CASE NO. SC16-1161

IN THE FLORIDA SUPREME COURT

FLO & EDDIE, INC.,

Plaintiff-Appellant,

v.

SIRIUS XM RADIO, INC.,

Defendant-Appellee.

On Certified Questions from the United States
Court of Appeals for the Eleventh Circuit
Case No. 15-13100

CORRECTED BRIEF *AMICI CURIAE* OF COPYRIGHT AND INTELLECTUAL PROPERTY LAW PROFESSORS IN SUPPORT OF DEFENDANT-APPELLEE SIRIUS XM RADIO, INC.

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IDENTITIES AND INTEREST OF *AMICI CURIAE*

Amici curiae, whose names and institutional affiliations are listed in the Appendix, are professors who teach and write about intellectual property law. *Amici* have an interest in 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 question whether there should be 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.

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 United States Court of Appeals for the Second Circuit ruled that no such right existed or could be enforced under New York law. After the United States Supreme Court denied *certiorari*, a broad consensus developed that broadcasters were free to play sound recordings without paying royalties to the performers or record companies.

During the past seven decades, proponents have repeatedly lobbied Congress to enact a public performance right for sound recordings. In doing so, they acknowledged that they did *not* currently have any such rights, either under 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 for the first time a public performance right in sound recordings under Florida law. Were the Court to side with Plaintiffs, its ruling would effectively extend Florida law to apply far beyond state borders, as broadcasters cannot limit their broadcasts to within the borders of Florida. The question whether public performance rights for sound recordings are to be recognized is best left for Congress to decide on a nationwide 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 (codified in 1947 at former 17 U.S.C. §10). If a work was published without proper notice, it immediately entered the public domain, such that it could be copied (and publicly performed) without restriction. *See National Comics Pubs., Inc. v. Fawcett Pubs., Inc.*, 191 F.2d 594, 598 (2d Cir. 1951) ("publication of a copyrightable 'work' puts that 'work' into the public domain except so far as it may be protected by [federal statutory] copyright."); *Fleischer Studios, Inc. v. Ralph A. Freundlich, Inc.*, 73 F.2d 276, 277

(2d Cir. 1934) ("publication without such notice amounts to a dedication to the public sufficient to defeat all subsequent efforts at copyright protection.").

State law provided only a common-law exclusive right to publish (reproduce and distribute) a work. Once the work was published, 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 considered "published" when copies of it 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).

Whether distribution of a work in the form of a "phonorecord" similarly divested common-law copyright protections remained in dispute for many years. Some courts held that distribution of phonorecords containing sound recordings of musical works divested the common-law copyright protection of the musical works contained in the recordings. *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 narrowly defined a "copy" of a musical work as "a written or printed record of it in intelligible notation," *White-Smith Music Pub. Co. v. Apollo Co.*, 209 U.S. 1, 17 (1908), held that distribution of "phonorecords" containing sound recordings of musical works did *not* amount to publication of the musical works. *Rosette v. Rainbow 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 adopted the latter view. *See* 17 U.S.C. § 303(b). Unlike a musical work, however, a sound recording can *only* be perceived through hearing, rather than by sight. Thus, there is no persuasive reason why the definition of publication that applies to musical works (limited to public distribution of "copies" of the work) 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. As such, a state remains free to hold that public distribution of phonorecords completely or partially divests a state common-law copyright in those recordings.

II. For 75 Years, It Has Been 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 the 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) ("Parks"). Initially, a common-law right of public performance was recognized under Pennsylvania law. *See Waring v. WDAS Broadcasting System*, 194 A. 631 (Pa. 1937). A federal district court predicted that North Carolina law would follow suit. *Waring v. Dunlea*, 26 F. Supp. 338 (E.D.N.C. 1939). But in 1940 the Second Circuit decided *RCA Mfg. Co. v. Whiteman*, 114 F.2d 86 (2d Cir. 1940), *cert. denied*, 311 U.S. 712 (1940), in Judge Learned Hand, writing for the court, questioned whether a common-law right of public performance existed, and held that if such a right did exist, it would be divested when a sound recording was first sold to the public, even though some phonorecords were labelled "Not Licensed for Radio Broadcast." 114 F.2d at 88.

Although *Whiteman* technically addressed only New York law, "when the Supreme Court refused to hear the case . . . 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*."). So "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. Their efforts failed. Indeed, by the 1950s, record companies were paying 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 in later New York cases, particularly *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 defendant recorded broadcast performances and sold records containing the recordings. The New York Supreme Court entered an injunction, which the Appellate Division affirmed, on the ground that a broadcast of a live performance was not a "publication" of the performance, and therefore the common-law right in such performances was preserved. 101 N.Y.S.2d at 498-99. That holding 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. Unlike *Whiteman* and this case, *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 that were lawfully made and sold to the general public.

