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EFF to Court: Expanding Copyrights In Old Music Recordings Will Squelch Competition In New Music Services

COMMENTARY BY [MITCH STOLTZ](#)

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Are you a radio listener? A fan of classic rock or jazz? Do you tune in to Sirius XM's "60s on 6" channel or seed your Pandora stream with the Rolling Stones? A case in federal appeals court in New York (and a similar case in California) could shake up music broadcasting, and not in a good way. A lower court [decision](#) expanded the scope of common law copyrights in sound recordings from before 1972, adding a new right to control public performances of those recordings. Unless the appeals court reverses the decision, broadcasters (both digital and analog), along with restaurants and other businesses, are now at risk of being sued for infringing "rights" never before recognized.

The decision applies to New York state but its effects could be felt far beyond. EFF [filed a brief](#) with the Court of Appeals for the Second Circuit last week, explaining to the court some of the many problems this ruling could cause if it's not reversed. EFF argued that the courts should leave decisions about expanding copyright law to Congress.

The case stems from a quirk of copyright. In the U.S., two copyrights generally exist for every song you hear on the radio or online. One relates to the underlying musical work (think sheet music). It typically belongs to a music publisher or songwriter. The other

copyright relates to the recorded performance of the work, and typically belongs to a record label or recording artist. This case is about the latter right.

Although copyrights in sound recordings exist for the reproduction and distribution of the work, they don't include a general right to control public performances, except for a limited right that covers "digital audio transmissions" like Internet and satellite radio. That's why AM and FM radio stations, and businesses like restaurants that play music, have never had to pay record labels or recording artists, nor ask their permission. The labels have tried for many decades to win a performance right, but so far neither Congress nor state legislatures have created one. (Songwriters and music publishers do get paid, typically through collecting societies ASCAP, BMI, and SESAC, for the right to publicly perform the composition). But recordings made before February 15, 1972 aren't covered by federal law at all. Instead, they fall under a patchwork of state laws, most of them vague and scarcely adapted for the digital age.

The strange status of pre-1972 recordings created an opportunity for recording artists and labels to try getting from the courts what Congress has never agreed to give them: a right to control public performances. Flo & Eddie, a company owned by members of the band the Turtles, sued Sirius XM in three states, claiming the satellite radio service should not be allowed to play Turtles tracks and other pre-1972 recordings. A court in Florida rejected Flo & Eddie's request, ruling that only the state legislature could create a new right of public performance. But federal district courts in New York and California found Sirius liable for state-law copyright infringement, effectively creating new public performance rights that might apply to all pre-1972 recordings and all types of broadcasters.

Sirius appealed both decisions, and a similar case against Pandora is also on appeal in California. Last week, EFF [filed a brief](#) with the Second Circuit, in New York, urging that court to reverse the decision. The National Association of Broadcasters, the New York

Broadcasters Association, Public Knowledge, Pandora, and a group of law professors also filed briefs opposing the new right.

Public performance rights in sound recordings are common outside the US, and they exist for digital radio services in the U.S. But they come with important safeguards: explicit limitations like fair use, and statutory licenses that avoid the massive transaction costs that would come with having to negotiate with each rightsholder individually. The New York and California decisions had none of these safeguards. Judge Colleen McMahon of the District Court for the Southern District of New York brushed this aside by suggesting that limitations and boundaries could be created later.

This is a problem, because creating a new, nearly unlimited public performance right will entrench the large, established players like the major FM station groups, and even Sirius. Bigger broadcasters can negotiate blanket licenses with major record labels, leaving new music services and smaller rightsholders behind. High transaction costs and anticompetitive behavior could create barriers for new music entrepreneurs and artists alike.

Also, a new performance right just isn't needed. Copyright in the U.S. exists to create incentives for artists to make new work. Adding new rights for recordings made in the 1970s and earlier doesn't encourage new music. At best, it might generate some income for the small number of "oldies" labels and rightsholders whose recordings still have commercial value. Other artists from that period, who may have made incredible musical contributions but no longer have popular appeal, are more likely to fade into obscurity, as the threat of litigation keeps broadcasters and digital music services from playing their recordings at all.

While a court can only consider the facts of the case in front of it, legislatures can craft comprehensive rules that balance competing interests, taking technological trends into account. Whether (or how) we should recognize public performance rights in sound

recordings are questions that are best left to Congress and state legislatures to answer, not the courts. That's why we hope the Second Circuit (and the Ninth Circuit, in California) reverse the Flo & Eddie decisions.

All of the briefs filed in the Second Circuit appeal thus far can be found here:

Defendant-Appellant's Brief:

- [Sirius XM](#)

Amicus Briefs:

- [EFF](#)
- [Law Professors](#)
- [National Association of Broadcasters](#)
- [New York State Broadcasters Association](#)
- [Pandora](#)
- [Public Knowledge](#)

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