

No. 15-13100-AA

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

FLO & EDDIE, INC., a California corporation, individually and on
behalf of all others similarly situated,

Plaintiff-Appellant,

v.

SIRIUS XM RADIO INC., a Delaware Corporation

Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of Florida

**MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*
THE ASSOCIATION FOR RECORDED SOUND COLLECTIONS
IN SUPPORT OF DEFENDANT-APPELLEE**

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Dated: October 13, 2015

**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, *amicus curiae* The Association of Recorded Sound Collections hereby certifies that set forth below is 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 THE ASSOCIATION FOR RECORDED SOUND
COLLECTIONS FOR LEAVE TO FILE AS *AMICUS CURIAE* IN
SUPPORT OF DEFENDANT-APPELLEE SIRIUS XM RADIO INC.**

Pursuant to Federal Rules of Appellate Procedure 29(b) and (e), the Association for Recorded Sound Collections (“ARSC”) respectfully requests leave to file the attached amicus curiae brief in support of Defendant-Appellee Sirius XM Radio Inc. ARSC has notified counsel for all parties of its intent to file this brief. Counsel for Plaintiff-Appellant Flo & Eddie declined to consent to this filing in an email copying counsel for Sirius XM Radio Inc.

ARSC is a nonprofit organization dedicated to the preservation and study of sound recordings in all genres of music and speech, in all formats, and from all periods. It includes as members approximately one thousand archivists, librarians, and curators of the world’s leading audiovisual repositories, along with record collectors, record dealers, researchers, historians, discographers, musicians, engineers, producers, reviewers, and broadcasters. ARSC has a strong interest in copyright law affecting sound recordings, and in particular those laws affecting historic recordings fixed before February 15, 1972. It advocates for law and policy that enables preservation of, and greater access to, the

world's recorded sound heritage. As an independent non-profit organization, ARSC is not sponsored by any of the parties to this case.

ARSC's proposed amicus brief will assist the Court in considering the important issues presented in this case. The brief explains that the district court correctly decided that there is no common law right of public performance of sound recordings fixed before February 15, 1972 in Florida, because there is no custom or case law evidencing such a right. ARSC's proposed amicus brief will explain that never before the recent litigations brought by Plaintiff-Appellee has the recorded music industry asserted a common law right of public performance in pre-1972 sound recordings. ARSC's particular expertise in the collection and preservation of sound recordings enables it to help the Court understand the broader implications of establishing a never-before acknowledged common law right of public performance for pre-1972 sound recordings, including for non-commercial entities.

For these reasons, ARSC respectfully requests leave to file the attached amicus brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Appellate Procedure 25, I certify that on October 13, 2015, I filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Joseph R. Wetzel
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**CERTIFICATE OF INTERESTED PERSONS AND
CORPORATE DISCLOSURE STATEMENT**

Pursuant to 11th Cir. R. 26.1, counsel for Amicus Curiae The Association for Recorded Sound Collections hereby certifies that the following additional persons have an interest in the outcome of this case:

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TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT.....	i
TABLE OF AUTHORITIES.....	ii
STATEMENT OF INTEREST	1
INTRODUCTION.....	2
ARGUMENT	4
I. The District Court’s Holding that Florida Law Does Not Recognize a Public Performance Right in Sound Recordings Should Be Affirmed.....	4
A. There Is No Common Law Right of Public Performance in Sound Recordings.....	5
B. Neither Intellectual Property Nor Tangible Property Principles Provide a Basis for Finding a Common Law Public Performance Right.	7
C. Flo & Eddie’s Position Would Upset The Balance Between Copyright and Antitrust Law.	10
D. Under Florida Law, Repeal of a Statute Cannot Establish or Prove a Common Law Right.	12
II. Reversal Would Disrupt Settled Understandings About the Scope of Copyright Protection and Cut Off An Ongoing, Healthy Legislative Debate.	14
CONCLUSION.....	21
CERTIFICATE OF COMPLIANCE	
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

