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COURT OF APPEALS

STATE OF NEW YORK

FLO & EDDIE, INC.,

Respondent,

-against-

No. 172

SIRIUS XM RADIO, INC.,

Appellant.

20 Eagle Street
Albany, New York
October 18, 2016

Before:

ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

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Sara Winkeljohn
Official Court Transcriber

1 MR. HACKER: Yes. That is the difference.

2 JUDGE ABDUS-SALAAM: What is the economic impact?
3 Would it be that if we decided in favor of Flo & Eddie, as
4 the District Court had, and said that we should answer that
5 question yes, would that mean that now recordings that are
6 played before 19 - - - that were made before 1971 would be
7 paid, what, in the same way that the 1972 and forward would
8 be or - - -

9 MR. HACKER: Not at all. We don't know at all
10 what would happen.

11 JUDGE ABDUS-SALAAM: Don't know what would
12 happen.

13 MR. HACKER: All it would do is give record
14 companies the authority to prohibit the performance of
15 those records that were made before 1972.

16 JUDGE ABDUS-SALAAM: Without some sort of
17 payment?

18 MR. HACKER: Without some sort of payment that
19 they would have to negotiate, that would have to be
20 negotiated with every single record company and record
21 owner, which isn't just the - - - the four that - - -
22 there's already one settlement there.

23 JUDGE RIVERA: So their - - - their advantage,
24 too, right? They want it played - - -

25 MR. HACKER: The record companies?

1 JUDGE RIVERA: Beneficial to them, they want it
2 played because then they'll get money off of you playing
3 it.

4 MR. HACKER: They - - - they might. But we don't
5 know what exactly they would demand in terms of a license.
6 We don't know how all of those who broadcast, which
7 includes not just Sirius XM, but all the radio stations.

8 JUDGE RIVERA: Isn't - - - isn't - - - because
9 this is all about our common laws. Isn't our common law -
10 - - isn't that what our cases say, flexible, we respond to
11 changes and these are - - - I think, both sides agree, and
12 there's no way you cannot agree, that we're talking about a
13 very different world technologically than the world of The
14 Platters or anyone else from that time period.

15 MR. HACKER: A - - - a couple - - -

16 JUDGE RIVERA: And doesn't our common law have
17 the flexibility to respond to that?

18 MR. HACKER: There are - - - there's flexibility
19 but there are clearly limits, and there's a couple of
20 points I'd like to make on that. The first is, with
21 respect to Sirius XM, we're not actually talking about a
22 fundamental, technological change. Sirius XM is just
23 another way of providing a radio.

24 JUDGE FAHEY: Well, and then let's take a - - -

25 MR. HACKER: Radio stations have been around for

1 decades.

2 JUDGE FAHEY: That's - - - that's a good point, I
3 think. Because I - - - in many ways, I think that goes to
4 one of the more interesting parts of this appeal. It
5 seems, in my mind, we have four formats that we're dealing
6 with here. First, we have traditional radio; secondly, you
7 have internet radio. In both of those formats - - - and
8 let's call Sirius XM, you know, even though it's in cars
9 and everywhere else, it's a - - - it's a streaming service,
10 but the listener does not choose what to listen to. They
11 don't own what to listen to.

12 MR. HACKER: Correct.

13 JUDGE FAHEY: Then we move to the next level.
14 Like me, I - - - I buy CDs still, and I - - - and I - - -
15 and you buy CDs or a record. Those are owning a hard copy
16 of it, and I can play that anytime I want. But now every
17 one of those first three formats are - - - are addressed
18 and covered, it seems to me, by both statute and history.

19 But now we have a new format where, in essence,
20 whether you have Apple Music or Spotify, whatever you're
21 doing, you're renting music. And when you rent music, then
22 you can listen to it anytime you want, just like you have a
23 hard copy, and it's not random. You - - - you own it as
24 long as you pay your rental fee, just like I can use the
25 space in my apartment as long as I pay my rental fee. So

1 in that form, and in that - - - that last type, I'm
2 wondering why the owner of that copyright wouldn't have
3 some rights to this new form of - - - of musical listening
4 and that involves a rented ownership as opposed to the
5 other formats, which you're in a different situation there.

6 MR. HACKER: Well, much to say, if I understand
7 the question right, the owner of the copyright and the
8 underlying composition does have rights in that last type
9 of format. But also the fact that you've correctly, I
10 think, identified the different kinds of technological
11 formats and the fact that they raise different concerns,
12 economic policy, competing policy - - -

13 JUDGE FAHEY: They do. They do.

14 MR. HACKER: - - - tells us why this - - -

15 JUDGE FAHEY: They do. But the problem is is,
16 you know, it's - - - there's two approaches to take here,
17 as one of my colleagues had said eloquently, I thought.
18 Either it's a legislative question or it's a common law
19 question. So if it's a common law question, does the
20 common law respond to this kind of fundamental change in
21 the business or not or do we say it's a legislative
22 question?

23 MR. HACKER: Well, I think the - - - it's a - - -
24 it's a legislative question, in part, because the common
25 law - - - this court does not have the tools before it that

1 are necessary to do all of the work one would have to do to
2 - - - to recognize and create and force, implement, and
3 administer this right. Just like in the Caronia case, the
4 court said there was no framework available to recognize a
5 medical monitoring plan.

6 JUDGE STEIN: Are there any jurisdictions in
7 which this right of performance has been recognized and is
8 currently recognized under common law?

