15-13100-AA

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,

DOES 1 THROUGH 10,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

PLAINTIFF-APPELLANT FLO & EDDIE, INC.
OPENING BRIEF

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to 11th Cir. R. 26.1 and 11th Cir. R. 28-1, Plaintiff-Appellant Flo & Eddie, Inc. ("Flo & Eddie") hereby discloses each of the trial judge(s), and all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this case or appeal, including subsidiaries, conglomerates, affiliates and parent corporations, including any publicly held corporation that owns 10% or more of the party's stock, and other identifiable legal entities related to a party:

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Federal Rule of Appellate Procedure 34(a) and 11th Cir. R. 34-3(c), Plaintiff-Appellant Flo & Eddie respectfully requests oral argument, which will assist and aid the Court in its consideration and evaluation of the record and issues raised herein, particularly given: (1) the issues of first impression presented by this appeal; (2) the District Court's erroneous application of federal law to purely state law issues in direct violation of 17 U.S.C. § 301(c); and (3) the importance of the issues to the putative members of the class.

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PRELIMINARY STATEMENT

From the Victrola to iTunes, sound recordings fixed prior to February 15, 1972 ("pre-1972 sound recordings") are the historical backbone of the music industry.[1] Those recordings include the iconic hits of The Turtles, all of which are owned by Flo & Eddie, Inc. ("Flo & Eddie"), including "Happy Together," "It Ain't Me Babe," "She'd Rather Be With Me," "You Baby," "She's My Girl," and "Elenore."

Pre-1972 recordings also comprise a significant amount of the music that Sirius XM Radio, Inc. ("Sirius XM") broadcasts (*i.e.*, publicly performs) on a daily basis to its 28 million subscribers through its satellite and Internet radio systems. However, despite using pre-1972 recordings to build a massive multi-billion dollar business, Sirius XM adopted a corporate policy pursuant to which it refused to obtain licenses or pay any royalties in connection with those recordings. Sirius XM instituted this policy based on its conclusion that pre-1972 recordings are not protected by ***federal*** copyright law. Indeed, they are not. But what Sirius XM ignored is that federal law is completely irrelevant, as states were given free rein by Congress to protect pre-1972 recordings until 2067 ***unburdened by any aspect***

[1] Pre-1972 recordings are to be distinguished from the musical compositions embodied in those recordings. *See e.g.*, *Saregama India Ltd. v. Mosley*, 635 F.3d 1284, 1289 n. 18 (11th Cir. 2011); *Newton v. Diamond*, 204 F. Supp. 2d 1244, 1248-49 (C.D. Cal. 2002). Musical compositions are protected by federal copyright law regardless of their date of creation and are not at issue in this litigation.

of the Copyright Act. *See* 17 U.S.C. § 301(c) ("With respect to sound recordings fixed before February 15, 1972, any rights or remedies under the common law or statutes of any State shall not be annulled or limited by this title until February 15, 2067"); *see also Goldstein v. California*, 412 U.S. 546, 93 S.Ct. 2303 (1973). And Florida has long provided this protection in three different ways: common law copyright infringement, broad property laws that protect against misappropriation and conversion, and a statutory civil theft law that makes it illegal to take the property of another. What Florida has protected, and what it continues to protect, are the recorded artistic performances embodied in pre-1972 recordings – in other words, ***the sounds that Sirius XM sells to its subscribers***.

Based on Florida's strong protection of property rights, Flo & Eddie filed this action against Sirius XM alleging, on behalf of itself and a class of owners of pre-1972 recordings, claims for common law copyright infringement, unfair competition, conversion, and civil theft. Sirius XM sought summary judgment with respect to Flo & Eddie's claims on two grounds: (1) that the public performance right is not one of the protectable rights inherent in the ownership of pre-1972 recordings, and (2) that the creation of "buffer copies" of pre-1972 recordings does not violate the reproduction right. Florida's broad protection of property and ownership rights should have resulted in a very quick denial of Sirius XM's motion for summary judgment. However, in its grant of Sirius XM's

motion, the District Court treated Florida law it as if it did not exist. Instead, the District Court relied entirely on inapplicable ***federal*** copyright law that it then used to limit Florida law in direct violation of 17 U.S.C. § 301(c).

The District Court's reliance on federal law infected its entire ruling, starting with its conclusion that there is no common law copyright protection in Florida for the public performance right in pre-1972 recordings. The District Court reached this conclusion not by citing a Florida case, but by citing a ***federal*** case for the proposition that rights in ***federal*** copyrights are not "unfettered." From this (and nothing else), the District Court concluded that a public performance right in pre-1972 recordings can only exist ***under Florida law*** if it is specifically granted by the legislature. That is the opposite of how the common law works. What the District Court ignored is that under the common law in Florida – which protects both tangible and intangible property – exclusive ownership of property already includes ***all*** rights and operates to exclude all others from using that property. *Tatum Bros. Real Estate & Inv. Co. v. Watson*, 92 Fla. 278, 289 (1926). The common law's protection of all such rights does not need extrajudicial action in order to exist, particularly given the 1977 repeal of Fla. Stat. § 543.02, which prior to that date had been the only limitation imposed on the common law by the Florida legislature with respect to pre-1972 sound recordings. Upon the repeal of § 543.02, Florida's common law resumed its full protection of pre-1972 recordings,

Miami v. Metro. Dade Cnty., 407 So. 2d 243, 244 (Fla. 3d DCA 1981), and from that date forward provided the same level of protection to those recordings as it does to all other forms of property.

By looking for a separate grant of the public performance right by the legislature, the District Court turned the concept of the common law on its head. Tellingly, in the context of a different right inherent in the ownership of pre-1972 recordings (namely, the ***reproduction*** right), the District Court fully understood that legislative action was not a necessary prerequisite. Indeed, the District Court acknowledged the existence of the reproduction right in pre-1972 recordings (as does Sirius XM) even though, like the public performance right, the Florida legislature has never separately granted that right either. This inconsistent treatment of the reproduction right and the public performance right by the District Court is intellectually indefensible and tantamount to the District Court legislating from the bench by unbundling the rights inherent in the ownership of property and unilaterally picking winners and losers among those rights.

After improperly dispensing with Flo & Eddie's common law copyright claim based on application of the wrong law, the District Court then went one step further and summarily dismissed Flo & Eddie's claims for unfair competition, conversion, and civil theft ***based on no law***. In dismissing these claims, the total extent of the District Court's analysis consisted of the statement that "because the

Court finds that Sirius has not infringed on any of Flo & Eddie's copyrights, these claims are without merit." Leaving aside the sparseness of this analysis, the District Court erred when it wrongly assumed that these claims were simply derivative of Flo & Eddie's common law copyright claim. They are not, as they each have their own body of law that required analysis separate from the common law copyright claim, which the District Court entirely neglected to undertake.

In fact, one of those claims – civil theft – is not even based on the common law. It is entirely statutory. In connection with this claim, the District Court completely ignored that the Florida legislature created a statutory scheme that imposes civil liability for using another's property to deprive that person of "a right to the property or a benefit from the property." Fla. Stat. § 772.11 and Fla. Stat. § 812.014. The legislature broadly defined "property" in Fla. Stat. § 812.012(4)(b) as "anything of value" including the "rights, privileges, interests, and claims" in tangible ***or intangible personal property***. Under this definition, the public performance, reproduction, and distribution rights attendant to ownership of pre-1972 recordings are certainly "anything of value," and their use by Sirius XM deprived Flo & Eddie of that interest and its benefit. To the extent the District Court was insistent on hearing from the Florida legislature, the civil theft statute certainly provided that voice, but the District Court was not listening.