Cases

<i>American Broad. Cos. v. Aereo, Inc.</i> , 573 U.S. ---, 134 S. Ct. 2498 (2014)	15
<i>Bd. of Trs. of the Internal Improvement Trust Fund v. Key West Conch Harbor</i> , 683 So. 2d 144 (Fla. 3d DCA 1996)	13
<i>Cartoon Network LP v. CSC Holdings, Inc.</i> , 536 F. 3d 121 (2d Cir. 2008)	15
<i>CBS Inc. v. Garrod</i> , 622 F. Supp. 532 (M.D. Fla. 1985)	7
<i>Costa Del Sol Ass’n, Inc. v. State Dep’t of Bus. & Prof’l Reg.</i> , 987 So. 2d 734 (Fla. 3d DCA 2008)	7
<i>Dep’t of Law Enf’t v. Real Prop.</i> , 588 So. 2d 957 (Fla. 1991)	7
<i>Dickman v. CIR</i> , 465 U.S. 330, 104 S. Ct. 1086 (1984)	9
<i>Dowling v. United States</i> , 473 U.S. 207, 105 S. Ct. 3127 (1985)	8
<i>Halstead v. Grinnan</i> , 152 U.S. 412, 14 S. Ct. 641 (1894)	14
<i>Lasercomb Am., Inc. v. Reynolds</i> , 911 F.2d 970 (4th Cir. 1990)	10
<i>Miami v. Metro. Dade Cnty.</i> , 407 So. 2d 243 (Fla. 3d DCA 1981)	13
<i>Schloss v. Sweeney</i> , 515 F. Supp. 2d 1068 (N.D. Cal. 2007)	10
<i>Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp.</i> , 562 F.2d 1157 (9th Cir. 1977)	11
* <i>Sony Corp. of Am. v. Universal City Studios, Inc.</i> , 464 U.S. 417, 104 S. Ct. 774 (1984)	6, 11

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 109 So. 2d 783 (Fla. 3d DCA 1959) 13

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 109 So. 2d 623 (Fla. 1926) 7

Twentieth Century Music Corp. v. Aiken,
 422 U.S. 151, 95 S. Ct. 2040 (1975) 11

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 627 F.3d 64 (2d Cir. 2010)..... 15

Western Union Tel. Co. v. Call Pub. Co.,
 181 U.S. 92, 21 S. Ct. 561 (1901)5, 6

Yaffee v. International Co.,
 80 So. 2d 910, (Fla. 1955) 13

Statutes

17 U.S.C. § 109 16

*Fla. Stat. § 543.02..... 10, 12, 13

Fla. Stat. Ann., Index (Vol. 3 1969) 10

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*NOI: Federal Copyright Protection of Sound Recordings
 Fixed Before February 15, 1972*
 (U.S. Copyright Office Jan. 31, 2011) 19

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*NOI: Federal Copyright Protection of Sound Recordings
 Fixed Before February 15, 1972*
 (U.S. Copyright Office Jan. 31, 2011) 19

Comments of Recording Industry of America (RIAA) and
 American Association of Independent Music (A2IM),
*NOI: Federal Copyright Protection of Sound Recordings
 Fixed Before February 15, 1972*
 (U.S. Copyright Office Jan. 31, 2011) 18, 20

Comments of Society of American Archivists,
*NOI: Federal Copyright Protection of Sound Recordings
Fixed Before February 15, 1972*
(U.S. Copyright Office Jan. 31, 2011) 18

Comments of the Recording Industry Association of America,
Music Licensing Study: Notice and Request for Public Comment
(U.S. Copyright Office May 23, 2014) 20

Erlinger, Jr., Michael,
*An Analog Solution in a Digital World: Providing Federal
Copyright Protection for Pre-1972 Sound Recordings,*
16 U.C.L.A. Ent. L. Rev. 45, 58 (2009)..... 18

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*NOI: Federal Copyright Protection of Sound Recordings
Fixed Before February 15, 1972*
(U.S. Copyright Office Jan. 31, 2011) 18