9 MR. HACKER: Not one. It doesn't exist. The
10 only place it exists is under the federal copyright act,
11 the DPRA, which only did it after years of study by the
12 Copyright Office, two years of study, 1,000-page report
13 balancing all of the competing interests - - -

14 JUDGE RIVERA: But the fact that - - - that they
15 haven't gone out and sought it before doesn't mean it
16 doesn't exist, right? Doesn't mean that the common law
17 might not yet recognize it.

18 MR. HACKER: Well, they - - -

19 JUDGE RIVERA: Isn't that the point? That we're
20 now at the point?

21 MR. HACKER: I think it does in the following
22 sense. This court emphasized in Naxos that in this area,
23 in particular, a page of history is worth a volume of
24 logic. For decades, Your Honors, radio stations have been
25 playing records that they lawfully purchased with no

1 objection from any stakeholder.

2 JUDGE RIVERA: Now let's talk about the page of
3 history. What about Metropolitan Opera? Isn't that a
4 recognition of some form of a performance right that is not
5 given up merely by giving someone a record - - -

6 MR. HACKER: I don't - - -

7 JUDGE RIVERA: - - - or selling a record?

8 MR. HACKER: Two answers. One, I don't think it
9 is. It's a copying case. It's not about recognizing and
10 allowing somebody to control post-sale performance. And
11 back to the page of history point, nobody, zero, courts,
12 industry stakeholders, commentators have ever construed
13 Metropolitan Opera as creating the - - -

14 JUDGE RIVERA: Yeah, but - - - I understand but
15 it's - - - so we're trying to construe it, right? So where
16 - - - where is the language so narrow that it would not let
17 us say that there is at least some seed in Metropolitan
18 Opera about this performance, right, that's - - - that's
19 going back to 1950?

20 MR. HACKER: Well, I - - - I don't know that it's
21 a question of the - - - the particular language in
22 Metropolitan Opera. If the court wanted to create this and
23 be literally the first court in this jurisdiction or any
24 other to do it - - -

25 JUDGE RIVERA: I'm - - - I'm not talking about

1 creating it. I'm talking about sort of this common law,
2 right. Yes. I started out the place. I'm just asking you
3 about this particular case and doesn't this particular case
4 have - - - it's our not our case, granted, but some - - -

5 MR. HACKER: Yes.

6 JUDGE RIVERA: - - - interesting language about a
7 right of performance - - -

8 MR. HACKER: I don't - - -

9 JUDGE RIVERA: - - - and why that's not
10 necessarily given up? I think - - - I especially would
11 like you to address this question of, I think it has in
12 here, a limited public - - - publication for limited
13 purposes on that right of performance. Isn't that,
14 perhaps, what we're talking about here? A - - - a limited
15 publication for purposes of allowing people to play it, but
16 if you're going to go around profiting off of it in the way
17 that you do, they say, well, wait a minute, that's not - -
18 - that's not what we intended to give up when we sold off
19 the CDs or we allowed you to play it.

20 MR. HACKER: Your Honor, we all grew up with
21 Wolfman Jack listening to the radio. All of those
22 broadcasters - - -

23 JUDGE RIVERA: I'm also younger than others, may
24 I just say, but go right ahead.

25 MR. HACKER: - - - profited.

1 JUDGE ABDUS-SALAAM: What? I'm sorry, counsel?

2 MR. HACKER: They - - - they all profited.

3 JUDGE ABDUS-SALAAM: Oh, they all profited?

4 MR. HACKER: Those broadcasters have been
5 profiting for decades off of - - -

6 JUDGE PIGOTT: Mr. - - - Mr. Hacker, you
7 mentioned that we don't have the tools to do it, and I was
8 curious if you could outline that a little bit.

9 MR. HACKER: Okay.

10 JUDGE PIGOTT: And - - - and I get your medical
11 monitoring - - -

12 MR. HACKER: Right. And the framework, the only
13 analog we have - - - again, no jurisdiction has done this
14 as a matter of common law, this court has only recognized
15 an antipiracy right, which is very limited, just preventing
16 - - - preventing copying. What you have in the DPRA is a
17 very nuanced scheme, regulatory scheme, developed after a
18 long period of review with competing policy interests. And
19 remember, there's competing interests here. Consumers will
20 be worse off, performing artists will be worse off,
21 composers definitely worse off. And here's how the DPRA
22 deals with it. They have a - - - a number of different
23 regulatory - - - a nuanced structure to manage it. There's
24 a carve-out for terrestrial broadcasters, so radio can
25 continue to do it, as they've been doing for decades.

1 There's a compulsory licensing scheme so that you can't
2 just stop it. You can't just say no, we demand a - - - you
3 know, a confiscatory amount.

4 JUDGE STEIN: So hypo - - - hypothetically, if we
5 - - - if we said that there was this limited common law
6 right and it - - - and it pertains under the changing times
7 to these companies that actually rent or sell the right to
8 listen to music, how - - - how would we decide what was - -
9 - who was profiting from it? For example, if a restaurant
10 plays - - - plays music in the background, is that - - -
11 are they profiting from it?

12 MR. HACKER: With respect, Your Honor, I think
13 that's a perfect question for Ms. Halligan because her
14 brief doesn't address that. They're not talking about
15 limited right; they're talking about a categorical property
16 right that says they get to decide. Nobody gets to ever
17 perform their music, they say publicly, but they don't even
18 explain that distinction, unless and until they say so.

