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* ENTERTAINMENT, ARTS, AND SPORTS LAW SECTION OF THE FLORIDA BAR IN SUPPORT OF FLO & EDDIE, INC.

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STATEMENT OF AMICUS CURIAE

The Florida Bar Entertainment, Arts, and Sports Law Section ("EASL") is a voluntary association of more than 1,000 members of The Florida Bar. EASL provides a forum for members to share in the technical and legal knowledge which relates to the entertainment, arts, and sports law industries, and to provide a standard and goal-setting mechanism to improve the practice of entertainment, arts, and sports law by Florida lawyers.

EASL is interested in the instant matter because its membership has numerous clients who own pre-1972 sound recordings and who will be affected by the Court's ruling.

The filing of this brief was reviewed and approved by the Executive Committee of the Board of Governors of The Florida Bar on September 27, 2016, consistent with applicable standing Board policies. It is tendered solely by the EASL Section–not in the name of The Florida Bar—and supported by the separate resources of this voluntary organization without implicating the mandatory membership fees paid by any Florida Bar licensee.

This brief addresses the first two questions certified to this Court by the 11th Circuit Court of Appeals: the existence of common law copyrights in Florida and divestive publication.

SUMMARY OF THE ARGUMENT

Florida common law provided copyright protection to sound recordings from their inception until 1941, and then again from July 1, 1977, to the present day. That common law copyright protection traces its heritage to 16th and 17th century England. There, with the increasingly commercial use of the printing press developed in the 15th century, courts recognized an author's right to be paid by a publisher for the author's writings. This English common law became part of the legal fabric of Florida in its birth into statehood in 1845.

Nearly a century later, in 1941, responding to union-backed injunctions in Pennsylvania and North Carolina against radio stations playing sound recordings of big band performances without payment, the Florida Legislature repealed all common law rights in sound recordings with new sections 543.02 and 543.03, Florida Statutes. The Legislature would not have explicitly repealed common law rights in sound recordings if those rights did not exist.

Responding to an overhaul of the federal Copyright Act that took effect on January 1, 1978, the 1977 Florida Legislature repealed Chapter 543, effective July 1, 1977. That federal overhaul, however, expressly reserved protections of sound recordings made prior to February 15, 1972, to the common law of each state.

The 1977 repeal of Chapter 543 returned common law copyright protections to sound recordings in Florida. Those protections continue to this day and require Sirius XM to pay for publicly performing Flo & Eddie's pre-1972 sound recordings.

Publication does not divest common law copyright owners of sound recordings of their rights. The jurisprudence of "publication" contemplates a passing of common law copyright protections to federal statutory copyright protections at the moment of the first sale to the public; however, because pre-1972 sound recordings enjoy no federal statutory copyright protection, there is no passing of protections and, hence, no divesting of the common law copyright.

ARGUMENT

I. Florida's History Confirms a Common Law Copyright in Sound Recordings Exists Today.

a. A "Page" of Common Law History[1]

Florida can trace its common law copyright ancestry to the development and expanded use of the printing press in the mid- and late-15th century. *See,* Peter K. Yu, *Of Monks, Medieval Scribes, and Middlemen*, 2006 Mich. St. L. Rev. 1, 10 (2006). In the next century, during the reign of Henry VIII in England, the Crown attempted to control the output of the printing presses mostly to suppress the reproduction and distribution of what were considered to be heretical publications. Zvi S. Rosen, *Common-Law Copyright*, at 6, 85 U. Cin. L. Rev. (forthcoming 2017) (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2834199#) (last visited on September 27, 2016) (hereafter cited as "Rosen" followed by a page number). The censorship efforts continued during the reign of Queen Mary who, in 1557, chartered the Stationer's Company, "and with that the regulation of books in terms of what we would now describe as intellectual property began." *Id.* That regulation assured that the printer—the Stationer's Company—would be paid

[1] When it comes to copyright, "a page of history is worth a volume of logic." *Eldred v. Ashcroft*, 537 U.S. 186, 188, 123 S. Ct. 769, 772, 154 L.Ed.2d 683 (2003).

for its publications. *Id.* It did not, as yet, give the original author of those publications a right to be paid by the printer. *Id.*

The courts of England developed rights of the author in the 16th and 17th centuries, recognizing "a common-law right of the author to be paid for his writings by the publisher . . . ." *Id.* The passage of the Statute of Anne in 1709 gave history its "first true copyright law." *Id.*, at 7. As with many statutes, courts interpreted it among competing claims by adversaries, "and in a series of cases in the middle of the eighteenth century, English Courts repeatedly enjoined the printing of unpublished works without the consent of the author." *Id.* Subsequent litigation confirmed that an author maintained a common law copyright in any unpublished work, but once published, the work became protected by the Statute of Anne, terminating the common law copyright in favor of the statutory protections. *Id.*, at 8.[2] That common law copyright existed on July 4, 1776.

