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# THE CURRENT STATE OF PRE-1972 SOUND RECORDINGS: RECENT FEDERAL COURT DECISIONS IN CALIFORNIA AND NEW YORK AGAINST SIRIUS XM HAVE BROADER IMPLICATIONS THAN JUST WHETHER SATELLITE AND INTERNET RADIO STATIONS MUST PAY FOR PRE-1972 SOUND RECORDINGS

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*Federal copyright law applies to sound recordings, but only to those fixed, i.e., produced, on or after February 15, 1972. Recordings produced prior to that date are subject to protection under the laws of the individual states until 2067. A recent spate of lawsuits has raised the issue of whether Sirius XM and Pandora's digital radio services have the right to play pre-1972 sound recordings without permission from the owners of those records. Since federal law does not protect public performance rights in pre-1972 sound recordings, Sirius and Pandora take the position they do not need permission to publicly perform them. Recently, Flo & Eddie, a company which owns recordings by the rock band called the "Turtles," has won two major federal district court decisions resulting in the*

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*finding that state law protects public performance rights in pre-1972 sound recordings. This article evaluates whether these cases were correctly decided. Further, this article asserts that the decision of the California District Court is intellectually dishonest in its interpretation of the legislative history of the statute, which served as a basis in its decision to protect public performance rights in pre-1792 sound recordings.*

*The article also discusses the cataclysmic potential impact that these cases may have on the current landscape of music licensing in New York and California and throughout the United States. If affirmed on appeal these cases could (i) give rise to class action lawsuits against any physical venues, as well as broadcasters, that now play pre-1972 recordings without permission, and (ii) be used as leverage in finally making terrestrial radio stations, which have never had pay to play obligations, pay to play all sound recordings, whenever they were produced.*



## INTRODUCTION

Federal copyright law applies to sound recordings, but only to those fixed, i.e., produced, on or after February 15, 1972.[1] Recordings produced prior to that date are subject to protection under the laws of the individual states until 2067.[2] A recent spate of lawsuits has raised the issue of whether Sirius XM's satellite service and Pandora's satellite service have the right to play sound recordings produced prior to February 15, 1972, without permission from, and without paying, the owners of the

[1] Sound Recordings Act, Pub. L. No. 140, 85 Stat. 39 (1971).
[2] 17 U.S.C § 301(c).

copyrights in those recordings or the artists performing on them. Pandora and Sirius XM currently are not paying SoundExchange for pre-1972 recordings.[3] Both companies contend that since federal law, which recognizes public performance rights for digital performances of sound recordings, does not apply to pre-1972 recordings, they do not need permission from the owners of the copyrights in such sound recordings or the artists who performed them.[4]

Pre-1972 recordings include some of the most iconic records of all time, including records featuring such artists as Billie Holiday, Frank Sinatra, Elvis Presley, Miles Davis, The Beatles, the Rolling Stones, the great artists of the Motown era such as the Supremes and Temptations, and countless others. Pre-1972 recordings account for about 5 percent of plays on Pandora and 15 percent at Sirius XM,[5] which highlights the importance of the issue for both companies. In 2013

SoundExchange paid out $590 million to artists and owners of sound recording copyrights (usually record companies).[6] Of that amount, Pandora paid approximately $300 million[7] and Sirius paid approximately $200 million.[8]

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[3] Sound Exchange is the non-profit collection agency set up to receive royalties from non-interactive digital radio services, including Sirius XM and Pandora, and to redistribute such royalties to sound recording owners and artists.

[4] This issue does not come up for interactive services such as Spotify or Rhapsody. As discussed later in this article, Pandora and Sirius are non-interactive and qualify for a compulsory license under the Digital Millennium Copyright Act. But Spotify and Rhapsody do not. They must therefore secure licenses from the owners the sound recordings, which are usually record companies. If Spotify and Rhapsody refused to pay for any pre-1972 recordings, the labels could deny permission to use any of their recordings.

[5] Glenn Peoples, *SoundExchange Launches Campaign for Royalties on Pre-1972 Recordings*, BILLBOARD (May 29, 2014), http://www.billboard.com/biz/articles/news/legal-and-management/6099428/soundexchange-launches-campaign-for-royalties-on-pre.

[6] Sound Exchange collected total royalties in the amount of $656 million dollars in 2013 with operating administrative costs of 4.5%. *SoundExchange Draft Annual Report for 2013 Provided Pursuant to 37 C.F.R. § 370.5(c)*, SOUNDEXCHANGE, 4 (Mar. 2013), http://www.sound exchange.com/wp-content/uploads/2014/03/2013-Fiscal-Report-PRE-AUDIT.pdf.

[7] Angus MacDonald, *Pandora Is Now Over 50% SoundExchange's Royalty Collections; Implications for Webcasting IV*, RAIN NEWS (Apr. 10, 2014), http://rainnews.com/pandora-is-now-over-50-soundexchanges-royalty-collections-implications-for-webcasting-iv/.

[8] The amount contributed by Sirius to SoundExchange is based on the fact that gross income for Sirius in 2013 was $2.15 billion, of which Sirius was required to pay 9% to SoundExchange. *See Sirius XM Holdings Inc. Annual Financials*, MARKETWATCH, http://www.marketwatch.com/ investing/stock/siri/financials (last visited Jan. 25, 2015) (providing Sirius' gross revenue from 2009 to 2013); Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, 78 Fed. Reg. 23,054 (Apr. 17, 2013) (to be codified at 37

As of December 2014, there are six lawsuits questioning Sirius XM and Pandora's position that they do not have to pay for pre-1972 recordings. Of these six cases, there have been three decisions, all of them against Sirius XM. In September 2014 a California federal court found that Sirius' policy violated a 1982 California statute specifically designed to protect pre-1972 recordings.[9] In November of the same year, Sirius XM suffered another major defeat in New York when the Southern District found that although New York had no statute protecting sound recordings, the state's common law required Sirius to secure permission to play pre-1972 recordings.[10] The same court wrote another decision rejecting a motion to reconsider its original opinion.[11] Although these federal trial court decisions clearly implicate whether or not Sirius and Pandora have to pay for pre-1972 recordings, the decisions have even broader implications for the music industry as a whole. In fact, if the decisions are upheld, this could lead to massive additional litigation in California and/or New York against broadcasters, and physical venues such as nightclubs, that currently pay nothing for playing recorded music, and ultimately lead to passage of federal legislation that would for the first time require terrestrial radios throughout the United States to pay to play recorded music. To understand those implications, it is necessary to provide some history of the music business with respect to public performance rights.

