

individually and on behalf of all others  
similarly situated,

Plaintiffs,

v.

iHEARTMEDIA, INC., a Delaware  
corporation,

Defendant.

OPINION

Civ. No. 15-cv-7574 (WHW)(CLW)

**Walls, Senior District Judge**

In this putative class action, the owners of sound recordings made before 1972 bring copyright infringement and unjust enrichment claims under New Jersey law against Defendant iHeartMedia for broadcasting their recordings without receiving authorization or compensating the recordings’ owners. Defendant moves to stay this case pending the resolution of three similar actions currently before the United States Courts of Appeals for the Second, Ninth, and Eleventh Circuits. This case is related to another case Plaintiffs have filed in this court against defendants Sirius XM Radio, Inc. and Pandora Media, Inc. *See Sheridan v. Sirius XM Radio, Inc. et al*, No. 15-cv-7576 (D.N.J. filed Oct. 19, 2015). Sirius XM Radio and Pandora have also requested a stay pending the Second, Ninth, and Eleventh Circuits’ rulings. Decided without oral argument under Fed. R. Civ. P. 78(a), Defendant iHeartMedia’s motion is granted.

Plaintiffs Arthur and Barbara Sheridan are citizens of Illinois who own the intellectual property and contract rights to master sound recordings created in the 1950s and 1960s, when Arthur Sheridan owned and operated record companies specializing in doo-wop, jazz, and rhythm and blues music (the “Pre-1972 Recordings”). *Id.* ¶¶ 2, 11-12, 15. As the owners of these Pre-1972 Recordings, Plaintiffs market the Recordings and receive revenue from third parties in exchange for licenses to publicly perform them. *Id.* ¶¶ 18-19.

Defendant iHeartMedia, Inc., which operates under the name “iHeartRadio,” *id.* ¶ 24, is a Delaware corporation with its principal place of business in Texas. *Id.* ¶¶ 13, 24. iHeartMedia owns “hundreds” of terrestrial (AM and FM) radio stations, streams the broadcasts of these stations on the internet, and also offers internet radio services to the public in the form of free, non-subscription, customizable music streaming “stations.” *Id.* ¶¶ 24-25. iHeartMedia generates revenue in part by selling advertising on its terrestrial and online radio stations. *Id.* ¶ 32. iHeartMedia regularly broadcasts the Plaintiffs’ Pre-1972 Recordings on its terrestrial and online radio stations, which reach listeners throughout the United States, including in New Jersey. *Id.* ¶ 31-33. iHeartMedia makes reproductions of these Recordings for the purposes of “archiving, advertising, buffering, streaming, and otherwise maintaining, accessing, and performing” them, *id.* ¶ 28, but has not licensed the Recordings from Plaintiffs or paid them royalties to broadcast or reproduce the Recordings. *Id.* ¶ 34.

an automatic license and royalty rate for digital public performances of sound recordings created on or after February 15, 1972,” ECF No. ¶ 21 (citing 17 U.S.C. §§ 112(e), 114(d)(2), (f), (g)(2)), but this system does not extend any copyright protections to the owners of rights in recordings created before February 15, 1972. *Id.*; *see also* 17 U.S.C. § 301(c).<sup>1</sup>

The Copyright Act preempts state common law protections for copyrighted works but does not preempt the state regulation of Pre-1972 Recordings. ECF No. 1 ¶ 4; 17 U.S.C. § 301(a), (c). Plaintiffs allege that New Jersey “state law prohibits the unauthorized reproduction and performance of pre-1972 sound recordings.” ECF No. 1 ¶ 1. Defendant, however, claims that until a “recent wave of litigation,” no court had recognized “anything close” to such a protection since 1937, and that it is a “100-year-old practice of the broadcasting industry” to reproduce and perform Pre-1972 Recordings without receiving authorization or paying royalties to the Recording owners. Def. Mot. Stay, ECF No. 8 at 1, 5 (citing *Waring v. WDAS Broad. Station, Inc.*, 194 A. 631 (Pa. 1937)).