When Florida became a state in 1845, the Legislature adopted English statutory and common law as it existed as of July 4, 1776, unless inconsistent with the U.S. Constitution, the laws of the United States, or the laws of the Legislature.

[2] The same concepts regarding "publication" apply today in Florida and to the instant dispute: Publication does not terminate a common law copyright where there is no passing of protections to a statute, as discussed *infra* at 14 - 17.

See § 2.01, Fla. Stat. (2016). Thus, Florida adopted the English common law that authors had in their works.

A "Page" of Copyright and Sound Recording History

Three decades after statehood, Thomas Edison invented the phonograph, the first machine that not only recorded sounds but also allowed those sounds to be played back. Rosen, at 33. By that time, Congress had passed various iterations of the Copyright Act, including the 1856 Dramatic Copyright Act. Act of Aug. 18, 1856, 11 Stat. 138. That Act recognized the intellectual property value not only of a dramatic work itself but also of a public performance of that work and created an exclusive statutory right of public performance in dramatic works. *Id.* Public performance of musical compositions—but not sound recordings—would receive similar federal statutory protection in 1897. Rosen, at 11.

The Copyright Act underwent another congressional overhaul in 1909. Copyright Act of 1909, 35 Stat. 1075. That overhaul, however, preserved common law copyright protection for unpublished works. *Id.,* at § 2 ("[N]othing in this Act shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor.").

The 1909 Copyright Act also addressed the rising tide of copyright infringement cases involving player piano rolls.[3] The prior year the U.S. Supreme Court had concluded that a player piano roll of a musical composition did not infringe on the copyright of that musical composition because, under the literal reading of the then-existing copyright law, a "copy" of a musical composition had to be seen and read in the same manner as the original, such as printed sheet music. *See White-Smith Music Pub. Co. v. Apollo Co.*, 209 U.S. 1 (1908). A mechanically reproduced piano roll looked nothing like printed sheet music. In language foreshadowing litigation about sound recordings[4]—which also reproduce musical

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[3] Player piano rolls were described in 1908 as "familiar to the public" with between one million and 1.5 million of them in use in the United States. *White-Smith Music Pub. Co. v. Apollo Co.*, 209 U.S. 1, 9 (1908). They consisted of

> perforated sheets, which are passed over ducts connected with the operating parts of the mechanism in such manner that the same are kept sealed until, be means of perforations in the rolls, air pressure is admitted to the ducts which operate the pneumatic devices to sound the notes . . . the perforations having been so arranged that the effect is to produce the melody or tune for which the roll has been cut.

Id., 209 U.S. at 10.

[4] A common definition of sound recordings is found in the U.S. Copyright Act: "'Sound recordings' are works that result from the fixation of a series of musical, spoken, or other sounds, . . . regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied." *See* 17 U.S.C. § 101.

compositions on them and which also look nothing like printed sheet music—the Court observed:

> When the combination of musical sounds is reproduced to the ear it is the original tune as conceived by the author which is heard. These musical tones are not a copy which appeals to the eye. In no sense can musical sounds which reach us through the sense of hearing be said to be copies, as that term is generally understood, and as we believe it was intended to be understood in the statutes under consideration. . . . The statute has not provided for the protection of the intellectual conception apart from the thing produced, however meritorious such conception may be . . . .

209 U.S. at 17.

Congress responded to *White-Smith* in the 1909 Copyright Act by creating a mandatory license at a statutory rate for the "mechanical reproduction" of musical compositions. *See* 35 Stat. 1075, § 1(e). Copyright protections for the sound reproduction technology, whether piano rolls or sound recordings, however, was not included in the 1909 Copyright Act, thus leaving such protections to the common laws of the states.

