CTQ-2016-00001

# Court of Appeals
## of the
# State of New York

FLO & EDDIE, INC., a California Corporation, individually and on behalf of all others similarly situated,

*Plaintiff-Respondent,*

– v. –

SIRIUS XM RADIO, INC., a Delaware Corporation,

*Defendant-Appellant.*

ON CERTIFICATION OF QUESTION BY THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## NOTICE OF MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*


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**COURT OF APPEALS OF THE STATE OF NEW YORK**

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|---|---|
| FLO & EDDIE, INC., A CALIFORNIA CORPORATION, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,<br><br>*Plaintiff-Respondent*,<br><br>-against-<br><br>SIRIUS XM RADIO, INC., A DELAWARE CORPORATION,<br><br>*Defendant-Appellant*. | Case No. CTQ-2016-00001<br><br>**NOTICE OF MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*** |

**PLEASE TAKE NOTICE** that, upon the annexed Affirmation of Benjamin E. Marks, dated September 1, 2016, in support of the Motion for Leave to File Brief as *Amici Curiae*, Pandora Media, Inc., iHeartMedia, Inc., the Computer & Communications Industry Association, the New York State Restaurant Association, and the National Restaurant Association will move this Court at the New York State Court of Appeals, Court of Appeals Hall, 20 Eagle Street, Albany, New York 12207 on September 12, 2016, for an Order pursuant to this Court's Rule of Practice 500.23 granting leave to file their attached brief as *amici curiae* in support of Defendant-Appellant in the above-captioned matter; and for such further relief as the Court may deem just and proper. A copy of the proposed brief is annexed as Exhibit A to the affirmation of Benjamin E. Marks, dated September 1, 2016.

PLEASE TAKE FURTHER NOTICE, that opposing papers, if any, must be served and filed in the Clerk's Office of the Court of Appeals, with proof of service on or before the return date of this motion pursuant to this Court's Rules of Practice 500.21 and 500.23.

Dated: New York, New York
September 1, 2016

Respectfully submitted,

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**COURT OF APPEALS OF THE STATE OF NEW YORK**

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| FLO & EDDIE, INC., A CALIFORNIA CORPORATION, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,<br><br>*Plaintiff-Respondent*,<br><br>-against-<br><br>SIRIUS XM RADIO, INC., A DELAWARE CORPORATION,<br><br>*Defendant-Appellant*. | Case No. CTQ-2016-00001<br><br>**AFFIRMATION OF BENJAMIN E. MARKS IN SUPPORT OF MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*** |

I, Benjamín E. Marks, an attorney duly admitted to practice in the State of New York, hereby affirm under penalty of perjury that the following is true to the best of my knowledge:

1. I am a partner with the law firm of Weil, Gotshal & Manges LLP and a member of the Bar of the State of New York.

2. I am counsel of record for proposed *amici curiae* Pandora Media, Inc. ("Pandora"), the Computer & Communications Industry Association ("CCIA"), the New York State Restaurant Association ("NYSRA"), and the National Restaurant Association ("NRA"). I am familiar with the underlying litigation and appeal in the federal courts.

3. I make this affirmation in support of the motion of Pandora, iHeartMedia, Inc. ("iHeartMedia"), CCIA, NYSRA, and NRA, seeking this

Court's leave pursuant to Rule of Practice 500.23 to file a brief as *amici curiae* in support of Defendant-Appellant on the question certified to the Court by the United States Court of Appeals for the Second Circuit.

4. A copy of the brief that proposed *amici curiae* Pandora, iHeartMedia, CCIA, NYSRA and NRA seek to file is attached hereto as Exhibit A.

5. Proposed *amicus* Pandora is the largest provider of Internet radio service in the United States, with nearly 80 million active users. Pandora also owns a terrestrial radio station, KXMZ, serving the Rapid City, South Dakota market.

6. Proposed *amicus* iHeartMedia also operates a popular digital music streaming business, and it is the largest owner of terrestrial radio stations in the United States.