19 JUDGE RIVERA: Well, they don't charge - - -

20 MR. HACKER: And that will be restaurants - - -

21 JUDGE RIVERA: They're not charging anyone to
22 hear that music when they come into the pizzeria, right?

23 MR. HACKER: And that's why Congress created a
24 specific statutory exception for them. This court would
25 have to somehow write in the common law something that says

1 here's the list of entities to whom this decision between
2 Sirius XM and Flo & Eddie doesn't apply and here's all the
3 circumstances. Let me add another thing that the DPRA adds
4 which is a - - -

5 JUDGE RIVERA: What - - - what makes it so
6 difficult? The rule is if you're going to charge people to
7 hear it, that that is not - - - that you are somehow
8 breaching their right of performance.

9 MR. HACKER: I think it's - - -

10 JUDGE RIVERA: Unless you negotiate a price with
11 them.

12 MR. HACKER: The difficulty is balancing all of
13 the rights and interests. I don't think this court can
14 create a compulsory licensing scheme. This court can't do
15 what the Congress realized it had to do to protect the
16 interests of performing artists, who are claimed to be the
17 - - - Flo & Eddie is trying to advance their interests.
18 But in - - - Congress said in the DPRA that the record
19 companies have to share half of the royalties with the
20 performing artists so they forced that on them, recognizing
21 that just creating the right without doing that would be
22 contrary to the interests of the performing artists.

23 JUDGE STEIN: As it stands now, it would - - - it
24 would apply to whoever owns the rights which is not
25 necessarily the performers. Is that what you're saying?

1 MR. HACKER: It's almost never the performers.
2 It's the - - - it's the record companies.

3 JUDGE FAHEY: Yeah. I just want to clarify. The
4 rental scheme, that wasn't their argument that was my
5 argument. So - - - so I want to clarify. It might - - -
6 it might be theirs but I was offering it to you that way in
7 terms of my analysis of what was there. And I saw that as
8 something distinctly new and different that was outside the
9 - - - any scheme that had been conte - - - contemplated so
10 far.

11 MR. HACKER: Which is exactly why we have
12 legislatures and administrative regulatory - - -

13 JUDGE FAHEY: But it also involves selling - - -
14 I can pick up my phone and put my little speaker on the
15 desk and play "Happy Together" forty-five times in a row
16 and you'll all have to listen to it. And I, in essence,
17 own that as long as I rent it, pay the rental service,
18 every month. That's entirely different from me putting on
19 WBAC and listening to what they have to say or putting on
20 Sirius XM in my car and say I want to listen to seventies
21 music and they play a list. That's - - - that's a
22 different thing altogether. It involves me the right to
23 choose what's put on, which is the essence of ownership.

24 JUDGE PIGOTT: Mr. Hacker let me - - - let me
25 stop you here so we'll keep your five minutes and - - -

1 MR. HACKER: Can I just answer this question?

2 JUDGE PIGOTT: Certainly. Go ahead.

3 MR. HACKER: Which is just when you purchased it,
4 you paid them a royalty. That's the difference. It's just
5 like in those circumstances - - -

6 JUDGE FAHEY: So are The Turtles getting it?

7 MR. HACKER: I'm sorry?

8 JUDGE FAHEY: Are they getting it? Are they
9 getting the royalty?

10 MR. HACKER: Whoever owns the copyright and the
11 composition would get it just like if you purchased a
12 record.

13 JUDGE PIGOTT: Thank you, Mr. Hacker.

14 MR. HACKER: Thank you.

15 JUDGE PIGOTT: Ms. Halligan, good afternoon.

16 MS. HALLIGAN: Thank you, Your Honor. May it
17 please the court, Caitlin Halligan for respondents Flo &
18 Eddie. I'd like to start with an issue that you raised,
19 Judge Rivera, and then turn to address the questions about
20 the impact of the rule that we're requesting here and these
21 questions about whether it would be readily administrable.

22 First of all, Judge Rivera you said - - - and
23 this court has squarely said in Naxos that the common law,
24 when it comes to copyright protection of sound recordings,
25 is flexible. It said that back in Metropolitan Opera more

1 than sixty-five years ago. It said that the expansive
2 common law protection, which exists to protect sound
3 recordings, is intended to guard against the commercial
4 exploitation of artistic labor. That is exactly what is at
5 issue here.

6 JUDGE STEIN: Why has nobody asserted this right
7 in so many years if anybody actually thought it existed? I
8 mean I understand - - -

9 MS. HALLIGAN: Yes.

10 JUDGE STEIN: - - - you know, we - - - we go back
11 to when there was a symbiotic relationship and - - - and
12 maybe there still is a symbiotic relationship. I'm not
13 sure that we can tell from this record whether this or
14 there isn't, whether things have really changed as much as
15 we think they have. But - - - but at least since, you
16 know, in the last couple of decades, why - - - why would
17 nobody have asserted this right if it was so obvious - - -
18 if it so obviously existed in our jurisprudence?

19 MS. HALLIGAN: A couple of answers to that, Judge
20 Stein. First of all, the record does make clear - - - and
21 this is a certified question so obviously it hasn't been
22 fully developed here, but I don't believe there's any
23 question and certainly, Sirius does not, I think, take
24 issue with the proposition that as streaming services have
25 become far more widely used that, at the same time, the

1 sales of hard copies - - - could be a CD, could be on
2 iTunes, Your Honor, could be, if you're really old-
3 fashioned, a vinyl - - - that those have dropped
4 significantly and in direct relationship.

