>> THE NEXT CASE ON THE DOCKET
IS "FLO & EDDIE" VERSUS
SIRIUSXM RADIO.
>> GOOD MORNING, YOUR HONORS.
HENRY GRAD STEIN, MY CO-COUNSEL
ANGLE CORTINES, ON BEHALF OF THE
"FLO & EDDIE," KNOWN AS TURTLES
AND OTHER ART TESTS AND OWNERS
OF PRE-1972 SOUND RECORDINGS
SIMILARLY SITUATED.
WE ALSO HAVE SUPPORTING OUR
POSITION THE FLORIDA SECTION OF
THE ENTERTAINMENT ARTS AND LAW
DIVISION OF THE STATE BAR.
AS THE OCCUR KNOWS WE ARE HERE
ON FOUR CERTIFIED QUESTIONS
WHICH THE COURT ACCEPTED FROM
THE 11th CIRCUIT AND FRAIL
WORK OF MY PRESENTATION WILL
FOLLOW THOSE QUESTIONS.
BEFORE WE BEGIN I THINK IT IS
VERY IMPORTANT TO IDENTIFY WHAT
THE PROPERTY IS CONCEPTUALLY SO
IT IS PROVIDE PROEX-TECHS THERE
IN THE COMMON LAW AND UNDER
BROAD PROPERTY RIGHTS OF FLORIDA
LAW.
WHAT IS PROTECTED IN ANY RECORD
ARE ESSENTIALLY TWO CATEGORIES
OF INTELLECTUAL PROPERTY.
THERE IS THE SONG, OR THE
MUSICAL COMPOSITION, WHICH HAS
BEEN PROTECTED BY FEDERAL
COPYRIGHT LAW SINCE 1909.
AND THEN THERE IS THE ARTISTIC
RENDITION OF THAT SONG.
THE SOUNDS THAT WERE CAPTURED IN
A STUDIO ON A MEDIUM OF STORAGE,
IN OUR CASE, PRIOR TO
FEBRUARY 15th, 1972, THE
AUDIO WORK.
WHAT THIS CASE CONCERNS THE
AUDIO WORK, THE SOUND.
THAT IS THE PROPERTY THAT WE'RE
HERE TO PROTECT.
AND SO WITH THAT UNDERSTANDING
THAT INTELLECTUAL PRODUCTION--
>> THE LAW TALKS ABOUT THAT IN
TERMS OF PERFORMANCE, CORRECT?
THAT IS THE PERFORMANCE?

>> THE REASON I AVOIDED THE WORD PERFORMANCE IN THAT CONTEXT BECAUSE IT'S A LITTLE BIT CONFUSING.
THE ARTISTS PERFORM ON A RECORD BUT REALLY THE QUESTION OF PUBLIC PERFORMANCE IN THIS CASE MEANS TO TAKE THE RECORD, THE SOUNDS THAT HAVE BEEN CAPTURED ON THAT MEDIUM OF STORAGE, AND TO PLAY THEM OUT LOUD PUBLICLY FOR MONEY.
SO I WANT TO FOCUS ON USE OF THE WORD PERFORMANCE IN THE CONTEXT OF THESE QUESTIONS WHICH IS PUBLIC PERFORMANCE.
BUT YES, OF COURSE, WITH A LITTLE P, A SMALL P, THE ARTISTS, THEY PERFORM THE SONG. THOSE SONGS, THAT SONG THAT THEY PERFORM, THAT MUSICAL COMPOSITION IS CAPTURED AS SOUNDS ON A RECORD, A MEDIUM OF STORAGE.
>> I UNDERSTAND WHAT YOU'RE SAYING BUT WE'RE TALKING ABOUT COMMON LAW AND ALL THE CASES THAT TALK ABOUT THIS ISSUE, THEY ALL TALK ABOUT WHAT YOU'RE TALKING ABOUT, THE SOUND USING PERFORMANCE.
OR IS THERE A DIFFERENT CATEGORY OF CASES THAT USES--
>> WE'RE TALKING ABOUT THE SOUNDS.
SOME OF THE STATUTORY SCHEME IN FLORIDA TALKS ABOUT THE SOUNDS.
CONCEPTUALLY WE'RE DEALING WITH THE SOUNDS.
THE PROPERTY THAT'S OWNED ARE THE SOUNDS, THE CAPTURED SOUNDS, THE AUDIO WORK.
THAT IS WHAT WE'RE DEALING WITH HERE TODAY.
>> CRITICAL DISTINCTION HERE IS BETWEEN THE PLAYING OF THESE SOUNDS AND THE REPRODUCTION OF THE SOUND.
>> EXACTLY.
>> ISN'T THAT CRITICAL TO THIS

WHOLE DISCUSSION ALSO?
>> YES, YOUR HONOR.
SO IF WE, IF WE, THE QUESTIONS ASSERTIFIED TO THE 11th CIRCUIT, EXCUSE ME BY THE 11th CIRCUIT BASICALLY DIVIDE THAT QUESTION INTO TWO CATEGORIES.
THE FIRST CATEGORY IS, BEFORE A RECORD IS SOLD OR DISTRIBUTED TO THE PUBLIC WHAT PROTECTIONS ARE AFFORDED UNDER FLORIDA LAW FOR THAT AUDIO WORK FOR THOSE SOUND?
WHAT PROTECTION IS THAT BEFORE THERE IS ANY SALE, BEFORE WHAT WAS SOMETIMES KNOWN AS PUBLICATION?
AND THEN THE NEXT QUESTION IS, WHAT THE IS THE PROTECTION AFFORDED UNDER FLORIDA LAW AFTER THE RECORD IS SOLD TO THE PUBLIC.
>> SO WE MAKE SURE, WE'RE TALKING, WHEN YOU SAY FLORIDA LAW, THE REASON THE 11th CIRCUIT CERTIFIED THE QUESTION BECAUSE THEY WERE ASKING US WHAT FLORIDA COMMON LAW WOULD BE ON THIS SUBJECT, THAT CORRECT?
>> THAT'S CORRECT.
>> FOR EXAMPLE, AFTER THIS WENT INTO-- AFTER THE FEDERAL STATUTE WAS FINALLY AMENDED TO PREEMPT AFTER 1972 OR 6, THERE WERE TWO--
>> FEBRUARY FIFTEEN, 1972.
>> CALIFORNIA, THE STATE ACTUALLY ENACT AD STATUTE TO PROTECT THE PERFORMANCE EVER SOUND RECORDING IS THAT CORRECT?
>> THAT'S CORRECT.
>> SO WHAT, WHAT YOU'RE ASKING US TO DO OR WHAT THE 11th CIRCUIT IS ASKING US TO DO IS TAKE, I GUESS THEY'RE RELYING ON THAT CASE INVOLVING THE MAGIC TRICK.
>> BLAZER VERSUS HOFFMAN.
>> EXTRAPOLATING CERTAIN STATUTES, SOMEHOW THERE WAS A

COMMON LAW RIGHT BEFORE 1972, IS
THAT-- JUST SO I UNDERSTAND THE
PARAMETERS WE ARE TALKING ABOUT.
>> INCLUDING BUT LIMITED TO THE
STATUTES, YES.
>> THERE IS NO QUESTION THEN,
AND JUSTICE LAWSON SAID, I WANT
TO UNDERSTAND THIS TOO, SO
YOU'VE GOT THE MUSICAL
COMPETITION, AND THE BIG ONE FOR
THIS GROUP IS QUOTE HAPPEN
TOGETHER."
>> WE'RE NOT TALKING ABOUT PRINT
MUSIC BUT SOUNDS.
>> THAT IS PROTECTED.
>> UNDER FEDERAL LAW.
>> HAS BEEN ALMOST SINCE
WHATEVER TIME.
>> YES.
>> THAT SONG, SOMEBODY WANTS TO
PERFORM IT, RIGHT?
>> YES.
>> THE QUESTION IS, WHEN THEY
PERFORM IT, DO THEY HAVE TO, TO
PERFORM IT, PAY SOMETHING TO THE
COMPOSER, THE PERSON WHO HOLDS
THE COPYRIGHT ON THE SONG?
>> YES.
THAT IS NOT THE QUESTION IN THIS
CASE.
>> I UNDERSTAND, I'M TRYING TO
GET TO THE NEXT LEVEL.
>> SO THE ANSWER IS YES.
>> AT THAT POINT YOU HAVE GOT
MAYBE THREE OR FOUR DIFFERENT
RENDITIONS OF THAT SONG AND NOW
THE QUESTION IS, IS WHEN IT'S ON
THE RADIO, DOES THE PERSON WHO
RECORDED THE SONG, WHO IS
DIFFERENT FROM THE COMPOSER,
HAVE A COPYRIGHT TO THAT, TO
EVERY TIME IT'S PLAYED FOR
MONEY, CORRECT?
>> THAT IS CORRECT.
>> WHAT'S YOUR BEST ARGUMENT IN
FLORIDA THAT, THAT RIGHT WAS
PROTECTED BY SOME COMMON LAW
COPYRIGHT LAW?
>> SO, UNDER FLORIDA, SO LET'S,
PRIOR TO THE SALE OF A RECORD,