## I
## BRIEF HISTORY OF COPYRIGHT AND PUBLIC PERFORMANCE RIGHTS FOR RECORDED MUSIC

In 1897, the federal copyright law was amended to protect public performance rights in musical compositions.[12] This meant that venues such as bars, taverns, honky-tonks and nightclubs[13] at which songs were publicly performed had to acquire licenses to perform them. Sound recordings did not exist at the time. In 1914, a group of prominent writers (including Irving Berlin, Jerome Kern and John Philip Souza),

C.F.R. pt. 382) (determining the rates and royalty payments Sirius must make to SoundExchange from 2013 to 2017).

[9] Flo & Eddie, Inc. v. Sirius XM Radio, Inc., No. 2:13-CV-05693, 2014 WL 4725382 (C.D. Cal. Sept. 22, 2014).

[10] Flo & Eddie, Inc. v. Sirius XM Radio, Inc., No. 13 Civ. 5784 (CM), 2014 WL 6670201 (S.D.N.Y. Nov. 14, 2014).

[11] Flo & Eddie, Inc. v. Sirius XM Radio, Inc., No. 13 Civ. 5784 (CM), 2014 WL 6670201 (S.D.N.Y. Dec. 12, 2014).

[12] *Circular 1a: A Brief History Introduction*, UNITED STATES COPYRIGHT OFFICE, http://copyright.gov:8081/circs/circ1a.html (last visited Jan. 28, 2015).

[13] Landmarks Preservation Commission, *Webster Hall and Annex*, THE GREENWICH VILLAGE SOCIETY FOR HISTORIC PRESERVATION (Mar. 18, 2008), http://www.nyc.gov/html/lpc/downloads/pdf/reports/websterhall.pdf.

and their music publishers, came together to form the American Society of Composers, Authors and Publishers (ASCAP) to collect royalties from venues that played their songs for the public. Monies generated by the public performance of songs received a major boost when commercial radio emerged in the 1920s. ASCAP started offering a blanket license to radio stations for the right to play any musical composition in its repertoire. ASCAP collects the licensing fees and then distributes them back to its songwriter and publisher members. However, in 1939 ASCAP announced a substantial increase in its blanket license fees for radio. This prompted the National Association of Broadcasters (NAB) to create a new public rights organization (PRO). They called it Broadcast Music, Inc. (BMI). It was designed to provide a lower-cost alternative to ASCAP. As such, BMI created competition in the field of performing rights by providing an alternative source of licensing for all music users. Later, another PRO emerged in the U.S. to collect public performance royalties on behalf of contemporary classical composers, SESAC (which originally stood for Society of European Stage Authors and Composers).

From the 1930s through the 1950s, the record business emerged as a significant part of the U.S. entertainment industry. The myriad of mostly small independent labels composing the record business, such as Sun Records (Elvis Presley), Atlantic (Ray Charles), Stax (Otis Redding) and Mercury (Sarah Vaughan), were led by entrepreneurs who constantly tried to get local radio stations to play their records. Often they would actually offer cash and other forms of "consideration," a practice known as "payola," to DJs or station managers to play their tracks. Following hearings exposing these practices in the late 1950s, Congress made it illegal for any radio station to receive consideration for broadcasting particular records unless it disclosed that fact along with the identity of the person furnishing such consideration.[14] Despite the law against payola, as recently as 2005 the record companies have been caught trying to bribe radio stations to play their records.[15] Former New York State Attorney General Eliot Spitzer prosecuted payola-related crimes in New York and settled out of court with Sony BMG Music Entertainment in July 2005, Warner Music Group in November 2005, and Universal Music Group in May 2006. The three majors agreed to pay $10 million, $5 million and $12 million respectively in fines. Spitzer's office found that the companies had used a broad array of illegal "pay for play" tactics to secure airplay for its music, including bribing

[14] 47 U.S.C. § 317 (1960). Some historians believe that the payola laws were actually a racist reaction to labels that were encouraging radio stations to play "race" music by such African American artists as Chuck Berry, Little Richard and James Brown.

[15] Jeff Leeds, *Universal Music Settles Big Payola Case*, N.Y. TIMES, (May 12, 2006), http://www.nytimes.com/2006/05/12/business/12payola.html.

programmers with laptop computers, luxury hotel stays and even free tickets to Yankee games.[16]

Nonetheless, for decades record companies have requested that Congress create a performance right for sound recordings in order to make radio stations *pay them*.[17] The legislative history of the 1976 Act shows that even ten years before the Act was passed the recording industry was trying to establish a public performance right in sound recordings. In the Register's Report on the new Act submitted to Congress in May 1965, the Register of Copyrights, L. Quincy Mumford, recognized that many in the recording business wanted Congress to establish a public performance right for sound recordings:

> Representatives of record companies have argued that there are no valid reasons in principle for placing sound recordings in a different category from all other works, and the American Federation of Musicians has recently adopted a formal position opposing the … bill because it would deny performers "a modicum of economic incentive and participation in the vast profits derived from the public performance of records."[18]

But he regarded this issue as so "explosively controversial," due to broadcasters' fierce opposition to the grant of such right, that the chances of passing the new Copyright Act would be seriously impaired if it included any proposal for a public performance right for sound recordings. He wrote in relevant part:

> "We are convinced that, under the situation now existing in the United States, the recognition of a right of public performance in sound recordings would make the general revision bill so controversial that the chances of its passage would be seriously impaired."[19]

In fact, the broadcaster's lobbying group, the NAB has been successful throughout the years at thwarting public performance rights for sound recordings. Although the NAB has consistently argued that broadcasters should not have to pay to play sound recordings because by playing them they promote record sales thereby benefitting both labels and artists, the political reality is that all members of Congress have radio stations in their district, and all members of Congress seek the goodwill of many of those radio stations, especially when they run for re-election. The recording industry, which is largely based in New York City, Los Angeles and

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[16] *Id.*

[17] H. COMM. ON THE JUDICIARY, 89TH CONG., SUPPLEMENTARY REG.'S REP. ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW (Comm. Print 1965).

[18] *Id.* at 51.