Finally, although the District Court properly recognized the existence of the reproduction right, it then once again wrongly used federal law to limit that right. In absolving Sirius XM of liability for reproducing pre-1972 recordings in the creation of back-up and buffer copies, the District Court relied exclusively on two cases decided under the federal Copyright Act. One of those cases found that buffer copies did not satisfy the definitions adopted in § 101 of the Copyright Act for the terms "copies" and "fixed," and the other case relied on the fair use limitations that Congress imposed on federal copyrights in § 107 of the Copyright Act. Once again, the District Court never explains why it resorted to federal law to decide a state law issue; regardless, it was not allowed to do that. The limitations that the District Court imposed on Florida with respect to buffer copies are nowhere to be found in Florida law, and § 301(c) bars federal courts from using those aspects of the Copyright Act to annul or limit protection of pre-1972 recordings.

STATEMENT OF JURISDICTION

The District Court had diversity jurisdiction over this matter pursuant to 28 U.S.C. § 1332(a) and (d) because the action is between citizens of different states and the amount in controversy exceeds the statutory limits. **(Doc. 1, ¶¶ 5, 7-8; Doc. 36, ¶¶ 19, 21-22; Doc. 41, ¶¶ 21-22)**[2] This Court has appellate jurisdiction

[2] "Doc." refers to the docket-entry number assigned by the District Court.

pursuant to 28 U.S.C. § 1291 as this is an appeal of a final judgment. A final judgment was entered on June 22, 2015 **(Doc. 142)**, and was thereafter timely appealed. **(Doc. 143)**; Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF ISSUES PRESENTED

Whether, under Florida law, the holders of common law copyrights in pre-1972 recordings have, as part of the bundle of rights attendant to their copyright, the right to exclusive public performance of those recordings?

Whether, under Florida law, the exclusive ownership of the artistic performances embodied in pre-1972 recordings includes all rights attendant to ownership of that property, including the right of reproduction, distribution, and public performance?

Whether it was error for the District Court to conclude that there is no right of public performance in pre-1972 recordings under Florida law?

Whether it was error for the District Court to apply federal copyright law in determining the scope of protection afforded to pre-1972 sound recordings under Florida law?

Whether it was error for the District Court to hold that unauthorized "back-up and buffer copies" are not unlawful reproductions under Florida law?

Whether it was error for the District Court to hold that Flo & Eddie's claims for unfair competition, conversion, and civil theft are derivative of its claim for common law copyright infringement?

STATEMENT OF FACTS

1. The Parties.

A. Flo & Eddie (The Turtles).

The Turtles are one of the great American rock bands. They were formed by teenagers Howard Kaylan, Mark Volman, Don Murray, Al Nichol, Charles Portz, and Jim Tucker in 1965 and almost immediately achieved breakthrough success with their cover of the Bob Dylan song "It Ain't Me Babe." That success was followed by the hit "You Baby" in 1966 and "Happy Together" in 1967. "Happy Together" is widely recognized as one of the great iconic recordings of the 1960s, and, in particular, the 1967 social phenomenon known as the "Summer of Love." The Turtles' string of hits continued with "She'd Rather Be With Me" in 1967, "Elenore" in 1968, and "You Showed Me" in 1969. **(Doc. 97-1, ¶¶ 2-3; Doc. 95 ¶ 52)**

Since 1971, The Turtles' recordings have been owned by Flo & Eddie, a corporation controlled by two of the founding members of the band – Kaylan and Volman. For the last four decades, Flo & Eddie have exploited these recordings by, among other things, licensing the rights to make and sell records and licensing

the rights for The Turtles' recordings to be used in movies, TV shows, and commercials. More recently, Flo & Eddie has licensed The Turtles' recordings to The Orchard to be exploited digitally, including through the iTunes and Amazon stores. In addition, Kaylan and Volman continue to devote their time and effort to promoting The Turtles and their music, and have been the main act on annual summer tours, such as the "Happy Together Tour," which features The Turtles and other musical groups from the 1960s. **(Doc. 97-1, ¶¶ 4-7; Doc. 95 ¶¶ 53-60)**

B. Sirius XM.

Sirius XM is the largest radio broadcaster in the United States, providing music on a subscription fee basis to over 28 million paid subscribers through its satellite and Internet radio systems. In exchange for monthly subscription fees which range from $9.99-$18.99, a subscriber can get access to, among other things, Sirius XM's broadcasts of commercial-free music, including many channels devoted solely to playing pre-1972 recordings, such as "40s on 4," "50s on 5," and "60s on 6." In addition to its satellite radio service, Sirius XM also streams and distributes music over the Internet for which it also charges a fee. **(Doc. 94, p. 3-4; Doc. 94-1 ¶¶ 1-8; Doc. 94-9; Doc. 94-10; Doc. 94-11; Doc. 95 ¶¶ 61-65)**

As part of its satellite and Internet radio services, Sirius XM publicly performs and reproduces pre-1972 recordings, including The Turtles' recordings.[3] Sirius XM does not dispute that it publicly performs these recordings by broadcasting and streaming them to delivery partners who operate content delivery networks, by broadcasting and streaming those recordings directly to its own subscribers**,** by broadcasting and streaming those recordings to the end users of the Dish Network, and by authorizing third parties to broadcast and stream recordings to Sirius XM's end users. **(Doc. 94, p. 5; Doc. 94-1 ¶¶ 16-19; Doc. 94-19; Doc. 94-20; Doc. 94-21; Doc. 94-22; Doc. 95 ¶ 74)** With respect to its reproductions, while Sirius XM tries to present a very cleansed version in its motion for summary judgment, even Sirius XM admits that it made reproductions in Florida in the form of buffer copies. As Sirius XM conceded, each time it broadcasts a recording in Florida, it creates at least two buffered copies – one as part of its terrestrial repeater system located in Florida and one in the receiver of its subscribers located in Florida. **(Doc. 94, p. 4; Doc. 94-1 ¶¶ 9-15; Doc. 94-12; Doc. 94-13; Doc. 94-14; Doc. 94-15; Doc. 94-16; Doc. 94-17; Doc. 94-18; Doc. 95 ¶¶ 67-72)** Sirius XM tries to diminish the creation of those buffered copies by describing them as

[3] The broadcast of a song (whether recorded or performed live) over terrestrial or satellite radio constitutes a performance. *SoundExchange, Inc. v. Librarian of Cong.*, 571 F.3d 1220, 1222 (D.C. Cir. 2009). The same is true for transmissions over the Internet. *Bonneville Int'l Corp. v. Peters*, 153 F. Supp. 2d 763, 766 n. 3 (E.D. Pa. 2001).

incidental, non-public, or fragmented **(Doc. 101, p. 10)**, but it cannot dispute that they are still copies of the recordings.

2. <u>The Litigations</u>.

Because Sirius XM publicly performs and reproduces – without license – pre-1972 recordings as part of its satellite and Internet services, on September 3, 2013, Flo & Eddie filed this action alleging, on behalf of itself and a class of owners of pre-1972 recordings, claims for common law copyright infringement, misappropriation/unfair competition, conversion, and civil theft. **(Doc. 1)** In addition to this action, because pre-1972 recordings are governed on a state-by-state basis, Flo & Eddie also filed two additional federal class actions: one in New York on August 16, 2013, *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, Southern District of New York, 13-CIV-5784 (CM) (the "New York Action"), and one in California, *Flo & Eddie, Inc. v. Sirius XM Radio*, Inc., Central District of California, CV-13-05693 (PSG) (the "California Action").