In the two decades that followed, technology saw improvement in sound recordings and the expansion of radio. *See generally*, Rosen, at 41-44. Musicians who previously were paid to perform live on radio shows now feared their performances could be recorded and rebroadcast without compensation. *Id.* at 43. A union, the American Federation of Musicians, represented nearly all of the

professional musicians in North America. *Id.* By the late 1930s, musicians suffered "a devastating impact" on their employment as nearly half of all music played on American radio stations was no longer live, but was recorded. *Id.*

The AFM responded using its union power to attack recorded music, negotiating deals with key radio stations and networks to increase the size of radio staff orchestras for continued live performances. *Id.* At the same time, a prominent big band leader, Fred Waring, created a national group of performing musicians and won injunctions against radio stations in Pennsylvania and North Carolina. *Id.* at 46, 47. Both radio stations were playing unauthorized recorded performances of Waring's orchestra, and courts in both states found the public performances on those sound recordings were protected by common law copyright. *See Waring v. WDAS Broadcasting Station, Inc.,* 194 A. 631 (Pa. 1937), *and Waring v. Dunlea,* 26 F. Supp. 338 (E.D. N.C. 1939).

In reaction to those union-backed decisions, some states passed statutes expressly abolishing common law copyright in sound recordings to "permit the free playing of phonograph records on the radio." Rosen, at 49. The Florida Legislature responded in 1941, passing sections 543.02 and 543.03, Florida Statutes, expressly abrogating the then-existing public performance copyright in sound recordings. *See* § 543.02, Fla. Stat. ("all asserted royalties on the

commercial use made of any such recorded performances by any person are hereby abrogated and expressly repealed"), *and* § 543.03, Fla. Stat. ("The sole intendment of this enactment is to abolish any common law rights attaching to phonograph records . . . and to forbid . . . the collection of subsequent fees and royalties on phonograph records . . . by performers . . . .").

Congress passed the first express federal statutory copyright in certain sound recordings under the Sound Recording Act of 1971. 85 Stat. 391 (1971). That Act, however, expressly exempted sound recordings made prior to February 15, 1972, leaving their protection to the common law or statutes of the states. *Id.* At that point in history, Florida sound recordings enjoyed no common law protections because of the abrogation of those protections by sections 543.02 and 543.03.

In 1976 Congress conducted another major overhaul of the Copyright Act, largely creating a system of federal preemption of copyright matters. *See* Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541. Congress again, however, expressly reserved the common law protections of the states for pre-1972 sound recordings. *See* 17 U.S.C. § 301(c).

Congress deferred the effective date of the 1976 Act until January 1, 1978. *See* Copyright Act of 1976: Transitional and Supplementary Provisions § 102. Six months before that effective date, the Florida Legislature, recognizing the pending

federal preemption, repealed sections 543.02 and 543.03. Chapter 77-440 House Bill No. 1780, Section 3.

As discussed in Section II that repeal revived Florida's common law copyright in sound recordings, a full six months before the effective date of the Copyright Act of 1976, and that common law copyright exists to this day.

If Florida's common law did not recognize common law copyright in sound recordings, then there was no action necessary by the 1941 Legislature to repeal those rights by Section 543.02 and 543.03. Moreover, those two statutes expressly referenced the performances of sound recordings, confirming the existence at that time of a public performance right within Florida's common law copyright. Finally, as discussed in more detail in Section III, courts in New York, California, Pennsylvania, and North Carolina have all ruled that common law copyright exists for sound recordings, and there is no reason why Florida's common law is any different.

II. The Repeal of Chapter 543 Revived Florida's Common Law Copyright

This Court has held that the repeal of a statute abrogating the common law revives those common law rights. In *Florida Fertilizer & Mfg. Co. v. Boswell*, 34 So. 241, 242 (Fla. 1903), this Court held: "[W]hen a statute changing the common law is repealed, the common law is restored to its former state." (citation omitted).

This Court further concluded that a separate statute prohibiting the "revival by implication" of a repealed statute did not "prevent such restoration of the common law." *Id.* (citation omitted) (hereafter, "*Florida Fertilizer*").

In *North Shore Hospital, Inc. v. Barber*, 143 So. 2d 849, 853 (Fla. 1962), this Court reaffirmed its position, finding, "Upon repeal of the statute in 1955, the common law of the state as it existed prior to the act was revived." (citing *Florida Fertilizer*).