IT'S-- FLORIDA COMMON LAW
ADOPTED THE COMMON LAW OF
ENGLAND IN ARTICLE 1, SECTION 2
OF THE CONSTITUTION.
IN THIS COURT'S DECISIONS,
PLURAL, IN GLAZER VERSUS HOFFMAN
AND ALSO SCLEMAN FROM 1943 THE
COURT SAID IT IS TRUE AN AUTHOR
OF COMMON LAW HOLD AS PROPERTY
INTEREST IN INTELLECTUAL
PRODUCTIONS PRIOR TO PUBLICATION
AND PROTECTION OF THESE COME LON
LAW RIGHTS AFTER PUBLICATION IS
GIVEN UNDER WELL-DEFINED
CIRCUMSTANCES THE SOUNDS, AUDIO
WORK IS ALWAYS PROTECTED UNDER
FLORIDA LAW, ALL THE WAY BACK IF
THEY HAD SUCH THINGS.
>> THE KEY PHRASE THERE IS
PREPUBLICATION.
>> TALKING ABOUT
POST-PUBLICATION.
>> I UNDERSTAND YOU HAVE TO KIND
OF GET AROUND THAT, BUT WHY
ISN'T THAT A PROBLEM?
LET ME ASK YOU THIS.
YOU DON'T HAVE ANY CASE IN
FLORIDA LAW THAT RECOGNIZES THE
RIGHT THAT YOU SEEK TO ASSERT,
DO YOU?
>> THAT IS CORRECT EXCEPT TO THE
EXTENT THAT THE GLAZER VERSUS
HOFFMAN CASE WAS IMPLICITLY
TALKING ABOUT THE PUBLIC
PERFORMANCE THE ABILITY TO SUE
SOMEONE FOR PUBLIC
PERFORMANCE--
>> SAID THEY COULDN'T DO IT.
SAID THEY COULDN'T DO IT.
>> WHAT HAPPENED IN THAT CASES,
IT WAS A DIFFERENT PERIOD OF
TIME.
IF I CAN FOLLOW THROUGH THE
STATUTES I CAN PROVE TO YOUR
HONOR, FOR THE PURPOSES OF
PUTTING A PIN IN THE
PREPUBLICATION ISSUE, I DON'T
THINK ANYBODY WOULD DISPUTE THAT
UNDER THE ENGLISH COMMON LAW
UNDER GLAZER VERY HOUSE HOFFMAN

AND SHLEMAN AND FLORIDA BROAD PROPERTY RIGHTS PROTECTED CONSTITUTIONALLY, ALL ENCOMPASSING, THAT SOMEONE WHO OWNS THOSE SOUNDS, THAT AUDIO WORK, HAS AN ABSOLUTE RIGHT TO THE PROTECTION OF FLORIDA LAW SO THAT SOMEONE ELSE CAN'T EXPLOIT IT.
THIS IS BEFORE THE RECORD IS SOLD.
IF SOUNDS ARE OWNED BY THE PERFORMERS AND THEY OWN THAT AUDIO WORK, I THINK EVERYBODY WOULD AGREE IN THIS CASE THAT NOT ONLY CAN IT NOT BE REPRODUCED BY SOME THIRD PARTY WITHOUT CONSENT, IT CAN'T BE DISTRIBUTED BY SOME THIRD PARTY WITHOUT CONSENT AND IT ALSO, IF THAT SOUND RECORDING HAD STAYED ON THE SHELF CAN'T BE PUBLICLY PERFORMED FOR 28 MILLION SUBSCRIBERS FOR MILLIONS OF DOLLARS WITHOUT THE CONSENT.
ANY ONE OF THOSE IS AN INFRINGEMENT OF THE INHERENT RIGHT OF PROPERTY OWNERSHIP UNDER FLORIDA LAW BEFORE THE SALE.
SO THE QUESTION IS, AND I THINK WHAT YOUR HONOR IS GETTING TO, WHAT ARE THE RIGHTS AFTER THE SALE?
AND THAT IS ACTUALLY--
>> WELL, THAT'S THE QUESTION.
>> THAT ACTUALLY IS A VERY STRAIGHTFORWARD ISSUE UNDER FLORIDA LAW AND THE REASON FOR THAT IS IN 1941, THIS ISSUE WAS PARTICULARLY-- YOUR HONOR, IF I MAY GET A GLASS OF WATER.
I'M A LITTLE BIT.
THIS ISSUE WAS AN ACUTE ISSUE IN THE EARLY '40s, AND THIS COURT SIDED WITH APPROVAL--
>> IT IS ALWAYS BEEN KIND OF AN ACUTE ISSUE FOR PERFORMANCE ARTISTS, HASN'T IT?
THERE IS A LONG HISTORY OF

PERFORMANCE ARTISTS WANTING TO
HAVE THE RIGHT TO BE COMPENSATED
FOR WHEN THEIR MUSIC IS, THAT'S
BEEN, IS PLAYED ON THE RADIO.
>> AT THE FEDERAL LEVEL THAT'S
CORRECT, BUT LET ME TELL YOU
WHAT HAPPENED IN FLORIDA.
SO IN-- THIS COURT SIDED WITH
APPROVAL OF TWO CASES CALLED,
ONE WAS CALLED WARING, VERSUS
DEAS BROADCASTING AND WARING.
BOTH OF THOSE CASES CONCERNED
PUBLIC PERFORMANCE OF SOUND
RECORDINGS AND THE COURTS
ENJOINED THE RADIO STATION IN
THOSE CASES FROM PLAYING THOSE
SOUND.
IN THE WARING VERSUS DUNLEA CASE
IN NORTH CAROLINA, THERE WAS A
LICENSE OF A RECORDING IN A
SINGLE RADIO STATION.
ANOTHER RADIO STATION AND COURT
ENJOINED THAT.
THAT WAS FRAMEWORK AS SIRIUSXM
POINT OUT WHICH 1941 THE
LEGISLATURE ENACTED 543.02 AND
543.04 WHICH EXPRESSLY STATED
THAT IT WAS ABROGATING THE
EXISTING COMMON LAW TO PUT A
FURTHER BURDEN ON COMMERCIAL
USE.
>> TO THE FURTHER EXTENT THERE
IS A COMMON LAW RIGHT?
>> WELL, IT SAYS ALL ASSERTED
COMMON LAW RIGHTS TO FURTHER
RESTRICT OR TO COLLECT ROYALTIES
ON THE COMMERCIAL USE MADE OF
ANY SUCH RECORDED PERFORMANCES
BY ANY PERSON ARE HEREBY
ABROGATED AND EXPRESSLY
REJECTED.
ANY ASSERTED TANGIBLE RIGHTS
DEEMED TO HAVE PASSED.
THIS IS TO ABOLISHING ANY COMMON
LAW RIGHTS ATTACHING TO PHONE
GRAPH RECORDS AND ELECTRICAL
TRANSCRIPTIONS.
>> THE CRITICAL THING SAYS
ASSERTED RIGHT AND ANY RIGHT.
>> THE LEGISLATURE--

