9th Circuit Defines Public Performance Rights for Owners of Pre-1972 Recordings Under California Copyright Common Law

Flo & Eddie, Inc. v. Sirius XM Radio, No. 17-55844 (9th Cir. Aug. 23, 2021)

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On August 23, 2021, the 9th Circuit found that under California common law and statutory copyright law, owners of pre-1972 sound recordings do not have an exclusive ownership right in public performances. This holding means that owners of pre-1972 sound recordings are entitled only to royalties for the public performance of their sound recordings under the federal Music Modernization Act ("MMA").

In a class action suit against Sirius XM, Plaintiffs argued that under California common law and statutory copyright law, Plaintiffs hold the exclusive ownership right of public performance, and therefore Sirius XM must pay for the broadcast of its pre-1972 songs. As a preliminary issue, the 9th Circuit found that the MMA does not preempt the claims made in this case because Sirius XM did not meet "certain conditions" that are required for the MMA to preempt state law claims arising before the passage of the MMA.

This case follows recent decisions in New York and Florida where no exclusive right to public performance was found under each state's respective common law. The New York Court of Appeals, hearing a certified question from the 2nd Circuit that is parallel to this case, found that "common-law copyright protection prevents only the unauthorized reproduction of the copyrighted work," but a lawful purchaser can play copies of the work. *Flo & Eddie, Inc.*, 70 N.E.3d 936, 947 (N.Y. 2016). Similarly, in *Flo & Eddie, Inc. v. Sirius XM Radio Inc.*, 229 So. 3d 305, 307 (Fla. 2017), on certification from the 11th Circuit, the Florida Supreme Court found that there is no common law public performance right.

In contrast, the California district court had concluded that under Section 980(a)(2) of the California Civil Code, "exclusive ownership" ***included*** the right of public performance. In determining the rights covered under this term, the court referred to the individual dictionary definitions of the words "exclusive" and "ownership," while reasoning that because the California legislature only listed one exception, for those who make cover versions of songs, courts should infer that the legislature "included all exceptions it intended to create." The 9th Circuit, however, found that the district court erred when it held that "exclusive ownership" included the right to public performance because the common law meaning of "exclusive ownership" must be examined under the historical setting of 1872, when the copyright statute was first enacted. As of 1872, no California court recognized the right of public performance, and by 1937, only Pennsylvania's state supreme court held that its common law protected an exclusive performance right. Therefore, in the state copyright law context, "exclusive ownership," only refers to the owner's common law copyright in an unpublished work to reproduce and sell copies. Fortunately, the MMA provides owners of many pre-1972 sound recordings with public performance rights for a period of time.