Posner, Richard,
Economic Analysis of Law (8th ed. 2011) 7

Reply Comments of the Music Library Association,
*NOI: Federal Copyright Protection of Sound Recordings Fixed
Before February 15, 1972* (U.S. Copyright Office Jan. 31, 2011) 18

*Testimony of Tim Brooks,
*A Study on the Desirability of and Means for Bringing Sound
Recordings Fixed Before February 15, 1972, Under Federal
Jurisdiction* (U.S. Copyright Office Jan. 28, 2011) 2, 19

*Authorities upon which are chiefly relied are marks with an asterisk

STATEMENT OF INTEREST¹

Amicus curiae the Association for Recorded Sound Collections, Inc. (“ARSC”) is “a nonprofit organization dedicated to the preservation and study of sound recordings—in all genres of music and speech, in all formats, and from all periods.”² It includes as members approximately one thousand archivists, librarians, and curators of the world’s leading audiovisual repositories, along with “record collectors, record dealers, researchers, historians, discographers, musicians, engineers, producers, reviewers, and broadcasters.”³ ARSC has a strong interest in copyright law affecting sound recordings, and in particular those laws affecting historic recordings fixed before February 15, 1972 (so-called “pre-72 sound recordings”). ARSC advocates for laws and policies that enable preservation of, and greater access to, the world’s recorded sound

¹ No party’s counsel authored this brief in whole or in part. Neither any party nor any party’s counsel contributed money that was intended to fund preparing or submitting this brief. No person other than *amicus*, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief.

² ARSC’s website is available at www.arsc-audio.org/about.html.

³ *Id.*

heritage.⁴ As an independent non-profit organization, ARSC is not sponsored by any of the parties to this case.

While ARSC agrees that the district correctly applied the concepts of a fixation requirement and fair use in disposing of Flo & Eddie's claims based on infringement of common law reproduction rights in pre-1972 sound recordings, this brief addresses Flo & Eddie's arguments regarding a common law right of public performance.

INTRODUCTION

The district court correctly found that Florida law does not recognize a right of public performance in pre-72 sound recordings. Reversing that decision would have broad and pernicious consequences. Sirius XM is just one of countless businesses and individuals who relied on the universally held, decades-old understanding that there is no recognized public performance right in pre-72 sound recordings. Unless the district court's ruling is affirmed, ARSC members and other users of these recordings would become predictable targets of claimants like Flo

⁴ See, e.g., Testimony of Tim Brooks, *A Study on the Desirability of and Means for Bringing Sound Recordings Fixed Before February 15, 1972, Under Federal Jurisdiction* (U.S. Copyright Office Jan. 28, 2011) ("Brooks Testimony"), available at <http://www.copyright.gov/docs/sound/comments/initial/20110128-Tim-Brooks-ARSC.pdf>.

& Eddie. Reversal would expose innumerable others to a litany of infringement claims for engaging in practices that no one in the recorded music industry thought to challenge, in Florida or elsewhere, during the first century of its existence.

Every one of Flo & Eddie's arguments begs the question by presuming the existence of a public performance right in pre-72 sound recordings at common law in Florida. Yet Flo & Eddie offers no support for the predicate. Instead, it would have the Court expand common law to include all rights not expressly forbidden by statute. This is incorrect. Common law is not simply the absence of law; it must have roots in caselaw or custom.

The purported right here has no such roots. Florida has never recognized a public performance right in pre-72 sound recordings. No Florida statute protects such a right. No Florida court has ever recognized a common-law public performance right in sound recordings. And no custom in Florida recognizes such a right. It was not until 1995 that *anyone* recognized a public performance right in sound recordings, and that limited, federal right established by Congress is a far cry from the unbounded right endorsed by Flo & Eddie. Establishing such an

unprecedented and unbounded right would offend common law and statutory competition and antitrust principles.

Flo & Eddie's position renders at least four decades, and as much as a century, of industry practice inexplicable. If endorsed by the Court, it could irreparably harm countless businesses and activities, including the educational and preservationist activities of ARSC members, in the near term. Worse, reversal could squelch decades of debate and doom any possibility of sensible federal legislation that would balance the concerns of rights holders with those of the general public.