On July 15, 2014, Sirius XM filed the motion for summary judgment that is the subject of this appeal. **(Doc. 77)** Sirius XM contended in that motion: (1) that the public performance right is not one of the rights inherent in the ownership of pre-1972 recordings, and (2) that the creation of buffer copies did not violate the reproduction right. **(Doc. 77, p. 5)** Sirius XM supported its motion not with Florida law, but rather with a lengthy discussion of the history of the performance

right in sound recordings under the federal Copyright Act, including Congressional legislative history, reports to Congress from the United States Copyright Office, Congressional testimony, and a study by the United States Copyright Office. **(Doc. 77, pp. 5-8)** Flo & Eddie timely opposed the motion by detailing for the District Court the Florida law that Sirius XM ignored, including 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. **(Doc. 94, pp. 6-17)** As Flo & Eddie explained, Florida statutory and common law provide protection for ***all*** of the rights inherent in recordings – not just some of them – and this includes the public performance right and the reproduction right. Flo & Eddie also objected to all of the federal "evidence" and arguments that Sirius XM was improperly inviting the District Court to rely on. **(Doc. 94, p. 6 n. 5; Doc. 96, p. 3)**

The briefing on Sirius XM's motion was initially completed on September 8, 2014, when Sirius XM filed its Reply. **(Doc. 101)** However, Sirius XM thereafter changed counsel and then sought leave to submit supplemental briefing (which the District Court granted). Sirius XM's stated purpose for the supplemental briefing was so that it could bring to the District Court's attention *RCA Mfg. Co. v. Whiteman*, 114 F.2d 86 (2nd Cir. 1940), a case that Sirius XM claimed was overlooked by prior counsel and stood for the proposition that under New York

law there is no "performance right" in sound recordings. **(Doc. 119)** As Flo & Eddie pointed out in its response to this additional briefing, *Whiteman* was expressly overruled over 60 years ago in *Capitol Records, Inc. v. Mercury Records Corp.*, 221 F.2d 657 (2d Cir. 1955). **(Doc. 120)** The additional briefing on Sirius XM's motion was completed on December 3, 2014.

By the time that the additional briefing had been completed, Sirius XM's argument that there is no performance right in pre-1972 recordings had already been rejected in both the California Action and the New York Action. Indeed, in the California Action, Sirius XM's argument was rejected on statutory and common law grounds. *See Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 2014 U.S. Dist. LEXIS 139053 (C.D. Cal. Sept. 22, 2014).[4] And in the New York Action, Sirius XM's arguments were rejected on common law grounds. *See Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 62 F. Supp. 3d 325 (S.D.N.Y. 2014). Within a few days, Sirius XM suffered another significant defeat in New York when its new counsel's attempt to seek reconsideration based on *Whiteman* was shot down, along with all of its other arguments for reconsideration. *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 2014 U.S. Dist. LEXIS 174907 (S.D.N.Y. Dec. 12, 2014).

[4] In its summary judgment order in this case, the District Court stated that the ruling in the California Action was solely statutory based. **(Doc. 142, p. 7)** That is incorrect. It was also based on common law. *See Flo & Eddie, Inc. v. Pandora Media, Inc.*, 2015 U.S. Dist. LEXIS 70551, *25-26, (C.D. Cal. Feb. 23, 2015).

In fact, the court in New York referred to Sirius XM's new counsel's reliance on *Whiteman* as "clear error." *Id*. at *4.

The District Court held a hearing on Sirius XM's motion for summary judgment on April 28, 2015. **(Docs. 140 and 141)** On June 22, 2015, the District Court issued its opinion, granting Sirius XM's motion. **(Doc. 142)** Flo & Eddie timely filed its notice of appeal on July 10, 2015. **(Doc. 143)**

STANDARD OF REVIEW

This Court reviews *de novo* the District Court's grant of Sirius XM's motion for summary judgment, *Sales v. State Farm Fire & Cas. Co.*, 902 F.2d 933, 935 (11th Cir. 1990), and views all facts and reasonable inferences in the light most favorable to Flo & Eddie. *Bridge Capital Inv'rs, II v. Susquehanna Radio Corp.*, 458 F.3d 1212, 1215 (11th Cir. 2006**).** "Summary judgment is appropriate only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Hallmark Developers, Inc. v. Fulton Cty., Ga.*, 466 F.3d 1276, 1283 (11th Cir. 2006); *see* Fed. R. Civ. P. 56(a).

SUMMARY OF ARGUMENT

Pre-1972 recordings (*i.e*., recordings made prior to February 15, 1972) have never been governed by federal copyright law and, indeed, cannot be. Congress unequivocally ceded to the individual states the exclusive authority for the protection of pre-1972 recordings, and expressly provided that the protections

provided by those states may not be annulled or limited in any respect by federal copyright law until 2067. *See* 17 U.S.C. § 301(c); *Goldstein v. California, supra*.

Florida provides that protection. As with all other states that protect pre-1972 recordings, the property that is protected in Florida consists of the recorded artistic performances embodied in those recordings – in other words, the sounds**.** The protection in Florida takes three forms (common law copyright infringement, common law property laws, and statutory civil theft laws) and is quite broad. Indeed, property rights in Florida are constitutionally protected, *Dep't of Law Enforcement v. Real Prop.*, 588 So. 2d 957, 964 (Fla. 1991), are viewed as nearly absolute, *Liquor Store, Inc. v. Cont'l Distilling Corp.*, 40 So. 2d 371, 374 (Fla. 1949), and operate to protect all of the rights and interests in the property to the exclusion of others**.** *Tatum Bros. Real Estate & Inv. Co. v. Watson*, 92 Fla. 278, 289 (1926).

The District Court did not analyze Flo & Eddie's common law rights based on Florida law. Instead, the District Court erroneously and improperly relied on ***federal*** copyright law (which consists only of limited enumerated rights) to conclude that Florida's ***common law*** copyrights must therefore operate under the same limited construct. From this and nothing else, the District Court concluded that a public performance right could only exist in Florida if it was granted by Florida legislature. That is not how the common law works.

Indeed, under the common law, the issue is not whether Florida has affirmatively *granted* a performance right, 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. The answer to that question is "no" and has been "no" since 1977 when the Florida legislature repealed Fla. Stat. § 543.02. Up until its repeal, § 543.02 had limited the right of owners of pre-1972 recordings to control the "commercial use" of those recordings. But upon its repeal, the common law was once again unconstrained and was no longer restricted in any respect. *Miami v. Metro. Dade Cnty*., 407 So. 2d 243, 244 (Fla. 3d DCA 1981); *State ex rel. Fussell v. McLendon*, 109 So. 2d 783, 785 (Fla. 3d DCA 1959).[5]

Since 1977, there has been no legislative proscription in Florida with respect to pre-1972 recordings or any of the rights inherent in the ownership of those recordings, and that is what the District Court should have based its decision on.

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[5] Prior to its repeal, Fla. Stat. § 543.02 had provided as follows:

> 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 are 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 the phonograph records or electrical transcriptions, whose sole value is in their use, is hereby forbidden and abrogated.

Because all rights in pre-1972 recordings come from the same bundle of property rights, under the common law, they are all entitled to protection regardless of whether the unauthorized use is reproduction or public performance – and it was error for the District Court to conclude otherwise.

