorized copying of sound recordings, is the only time the Florida legislature specifically addressed the issue of ownership rights in sound recordings. *See Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, No. 13-23182-CIV, 2015 WL 3852692, at *8 (S.D. Fla. July 13, 2015). The relevant section of § 540.11 specifically excludes broadcast radio. Fla. Stat. § 540.11(6)(a) ("This section does not apply: (a) To any broadcaster who, in

connection with, or as part of, a radio, television, or cable broadcast transmission, or for the purpose of archival preservation, transfers any such sounds recorded on a sound recording."). Therefore, it can be inferred that the law exempts radio broadcasters from the restrictions on copying sound recordings. Under this reading of the statute, Flo & Eddie does not have the exclusive right of reproduction in its sound recordings as against Sirius XM. Furthermore, Flo & Eddie has not been able to point to a single Florida case that recognizes a performance right in pre-1972 sound recordings. *See Flo & Eddie, Inc.*, 2015 WL 3852692, at *8. This is because neither Florida legislation nor Florida case law has ever granted an exclusive right of public performance in sound recordings. *See id.* Rather, Florida's common law copyright jurisprudence creates only a limited common law right to restrict first publication; nothing more. *Glazer v. Hoffman*, 16 So. 2d 53, 55 (Fla. 1943) (Florida's common law copyright protects only the right to first publication, and does not provide rights once a work has been dedicated to the public by public performance); *see also* 35 Fla. Jur 2d Literary Property § 1 ("[C]ourts have stated that the only right an author has under the common-law copyright is the right of first publication.").

As the Supreme Court has explained, "Copyright protection has never accorded the copyright owner complete control over all possible uses of his

work," *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 432 (1984). Rights not granted to rightsholders remain with the public.

Flo & Eddie asserts that the 1977 repeal of Section 543.02, Florida Statutes, somehow restored a common law performance right that had never previously been recognized. The legislative history of that repeal shows no such intent. Rather, the statute was repealed because it was duplicative of federal antitrust law. *Florida H.R. Staff Report for HB 1780*, at 2 (Apr. 27, 1977). In fact, the legislative history shows that the legislature acknowledged that "the owners of the rights to music fixed before February 15, 1972 will not be protected under any law, state or Federal." *Id.*

In this case, the U.S. District Court for the Southern District of Florida correctly held that the issue of whether copyright protection for pre-1972 sound recordings should include the exclusive right of public performance should be decided by the Florida legislature. *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, No. 13-23182-CIV, 2015 WL 3852692, at *5 (S.D. Fla. June 22, 2015). A finding in favor of Flo & Eddie on the certified questions would effectively invent brand new rights under Florida law: a general, exclusive right of reproduction and public performance in all sound recordings that are subject to state law. If this Court creates new rights, it would leave more questions unanswered than answered. For example, will the recording

owners share the royalties with the artists? If so, how will royalties be distributed? Administrative questions such as these could potentially lead to an increase in the costs consumers of these sound recordings pay, and limit the public's exposure to these recordings. Creating a new performance right would affect the broadcasts of hundreds of AM and FM radio stations (both in Florida and elsewhere), thousands of internet radio stations, and tens of thousands of restaurants, cafés, and others who use recorded music.

The common law must evolve incrementally to avoid encroachment on the legislative branch. In *Hoffman v. Jones*, discussing a statutory section which codified common law, this Court stated that "[a]s a general rule, that part of the common law . . . should be changed through legislative enactment and not by judicial decision. Only in very few instances and with great hesitation has this Court modified or abrogated any part of the common law codified by section 2.01." 280 So. 2d 431 (Fla. 1973). Expanding on *Hoffman*, this Court later held that, "adding to the statutory remedies by modifying or abrogating the common law without any meaningful consideration of legislative intent violates the Restatement and the precedent of this Court that recognizes the judiciary's limited policymaking role in our form of government." *See Florida Dept. of Corrections v. Abril*, 969 So. 2d 201, 222 (Fla. 2007). Creation of a new right of public performance would

be a drastic change to existing law, one that should be done, if at all, by the legislature.

Additionally, when the federal Congress first created a public performance right for post-1972 sound recordings, it made a number of complex policy decisions such as providing statutory licenses and a rate-setting tribunal for digital radio; apportioning royalties among rightsholders, musicians and vocalists; and limiting the performance right with specific statutory defenses. *See, e.g.*, 17 U.S.C. § 114. Nuanced policy decisions like these are best made by the legislature. The Court, deciding an individual case, is ill-equipped to make policy decisions that will necessarily follow from the creation of a new right. For Sirius XM to engage in public performance of pre-1972 sound recordings, it will probably need licenses for the rights in the underlying musical compositions akin to the ones it obtains for post-1972 sound recordings from performance rights organizations, which include ASCAP, BMI, and SESAC. Additionally, it must also obtain licenses for the public performance of pre-1972 sound recordings like it does for post-1972 sounds recordings. *See* 17 U.S.C. § § 112, 114. For other copyrighted works, comparable licensing mechanisms took decades, and repeated litigation, to coalesce:

> ASCAP and the blanket license developed together out of the practical situation in the marketplace: thousands of users,

> thousands of copyright owners, and millions of compositions. Most users want unplanned, rapid, and indemnified access to any and all of the repertory of compositions, and the owners want a reliable method of collecting for the use of their copyrights. Individual sales transactions in this industry are quite expensive, as would be individual monitoring and enforcement, especially in light of the resources of single composers. Indeed . . . the costs are prohibitive for licenses with individual radio stations, nightclubs, and restaurants, and it was in that milieu that the blanket license arose.

Broadcast Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 20 (1979). When Congress created public performance rights for digital audio transmissions of post-1972 sound recordings, it realized the problems licensees would face in contracting with a number of different rights holders as well as the risk of collusive behavior. Congress's solution to this problem was to empower collective licensing through a rights organization. *See* About, SoundExchange, *available at* http://www.soundexchange.com/about (last visited Nov. 22, 2016).

Creating a new public performance right through this case would create similar licensing difficulties and possible collusive behavior. The district court acknowledged this problem when it said if it were to "recognize and create" a new performance right "many unanswered and difficult regulatory issues" would linger, such as "(1) who sets and administers the licensing rates; (2) who owns a sound recording when the owner or artists is deader the record company is out of business; and (3)

what, if any, are the expectations to the public performance right." *Flo & Eddie, Inc.*, 2015 WL 3852692, at *5.

In order to prevent these administrative problems, new performance rights should only be created, if at all, after careful consideration and deliberation by the legislature.

D. Copyright Law Should Not Be Expanded Unless There Is a Need for More Incentives for Artistic Creation.

Article I, Section 8 of the United States Constitution states the purpose of copyright law: "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Historically, copyright is intended to encourage the spread of knowledge and culture by creating incentives for artistic production while minimizing monopoly control over these products. In fact, the British Statute of Anne, the first modern copyright law, was prefaced "[a]n Act for the Encouragement of Learning." *See* the Statute of Anne, 8 Ann., c. 19 (1710); *see also* Thomas Babington Macaulay, *First Speech to the House of Commons on Copyright* (Feb. 5, 1841) (*available at* http://www.thepublicdomain.org/2014/07/24/macaulay-on-copyright/) ("[M]onopoly is an evil. For the sake of the good we must submit to the evil; but the evil ought not to last a day longer than is necessary for the purpose of securing the good.").

Courts and legislators have generally refused to expand copyright law absent some showing that greater incentives for creation are required, and then only to the extent needed to create such incentives. *See Golan v. Holder*, 132 S. Ct. 873, 887 (2012). Federal law only recognized a copyright in sound recordings after the sale of recorded music had become a major, if not primary, source of income for musicians, and the copyright for those sound recordings did not include a right of pubic performance. *See* H.R. Rep, 92-487, at 2-3 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1566, 1567.

A finding in favor of Flo & Eddie here creates no such incentives, because new sound recordings are governed by federal law exclusively. Thus, to the extent that copyright law is expected to create incentives to disseminate new work, no such incentives are created here. Sirius XM and other internet radio and satellite broadcasters have a long history of playing pre-1972 sound recordings for their listeners. And, if Florida common law is made to include a right of public performance, that function would be greatly harmed. Additionally, the broadcasts of hundreds of AM and FM radio stations including high school, college, and religious broadcasters, along with thousands of Internet radio stations which play in restaurants, cafes, and other music venues will be affected.

E. Expansions of Copyright Are Historically Coupled with Limitations.

Finding in favor of Flo & Eddie on the certified questions would expand the scope of copyright in sound recordings far broader than any that Congress and the Florida legislature have fashioned. This would make it inconsistent with historical practice as well as legislative intent.

Traditionally, the bundle of rights comprising copyright has been limited to specific categories. For example, when Congress passed the first U.S. copyright statute in 1790, it limited protection to particular narrow categories of works and similarly granted narrow exclusive rights over those works. *See* Act of May 31, 1790, ch. 15, 1 Stat. 124 (repealed 1831) (granting copyright only to books, maps, and charts, and only for a set of four exclusive rights conditioned on compliance with formalities). Over the years, the scope of what is considered copyrightable has expanded, but concurrently, courts and legislatures have recognized limits on those rights in order to preserve the public benefits of the law. *See, e.g.,* Act of Feb. 3, 1831, ch. 16 § 1, 4 Stat. 436, 436 (repealed 1870) (granting a copyright in musical compositions, but not granting a right of public performance of those compositions).