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<sup>1</sup> Importantly, sound recordings are considered distinct from “musical works,” i.e., musical notes and lyrics. *See White-Smith Music Pub. Co. v. Apollo Co.*, 209 U.S. 1 (1908). The Copyright Act gives owners of musical works the exclusive right to authorize all public performances and displays of musical works without limiting its protection to performances “by means of a digital audio transmission,” 17 U.S.C. § 106, and protects musical works created before 1972. For a detailed history of the 1971 amendment to the Copyright Act that first extended federal copyright protection to sound recordings, *see* Def. Mot. Dismiss, ECF No. 9 at 2-5.

Central District of California, Southern District of New York, and Southern District of Florida. *See Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, No. 13-cv-5963, ECF No. 1 (C.D. Cal. Aug. 6, 2013); *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, No. 13-cv-5784, ECF No. 1 (S.D.N.Y. Aug. 16, 2013) (“*Flo & Eddie New York*”); *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, No. 13-cv-23182, ECF No. 1 (S.D. Fla. Sept. 3, 2013) (“*Flo & Eddie Florida*”). In 2014, Flo & Eddie filed another action in the Central District of California against online broadcaster Pandora Media, Inc. *See Flo & Eddie, Inc. v. Pandora Media, Inc.*, No. 14-cv-7648 (C.D. Cal. Oct. 2, 2014) (“*Flo & Eddie California*”). The actions assert copyright infringement and unjust enrichment claims against the defendants under New York, Florida, and California law, respectively, for broadcasting and reproducing Pre-1972 Recordings without the authorization of the Recording owners. *See* ECF No. 8 at 1.

Courts have reached differing conclusions about Flo & Eddie’s claims under the laws of the various states. The Southern District of New York denied Sirius XM Radio’s motion for summary judgment and found, on an issue of first impression, that New York common law provides Pre-1972 Recording owners with the exclusive rights to reproduce and publicly perform their Recordings. *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 62 F. Supp. 3d 325, 338 (S.D.N.Y. 2014), *appeal pending*, No. 15-1164 (2d Cir.). The Central District of California granted summary judgment against Sirius XM Radio and denied a motion to dismiss filed by Pandora, finding that a California statute governing Pre-1972 Recordings provides owners with the

however, granted summary judgment for Sirius XM Radio. The court held that that Florida common law does *not* provide Pre-1972 Recording owners with exclusive rights to public performance of their Recordings and that the “buffer” copies of Recordings alleged in the complaint do not constitute unlawful reproductions, and declined to hold whether Florida common law provides Pre-1972 Recording owners with exclusive rights to reproduce their Recordings. *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 2015 WL 3852692, at \*5-6 (S.D. Fla. June 22, 2015), *appeal pending*, No. 15-13100 (11th Cir.). Appeals of these decisions are pending before the Second, Ninth, and Eleventh Circuits, respectively.

#### **IV. The Sheridan actions**

On October 19, 2015, Plaintiffs Richard and Barbara Sheridan filed the complaint in this action, raising claims under New Jersey common law similar to those asserted by Flo & Eddie under New York, California, and Florida law. In the complaint, brought in federal court under the Class Action Fairness Act of 2005, 28 U.S.C. § 1322(d), because Plaintiffs claim at least one class member is of diverse citizenship from the defendants, there are more than 100 class members, and the aggregate amount in controversy exceeds \$5,000,000, ECF No. 1 ¶ 8, Plaintiffs allege that “New Jersey common law protects Pre-1972 Recordings from being copied, distributed, or otherwise exploited without license or authorization,” *id.* ¶ 23, that iHeartMedia infringed New Jersey common law copyrights of Pre-1972 Recording owners and engaged in unfair competition by “duplicating the Pre-1972 Recordings without authorization from Plaintiffs

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