5 So I think there's little question but that the
6 economics have changed here. In terms of why this right
7 has not been vindicated, my best guess, and the - - - and
8 the record doesn't clearly lay this out, is that there was
9 not a significant economic incentive to do that. And the
10 Supreme Court looked at just this question two years ago in
11 Petrella. Justice Ginsburg said, "There's nothing
12 untoward" in looking at the very question of the effect of
13 delaying bringing a copyright claim. She says there's
14 nothing untoward about that. There's nothing wrong "about
15 waiting to see whether an infringer's exploitation
16 undercuts the value of the copyrighted work, has no effect"
17 on it "or even compliments it." And so - - -

18 JUDGE STEIN: Okay. So but - - - and you know,
19 that - - - that gets back to whether, in fact, that right
20 exists in our law anyway and whether - - - whether there's
21 anything for us to expand or - - - or grow on - - -

22 MS. HALLIGAN: Yes.

23 JUDGE STEIN: - - - this seed that - - -

24 MS. HALLIGAN: And let me - - -

25 JUDGE STEIN: - - - and whether we should.

1 Because, you know, even if we think that maybe this is
2 something that's fair, and of course, there's other claims
3 in this case - - -

4 MS. HALLIGAN: Yes.

5 JUDGE STEIN: - - - that could also deal with
6 that, but, you know, whether this is something that we
7 should really leave to the legislature. And there - - -
8 there certainly seem to be a lot of issues that the federal
9 Congress has dealt with in its decision on post-1972
10 performance that we - - - how would we - - - how would we
11 deal with that?

12 MS. HALLIGAN: So - - - so first that question
13 and then your question about whether or not it's fair and
14 you should do it. Congress was very clear that in enacting
15 the protections for post-1972 sound recordings, and it says
16 this in so many words in the statute in the 1971 enactment
17 and in Section 301(c) of the 1976 act, it says that it does
18 not touch or in any way affect preexisting common law
19 copyright. So - - - so I think that that's clear.

20 In terms of whether you should, I think that
21 Naxos, while it does not squarely involve performance
22 rights, gives very substantial guidance on this question
23 and here's why. One of the issues that this court had to
24 grapple with in Naxos - - - which is viewed as the most
25 scholarly extensive opinion on common law copyright

1 protection of sound recordings, one of the issues was the
2 effect that sale has on whether common law copyright
3 protection continues. Because as Judge Graffeo pointed out
4 in that opinion, for literary works the sale of that book
5 or play constitutes publication and at that point, common
6 law copyright protection is over. What she said is - - -

7 JUDGE STEIN: Yeah. But we're talking about
8 reproduction. I mean that's - - - that's a different issue
9 here.

10 MS. HALLIGAN: Well, I think that the underlying
11 principles - - -

12 JUDGE STEIN: Piracy issue - - -

13 MS. HALLIGAN: I think the underlying principles
14 are the same because what she said is that, as Judge Rivera
15 pointed out, the common law here is broad and flexible and
16 its goal is quote "to keep pace with constantly changing
17 technological and economic aspects so as to reach just and
18 realistic results."

19 JUDGE GARCIA: But counsel, I think that, to me,
20 is the - - - is an issue I'm having here that it - - - I
21 think the common law, you could view it as too expansive.
22 Because it took the federal government years and hearings
23 and reports to come up with a scheme that was you can carve
24 this out and you have AM-FM and you have these exceptions.
25 We have to paint with a pretty broad brush. You say we can

1 do all these things, but I think we have to find a right or
2 not find a right here.

3 And one of the things that brought this home to
4 me was your footnote 19 that says: "Any concerns about
5 whether public entities such as museums or schools or
6 smaller organizations such as college or religious
7 broadcasters would be required to pay royalties are
8 premature and not presented here. In any event, such
9 entities may well be able to negotiate collective licenses
10 for pre-1972 recordings." Is that really the rule we want
11 to make that schools and religious organizations are going
12 to negotiate for pre-1972 right?

13 MS. HALLIGAN: Well, I think, Your Honor, if - -
14 - if the court wants to reserve some particular question
15 like that, that might make sense. But what it shouldn't do
16 here is - - -

17 JUDGE GARCIA: But where would we leave them at
18 this point if we reserve it? Are they potentially
19 violating your copyright then?

20 MS. HALLIGAN: I think - - - I think that - - -
21 that the answer to that is, in part, what's the
22 alternative. What Sirius does here is very
23 straightforward.

24 JUDGE STEIN: The alternative is to - - - to let
25 the legislature act.

1 MS. HALLIGAN: Well, the legislature has proved
2 very adept at addressing concerns of the sort that you
3 raise. So for example, one of the points that amici makes
4 is what happens to AM-FM broadcasters? And I think Your
5 Honor suggested that, as well. They have proved very adept
6 at going to Congress and getting protection. And what
7 Congress has said is with respect to those kinds of
8 questions, it has looked at that. It did that way back in
9 1995. Congress looked at this question with regard to
10 post-1972 recordings twenty years ago and it found - - -

11 JUDGE GARCIA: But should we be doing that?
12 Should we be looking at pre-1972 AM-FM broadcasts or pre-
13 1972 recordings?