Not only does Florida protect pre-1972 recordings under the common law, but it also protects them statutorily through its civil theft laws. Fla. Stat. § 772.11 and Fla. Stat. § 812.014(1) prohibit the taking of any property, which the Florida legislature has broadly defined as "anything of value," including the "rights, privileges, interests, and claims" in tangible or intangible personal property or the "result[s] from a person's physical or mental labor or skill...." Fla. Stat. § 812.012(4)(b). Under any analysis, this broad definition of property includes the artistic performances embodied in pre-1972 recordings. Nevertheless, the District Court erroneously refused to consider them because it had already concluded based on federal copyright law that Florida's protection of pre-1972 recordings was limited.

The District Court's preoccupation with federal law also led it to erroneously conclude that that Sirius XM had not violated the reproduction right by making "buffer copies." In reaching this conclusion, the District Court relied exclusively on two federal cases decided under the Copyright Act to conclude that the copies

made by Sirius XM were supposedly not significant enough to be actionable under Florida common law.

Each time that the District Court relied on federal copyright law to limit Florida's protection of pre-1972 recordings, it violated the express prohibition in 17 U.S.C. § 301(c) against doing that. But the District Court's improper reliance on the Copyright Act did not happen by accident. Indeed, that error was invited by Sirius XM when it quoted liberally from federal copyright cases to support its arguments regarding Florida law and when it implored the District Court to consider the "evidence" provided by Sirius XM of the history of performance right in ***post***-1972 recordings under the federal Copyright Act, Congressional legislative history and testimony regarding the federal Copyright Act, and studies and reports done by the United States Copyright Office.

When the District Court's summary judgment order is stripped of federal law, the only thing that remains is Sirius XM's clear liability under Florida law. Indeed, Sirius XM admitted that it reproduced and publicly performed pre-1972 recordings without licenses. Sirius XM's admissions establish its liability for common law copyright infringement. As case law and the repeal of Fla. Stat. § 543.02 make clear, the rights afforded by common law copyrights derive from the ability to exclude ***all*** unauthorized uses of those copyright, and therefore capture all of Sirius XM's unauthorized conduct. Similarly, Sirius XM's business practice

of taking, exploiting and asserting dominion over the property of others subjects it to liability under Florida's unfair competition, conversion, and civil theft laws. The District Court never even addressed these claims because it wrongly assumed that they were simply derivative of Flo & Eddie's common law copyright infringement claim.

ARGUMENT

I. THE DISTRICT COURT WRONGLY CONCLUDED THAT THERE IS NO PERFORMANCE RIGHT IN PRE-1972 RECORDINGS.

Unlike recordings made after February 15, 1972, recordings made prior to that date are not covered by federal copyright law and are protected by the laws of the individual states. While this has always been the case, it was initially codified by Congress in 1971 when it passed the Sound Recording Amendment which, for the first time, granted federal copyright protection to post-1972 recordings. In so doing, Congress made it very clear that with respect to pre-1972 recordings, "any rights or remedies under the common law or statutes of any state shall not be annulled or limited by this title until February 15, 2067." 17 U.S.C. § 301(c).[6] Section 301(c) affirmatively cedes to the states full and complete jurisdiction and power with respect to pre-1972 recordings, clearly stating that nothing in the Copyright Act may annul or limit any of the protections granted to pre-1972

[6] The use by Congress of the phrase "any rights or remedies" shows the breadth of § 301(c). "Any" rights means "all" rights, not simply a subset of rights. *United States v. Gonzales*, 520 U.S. 1, 5, 117 S.Ct. 1032 (1997).

recordings by state statute or common law. Shortly thereafter, the United States Supreme Court unequivocally confirmed the broad power of the states to protect pre-1972 recordings thereby. *Goldstein v. California, supra*.

In Florida, the protections afforded to pre-1972 recordings are quite broad and emanate from two distinct sources: the state's common law and the statutory civil theft law. Both provide protection for all of the rights inherent in the ownership of the artistic performances in pre-1972 recordings.

A. Florida Law Protects All Rights in Pre-1972 Recordings.

1. Common Law.

Conspicuously absent from the District Court's summary judgment ruling is any discussion of Florida law dealing with the scope of property rights, including that those rights are constitutionally protected. *Dep't of Law Enforcement v. Real Prop.*, 588 So. 2d 957, 964 (Fla. 1991) ("[p]roperty rights are among the basic substantive rights expressly protected by the Florida Constitution."). The scope of common law property rights in Florida is extraordinarily broad. Indeed, the "proverbial bundle of property rights" consists of "***all*** of the sticks or incidents of ownership." *Costa Del Sol Ass'n v. Dep't of Bus. & Prof'l Regulation, Div. of Fla. Land Sales, Condos., & Mobile Homes*, 987 So. 2d 734, 736 (Fla. 3d DCA 2008) (emphasis added). As the Florida Supreme Court has made clear, the "right to own, hold and enjoy property is nearly absolute." *Dep't of Ins. v. Dade Cnty.*

Consumer Advocate's Office, 492 So. 2d 1032, 1039 n. 3 (Fla. 1986) (quoting *Liquor Store, Inc. v. Cont'l Distilling Corp.*, 40 So. 2d 371, 374 (Fla. 1949)).

In the context of pre-1972 recordings, the property that is owned and consequently protected is the artistic performances embodied in those recordings (*i.e.*, the sounds). *See* Fla. Stat. § 540.11 (criminal statute defining "owner" of sound recording as "the person who owns the original sounds embodied in the master phonograph record"); *see also CBS, Inc. v. Garrod*, 622 F. Supp. 532, 533 (M.D. Fla. 1985) (finding liability for the unauthorized duplication of the performances embodied in sound recordings). In *Garrod*, CBS brought claims for common law copyright infringement, unfair competition, conversion, and statutory theft in connection with Garrod's unauthorized duplication and distribution of the performances embodied in a number of pre-1972 recordings owned by CBS. The trial court granted summary judgment to CBS on each of the claims, finding that CBS had a protectable property interest in the performances based on its "professional investment of time, skill and money in the recordings."

Florida is not alone in recognizing that the artistic performance embodied in a pre-1972 recording is the property that is entitled to protection. *See e.g., Capitol Records, Inc. v. Naxos of Am., Inc.*, 4 N.Y.3d 540 (2005) (artistic performances embodied in pre-1972 recordings are a form of property that are entitled to the full protection of New York law); *Metro. Opera Ass'n v. Wagner-Nichols Recorder*

Corp., 199 Misc. 786, 802 (Sup. Ct. 1950) ("[T]o refuse the groups who expend time, effort, money, and great skill in producing these artistic performances, the protection of giving them a property right in the resulting artistic creation would be contrary to existing law, inequitable, and repugnant to the public interest."); *Capitol Records, Inc. v. Erickson*, 2 Cal. App. 3d 526, 537-38 (1969) (copying and distributing plaintiff's pre-1972 recordings "appropriates artistic performances produced by [plaintiff's] efforts" and defendant "had appropriated the product itself – performances embodied on the records."); *A & M Records, Inc. v. Heilman*, 75 Cal. App. 3d 554, 564 (1977) ("[R]ecorded performances are [plaintiff record company's] intangible personal property.")[7]

Owning the recorded performance in a pre-1972 recording necessarily carries with it the right to exclude Sirius XM from using that performance as part of its business without first obtaining a license. Florida has long recognized that "while the word 'property,' in common use, is applied to the tangible physical thing commonly called property, in the law it is not the material object, but the