Notably, in *CBS, Inc. v. Garrod*, 622 F. Supp. 532, 533 (M.D. Fla. 1985), a defendant asserted Florida's statutory abolition of the common law copyright in sound recordings as an absolute defense to claims by CBS of record piracy. The federal court rejected this defense, noting the statute had been repealed and "cannot now preclude this action." *Id.* at 534. Thus, CBS was allowed to proceed in its injunction and damages claims based on violations of Florida's common law copyright of sound recordings. *Id.* (holding "a record producer's common law copyright protects the record itself, whether it is the master or a copy.")

The repeal of Sections 543.02 and 543.03 were unmistakably and unambiguously intentional and not the result of oversight or mistake. The Legislature did not repeal Section 543.041—which made dealing in pirated sound recordings unlawful—with the remainder of the Chapter. Rather, the Legislature

retained and amended that provision, now existing as section 540.11, Florida Statutes (2016). In doing so the Legislature clearly recognized that federal pre-emption did not apply to pre-1972 sound recordings and preserved the section which provided for civil and criminal penalties for unauthorized duplication of pre-1972 sound recordings. Florida Statutes currently contain no Chapter 543 at all.

Moreover, it is a well-settled rule of statutory construction in Florida that the Legislature "is presumed to know the existing law when a statute is enacted." *Collins Inv. Co. v. Metropolitan Dade County*, 164 So. 2d 806, 809 (Fla. 1964), *superceded by statute on other grounds as recognized by Adler-Built Indus., Inc. v. Metropolitan Dade County*, 231 So. 2d 197 (Fla. 1970). As this Court stated in *Collins Inv. Co.*: "The Legislature is presumed to be acquainted with judicial decisions on the subject concerning which it subsequently enacts a statute." 164 So. 2d at 809. *See also Crescent Miami Center, LLC v. Florida Dept. of Revenue*, 903 So. 2d 913 (Fla. 2005). Thus, the 1977 Legislature is presumed to have known, per this Court's 1962 *Barber* decision, that enacting a statute repealing laws that abrogated the common law served to revive the common law itself. Any argument to the contrary runs afoul of this well-settled rule of statutory construction.

Thus, as in *Florida Fertilizer* and *Barber*, the repeal of sections 543.02 and 543.03 fully restored the common law copyright in sound recordings in Florida. Those common law protections exist today.

III. Publication of a Sound Recording Does Not Divest It of Common Law Rights Absent a Federal Right to the Same.

Publication does not necessarily divest an owner of his common law copyrights. For divestiture to occur, the copyright owner must have a concurrent federal right of which he may avail himself for protection. Pre-1972 sound recordings have never had, and to this day still do have not have, federal copyright protection, and thus they do not have the statutory sanctuary required for divestiture.

The confusion with the rule of publication as divesting common law rights is that the rule has gone from a "general" rule to a "one size fits all" rule. This Court itself called it a "general rule" in *Glazer v Hoffman* 16 So. 2d 53 (Fla. 1943). However, by definition, a general rule does not govern every instance.

The "general rule" is derived from the fact that the act of publication would necessarily invoke federal copyright laws. Under the 1909 Copyright Act, Section 9, the right to a copyright is invoked by "publication thereof with notice of the copyright required by this act" and the term of copyright under Section 23 provides for an initial term of "twenty-eight years from the date of first publication."

Further, Section 12 of the 1909 Act provided for the registration of works "of which copies are not reproduced for sale," that is, unpublished works. This registration, of course, would also invoke the protections of federal copyright law.

The "general rule," however, fails to recognize that federal copyright protection has never been granted to pre-1972 sound recordings. Thus, the distribution of a phonorecord containing a pre-1972 sound recording cannot be a publication that divests common law rights because a pre-1972 sound recording cannot invoke federal statutory protection, even if the owner of such rights wanted to. Thus, the distribution of such a sound recording could never invoke a federal right and is not, therefore, equivalent to publication under federal law. The Supreme Court of the United States so ruled in *Goldstein v. California* 412 U.S. 546, 570 (1973):

> No comparable conflict between state law and federal law arises in the case of recordings of musical performances. In regard to this category of 'Writings,' Congress has drawn no balance; rather, it has left the area unattended, and no reason exists why the State should not be free to act.