7. Proposed *amicus* CCIA is an international, not-for-profit membership organization dedicated to innovation and enhancing society's access to information and communications. CCIA promotes open markets, open systems, open networks, national uniformity in intellectual property regulation, and full, fair, and open competition in the computer, telecommunications and Internet industries. Its members include some of the world's largest technology and media companies and collectively offer a wide variety of products and services affected by copyright

law, including search engines, digital streaming, e-commerce platforms, and social media platforms. *See* http://www.ccianet.org/about/members/.

8. Proposed *amicus* NYSRA is the leading business association for the restaurant and hospitality industry in New York State. Founded in 1935, NYSRA is comprised of 56,000 establishments, 628,000 employees, and sales of more than $27 billion. It is the cornerstone of the New York State economy, career opportunities, and community involvement. The NYS Restaurant Association along with its chapters and the NYS Restaurant Association Educational Foundation work to "Help Restaurateurs Succeed" by offering cost saving benefits, education and advocacy.

9. Proposed *amicus* NRA is the leading business association for the restaurant and foodservice industry. The NRA's mission is to help members build customer loyalty, rewarding careers, and financial success. Nationally, the industry is made up of one million restaurant and foodservice outlets with many of its members in the State of New York. Despite being an industry of mostly small businesses, the restaurant industry is the nation's second-largest private-sector employer.

10. For nearly a century—until this case and a spate of follow-on actions—the music and broadcasting industries, the U.S. Copyright Office, and businesses like *amici* and their members, uniformly understood that public

performances of sound recordings fixed before February 15, 1972 ("pre-1972 recordings") did not require the permission of, or royalty payments to, the creators of such recordings under either federal or state law. Proposed *amici* Pandora, iHeartMedia, and certain members of CCIA, NYSRA, and NRA routinely perform pre-1972 recordings as part of the day-to-day operation of their businesses and have done so premised on the understanding that no license was required to do so.

11. The proposed *amici* accordingly have a substantial interest in the outcome of this landmark case, which will decide whether there is any right of public performance for creators of sound recordings under New York law.

12. That certified question is one of general public interest. As the Second Circuit recognized in certifying the question presented here, music users such as *amici* "have 'adapted to an environment in which they do not pay for broadcasting pre-1972 sound recordings,'" and recognizing a performance right in pre-1972 recordings would "'upset those settled expectations' of radio broadcasters" and numerous other industries. *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 821 F.3d 265, 270 (2d Cir. 2016) (quoting *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 62 F. Supp. 3d 325, 352 (S.D.N.Y. 2014)). A new public performance right would not only disrupt reasonable, investment-backed expectations but also, as the District Court acknowledged, potentially subject companies to retroactive damages notwithstanding decades of acquiescence by

Respondent Flo & Eddie and the rest of the recording industry. *See Flo & Eddie*, 62 F. Supp. 3d at 352 (recognizing that a New York common law public performance right would "upend the analog and digital broadcast industries" and "expos[e] [other broadcasters] to significant liability").

13. Thus, this Court's decision will impact thousands of businesses throughout New York, including the proposed *amici*. Indeed, two of the proposed *amici*, Pandora and iHeartMedia, are already defendants in similar pending lawsuits filed by various plaintiffs asserting purported state law rights to public performances of pre-1972 recordings.

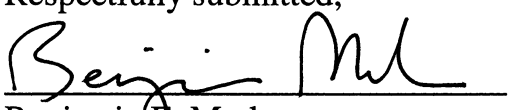
14. The brief of proposed *amici* will assist the Court in resolving this watershed case by providing *amici*'s unique perspectives, as businesses that will be directly affected by the Court's decision, on the significant and wide-ranging harm to numerous constituencies that would result from the declaration of a New York public performance right in pre-1972 recordings. The brief of proposed *amici* seeks to provide further explanation and detail as to why any such right would effect a sea change in the law, destabilize numerous industries, including some not before the Court, and substantially restrict the public's uninterrupted access to sound recording performances.