Capitol Records, Inc. v. Mercury Records Corp., 221 F.2d 657 (2d Cir. 1955), is similarly distinguishable from *Whiteman* and this case. That case involved competing claims to reproduce and distribute in the U.S. recordings made in Germany. The Second Circuit held that: (1) sound recordings were not eligible for a federal statutory copyright under the 1909 Copyright Act, *id.* at 659-62; (2) as between the two parties, Capitol Records had the right to reproduce and sell the recordings in the U.S., *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. 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 stated that "the quoted statement from the *RCA* case is not the law of the State of New York." *Id*. It reasoned that under *Metropolitan Opera*, "where the originator, or the assignee of the originator, of records of 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).

As the emphasized language indicates, *Capitol Records v. Mercury Records* involved only "the right to copy and sell" recordings that had been lawfully made. The court did not address whether the common-law property right in such recordings includes a public performance right. *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, *Capitol Records* overruled *Whiteman* in its entirety, such that they had enforceable common-law public performance rights in sound recordings in New York, why would recording companies have publicly complained for six decades afterward that they did *not* have such right? Their vehement public protests about the unfairness of lacking such a right belies Plaintiffs' contention that such a right already existed.

Capitol Records, Inc. v. Naxos of America, Inc., 797 N.Y.S.2d 352 (2005), similarly did not involve public performance, but rather Capitol's right to prevent Naxos from *reproducing and selling recordings* that had been released to the public. The specific 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. *Id.* at 366-67. But the *Naxos* court said nothing about whether the state common-law right in sound recordings includes a right of public performance.

In fact, until trial court decisions were issued last year in companion cases in New York and California, no known U.S. court had recognized a common-law public performance right in pre-1972 sound recordings since *Whiteman* was decided more than 75 years ago. And the lack of a public performance right under state law is further confirmed by the long history of record companies seeking (unsuccessfully) to convince Congress to enact such a right.

III. Proponents Have Repeatedly Denied The Existence of Public Performance Right 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 to create such rights were proposed and 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 creation of such a right, and many opposed it, the one thing on which they all agreed 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 existed under state law, it would have been absurd for so many sophisticated people to spend so much effort lobbying for and against a public performance right under federal law.

In 1971, as a condition of receiving federal copyright protection against unauthorized duplication and sale of recordings made on or after February 15, 1972, record companies grudgingly accepted that such federal protection would *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 that they had a right of public performance under state law, it is highly doubtful that they would have accepted a federal law that effectively 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* Register of Copyrights, *Performance Rights in Sound Recordings* 3-7 (June 1978); Register of Copyrights, *Copyright Implications of Digital Audio Transmission Services* 156-57 (Oct. 1991); 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. Register of Copyrights, *Federal Copyright Protection for Pre-1972 Sound Recordings* (Dec. 2011). Summarizing the legal landscape 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 has arisen, recording industry executives have testified that they had no existing right to collect royalties for unauthorized public performances. 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 . . . 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).[1] That same year, Jazz pianist Stan Kenton 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.

Similarly, in 1978, Barbara A. Ringer, Register of Copyrights, testified that: "Broadcasters and other commercial users of recordings have performed them without permission or payment for generations." Performance Rights in Sound Recordings, Hearings 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 complained in a statement: "Under existing law, broadcasters pay the composer and publisher

[1] Capitol's president gave this testimony 12 years after Plaintiffs say *Capitol Records v. Mercury Records* overruled *Whiteman*. If Plaintiffs were correct, Capitol would have *already* entitled under state law to demand compensation.

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." Register of Copyrights, *Performance Rights in Sound Recordings* 726 (June 1978).

And 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." 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.[2] The AFL-CIO, American Federation of Musicians, and 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.

If Plaintiffs' contention were to be accepted, one would need to believe that all of these witnesses testified before Congress with their fingers crossed behind their backs, silently thinking: "When I testified about the injustice of recording

[2] 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.

artists and record companies not receiving compensation for public performances of sound recordings, I was only complaining about the lack of a federal right. Such a right exists, and has always existed, under state law. But we simply chose not to enforce our state-law rights, even though those rights are so important." That notion is highly implausible.

In reality, for 75 years, performers and record companies accepted *Whiteman* as the law. That is why they have repeatedly testified before Congress that they lack a public performance right in sound recordings and pleaded with Congress to change that. With one limited exception, Congress has resisted all invitations to enact a public performance right in sound recordings. It is only dissatisfaction with Congress's judgment that has led sound recording copyright owners to try to convince the federal district court, and now this Court, to recognize for the first time a public performance right under Florida 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.

