To be Argued by:
CAITLIN J. HALLIGAN
(Time Requested: 30 Minutes)

CTQ-2016-00001

Court of Appeals

of the

State of New York

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

Plaintiff-Respondent,

– against –

SIRIUS XM RADIO INC., a Delaware Corporation,

Defendant-Appellant,

DOES, 1 THROUGH 10,

Defendants.

ON APPEAL FROM THE QUESTION CERTIFIED BY THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT IN DOCKET NO. 15-1164

BRIEF FOR PLAINTIFF-RESPONDENT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to 22 N.Y.C.R.R. § 500.1(f), Plaintiff-Respondent Flo & Eddie, Inc. hereby states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

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PRELIMINARY STATEMENT

Sound recordings fixed prior to February 15, 1972 are the historical backbone of the music industry. These legendary recordings include the iconic hits of The Turtles, the rights to which are owned by Flo & Eddie, Inc. ("Flo & Eddie"). Unsurprisingly, pre-1972 sound recordings comprise a significant amount of the music that Sirius XM Radio Inc. ("Sirius XM") broadcasts (*i.e.*, publicly performs) on a daily basis to 28 million subscribers through its satellite and Internet radio systems. Despite copying tens of thousands of pre-1972 recordings to develop a vast library of music and build a massive, multi-billion dollar business, Sirius XM refused to obtain licenses or pay royalties to exploit these recordings.

In June 2015, after losing its motion for summary judgment in this case, Sirius XM quickly settled a similar case brought by record labels seeking compensation for its performance of pre-1972 sound recordings. Yet Sirius XM still refuses to obtain licenses or pay royalties for exploiting pre-1972 sound recordings owned by Flo & Eddie and similarly situated copyright holders. Sirius XM emphasizes that pre-1972 recordings are not protected by federal copyright law, which is true. But Congress has expressly permitted states to protect copyright in these recordings however they see fit until 2067. *See* 17 U.S.C. § 301(c). New York has taken up that mantle and long provided common law

protection for sound recordings. *See, e.g.*, *Capitol Records, Inc. v. Naxos of Am., Inc.*, 4 N.Y.3d 540 (2005); *Metro. Opera Ass'n v. Wagner-Nichols Recorder Corp.*, 199 Misc. 786 (Sup. Ct. N.Y. Cnty. 1950), *aff'd* 279 A.D. 632 (1st Dep't 1951).

More than 250 years ago, William Blackstone acknowledged the expansive reach of common law copyright when he noted that any unauthorized use of a person's original work is "an invasion of his right of property." 2 William Blackstone, *Commentaries on the Laws of England in Four Books* 405-06 (1766). New York's common law of copyright provides robust protection against such invasion by prohibiting the unauthorized appropriation of a creator's skill, talent, and hard work. It confers rights as expansive as those in tangible property, including the right against unauthorized copying, sale, reproduction, public performance, and dissemination. And it provides even *more* protection for sound recordings than for other forms of copyrightable works.

Sirius XM now admits that New York common law copyright extends to sound recordings, and concedes—as it must, given this Court's seminal decision in *Capitol Records, Inc. v. Naxos*—that post-sale, owners of sound recordings maintain common law copyright protection against unauthorized "duplication and distribution." Appellant Br. at 15. But in Sirius XM's view, these are the *only* rights that remain post-sale: according to Sirius XM, public sale somehow extinguishes the performance right that existed prior to the sale. *See id.* at 30.

Sirius XM's self-serving distinctions between pre-sale and post-sale exploitation, and between copying and performance have no support in precedent or common sense. While other artistic works are protected under the common law only until publication, "it has been the law in this state for over 50 years that . . . the public sale of a sound recording otherwise unprotected by statutory copyright does not constitute a publication sufficient to divest the owner of common-law copyright protection." *Naxos*, 4 N.Y.3d at 560. The rule Sirius XM asks this Court to adopt also disregards the economic reality at stake here: Sirius XM wants to broadcast pre-1972 sound recordings, reap significant profits, and pay artists nothing.

Not surprisingly, Sirius XM has to reach far and wide to defend this position. Rather than grappling with New York law, Sirius XM spends page after page of its brief cataloging the development of *federal* protections for *post*-1972 sound recordings. It wants this Court to proceed as if—in contravention of federal law and *Naxos* alike—the development of federal copyright protection dictates the scope of New York common law. Exactly wrong: in fact, the federal Copyright Act expressly preserves state common law copyright protections for sound recordings fixed prior to 1972, 17 U.S.C. § 301(c), as this Court explained in affirming New York's protection for such works, *Naxos*, 4 N.Y.3d at 559-60.

Sirius XM also relies heavily on *RCA Mfg. Co. v. Whiteman*, 114 F.2d 86 (2d Cir. 1940), in arguing that New York does not recognize a performance right after the public sale of a sound recording. What Sirius XM fails to disclose, let alone reckon with—despite the fact that it has been raised on numerous occasions—is that the very portion of *Whiteman* on which it relies was explicitly overruled more than 60 years ago. *See Capitol Records, Inc. v. Mercury Records Corp.*, 221 F.2d 657 (2d Cir. 1955). Since then, *Whiteman* and the misunderstanding of New York law on which it rested have been repeatedly repudiated by this Court and the federal court from which it arose. Indeed, in *Naxos*, this Court held that, for sound recordings, *no* property rights are extinguished due to a sale.

Sirius XM wants to skirt New York's established common law protections by employing new technologies—digital streaming and satellite broadcasting—that allow it to distribute music to customers who can then listen to songs without purchasing a physical or digital copy of a record. But unauthorized dissemination without compensation infringes on a copyright owner's exclusive right to authorize commercial exploitation of her property and violates her property interests, no matter the mechanism of the infringement.

Perhaps because they have no support in the law for their position, Sirius XM and its amici complain about "settled expectations" and the logistics of

compensating copyright holders. Neither expectations nor administrative details would be reason to unravel the substantial common law copyright protections that New York has historically given sound recordings. Even more importantly, they can carry no weight in light of Sirius XM's recent settlement guaranteeing royalty payments for the vast majority of the pre-1972 recordings that it plays—a fact that Sirius XM neglected to share with this Court.

The notion that a business can reproduce and perform sound recordings—in exchange for hundreds of millions of dollars in subscription fees—without compensating the recording artists whose artistic effort and originality created those works violates the letter and the spirit of New York's common law copyright. This Court should reject it, answer the certified question in the affirmative, and confirm that New York common law copyright protects public performance of sound recordings both before and after sale.

CERTIFIED QUESTION ACCEPTED FOR REVIEW

The United States Court of Appeals for the Second Circuit certified, A-1729, and this Court accepted, A-1740, the following question: "Is there a right of public performance for creators of sound recordings under New York law and, if so, what is the nature and scope of that right?"

STATEMENT OF FACTS

I. The Origins of Copyright Protection for Sound Recordings in State and Federal Law

Copyright law in the United States has historically consisted of a dual system of federal and state protection. *See* 1 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 2.02 (rev. ed. 2016). Under this system, any copyrightable work had perpetual common law copyright under state law, often, but not always, until the point of publication. When a work was divested of protection under state common law, it became shielded—to the extent available—by federal statutory copyright law.

Sound recordings occupy a unique space in copyright law, as this Court has recognized. *See Naxos*, 4 N.Y.3d at 552-53. Every recorded song carries two distinct copyrights—one for the musical work, or "the notes and lyrics of the song as they appear on sheet music," and one for the sound recording, or "the recorded musical work performed by a specific artist" or group of artists. *Recording Indus. Ass'n of Am., Inc. v. Librarian of Congress*, 608 F.3d 861, 863 (D.C. Cir. 2010). While federal copyright law has protected musical works since 1831, *see* Copyright Act of 1831, Ch. 16, 4 Stat. 436 (1831), it did not provide express protection for sound recordings until the Sound Recording Act of 1971 ("SRA"), *see* Pub. L. 92-140, 85 Stat. 391 (1971).

Prior to 1971, state law filled the gap left by federal law. *See Naxos*, 4 N.Y.3d at 553 ("Congress . . . confirmed that, although sound re-cordings were not protected under federal law, there was nothing to prevent the states from guaranteeing copyright protection under common law."). When Congress adopted federal protections for sound recordings in the SRA, it chose to preserve these state law rights. The SRA made the new federal protection for sound recordings applicable only to sound recordings "fixed" after February 15, 1972. *See* SRA, Pub. L. 92-140, 85 Stat. 392 (1971). But Congress directed that "nothing in title 17" was to be "applied retroactively or be construed as affecting in any way any rights with respect to sound recordings fixed before" 1972. *Id.* Four years later, Congress passed the 1976 Copyright Act, which expressly preempted any state statutory or common law protections that are also provided under federal statutory copyright law—including for "unpublished" works. *See* 17 U.S.C. § 301(a) (1976); *see* Pub. L. No. 94-553, 90 Stat. 2572 (1976). However, in Section 301(c) of the Act, Congress specifically *exempted* certain protections from this preemptive scheme—including by preserving the SRA's carve-out of state common law protections for all sound recordings fixed prior to February 15, 1972. *See* 17 U.S.C. § 301(c) (1976). This provision instructs that "[w]ith 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, 2047." *Id.*

In both the SRA and the 1976 Act, Congress granted owners of copyrights in *post*-1972 sound recordings protection against unauthorized reproduction and distribution, but not against unauthorized public performance. With the advent of digital broadcasting, Congress passed the Digital Performance Right in Sound Recordings Act of 1995 ("DPRA"), which gives the owner of a copyright to a sound recording the exclusive right "to perform the copyrighted work publicly by means of a digital audio transmission." 17 U.S.C. § 106(6) (1996). Pursuant to this provision, any digital audio broadcaster—including, for example, Sirius XM—that plays a sound recording that was fixed after February 15, 1972 is required to obtain a license and pay a royalty for performing (*i.e.*, broadcasting) that recording. *See* 17 U.S.C. §§ 106(6), 114.