[19] *Id.*

Nashville, has always had far less clout. These political realities have resulted in the United States being one of the only countries in the world where radio stations do not pay for the performance of musical recordings.

But subsequent to 1999, when income from recorded music started to plummet, the recording industry, led by the major labels, has been lobbying even more diligently to change the federal copyright law to make radio pay them for playing their records. The latest incarnation of this effort was the introduction in September 2013 of the Free Market Royalty.[20] Like the earlier failed Performing Rights Act of 2007 and the Performance Rights Act of 2009,[21] this Act would require AM/FM broadcasters to pay performers and copyright owners. As hard as the record industry has tried, however, the broadcasting community, led by the NAB, has pushed back by lobbying effectively against a general right of public performance in sound recordings.[22]

In 1971, Congress passed the Sound Recording Act, which amended § 102 of the Copyright Act to add "sound recordings" to the list of works of authorship that receive protection. However, sound recording copyright owners were still not given the full bundle of rights usually associated with copyrights.[23] While reproduction, adaptation and distribution rights were now protected, the right of performance was not, thereby allowing broadcasters to continue to pay nothing to the labels. This served as a compromise between the recording industry, which wanted to create uniform federal protection against physical piracy rather than continue to fight against it in each state, and the broadcast community, which did not feel that it should have to pay the labels for playing their records when doing so already benefitted the recording industry by promoting record sales.[24]

In 1976 Congress overhauled the old 1909 Copyright Act to conform to international standards, including changing the term of protection from a 28-year term with a renewal term of another 28 years, to 50 years after the death of a creator or 70 years for corporate works.[25] Once again, however, the broadcast community

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[20] Free Market Royalty Act, H.R. 3219, 113th Cong. (2013).

[21] Performing Rights Act, H.R. 4789, 111th Cong. (2007); Performing Rights Act, H.R. 848, 111th Cong. (2009).

[22] However, as discussed below, the record companies were successful in persuading Congress in 1995 to create an exclusive public performance right for *digital* transmissions of sound recordings.

[23] Sound Recording Act of 1971, Pub. L. No. 92-140, 85 Stat. 391 (1971).

[24] H. COMM. ON THE JUDICIARY, *supra* note 18, at 51-52.

[25] These periods were later extended 20 years each.

was able to persuade Congress to specifically carve-out public performance rights for sound recordings.

The 1976 Act included another provision that the recording industry did not favor: a right for authors to terminate grants of copyright after 35 years.[26] The reasoning behind this right of termination was that young creators often sell or assign their copyrights for little or no money at the beginning of their careers. Congress felt that they or their families should have the right to recapture those copyrights after a certain period of time. Had this provision applied to recordings made before the implementation of the Act on January 1, 1978, any record older than 35 years would be subject to possible termination by artists, the "authors" of such sound recordings. Therefore, instead of asking Congress to apply the new Copyright Act to records made before 1972, the industry urged that those records continue to be protected exclusively by state law. Consequently, the Act specifically provided that pre-1972 sound recordings would remain subject to state statutes or copyright common law.[27]

Even though the recording industry has thus far been unsuccessful in trying to obtain public performance rights under federal law, in 1995 it did manage to obtain exclusive *digital* public performance rights. The Digital Performance Right in Sound Recordings Act (DPRA)[28] granted owners of a copyright in sound recordings an exclusive right "to perform the copyrighted work publicly by means of a digital audio transmission."[29] The DPRA was enacted because the recording industry was able to persuade Congress that digital technology would threaten its business by allowing people to make perfect copies from digital transmission, thus displacing record sales. The Act received no significant opposition because it had no impact on normal broadcasters and at the time there very little digital transmission of music.[30]

In the next several years, the Internet started to take off and new services such as AOL and Yahoo! were successful in getting a compulsory license through

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[26] 17 U.S.C. § 304(c) (2002).

[27] 17 U.S.C. § 301(c) (1998): "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. The preemptive provisions of subsection (a) shall apply to any such rights and remedies pertaining to any cause of action arising from undertakings commenced on and after February 15, 2067. Notwithstanding the provisions of section 303, no sound recording fixed before February 15, 1972, shall be subject to copyright under this title before, on, or after February 15, 2067."

[28] 17 U.S.C. § 106(6) (2002).

[29] *Id.*

[30] The only significant player in digital transmission of music was a little company based in Horshal Pennsylvania called Music Choice.

Congress as part of the Digital Millennium Copyright Act (DMCA) of 1998.[31] This meant that certain digital streaming services could use any recording without permission, provided that they qualified for licenses. The two major qualifications, codified in Section 114 of the Copyright Act, were that the services were non-interactive, that is, listeners cannot select particular songs, and that they paid the required royalty rate. Both Sirius XM and Pandora operate under that regime today. They pay royalties to SoundExchange, a not-for-profit that collects monies from statutorily covered services and redistributes that money to record companies and artists on a 50-50 basis. Yet both Sirius XM and Pandora take the position that they are not legally required to pay for pre-1972 recordings, because neither the DPRA nor DMCA apply to such recordings.

## II
## THE CURRENT PRE-1972 CASES

As noted above, as of the submission of this article there are six cases questioning Sirius XM or Pandora's position that they do not have to ask for permission or pay for pre-1972 recordings. Four of the six lawsuits were brought by Flo & Eddie Inc., a corporation created in 1971 that is owned and exclusively controlled by Howard Kaylan and Mark Volman, two of the founding members of the music group "The Turtles."[32] Flo & Eddie Inc. started three lawsuits against Sirius XM in California, New York and Florida, and filed another one against Pandora in California. We discuss the recent decisions in favor of Flo & Eddie in California and New York below. Additionally, the recording industry—lead by Capitol, a wholly owned label of Universal Music—is suing Sirius XM in

[31] Provisions relevant to public performance rights for digital transmission of sound recordings codified at codified at 17 U.S.C. §114(d)-(j) (2010).

[32] Although of Flo & Eddie's suits are structured as class actions potentially representing any owners of pre-78 copyright owners although to date, class action status has not been certified in any of these cases. If the class is certified in any particular case, any other pre-1972 copyright owner will be able to opt-in to the class and will be entitled to their pro-rated share of damages in that particular case. The potential total damages would be based on Sirius and Pandora's plays of all pre-1972 sound recordings.