The Florida Legislature has left no doubt about where it stands regarding the *Whiteman* case. In 1941, the Florida Legislature enacted Senate Bill No. 268, ch. 20868 (codified at Florida Statutes §§543.02 and 543.03), which disavowed any purported common-law right in recorded performances and any attempt to collect royalties for the public performance of those recorded performances:

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 the language of these 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, which was specifically designed to overturn the *Waring v. Dunlea* decision in that state.[3] It is undisputed that there was no decision recognizing such a common-law right under Florida law.

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 §§543.02 and 543.03

[3] *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.

were repealed in 1977, the Florida Legislature intended to revive (or create) a common-law right of public performance that had never been recognized to exist under Florida law. Yet if that was what the Legislature intended, one would expect it to have said so, and record companies and performers to have tried 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 had ever existed in Florida. It was not only former Florida Statutes §§543.02 and 543.03 that the Florida Legislature repealed in 1977, but rather all of chapter 543 except for former Florida Statutes §543.041, which was retained, amended, and renumbered as Florida Statutes §540.11. Why was the bulk of the chapter repealed? Because, after enactment of the 1976 Copyright Act, "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 was one section retained and amended? 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 the *only* protection for sound recordings in Florida was statutory. Section 540.11, the section that was amended

and retained, prohibits only the duplication and sale of sound recordings, and does *not* provide any exclusive right of public performance. Indeed, §540.11(6)(a) expressly authorizes broadcasters to make copies as necessary for their broadcasts.

It would be inconsistent with the long settled understanding of Florida law for this Court now to recognize a public performance right under Florida common law for pre-1972 sound recordings. 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 existed, it would have been unnecessary to retain and amend former §543.041. And despite recognizing that it was up to state law to protect sound recordings fixed before February 15, 1972, it chose to retain *only* a statutory right to prohibit duplication and sale of such recordings. The Legislature could have enacted a public performance right at the time, but it did not. It may have repealed an express prohibition on recognizing of such a right, but it did so only because it though the prohibition no longer necessary due to Federal law's denial of a public performance right in sound recordings. 17 U.S.C. § 114(a).

This Court's decision in *Glazer v. Hoffman*, 16 So.2d 53 (Fla. 1943), confirms that there is no common-law right of public performance after a work has been "published." *Glazer* involved an alleged common-law right to publicly perform a magic act. This Court held that "an owner of literary or intellectual property terminates his private interest or common law rights by publication,

which operates as a dedication and termination of his private rights," 16 So.2d at 55, and that the plaintiff had "published and dedicated to the public by his several public acts and performances before the public, and thereafter immediately the trick or stunt became the property of the general public, and the defendant below had a lawful right to use the same." *Id*. The injunction was limited to the "address" or "patter" that was protected by a *federal statutory copyright*,[4] and the trade name "Think-a-Drink Count Maurice"; no part of the alleged common-law copyright in the magic act was sustained. *Id.* at 56. Under *Glazer*, Flo & Eddie's alleged common-law rights in its sound recordings ended when phonorecords were made and sold to the public.

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

If this Court were to recognize a public performance right under Florida law, its ruling logically could not be limited to digital audio transmission. Every broadcaster whose signal can be received in Florida would be obligated to pay royalties to sound recording copyright owners, for the first time in their history. But broadcast signals cannot be confined to the borders of a particular state, and broadcasters are unable to tailor their signal so that it reaches only listeners who

[4] "[T]he performance was preceded by an 'address' written or produced by the plaintiff, which was on March 18, 1938, copyrighted to Charles Hoffman . . . by the registrar of copyrights . . . under certificate numbered 9515." 16 So.2d at 54.

live outside of Florida.[5] In order to comply with Florida law, broadcasters would be required simply to refrain from performing pre-1972 sound recordings, implicating First Amendment rights to communicate with listeners who live outside of Florida. 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.

CONCLUSION

It has been "an accepted fact of life in the broadcasting industry for the last century" that no publication right exists. *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 62 F. Supp. 3d 325, 340 (S.D.N.Y. 2014). Imposing state law obligations to pay royalties now would be disruptive to the broadcast and recording industries, and would extend Florida law far beyond state borders. If such a drastic change in the *status quo* is to be made, it should only be made by Congress.

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

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I certify that, on this 19th day of December, 2016, I have filed the foregoing documents electronically through the Florida Courts e-filing Portal, which will serve a copy on all e-mail addresses designated by counsel who have appeared in this action.

s/ Daniel A. Bushell
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief satisfies the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure. It was typed in Times New Roman, 14 Point.

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