14 MS. HALLIGAN: Sure. That's no different than
15 what the court did in Naxos.

16 JUDGE GARCIA: But we're making then a policy
17 decision. No. If we say, okay, we're going to give you a
18 common law right pre-1972 but we're going to carve out AM-
19 FM - - -

20 MS. HALLIGAN: I'm not - - - I was - - -

21 JUDGE GARCIA: - - - isn't that a decision to
22 make for the legislature?

23 MS. HALLIGAN: I wasn't suggesting that, Your
24 Honor. What I was suggesting is that if there is ever a
25 circumstance where a plaintiff claims infringement based on

1 playing a song on an AM-FM radio station, then there is
2 every opportunity in that instance, first of all, for the
3 radio station to make the argument that you're laying out,
4 which is to say when you balance these questions of access,
5 it comes out the other way. But more importantly with
6 regard to the radio broadcasters, they are well able to
7 secure any kind of protection that they might think is
8 warranted, as their success in doing so, I think, proves.
9 And in addition, these suggestions that they can't comply
10 are belied by the facts. They already pay royalties for
11 musical compositions, and they've been able to work that
12 out without any significant difficulty.

13 JUDGE STEIN: Well, there's only one - - -
14 there's only one author of a musical composition, for
15 example.

16 MS. HALLIGAN: Yes.

17 JUDGE STEIN: And - - - and that doesn't ever
18 change.

19 MS. HALLIGAN: Correct.

20 JUDGE STEIN: But the owner of the performance
21 rights can change every day. So I mean - - -

22 MS. HALLIGAN: Well, - - -

23 JUDGE STEIN: - - - you agree there has to be
24 some kind of mechanism to figure out - - -

25 MS. HALLIGAN: I would - - - I would take issue

1 with - - - with that, Your Honor, actually. I believe that
2 - - - that's what at issue here is there's a sound
3 recording, right. And in the same way that a composer
4 could sell their copyright in a musical composition to
5 anyone, record label, any other organization, so too can a
6 recording artist. And so, yes, some record labels own the
7 copyright protections that the recording artists, whether
8 it's The Turtles or The Platters or Pearl Jam, might have
9 but that doesn't mean that it's - - - it's indeterminate in
10 any way. And I would ask you to look at page 55 of our
11 brief. We lay out in detail the ways in which public and
12 private enterprise have risen to deal with these issues.
13 And also, I would ask you to look at - - -

14 JUDGE RIVERA: Could we - - - could we perhaps go
15 back to what I thought was sort of the - - - the way you
16 were arguing this case - - -

17 MS. HALLIGAN: Yes.

18 JUDGE RIVERA: - - - which is we would not now -
19 - - I mean it would be an obvious declaration of this right
20 of performance. But it's not as if there's not something
21 that we would building on, or have I misunderstood your
22 argument?

23 MS. HALLIGAN: Absolutely, Your Honor. I think
24 that that is clearly right, and I think that what
25 Metropolitan Opera and Naxos make clear is that the

1 objective of the common law is to guard against commercial
2 exploitation of artistic labor. Sirius sells songs. The
3 way they do it is you pay a subscription fee, they get 4
4 billion dollars a year in revenue, 26-million-plus
5 subscribers - - -

6 JUDGE RIVERA: So - - - so when would there be
7 publication of this performance? At what point is there an
8 intent to put this out in the public domain and we've now
9 given up our right of performance?

10 MS. HALLIGAN: Well, I think - - -

11 JUDGE RIVERA: When would that - - -

12 MS. HALLIGAN: I think that what Naxos says is
13 that with respect to sound recordings - - -

14 JUDGE RIVERA: Um-hum.

15 MS. HALLIGAN: - - - that the sale is not
16 publication. I suppose that a recording artist could
17 release it into the public domain if he or she said I want
18 to do that, and it would then not be something that was
19 subject to copyright. But I think that - - - that the same
20 rule that applies with respect to musical compositions
21 would - - - would apply here.

22 I want to also address this question of intended
23 use because the key point that Sirius is making in its
24 brief is that post-sale somehow the scope of common law
25 copyright protection can or should shrink to only cover

1 copying and distribution but not to cover performance. The
2 reality, and this is not contested, is that today that
3 distinction has really been obliterated because instead of
4 buying a piece of plastic, what consumers like us do is
5 generally to listen to that through a streaming service.
6 And so the intent of use is for - - - when I buy a CD is
7 for me to go home and put it in my record player and listen
8 to it. It is not for Sirius to do what it has done here
9 which is to go to Virgin Megastore, buy a CD, and then
10 broadcast it to 26 million subscribers without compensating
11 them a single penny. So all we're saying here is very
12 straightforward. We're saying that when the technology
13 does evolve, as this court said in Naxos, what this court -
14 - -

15 JUDGE RIVERA: The - - - the Federal Court has
16 not - - - or the Second Circuit, they're holding off this
17 question about whether or not they made copies, correct?

18 MS. HALLIGAN: They have decided that there was
19 copying but with respect to the fair use defense that was
20 raised - - -

21 JUDGE RIVERA: Okay. All right.

22 MS. HALLIGAN: - - - they have held off on - - -
23 on adjudicating that, as well. And that also provides an
24 answer, in part, to your question, Judge Garcia. There may
25 well be circumstances in which a fair use defense is deemed

1 to be applicable and - - - and so - - -

2 JUDGE GARCIA: To go to your point on the - - -
3 on Sirius, what's - - - is there - - - and I just ask - - -
4 a difference between them selling a service so you are
5 paying to hear this music versus pretty much AM-FM where
6 advertisers are paying and you're not getting any of the
7 royalties from that, either, so you can hear the service?
8 I mean somebody's paying the broadcaster. In this case,
9 it's a subscription service. But what's the difference?