California[33] and Pandora in New York.[34] All of these suits raise the issue of whether digital music services must ask permission to play pre-1972 recordings.[35]

The issue presented in these six cases is immensely important because it has implications that go far beyond just whether Pandora and Sirius XM should be paying for pre-1972 records. As we discuss in more detail in **Possible Consequences of the Decisions if Upheld on Appeal**, if owners of pre-1972 sound recordings are found to have exclusive public performance rights, this would implicate many other businesses which play sound recordings publicly, including not only terrestrial radio, broadcast TV and cable, but also any other physical place that plays recorded music such as bars, restaurants, nightclubs, arenas, stadiums, amusement parks, department stores and malls. Indeed, if decisions favoring the plaintiffs in these cases are upheld on appeal, they may not only change the landscape of music licensing in the states in which they are decided, but could also form the basis for changing U.S. copyright law to finally protect public performance rights for all sound recordings.

### *A. Judge Gutierrez's Decision*

Flo & Eddie Inc. won a decisive victory against Sirius in federal trial court in California[36] on September 22, 2014, when Judge Paul Gutierrez granted Flo & Eddie's motion for summary judgment. Judge Gutierrez declared:

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[33] Capitol Records, LLC v. Sirius XM Radio Inc., No. BC-520981 (Cal. Supp. Ct., Sept. 11, 2013). The plaintiffs included Capitol Records LLC, Sony Music Entertainment, UMG Recordings Inc. and Warner Music Group Corp. as well as ABKCO Music & Records Inc.

[34] Capitol Records, LLC v. Pandora Media, Inc., No. 651195/2014 (Sup. Ct. N.Y. filed Apr. 17, 2014). This lawsuit included the same plaintiffs as the case against Sirius.

[35] SoundExchange has also brought a separate suit against Sirius XM, but the issue in that case is not whether Sirius XM should have to pay to play pre-1972 Sound Recordings. The royalties that Sirius XM must pay under the statutory license are set periodically in regulations prescribed by the federal Copyright Royalty Board ("CRB"). Under those regulations Sirius must pay SoundExchange a percentage of "Gross Revenues." SoundExchange claims that starting in 2007 Sirius underpaid for the statutory license by devising its own definition of Gross Revenues – a definition that substantially reduced its royalty payments to SoundExchange. *See* Complaint, SoundExchange Inc v. Sirius XM Radio Inc., No. 1:13-cv-01290 (D.D.C. Aug. 26, 2003), *available at* http://www.soundexchange.com/wp-content/uploads/2013/08/SoundExchange-Sues-SiriusXM-Complaint.pdf.

[36] Flo & Eddie, Inc. v. Sirius XM Radio, Inc., No. 2:13-CV-05693, 2014 WL 4725382 (C.D. Cal. Sept. 22, 2014).

> The Court finds that copyright ownership of a sound recording under § 980(a)(2) includes the exclusive right to publicly perform that recording. *See* Cal. Civ. Code § 980(a)(2). Accordingly, the Court GRANTS summary judgment on copyright infringement in violation of § 980(a)(2) in favor of Flo & Eddie.[37]

As discussed in detail below, Judge Gutierrez's decision was based on his reading of legislative intent underlying § 980(a)(2) of the California Civil Code. That section, which was enacted in 1982, reads as follows:

> 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.[38]

The court reasoned the language of the statute itself was "the most reliable indicator of legislative intent."[39] The court focused on the words "exclusive ownership" in a sound recording "as against all persons" and found that the plain meaning of these words was to give all rights in sound recordings to their owners to the exclusion of others. The court observed that there was nothing in the statutory language to suggest that the legislature intended to exclude any right or use of the sound recording from the concept of 'exclusive ownership.' He inferred from this that "the legislature did not intend to further limit ownership rights, otherwise it would have indicated that intent explicitly." Judge Gutierrez concluded, "copyright ownership of a sound recording under § 980(a)(2) includes the exclusive right to publicly perform that recording."[40]

It is clear that, if upheld, this decision would mean that both Pandora and Sirius XM would have to seek permission and pay for pre-1972 recordings in California. However, would nightclubs, bars and restaurants, as well as radio and

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[37] *Id.* at 9.

[38] CAL. CIV. CODE § 980(a)(2) (West 2007).

[39] *Flo & Eddie, Inc.*, 2014 WL 4725382 at *5 (quoting Esberg v. Union Oil Co., 28 Cal. 4th 262, 268 (2002) (citing People v. Lawrence, 24 Cal. 4th 219, 230 (2000)).

[40] Gutierrez buttressed his conclusion by pointing out that the legislature specifically excluded cover recordings (*i.e.*, "independent fixation of other sounds" that imitate the original recording) from the bundle of exclusive rights enjoyed by owners of sound recordings. He reasoned if they intended to exclude public performance rights, they would have made that an additional exclusion.

TV stations have to seek permission to play and pay performance royalties for pre-1972 records in that state? On its face, yes. Gutierrez's interpretation of California law would make the exclusive right of public performance in sound recordings apply to any public performance of a pre-1972 recording, whether on a digital service or otherwise, including performances in terrestrial radio or television broadcasts, nightclubs, restaurants, bars and any other public places. In other words, they would all have to seek permission from the copyright owner of each pre-1972 recording—usually the record company.[41] The owners of such recordings could then charge any amount they wished, or deny permission altogether.

On October 6th, 2014, Sirius XM announced that it would appeal Judge Gutierrez's ruling. In the meantime, all the other lawsuits against it and Pandora are ongoing.

*1. Criticism of Gutierrez's Decision*

It is questionable whether Judge Gutierrez's decision will be upheld on appeal. By his own analysis he was supposed "to ascertain the intent of the drafters so as to effectuate the purpose of the law."[42] However, Judge Gutierrez basically ignored the intent made manifest in the legislative history. Instead, as discussed above, he relied on the statutory language itself, on the basis that it "is generally the most reliable indicator of legislative intent."[43] His decision rejected Sirius' reliance on legislative history, noting that:

> Sirius XM's attempts to insert ambiguity into the textual language fail because Sirius XM relies on information outside the statutory language to find that ambiguity in the first place. *See Opp.* ¶ 7:5-19, 16:20-17:4; *see People v. Hagedorn*, 127 Cal. App. 4th 734, 743 (2005) ("Courts generally resort to legislative history to resolve ambiguities, not to create them"). *Regardless, the legislative history of § 980(a)(2) is consistent with the Court's textual reading of the statute*.[44]

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[41] Most artists who enter into recording agreements with record companies do not retain the copyright in their sound recordings. Generally, recording agreements contain a "work for hire" clause under which the record label becomes the sole owner of the copyrights in each recording produced under the agreement.