ARGUMENT

I. The District Court's Holding that Florida Law Does Not Recognize a Public Performance Right in Sound Recordings Should Be Affirmed.

Flo & Eddie claims that Florida law has always recognized a right in the public performance of pre-1972 sound recordings. But Flo & Eddie acknowledges that no Florida decision ever expressly created such a right. And for decades, bars, restaurants, and other music users (including members of *amicus* the Association for Recorded Sound Collections) have played pre-1972 sound recordings without fear of incurring copyright liability. To create such a right now would turn everyone who has played a pre-1972 sound recording in Florida into an

infringer. Doing so would also generate significant tension with principles of antitrust law.

A. There Is No Common Law Right of Public Performance in Sound Recordings.

Flo & Eddie believes that “the issue is whether Florida has affirmatively *excluded* the performance right from the bundle of rights attendant to the ownership of the artistic performances embodied in pre-1972 recordings.” Flo & Eddie Br. 16. That claim is based on a fundamentally flawed understanding of the common law and basic principles of intellectual property.

“What is the common law?” *Western Union Tel. Co. v. Call Pub. Co.*, 181 U.S. 92, 101, 21 S. Ct. 561, 564 (1901). It is “those principles, usages and rules of action applicable to the government and security of person and property, which do not rest for their authority upon any express and positive declaration of the will of the legislature.” *Id.* at 101, 21 S. Ct. at 564 (citation omitted). The common law “comprises the body of those principles and rules of action relating to the government and security of persons and property, which derive their authority solely from usages and customs of immemorial antiquity, or from the judgments and decrees of the courts recognizing, affirming, and

enforcing such usages and customs.” *Id.* at 102, 21 S. Ct. at 564 (citation omitted). To be deemed a principle of the common law, therefore, the claimed right must derive from “usages and customs” or from judicial decisions “recognizing, affirming and enforcing” such usages and customs.

Flo & Eddie’s position turns this principle on its head. Rather than identify a custom, usage, or judicial decision recognizing a pre-1972 common law right to control the public performance of a sound recording, Flo & Eddie relies on the *absence* of any express “legislative proscription in Florida with respect to pre-1972 recordings or any of the rights inherent in the ownership of those recordings.” Flo & Eddie Br. 16. But that rule would give creators virtually unlimited control over all possible uses of their creation, or unlimited copyright. The district court correctly rejected that extreme position, observing that “[c]opyright protection has never accorded the copyright owner complete control over all possible uses of his work.” Doc. 142, at 8 (citing *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 431, 104 S. Ct. 774, 783 (1984)). *See also* Richard Posner, *Economic Analysis of Law* § 3.6 (8th

ed. 2011) (“Truly exclusive (absolute, unqualified) property rights would be a contradiction in terms.”).

B. Neither Intellectual Property Nor Tangible Property Principles Provide a Basis for Finding a Common Law Public Performance Right.

What matters is that no Florida case or custom has ever recognized a pre-1972 public performance right in sound recordings. The only case in Florida addressing common law rights in the public performance of sound recordings held only that a record owner has the right to prevent others from pirating the owner’s works. *See CBS Inc. v. Garrod*, 622 F. Supp. 532, 533 (M.D. Fla. 1985). As Sirius XM explains, that well-settled, limited right by no means implies a broad right to control the public performance of all sound recordings. *See* Sirius XM Br. 23-24 (citing cases).

The remaining cases on which Flo & Eddie relies involve rights to real or personal property that derive from settled customs and prior decisions. *See, e.g., Dep’t of Law Enf’t v. Real Prop.*, 588 So. 2d 957 (Fla. 1991); *Tatum Bros. v. Watson*, 109 So. 2d 623 (Fla. 1926); *Costa Del Sol Ass’n, Inc. v. State Dep’t of Bus. & Prof’l Reg.*, 987 So. 2d 734 (Fla. 3d DCA 2008). In relying on these decisions, Flo & Eddie disregards the

fundamental differences between intellectual property and real and personal property.