>> YOUR ARGUMENT DEPENDS ON THE IMPLICATION THAT BECAUSE THE LEGISLATURE PASSED THAT STATUTE IN RESPONSE TO WARING AND NORTH CAROLINA AND PENNSYLVANIA WARING, BECAUSE THEY DID THAT, YES, THEREFORE IN FLORIDA A COMMON LAW RIGHT EXISTED.
>> NO, YOUR HONOR.
>> THAT IS NOT YOUR ARGUMENT?
>> THAT IS PART OF THE ARGUMENT. PART OF THE--
>> ISN'T THAT A CRITICAL PART OF THE ARGUMENT.
>> IT'S A AN IMPORTANT PART OF MY ARGUMENT.
THE LEGISLATURE IS PRESUMED NOT TO HAVE DONE A MEANINGLESS ACT THE LEGISLATURE RECOGNIZED SUCH RIGHTS MAY EXIST IN FLORIDA, THAT IS BEFORE THERE IS A SALE AND YOU OWN THAT PROPERTY WHICH ARE THE SOUNDS.
YOU OWN ALL THE BUNDLES OF RIGHTS.
>> BUT ISN'T IT A COMMON THING FOR A LEGISLATURE, WHICH OBSERVES A COURT SOMEWHERE ELSE HAS DONE SOMETHING THE LEGISLATURE DOESN'T LIKE, DOESN'T AGREE WITH, FOR THE LEGISLATURE TO SAY, WE DON'T WANT THAT HERE?
AND ISN'T THAT EXACTLY WHAT HAPPENED IN THESE CIRCUMSTANCES?
ISN'T THAT THE MOST REASONABLE WAY UNDERSTANDING WHAT THE LEGISLATURE DID IN THESE CIRCUMSTANCES?
>> THAT IS, WELL, YOUR HONOR, I THINK THAT THE LEGISLATURE UNDERSTOOD THAT THE COMMON LAW WAS THAT WAY.
>> SEE THAT IS, BUT TO ME THAT ARGUMENT THAT THE LEGISLATURE COULD CREATE THE COMMON LAW WHICH IS THIS COURTS DOMAIN, I THINK-- WHAT?
>> I COMPLETELY AGREE WITH YOUR HONOR.

>> TELL ME, HERE'S THE PROBLEM
AND I GUESS IT GOES TO SOMETHING
THAT MIGHT BE CALLED COMMON
SENSE WHICH WE'RE NOT ALWAYS
DOING WHAT WE'RE JUDGES BUT
WE'VE GOT 50 STATES THAT WOULD
HAVE COMMON LAW AND FOR ALL
THESE YEARS AROUND THE COUNTRY,
RIGHT, THEY WERE URGING THE
FEDERAL GOVERNMENT TO PASS
PROTECTION FOR THE PERFORMANCES
OF THIS MUSIC ON RADIO OR NOW
ALL THESE OTHER ALTERNATIVE WAYS
OF DISTRIBUTING MUSIC.
AND NOW WE'RE LOOKING JUST AT
FLORIDA AND I'M STILL STRUGGLING
TO WHAT'S YOUR STRONGEST POINT
THERE WAS A COMMON LAW RIGHT TO
COPYRIGHT PROTECTION FOR THE
PLAYING OF MUSIC THAT WAS
PERFORMED AND SOLD.
>> SO, BY THE WAY THE QUESTION'S
CERTIFIED TO THE COURT ARE
CERTIFICATE BROADER THAN THE
PUBLIC IMPORTANCE QUESTION.
I THINK EVERYBODY AGREES WITH
THAT.
>> WOULD YOU AGREE IF THERE IS
NO RIGHT THE REST OF THE
QUESTIONS--
>> IF THERE IS NO COPYRIGHT AT
ALL?
>> TO, WHATEVER THE FIRST
QUESTION IS.
>> THE FIRST QUESTION IS THERE
COMMON LAW COPYRIGHT.
IF THERE IS, DOES IT INCLUDE
REPRODUCTION.
DOES IT--
>> IF THERE IS NOT--
>> LOGICALLY YES.
WHAT HAPPENED TO THAT STATUTE,
WHAT HAPPENED WAS IN 1976 WHEN
THE FEDERAL LAW WAS AMENDED, AND
IN 1977, WHEN THE STATE
LEGISLATURE AMENDED IT, IF ONE
LOOKS AT THE LEGISLATIVE HISTORY
FOR THE REPEAL OF SECTION 543
AND 542, THE LEGISLATURE WAS
ACUTELY AWARE THAT IN THE

ABSENCE OF STATE COURT
PROTECTION THERE WOULD BE
NOTHING PROTECTING THE RIGHTS IN
PRE-192 RECORDINGS.
-- SAYS THAT IN THE STAFF REPORT
OF APRIL 27, 1977, WHICH IS
ATTACHED AS PART OF THE
ADDENDUM.
>> COULD YOU PLEASE STILL ANSWER
MY-- MY QUESTION WAS, WHAT IS
YOUR STRONGEST ARGUMENT THERE
WAS A COMMON LAW RIGHT IN
FLORIDA.
YOU'RE NOW TALKING TO ME ABOUT
SOME, TALKING TO US ABOUT A
STATUTE THAT HAS SOME STAFF
ANALYSIS IN IT.
>> MY STRONGEST ARGUMENT IS THAT
THE PROPERTY LAWS IN FLORIDA ARE
VERY BROAD AND ALL ENCOMPASSING
AND PROTECT THE ENTIRE BUNDLE OF
RIGHTS INHERENT IN OWNERSHIP OF
THE SOUNDS OR THE AUDIO WORK.
>> HOW DO YOU-- EXCUSE ME.
HOW DO YOU GET AROUND THE GLAZER
COURT?
THEY SAID PREPRODUCTION,
PREPERFORMANCE YOU HAD A
COPYRIGHT.
>> RIGHT.
>> ONCE, IT CAME OUT INTO THE
PUBLIC, YOU DIDN'T, EVEN THOUGH
THEY MAY HAVE CITED TO THESE
OTHER CASE, THE IN THE FINAL
ANALYSIS THEY SAY THERE IS NO
COPYRIGHT ONCE IT IS OUT IN THE
THE PUBLIC.
HOW DO YOU GET AROUND THAT?
>> THAT EXACT QUESTION IS
ANSWERED BY THE REPEAL OF
SECTION 543.02 AND 543.03
DESIGNED TO PROTECT OWNERS, THAT
IS EXACTLY THE LAW.
THE LAW WAS EXACTLY AS STATED IN
THE GLAZER DECISION.
THERE WAS A STATUTE SAID ONCE
YOU SELL A RECORD YOU LOSE ALL
YOUR RIGHTS.
THEN BECAUSE OF THE FACT THERE
WAS NO PROTECTION FOR PRE-72

RECORDINGS, THE LEGISLATURE
REPEALED THAT STATUTE AND
REVIVED THE COMMON LAW.
THIS CONCEPT OF PUBLICATION IS
NOT IN THE ABSTRACT.
ONLY IN THOSE CIRCUMSTANCES
WHERE YOU'RE HANDING OFF TO THE
FEDERAL COURT.
>> THIS, WHEN YOU TALK ABOUT THE
STATUTE, REVIVING THE COMMON
LAW, THAT GOES BACK TO THE
QUESTION THAT EVERYBODY'S BEEN
ASKING ABOUT IS WHAT SHOWS THAT
THERE WAS A COMMON LAW RIGHT
ALONG THE LINES THAT YOU'VE
ASSERTED?
YOU CAN'T-- THE REPEAL OF A
STATUTE CAN NOT REVIVE SOMETHING
THAT DID NOT EXIST, WOULDN'T YOU
AGREE.
>> THAT'S CORRECT.
BUT THIS COURT IN ITS PRECOURT
DECISIONS AT THE TIME MADE CLEAR
THE COMMON LAW PROTECTS THE
INTELLECTUAL PRODUCTIONS OF THE
AUTHOR.
I DON'T THINK THERE IS ANY
QUESTION THAT UNDER THE BROAD
PROPERTY RIGHTS OF FLORIDA THAT
IT PROTECTS THE AUDIO WORK.
IF YOU CREATE AN AUDIO WORK
YOU'RE AN OWNER.
YOU OWN IT.
UNDER FLORIDA PROPERTY LAW YOU
OWN ALL THE BUNDLES OF RIGHTS.
THAT'S THE LAW THAT EXISTS AND
THE LEGISLATURE LOOKED
SPECIFICALLY AT THE QUESTION OF
SALE AND THEN SAID NO, SALE WILL
BE AN IRRELEVANT FACT.
ONCE THEY REPEALED 543 AND 03
MADE POINT OF SALE IS IRRELEVANT
FACT.
I AGREE, YOUR HONOR, IF IT IS
PROTECTED BEFOREHAND, PROPERTY
PROTECTS, SOUND RECORDING
PROTECTS THE AUDIO WORK, AS A
RESULT OF REPEAL OF 543.0203 THE
FACT OF THE SALE IS IRRELEVANT.
THE PROPERTY IS STILL OWN AND