10 MS. HALLIGAN: Well, I - - - certainly, the - - -
11 the payment is much more direct here. But I think that
12 analytically, they may be similar. I think that you might
13 be right in that way. And that's why I think that the
14 points that the AM-FM broadcasters raise here, we've
15 attempted to - - - to address.

16 JUDGE PIGOTT: If we do - - - if we do what - - -
17 what you suggest, I think you were going to tell us what
18 you think the impact would be?

19 MS. HALLIGAN: Yeah. Yeah. Absolutely, Your
20 Honor. First of all, with regard to whether it's feasible
21 to actually manage this, California Federal District Court
22 looked at exactly this question in the course of deciding
23 whether or not class certification was appropriate. We
24 cite that case in our brief at page 55. I would ask you to
25 look at it because it addresses many of the concerns that

1 this court has raised about whether or not that's feasible.
2 So the economic impact, I assume, would be for recording
3 artists substantial because, as Judge McMahon said, why buy
4 a record or download a recording from iTunes if you can
5 easily hear it performed for Sirius for free. So those
6 hard copy sales, no reason for them to go back up.

7 JUDGE RIVERA: And - - - and what impact would
8 that have on the - - - on creation of this work? Because
9 isn't that also some of the thread in these cases, the
10 social benefit of the - - -

11 MS. HALLIGAN: Absolutely.

12 JUDGE RIVERA: - - - mind being encouraged?

13 MS. HALLIGAN: And - - - and for us all to be
14 able to listen to it, I think as - - -

15 JUDGE STEIN: But - - - but these works are
16 already created before 1972. We're only talking about that
17 so - - -

18 MS. HALLIGAN: Yes. That's - - - that's right,
19 Your Honor. And so - - -

20 JUDGE STEIN: Right? So there's - - - so there's
21 no need to encourage that - - -

22 MS. HALLIGAN: Well, I think this - - -

23 JUDGE STEIN: - - - is there? Because the
24 federal law - - -

25 MS. HALLIGAN: This court - - -

1 JUDGE STEIN: - - - protects everything after
2 that.

3 MS. HALLIGAN: This court said - - - suggests
4 otherwise in Naxos. What was at issue in Naxos were
5 records that were made in the 1930s. Naxos, of course, was
6 heard by this court eleven years ago. And so that's a much
7 longer difference in time than what we have here with
8 recordings that were made, you know - - -

9 JUDGE STEIN: Well, I understand that.

10 MS. HALLIGAN: And so - - -

11 JUDGE STEIN: But in terms of encouraging
12 creative, you know - - -

13 MS. HALLIGAN: Yeah. So Judge McMahon, I think,
14 got it exactly right. She said that part of how we foster
15 future creativity is to reward past creativity. And that's
16 perfectly in line with what this court decided in Naxos.
17 Which is the fact that there were records made in the 1930s
18 and those were what was sought to be protected there
19 didn't, in any way, diminish the force of the copyright
20 protection that was made available to - - -

21 JUDGE FAHEY: I want to go - - - I want to go
22 back to just one point that - - - that I made to opposing
23 counsel.

24 MS. HALLIGAN: Yes.

25 JUDGE FAHEY: Which is what if where I'm

1 proposing something less than that? I - - - I viewed the
2 rental of music and the buying of a CD as pretty much the
3 same thing right now.

4 MS. HALLIGAN: Yes.

5 JUDGE FAHEY: And that's different from a
6 streaming service which is like traditional AM-FM radio.
7 And how would you respond to that? What you're asking for
8 is the whole ball of wax.

9 MS. HALLIGAN: Well, what we're asking for is for
10 you to hold that when it's used for commercial purposes
11 that that is protected because that's what serves - - - if
12 I may finish, that's what serves the purposes that this
13 court said the copyright is intended to protect. I would
14 ask Your Honor to look at pages - - -

15 JUDGE STEIN: So what isn't - - - what would be
16 excluded from that?

17 MS. HALLIGAN: Well, certainly, there's - - -
18 there's no dispute, first of all, that some of these
19 hypotheticals about what happens to someone playing a party
20 in their backyard, no one suggests that that's public
21 performance. That's clearly not covered. AM-FM radio we
22 discussed. I think conceptually that is covered by a
23 public performance right but there's every reason to
24 believe that the radio stations would be able to deal with
25 that both because they pay royalties for musical

1 compositions and for sound recordings, they've been very
2 able to get exemptions from Congress. There will also be
3 issues about fair use, for example, with educational
4 institutions. But the courts have been very capable of
5 working those out over the years with regard to every other
6 kind of copyrighted work.