Expanding public performance rights involves balancing the rights of recording artists, broadcasters, and the public, taking into account the

broader impacts of new technologies. *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) ("[I]t is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors or to inventors in order to give the public appropriate access to their work product."); *see also Authors Guild v. Google, Inc.*, 770 F. Supp. 2d 666, 680 (S.D.N.Y. 2011) (Chin, J) ("The Supreme Court has recognized that courts should encroach only reluctantly on Congress's legislative prerogative to address copyright issues presented by technological developments."); *see also Eldred v. Ashcroft*, 537 U.S. 186, 187 (2003).

Therefore, for example, expansion of copyright to cover secondary transmissions of TV signals was coupled with a statutory license, as was expansion of federal copyrights in sound recordings to cover performances by digital transmission. Copyright Act of 1976, Pub. L. 94-553, 90 Stat. 2541 (Oct. 19, 1976); Digital Performance Right in Sound Recordings Act, Pub. L. No. 104-39, 109 Stat. 336 (Nov. 1, 1995). In 1980, with the emerging consensus that copyright applied to computer software, Congress created an exemption for certain reproductions that are essential for the normal operation of software. Computer Software Copyright Act, Pub. L. No. 96-517, 94 Stat. 3015 (Dec. 12, 1980). As early as 1909, Congress

coupled an expansion of copyright to mechanical reproductions of music with a statutory mechanism for obtaining such rights. Copyright Act of 1909, Pub. L. 60-349, 35 Stat. 1075 (Mar. 4, 1909).

When the Florida legislature enacted various copyright statutes, including Fla. Stat. § 540.11 (2015), it was surely aware of this history. The district court's decision to refuse to expand the parameters of copyright law in this case to create a new common law right of public performance is consistent with this history where grants of rights under copyright are enacted concurrently (or close to concurrently) with explicit limitations on those rights.

F. Creating a New Right of Public Performance Will Give Larger, Established Businesses an Unfair Advantage over Newer, Smaller Ones, Distorting Competition and Harming Innovation.

If this Court creates a new public performance right for pre-1972 sound recordings, collusive behavior and licensing difficulties will likely result from the creation of this new right. The federal district court in this case recognized these problems. *Flo & Eddie, Inc.*, 2015 WL 3852692, at *5. A new, unlimited right of public performance on works that are more than 40 years old will more likely than not chill new innovations in music broadcasting and distribution. New businesses that seek to use sound recordings will face immense transaction costs and uncertainty from the

creation of a general public performance right. A decision in favor of Flo & Eddie will leave no effective way to license pre-1972 sound recordings because the mechanisms for doing so have never existed. And with the creation of new rights in law comes the risk of litigation. This has the potential to chill innovation. Without a statutory license, the only effective way to collectively license the new rights would likely be through additional litigation. With this risk of added litigation, small innovators with fewer resources compared to bigger businesses will be deterred from entering the market.

If this Court rules in favor of Flo & Eddie and creates a new right of public performance, it will place larger broadcasters such as Sirius XM in a privileged position. Sirius and those with available resources for litigation will be able to negotiate licenses for the public performance of broad catalogs of recordings, while smaller entities may be left behind. Any agreement between Sirius XM and the proposed plaintiff class in this lawsuit risks giving Sirius XM (and other large incumbent music services) a de facto monopoly over digital transmissions of pre-1972 recordings, an advantage that could be leveraged into additional market power over the delivery of newer recordings as part of a comprehensive music service. Under similar circumstances, the U.S. District Court for the Southern District of New York

rejected a proposed class action settlement between Google and a class of authors over the Google Books service. *Authors Guild v. Google, Inc.*, 770 F. Supp. 2d 666, 682 (S.D.N.Y. 2011). The court concluded that the proposed settlement of copyright claims involving thousands of works would have given Google the power to lock out competitors in the Internet search market. *Id.* A similar danger is present here. Any settlement of this case following a decision in favor of Flo & Eddie is likely to place Sirius XM in a dominant position in the market for digital recording delivery, locking out new competitors who could create new markets for creative work and expand access to culturally important recordings.

CONCLUSION

A finding in favor of Flo & Eddie on the certified questions would create new rights under common law copyright that have never before existed. This should be done, if at all, by the legislature. The example set by federal copyright law, which has wrestled with the proper application of copyright to digital transmissions since their inception, counsels restraint here. New rights under copyright should be justified by the need for incentives, and limited appropriately to create such incentives while preserving access and entrepreneurship. Only the legislature is equipped to address those wide-ranging policy questions. This Court should defer by

declining to create a right of public performance of sound recordings under state common law.

Dated: November 28, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing was served on November 28, 2016 to all parties listed below. Service was by email to all parties not exempt from Rule 2.516 Fla. R. Jud. Admin. at the indicated email address on the service list, and by U.S. Mail to any other parties:

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