BUNDLES OF STICKS ARE PROTECTED.
>> YOU'RE INTO YOUR REBUTTAL TIME.
WELCOMED TO CONTINUE.
>> THANK YOU, YOUR HONORS.
>> MORNING YOUR HONORS, MAY IT PLEASE THE COURT, JOHN HACKER FOR SIRIUSXM I WOULD LIKE TO START WHERE MR. GRADSTEIN DID AND COURT WAS FOCUSED, GLAZER CASE.
HE QUOTED IT BUT ONLY READ HALF THE QUOTE.
IT IS TRUE AUTHOR IN COMMON LAW OWNS A PROPERTY RIGHT HIS INTELLECTUAL PRODUCTIONS PRIOR TO PUBLICATION OR DEDICATION TO THE PUBLIC, PROTECTION OF THESE COMMON LAW RIGHTS AFTER PUBLICATION IS GIVEN UNDER WELL-DEFINED CONDITIONS AND CIRCUMSTANCES.
THAT'S WHERE MR. GRADSTEIN STOPS.
THE STANCE KEEPS GOING.
BUT THE GENERAL RULE IS AN OWNER OF LITERARY OR INTELLECTUAL PROPERTY TERMINATES HIS PROPERTY INTERESTS OR COMMON LAW RIGHTS BY PUBLICATION.
WHICH OPERATES AS A DEDICATION AND TERMINATION OF HIS PRIVATE RIGHTS.
THAT HAS BEEN THE COMMON LAW OF FLORIDA SINCE ITS INCEPTION AND REMAINS THE COMMON LAW OF FLORIDA TODAY.
A STRAIGHTFORWARD APPLICATION OF THAT RULE, YOUR HONORS, WOULD RESOLVE THIS CASE EASILY.
THE PUBLIC SALE OF PRE-OF PRE-1972 RECORDS, EXTINGUISHED ALL THE COMMON LAW RIGHTS IN THOSE RECORDS.
NOW THERE IS ANOTHER NARROWER THAT THE COURT COULD SOLVE THIS CASE.
>> THAT IS DIFFERENT THAN COPYING IT.
>> EXACTLY, THAT IS EXACTLY

RIGHT.
>> THE OTHER PART IS, THERE IS NO QUESTION THAT SIRIUSXM PAYS FOR A, WHAT DO THEY PAY FOR WHEN THEY PLAY "HAPPY TOGETHER"?
>> THEY PAY, THEY HAVE A LICENSE.
THEY PAY FOR ANYTHING THAT IS COPYRIGHTED UNDER THE FEDERAL COPYRIGHT STATUTE WHICH ESSENTIALLY WOULD BE THE COMPOSITION.
>> THE COMPOSITION IS STILL PROTECTED BY--
>> STILL PROTECTED, STILL PAID BY ANY BROADCASTER, PRESUMABLY.
>> WOULD IT, HOW MANY, JUST TO GET THE, I ALWAYS SOMEHOW NEED THE FEEL OF THIS, WE HAVE "HAPPY TOGETHER," SEEMS LIKE THEIR MOST POPULAR SONG, HOW MANY RECORDINGS OTHER THAN THE TURTLES?
ARE THERE OTHER RECORDINGS OF THAT SONG?
>> OF "HAPPY TOGETHER"?
I DON'T KNOW NO ABOUT THAT.
>> WE'RE DEALING WITH THE PRE--2 RECORDING OF THAT, CORRECT?
>> RIGHT, THAT'S CORRECT.
>> IF SOMEBODY RECORDED IT TODAY, IT WOULD HAVE, IF A NEW GROUP, THEY AUTHORIZED A NEW GROUP TO RECORD IT, IT WOULD BE PROTECTED?
>> THE COMPOSITION, THE RIGHTS IN THE COMPOSITION WOULD BE PROTECTED AND RECORDING MADE TODAY WOULD BE SUBJECT TO FEDERAL LAW.
>> RIGHT.
WE'RE ONLY, WE'RE DEALING HERE WITH WHETHER COMMON LAW WOULD ADDRESS IN FLORIDA THE RIGHTS PRE-IN 1972?
>> THAT'S RIGHT, A RECORD MADE, RECORDED PRESSED PRIOR TO 1972.
>> WERE THEY ALL RECORDS BACK THEN BEFORE-- TALKING ABOUT RECORDS, I DON'T EVEN KNOW IF

THE PEOPLE LISTENING EVEN KNOW
WHAT A RECORD IS.
>> THAT IS A VERY FAIR POINT.
I SUSPECT ALMOST ALL OF THEM
WERE RECORDS.
I DON'T KNOW WHAT KIND OF TAPE
TECHNOLOGY THERE WAS AT THAT
TIME BUT THAT WOULD BE SOLD AS A
RECORD.
WE'RE TALKING ABOUT RECORDS MADE
AND SOLD PRIOR TO 1972.
THE NARROW WAY, TO PICK UP ON
WHAT YOU'RE SAYING, YOUR HONOR,
THE NARROWER WAY TO RESOLVE THIS
CASE IS TO RECOGNIZE PUBLICATION
AS GLAZER, PASSAGE FROM GLAZER I
READ TO YOU, PUBLICATION ALWAYS
HAS BEEN UNDERSTOOD ESSENTIALLY
A DEDICATION OF RIGHTS TO THE
PUBLIC.
THAT IS HOW YOU UNDERSTAND.
WHEN A PUBLICATION FOR COPYRIGHT
PURPOSES HAS OCCURRED, WHEN
YOU'RE DEDICATING THE RIGHT TO
USE THE ITEM TO THE PUBLIC, THE
COURT COULD HOLD THAT A PUBLIC
SALE OF A RECORD DEDICATES THE
RIGHT TO PERFORM THE RECORD, NO
CASE HAS EVER HELD OTHERWISE,
AND THAT IS THE WHOLE POINT OF
THE SALE.
TO ALLOW THE PURCHASER TO
PERFORM THE RECORD, BUT NOT THE
RIGHT TO COPY AND SELL THE
RECORD.
THAT IS A FUNDAMENTALLY
DIFFERENT RIGHT.
AND THAT'S NOT OF COURSE WHY
RECORDS ARE SOLD.
RECORD COMPANIES WEREN'T SELLING
RECORD SO THEY COULD BE COPIED
AND SOLD TO OTHER PEOPLE IN
COMPETITION WITH THE RECORD
COMPANY.
THAT APPROACH WOULD HARMONIZE
FLORIDA LAW WITH
ALREADY-EXISTING STATUTORY
CRIMINAL LAW, AND HARMONIZE
FLORIDA LAW WITH THE LAW
LITERALLY EVERYWHERE ELSE THAT