Congress has repeatedly made clear that it does not wish to interfere with state common law copyright protections for *pre*-1972 sound recordings. As noted above, in passing the 1976 Act, Congress preserved the dual system of copyright with regard to sound recordings, with state protection—no matter its scope—applying to all sound recordings fixed before February 15, 1972. When enacting the DPRA, Congress did not amend or otherwise diminish the carve-out for these state law protections. Three years later, Congress reaffirmed its commitment to

state common law copyright by passing the Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998), which amended Section 301(c) to *extend* state law protection of pre-1972 recordings from 2047 until the current expiration date of 2067. In sum, Congress has spoken: federal copyright law has no bearing on state common law protections for pre-1972 sound recordings.

II. The Parties and Their Role in the Music Industry

A. Flo & Eddie (The Turtles)

The Turtles are a legendary American rock band originally formed in 1965 by six teenagers based in Southern California. A-1026. The band had numerous hit records throughout the late 1960s, including a cover of Bob Dylan's "It Ain't Me Babe" (1965), "You Baby" (1966), "She'd Rather Be With Me" (1967), "Elenore" (1968), "You Showed Me" (1969), and the iconic "Happy Together" (1967), which is broadly recognized as a quintessential 1960s recording. A-1026-27.

In 1970, The Turtles sued their record label, White Whale, for systematic underpayment of royalties. A-1027. That lawsuit settled in 1971, and White Whale transferred all right, title and interest in and to the original master recordings of The Turtles to the band members. Two of the band's founding members—Mark Volman and Howard Kaylan—purchased the other members'

interests in The Turtles' master recordings and ultimately transferred all of the rights in these recordings to Flo & Eddie, a corporation Mr. Volman and Mr. Kaylan created in 1971 and still own and control. *Id*.

For more than 40 years, Flo & Eddie has exploited its rights to these recordings by, among other things, licensing the rights to make and sell records, licensing the rights for The Turtles' recordings to be used in movies, television shows, and commercials, and licensing the recordings to be sold digitally, including through iTunes and Amazon. *Id*. Mr. Volman and Mr. Kaylan also devote significant time and effort to promoting The Turtles and their music, including by headlining summer tours such as the "Happy Together Tour," which features The Turtles and other 1960s musical groups. A-1028.

B. Sirius XM and Its Commercial Exploitation of Pre-1972 Sound Recordings

In 2008, Sirius Satellite Radio and XM Satellite Radio merged to become the United States' largest radio broadcaster. A-1102. Sirius XM provides music and other content on a subscription fee basis (with fees ranging from $9.99 to $18.99 per month) to more than 28 million customers through its satellite and Internet radio systems. A-1102, 1104. Sirius XM's subscribers receive audio content in numerous ways, including via digital radios installed in vehicles and instant and on-demand streaming through a computer or mobile device. A-1102. Sirius XM also broadcasts and streams recordings to partners who operate content

delivery networks and subscribers to Dish Network's television services, as well as other end users who hear Sirius XM's broadcasts as streamed by authorized third parties. A-1102-04, 1256-58.

Sirius XM's satellite radio service broadcasts on hundreds of channels, including many dedicated entirely to music. Pre-1972 recordings are played on all types of channels broadcast by Sirius XM, including multiple music channels devoted *solely* to playing pre-1972 recordings, such as "40s on 4," "50s on 5," and "60s on 6." A-1106. Sirius XM's Internet radio service includes most of the same channels offered by Sirius XM's satellite service, and also offers a number of additional channels, features, and applications not available through the satellite service. A-1115. For example, Sirius XM's "OnDemand" service permits Internet subscribers to download broadcasts from a content catalog and listen to them at any time. A-1117. And the "MySXM" feature allows subscribers to personalize their music listening experience by providing certain genres of music on particular stations. A-1118.

Sirius XM's technical operation requires the creation and maintenance of three different music libraries and databases, located in New York City and Washington D.C. A-1155. In creating these music libraries and databases, Sirius XM copied at least 42,000 pre-1972 recordings, including at least 85 recordings by The Turtles. A-981, 990, 1143-44. After creating these master libraries and

databases, Sirius XM copied them several times over to create numerous onsite backup libraries and databases, and multiple offsite disaster recovery libraries and databases. A-1163-66. Sirius XM has also created copies of these libraries and databases to share with third parties that are authorized to broadcast Sirius XM channels. A-1169-71.

As part of its daily operations, Sirius XM regularly makes additional copies of individual recordings contained within its libraries, including "tips and tails" (the first and last few seconds of a recording, to facilitate voice transitions by program hosts), full copies of recordings for "play out" servers,[1] and buffer copies. A-1177-81. Sirius XM also authorizes the creation of a regular five-hour cache of its broadcasts for "on demand" delivery to Internet subscribers. A-1233.

Pre-1972 sound recordings are an enormously valuable part of Sirius XM's catalog and business. Given the broad popularity of artists as varied as the Beach Boys, Chuck Berry, Diana Ross, and Johnny Cash, and of iconic recordings including "Bridge Over Troubled Water" by Simon & Garfunkel, "Georgia on My Mind" by Ray Charles, and "Respect" by Aretha Franklin, to give just a few examples, it is unsurprising that pre-1972 recordings constitute approximately 15

[1] Because Sirius XM broadcasts songs from a "play out" server, rather than directly from one of its music libraries, Sirius XM transfers a new copy of each song to that server each time that song is broadcast. Thus, if a particular song is broadcast one hundred times, it will be copied to the "play out" server one hundred times. A-1177-78, 1196-99.

percent of all digital radio transmissions, including transmissions by Sirius XM. *See* Brian T. Yeh, Congressional Research Service, *Copyright Licensing in Music Distribution, Reproduction, and Public Performance*, at 19 (2015); Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, 78 Fed. Reg. 23,054, 23,080 (Apr. 17, 2013) (stating that Sirius XM conceded that pre-1972 sound recordings comprise between 10 and 15 percent of its subscription revenue).[2] Prior to June 2015, Sirius XM maintained a corporate policy that it did not have to obtain licenses or pay royalties to copy or perform *any* of these recordings, A-1270-73, and Sirius XM still refuses to obtain licenses or pay royalties to perform the iconic recordings of The Turtles and many others not covered by its 2015 settlement.

C. Market Changes in the Economics of Music Consumption

This case, along with similar cases in California and Florida, arises amidst significant changes in the technology and economics of music consumption that have occurred over the past fifteen years: first, the transition from physical sales of

[2] Of the *Rolling Stone*'s 500 Greatest Songs of All Time, 305 were recorded prior to 1972, including 9 of the top 10. *See* Rolling Stone, *500 Greatest Songs of All Time* (Apr. 7, 2011), *available at* http://www.rollingstone.com/music/lists/the-500-greatest-songs-of-all-time-20110407 (last visited Sept. 18, 2016). As of 2015, 83 percent of sound recordings inducted into the GRAMMY Hall of Fame, which honors "recordings of lasting qualitative or historical significance" and includes The Turtles' "Happy Together," were "fixed" prior to 1972. *See* GRAMMY Hall of Fame, GRAMMY.org, https://www.grammy.org/recording-academy/awards/hall-of-fame (last visited Sept. 18, 2016).

albums to the digital sales of singles (largely in response to digital music piracy), and second, the transition from digital music downloads to digital music streaming.

In the early 2000s, the advent of Napster and other peer-to-peer file sharing programs permitted sound recordings to be copied and instantaneously disseminated worldwide for free—*i.e.*, pirated. These programs gutted the market for compact discs and cassette tapes. The impact on record sales was immediate and severe. Between 2000 and 2005, domestic sales (in physical units) of CDs fell by nearly 25 percent, domestic sales of cassettes plummeted by 82 percent, and the once-burgeoning market for CD singles nosedived by 91 percent. *See* Recording Indus. Ass'n of Am., Year End Statistics, 1989-2007, *available at* http://www.icce.rug.nl/~soundscapes/VOLUME02/Trends_and_shifts_Appendix.shtml ("RIAA's Year End Statistics, 1989-2007") (last visited Sept. 18, 2016).

The record industry mitigated—but never fully recovered from—this rampant piracy by developing lawful music downloading services. These services, which allowed a consumer to download music legally (for a price) and paid royalties to the copyright holders, were initially successful: by 2007, sales of digital singles and albums resulted in over $1.2 billion in revenues. *See* RIAA's Year End Statistics, 1989-2007. But by replacing the sale of albums with sales of singles, digital music marketplaces cut record labels' and artists' revenues in half. *See* John Seabrook, *The Song Machine* 134 (2015).