[7] Even though the District Court acknowledged that California and New York have "well developed case law regarding the arts and related property rights" **(Doc. 142, pp. 7-8)**, it refused to consider those cases. The District Court's decision to turn a blind eye to decisions that addressed the same issues relating to pre-1972 recordings is difficult to understand. Florida courts routinely consider the analysis of foreign courts in analyzing issues that are new to Florida. *Kisling v. Rothschild*, 388 So. 2d 1310, 1312 n. 3 (Fla. 5th DCA 1980) (relying on cases from other states to conclude that architectural plans and designs are protected by common law copyright); *Intervest Constr. of Jax, Inc. v. Gen. Fid. Ins. Co.*, 133 So. 3d 494, 505 (Fla. 2014) (relying on case law from other state as persuasive authority).

right and interest which one has in it***, to the exclusion of others,*** which constitutes property." *Tatum Bros. Real Estate & Inv. Co. v. Watson*, 92 Fla. 278, 289 (1926) (emphasis added). Indeed, exclusion is the *sine qua non* of property ownership. As the United States Supreme Court stated in *Dickman v. Comm'r*, 465 U.S. 330, 336, 104 S.Ct. 1086 (1984):

> Of the aggregate rights associated with any property interest, the right of use of property is perhaps of the highest order. One court put it succinctly: 'Property' is more than just the physical thing – the land, the bricks, the mortar – it is also the sum of all the rights and powers incident to ownership of the physical thing. It is the tangible and the intangible. Property is composed of constituent elements and of these elements the right to *use* the physical thing to the exclusion of others is the most essential and beneficial. Without this right all other elements would be of little value . . . ." (citing *Passailaigue v. United States*, 224 F. Supp. 682, 686 (M.D. Ga. 1963))

See also St. Johns River Water Mgmt. Dist. v. Koontz, 861 So. 2d 1267, 1271 (Fla. 5th DCA 2003) (recognizing that one of the important sticks in the bundle of property rights is the right to exclude others from using the property).

When it comes to pre-1972 recordings, because the common law copyright and the protected property interest consist of the recorded artistic performances embodied in those recordings, the right to exclude must extend to all unauthorized uses of those performances. Thus, the method of infringement chosen by Sirius XM (*i.e.*, reproduction, distribution, or public performance) is of no consequence –

all unlicensed uses by Sirius XM are forbidden. *See SmokEnders, Inc. v. Smoke No More, Inc.*, 1974 U.S. Dist. LEXIS 6183, *30-31 (S.D. Fla. Oct. 21, 1974).

In *SmokEnders*, the court found infringement of the common law copyright in unpublished manuals used in connection with smoking cessation programs. The defendant's infringement consisted of the unauthorized oral rendition and copying of the manuals. In finding liability, the *SmokEnders* court first confirmed the basic proposition that the owner of a common law copyright "may restrict the use or enjoyment of" the copyright to "definitely selected individuals or a limited, ascertained class, or he may expressly or by implication confine the subject to some occasions or definite purpose." *Id*. at *29-30. From there, the court had no trouble concluding that the "unauthorized use" of property protected by common law copyright under Florida law is "piracy" and that that "[i]nfringement of common law copyrights consists in doing, without the consent of the owner, anything which is the sole right of the owner to do." *Id*.

Here, the District Court had it backwards when it concluded that the method of use somehow defines the scope of ownership. The right and ability to exclude others from using a pre-1972 recording applies to all unauthorized uses as a natural (and indeed, constitutionally protected) incident of property ownership and should have been the end of the District Court's analysis. However, the District Court skipped right past this basic tenet of the common law and wrongly went in search

of a separate affirmative grant of a performance right by the Florida legislature to determine its ultimate ruling. Perhaps the best proof of the District Court's error is that it did not go in search of a specific grant of the reproduction right by the Florida legislature, yet the District Court readily accepted that this right exists, as does Sirius XM. **(Doc. 142, pp. 6, 10; Doc. 77, p. 1)** In fact, the reproduction right – which comes from the same bundle of sticks as all other rights in pre-1972 recordings – has been an unquestioned part of Florida's jurisprudence for decades. *See Garrod*, 622 F. Supp. at 534-535 (liability imposed for the unauthorized duplication of pre-1972 recordings); *SmokEnders*, 1974 U.S. Dist. LEXIS 6183 at *30-31 (holding that unauthorized photocopying of a document protected by common law copyright is piracy). Its legitimacy emanates from the very same property protections as the public performance right, or indeed, any other use of a pre-1972 recording: the simple right to exclude.

When the common law is viewed from the proper perspective, the issue is not whether Florida has affirmatively *granted* a performance right; rather, the issue is whether it has affirmatively *excluded* the performance right from the bundle of rights attendant to the ownership of the artistic performances embodied in pre-1972 recordings. The answer to that question is no, as it has been since at least 1977 when the Florida legislature repealed Fla. Stat. § 543.02, which prior to that date had limited the right to control "commercial use" of pre-1972 sound recordings.

Upon its repeal, the common law protecting pre-1972 sound recordings was once again unconstrained and was no longer restricted in any respect. *Miami v. Metro. Dade Cnty*., 407 So. 2d 243, 244 (Fla. 3d DCA 1981); *State ex rel. Fussell v. McLendon*, 109 So. 2d 783, 785 (Fla. 3d DCA 1959).

Since 1977, there has been no legislative proscription in Florida with respect to pre-1972 recordings or any of the rights inherent in the ownership of those recordings, including the performance right. Moreover, Florida has not said that the exclusive ownership rights in pre-1972 recordings should be defined differently from any other form of property by making their protection dependent on the method of infringement, or that the protection of property rights is based on how those rights are used by others.[8] The public performance right in pre-1972 recordings exists because Florida's common law protects all rights inherent in ownership, and the District Court was wrong to assume that it did not exist simply because it could not find a case specifically saying that it existed. That is not and has never been how the protection of property rights works. In fact, the District Court's requirement that for a right to exist under common law there first must be a case saying that it exists would have the perverse result of precluding the protection of property rights in every case of first impression.

[8] To the contrary, in enacting ***and*** in repealing Fla. Stat. § 543.02, the Florida legislature treated all uses of pre-1972 recordings the same.

2. Statutory Law.

Florida has a long history of protecting property not only with its common law, but also statutorily as part of the state's civil theft laws. Of particular relevance to this case is Fla. Stat. § 772.11, which creates a civil cause of action for an injury resulting from (among other things) a violation of Fla. Stat. § 812.014(1). That violation occurs when:

> (1) A person commits theft if he or she knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent to, either temporarily or permanently:
>
> > (a) Deprive the other person of a right to the property or a benefit from the property.
> >
> > (b) Appropriate the property to his or her own use or to the use of any person not entitled to the use of the property.

Fla. Stat. § 812.014.