HAS ADDRESSED THIS, WHILE
AVOIDING THE MASSIVE DISRUPTION,
AND REGULATORY POLICY MAKING
THAT WOULD BE ENTAILED
RECOGNIZING UNPRECEDENTED RIGHT
THAT PLAINTIFF WANTS TO
RECOGNIZE IN THIS CASE.
>> COULD THE LEGISLATURE
TOMORROW, NOT TOMORROW, NEXT
WEEK, PASS A STATUTE THAT WOULD
GRANT THE COPYRIGHT PROTECTION
PRE-72 OR IS IT TOO LATE FOR
THEM?
>> CERTAINLY A MATTER-- THEY
COULD TRY TO DO THAT.
DEPEND EXACTLY HOW THEY WOULD DO
IT.
MIGHT BE A RETROACTIVITY
PROBLEM, I DON'T DISPUTE THAT,
THAT COULD BE ISSUE.
ONE OF THE AMICUS BRIEF POINTS
OUT ALL THE RECORDS WERE SOLD
BEFORE 1972 WHEN THIS STATE SAID
BY STATUTE, WHEN YOU SELL A
RECORD YOU'RE GIVING UP ALL YOUR
RIGHTS.
SELL THAT RECORD, GO AHEAD BUT
YOU'RE GIVING UP ALL YOUR
RIGHTS.
SO ALL THESE TRANSACTIONS
OCCURRED EVERYBODY WHO WAS
MAKING AND SELLING A RECORD KNEW
UNDER FLORIDA LAW THEY WERE
GIVING UP THEIR RIGHTS.
MIGHT BE A QUESTION WHETHER THE
LEGISLATURE CHANGED THAT
RETROACTIVELY.
THEY COULD DO THAT.
>> WHAT SEEMS TO BE THEIR BEST
ARGUMENT, WE ADOPTED COMMON LAW.
COMMON LAW HAS BROAD PROPERTY
RIGHTS AND THESE ARE INCLUDED
WITHIN THOSE BROAD PROPERTY
RIGHTS AND THAT SEEMS TO IT BE
THE AMICUS.
WE'VE GOT AMICUS ON BOTH SIDES.
WHAT ABOUT THAT ARGUMENT, THAT
YOU KNOW, THAT THE FIDELITY TO
THE COMMON LAW OF PROPERTY
RIGHTS?

>> I THINK THE ISSUE, YOUR HONOR, IS WHAT HAPPENS AFTER THE PUBLIC SALE, THE PUBLICATION, THE PUBLIC DISTRIBUTION.
WHATEVER RIGHTS PERSISTED BEFORE THE SALE I DON'T THINK THIS COURT EVEN HAS TO ANSWER THAT QUESTION FRANKLY.
THE REAL QUESTION HERE IS, WHAT HAPPENS WHEN THE SALE IS MADE, THE RECORDS ARE PUBLICLY SOLD UNCONDITIONALLY UNDER A REGIME WHERE WHEN THE SALE HAPPENS UNDER FLORIDA LAW YOU LOSE ALL YOUR RIGHTS.
THAT IS WHAT THE STATUTE SAYS.
>> AT THE SAME TIME, LOOKING AT IT HISTORICALLY FROM A COMMON LAW APPROACH IT IS CERTAINLY HELPFUL TO UNDERSTAND THE STATUS AND THE RIGHTS AND RESPONSIBILITIES BEFORE WE GET TO THE STAGE OF A PUBLICATION OR SALE BECAUSE, THE COMMON LAW IS, I MEAN AS THE COMMON LAW ORIGINALLY DEVELOPED, NO ONE EVER THOUGHT OF A RECORD.
HAD NO IDEA THERE WOULD BE SUCH A THING.
EVEN AT THAT TIME I DON'T KNOW THAT, IN THE EARLY, EARLY '60s, IN MY PRIME, THAT WE EVEN THOUGHT ABOUT A SIRIUSXM KIND OF CONCEPT.
SO, I MEAN, THE THING THAT WE WOULD BE HOLDING, IN YOUR VIEW IS, IS THAT A GROUP, I GO IN AND I MAKE A SONG AND I PUT IT ON THE SHELF.
AT THAT POINT NOBODY CAN DO ANYTHING WITH IT UNLESS I AGREE.
CERTAINLY WRITERS WHO WROTE THE WORDS, THE NOTES ON THE PAGE PROTECTED.
BUT THEN IF I SELL IT, AND AT THE TIME THE CONCEPT WAS, OKAY, THAT'S THE SALE, THAT IS WHAT IS COMPENSATED BUT NOW WE'RE IN THE DIGITAL AGE AND THAT SOUND, THAT AUDIO, CAN BE USED FOR PROFIT

JUST AS THOUGH IT WERE COPIED,
JUST AS THOUGH THAT RECORD WERE
REPRODUCED, BUT WE'RE JUST DOING
IT DIFFERENTLY AND WE'RE
BROADCASTING IT THROUGH THE
WORLD.
AND I COULD, FOR EXAMPLE, THEY
COULD USE MY SONG AS THEIR THEME
SONG TO MAKE MILLIONS OF DOLLARS
FOR A TV PROGRAM.
THAT'S WHAT WE WOULD BE SAYING,
CORRECT?
>> WELL, IF YOU DID THAT ON A TV
PROGRAM YOU WOULD STILL BE
PAYING THE COMPOSER.
>> NO, NO, I'M JUST TALKING
ABOUT--
>> THE RECORD ITSELF.
>> WE'RE TALKING ABOUT PERFORMER
AUDIO BUT THAT PORTION OF IT,
THAT CAN BE USED FOR COMMERCIAL
PURPOSES IF WE HOLD TODAY, THAT
THERE IS NO PROTECTION, FOR
THAT, THAT PERSON OR GROUP OF
PEOPLE, FREELY WITH EXEMPT FOR
THE EXISTING WHICH WE'RE NOT
TALKING ABOUT TODAY.
THAT'S WHERE WE WOULD BE, RIGHT?
AND THAT'S WHERE YOU SAY WE ARE
TODAY.
>> THAT'S WHERE WE'VE BEEN FOR
DECADES.
>> YES, I UNDERSTAND.
THAT IS EXACTLY WHAT WE'RE
SAYING AND THESE CHANGES IN THE
WAY THAT IT'S DELIVERED WHERE AN
OLD D.J. USED TO TURN THE DISK
BACK, IN THE VAN AT A SOCK HOP
OR WHATEVER, THIS IS NOW HAPPENS
ALL VERY SCIENTIFICALLY AND
TECHNOLOGICALLY AND IT IS
BROADCAST ACROSS THE WORLD BUT
THE LAW IS THE SAME AND THERE IS
NO COMPENSATION DUE TO THE
VOICES THAT WE HEAR IN THE,
ACROSS THE MILES?
>> A COUPLE OF POINT IF I MAY,
YOUR HONOR.
>> SURE, PLEASE.
>> WASN'T JUST THE D.J. AT THE

SOCK HOP, YOU REMEMBER.
YOU REMEMBER WOLFMAN JACK AND
DICK CLARK.
>> I DO.
>> THEY WERE ALL MAKING
EXTRAORDINARY AMOUNTS OF
MONEY--
>> I UNDERSTAND.
PAYOLA AND ALL THAT.
>> THAT IS WHAT IS GOING ON.
THESE WERE NOT--
>> I UNDERSTAND.
>> THAT HAS ALWAYS BEEN TRUE.
THE RECORDS WERE PURCHASED.
>> RIGHT.
>> AND USED BY LARGE
BROADCASTING ENTITIES TO MAKE
MONEY THROUGH ADVERTISING, NOT
SUBSCRIPTIONS.
>> RIGHT.
>> THAT IS JUST A BUSINESS
MODEL.
THAT IS NOT A FUNCTIONAL
DIFFERENCE.
>> RIGHT.
>> SO THERE'S THAT POINT.
THE SECOND POINT I WOULD MAKE,
YOUR HONOR, IS TO SAY THAT
BECAUSE THERE IS A DIFFERENT WAY
OF BROADCASTING, AND THE
BROADCASTERS MAKE MONEY THAN
THEY DID IN THE '60s,
THEREFORE THE RIGHTS SHOULD
RETROACTIVELY CHANGE, I THINK IS
LIKE SAYING, IF YOU SELL A PIECE
OF PROPERTY, IN KIND OF A
WASTELAND IN THE 1960S, THEN
THERE IS ECONOMIC DEVELOPMENT
COMES ALONG 50 YEARS LATER,
MAKES THAT PROPERTY INCREDIBLY
VALUABLE, SOMEBODY SHOULD SAY,
THE SELLER SHOULD SAY I DIDN'T
UNDERSTAND THAT WOULD BE THE
MODEL AND THEREFORE YOU SHOULD
RETROACTIVELY COMPENSATE MY FOR
THE SALE OF THE PROPERTY.
THESE TRANSACTIONS WERE
COMPLETED IN THE '60s.
>> I UNDERSTAND YOUR ARGUMENT WE
SHOULD FUNDAMENTALLY HAVE