Although all recording artists, including The Turtles, had to adjust to this new reality, digital music marketplaces compensated artists for their recordings because they received royalties on each digital sale. But this revenue stream has now been compromised by yet another paradigm shift—the introduction of digital streaming services. Streaming services do not require a user to purchase any specific song in order to play it; rather, a user pays a monthly subscription fee to a digital radio provider, such as Sirius XM or Pandora, to listen to an Internet channel playing any type of music she selects.[3] A-905, 996. Alternatively, a user can pay a monthly subscription fee to an "on demand" service like Spotify or YouTube and select any song from a catalog of millions, which can be played via an Internet or cellular connection. Seabrook, *supra*, at 285-86. The use of streaming services has skyrocketed every year since they were introduced. According to Nielsen's SoundScan statistics, listeners "streamed" 208.9 billion songs between January and July of 2016 alone—an increase of nearly 60 percent over the same time period in 2015. Over the same time period, physical and digital album sales declined by 12 percent, and 18 percent, respectively. Nielsen, *2016 Music U.S. Mid-Year Report* (July 7, 2016), *available at*

[3] Unlike its Internet service, Sirius XM's satellite service broadcasts a digital transmission through a satellite and is not a "streaming" service. Nevertheless, Sirius XM's satellite service broadcasts music to its listeners without those listeners having to pay for a digital download of those songs. A-980-81.

http://www.nielsen.com/content/dam/corporate/us/en/reports-downloads/2016-reports/us-mid-year-report-july-2016.pdf (last visited Sept. 18, 2016).

As digital streaming becomes more common, the right to license and receive compensation for the digital public performance of music (that is, digital "streaming" and "broadcasting") is increasingly crucial to the livelihood of recording artists. As explained *supra* at 8, the Copyright Act requires digital streaming and broadcasting services to pay royalties for performing post-1972 records. Thus, the astronomic rise in streaming services and corresponding royalty revenues has partially offset the declining revenue from physical and digital sales of post-1972 sound recordings. *See* Ben Sisario, *Universal Music Posts Strong Results, and Streaming Is a Bright Spot*, N.Y. Times (Sept. 2, 2015). But without royalty revenues from streaming services, artists who made *pre*-1972 sound recordings are left uncompensated for the use and enjoyment of their work by the multi-billion dollar music streaming and broadcasting industry.

III. Procedural History

A. Proceedings Below

On August 16, 2013, Flo & Eddie filed this action on behalf of itself and a class of owners of pre-1972 recordings in the United States District Court for the Southern District of New York, bringing claims against Sirius XM for New York state common law copyright infringement and unfair competition. A-1. On May

30, 2014, Sirius XM moved for summary judgment, and, as relevant to the question certified to this Court, contended that New York common law does not afford copyright holders a public performance right in sound recordings. *See* Sirius XM Memorandum of Law in Support of Motion for Summary Judgment ("Dkt. 54") at 8, *Flo & Eddie, Inc. v. Sirius XM Radio Inc.*, No. 13-cv-5784(CM) (S.D.N.Y. May 30, 2014).

Before the District Court, Sirius XM relied almost entirely on the federal Copyright Act, which by its express terms does not apply to pre-1972 sound recordings, as well as on reports and studies provided to the United States Congress by the United States Copyright Office. *See id.* at 8-12, 21-23. While acknowledging that New York common law protects sound recordings, as this Court held in *Naxos*, *see* 4 N.Y.3d at 559-60, Sirius XM contended that it did not cover public performance of recordings because no case had yet squarely recognized this protection. Dkt. 54 at 12-14. Sirius XM also claimed that performance of pre-1972 sound recordings should not be protected under New York common law because it would not create "incentives for the creation of new" recordings. *Id.* at 20.

On November 14, 2014, the District Court (McMahon, J.) denied Sirius XM's motion and concluded that New York law protects a public performance

right in pre-1972 sound recordings.[4] A-1666. The District Court explained that New York common law provided an entire "bundle" of rights to copyright holders, including a right against unauthorized reproduction, distribution, and performance, A-1682 (citing 2 Nimmer on Copyright § 8[C][2]), and noted that in accordance with these general principles, "New York courts have long afforded public performance rights to holders of common law copyrights in works such as plays and films." A-1682 (citations omitted).

The District Court squarely rejected Sirius XM's reliance on federal law, on the ground that it does not preempt or limit state law protections. A-1677, 1682. The Court further explained that federal law actually supports state protection of public performance because it establishes that "an express carve-out is required in order to circumscribe the bundle of rights appurtenant to copyright." A-1685. The District Court noted that in the SRA, Congress limited federal copyright protection in sound recordings to unauthorized reproduction and distribution. The only logical reason for taking this step was that "absent such an explicit limitation[], holder[s] of sound recording copyrights would have enjoyed the entire bundle of

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[4] Sirius XM also moved for summary judgment on two grounds not before this Court, both of which the District Court rejected. The District Court denied Sirius XM's fair use defense, concluding that Sirius XM's "non-transformative use" of The Turtles' recordings "for commercial gain" could not be "fair." A-1696. The District Court also held that the Dormant Commerce Clause does not bar Flo & Eddie's claims because New York State "does not 'regulate' anything by recognizing common law copyright." A-1702.

rights traditionally granted to copyright holders—including the right to public performance" under federal law. A-1686. The District Court rejected Sirius XM's narrow reading of New York case law, finding that "[n]o New York case recognizing a common law copyright in sound recordings has so much as suggested that right was in some way circumscribed, or that the bundle of rights appurtenant to that copyright was less than the bundle of rights accorded to plays and musical compositions." A-1685.

The District Court likewise dismissed Sirius XM's policy-based arguments. There is no reason, the Court explained, to believe that "either statutory or common law copyright any longer focuses on fostering future creativity, as opposed to rewarding past creativity." A-1688. Nor had Sirius XM shown that recognizing public performance rights would "unjustly punish good faith investors." *Id.* To the contrary: "New York has always protected public performance rights in works other than sound recordings" and there is "no reason why New York—a state traditionally protective of performers and performance rights—would treat sound recordings differently." A-1690.

Following this decision, Sirius XM changed counsel and filed a motion for reconsideration. Sirius XM's Memorandum of Law in Support of Motion for Reconsideration (Dkt. 100), *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, No. 13-cv-5784 (CM) (S.D.N.Y. Dec. 1, 2014). It claimed that its prior counsel had

overlooked *Whiteman*, which "established the longstanding rule that no public performance right exists in sound recordings at common law." *Id.* at 12. On December 12, 2014, the District Court denied Sirius XM's motion for reconsideration, explaining that *Whiteman* had been reversed 60 years ago, and in any event, had never stood for the proposition that New York does not recognize a public performance right in sound recordings. A-1707-08.

On interlocutory appeal (which Flo & Eddie did not oppose), the United States Court of Appeals for the Second Circuit recognized that "New York common law . . . provide[s] certain rights to copyright holders in" pre-1972 sound recordings. A-1733 (citing *Naxos*, 4 N.Y.3d at 563). The Second Circuit ruled that the nature and scope of those rights presented a "significant and unresolved issue of New York copyright law," A-1730, "appropriately resolved by a New York court," A-1735. Accordingly, it certified the following question to this Court: "Is there a right of public performance for creators of sound recordings under New York law and, if so, what is the nature and scope of that right?" A-1739.[5] On May 3, 2016, this Court accepted the certified question. A-1740.

[5] The Second Circuit declined to address the issues of fair use or the Dormant Commerce Clause before this Court had clarified the parameters of the public performance right, and the certified question does not encompass these points. A-1735 n.4, 1738.

B. Other Actions Challenging Sirius XM's Refusal to Pay For Pre-1972 Sound Recordings

Because pre-1972 sound recordings are protected on a state-by-state basis, Flo & Eddie has filed class actions in California and Florida against Sirius XM and other digital radio providers, such as Pandora. *See Flo & Eddie, Inc. v. Sirius XM Radio Inc.*, No. 13-cv-5693 (C.D. Cal. 2013); *Flo & Eddie, Inc. v. Pandora Media Inc. et al.*, No. 14-cv-7648 (C.D. Cal. 2014); and *Flo & Eddie, Inc. v. Sirius XM Radio Inc.*, No. 13-cv-23182 (S.D. Fla. 2013).

Flo & Eddie prevailed in both California actions. *See Flo & Eddie, Inc. v. Sirius XM Radio Inc.*, No. 13-cv-5693, 2014 WL 4725382 at *1 (C.D. Cal. Sept. 22, 2014) (granting summary judgment to Flo & Eddie "on the basis of public performance conduct"); Order Denying Pandora's Motion to Dismiss, *Flo & Eddie, Inc. v. Pandora Media, Inc.*, No. 14-cv-7648, Dkt. 28 at *18-29 (C.D. Cal. Feb. 23, 2015) (denying Pandora's motion to dismiss and affirming that California state law grants "exclusive ownership" to rights holders in sound recordings, including the right to publicly perform a recording).[6] In the Florida action, the district court recognized that "California and New York are the creative centers of the Nation's art world" and have "well-developed case law regarding the arts and

[6] Sirius XM and Pandora, respectively, have appealed and those actions are currently pending before the United States Court of Appeals for the Ninth Circuit.

related property rights," including the public performance right at issue in these cases, but could not identify comparable case law in Florida. *See Flo & Eddie, Inc. v. Sirius XM Radio Inc.*, No. 13-cv-23182, 2015 WL 3852692 (S.D. Fla. June 22, 2015) (granting Sirius XM's motion for summary judgment). Flo & Eddie appealed to the United States Court of Appeals for the Eleventh Circuit, which certified the question to the Florida Supreme Court. *See Flo & Eddie, Inc. v. Sirius XM Radio Inc.*, 827 F.3d 1016 (11th Cir. 2016).