The reach of Fla. Stat. § 812.014(1) is extraordinarily broad given the definition of "property" that was adopted by the Florida legislature. Indeed, rather than limiting the property that was covered by this statute or the protected rights in that property, the legislature expressly defined "property" to mean "anything of value," including the "rights, privileges, interests, and claims" in tangible or intangible personal property. Fla. Stat. § 812.012(4)(b). This definition has been broadly construed. *See e.g. Garrod*, 622 F. Supp. at 534-535 (finding of civil theft based on unlawful taking of "impulses" in pre-1972 recordings); *Crow v. State*,

392 So. 2d 919, 920 (Fla. 1st DCA 1980) (stolen property consisted of the royalty rights and/or services of several popular singers); *New Lenox Indus. v. Fenton*, 510 F. Supp. 2d 893, 910 (M.D. Fla. 2007) (civil theft law encompasses theft of trade secrets); *Jacobs Wind Elec. Co. v. Dep't of Transp.*, 626 So. 2d 1333, 1337 (Fla. 1993) (patent is protected property subject to civil theft law where claim is not preempted by federal law); *Korman v. Iglesias*, 736 F. Supp. 261, 265 (S.D. Fla. 1990) (civil theft law covers claim for royalties against co-author of copyright); *Miller v. Wallace Int'l Trucks, Inc.*, 532 So. 2d 1276, 1277 (Fla. 2d DCA 1988) (taking of "lien" rights in vehicle considered civil theft).

The definition of property in § 812.012(4)(b) also includes "services," which the Florida legislature has broadly defined to include "anything of value resulting from a person's physical or mental labor or skill..." Fla. Stat. § 812.012(4)(b) and (6). That definition of services is very similar to the description of the protectable copyright interest identified by a number of courts resulting from the creation of the artistic performances in pre-1972 recordings. *See e.g*. *Garrod*, 622 F. Supp. at 534-35 (copyright interest based on investment of "skill, labor, and money").

The District Court never even discussed the definition of property in § 812.012(4)(b) and certainly could not conclude on summary judgment that the public performance right is not "anything of value." Pre-1972 recordings have tremendous value as even the District Court recognized when it acknowledged that

Flo & Eddie regularly license their pre-1972 recordings for use by others. **(Doc. 142, pp. 1-2)** And Sirius XM certainly cannot dispute the significant value of the public performance right. Indeed, on July 31, 2015, Sirius XM paid $210 million to a group of record companies to obtain (among other things) the right to publicly perform their pre-1972 recordings through 2017, including in Florida.[9]

B. The District Court Applied the Wrong Law.

Despite acknowledging that it must look to Florida law "to determine the breadth of Flo & Eddie's property rights," **(Doc. 142, p. 6)**, the District Court then completely ignored Florida's broad property laws and inexplicably based its conclusion that there is no performance right in pre-1972 recordings on a single quote from a case based only on federal law. Indeed, the District Court summarily concluded that owners of pre-1972 recordings do not have "unfettered rights" ***under Florida law*** because the Supreme Court stated in *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 432 (1984) that "[c]opyright protection has never accorded the copyright owner complete control over all possible uses of his work." The District Court's non-sequitur attempt to define the scope of common law rights in Florida through the lens of *Sony* was clear error.

Sony involved ***federal*** copyrights, was decided under ***federal*** copyright law, and solely concerned the scope of the ***federal*** copyright protection set forth in 17

[9] *See* Sirius XM Holdings Inc., Current Report (Form 8-K) at Item 8.01 (June 26, 2015), http://investor.siriusxm.com/secfiling.cfm?filingID=930413-15-2915.

U.S.C. § 106 as limited by the ***federal*** fair use considerations set forth in 17 U.S.C. § 107. *Sony* does not have general application to common law copyrights or common law property law, nor was the Supreme Court even suggesting that it did. In fact, *Sony* only makes sense in the context of the federal Copyright Act, which expressly limits its protection to the specific enumerated rights set forth in 17 U.S.C. § 106. That is the reason why the *Sony* court concluded that rights in federal copyrights are not "unfettered." However, the common law is a very different animal than a limited statutory scheme like the Copyright Act. The common law does not require a separate grant of rights, as it uses as its starting point that all rights are inherent in ownership of property. It is for this reason that it is widely recognized that common law rights are viewed to be much broader than federal copyrights. S*ee* 6 W.F. Patry, *Patry On Copyright* § 18.55 at 18-198 (2010 ed.) (recognizing that state protection of pre-1972 recordings are not limited by the federal Copyright Act and can provide rights "***beyond***" that Act).

Sony should never have been part of the District Court's legal analysis, ***much less the entirety of that analysis***. By using *Sony* to limit Florida law, the District Court wrongly conflated two very different and mutually exclusive sets of laws – and ironically violated § 301(c) in the process by using the Copyright Act to limit the scope of Florida's protection of pre-1972 recordings. In the context of

pre-1972 recordings, relying on federal law to determine Florida law is like looking at the color red in order to define the color blue.

The District Court's improper reliance on federal law did not occur by accident. Sirius XM actually invited that error in its motion when it implored the District Court to determine whether a public performance right exists under Florida law by proffering evidence of: (1) the history of the performance right in ***post***-1972 recordings under the federal Copyright Act, (2) Congressional legislative history testimony regarding the federal Copyright Act, and (3) studies and reports done by the United States Copyright Office. **(Doc. 77, pp. 5-8)** All of Sirius XM's so-called "evidence" had nothing to do with Florida law, was objected to by Flo & Eddie as "irrelevant, non-binding, nonprecedential, and inadmissible hearsay" **(Doc. 94, p. 6 n. 5; Doc. 96, p. 3)**, and was intended by Sirius XM to lead the District Court down the wrong analytical path – which is exactly what occurred.

Sirius XM also lined that path with various policy arguments that inexplicably showed up in District Court's summary judgment order. For example, the District Court questioned how there could be a performance right since that would raise questions as to who then would "set[] and administer[] the licensing rates." **(Doc. 142, p. 9)** As with any free market, the willing sellers and willing buyers set the rates, which is exactly what already occurs every time a movie or TV studio obtains a license to use a pre-1972 recording. The setting of rates is not

relevant to the existence of a performance right, nor should it have ever been a concern of the District Court.

Ultimately, under the purported guise of not wanting to legislate from the bench, that is precisely what the District Court did. It was the District Court's obligation to apply Florida law as it exists, not ignore that law because it does not fit within the District Court's narrative or desired outcome.

II. THE DISTRICT COURT WRONGLY CONCLUDED THAT THE RIGHT OF REPRODUCTION INHERENT IN PRE-1972 RECORDINGS SHOULD BE LIMITED BY FEDERAL LAW.

Sirius XM does not dispute that it made (and continues to make) copies of pre-1972 recordings in Florida. However, despite recognizing the existence of the reproduction right inherent under Florida law in the ownership of pre-1972 recordings, the District Court then made two very fundamental errors in ruling that Sirius XM's creation of back-up and buffer copies are not unlawful reproductions.

First, the District Court ignored that it was deciding a motion for summary judgment and that its role was simply to determine the existence of disputed issues. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505 (1986). The District Court went far beyond this and actually decided those issues by making the qualitative and quantitative factual determination that Sirius XM's reproductions were too insignificant to be actionable. **(Doc. 142, p. 10)** The scope of Sirius XM's reproductions requires an analysis by the trier of fact, not a balancing test by

the District Court. This is particularly true given that Sirius XM's presentation of a cleansed explanation of the reproductions that it made in Florida was refuted by Flo & Eddie, thereby resulting in triable issues of fact. **(Doc. 94, p. 4; Doc. 94-1 ¶¶ 9-15; Doc. 94-12; Doc. 94-13; 9 Doc. 4-14; Doc. 94-15; Doc. 94-16; Doc. 94-17; Doc. 94-18; Doc. 95 ¶¶ 67-72)**

Second, the District Court came to its conclusions by once again wrongly applying federal law to determine the scope of rights under Florida law. Based on two federal cases decided under the Copyright Act, the District Court concluded that Sirius XM's "buffer and back-up copies do not constitute an improper reproduction." To that end, the District Court cited *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008) for the proposition that "acts of buffering did not constitute copies sufficient to constitute copyright infringement" and *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014) for the proposition that "buffered copies do not constitute copyright infringement." **(Doc. 142, p. 10)** Neither of these cases were appropriate for the District Court to rely upon to circumscribe Florida's protection of pre-1972 recordings.