7 JUDGE ABDUS-SALAAM: Would that be our concern or
8 would it be the Second Circuit's concern?

9 MS. HALLIGAN: The fair use issue, specifically,
10 is certainly not your concern. And I would just ask you,
11 in closing, to consider the alternatives here. There's no
12 question but that what's happening here is unauthorized use
13 of artistic labor. And there is no compensation being
14 provided at all and there's a whole lot of - - -

15 JUDGE STEIN: It's only unauthorized because
16 they're now seeking, after 100 years, to be paid for it.

17 MS. HALLIGAN: Your Honor - - -

18 JUDGE STEIN: Which they never did before. You
19 don't disagree that it was authorized - - -

20 MS. HALLIGAN: But well, in - - - in Waring,
21 which is a case from Pennsylvania, actually, there is a
22 performance right. Also - - - and I know that my time is
23 up, but - - - but Sirius has entered into a settlement to
24 pay already for the vast majority of pre-1972 recordings
25 because it settled with the record labels. The recording

1 artists individually it hasn't settled with. In addition,
2 California has already found protection under its own
3 statute. And in Florida - - -

4 JUDGE STEIN: It's their statute.

5 MS. HALLIGAN: It is, but in Florida, Your Honor
6 - - - and that's because that's what's at play there,
7 although there's some suggestion that there's residual
8 common law protection in California. But - - - but in
9 Florida, as well, a common law question, the Eleventh
10 Circuit said they thought there was a good chance that the
11 Florida Supreme Court would find common law protection,
12 same question as presented to you, and like the Second
13 Circuit, it is certified to that court. So this landscape
14 is changing very quickly, and they're asking you to hold
15 off on what is really now a very small silver of those
16 recordings.

17 JUDGE RIVERA: Well, - - - well, if we go too
18 far, the legislature can always tell us, no?

19 MS. HALLIGAN: Absolutely. The state legislature
20 or the federal legislature because there's no question but
21 that there's preemptive authority that lies with Congress.

22 JUDGE PIGOTT: Thank you, Ms. Halligan, very
23 much.

24 MS. HALLIGAN: Thank you, Your Honor.

25 JUDGE PIGOTT: Mr. Hacker.

1 MR. HACKER: I don't think, with respect, Your
2 Honor, it's - - - that it's consistent with the judicial
3 function to create a new, literally unprecedented, right
4 that - - - that even the District Court recognized would
5 upend this entire industry, unleash the chaos that's
6 inevitable, and then have the legislature undo the damage
7 through whatever mechanisms the legislature at that time
8 comes up with.

9 JUDGE PIGOTT: What - - - what, in your view, is
10 the chaos? I keep looking - - - thinking about this and I
11 - - - and I can think of some things. I'm sure you've
12 thought of more. And, Ms. Halligan was pointing out, you
13 know, that it's not that - - - you know, that big - - -

14 MR. HACKER: I mean of all the settled
15 expectations, the records that were made and sold,
16 broadcast by AM-FM radio for decades without any
17 expectation of any kind of the compensation that they're
18 talking about. You have the interest of composers, which
19 are unambiguously injured by this. That was the reason
20 composers opposed the DPRA right because they were going to
21 get a smaller slice of the pie. You have the interest of
22 performing artists, also injured by this kind of
23 performance right because it reduces the amount of music
24 that's out there. The way a 1960s performing artist makes
25 money now is through festivals, through, you know, tours

1 and that kind of thing, and they make money when their
2 music is heard. So Sirius XM - - -

3 JUDGE GARCIA: Is - - - is your opponent accurate
4 that you have negotiated settlements with certain large
5 percentage of - - -

6 MR. HACKER: We, Sirius XM, negotiated one
7 settlement with four record companies, that's eight-five
8 percent of - - - of the rights out there, that expires next
9 year. That doesn't do anything to explain how - - -
10 whether we could or will be able to negotiate licenses with
11 the other record holders, nor does it say that other
12 broadcasters, restaurants, DJs, small radio stations will
13 ever be able to find all the rights holders and negotiate
14 with them if this court adopts that kind of common law
15 rule. It says nothing whatsoever about the effects of the
16 common law rule on the industry, which I think at this
17 point have to be basically stipulated to be just the kind
18 of chaos Judge McMahon was talking about.

19 JUDGE ABDUS-SALAAM: Is that what we have to
20 decide or get? I asked Ms. Halligan that. Do we decide
21 whether the common law protects this right and then let the
22 Second Circuit sort that out? Or do we have to figure out
23 all the details here in this court?

24 MR. HACKER: Well, I think it's interesting. The
25 question presented by the Second Circuit was, to be

1 specific, is there a right of public performance for
2 creators of sound recording under New York law? That's the
3 threshold question. And if so, what is the nature and
4 scope of that right? Plaintiff doesn't ever address that
5 second question because I think addressing it just exposes
6 the fact that it's such a regulatory legislative question
7 to figure out all of the details. The question really here
8 is whether this court, through its common law decision-
9 making, is in a position to adopt the kind of nuanced
10 balance of the various interests that are competing - - -

11 JUDGE PIGOTT: At one - - -

12 MR. HACKER: - - - that took so long for Congress
13 to balance.

14 JUDGE PIGOTT: At one point we decided
15 comparative negligence should take over from contributory
16 negligence and most of the sky stayed up even though there
17 was a lot of thoughts that maybe it would all fall. And it
18 took a lot of courage, I thought, for the court - - - for
19 this court to do that but should we be too worried about
20 that kind of thing?

21 MR. HACKER: I think in any case one has to
22 worry. The medical monitoring case, I think, is a good
23 example of that. The court didn't adopt the independent
24 medical monitoring. Certainly, it could have found it in
25 seeds in prior cases but the court said we don't have a

1 framework for implementing and administering it.
2 Dissenting judges disagreed but they didn't - - - nobody
3 disagreed because they welcomed the idea of a court
4 adopting, you know, a regulatory scheme. They just
5 disagreed that it would require that kind of - - - kind of
6 regulatory scheme.