In addition to Flo & Eddie, a number of other copyright holders have filed actions against Sirius XM, Pandora, and other digital radio providers for infringement in connection with unlicensed and uncompensated use of pre-1972 recordings.[7] Among them was an action filed in September 2013 by several major record labels that hold rights to many pre-1972 sound recordings. *Capitol Records, LLC. v. Sirius XM Radio Inc.*, No. BC-520981 (Cal. Super. Ct. 2013). In June 2015, Sirius XM settled that lawsuit and agreed to pay $210 million in exchange for a covenant not to sue over use of plaintiffs' pre-1972 sound recordings through December 31, 2017. U.S. Securities and Exchange Commission, Form 10-K (Feb. 2, 2016) ("Sirius XM FY 2015 10-K") at 12, Commission File #001-34295, Registrant: Sirius XM Holdings, Inc.,

[7] *See, e.g.*, *Sheridan v. Sirius XM Radio Inc. and Pandora Media, Inc.*, No. 15-cv-7576 (D.N.J. 2015); *Sheridan v. iHeart Media, Inc.*, No. 15-cv-7574 (D.N.J. 2015).

https://www.sec.gov/Archives/edgar/data/908937/000156459016012174/siri-10k_20151231.htm. Sirius XM also received the right to negotiate a license with the record labels to reproduce, perform, and broadcast the pre-1972 recordings after January 1, 2018. *See* Sirius XM June 2015 10-Q at 21 (July 28, 2015), https://www.sec.gov/Archives/edgar/data/908937/000156459015005695/siri-10q_20150630.htm. According to Sirius XM's annual securities filing, the settlement purports to apply to "approximately 85% of the pre-1972 recordings [Sirius XM] ha[s] historically played." Sirius XM FY 2015 10-K at 18. In addition, Sirius XM disclosed that it "entered into certain direct licenses with other owners of pre-1972 recordings, which in many cases include releases of any claims associated with our use of pre-1972 recordings." *Id*.

ARGUMENT

Sirius XM concedes that New York's common law applies to pre-1972 sound recordings, but inexplicably relies on the *federal* treatment of *post*-1972 sound recordings in trying to circumscribe the scope of that right. But Congress expressly left the scope of copyright protection for pre-1972 recordings to be resolved by state common law, *see* 17 U.S.C. § 301(c), and New York has filled that gap in a line of seminal cases that ensure robust common law copyright protection for pre-1972 sound recordings.

This Court's precedent confirms that New York's common law copyright protection for pre-1972 sound recordings includes control over public performance. Sirius XM nonetheless claims that public sale divests pre-1972 sound recordings of all but "core" copyright protections—according to Sirius XM, copying and resale—the two rights that Sirius XM contends it does *not* infringe by broadcasting pre-1972 sound recordings to millions of paying customers. The federal copyright law and policy on post-1972 recordings on which Sirius XM relies is irrelevant, and *RCA Mfg. Co. v. Whiteman*, the Second Circuit case on which Sirius XM also relies, has been overruled. Moreover, this Court has already rejected the crux of Sirius XM's argument, holding in *Naxos* that public sale does not extinguish common law copyright in sound recordings. Sirius XM's effort to short-circuit *Naxos* by concocting a "copying" versus "intended use" distinction is incoherent and crafted only to allow it to avoid paying for the songs it broadcasts.

Sirius XM and its amici complain that New York courts have never explicitly addressed the question presented here and resort to hyperbolic forecasts of industry upheaval. As to the first point, while existing precedent weighs strongly in favor of Respondent's position here (as the District Court explained), this precise issue has not previously been squarely presented and it is appropriate to resolve it now. Indeed, this Court hears cases for precisely that reason. *See* 22 N.Y.C.R.R. § 500.27(a). As to the second point, upholding the legal rights of

owners of pre-1972 sound recordings will not give rise to the cataclysms that Sirius XM and its amici prophesize. Like other industry players, Sirius XM routinely pays to broadcast post-1972 sound recordings, and has reached a settlement to do just that for the vast majority of the pre-1972 sound recordings it broadcasts. Sirius XM's effort to carve out an unprincipled and self-serving exception from common law copyright so that it can broadcast its remaining pre-1972 recordings without payment should be rejected.

I. New York Law—Not Federal Law—Governs This Case

The federal Copyright Act provides that recordings made prior to February 15, 1972 are protected by state law, no matter how broad that law may be. *See* 17 U.S.C. § 301(c); *supra* at 7-9. It is a hornbook principle of federalism that a state can provide greater protections than federal law unless expressly preempted. *See Addington v. Texas*, 441 U.S. 418, 431 (1979) ("The essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold."); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) ("[T]he historic [] powers of the States [are] not . . . superseded by . . . the Federal Act unless that [is] the clear and manifest purpose of Congress.").[8]

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[8] New York law provides numerous protections that go beyond federal law. *See, e.g.*, N.Y. Gen. Bus. Law §§ 352-359-h (McKinney 2016) (New York's Martin Act).

Here, Congress has not only declined to preempt state copyright protections, but it has expressly *exempted* them from preemption. 17 U.S.C. § 301(c). In *Goldstein v. California*, the U.S. Supreme Court unequivocally confirmed that the Copyright Act means exactly what it says: states have the broad authority to protect pre-1972 sound recordings in whatever way they deem fit: "Congress . . . has left the area unattended, and no reason exists why the State should not be free to act." 412 U.S. 546, 570 (1973). "States are thus free to extend pre-1972 recordings the full panoply of rights granted original works of authorship by the federal Copyright Act *and beyond* . . . ." 6 W.F. Patry, Patry on Copyright § 18.55 at 18-198 (2010) (emphasis added).[9]

Because all of the sound recordings at issue in this case were fixed prior to February 15, 1972 and this suit was filed in New York, the only applicable copyright law is New York state common law. Yet Sirius XM devotes nearly 20 pages of its brief to the history of federal copyright protections for post-1972 sound recordings. *See* Appellant Br. at 3-4, 13-19, 21-24, 38-39, 43-44.[10] Sirius XM

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[9] Despite Sirius XM's reliance on an earlier statement by the U.S. Copyright Office, *see* Appellant Br. at 23-24, the Office has since acknowledged that a state could "properly interpret its law to recognize" "a public performance right in pre-1972 [sound] recordings." Music Licensing Study: Second Request for Comments, 79 Fed. Reg. 42,833, 42,834 n.3 (July 23, 2014). Sirius XM acknowledges this later statement, but fails to substantively address it. *See* Appellant Br. at 24 n.4.

[10] Nearly all of Sirius XM's amici do the same: Pandora Br. at 13-20, 24-27; Copyright Prof. Br. at 14-20; National Association of Broadcasters ("NAB") Br. at 11-14; NY Broadcasters

details federal legislative history, as well as testimony, reports, and studies provided to Congress by the U.S. Copyright Office, *all* discussing the treatment of post-1972 sound recordings under federal law. None of this bears on the nature and scope of New York protections for pre-1972 sound recordings.

Sirius XM also claims that statements made by record executives seeking a federal performance right for sound recordings suggest that no such right existed under state common law. *See* Appellant Br. at 22-23; *see also* Copyright Prof. Br. at 17-20. While the federal Copyright Act eventually added a public performance right for post-1972 sound recordings, it maintained the carve-out for state law protections for pre-1972 sound recordings. *See* 17 U.S.C. § 301(c). The notion that record executives wanted standardized federal legislation for *all* sound recordings is unsurprising and certainly does not indicate a preference for *no* protection instead of state protection for pre-1972 recordings. In any event, their views are irrelevant to determining whether New York common law includes a performance right.[11]

Br. at 28-30, 33-37; Electronic Frontier Foundation ("EFF") Br. at 5-7; CBS Radio Br. at 3, 12-16.

[11] Equally irrelevant is the motley collection of blog posts, articles, and law student notes cited by Sirius XM purporting to identify a "consensus that state law does not provide a public performance right for sound recordings." *See* Appellant Br. at 21 n.3. These sources cite no case law or state statutory provisions except for *Whiteman*, which has not been good law for over 60 years. Much like the rest of Sirius XM's brief, these secondary sources discuss federal law and amount to nothing more than wishful thinking about the status of state common law protections and the validity of *Whiteman*'s analysis.

Sirius XM's lengthy exegesis of federal copyright law is beside the point. The Copyright Act preempts state copyright protection of post-1972 sound recordings, but it leaves unencumbered state protection of pre-1972 sound recordings. As such, neither the Copyright Act itself nor its legislative history constrains the scope of copyright protection accorded pre-1972 recordings under the common law of New York or any other state.

II. New York's Common Law Protects Pre-1972 Sound Recordings From Unauthorized Post-Sale Public Performance

New York common law protection for pre-1972 sound recordings is broad and encompasses *all* forms of infringement, whether through copying, selling, reproduction, or public performance. The right to restrict unauthorized public performance, just like the protections against duplication and distribution, remains with the owner after publication or public sale, lasting until federal preemption commences in 2067.