STABILITY IN THE LAW AND COMMON
LAW SHOULD REMAIN.
I'M TRYING TO MAKE SURE WE
UNDERSTAND EXACTLY WHAT WE'RE
TALKING ABOUT HERE AND THE
EXPANSION, THE ARGUMENT IS, THE
EXPANSION AND DISTRIBUTION OF
THAT SOUND, NOT RECORDINGS OR
ANYTHING, IS JUST A PRODUCT OF
SOCIETAL DEVELOPMENT?
>> AS EMPIRICAL MATTER I'M NOT
SURE THERE IS EXPANSION.
THE CHANGE IN THE WAY IT IS
DELIVERED.
TERRESTRIAL RADIO, DIGITAL
RADIO.
THE THIRD POINT I WOULD MAKE IS,
THIS IS EXACTLY WHAT
LEGISLATURES AND REGULATORS ARE
FOR.
TO THE EXTENT THESE CHANGES
JUSTIFY RECONSIDERATION OF THE
WAY RIGHTS ARE MANAGED AND
DISTRIBUTED, THAT'S A
LEGISLATIVE SOLUTION.
THAT IS EXACTLY THE PROBLEM.
THE ISSUE, THAT WAS GOING ON FOR
DECADES THAT CONGRESS FINALLY
DEALT WITH IN THE DPRA, VARIOUS
BALANCING OF COMPETING
INTERESTS.
REMEMBER WE'RE NOT JUST TALKING
ABOUT--
>> I UNDERSTAND THAT ARGUMENT.
IT IS ALWAYS THE PERSON WHOSE
INTERESTS ARE FAVORED BY THE
LEGISLATION, IT IS ALWAYS A
BALANCING.
THE FELLOW'S WHOSE OX HAS BEEN
GORED THIS IS CONTRARY TO COMMON
YOU LAW.
THIS IS LEGISLATORS IMPOSING
THEIR WILL ON A BODY OF LAW.
>> IT IS NOT JUST SIRIUS.
>> I UNDERSTAND.
>> COMPOSERS ARE BETTER OFF WITH
BROAD AVAILABILITY OF BROADCAST
MUSIC.
THEIR MUSIC IS OUT THERE.
THEY GET MORE MONEY FROM

LICENSES.
THEIR MUSIC GETS HEARD.
>> BUT PERFORMERS HAVE NOT TRADITIONALLY IN COMMON LAW BEEN PROTECTED IN THE SAME EXTENT.
THAT IS WHAT THIS CASE IS ABOUT, ISN'T IT?
>> NO THIS IS ABOUT RECORD COMPANIES.
RECORD COMPANIES BENEFIT.
PERFORMERS ONLY BENEFIT IF THE RECORD COMPANIES WHO OWN THE RIGHTS DECIDE TO HAND THEM ROYALTIES.
>> RIGHT.
>> IN THE DPR AT, YOUR HONOR, CONGRESS HAD TO SOLVE THAT LEGISLATIVELY DEMANDING 50% ROYALTY SHARING TO INSURE PERFORMERS GET ANY MONEY.
NO SURE THAT IF THINK ADOPT THIS RIGHT, LARGESS WOULD BE BESTOWED ON THE PERFORMERS.
RIGHTS ARE ALMOST ALL HELD BY LARGE RECORD COMPANIES.
>> THAT PERFORMERS SOLD THEIR RIGHTS.
>> NOT CLEAR PERFORMERS WOULD BE BETTER OFF.
WHAT IS CLEAR THAT PERFORMERS BENEFIT NOW ESPECIALLY THE PRE-1972 PERFORMERS.
THE WAY THEY MAKE MONEY, QUOTE HAPPY TOGETHER" GETS HEARD ON RADIO, PEOPLE GO TO FESTIVALS TO LISTEN TO THEM.
THIS IS WHAT THE NEW YORK COURT EMPHASIZED IN THE SIRIUSXM DECISION.
IN PRACTICAL MATTER IT IS NOT SURE PERFORMERS THAT WOULD BE BETTER OFF WITH THE RIGHTS FLOW FLY WOULD HAVE YOU ADOPT.
>> NONE OF CURRENT COURTS WOULD CONSIDER--
>> DISTRICT COURT AND EFFECTIVELY REVERSED BY NEW YORK COURT OF APPEALS.
>> WOULD YOU ADDRESS IN THE CONCURRENCE OF THE NEW YORK

CASE, THE CONCURRENCE TALKS
ABOUT CONTINUUM, THE FIVE-STEP
CONTINUUM FROM AM TO FM RADIO TO
THE SALE OF A SOUND RECORDING
THROUGH iTUNES, GOOGLE PLAY.
HOW DOES THAT CONTINUUM AFFECT
WHETHER IT IS, IS THERE A COMMON
LAW COPYRIGHT IN ANY OF THEM?
I WAS TRYING TO, YOU KNOW, THAT
CERTAINLY DESCRIBED FOR ME THE
CONTINUUM, WHAT, WHERE WE'VE
GONE FROM, AGAIN PERFORMERS
AROUND RECORDS WOULD TRY TO GIVE
THEIR RECORDS AWAY TO RADIO
STATIONS SO IT WOULD BE HEARD,
RIGHT?
>> RIGHT.
>> SO WHAT IS THE SIGNIFICANCE,
IF ANY OF A CONTINUUM?
>> I THINK WHAT THAT JUDGE WAS
GETTING AT ON THE CONTINUUM.
AT SOME POINT, WHAT YOU HAVE,
THIS MAY BE A PARTIAL ANSWER TO
JUSTICE LEWIS' QUESTION, AT SOME
POINT YOU HAVE A TECHNOLOGICAL
EQUIVALENT OF COPYING A RECORD.
THAT IS WHAT THE JUDGE SAID WAS
WHAT SPOTIFY WAS DOING.
I DON'T WANT TO THROW SPOTIFY
UNDER THE BUS BUT TO USE THE
JUDGE'S VIEW OF IT, EFFECTIVELY
LIKE YOU, THEY, THE ACCESS YOU
HIT A BUTTON YOU COULD HEAR A
PARTICULAR SONG.
THAT IS LIKE A COPY OF THE
RECORD, MAYBE R MAKING A COPY OF
AVAILABILITY TO SUB DESIRE
EFFORT THAT IS NOT WHAT
SIRIUSXM--
>> PROTECTED IF SPOTIFY HAS TO
PAY FOR--
>> SPOTIFY IS NOT NOW COVERED BY
FEDERAL ACT T HAS WHATEVER
RIGHTS OR DOESN'T HAVE UNDER
STATE LAW.
THAT WOULD BE ISSUE IF AND WHEN
THAT KIND OF CASE COMES UP.
THAT CONCURRENCE IS KIND OF
ANTICIPATING THAT.
THE MAJORITY SAID WE DON'T WANT