7 JUDGE RIVERA: But how - - -

8 MR. HACKER: Here it clearly does - - -

9 JUDGE RIVERA: How is it more difficult than
10 figuring out when - - - when publication fixes? I mean
11 that - - - that strikes me as the harder question than
12 this. This is pretty straightforward here.

13 MR. HACKER: Well, it's not a question of whether
14 - - - I mean one could easily decide that it exists just by
15 deciding it. The problem - - -

16 JUDGE RIVERA: Well, I'm just saying the courts
17 are able to make that determination, so - - - and that
18 strikes me as much more difficult than this.

19 MR. HACKER: Because in those cases, the context
20 of - - - of Naxos and all the other - - - and Metropolitan
21 Opera was whether or not there should be an antipiracy
22 right which was a very simple, very different kind of
23 concern that it was recognized. By the time this court got
24 to it in Naxos, as this court pointed out, one of the
25 reasons the court was so prepared to do it is that other

1 jurisdictions had done it. The Copyright Office had been -
2 - - had recognized - - -

3 JUDGE RIVERA: So but - - - but isn't she right
4 at the heart of it it's that - - - it's that you're using
5 the performance to profit and - - - and the performers, or
6 whoever is holding that right, gets no benefit form that
7 and that that strikes at - - - that's what the - - - the
8 heart of the case, right?

9 MR. HACKER: Not in any different way than has
10 been going on for decades in the industry. That's what
11 every single radio station, when they were playing it, that
12 was the understanding.

13 JUDGE RIVERA: Not in the same way. That you
14 can't - - - you can't make that argument here.

15 MR. HACKER: I think I can - - -

16 JUDGE RIVERA: It's a very different world in
17 terms of the amount of - - - of economic or financial
18 profit you're making off of it.

19 MR. HACKER: Not with respect - - -

20 JUDGE RIVERA: It's not like being a DJ in a
21 station or that station.

22 MR. HACKER: But the fact that there's more money
23 - - - that one broadcaster makes more money than another
24 broadcaster doesn't change - - -

25 JUDGE RIVERA: Well, it's not just more money,

1 right? That's her point. It's not just that you're making
2 all of that money through this particular way of delivering
3 music and the clients that you have. It's also that on
4 their side they're not - - - they're not making money off
5 the CDs or the records. These other ways that maybe they
6 thought they were - - -

7 MR. HACKER: But - - - but Your Honor - - -

8 JUDGE RIVERA: - - - an equal. Maybe they'd got
9 enough off of the way the DJs and the stations or anybody
10 would play that music that - - - that encouraged the
11 purchase if they got some money off of it. That's - - -
12 that's her argument, right? That it's off kilter that way.

13 MR. HACKER: That's right. And Sirius XM
14 promotes that. We're like a radio station, that we're not
15 like Spotify. We're not displacing sales. We're
16 encouraging sales because more people now listen to music
17 from the 1960s.

18 JUDGE PIGOTT: You're saying - - -

19 MR. HACKER: They hear it on the - - - in their
20 car and then they want to go buy the record.

21 JUDGE PIGOTT: You're saying, too, I - - - I
22 guess that these memory tune stations, you know, would - -
23 - would go out of business if they had to pay royalties on
24 all of the songs that they were playing.

25 MR. HACKER: There would be huge economic

1 consequences. It depends on what - - - what stations in
2 that - - - in that position wanted to do or what record
3 owners - - - rights owners wanted to do. But to be very
4 clear about the - - - a critical point that I think was an
5 - - - an error by Ms. Halligan in saying that Sirius XM
6 sells songs. Sirius XM doesn't sell songs.

7 JUDGE ABDUS-SALAAM: That aside, though, counsel,
8 are you saying that if we can't determine what the scope of
9 this protection would be, we shouldn't decide that there is
10 any protection?

11 MR. HACKER: I think what I'm saying is that
12 given all of the - - - the kind of complex balancing that -
13 - - that Congress had to deal with in recognizing the right
14 and all of the regulatory nuance that Congress implemented
15 in finally recognizing the rights shows why this court
16 should not exercise its authority to extend this right
17 beyond the antipiracy right that was very straightforward,
18 already well-recognized, easily enforced, that had already
19 been recognized in the 1950s.

20 In the 1950s, the Second Circuit recognized an
21 antipiracy right. And do you know how many industry
22 stakeholders - - - do you know how many record companies
23 said there's an antipiracy right and that includes a
24 performance right? None. They never said it because - - -
25 and again, a page of history being worth a volume of logic.

1 That's how the industry has been structured now for
2 decades. And with respect to services like Sirius XM,
3 there's no displacement of sales. There's no difference
4 there. There may be some different case involving a
5 different kind of service that this court would want to
6 take on and address. But for this case, for this provider,
7 there's - - - not differently situated from radio stations
8 and how the music industry has been structured, again, for
9 decades. Not only without objection from the - - - from
10 record companies, but with the affirmative declaration to
11 Congress. The reason the DPRA - - - that they were seeking
12 a performance right in the DPRA, there's no mystery about
13 that. It's not that we don't know. We know exactly. The
14 reason they sought it is they said to Congress - - - the
15 RIA said to Congress we need a legislative right because
16 there is no common law protection. That's the
17 understanding, and it shouldn't change today.

18 JUDGE PIGOTT: Thank you, Mr. Hacker.

19 MR. HACKER: Thank you.

20 (Court is adjourned)

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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Sirius XM Radio, Inc., No. 172 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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