With respect to *Cartoon Network*, what the District Court completely ignored is that the Second Circuit's ruling was based entirely on the Copyright

Act's definitions of "copy" and "fixed," ***which do not exist in Florida***.[10] The District Court is not permitted to import statutory definitions from the Copyright Act into Florida law. Even more perplexing is the District Court's citation to *Authors Guild*. Despite the District Court's description of that case as involving buffer copies, it did not. *Authors Guild* dealt with whether a university's systematic digitization of copyrighted books in order to create a searchable database was fair use under § 107 of the Copyright Act. Using the fair use exception in § 107 to limit the common law rights of the owners of pre-1972 recordings, however, could not be a clearer violation of § 301(c).

Moreover, the issue of fair use was not even properly before the District Court given that Sirius XM never raised it in its initial brief. (**Doc. 77, p. 20)** To the contrary, in its initial brief, Sirius XM contended that it did not make any copies in Florida, not that the copies it made were fair use. Sirius XM's failure to raise the issue of fair use in its initial brief means that the issue was deemed to be abandoned. *See e.g.*, *Wilkerson v. Grinnell Corp.*, 270 F.3d 1314, 1322 (11th Cir. 2001) It was only after Flo & Eddie filed its opposition and disproved Sirius XM's

[10] The District Court also ignored that *Cartoon Network* is not even the definitive law under the Copyright Act as other circuits have come to different conclusions on this issue. *See e.g.*, *MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 518 (9th Cir. 1993) and *Stenograph L.L.C. v. Bossard Assocs.*, 144 F.3d 96, 101-02 (D.C. Cir. 1998).

contention that it did not make copies in Florida that Sirius XM raised the issue of fair use.

III. UNDER FLORIDA LAW, SIRIUS XM'S LIABILITY IS CLEAR AND SHOULD HAVE RESULTED IN THE DENIAL OF ITS MOTION FOR SUMMARY JUDGMENT.

When federal law is excised from the District Court's decision and replaced with Florida law, what remains is Sirius XM's liability. Indeed, because the District Court rested its entire opinion on two erroneous beliefs that it derived from federal law (namely, that there is no performance right and that buffer copies were fair use reproductions), it never analyzed the specifics of Flo & Eddie's claims. In fact, with respect to three of the claims (unfair competition, conversion, and statutory civil theft), the District Court simply assumed that they were derivative of Flo & Eddie's common law copyright claim and required no additional analysis whatsoever. **(Doc. 142, p. 11)** ("[B]ecause the Court finds that Sirius has not infringed on any of Flo & Eddie's copyrights, these claims are without merit.") Those claims are not derivative. As the *Garrod* court held, claims for unfair competition, conversion, and civil theft provide an additional basis for relief separate and apart from a claim for common law copyright infringement. *Garrod*, 622 F. Supp. at 535-36. Florida is not alone in recognizing the freestanding nature of these claims. New York and California do as well. *Capitol Records, Inc. v. Naxos of Am.*, Inc., 4 N.Y.3d 540, 564 (2005) (holding that causes of action for

copyright infringement and unfair competition are not synonymous under New York law); *Lone Ranger TV, Inc. v. Program Radio Corp.*, 740 F.2d 718, 726 (9th Cir. 1984) (finding liability for conversion even though it did not find liability for common law copyright infringement).

When all of the elements of Flo & Eddie's claims are properly analyzed, Sirius XM's liability is readily apparent.[11]

A. Common Law Copyright Infringement.

Sirius XM admitted that it reproduced and publicly performed pre-1972 recordings (including many of The Turtles' recordings owned by Flo & Eddie and identified on Exhibit A to the Complaint) and that it authorized third parties to reproduce and publicly perform all of those same recordings. Sirius XM also admitted that it engaged in all of this exploitation without licenses. Sirius XM's admissions establish its liability for common law copyright infringement.

As *Garrod*, *SmokEnders*, and the repeal of Fla. Stat. § 543.02 make clear, the rights afforded by common law copyrights are necessarily broad in scope because they derive from the ability to exclude ***all*** uses of the copyright. The method of infringement chosen by Sirius XM (*i.e.*, reproduction, distribution, or public performance) is irrelevant. For common law copyright infringement, what

[11] In order to defeat Sirius XM's motion for summary judgment, Flo & Eddie was only required to show triable issues of fact. It was not obligated to prove Sirius XM's liability even though the evidence in this case does just that.

matters here is that Sirius XM's public performance and reproduction of the recorded artistic performances embodied in pre-1972 recordings was done without the consent of the owners of those recordings and in total derogation of their rights.

B. Unfair Competition.

Florida has never adopted a "one size fits all" approach to defining the parameters of a claim for unfair competition. The reason for this flexibility is because "the law of unfair competition is the umbrella for all statutory and nonstatutory causes of action arising out of business conduct which is contrary to honest practice in industrial or commercial matters." *AlphaMed Pharms. Corp. v. Arriva Pharms., Inc.*, 432 F. Supp. 2d 1319, 1353 (S.D. Fla. 2006) (citing *Am. Heritage Life Ins. Co. v. Heritage Life Ins. Co.*, 494 F.2d 3, 14 (5th Cir. 1974)). Thus, when mapping the "contours of Florida's elastic unfair competition cause of action," courts recognize that "the precise elements of the claim are somewhat elusive" and, therefore, should correspond to the underlying acts of unfair competition on a "case by case basis." *Id.*

It is this elasticity and flexibility that caused the *Garrod* court to hold that in the context of the unauthorized use of pre-1972 recordings, unfair competition consists of three elements: "(1) time, labor, and money expended by the plaintiff, (2) competition, and (3) commercial damage." *Garrod*, 622 F. Supp. at 536. In holding as it did, *Garrod* was guided by the United States Supreme Court's

decision in *International News Service v. Associated Press*, 248 U.S. 215, 239-40, 39 S.Ct. 68 (1918), which articulated the common sense proposition that unfair competition laws should be used to attach liability to the conduct of people who attempt to profit off the property of others.

> [D]efendant, by its very act, admits that it is taking material that has been acquired by complainant as the result of organization and the expenditure of labor, skill, and money, and which is salable by complainant for money, ***and that defendant in appropriating it and selling it as its own is endeavoring to reap where it has not sown…*** (emphasis added)

Id.

While *International News Service* was based on federal common law that ceased to exist as a result of *Erie v. Tomkins*, 304 U.S. 64, 58 S.Ct. 817 (1938), state courts routinely rely on it in connection with unfair competition claims, including those involving piracy of pre-1972 recordings. *See e.g. Erickson*, 2 Cal. App. 3d at 531 (1969); *Metro. Opera Ass'n*, 199 Misc. at 796; *Waring v. WDAS Broadcasting Station, Inc.*, 327 Pa. 433 (1937); *Mercury Record Productions, Inc. v. Econ. Consultants, Inc.*, 64 Wis. 2d 163, 218 N.W.2d 705 (1974). Thus, the *Garrod* court was correct to look to *International News Service* and construe unfair competition in a manner that recognized what in fact was being stolen.