While Sirius XM acknowledges that common law copyright protection for pre-1972 sound recordings survives public sale, it contends that this protection shrinks after sale, leaving only a narrow "anti-piracy" right that protects what Sirius XM deems to be the "core" of copyright—copying and selling. *See* Appellant Br. at 12-13, 33-34, 38-39. That proposition lacks any support. Recording artists, of course, consider "core" copyright rights to encompass public performance, and New York courts have agreed. *See Capitol Records, Inc. v.*

Greatest Records, Inc., 252 N.Y.S.2d 553, 556 (Sup. Ct. N.Y. Cnty. 1964) (listing common law rights as "protection against the unauthorized *appropriation*, reproduction, or duplication" of a performance) (emphasis added). Nothing about sale warrants extinction of a performance right, any more than it transforms the right to control copying and distribution, which indisputably survives sale. This Court should affirm that New York common law copyright covers performance and reject Sirius XM's novel theory of radically constricted post-sale "anti-piracy" rights.

A. New York's Common Law Copyright Protects Public Performance of Pre-1972 Sound Recordings

Under New York law, common law copyright is a property right that allows owners of artistic works to protect the product of intellectual labor, time, effort, money, and skill. An artistic work "is not distinguishable from any other personal property. It is governed by the same rules of transfer and succession, and is protected by the same process, and has the benefit of all the remedies accorded to other property so far as applicable." *Palmer v. De Witt*, 47 N.Y. 532, 538 (1872) (discussing common law copyright in the manuscript of a play). While the scope of rights in artistic works, like all property rights, is limited by practicality and other concerns, *see* Appellant Br. at 30-31, copyright protections are as expansive as rights in other forms of tangible property. *See Metro. Opera*, 199 Misc. at 797-98. As this Court has recognized, "[i]n the latter half of the 18th century, a

recognition emerged that the creation of a literary work should vest rights in its author similar to the ownership rights in perpetuity associated with other forms of tangible property." *Naxos*, 4 N.Y.3d at 547; *see also Tams v. Witmark*, 63 N.Y.S. 721, 722 (Sup. Ct. N.Y. Cnty.), *aff'd*, 48 A.D. 632 (1st Dep't 1900) ("The literary property here in suit is personal property, and is governed by the same rules of transfer as other personal property.").

As with other species of property, an owner's control over artistic and intellectual property is comprised of a "bundle" of rights. Under New York law, these rights include the ability to exclude others from unauthorized reproduction, dissemination, public performance, copying, or sale of an artistic work. *See Greatest Records*, 252 N.Y.S.2d at 556.

The right of public performance—that is, the right to prevent others from publicly "performing" an artistic work without authorization—has long been part of the common law bundle. One of the earliest expositions of the right was set forth by the U.S. Supreme Court in *Ferris v. Frohman*, 223 U.S. 424 (1912). There, an English playwright sought to protect his unpublished manuscript "against its unauthorized use" in the United States, despite the unavailability of copyright protection in England. *Id.* at 434. The Court held that such protection was available, and listed among the "sticks" in the playwright's property bundle the right to prohibit pirating, copying, and performance. *Id.* at 435-36 ("where a

dramatic performance has been allowed by the author to be acted at a theater, no person has a right to pirate such performance, and to publish copies of it surreptitiously; or *to act it at another theater* without the consent of the author or proprietor") (emphasis added).

New York courts have acknowledged the validity of a public performance right in a range of cases holding that the right can be assigned through sale or lease. *See Palmer*, 47 N.Y. at 541 (plaintiff had acquired "the right to the first publication of th[e] drama, as well as the right to represent the same upon the stage in the United States"); *Brandon Films, Inc. v. Arjay Enters., Inc.*, 230 N.Y.S.2d 56, 58 (Sup. Ct. N.Y. Cnty. 1962) (finding that plaintiff retained the right to control the unauthorized exhibition of films even after leasing that right to others); *De Mille Co. v. Casey*, 201 N.Y.S. 20, 28 (Sup. Ct. N.Y. Cnty. 1923) (rejecting argument that the sale of rights to perform a photoplay upon satisfaction of certain conditions had extinguished plaintiff's right to terminate defendant's license if such conditions were not met). New York's unambiguous recognition of the ability to sell or assign the right to perform artistic works "presupposes" that the owner has a performance right to sell. *Mercury Records*, 221 F.2d at 662.

Sound recordings are no different. The public performance right in sound recordings has been treated as a valuable property right that merits robust protection. For example, in *Metropolitan Opera*, a case concerning the copying

and sale of Columbia Records' sound recordings of the Metropolitan Opera's orchestral performances, the Court explained that Metropolitan Opera held "[t]he exclusive right" to the productions created by it, including "the right to license the use of its performances and productions commercially in radio broadcasts, recordings and in other forms" upon its terms. 199 Misc. at 798. And in *Naxos*, which concerned the unauthorized sale of recorded performances, this Court cited approvingly—and described at length—the Pennsylvania Supreme Court's decision in *Waring v. WDAS Broadcasting Station Inc.*, 327 Pa. 433 (1937), which enjoined public performances of pre-1972 sound recordings. *See also Capitol Records, LLC v. Escape Media Group, Inc.*, No. 12-cv-6646 (AJN), 2015 WL 1402049, at *4 (S.D.N.Y. Mar. 25, 2015) (citing *Naxos* as support for plaintiff's claim that unauthorized public performance of its pre-1972 recordings violated common law copyright). New York courts have embraced the public performance right in pre-1972 sound recordings as a matter of course—an integral component of the common law copyright in those works.

B. Sirius XM's Post-Sale "Anti-Piracy" Argument Cannot Be Reconciled With New York Common Law

In the face of precedent stressing the importance of protecting a copyright owner's right to control public performances, Sirius XM concedes that New York law provides this right, *see* Appellant Br. at 36 n. 6, but insists that it magically disappears post-sale. According to Sirius XM, public sale strips down the bundle

of copyright protections available to a sound recording owner into a mere "anti-piracy" right that protects against only copying and sale. Appellant Br. at 33-34. The development of New York's common law of copyright firmly refutes this position and this Court should reject it.

1. Public Sale of Sound Recordings Does Not Strip Them of Common Law Copyright Protection

As noted by Sirius XM, under American common law, copyright protection for most artistic works originally ceased after sale, or "first publication." *See* Appellant Br. at 8; *see Palmer*, 47 N.Y. at 537 (describing the common law copyright protection as "copyright before publication"). At that point, state protection was "lost," although the work could be protected by federal statutory copyright law. *See Roy Export Co. Establishment of Vaduz v. CBS, Inc.*, 672 F.2d 1095, 1101 (2d Cir. 1982).

Sirius XM points to this archaic rule in claiming that only so-called "core rights"—the right to prevent copying and resale—remain after a sound recording's publication. Appellant Br. at 33. But this argument fails even at first blush: sound recordings evolved differently than other artistic works under both federal and state law, and the "first publication" rule never applied to them. Initially, sound recordings were unprotected by federal copyright. *See White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1, 10, 17 (1908) (denying copyright protection on ground that piano rolls, as well as records, used to record musical

compositions were not "copies" of a copyrighted composition, but only component "parts of the mechanism" which executed the composition). By the 1970s, as the technology to reproduce—and pirate—sound recordings evolved, *Naxos*, 4 N.Y.3d at 555, states filled in the gaps left by federal copyright law. In *Goldstein*, the U.S. Supreme Court affirmed states' authority in this regard, noting that "[n]owhere" in the 1909 Copyright Act did Congress indicate that it "intended records, as renderings of original artistic performance, to be free from state control." 412 U.S. at 566. The Court confirmed that states could protect pre-1972 sound recordings, and laid to rest any concerns that such provisions would hamper productivity. "[E]ven when the [state] right is unlimited in duration," the Court concluded, "any tendency to inhibit further progress in science or the arts is narrowly circumscribed." *Id.* at 560-61.

This Court has likewise held that New York's copyright protection of sound recordings can be of unlimited duration, given that "sound recordings could not be 'published' under federal law." *Naxos*, 4 N.Y.3d at 552. As a result, while public sale typically signaled the end of common law protection and the onset of federal copyright protection for other artistic works, sale has no impact on the scope of copyright protections for pre-1972 sound recordings.[12] *Id.* As this Court

[12] Public sale has no impact on artistic works that are wholly covered by federal statutory law, such as post-1972 sound recordings.

explained, "[i]n the absence of protective legislation, Congress intended that the owner of rights to a sound recording should rely on the 'broad and flexible' power of the common law to protect those property rights after public dissemination of the work." *Id.* at 555. Indeed, the Second Circuit, reading the tea leaves fifty years before *Naxos*, had reached the exact same conclusion and held that under New York law, "where the originator, or the assignee of the originator, of records of performances by musical artists puts those records on public sale, his act does not constitute a dedication of the right to copy and sell the records." *Mercury Records*, 221 F.2d at 663; *see also Naxos*, 4 N.Y.S.3d at 554-55 (describing *Mercury Records* as "consistent with the longstanding practice of the federal Copyright Office and [] the accepted view within the music recording industry").