[42] *Flo & Eddie, Inc.*, 2014 WL 4725382 at *4 (quoting from Esberg v. Union Oil Co., 28 Cal. 4th 262, 268 (2002) (citing Preston v. State Bd. of Equalization, 25 Cal. 4th 197, 213 (2001)).

[43] *Id.* at *4 (quoting *Esberg*, 28 Cal. 4th at 268) (citing People v. Lawrence, 24 Cal. 4th 219, 230 (2000)).

[44] *Id.* at *6 (emphasis added).

First he lays out in his opinion Sirius' interpretation of the legislative history, which does in fact support its position, and then completely ignores both Sirius' interpretation and the legislative history itself.

Sirius argued that the 1982 revision of the California Civil Code was motivated by the preemption provisions of Section 301(c) of the Copyright Act, which, as of its implementation 1978, had made much of the former version § 980 obsolete. The revision was needed to clarify what state-level protections remained. The former version of § 980 was very broad and did not distinguish between different types of copyrightable property:

> The author or proprietor of any composition in letters or art has an exclusive ownership in the representation or expression thereof as against all persons except one who originally and independently creates the same or a similar composition.[45]

This broad protection was necessary to protect unpublished works since the federal law did not offer such works *any* protection. But after the implementation of the new Copyright Act, federal law for the first time became available for unpublished works. So, according to Sirius, the California legislature rewrote its sweeping provision to narrow it to the areas of the law that it still had the authority to regulate. Therefore, it replaced the above subsection with subsection (a)(1), pertaining to works "not fixed in any tangible medium of expression" such as live theatre and concerts, and subsection (a)(2), pertaining to pre-72 sound recordings. This narrowing of state-regulated subject matter tracked the federal Copyright Act's preemption provisions.[46] Accordingly, Sirius argued, the California legislature did not expand or limit ownership rights in sound recordings by its 1982 amendment. Rather, it excluded works of authorship in other mediums of expression from the law because it no longer had authority to regulate copyrights of those works.

Sirius' position is correct. The documents comprising the legislative history are replete with discussions that the bill was simply trying to conform California law

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[45] CAL. CIV. CODE § 980 (1942) (current version at CAL. CIV. CODE § 980 (West 2007)).

[46] *See* 17 U.S.C. § 301(a) (1998): "On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State."

to the pre-emption provisions of the federal law.[47] In fact, the Patent, Trademark, and Copyright Section of the California Bar, in endorsing the then new legislation, specifically found this to be the exclusive purpose of § 980(a).[48]

But instead of seriously considering Sirius' argument, which he summarizes in one paragraph in his opinion,[49] Judge Gutierrez fails to even address it. Instead, he makes another argument based on statutory construction:

> As the California legislature clearly considered the Federal Copyright Act when drafting its 1982 amendment, § 980(a)(2)'s *similarities to and differences from the federal law can further reveal the legislature's intent regarding sound recording rights*.[50]

Instead of actually looking at the legislative history, as Sirius did, Gutierrez embarks on a comparison of the actual language of the Act and its revision in an attempt to support his conclusion that California intended to protect public performance rights in sound recordings. He points out that the language in § 980(a)(2) that excludes from protection "one who independently makes or duplicates another sound recording" is almost identical to the wording in Section 114(b) of the Copyright Act.[51] Gutierrez then observes that Section 114 "contains other expressly stated limitations," specifically, "[t]he exclusive rights of the owner of copyright in a sound recording … do not include any right of performance[.]"[52] He concludes that since the California legislature did not include this other limitation in § 980, it intended to protect public performance rights. This seems to the authors to be a huge stretch.

As discussed above, for decades the recording industry has tried to achieve a public performance right in sound recordings, and for decades the broadcast

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[47] According to the legislative history the purpose of that amendment was only to "*maintain* rights and remedies" in sound recordings. *See* ASSEMB. COMM. ON JUDICIARY, 1981-1982 REG. SESS., REP. ON AB 3483 (Katz), at 1-2 (Ca. 1982) (emphasis added). The purpose of the amendment was also to make "*technical and minor* policy changes in the State copyright laws in order to conform with Federal Law." *See* CAL. DEPT. OF FIN., 1981-1982 REG. SESS., ENROLLED BILL REP. ON AB 3483 (1982) (emphasis added).

[48] Letter from Exec. Comm. of the Patent, Trademark and Copyright Section, of the State of California, to Members, Board of Governor, of the State of California (October 27, 1981) (on file with authors).

[49] Flo & Eddie, Inc. v. Sirius XM Radio, Inc., No. CV 13–5693 PSG, 2014 WL 4725382 at *6 (C.D. Cal. Sept. 22, 2014).

[50] *Id.* at *7 (emphasis added).

[51] *Id.* at *4.

[52] *Id.* at *7 (citing 17 U.S.C. § 114(a) (2010)).

community has been able to prevent this from happening. If the state legislature wanted to establish a public performance right for sound recordings, and thereby overturn many years of music industry practice and make broadcasters, bars, restaurants, nightclubs as well as other places that play records pay record companies for the first time in California history, as well as the history of the United States, it seems inconceivable that there would be no mention of the right of public performance in the legislative history or the law.

Moreover, if Judge Gutierrez had honestly analyzed the legislative history, he would have to deal with this elephant in the room: the legislation passed without opposition.[53] It seems obvious to the authors that no one thought that the intent was to create a right that would stand music licensing on its head in California. If the statute clearly stated that pre-72 recordings had a right of public performance, it is unbelievable that almost every radio network, TV station, restaurant chain, hotel, motel and bar or their trade associations would not have loudly protested. Therefore, it seems almost irrational to impute the intent that Gutierrez found in the statute.

In sum, the legislative history makes it clear that the 1982 revision of § 980(a) was only about conforming California law with the pre-emption provisions in the 1976 Copyright Act. If the legislature wanted to (i) announce the existence of a right no one in the entire entertainment business thought existed and (ii) change more than 100 years of business practice, it would have mentioned such a sweeping change in both the legislative history and the statute. If Judge Gutierrez did not ignore the legislative history, he clearly ignored the intent manifested in that history.