Not only is Sirius XM taking Flo & Eddie's property (the performances embodied in its pre-1972 recordings) but it is then turning around and selling that property in direct competition with Flo & Eddie. Flo & Eddie licenses the very

performances that Sirius XM is selling to its subscribers. The content that Flo & Eddie is monetizing is the exact same content that Sirius XM is monetizing – ***that is competition***. *See e.g.*, *Dillon v. NBCUniversal Media*, LLC, 2013 U.S. Dist. LEXIS 100733 (C.D. Cal. June 18, 2013); *see also Arista Records LLC v. Lime Grp. LLC*, 784 F. Supp. 2d 398, 437 (S.D.N.Y. 2011). The fact that Sirius XM's subscribers can get those performances from Sirius XM necessarily means that they do not have to satisfy their demand for those performances from Flo & Eddie.

Lastly, the commercial damage to Flo & Eddie from Sirius XM's competition is manifest. Under the law, commercial damages are much broader than lost sales, and also include the unjust enrichment and lost license fees that results from the unfair competition. *AlphaMed Pharms. Corp.*, 432 F. Supp. 2d at 1335. In this case, that unjust enrichment is the revenue received by Sirius XM in connection with its exploitation of pre-1972 recording, which Flo & Eddie provided expert evidence of in opposition to Sirius XM's motion for summary judgment. **(Docs. 94 p. 12; Doc. 100[12])**; *see Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 62 F. Supp. 3d 325, 349 (S.D.N.Y. 2014) (finding that "it is a matter of economic common sense that Sirius harms Flo and Eddie's sales and potential licensing fees (even if the latter market is not yet extant) by publicly performing Turtles sound recordings.")

[12] Doc. 100 is confidential under the District Court's protective order and was filed under seal. As a result, it is not included in Flo & Eddie's appendix.

C. Conversion.

Liability for conversion attaches when a defendant wrongfully asserts dominion over the property of someone else that is inconsistent with that other person's ownership of that property. *Joe Hand Promotions, Inc. v. Hart*, 2012 U.S. Dist. LEXIS 53335, *5 (S.D. Fla. Apr. 16, 2012). The act of asserting dominion over the property of another does not need to deprive that person of exclusive possession of his property in order to establish liability for conversion. *Warshall v. Price*, 629 So. 2d 903, 904 (Fla. 4th DCA 1993); *Nealy v. Ross*, 249 So. 2d 522, 523 (Fla. 3d DCA 1971).

Moreover, conversion does not require the actual taking of physical property. Florida courts uniformly hold that a claim will lie for a wrongful taking of intangible interests in a business venture. *Estate of Corbin*, 391 So. 2d 731, 732 (Fla. 3d DCA 1980); *see also Joe Hand Promotions*, 2012 U.S. Dist. LEXIS 53335 at *5-6 (unauthorized taking of television broadcast of a fight constituted conversion); *Garrod*, 622 F. Supp. at 536 (conversion found with respect to the unauthorized taking of the "time, effort and expense" of producing records); *Total Mktg. Techs. v. Angel Medflight Worldwide Air Ambulance Servs., LLC*, 2012 U.S. Dist. LEXIS 1829, *9 (M.D. Fla. Jan. 6, 2012) (defendant found liable for conversion for wrongfully asserting dominion over plaintiff's confidential business information by diverting phone calls from plaintiff's customers to another

company); *Intelsat Corp. v. Multivision TV LLC*, 2010 U.S. Dist. LEXIS 138955, *14-16 (S.D. Fla. Dec. 27, 2010) (stating that "[t]he allegations of [defendants'] unauthorized transmissions to the satellite and the concomitant disruption of service are acts of dominion over [plaintiff's] satellite services inconsistent with [plaintiff's] ownership.").

Under any analysis, Sirius XM's conduct constitutes conversion. Its performance of pre-1972 recordings is the same assertion of dominion that the defendants in *Joe Hand Promotions* and *Intelsat Corp.* asserted over satellite signals and transmissions. Moreover, it is "wrongful" in that Sirius XM has never obtained licenses from the owners of the pre-1972 recordings, and it is certainly "inconsistent" with the exclusive rights of the owners of those recordings.

D. Civil Theft.

Having established that the artistic performances in pre-1972 recordings are property as defined in § 812.012(4)(b), Sirius XM's liability under §§ 772.11 and 812.014 becomes quite clear. Indeed, its conduct was done "knowingly," which is defined as: (1) "with actual knowledge and understanding of the facts or the truth," or (2) "an act done voluntarily and intentionally and not because of mistake or accident or other innocent reason." *Shaw v. State*, 510 So. 2d 349, 351 (Fla. 2d DCA 1987). Sirius XM's conduct satisfies both standards, as it was the consequence of a conscious business decision that resulted in a corporate policy

pursuant to which Sirius XM systematically obtained and used pre-1972 recordings as part of its satellite and Internet radio offerings without any licenses.[13]

Moreover, Sirius XM did all of the foregoing with the requisite criminal intent for civil theft, which exists when there is an intent to temporarily or permanently deprive or appropriate the property (or a benefit from the property) of another. Fla. Stat. § 812.014(1); *Country Manors Asso. v. Master Antenna Sys.*, 534 So. 2d 1187, 1192 (Fla. 4th DCA 1988); *State v. Dunmann*, 427 So. 2d 166, 169 (Fla. 1983). Criminal intent can be "inferred from the acts of the parties and from the surrounding circumstances;" it does not require direct proof. *State v. West*, 262 So. 2d 457, 458 (Fla. 4th DCA 1972). Thus, determining that intent is most certainly not an issue that can be decided on summary judgment.

In any event, there can be little doubt that Sirius XM intended to deprive the owners of pre-1972 recordings of their property as well as a benefit from that property; namely, control of or compensation under the performance right. Sirius XM knew that it did not own the pre-1972 recordings that it was exploiting and that it did not have the permission of the owners of those recordings to exploit them. Yet, based on the patently false excuse that pre-1972 recordings were in the

[13] "Obtains or uses" includes "taking or exercising control over property" and "making any unauthorized use, disposition, or transfer of property. Fla. Stat. § 812.012(3)(a) and (b). Sirius XM's conduct satisfies this definition as it exploited pre-1972 recordings without the approval of the owners of those recordings.

public domain – an excuse that no Florida lawyer could endorse in light of the 1986 decision in *Garrod* – Sirius XM decided that it would forgo licenses and the payment of royalties. Sirius XM's "public domain" argument was simply a pretext to exploit pre-1972 recordings for free. Under the rubric of "any excuse will do," Sirius XM took what it wanted in complete and utter disregard for the rights of the owners of those recordings. That is criminal intent.

CONCLUSION

Because the District Court applied the wrong law and erroneously concluded (1) that the public performance right is not one of the protectable rights inherent in the ownership of pre-1972 recordings, (2) that the creation of buffer copies does not violate the reproduction right, and (3) that the claims of unfair competition, conversion, and civil theft are all derivative of the claim for common law copyright infringement, the District Court's summary judgment order should be reversed in its entirety.

Dated: September 1, 2015

Respectfully submitted,

By: /s/ Harvey W. Geller

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CERTIFICATE OF COMPLIANCE

The brief complies with the Fed. R. App. P. 32(a)(7)(B) because it contains 10,710 words (based on Microsoft Word word-count function), excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(b)(iii). The brief also complies with the typeface requirements of Fed. R. App. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word in 14 point Times New Roman.

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CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure, I hereby certify that I have this 1st day of September 2015 served a copy of the foregoing documents electronically through the Court's CM/ECF system on all registered counsel.

By: /s/ Sidney Summers
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