“[P]roperty rights of a copyright holder have a character distinct from the possessory interest of a [real property owner].” *Dowling v. United States*, 473 U.S. 207, 216-17, 105 S. Ct. 3127, 3133 (1985). Ownership of a copyright “has never accorded . . . complete control over all possible uses of [the] work” — rather, “like other intellectual property,” copyright “comprises a series of carefully defined and carefully delimited interests to which the law affords correspondingly exact protections.” *Id.* (emphasis added); see William Landes & Richard Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & Econ. 265, 268 (1987) (“intellectual property is a particularly costly form of property” and is thus “limited in ways that physical property is not”).

Flo & Eddie’s reliance on decisions involving personal property is also unavailing. When someone transfers her interest in personal property to someone else, the transfer typically extinguishes the prior owner’s interest in the property. If a baker buys a sack of flour, for example, the seller cannot restrict the baker’s right to bake a cake. Nor may the flour seller ordinarily benefit from the proceeds of the baker’s

sale of the cake. Rights in intellectual property, by contrast, are not necessarily transferred. Intellectual property involves the retention of specified rights notwithstanding the transfer of ownership of goods embodying the intellectual property to others.

A sound recording company does not have the right to prevent a sound recording purchaser from listening to a lawfully purchased recording. If it had that right, every ARSC member in Florida would be a copyright infringer. As absurd as it sounds, under Flo & Eddie's theory, the creator of a sound recording would retain such unlimited rights. For this reason, whatever rights Flo & Eddie possesses in the recorded performance must coexist with competing rights attendant in the ownership of a copy of a sound recording. Allowing Flo & Eddie to retain the absolute right to exclude the lawful owner of a sound recording from a performance of that recording (public or otherwise) would defeat the entire purpose of sound recordings — *i.e.*, the ability to listen to a performance at a later time — and render ownership of the sound recording illusory. *Cf. Dickman v. CIR*, 465 U.S. 330, 336, 104 S. Ct. 1086, 1090 (1984) (“Of the aggregate rights associated with any

property interest, the right of use of the property is perhaps of the highest order.”).

C. Flo & Eddie’s Position Would Upset The Balance Between Copyright and Antitrust Law.

Flo & Eddie’s unlimited conception of rights in sound recordings also ignores the inherent tension between intellectual property and antitrust principles. As a general principle, “[a] . . . copyright is often regarded as a limited monopoly—an exception to the general public policy against restraints of trade.” *Lasercomb Am., Inc. v. Reynolds*, 911 F.2d 970, 977 (4th Cir. 1990). *See also Schloss v. Sweeney*, 515 F. Supp. 2d 1068, 1080 n.8 (N.D. Cal. 2007) (“[A] copyright, as a government-sanctioned *limited* monopoly, represents an exception to the general public policy against restraints of trade embodied in the antitrust laws.”) (emphasis added); *see also* Fla. Stat. Ann., Index (Vol. 3 1969) (indexing copyright statutes, including Fla. Stat. § 543.02, under the heading “MONOPOLIES”).

“The limited scope of the copyright holder’s statutory monopoly . . . reflects a balance of competing claims upon the public interest. . . . But the ultimate aim is to stimulate artistic creativity for the general public good.” *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156, 95 S.

Ct. 2040, 2044 (1975) (citation omitted). *See also Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1170 (9th Cir. 1977) (citation omitted) (noting that copyright's coexistence with competing free speech principles "is justified by the greater public good in the copyright encouragement of creative works").

But copyrights are not absolute. In "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," the decision maker must strike "a difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand." *Sony*, 464 U.S. at 429. 104 S. Ct. at 782. For this reason, "[c]opyright protection has never accorded the copyright owner complete control over all possible uses of his work." *Id.* at 432, 104 S. Ct. at 783-84. Flo & Eddie criticizes the reliance on *Sony* because it is a federal case (*see Flo & Eddie Br. 29*), but the passages above describe a general principle that applies beyond federal law.