### *B. Judge McMahon's Decisions*

Judge Colleen McMahon of the Southern District of New York denied Sirius' motion for summary judgment against Flo & Eddie's complaint alleging that Sirius XM Radio committed common law copyright infringement by publicly performing pre-72 sound recordings of the Turtles. McMahon found that "general principles of common law copyright dictate that public performance rights in pre-72 sound

[53] According the Legal Affairs department of the Governor's Office: "There is no known opposition to the bill." LEGAL AFFAIRS DEP'T OF THE GOVERNOR'S OFFICE, ENROLLED BILL REP. ON AB 3483 (KATZ) (Ca. Aug. 13, 1982). The same enrolled report confirms Sirius' contention that the bill was intended to conform California law to the federal copyright law: "This bill, sponsored by the State Bar's Patient [stet], Trademark and Copyright Section, amends California law to conform to the Federal Copyright Act of 1976." Brief for Sirius XM Radio, Inc. at 14, Flo & Eddie, Inc. v. Sirius XM Radio, Inc., No. 2:13-cv-05693, 2014 WL 4725382 (C.D. Cal. Sept. 22, 2014) No. 13-CV-5693 PSG (RZx), 2014 WL 5590867.

recordings do exist."[54] McMahon based this conclusion on a series of New York court decisions that afforded public performance rights to holders of common law copyrights in works such as plays[55] and films.[56]

McMahon acknowledged that no particular case specifically upheld public performance rights in a sound recording. Indeed, she wrote that "the conspicuous lack of any jurisprudential history confirms that not paying royalties for public performances of sound recordings was an accepted fact of life in the broadcasting industry for the last century."[57] But she discarded that history by going on to assert:

> ….acquiescence by participants in the recording industry in a status quo where recording artists and producers were not paid royalties while songwriters were does not show that they lacked an enforceable right under the common law—only that they failed to act on it.[58]

Judge McMahon concluded that New York common law protects public performance rights in all copyrightable works, including sound recordings. She ended her decision by writing:

> New York has always protected public performance rights in works other than sound recordings that enjoy the protection of common law copyright. Sirius suggests no reason why New York—a state traditionally protective of performers and performance rights—would treat sound recordings differently.[59]

*1. Sirius XM's Motion for Reconsideration*

Following its defeat for summary judgment, Sirius XM retained O'Melveny & Myers as its new legal counsel, and filed a motion for reconsideration of the district court's decision. O'Melveny predicated its entire motion on one case, *RCA Manufacturing Co. v. Whiteman*,[60] decided by the Second Circuit in 1940. Although

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[54] Flo & Eddie, Inc. v. Sirius XM Radio, Inc., No. 13-Civ.-5784 (CM), 2014 WL 6670201, at *15 (S.D.N.Y. Nov. 14, 2014).

[55] *See* Palmer v. De Witt, 47 N.Y. 532, 535-36, 540-41 (1872); Roberts v. Petrova, 213 N.Y.S. 434, 434-37 (Sup. Ct. 1925); French v. Maguire, 55 How. Pr. 471, 472-73, 479-80 (N.Y. Sup. Ct. 1878).

[56] *See* Brandon Films, Inc. v. Arjay Enter., Inc., 230 N.Y.S.2d 56, 57-58 (Sup. Ct. 1962); Roy Exp. Co. v. Columbia Broad. Sys., Inc., 672 F.2d 1095, 1097-99, 1101-04 (2d Cir. 1982) (applying New York law) (recognizing a public performance right in compilations of film clips).

[57] *Flo & Eddie, Inc.*, 2014 WL 6670201 at *11.

[58] *Id.*

[59] *Id.* at *15.

[60] RCA Mfg. Co. v. Whiteman, 114 F.2d 86 (2d Cir. 1940).

*Whiteman* did concern sound recordings and New York law on common law copyrights, neither Sirius' prior attorneys nor the judge had addressed it at all in the prior proceeding. O'Melveny specifically depended on certain language written by none other than the legendary jurist, Learned Hand, who wrote the opinion for the three-man court. O'Melveny argued that the following statements from Hand's opinion stood for the proposition that New York common law does not recognize public performance rights for sound recordings:

> Copyright in any form, whether statutory or at common-law, is a monopoly; it consists only in the power to prevent others from reproducing the copyrighted work. W.B.O. Broadcasting Corporation has never invaded any such right of Whiteman; they have never copied his performances at all; they have merely used those copies which he and the RCA Manufacturing Company, Inc. made and distributed.[61]

Judge McMahon, however, was far from impressed with this argument and went as far as characterizing its reliance on *Whiteman* as "clear error" in her opinion denying the motion.[62]

*Whiteman* concerned the public performance rights of Paul Whiteman, a well-known orchestra conductor, who made a series of sound recordings on the RCA label in the 1930s. The recordings were sold to the public, but the records each bore the legend, "Not Licensed for Radio Broadcast." Despite the legend, WNEW, which was owned by W.B.O. Broadcasting, played some of Whiteman's recordings without permission from Whiteman nor RCA.[63] RCA then sued W.B.O. for common law copyright infringement. Writing for a three-man court, Judge Hand found in favor of W.B.O. The basis for his decision was his determination that under New York common law the sale of the records constituted a "publication," and that since publication divested works of common law copyright, RCA lost any copyright protection it might have had.

In rejecting Sirius' motion, Judge McMahon found that the statements by Judge Hand that it relied on were irrelevant to the holding in *Whiteman.* She also observed that even if that language had been relevant to the holding, subsequent New York State court decisions disagreed with the outcome in *Whiteman* and, in

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[61] *Id.* at 2.

[62] Flo & Eddie, Inc. v. Sirius XM Radio, Inc., No. 13 CIV. 5784 CM, 2014 WL 7178134, at *1 (S.D.N.Y. Dec. 12, 2014).

[63] RCA Mfg. Co. v. Whiteman, 28 F. Supp. 787 (S.D.N.Y. 1939).

recognizing this development, the Second Circuit itself reversed the holding in *Whiteman*.[64]

Judge McMahon pointed out that the holding in *Whiteman* concerned whether RCA lost its copyright in the recordings by "publishing" them by offering them for sale to the public. Although the *Whiteman* court answered in the affirmative, it did not decide exactly what rights may have been forfeited by publication, or whether the right of public performance was among them. So, the language on which Sirius relied was, at best, dicta.