The Supreme Court further ruled:

> Petitioners place great stress on their belief that the records or tapes which they copied had been "published." We have no need to determine whether, under state law, these recordings had been published or what legal consequences such publication might have. For purposes of federal law, "publication" serves only as a term of the art which defines the legal relationships which Congress has adopted

> under the federal copyright statutes. *As to categories of writings which Congress has not brought within the scope of the federal statute, the term has no application.*

Id., 412 U.S. at 570, n.28 (emphasis added).

In interpreting Florida law on the same issue, the federal district court in *Garrod* ruled:

> Thus, because of the unique nature of the recording business, and the fact that there was no simple method of protecting record producers' interests until phono-records were protected by the Sound Recording Act of 1972 . . . CBS did not lose its common law copyright through publication by distribution of its records.

622 F. Supp. 532, 535 (internal citations omitted).

New York courts reached the same result:

> In contrast, in the realm of sound recordings, it has been the law in this state for over 50 years that, in the absence of federal statutory protection, the public sale of a sound recording otherwise unprotected by statutory copyright does not constitute a publication sufficient to divest the owner of common-law copyright protection.

Capitol Records, Inc. v. Naxos of America, Inc., 830 N.E.2d 250, 264 (N.Y. 2005).

California, too, found:

> [Defendant's] sole argument as to why it has not misappropriated and converted the pre–1972 Recordings is that Record Companies lack standing to bring claims for the pre–1972 Recordings because such recordings have been "published," i.e. sold, and are now in the public domain. This argument is completely devoid of merit because mere

> publication of a protected work does not strip protectable and actionable ownership rights.

Capitol Records, LLC. V. BlueBeat, Inc., 765 F.Supp. 2d 1198, 1206 (C.D. Cal. 2010).

Likewise, a federal district court in North Carolina determined:

> The great singers and actors of this day give something to the composition that is particularly theirs, and to say that they could not limit its use is to deny them the right to distribute their art, as they may see fit, when they see fit. Surely, their labors and talents are entitled to the privilege of distribution, especially where, as here, the privilege is subject to definite terms and bounds. They have an exclusive right in their property and thus have a right to prohibit its unauthorized public performance.

Waring v. Dunlea, 26 F. Supp 338 (E.D. N.C. 1939) (citations omitted).

There is no reason that Florida common law is any different from the common law of New York, California, Pennsylvania, or North Carolina, all of which have ruled that common law copyright exists in sound recordings and that publication of such phonorecords does not divest the owner of common law rights. To rule to the contrary would mean that an owner of the Florida common law copyright reinstated to sound recording owners in 1977 has a right of public performance only if it never distributes phonorecords to the public. This result would largely be the equivalent of having no common law copyright at all.

CONCLUSION

For the reasons stated herein the Entertainment, Arts, and Sports Law Section of the Florida Bar respectfully submits that this Court should answer the first two certified questions as follows:

1. Whether Florida recognizes common law copyright in sound recordings and, if so, whether that copyright includes the exclusive right of reproduction and/or the exclusive right of public performance?

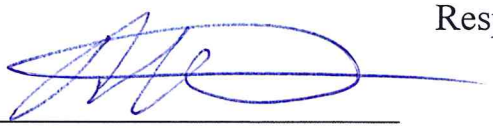
This question should be answered "yes," Florida recognizes a common law copyright in sound recordings, and "yes," that common law copyright includes the exclusive rights of reproduction and public performance.

2. To the extent that Florida recognizes common law copyright in sound recordings, whether the sale and distribution of phonorecords to the public or the public performance thereof constitutes a "publication" for the purpose of divesting the common law copyright protections in sound recordings embedded in the phonorecord and, if so whether the divestment terminates either or both of the exclusive right of public performance and the exclusive right of reproduction?

This question should be answered "no" on all points, as publication will only serve to divest the rights in a common law copyright when there is a

concurrent federal statutory right, and no such federal statutory right is available to the owners of pre-1972 sound recordings.

Respectfully submitted,



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Counsel for *Amicus Curiae,* the Entertainment, Arts, & Sports Law Section of the Florida Bar, certifies that this brief is typed in 14 point (proportionately spaced) Times New Roman, in compliance with Rule 9.210 of the Florida Rules of Appellate Procedure.

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