Federal law also explicitly rejects the notion that the sale of a pre-1972 sound recording negates common law copyright protection. In *La Cienega Music Co. v. ZZ Top*, the U.S. Court of Appeals for the Ninth Circuit held that La Cienega Music Company had published its recording of a song later popularized by ZZ Top by releasing it to the general public, and thus left it unprotected by state common law copyright. 53 F.3d 950, 952-53 (9th Cir. 1995). Congress criticized the ruling as "overturn[ing] nearly 90 years of [precedential] decisions," 143 Cong. Rec. H9882 (statement of Rep. Coble), and as this Court noted in *Naxos*, further warned that it would "cause musicians, composers and publishers to lose over a billion

dollars in annual revenue." *Naxos*, 4 N.Y.3d at 558 (citing 143 Cong. Rec. H.9882 (statement of Rep. Delahunt)). Soon after the ruling, Congress enacted Section 303 of the federal Copyright Act, which provides that "[t]he distribution before January 1, 1978, of a phonorecord shall not for any purpose constitute a publication of the musical work embodied therein." 17 U.S.C. § 303(b), *see* Technical Amendments to Title 17, Pub. L. No. 105-80, 111 Stat. 1529 (1997); *see also ABKCO Music, Inc. v. LaVere*, 217 F.3d 684, 690 (9th Cir. 2000) (acknowledging that *La Cienega* was superseded by statute).

Despite this clear commitment to protecting sound recordings before and after sale, Sirius XM asks this Court to assume that only the right to "copy and sell" sound recordings remains with a copyright owner after sale, because those were the rights specifically addressed in *Naxos* and *Metropolitan Opera*. Appellant Br. at 13, 33-34, 37. Its argument completely misapprehends the nature of common law reasoning: If a specific fact pattern is not presented to a court, there is no reason for the court to depart from the incremental decision-making that marks evolution of the common law. The only message that can fairly be taken from *Naxos* and other New York precedent is strong support for copyright of sound recordings and other artistic works, not some inchoate intent to exclude performance from the rights that continue after sale.

Moreover, the cases on which Sirius XM relies, *see* Appellant Br. at 13, 33-34, 37, provide not one bit of support for this artificial distinction. In *Metropolitan Opera*, the Court found that the "defendants' piratical conduct"—recording and reselling broadcasts of Metropolitan Opera's performances—"constitute[d] unfair competition both with Metropolitan Opera and Columbia Records." 199 Misc. at 796. The opera company "derive[d] income from . . . the broadcasting of those productions over the radio" and from the licenses it sold to Columbia Records, and Columbia Records held the right—purchased from Metropolitan Opera—to the "exclusive privilege of making and selling records" of Metropolitan Opera's performances. *Id.* at 796. The Court held that "[t]o refuse to 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." *Id.* at 802. If, as Sirius XM suggests, Appellant Br. at 12-13, the only cognizable post-sale harm to Metropolitan Opera and Columbia Records resulted from the copying and resale of its performances, the Court would not have mentioned as proof of "piratical conduct" the loss of the income from the "broadcasting" of its performances, or noted that there is a property right in the "artistic creation" embodied by the "broadcast" of performances.

Nor can *Naxos* be read as rejecting the existence of a public performance right in post-sale, pre-1972 sound recordings. *See* Appellant Br. at 33-34. To the contrary, *Naxos* fully supports recognition of that right.

While the *Naxos* Court had no reason to explicitly address public performance, it endorsed *Waring*, the Pennsylvania Supreme Court's decision enjoining a radio station's public broadcasting of an orchestra's post-sale, pre-1972 sound recordings. *Waring* held that, unless the orchestra's restrictions on public broadcasting could "be imposed and enforced, it [would] be impossible for distinguished musicians to commit their renditions to phonograph records—except possibly for a prohibitive financial compensation—without subjecting themselves to the disadvantages and losses which they would inevitably suffer from the use of the records for broadcasting." 327 Pa. at 447. *Waring* distinguished between a restriction on performing the records at home (which would not be allowed) and the orchestra's legitimate restriction, which "works for the encouragement of art and artists." *Id.* *Naxos* stressed this same point, observing that "a performer who transforms a musical composition into a sound product creates 'something of novel intellectual or artistic value [and] has undoubtedly participated in the creation of a product in which he is entitled to a right of property.'" 4 N.Y.3d at 533 (quoting *Waring*, 327 Pa. at 441).

Even more to the point, *Naxos* itself instructs that public sale has *no* significance for the scope of common law copyright for pre-1972 recordings. It holds that New York common law copyright protects pre-1972 sound recordings "without regard to the limitations of 'publication' under the federal act," and "[u]p to the point that federal law governed." *Naxos*, 4 N.Y.3d at 557, 559 (citing *Goldstein*, 412 U.S. at 560-61). That point is 2067, the year of "federal preemption of state law" with regard to pre-1972 sound recordings. *Id.* at 558. Indeed, this Court concluded in *Naxos* that common law copyright applies until 2067 *even if* the sound recording was made in a foreign country and the term of copyright in the country of origin had expired. *Id.* at 561. *Naxos* represents a robust view of common law copyright protection for sound recordings, and Sirius XM's limitation would be a significant and unjustified retrenchment.

In short, public sale does not divest sound recordings of *any* of the protections of common law copyright, including the public performance right. In the world of pre-1972 sound recordings, the only date that matters is the date of federal preemption in 2067. This Court should reject Sirius XM's attempt to rewrite the history of New York common law to focus on the public sale of

recordings as triggering some "core" "anti-piracy" rule untethered from the case law and the policy considerations expressed therein.[13]

2. *Whiteman* Has Been Overruled and Is Irrelevant

Unable to find any support in New York common law for treating post-sale public performance rights differently from other rights in the common law copyright bundle, Sirius XM turns to an overruled case, *RCA Mfg. Co. v. Whiteman*. According to Sirius XM, *Whiteman* is a "seminal judicial decision" that "established a historical consensus" that owners of pre-1972 sound recordings were divested of the public performance right (and apparently only that right) after public sale of the sound recordings. Appellant Br. at 19, 21. But *Whiteman* cannot bear the weight Sirius XM's new counsel places on it—in fact, it can bear no weight at all. *Whiteman* is not good law, nor is it binding on this Court. *See Naxos*, 4 N.Y.3d at 554-55; *Mercury Records*, 221 F.2d at 663 ("Our conclusion is that the quoted statement from the RCA case is not the law of the State of New York."); *see also* A-1734 ("[W]hatever the holding of *Whiteman*, it is only a

[13] Sirius XM argues that the common law develops at a "snail-like" pace unsuited to recognizing a public performance right in pre-1972 sound recordings. Appellant Br. at 42, 46. But it is Sirius XM's approach that requires such a leap, reading into supposed silences in cases that did not address public performance the "adopt[ion]" of an "anti-piracy" right that protects only a fraction of the copyright protections that sound recording owners and other intellectual property owners have enjoyed for decades. *Id.* at 39.

federal court's construction of state law, which ceases to bind us upon an indication of adverse state authority, such as *Naxos*").

In any event, *Whiteman* does not support Sirius XM's argument. In *Whiteman*, RCA Manufacturing Company created sound recordings of Paul Whiteman's orchestral performances and sold them to the public. 114 F.2d at 87. Each of those recordings was labeled with a limitation on its further use: "Not Licensed for Radio Broadcast" or, among other things, "Only For Non-Commercial Use on Phonographs in Homes." *Id.* Those recordings were purchased by W.B.O. Broadcasting Corporation, which proceeded to broadcast them over the radio notwithstanding the labels. The trial court found that Whiteman's common law property rights had passed to RCA, which could enjoin the broadcasting of the records, and that Whiteman could also enjoin W.B.O. on the ground of unfair competition. *Id.*

On appeal, Judge Hand held that "the 'common-law property' in [the plaintiff's] performances ended with the sale of the records." *Id.* at 88. Under that logic, an alleged infringer could do *anything* after sale—broadcast for profit, copy, or resell. As noted above, this holding has been overruled. But even assuming that parts of *Whiteman* somehow remained good law, Sirius XM's distinction between the right to copy or resell a work after public sale and the right to publicly perform it can be found nowhere in *Whiteman*.

Sirius XM nevertheless argues that *Whiteman* "established a historical consensus" that sound recording owners have no public performance right once a work is sold. Appellant Br. at 21. It points to Judge Hand's characterization of common law copyright as "consist[ing] only in the power to prevent others from reproducing the copyrighted work[s]," and his conclusion that a defendant who "merely used" copies of a performance has not infringed a copyright. *Id.* at 20, 34-35 (quoting 114 F.2d at 88). But *Whiteman*—even if it were still good law—would not support a copying/use distinction. When Judge Hand observed that the defendant merely "used … copies" of Whiteman's performance, 114 F.2d at 88, he was not distinguishing between public performance and copying. Instead, he was laying out his (now overruled) holding that the defendant "never invaded any [] right of Whiteman" because plaintiffs had abandoned their common law property right in the performance by making and distributing a copy of it. *Id.* The "right" at issue in the case was the right to restrict the copying of something once sold, not performance. *See id.* at 89 ("Thus, even if Whiteman and RCA Manufacturing Company, Inc., have a 'common-law property' which performance does not end, it is immaterial, unless the right to *copy the rendition from the records* was preserved through the notice of the restriction.") (emphasis added).

At bottom, *Whiteman* concerned only the question of whether public sale divested a sound recording of common law copyright protection, and its answer to

that question is wrong. *Whiteman* provides no support for a post-sale "anti-piracy" rule that would arbitrarily strip down the bundle of copyright protection afforded to sound recordings following public sale—an event this Court has held has *no* significance in pre-1972 common law sound recording copyright protection.