Taken to its logical conclusion, Flo & Eddie's position would upset the careful balance between copyright and antitrust law. It would grant copyright owners an unlimited monopoly over all uses of pre-72 sound recordings. *See* Flo & Eddie Br. 12 (arguing that "the broad ownership rights in the artistic performances embodied in pre-1972 recordings necessarily include the right to exclude Sirius XM from using or exploiting that performance in any manner whatsoever without a license"). Recognizing such a right for the first time in 2015 would bring along all of the antitrust baggage of copyright without any of the countervailing benefits. All of the pre-72 sound recordings have existed for over four decades. Whether in 1977 or 2015, granting a public performance right in pre-72 recordings does not serve the encouragement of creative works already in existence.

D. Under Florida Law, Repeal of a Statute Cannot Establish or Prove a Common Law Right.

Flo & Eddie argues that, after the repeal of Fla. Stat. § 543.02 in 1977, "the common law protecting sound recordings was once again unconstrained and was no longer restricted in any respect." Br. at 26. But this tells us nothing about what the antecedent Florida common law protecting sound recordings was. It also requires the Court to

believe that the entire recorded music industry knowingly sat on its public performance rights for decades before the enactment of Fla. Stat. § 543.02 in 1941 and for decades more after its repeal in 1977.

Again, Flo & Eddie cites to cases that are inapposite.⁵ Those cases support the uncontroversial proposition that, when a statute limiting (or expanding) the availability of certain common law rights is repealed, such rights are restored (or withdrawn) at the point of repeal. Beyond that, under Florida law, the act of repeal carries no further significance. *Bd. of Trs. of the Internal Improvement Trust Fund v. Key West Conch Harbor*, 683 So. 2d 144 (Fla. 3d DCA 1996) (Gersten, J., dissenting) (citing *Yaffee v. International Co.*, 80 So. 2d 910, 912 (Fla. 1955)) (“When a statute is repealed, it is as if the repealed statute never existed.”).

After the repeal of Fla. Stat. § 543.02, Flo & Eddie is left with exactly what preceded the statute’s enactment: a complete dearth of caselaw or custom establishing a public performance right in pre-72 sound recordings. Where there is no custom, caselaw, or industry

⁵ Plaintiff-Appellant cites *Miami v. Metro. Dade Cnty.*, 407 So. 2d 243, 244 (Fla. 3d DCA 1981) (relating to the regulation of taxicabs) and *State ex rel. Fussell v. McLendon*, 109 So. 2d 783, 785 (Fla. 3d DCA 1959) (relating to regulations permitting the inspection of corporate records).

practice pointing to such a right, the only logical inference is that such a right “never existed.” See *Halstead v. Grinnan*, 152 U.S. 412, 416, 14 S. Ct. 641, 643 (1894).

II. Reversal Would Disrupt Settled Understandings About the Scope of Copyright Protection and Cut Off An Ongoing, Healthy Legislative Debate.

Reversal of the decision below would create potentially unmanageable problems for ARSC and other copyright holders. It would expose a vast array of businesses and individuals to copyright liability, disrupting their settled expectations regarding pre-1972 sound recordings. And it would abruptly end the robust and ongoing legislative debate about the proper scope of copyright protection afforded to pre-72 sound recordings.

Adopting Flo & Eddie’s unprecedented view of the scope of common law copyright would sweep in countless additional uses of pre-72 sound recordings in Florida. For example, if the purported common law right of public performance were as unbounded as Flo & Eddie suggests, there would be no readily apparent limit to the types of performances that might suddenly result in claims of copyright infringement. Federal law creates infringement liability only for

“public” performances of copyrighted works, and the federal courts have carefully explained what it means to perform a work publicly. *See, e.g., United States v. ASCAP (In re Application of RealNetworks)*, 627 F.3d 64, 71-75 (2d Cir. 2010) (holding that a digital download did not constitute a public performance under the Copyright Act); *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F. 3d 121 (2d Cir. 2008) (holding that transmission of unique recordings to cable subscribers from a remote digital video recording server operated by cable operator did not constitute a public performance); *American Broad. Cos. v. Aereo, Inc.*, 573 U.S. ---, 134 S. Ct. 2498 (2014) (holding that service designed to allow for remote capture and recording of over-the-air television broadcasts for streaming to individual users infringed television broadcasters’ public performance rights).