Judge McMahon found that Sirius' interpretation of Hand's language was a "stretch," and that Sirius had also interpreted that language entirely out of context. She observed:

> Indeed had *Whiteman* been predicated on the absence of a public performance right in sound recordings, the entire discussion of whether RCA's common law rights were divested by publication would have been superfluous; RCA could not possibly have "lost" via publication a right that never existed in the first place.[65]

Finally, she found that even if *Whiteman* stood for the proposition that Sirius asserted, its motion would fail because "*Whiteman* has been overruled, so it stands for nothing at all."[66]

## III
## POSSIBLE CONSEQUENCES OF THE DECISIONS IF UPHELD ON APPEAL

The decisions in both New York and California have broader implications than just whether Sirius XM or other digital services must pay to perform pre-72 sound recordings. Neither decision includes any language that would limit protection of public performances rights in sound recordings to digital transmissions. Indeed both decisions were based on cases (McMahon) or a statute (Gutierrez) that pre-dated the digital era. So logically, there is no reason why they would not apply to all forms of public performance of sound recordings.

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[64] *Flo & Eddie*, No. 13 Civ. 5784(CM), 2014 WL 7178134, at *4 (S.D.N.Y. Dec. 12, 2013) (citing Capitol Records v. Mercury Records Corp., 221 F.2d 657, 663 (2d Cir. 1955)).

[65] *Flo & Eddie*, 2014 WL 7178134, at *3.

[66] *Id.* at *4.

The balance of this article deals with possible consequences of the decisions. But, for now, it is important to point out that if these decisions are upheld on appeal they would profoundly change the landscape of music licensing in the United States. For the first time in U.S. history, not only would radio and television stations have to pay for the performance of music recordings, but so would every bar, restaurant, nightclub, retail store, mall, amusement park, bowling alley and any other public establishment that plays music. Such a sweeping change could have dramatic consequences for the entire music industry, as set forth below.

### *A. Impact on Likelihood of Success of the RESPECT Act*

On May 29, 2014, the Respecting Senior Performers as Essential Cultural Treasures Act, or the RESPECT Act,[67] was introduced in Congress. If passed, this legislation would require digital music services that transmit sound recordings under the statutory license provided under Section 114 of the Copyright Act, including Sirius and Pandora, to pay royalties for sound recordings fixed before February 15, 1972, in the same manner as they pay royalties for sound recordings protected by federal copyright that are fixed after such date.[68] As discussed above, sound recordings fixed before February 15, 1972, are currently governed by state laws and are not subject to federal copyright laws—specifically, Section 114 of the Copyright Act, which requires music services to pay a performance royalty for transmitting such recordings. The RESPECT Act would also specifically "[prohibit] an

[67] RESPECT Act, H.R. 4772, 113th Cong. (2014).

[68] In accordance with rate-setting pursuant to Section 114, Pandora currently pays SoundExchange a "per stream" royalty of .0013 cents for its free service and .0023 for streams on its premium service. That means it must pay the applicable fraction of a penny for the stream of every song. Sirius XM in contrast pays a percentage of its "gross income." That percentage is currently 9.5%. However, Sirius XM excludes from its gross revenue an amount of money commensurate with the amount of pre-1972 recordings that it plays on its service, which it claims is approximately 15%. In fact, in a separate lawsuit filed against Sirius, SoundExchange claims that this deduction is unjustifiable. In its lawsuit, filed in Washington, D.C. federal court in August 2013, SoundExchange argued, "[r]ather than paying a percentage of Gross Revenues as that term is defined in the federal regulations, Sirius XM devised its own definition of Gross Revenues – a definition that substantially reduced its royalty payments to SoundExchange." Eriq Gardner, *SiriusXM Sued Over Alleged Underpayment of Royalties*, THE HOLLYWOOD REPORTER (Aug. 27, 2013, 8:13 AM), http://www.hollywoodreporter.com/thr-esq/siriusxm-sued-alleged-underpayment-royalties-615039.

infringement action against a transmitting entity from being brought under a state law if the appropriate royalty is paid under this Act."[69]

Both Sirius and Pandora have opposed the bill. In fact, David Frear, the president of Sirius XM, testified before the U.S. House of Representatives that the proposed RESPECT Act would:

> ….further exacerbate the irrational disparity between digital services and terrestrial radio (which would remain exempt from paying performance royalties for any recordings), create a new payment obligation on a narrow set of licensees, and bestow a one-sided windfall on owners of recordings created 70 or 80 years ago, without advancing in the least the foundational purpose of copyright law: providing an incentive for the creation of new recordings.[70]

However, the cases currently being litigated against Sirius and Pandora could have a direct impact on the passage of the RESPECT Act by changing the position of Sirius and Pandora. Here's why: The RESPECT Act, if passed, would affirm Sirius' and Pandora's rights to play pre-1972 sound recordings without the permission of the record companies. As long as they paid the statutory rate set up by the DMCA, neither the record companies nor any other owners of pre-1972 recordings could prohibit Sirius or Pandora from playing those records. In other words, the RESPECT Act could actually help Sirius and Pandora. Without it, the sound recording copyright owners could demand big upfront advances as well as greater royalties than Sirius and Pandora are currently paying for post-1972 recordings.

The RESPECT Act was initially referred to the Judiciary Committee, which handles any possible amendments to the Copyright Act. That Committee passed the bill on to the Subcommittee on Courts, Intellectual Property, and the Internet for consideration. That Committee held hearings on copyright law reform, including the RESPECT Act, but took no further action in the last session of Congress. Therefore, the Act would have to be re-introduced in order to move forward. As of the submission of this article for publication, the legislation has not been re-introduced

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[69] Congressional Research Service, *Summary: H.R.4772 — 113th Congress (2013-2014)*, CONGRESS.GOV, https://www.congress.gov/bill/113th-congress/house-bill/4772 (last visited Feb. 1, 2015).

[70] *Music Licensing Under Title 17: Hearing Before the Subcomm. on Courts, Intellectual Prop., and the Internet of the H. Comm. on the Judiciary*, 113th Cong. 2 (2014) (written statement of David J. Frear, Chief Financial Officer, Sirius XM Holdings Inc.) (emphasis omitted).

in Congress. Supporters of the Act such as SoundExchange, RIAA, NARIS and others have had no official comment; however, they may be in the process of evaluating their opportunity to get even more protection for sound recordings than offered by the RESPECT Act, which is limited to digital transmission of pre-72 recordings. (*See* **Will Terrestrial Radio Finally Agree to Pay to Play Sound Recordings?** below).