3. Sirius XM's Proposed Distinction Between "Copying" and "Intended Use" Is Incoherent and Disregards Its Blatant Commercial Exploitation of Pre-1972 Sound Recordings

Sirius XM's proposed distinction between "copying" and "intended use" has no more validity than the line it tries to draw between pre-sale and post-sale uses of artistic works. It has no basis in precedent and it ignores the reality of what Sirius XM proposes to do: broadcast sound recordings for profit without paying a penny to the artists that produced them.

Sirius XM claims that its technology enables it to sell access to Flo & Eddie's sound recordings without copying them.[14] The notion that Sirius XM broadcasts its recordings without creating copies is simply wrong. Sirius XM has created, and continues to create, multiple copies of sound recordings to operate its satellite broadcasting and Internet streaming services. *See supra* at 11-12.

[14] Sirius XM defends its copying by arguing that it is a "fair use" because of its view that performance of the copies is permitted, and the District Court rejected this argument, A-1696. The Second Circuit declined to rule on the fair use defense until this Court has rendered a decision on the certified question, A-1735 n.4, and the fair use defense is not before this Court.

Even if Sirius XM did not copy sound recordings, its effort to evade copyright protection lacks any support in precedent. New York courts have never been preoccupied with the means by which copyright protections for artistic works are infringed. *See Naxos*, 4 N.Y.3d at 564. The inquiry instead is context-specific; courts look beyond the defendant's characterization of his activities to the ultimate result of the activity. *See Ferris*, 223 U.S. at 436 (noting that a claim that "the owner of a play cannot complain if the piece is reproduced from memory" relies on a "distinction [] without sound basis and has been repudiated"); *see also Metro. Opera*, 199 Misc. at 796 ("The modern view as to the law of unfair competition" rests "on the broader principle that property rights of commercial value are to be and will be protected from any form of unfair invasion or infringement and from any form of commercial immorality, and a court of equity will penetrate and restrain every guise resorted to by the wrongdoer."); *cf. Int'l News Serv. v. Associated Press*, 248 U.S. 215, 236 (1918) ("Obviously, the question of what is unfair competition in business must be determined with particular reference to the character and circumstances of the business.").

More generally, the scope of intellectual property protection does not turn on *how* the infringer chooses to infringe. *See Greatest Records*, 252 N.Y.S.2d at 556 (holding that, with respect to music recordings, defendants could be enjoined under New York common law "not [for] the copying of some article or goods made and

sold by another" but for "the use of [the] identical product for the profit of another") (internal quotations omitted); *see also Twentieth Century Sporting Club, Inc. v. Transradio Press Serv., Inc.*, 165 Misc. 71, 72-73 (Sup. Ct. N.Y. Cnty. 1937) (finding that defendants' broadcast of a "running account of" a boxing match arranged by plaintiffs who owned broadcasting rights "would constitute an unlawful appropriation of the exclusive property rights of the plaintiffs"). Sirius XM relies on a snippet from Nimmer which states that, under the *federal* Copyright Act, "the performance right is not infringed unless the work is copied," to argue that common law copyright is also limited to the right to prevent unauthorized copies. *See* Appellant Br. at 35 (quoting 2 Nimmer § 8:02[A]). This is simply a misreading of Nimmer.[15] But in any event, whatever the scope of federal copyright for post-1972 sound recordings may be (and it undoubtedly includes public performance), Sirius XM's proposition that so long as "copying" is not involved a work is fair game has no foothold in New York common law.

In short, even if technical developments allowed Sirius XM to distribute, reproduce, and provide sound recordings to its customers without copying those

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[15] Nimmer explains that the term "copying" can be used both in a specific sense (when discussing the reproduction right), as well as in a generic sense, which encompasses "the infringing of any of the copyright owner's five exclusive rights'" under the federal Copyright Act—reproduction, adaptation, distribution, performance, and display. 2 Nimmer § 8.02[A]. A performance without a copy cannot infringe the reproduction right, but could obviously infringe the performance right that undisputedly exists under federal law.

recordings, that would be irrelevant. The rule Sirius XM proposes would allow for wholesale evasion of common law copyright, so long as the owner's work could be appropriated in some newfangled way. The result would be "[u]nrestrained commercial exploitation" that would render an owner's property right in a sound recording "of little value." *Radio Corp. of Am. v. Premier Albums, Inc.*, 240 A.D.2d 62, 63 (1st Dep't 1963).

Sirius XM also tries to draw a line between what it calls "core" "anti-piracy" efforts—prevention of copying and resale—and doing what a sound recording is "meant" to allow owners to do—play it. Appellant Br. at 15. To be sure, prohibiting a purchaser from simply playing a recording for her own enjoyment would be untenable under either federal or state copyright law. "No license is required," for example, "to sing a copyrighted lyric in the shower." *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 155 (1975). But Sirius XM is "playing" these recordings publicly, for profit, to millions of listeners. "Even where the hearers are allowed to make copies of what was said for their personal use, they cannot later publish for profit that which they had not obtained the right to sell." *Nutt v. Nat'l Inst. Inc. for the Imp. of Memory*, 31 F.2d 236, 238 (2d Cir. 1929); *see also Int'l News*, 248 U.S. at 239 (comparing "[t]he right of the purchaser of a single newspaper to spread knowledge of its contents gratuitously, for any legitimate purpose not unreasonably interfering with complainant's right to

make merchandise of it," with "transmit[ting] that news for commercial use, in competition with complainant"). "The title to the physical substance and the right to the use of literary or artistic property which may be printed upon or embodied in it are entirely distinct and independent of each other." *Waring*, 327 Pa. at 448.

Sirius XM claims that an owner's common law public performance right in a play, film, or musical composition (which is undisputed),[16] differs from a similar right in sound recordings, on the ground that infringement of plays, films, and compositions requires copying, but Sirius XM purports to "simply *use*[] the record," thus fulfilling "its intended purpose." Appellant Br. at 35-36. But since when does public performance of a film or musical composition require copying? And since when is performance of a play not the "intended purpose" of the play? A play can be performed without "copying" the manuscript on which it is written, but the author's public performance right prohibits the unauthorized "use" of the manuscript for profit. *See French v. Maguire*, 55 How. Pr. 471 (Sup. Ct. N.Y. Cnty. 1878) (granting injunction against unauthorized performances of

[16] *See, e.g.*, *Brandon Films, Inc. v. Arjay Enters., Inc.*, 230 N.Y.S.2d 56 (Sup. Ct. N.Y. Cnty. 1962) (recognizing public performance right in films); *Gieseking v. Urania Records, Inc.*, 155 N.Y.S.2d 171, 172–73 (Sup. Ct. N.Y. Cnty. 1956) (musical performances); *French v. Maguire*, 55 How. Pr. 471 (Sup. Ct. N.Y. Cnty. 1878) (plays).

unpublished play). Sirius XM's distinction has no foothold in the common law, or in common sense.

Under New York law, common law property rights "have been repeatedly recognized and upheld by the courts," and "the doctrine is a broad and flexible one. It has allowed the courts to keep pace with constantly changing technological and economic aspects so as to reach just and realistic results." *Metro. Opera*, 199 Misc. at 799. By contrast, Sirius XM's proposal—that so long as you can develop the technology to play, distribute, and even broadcast a recording without copying, you can profit off another's work and inflict the same harms as you would from copying and distribution—would bring about the opposite result. It is entirely implausible that such a rule, based on meaningless distinctions that would allow infringers to circumvent decades of common law copyright protection, is how the New York common law "keep[s] pace with constantly changing technological and economic aspects [] to reach just and realistic results."

III. Protecting Performance Rights in Pre-1972 Sound Recordings Promotes Key Public Policy Goals

A. Artists Should Be Compensated for the Use of Their Work

Musicians and singers who perform songs and the entities that produce sound recordings are creators of art and deserve to be compensated when their work generates value. These considerations are especially important in New York State, which has long been the world's leading cultural and artistic capital and

home to thousands of hard-working, creative, and innovative artists.[17] New York's interest in protecting the rights of performers is reflected in the robust body of case law protecting performance rights in plays, operas, and other artistic creations, and the recognition of public performance rights in sound recordings flows naturally from this jurisprudence.

Sirius XM insists that pre-1972 recordings are in the "public domain," A-1095, and it can use them in any manner it wants for free—including by charging its customers subscription fees and earning substantial profits from a catalog that contains tens of thousands of pre-1972 recordings that it has copied dozens of times over. Sirius XM seeks to justify this high-tech piracy by arguing that "no recording owner ever even thought to assert [a performance] right since the Second Circuit's decision in *Whiteman*." Appellant Br. at 26. This justification is as baseless as it is cynical.

A copyright holder's decision not to pursue an infringement action until it is necessary or economically sensible does not divest him of any rights held in an

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[17] New York State is home to the most diverse arts and entertainment community in the world, hosting a "broad range of nonprofit and commercial organizations in live theater, music, dance, films, sound recordings, television, interactive games, radio, new media, and cultural organizations in the visual arts." Lois Grey *et al.*, *Cultural Capital: Challenges to New York State's Competitive Advantages in the Arts and Entertainment Industry* at 5, Cornell University Industrial and Labor Relations Study (2009). New York's role in the music industry is particularly critical—nearly 100,000 New Yorkers work in the music industry and make up 10% of the national music industry work force. *See* RIAA Amicus Br. at 1.

artistic work (though it may impact the start date for the damages period under the applicable statute of limitations). As the U.S. Supreme Court recently explained in *Petrella v. Metro-Goldwyn Mayer, Inc.*, "[i]t is hardly incumbent on copyright owners . . . to challenge each and every actionable infringement. And there is nothing untoward about waiting to see whether an infringer's exploitation undercuts the value of the copyrighted work, has no effect on the original work, or even complements it." 134 S. Ct. 1962, 1976 (2014). For example, the technological capacity to fix a particular musical performance in a tangible medium that could be distributed and played did not exist until the late 1800s. *United States v. Western Electric Co.*, 531 F. Supp. 894, 913 (D.N.J. 1981) (noting that Thomas Edison invented the phonograph in 1877). Prior to that time, musical performances were ephemeral. Yet, no one proposes examining case law from the mid-nineteenth century and concluding that sound recordings are not and have never been subject to copyright at common law merely because no one asserted such a right before technology allowed its infringement.