But Florida law on the subject is nonexistent; neither the Florida Legislature nor the Florida courts have outlined the contours of what constitutes a “public” performance under Florida law. Flo & Eddie’s position thus raises troubling questions about the scope of infringement risk that do not arise under federal law. Could a newly-minted common law copyright holder sue a homeowner who plays a pre-1972 sound

recording at a neighborhood barbecue? What about a teacher who plays a pre-1972 sound recording in the classroom? Under Flo & Eddie's theory, it is impossible to find a limiting principle.

Reversal would also undermine the future of recording collection, scholarship, and preservation. Under federal law, the exclusive right to distribute a work is limited to the first authorized transfer of each copy of a work, subject to certain further limitations. 17 U.S.C. § 109(a). This so-called "first sale doctrine" allows a library, for example, to lend sound recordings without the fear of incurring copyright infringement liability. As discussed above, libraries, museums, archivists, and researchers rely heavily on this doctrine to conduct their daily business. Reversal would instantaneously undermine that reliance.

It would be impossible for ARSC members to license all of the pre-72 sound recordings in their collections, potentially on a state-by-state basis, both from a financial perspective and as a matter of practicability. Under Flo & Eddie's theory, therefore, countless entities might have to rely on the fact-bound and unpredictable common law fair use doctrine in order to loan pre-1972 sound recordings, resort to constitutional arguments in an effort to define a never-before-

recognized state law copyright interest, or forego the use of pre-1972 sound recordings altogether.

Under Flo & Eddie's theory, it is unclear what new rights would be conferred in pre-72 sound recordings. Arguably anything not expressly proscribed by the legislature would be fair game. Does Flo & Eddie's bundle of sticks also go beyond federal copyright law in conferring, for example, a "making available" right, or "moral" rights? Could the producer of a sound recording bar its inclusion in a certain collection? Archives making their pre-72 works available to researchers could face unprecedented legal challenges. Parodists might need to raise First Amendment challenges to assertions of moral rights in pre-72 sound recordings. Reversal could also pose an existential threat to the record collection and resale industry, which relies on a pre-*Sirius XM* understanding of federal and state copyright law for the validity of its practices.

Reversal would also prematurely cut off a robust legislative debate about the appropriate scope of copyright protection for pre-72 sound recordings. When Congress declined to extend federal copyright protection to pre-72 sound recordings, the result was an arbitrary

disparity in the treatment of sound recordings.⁶ After observing this disparity in practice, parties representing a wide variety of interests — including major stakeholders representing the recording industry,⁷ libraries and archives,⁸ broadcasters,⁹ and the public interest¹⁰ — have

⁶ There is evidence, as Professor Nimmer points out, that the disparity is an anomaly born out of a mistaken belief that federalizing copyright in pre-1972 sound recording would bring all such recordings into the public domain. Reply Comments of the Music Library Association, *NOI: Federal Copyright Protection of Sound Recordings Fixed Before February 15, 1972* (U.S. Copyright Office Jan. 31, 2011), available at <http://copyright.gov/docs/sound/comments/reply/041211-MLA.pdf> (citing Michael Erlinger, Jr., *An Analog Solution in a Digital World: Providing Federal Copyright Protection for Pre-1972 Sound Recordings*, 16 U.C.L.A. Ent. L. Rev. 45, 58 (2009)).

⁷ Comments of Recording Industry of America (RIAA) and American Association of Independent Music (A2IM), *NOI: Federal Copyright Protection of Sound Recordings Fixed Before February 15, 1972* (U.S. Copyright Office Jan. 31, 2011), available at <http://www.copyright.gov/docs/sound/comments/initial/20110131-RIAA-and-A2IM.pdf> (“RIAA Pre-72 Comments”).