TO DEAL WITH THAT NOW.
WE DON'T HAVE TO DEAL WITH THAT NOW.
ALSO THIS COURT DOESN'T HAVE TO DEAL WITH IT.
I WOULD LIKE TO TURN BRIEFLY, IF I COULD--
>> YOU DON'T THINK THE CONTINUUM HAS ANYTHING TO DO WITH WHAT WE HAVE TO ANSWER?
>> I THINK THIS COURT CAN AND SHOULD DECIDE THE CASE WITHOUT GETTING FURTHER DOWN THE CONTINUUM.
I THINK THIS COURT SHOULD DO EXACTLY WHAT THE MAJORITY DID IN THE SIRIUS NEW YORK CASE IF ONE WANTED TO GO THE ROUT OF CONCURRENCE WE WOULD PREVAIL--
>> WHAT THE STATUTES AND WHAT THE LEGISLATURE WAS DOING IN THE '40s, THE '50s.
THE LEGISLATURE COULD HAVE MADE A DECISION BACK THEN TO MAKE EVERYTHING CLEAR LEGISLATIVELY AS TO WHAT PROTECTIONS THEY WANTED TO GIVE IN FLORIDA?
>> AND IT DID, ACTUALLY.
AND IT SAID THERE ARE NO PROTECTIONS.
EFFECTIVELY, ESSENTIALLY CODIFIED THE WHITEMAN DECISION IN NEW YORK AND SPECIFICALLY REFUTED THE WARING DECISION FROM NORTH CAROLINA, ADOPTING STATUTORY LANGUAGE LIKE THE NORTH CAROLINA LEGISLATURE ADOPTED TO BE A ABROGATE THAT PARTICULAR DECISION.
THAT JUSTICES CANADY AND LAWSON WERE RIGHT, THAT LANGUAGE IN 1941, ASSERTED ANY COMMON LAW RIGHTS, THEY DIDN'T WANT ANY TO EXIST AT ALL, THEY DIDN'T EXIST AT ALL.
COMES ALONG 1977 WHICH MY COLLEAGUE RELIES ON HEAVILY, QUITE CLEARLY MISCONSTRUES WHAT HAPPENED IN 197.
FIRST OF ALL THE LEGISLATIVE

HISTORY MAKES CLEAR THE
LEGISLATURE ASSEMBLY THOUGHT THE
LAW WAS NOT NECESSARY.
IT WAS NUMBER OF OTHER LAWS THAT
THE LEGISLATURE WAS REPEALING AS
UNNECESSARY.
THIS WAS ONE OF THEM.
BUT IN SO DOING THEY
SPECIFICALLY SAID, THE STAFF
REPORT, MR. GRADSTEIN CITES
SPECIFICALLY SAYS WE'RE GOING TO
PRESERVE-- REMEMBER IN 1971 THE
LEGISLATURE ADOPTED ANTI-PIRACY
OR COPYING CRIMINAL LAW.
THE LEGISLATURE SAID WE'LL
REPEAL EVERYTHING, BUT WE WILL
SAVE THAT.
WHY DID THEY DO IT?
HERE IS WHAT THEY SAID.
IF SECTION 503.401 IS
ANTI-PIRACY PROVISION IS
REPEALED, OWNERS OF SOUND
RECORDINGS FIXED BEFORE 1972
WILL NOT BE PROTECTED UNDER ANY
LAW, STATE OR FEDERAL.
SO IF ANYTHING, THE LEGISLATURE
WAS RECOGNIZING THEY NEEDED TO
KEEP THE ANTI-PIRACY PROVISION
IN PLACE IF THEY DIDN'T THERE
WOULD BE NO PROTECTIONS
WHATSOEVER.
IT IS LITERALLY THE OPPOSITE,
THE DIRECT OPPOSITE OF THINKING
BY REPEALING THE STATUTE THEY
WERE RESURRECTING THIS LARGE
PANOPLY OF PROTECTIONS THAT
EXISTED BEFORE 1941.
IT IS QUITE THE OPPOSITE OF WHAT
MY COLLEAGUE PROPOSES.
WHAT I DO AGREE WITH, FROM AND
EDDIE ON--
>> WOULD BE CRAZY FOR TO US LOOK
AT STAFF ANALYSIS OF A STATUTE
TO DETERMINE THAT WE, THE STATE
OF FLORIDA, THE JUDICIARY,
RECOGNIZE A COMMON LAW RIGHT.
>> I TOTALLY AGREE WITH THAT THE
RIGHT WAY, THIS IS WHAT I ABOUT
TO SAY, I AGREE WITH "FLO &
EDDIE," THE RIGHT WAY TO LOOK AT

IT, ALL THAT HAPPENED, THE CASE
THEY CITE FROM THE THIS COURT,
RESTORED COMMON LAW PRIOR TO
1941.
WHATEVER THAT WAS.
IT IS THEIR BURDEN TO IDENTIFY
ANYWHERE IN FLORIDA LAW BEFORE
1941 WHERE THIS KIND OF RIGHT
WAS RECOGNIZED.
AND THERE IS NO SUCH CASE.
MR. GRADSTEIN ACKNOWLEDGED THERE
HAS NEVER BEEN NO SUCH CASE.
GLAZER WAS 1943, STATING
FUNDAMENTAL PRINCIPLE OF FLORIDA
COMMON LAW DID EXIST, WHICH
WHATEVER RIGHTS YOU HAVE IN A
CREATIVE WORK ARE TERMINATED
UPON PUBLICATION.
SO THIS PERFORMANCE RIGHT, THE
RIGHT TO CONTROL THE USE OF A
RECORD AFTER YOU SELL IT UNDER
FLORIDA LAW AT THAT TIME WAS
UNDERSTOOD TO HAVE BEEN
TERMINATED WHICH WAS THE
AMERICAN LAW, THE FUNDAMENTAL
RULE OF AMERICAN COMMON LAW
COPYRIGHT SINCE THE WHEATON CASE
IN THE 1800S.
THE LAST POINT I WOULD MAKE IS
JUST TO EMPHASIZE SOMETHING I
SUGGESTED TO JUSTICE LEWIS, THAT
BOTH SIRIUS NEW YORK CASE
RECOGNIZED AND THE DISTRICT
COURT IN THIS CASE RECOGNIZED TO
THE EXTENT THE COURT THINKS
BECAUSE OF TECHNOLOGICAL CHANGE
THERE IS SOMETHING THAT NEEDS TO
BE DONE, THESE ISSUES NEED TO BE
ADDRESSED.
THE RIGHT WAY TO ADDRESS IT, IS
THROUGH LEGISLATIVE POLICY
MAKING.
ONLY THE LEGISLATURE IS PROPERLY
EQUIPPED TO BALANCE ALL THE
COMPETING INTERESTS WHICH ARE
NOT JUST SIRIUSXM, NOT JUST A
PERFORMER LIKE "FLO & EDDIE."
TALKING ABOUT INTERESTS OF
COMPOSERS.
TALKING ABOUT THE INTEREST OF

THE LISTENING PUBLIC, ALL OF
THOSE WERE HOTLY-CONTESTED
LITERALLY FOR DECADES BEFORE
CONGRESS FINALLY BALANCED THEM
AN CAME UP WITH ITS OWN RULE FOR
RECORDINGS MADE AFTER 1972.
>> ON THE CALIFORNIA AND
NEW YORK CASES, ARE THE SAME
KIND OF ISSUES STILL PENDING?
>> IN NEW YORK IT'S RESOLVED.
IN CALIFORNIA, AS I UNDERSTAND
IT THE CASE THAT IS CURRENTLY
PENDING IS ABOUT THE CALIFORNIA
STATUTE.
CALIFORNIA DID ADDRESS THIS IN A
LEGISLATIVE WAY.
>> WHAT WAS THE OUT COME IN THE
NEW YORK CASE?
>> NEW YORK CASE, SIRIUS XM,
THERE IS NO EXCITE TO CONTROL
PERFORMANCE OF A RECORD AFTER IT
HAS BEEN SOLD.
BEFORE THAT DECISION, IN ALL THE
BRIEFING IN CASE, "FLO &
EDDIE" SAID THAT FLORIDA COMMON
LAW IS THE SAME AS NEW YORK
COMMON LAW.
THEY SAID YOU SHOULD LOOK TO
NEW YORK CASES BEFORE THE
SIRIUSXM NEW YORK CASE THAT
PROHIBITED, THAT CREATED AN
ANTI-PIRACY RIGHT AFTER SALE.
THEY SAID AN ANTIPIRACY RIGHT
NECESSARILY ENTAILS CONTROLLED
PERFORMANCE.
THE SIRIUSXM CASE SAID THAT IS
NOT CORRECT.
THEY'RE FUNDAMENTALLY DIFFERENT
RIGHTS.
THE RIGHT AGAINST COPYING
DOESN'T ENTAIL THE RIGHT TO
PERFORMANCE.
IN CONTRARY IN FACT THE REASON
THAT NEW YORK PRECEDENTS HAD
PROHIBITED PIRACY, ACTUALLY
SUPPORTS THE OPPOSITE CONCLUSION
WITH RESPECT TO PERFORMANCE,
FIRST OF ALL RECORDS ARE NOT
SOLD IN ORDER TO BE COPIED AND
RESOLD.