Similarly, the dramatic shift from sales of physical and digital copies of records to digital streaming and broadcasting, *see supra* at 13-16, may have prompted artists to assert performance rights in sound recordings. Because technology now permits streaming services to charge subscription fees to consumers, who may then enjoy music without purchasing it, recording artists

must rely on the performance right to receive *any* compensation for the use of their creative works. It would be fundamentally unfair to deprive recording artists of compensation merely because businesses have exploited new technologies for music delivery that did not exist even ten years ago.

Several amici contend that because record labels—not recording artists—hold the copyright to many pre-1972 sound recordings, a rule recognizing a public performance right in sound recordings would benefit the record companies and not the artists. CBS Radio Br. at 16-18; *see also* NAB Br. at 3. Of course, it is recording artists who have brought this very case and would certainly benefit from compensation. More broadly, the rule that Sirius XM advocates would result in *no one* receiving payment for performance of a pre-1972 sound recording, and it is hard to imagine how that would leave artists better off. (Additionally, recording artists have contractual rights vis-à-vis their record labels, which may entitle them to a share in any royalties received by the labels.) The arguments advanced by Sirius XM and its amici do not seek to protect artists—they seek to protect their own bottom lines.

B. Recognizing a Performance Right in Pre-1972 Sound Recordings Will Not Disrupt the Music Industry

Sirius XM and multiple amici contend that the decision to "grant" a performance right in sound recordings should be left to the Legislature, Appellant Br. at 40-42; *see also* NAB Br. at 27-31; Pandora Br. at 19-27, but this argument

fundamentally misunderstands the nature of common law copyright and the precedent concerning sound recordings. The notion that creators of artistic works are entitled to be compensated for the use of that work is hardly new; rather, it is Sirius XM's contrary position that it can exploit the time, skill, and labor of recording artists and producers without compensation that is novel (not to mention unjustified). Moreover, as detailed above, *see supra* Part II, New York law firmly supports common law protection of pre-1972 sound recordings and provides no basis for excluding just post-sale performance rights for such works. Thus, legislative action would be required to divest copyright owners of this right, not to grant it.[18]

Sirius XM and its amici also contend that this Court should not disturb the so-called "settled expectation" of entities such as Sirius XM, AM/FM broadcasters, television broadcasters, restaurants, bars, small businesses, and public entities that commercial exploitation of pre-1972 sound recordings should be "unqualified and

[18] Sirius XM cites *Jewelers' Mercantile Agency v. Jeweler's Weekly Pub. Co.*, 155 N.Y. 241 (1898), for the proposition that this Court should "defer" to the legislature's policymaking discretion, *see* Appellant Br. at 40-41, but that case is inapposite. *Jewelers* merely stands for the uncontroversial notion that, under "the present state of the law," publication divests books of common law copyright, after which the owner may only rely on *federal* statutory protections. *See* 155 N.Y. at 247, 254. As explained above, sound recordings are treated differently from books: pre-1972 sound recordings are governed entirely by state law, and this Court has already held that public sale does not divest sound recordings of any common law copyright protection. *See supra* at 33-35. Sirius XM also cites *Campaign for Fiscal Equity, Inc. v. State*, 8 N.Y.3d 14 (2006), for the same proposition. *Campaign for Fiscal Equity* concerned a constitutional challenge to the State's education funding scheme and is completely irrelevant to common law copyright protection.

unencumbered." Appellant Br. at 27, 42-43; *see also* CBS Br. at 7-16; Pandora Br. at 28-37; NY Broadcasters Br. at 12-22; ARSC Br. at 18-25. As the District Court noted, "expectations are rarely 'settled' enough to provide a justification for declining to apply the correct legal rule." A-1688. And in any event, there is no reason to think that Sirius XM's investors or the music industry writ large "would be truly surprised" if Sirius XM or any other business that plays sound recordings for profit "were to have to pay royalties in order to perform pre-1972 sound recordings," given that most of these entities already "pay royalties under federal law in order to broadcast [those] recordings." *Id*.

Appellants and Amicus National Association of Broadcasters point to a provision in federal law that exempts AM/FM broadcasters from paying performance royalties for post-1972 sound recordings, but that has no bearing on this Court's interpretation of state common law. *See* Appellant Br. at 44; NAB Br. at 12-13. Moreover, the AM/FM distinction has become largely meaningless in this regard. iHeartRadio, the largest owner of AM/FM stations in the country, *see* Pandora Br. at 6, simulcasts its stations' broadcasts over the Internet, and the AM/FM stations owned by iHeartRadio therefore pay royalties for post-1972 sound recordings, despite the federal exemption.[19] *See* 17 U.S.C. §§ 106(6), 114;

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[19] Any concerns about whether public entities such as museums or schools, or smaller organizations such as college or religious broadcasters would be required to pay royalties,

iHeart Radio, *Get the iHeart Radio App*, http://news.iheart.com/features/get-the-iheartradio-app-240 (last visited Sept. 18, 2016).

Sirius XM also wrings its hands about purported "unanswered" questions and the "administrative difficulties" of negotiating licenses and royalties for pre-1972 sound recordings (as if that is somehow substantially different than negotiating the same thing for post-1972 sound recordings). Appellant Br. at 45. What Sirius XM does not mention is that it entered into a June 2015 settlement with record labels, covering the vast majority of pre-1972 sound recordings historically played by Sirius XM. Not only does the record label settlement resolve damages for historical nonpayment of royalties, but it provides for negotiation of royalty rates and sets up a dispute resolution mechanism. *See* Sirius XM June 2015 10-Q at 21.[20] Sirius XM's complaints about the difficulty of resolving these same issues for other pre-1972 recordings therefore ring hollow.

Sirius XM's amici also make much hay of the purported administrative costs associated with recognizing performance rights in pre-1972 sound recordings. *See, e.g.*, Pandora Br. at 28; CBS Radio Br. at 8-11; NY Broadcasters Br. at 16-17.

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see, e.g., EFF Br. at 12-13, are premature and not presented here. In any event, such entities may well be able to negotiate collective licenses for use of pre-1972 sound recordings.

[20] Sirius XM also admits that it has also negotiated licensing agreements with "other" pre-1972 rights holders in addition to those covered by the June 2015 settlement. Sirius XM FY 2015 10-K at 18.

Taking note of this Court's view that "a page of history is worth a volume of logic," *Naxos*, 4 N.Y.3d at 544, it is clear that each time copyright law has purportedly threatened to complicate the music marketplace, private enterprise has quickly stepped up with a proposed solution. For example, AM/FM broadcasters and all other entities who play music are required to pay royalties to the *composers* of songs when they are performed. When compensation was first required, ASCAP and BMI emerged as the entities that centralized licensing for public performance of compositions. *See Broad. Music, Inc. v. Columbia Broad. Sys., Inc*., 441 U.S. 1, 10 (1979). More recently, private companies such as Music Reports, Inc. have begun creating comprehensive licensing databases for virtually all commercially relevant sound recordings, both pre- and post-1972. *See Flo & Eddie, Inc. v. Sirius XM Radio Inc*., No. 13-cv-5693, 2015 WL 4776932 at *7 (C.D. Cal. May 27, 2015). Sirius XM is not unfamiliar with these services, as it has been utilizing them for years. *See* Ed Christman, *SiriusXM Attempting to License Directly From Labels*, Billboard (Aug. 11, 2011), *available at* http://www.billboard.com/biz/articles/news/1176559/siriusxm-attempting-to-license-directly-from-labels (last visited Sept. 18, 2016).

It is simply disingenuous to claim that Sirius XM and other companies will be unable to navigate the music marketplace if forced to license pre-1972 recordings—the truth of the matter is that they already are doing exactly that. In

any event, this Court is tasked with interpreting the scope of New York's common law, not divining how the broadcasting industry will negotiate licenses and royalty schemes. And the scope of property rights has never depended on how easy it would be for third parties to use property that someone else owns.

This case is not about Sirius XM's inability to pay for licenses or royalties—it is about its refusal to compensate recording artists and producers based on a unilateral and self-serving interpretation of copyright law. Sirius XM is a global powerhouse with annual revenues exceeding $4.5 billion. *See* Sirius XM FY 2015 10-K at 21. Its annual advertising budget ($228.6 million) exceeds the total amount of the record label settlement for historical use of thousands of pre-1972 sound recordings. *See id.* at F-11. A ruling favorable to Flo & Eddie in this case seems unlikely to materially impact Sirius XM's finances. But even if it did, Sirius XM's financial bottom line does not take precedence over the rights and protections endowed by New York law to copyright holders.

CONCLUSION

For the foregoing reasons, this Court should hold that New York law protects an owner's right to control the public performance of sound recordings.

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