⁸ Comments of Society of American Archivists, *NOI: Federal Copyright Protection of Sound Recordings Fixed Before February 15, 1972* (U.S. Copyright Office Jan. 31, 2011), available at <http://www.copyright.gov/docs/sound/comments/initial/20110124-Society-of-American-Archivists.pdf>.

⁹ National Association of Broadcasters Reply Comments, *NOI: Federal Copyright Protection of Sound Recordings Fixed Before February 15, 1972* (U.S. Copyright Office Jan. 31, 2011), available at <http://www.copyright.gov/docs/sound/comments/reply/041413nab.pdf>.

¹⁰ Comments of EFF, *NOI: Federal Copyright Protection of Sound Recordings Fixed Before February 15, 1972* (U.S. Copyright Office Jan.

supported retroactively incorporating pre-72 sound recordings into federal law. And at Congress's direction, the United States Copyright Office conducted a thorough study and issued a substantive report that recommends removing pre-1972 sound recordings from state jurisdiction.

Although there appears to be a consensus that Congress should federalize copyrights in pre-1972 sound recordings, not all stakeholders agree about how Congress should go about it.¹¹ The music library community, for example, has argued for federalization because federal law provides clear limits to the scope of copyrights. *See* Comments of Eric Harbeson for the Music Library Association, *NOI: Federal Copyright Protection of Sound Recordings Fixed Before February 15, 1972* (U.S. Copyright Office Jan. 31, 2011), *available at* <http://www.copyright.gov/docs/sound/comments/initial/20110131-Eric-Harbeson-Music-Library-Ass%27n.pdf>. The music library community has taken this position even though federalizing the copyright in pre-

31, 2011), *available at* <http://www.copyright.gov/docs/sound/comments/initial/20110131-Abigail-Phillips-Electronic-Freedom-Foundation.pdf>.

¹¹ ARSC supports establishing a federal public performance right in sound recordings. *See* Brooks Testimony.

1972 sound recordings would deprive it of more favorable rules applied in some states. *See id.*

For its part, the Recording Industry Association of America (“RIAA”) initially expressed concern over federalization, raising concerns about chain of title, the loss of copyright over recordings that will enter the public domain, and the shortening of their copyright term. *See* RIAA Pre-72 Comments. But more recently, the RIAA has endorsed the federalization of copyrights in pre-72 sound recordings, recognizing the benefits that come with the introduction of statutory damages, extensive criminal copyright protections, and a more comprehensive slate of exclusive rights. *See* Comments of the Recording Industry Association of America at 33, *Music Licensing Study: Notice and Request for Public Comment* (U.S. Copyright Office May 23, 2014), available at http://copyright.gov/policy/musiclicensingstudy/comments/Docket2014_3/Recording_Industry_Association_of_America_MLS_2014.pdf.

Reversal would cut this debate off, awarding all the spoils to the sound recording industry. It would undermine Congress’s efforts to strike an appropriate balance between the sound recording industry

and the public. The district court's decision should be affirmed, and the question of the copyright status of pre-1972 sound recordings should be returned to Congress.

CONCLUSION

The district court's decision should be affirmed. Flo & Eddie has failed to point to any basis for finding a common law right in the public performances of pre-72 sound recordings. Accordingly, all of Flo & Eddie's claims predicated on the existence of such a right fail.

Respectfully submitted,

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October 13, 2015

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure Rule 32(a)(7)(C), I certify that this amicus brief complies with the length limitations set forth in Rule 32(a)(7)(B)(ii) because it contains 3,990 words, as counted by Microsoft Word, not counting the items that may be excluded under Federal Rule 32(a)(7)(B)(iii).

/s/ Joseph R. Wetzel
Joseph R. Wetzel

CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Appellate Procedure 25, I certify that on October 13, 2015, I filed this amicus brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Joseph R. Wetzel
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