THEY ARE SOLD TO BE PERFORMED.
THE THAT IS WHY DEDICATION OF
THE RIGHT TO DO THAT THING.
AND PIRACY HAS NO REAL BENEFITS
TO THE PUBLIC WHEREAS
PERFORMANCE HAS ALL THE BENEFITS
I'VE ALREADY DESCRIBE INCLUDING
BENEFITS TO COMPOSERS WHO
BENEFIT FROM LICENSING FEES AND
TO THE LISTENING PUBLIC.
THOSE ARE THE INTERESTS THAT
NEED TO BE TAKEN INTO ACCOUNT.
WHAT MATTERS FOR THIS COURT
HOWEVER IS THAT FLORIDA COMMON
LAW HAS NEVER RECOGNIZED THIS
RIGHT AND THERE IS NO REASON TO
DO SO TODAY.
THANK YOU.
>>> DOES THAT NEW YORK CASE, IT
IS, IS IT FINAL?
>> YESES IT IS, YOUR HONOR.
>> ISN'T IN THE SAME POSTURE
AGAIN, I REALIZE IT CAME OUT
AFTER MOST OF THE BRIEFING I
DON'T KNOW IF ALL THE BRIEFING
BUT THEY'RE VERY CLEAR COMMON
LAW COPYRIGHT LAW DOESN'T
RECOGNIZE A RIGHT OF PUBLIC
PERFORMANCE FOR SOUND RECORDINGS
MADE PRE-TO FEBRUARY 15, '72.
HOW DO YOU, DID NEW YORK GET IT
WRONG OR THINGS, COMMON LAW IS
JUST DIFFERENT IN FLORIDA
BECAUSE OF THE STATUTES THAT,
AND THE 19, MAGIC TRICK CASE?
>> WELL THE NEW YORK DECISION IS
INFORMATIVE, RECOGNITION OF THE
COMMON LAW COPYRIGHT THAT
PREVENTS UNAUTHORIZED
DUPLICATION AND PRODUCTION.
WHEN IT CAME TO THE QUESTION OF
PUBLIC PERFORMANCE NEW YORK LAW
TOOK A TANGENT DIFFERENT THAN
FLORIDA LAW BECAUSE IT WENT
FORWARD ON THE WHITEMAN DECISION
AND SAID THAT THE WHITEMAN
DECISION IN SECOND CIRCUIT WAS
NOT ACTUALLY OVERRULED WITH
RESPECT THE QUESTION OF PUBLIC
PERFORMANCE.

CONVERSELY IT IS IN DIRECT
CONTRAVENTION TO THE WARRING,
WDAS PERFORMANCE DECISION IN
PENNSYLVANIA AND WARRING VERSUS
DUNLEA BOTH CITED BY THIS COURT
FOR WHATEVER REASONS.
>> THE ANSWER YOU THINK IT IS
DIFFERENT?
>> THE LAW ON PURPLE PERFORMANCE
QUESTION DIVERGED BETWEEN
WHITEMAN AND PENNSYLVANIA COURT.
WHEN THE STATUTORY SCHEME TRIED
TO PREVENT, MADE CLEAR A SALE OF
A RECORD WAS A RELINQUISHMENT OF
THE RIGHT TO CONTROL ITS PUBLIC
PERFORMANCE THEY RESCINDED THAT,
THEY REPEALED THAT IN 1977, FOR
WHATEVER REASONS BUT ACUTELY
AWARE OTHERWISE THERE IS NO
PROTECTION FOR PRE-1972
RECORDINGS.
WHY RESCIND IT AT ALL?
WHY SHOULD THAT BE REPEALED IF
NOT TO REVIVE THE COMMON LAW AS
THEY UNDERSTOOD IT, AS EXISTED
UNDER THE TWO WARRING CASES AND
UNDER GENERAL PRINCIPALS OF
PROPERTY PROTECTION UNDER COMMON
LAW?
THE QUESTION IS AS SIRIUSXM
ADMITS THERE IS PROTECTION
BEFORE SALE.
THE SALE OF THE A RECORD IS SALE
OF PIECE OF PLASTIC TO ALLOW ONE
TO LISTEN TO THE AUDIO WORK.
IT IS NOT A SALE OF THE AUDIO
WORK.
IF IT WAS A SALE OF THE AUDIO
WORK THEN THERE WOULD BE NO
BASIS FOR CHALLENGING THE
UNAUTHORIZED DISTRIBUTION AND
COPYING.
SO THERE IS NO PRINCIPLED REASON
AS THE 11th CIRCUIT CASE
SAID IN TODAY'S WORLD THAT THE
RIGHTS THAT HAVE ALWAYS EXISTED
THERE, THAT THE TRANSFER OF THE,
OF A CHATTEL ON WHICH THE SOUND
ARE EMBODIED IS SOMEHOW A
TRANSFER OF THE SOUNDS, ALLOWING

IN TODAY'S WORLD WHAT IS AN
EXERCISE OF DOMINION, CONTROL
AND TANTAMOUNT TO COPYING AND
DISTRIBUTION BECAUSE IT SIMPLY
HIGH-TECH PIRACY.
THE FACT THAT IT IS NOW, YOU
KNOW COPIED IN BITS, THERE IS NO
LICENSE FOR THAT.
>> ONE OF THE THINGS YOU'VE
MENTIONED IS THAT GLAZER VERSUS
HOFFMAN CITES WARING CORRECT?
YES.
>> YOU'RE RELYING ON THAT.
>> SORRY?
>> RELYING ON THE CITATION OF
GLAZER TO WARING, CORRECT?
>> TWO WARINGS INTERNATIONAL
NEWS.
>> ISN'T THAT CASE OPINION CITES
THEM SIMPLY SAYING THAT WHAT IS
THE PLAINTIFF THERE RELIED ON?
>> THAT'S CORRECT.
THAT IS GOES ON TO SAY, IT GOES
ON TO SAY THERE CAN BE NO DOUBT
THAT THE COMMON LAW PROTECTIONS
INTELLECTUAL PRODUCTION.
IT DOESN'T SAY WE DISAGREE WITH
THOSE CASE.
IT GOES ON TO SAY THERE IS NO
DOUBT THERE IS SUCH A RIGHT
UNDER COMMON LAW PRIOR TO THE
SALE.
AFTER 54.02 AND 03 WERE
REPEALED, AS A RESULT OF RESULT
PUBLICATION HAS NO APPLICATION
TO SOUND RECORDINGS AND THEY'RE,
UNIVERSALLY UNDERSTOOD TODAY
UNDER SUPREME COURT CASE OF
GOLDSTEIN, I CITE FOOTNOTE 29.
UNDER THE CIRCUIT COURT CASE OF
ABCO, UNDER NAXOS IN NEW YORK,
THERE IS AN ENTIRE EXPOSITION
THERE IS NO CONCEPT OF A
PUBLICATION WHEN IT COMES TO
SALE OF A RECORD.
PUBLICATION IS IDEA THAT THERE
IS HANDOFF TO FEDERAL LAW.
FEDERAL LAW DOESN'T COVER
PRE-1972 RECORDINGS.
THERE WAS NEVER ANY HANDOFF,

NEVER ANY BASIS TO SAY THE
GENERAL RULE OF PUBLICATION
APPLIES TO RECORDS.
>> GET YOU BETWEEN BREATH.
YOUR TIME IS UP.
WRAP IT UP.
>> THANK YOU, YOUR HONORS FOR
THE ARGUMENTS IN OUR BRIEF.
WE HOPE THE COURT RULES IN, IN,
ANSWER TO THE QUESTIONS IN FAVOR
OF "FLO & EDDIE" AND OTHER
SIMILARLY SITUATED.
THANK YOU FOR YOUR TIME.
>> THANK YOU FOR YOUR ARGUMENTS.
WE'LL BE IN RECESS FOR TEN
MINUTES.