### *B. Possible Class Action Suits against Terrestrial Radio and Physical Venues That Play Pre-72 Sound Recordings*

Another consequence of the decisions reported in this article is that either could serve as the legal basis of a class action lawsuit on behalf of copyright owners of recordings by legacy artists against terrestrial broadcasters and physical venues in New York and/or California.

Judge McMahon practically invited such a suit in her opinion by writing:

> ….the conspicuous lack of any jurisprudential history confirms that not paying royalties for public performances of sound recordings was an accepted fact of life in the broadcasting industry for the last century. So does certain testimony cited by Sirius from record industry executives, artists and others, who argued vociferously before Congress that it was unfair for them to operate in an environment in which they were paid nothing when their sound recordings were publicly performed. That they were paid no royalties was a matter of statutory exemption under federal law; that they demanded no royalties under the common law when their product as ineligible for federal copyright protection is, in many ways, inexplicable.[71]

As discussed above, she went even further and specifically pointed out that the recording industry's "acquiescence . . . in the status quo," where sound recording copyright owners did not receive royalties from public performance of their works while owners of copyrights in musical compositions did, did not show "that they lacked an enforceable right under the common law—only that they failed to act on it."[72]

McMahon's remarks encourage, and even seem to invite, owners of pre-72 sound recordings to "act" on the public performance rights she recognized that they

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[71] Flo & Eddie, Inc. v. Sirius XM Radio, Inc., No. 13 CIV. 5784 CM, 2014 WL 6670201, at *11 (S.D.N.Y. Nov. 14, 2014) (citations omitted) (emphasis added).

[72] *Id.*

have. A class action lawsuit representative of all owners of pre-1972 recordings would be a logical way of accepting that invitation.[73] Such a class action lawsuit could have a monumental impact on the landscape of music licensing by making radio and physical venues actually pay for the performance of sound recordings for the first time. But damages would be hard to prove. Since pre-1972 sound recordings are not subject to federal law, statutory damages, which provide for up to $150,000 per work for willful infringement, are not available, so the plaintiffs would have to show that the performance of their recordings actually caused them financial harm. No doubt, the defendants would argue that the public performance of the recordings promoted record sales, thus actually benefiting the plaintiffs financially. On the other hand, if the plaintiffs could convince a court to issue an injunction against any further performances of their recordings, they may well be able to extract a large financial settlement.

Of course, such a suit may be premature until the Second Circuit has reviewed McMahon's ruling. One thing is certain: Sirius is appealing the decision.[74] Of course, if Judge Gutierrez's decision is upheld by the 9th Circuit, one could expect similar consequences. But, based on our analysis of the two decisions, as presented above, the authors believe McMahon's decision has the greater likelihood of being affirmed.

### *C. Will Terrestrial Radio Finally Agree to Pay to Play Sound Recordings?*

As discussed above, the recording industry has for many years lobbied Congress to make terrestrial radio stations pay the industry to play its records. The NAB has consistently thwarted those efforts. If either McMahon's or Gutierrez's decision is upheld on appeal, the recording industry, as represented by the RIAA, could use such a favorable decision as leverage to finally secure the NAB's cooperation in passing legislation that would for the first time require radio stations to pay for performing sound recordings. That leverage would flow from the RIAA's agreement to forego launching lawsuits against terrestrial radio stations in California and/or New York in return for the NAB's cooperation.

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[73] *See* Jonathan Stempel, *Sirius XM is dealt new setback in Turtles copyright lawsuit*, REUTERS (Jan. 15, 2015, 6:54 PM), http://www.reuters.com/article/2015/01/15/us-siriusxm-turtles-idUSKBN0KO2TL20150115.

[74] Lisa Shuchman, *A Bad Precedent Trips Up O'Melveny in a Big IP Case*, THE AMERICAN LAWYER (Jan. 5, 2015), http://www.americanlawyer.com/id=1202713086677/A-Bad-Precedent-Trips-Up-OMelveny-in-a-Big-IP-Case.

It should be noted that the nation's largest radio network, Clear Channel, has already signaled its agreement to pay for performance of sound recordings on terrestrial radio. In 2013, the network made a deal with Big Machine, the record label for Taylor Swift, Tim McGraw and Rascal Flatts. Under that deal, Clear Channel agreed to pay for the terrestrial broadcast of Swift's records in exchange for a lower royalty for the digital broadcast of her records on Clear Channel's internet radio service, iHeartradio.[75] This deal recognized that although terrestrial radio stations presently pay nothing to play records, internet radio stations are paying far too much. The additional leverage of a favorable decision for Flo & Eddie at the appellate level could be precisely the additional leverage required to persuade the NAB to join Clear Channel in a compromise.

## CONCLUSION

The victories of Flo & Eddie in federal courts in New York and California, if upheld on appeal, may have consequences far beyond whether Sirius and Pandora have to pay for performing pre-1972 sound recordings. In fact, they may not only directly lead to massive additional litigation on behalf of legacy artists, but also to a revolution in music licensing in the United States by resulting in terrestrial radio stations paying for the performance of any sound recording for the first time in the history of the U.S.

If owners of pre-1972 sound recordings are found to have exclusive public performances rights, such a decision would implicate many other businesses that play sound recordings publicly besides Sirius or Pandora, including not only terrestrial radio, broadcast TV and cable, but also any other physical place that plays recorded music such as bars, restaurants, nightclubs, arenas, stadiums, amusement parks, department stores and malls. Indeed, if decisions favoring the plaintiffs in these cases are upheld on appeal, they may not only change the landscape of music licensing in the states in which they are decided, but could also form the basis for changing U.S. copyright law to finally protect public performance rights for all sound recordings.

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[75] *Big Machine Label Group and Clear Channel Announce Groundbreaking Agreement*, IHEARTMEDIA.COM (Jun. 6, 2012), http://www.iheartmedia.com/Pages/Big-Machine-Label-Group-and-Clear-Channel-Announce-Groundbreaking-Agreement-to-Enable-Record-Company-and-Its-Artists-to-Par.aspx.