FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FLO & EDDIE, INC., a California corporation, individually and on behalf of all others similarly situated, *Plaintiff-Appellee*, v. SIRIUS XM RADIO, INC., a Delaware corporation, *Defendant-Appellant.*	No. 17-55844 D.C. No. 2:13-cv-05693-PSG-GJS OPINION

Appeal from the United States District Court
for the Central District of California
Philip S. Gutierrez, Chief District Judge, Presiding

Argued and Submitted February 8, 2021
Pasadena, California

Filed August 23, 2021

Before: Richard C. Tallman, Consuelo M. Callahan, and Kenneth K. Lee, Circuit Judges.

Opinion by Judge Lee

SUMMARY*

Copyright / California Law

The panel reversed the district court's grant of partial summary judgment to Flo & Eddie, Inc. in its action against Sirius XM satellite radio, seeking royalties for pre-1972 songs that were played on Sirius XM without permission or compensation.

The complaint alleged a violation of California common law and statutory copyright law. Flo & Eddie control the rights to the songs of the rock band the Turtles. Relying on California's copyright statute, Cal. Civil Code § 980, Flo & Eddie argued that California law gave it the "exclusive ownership" of its pre-1972 songs, including the right of public performance, which required compensation whenever their copyrighted recordings were publicly performed.

The panel held that the district court erred in concluding that "exclusive ownership" under Section 980(a)(2) included the right of public performance. Without contrary evidence, the panel presumed that California did not upend the common law in establishing "exclusive ownership" in the statute. The panel remanded for entry of judgment consistent with the terms of the parties' contingent settlement agreement.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

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OPINION

LEE, Circuit Judge:

When an AM/FM radio station plays a song over the air, it does not pay public performance royalties to the owner of the original sound recording. In contrast, digital and satellite radio providers like Sirius XM must pay public performance royalties whenever they broadcast post-1972 music. But until Congress amended the copyright code in 2018, they did not have to fork over royalties for playing pre-1972 music under federal law. What remains less clear is whether digital and satellite radio stations have a duty to pay public performance royalties for pre-1972 songs under state copyright law. This patchwork quilt of federal and state copyright laws, along with statutory distinctions between terrestrial radio and digital stations, led to a ball of confusion—and to this longstanding litigation.

At issue in this case is whether California law creates a right of public performance for owners of pre-1972 sound recordings. The district court held that SiriusXM must pony up payments for playing pre-1972 music because California law grants copyright owners an "exclusive ownership" to the music. Looking at the individual dictionary definitions of the words "exclusive" and "ownership," the district court gave broad meaning to the phrase "exclusive ownership" and reasoned that it must include "right of public performance."

To answer this 21st century question about the obligations of satellite radio stations, we must rewind back almost 150 years and look to the common law in the 19th century when California first used the phrase "exclusive ownership" in its copyright statute. At that time, no state had recognized a right of public performance for music, and California protected only unpublished works. Nothing

suggests that California upended this deeply rooted common law understanding of copyright protection when it used the word "exclusive ownership" in its copyright statute in 1872. So we do not construe "exclusive ownership" to include the right of public performance. We thus reverse the district court's partial summary judgment for the plaintiff-appellant Flo & Eddie.

BACKGROUND

I. The Turtles Sue Sirius XM.

In 1971, Howard Kaylan and Mark Volman—the founding members of the Turtles—formed Flo & Eddie, Inc. to control the rights to the band's songs, including their iconic anthem, "Happy Together." Ever since, Flo & Eddie has licensed the rights to make and sell records, and to use its music in movies, TV shows, and commercials.

While Flo & Eddie reaps royalties from the Turtles' songs being played on the big screen and television, it does not receive performance royalties for airplay on AM/FM radio. Sound recording owners have no right to receive royalty for AM/FM airplay under federal law. Until August 2013, Flo & Eddie had not asked Sirius XM to pay for playing the Turtles' pre-1972 recordings. Flo & Eddie, however, apparently had a change of heart and was no longer content to let it be. It filed a putative class action suit against Sirius XM, alleging that it had played the Turtles' music and other pre-1972 songs without permission or compensation. The complaint alleged, among other things, a violation of California common law and statutory copyright law. Relying on California Civil Code Section 980, Flo & Eddie argued that California gives it the "exclusive ownership" of its pre-1972 songs, including the right of public

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