



## Not Quite "Happy Together" Recording Industry Scores Significant Victory in First Major Pre-1972 Sound Recordings Performance Rights Decision

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When Sirius XM broadcasts "Happy Together," "It Ain't Me Babe," and other hit recordings from The Turtles through its satellite and Internet radio services, it infringes the copyrights to these recordings, according to a court in the Central District of California.

In an order issued September 22, 2014, in *Flo & Eddie Inc. v. Sirius XM Inc.*, 2:13-cv-05693 (C.D. Cal.)<sup>1</sup>, the record industry scored a significant victory in the first major court ruling on the issue of state copyright protection for public performances of pre-1972 sound recordings. The court granted Flo & Eddie summary judgment on its claim that Sirius' unlicensed public performances of its sound recordings violated California Civil Code § 980(a)(2), the section in California's copyright statute that applies to pre-1972 sound recordings. Flo & Eddie is the corporation owned and operated by Howard Kaylan and Mark Volman, founding members and the lead singer and guitarist, respectively, of the 1960s pop group The Turtles. Because the case involves only California state law, however, the court's ruling is limited in scope to public performances of these recordings in the state of California.

This case is one of a series of lawsuits that seek royalties for public performances by new media music services such as Sirius XM and Pandora of sound recordings created before February 15, 1972, based on the argument that state law protects these recordings from such unlicensed uses. While music **compositions** have long enjoyed copyright protection under U.S. copyright law, only in

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<sup>1</sup> <http://www.soundexchange.com/wp-content/uploads/2014/09/Flo-Eddie-v.-Sirius-XM-Order-on-MSJ.pdf>



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1972 did Congress extend copyright protection to **sound recordings**. Individual states, however, had enacted their own copyright statutes, which co-existed with the federal Copyright Act until the enactment of the 1976 Copyright Revision Act, which preempted these state laws. The 1976 federal law, however, expressly carved out a preemption exemption to sound recordings created before February 15, 1972. See 17 U.S.C. § 301(c) ("With respect to sound recordings fixed before February 15, 1972, any rights or remedies under the common law or statutes of any State shall not be annulled or limited by this title until February 15, 2067.")

In 1995, Congress expanded the rights attached to a sound recording when it passed the Digital Performance Right in Sound Recordings Act, which added digital audio transmissions of sound recordings to the exclusive bundle of rights a copyright grants. See 17 U.S.C. § 106(6). SoundExchange has emerged as the performance rights organization that collects the compulsory license fees that non-interactive digital music services—including Sirius XM—pay to perform these recordings.

But Sirius did not pay, and SoundExchange did not attempt to collect, royalties for pre-1972 recordings, as these do not have federal copyright protection. The digital public performance rights that owners of these sound recordings possess have existed in a sort of legal limbo based on the interpretations of state copyright statutes. Flo & Eddie owns the rights to The Turtles' recordings, and tested these legal waters by suing Sirius for violating California copyright law—and bringing claims for unfair competition, conversion, and misappropriation—for broadcasting its sound recordings.

The case boiled down to statutory construction. The applicable statute, California Civil Code § 980(a)(2), reads (with emphasis added):

The author of an original work of authorship consisting of a sound recording initially fixed prior to February 15, 1972, has an **exclusive ownership** therein until February 15, 2047, as against all persons except one who independently makes or duplicates another sound recording that does not directly or indirectly recapture the actual sounds fixed in such prior recording, but consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate the sounds contained in the prior sound recording.

Flo & Eddie argued that "exclusive ownership" of sound recordings encompasses the right to control public performances of these recordings. Sirius argued that because the statute did not expressly specify the public performance right, it was not included in the "exclusive ownership" of a recording. Based on the plain language of the statute, its legislative history, and two court decisions which implied that the California statute granted the owner of a sound recording the exclusive right to control public performances of its recordings, the court agreed with Flo & Eddie's interpretation. As such, because no dispute existed that Sirius had broadcast The Turtles' recordings without a license, the court granted Flo & Eddie's summary judgment motion that these public performances infringed their sound recording copyrights. The court also granted Flo & Eddie summary judgment on its unfair competition, conversion, and misappropriation claims.

This case has the potential to create significant revenue streams for major record labels and other owners of pre-1972 sound recordings. Conversely, it presents new licensing and business challenges to Internet, satellite, and other new media non-interactive music service providers. Of course, a treasure trove of artistically and commercially successful music was recorded before 1972—think Elvis, The Beatles, Jimi Hendrix, Miles Davis, Duke Ellington ... the list could go on and on. A huge void would exist if Sirius simply stopped broadcasting these recordings. As such, the full implications of the decision in the *Flo & Eddie* case may take years to emerge, especially considering that the decision applies only in California. For example, a court interpreting another state's law could issue an opposite decision. But in practicality, Sirius could most likely not block its broadcasts from California. So if this decision is affirmed on appeal, new licensing requirements will likely emerge for digital public performances of pre-1972 sound recordings.

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