15. The brief of proposed *amici* accordingly will enhance the full presentation of the important issues before the Court, including their wide-ranging implications, as required by this Court's Rule of Practice 500.23(a)(4).

WHEREFORE, we respectfully request that the Court grant this motion for leave to file a brief as *amici curiae* in the above-captioned matter.

Dated: New York, New York
September 1, 2016

Respectfully submitted,



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# Exhibit A

CTQ-2016-00001

# Court of Appeals
## of the
# State of New York

FLO & EDDIE, INC., a California Corporation, individually and on behalf of all others similarly situated,

*Plaintiff-Respondent,*

– v. –

SIRIUS XM RADIO, INC., a Delaware Corporation,

*Defendant-Appellant.*

ON CERTIFICATION OF QUESTION BY THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

# BRIEF OF PANDORA MEDIA, INC., iHEARTMEDIA, INC., THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION, NEW YORK STATE RESTAURANT ASSOCIATION AND NATIONAL RESTAURANT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT SIRIUS XM RADIO, INC. ON THE CERTIFIED QUESTION FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT


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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 500.1(f) of the Rules of Practice of the Court of Appeals:

1. Pandora Media, Inc. states that it is a publicly owned corporation and that it has no parent corporation and that its subsidiaries include: Pandora FM LLC, Pandora Media California, LLC, Next Big Sound LLC, Pandora Cayman Limited, Pandora Media UK Ltd., Pandora Hong Kong Limited, Pandora Media Australia Pty Limited, Pandora New Zealand, Pandora Media HK LLC, Ticketfly, LLC, and Ticketfly Canada Service Inc.

2. iHeart Media, Inc. states that it is a publicly owned corporation and that it has no parent corporation and that its subsidiaries include the entities listed in Exhibit 1.

3. The Computer & Communications Industry Association states that it does not have a parent corporation or any corporate affiliates or subsidiaries.

4. The New York State Restaurant Association states that it does not have a parent corporation and that its subsidiary is New York State Restaurant Services and that its affiliate is New York State Restaurant Association Educational Foundation.

5. The National Restaurant Association is a not-for-profit organization under 26 U.S.C. § 501(c)(6), incorporated in the State of Illinois. Its subsidiaries are Alliance Business Solutions, LLC; ARN 2055, LLC; Environmental Health

Testing, LLC; The National Restaurant Association Educational Foundation; National Restaurant Association Services, LLC; and National Restaurant Association Solutions, LLC.

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Pandora Media, Inc. ("Pandora"), iHeartMedia, Inc. ("iHeartMedia"), the Computer & Communications Industry Association ("CCIA"), the New York State Restaurant Association ("NYSRA"), and the National Restaurant Association ("NRA") (collectively, "Amici") respectfully submit this brief as *amici curiae* in support of Appellant Sirius XM Radio Inc. ("Sirius XM") to explain why this Court should answer the certified question in the negative and confirm that there is no right of public performance for creators of sound recordings under New York law. Pursuant to Rule 500.23(a) of this Court's Rules of Practice, Amici submit this brief together with a motion for leave to file.

## PRELIMINARY STATEMENT

Respondent Flo & Eddie Inc. ("Flo & Eddie"), the owner of sound recordings made nearly fifty years ago and publicly performed widely ever since, seeks a radical expansion of the scope of protection accorded to sound recordings under New York common law. Amici respectfully urge this Court to reject Flo & Eddie's attempt to transform New York law and to answer "No" to the certified question presented.

Until this case and a spate of follow-on actions, there was a long-standing and uniform consensus that neither New York common law nor the law of any other State provided record labels with the right to control public performances of the sound recordings they create and sell. The legal regime governing public

performances of sound recordings—a practice on which entire industries are based—has been understood for decades to be the exclusive province of Congress, to which all legal and policy arguments concerning the issue have been addressed. Congress's carefully calibrated responses over the better part of a century, in turn, have set the legal parameters that have guided day-to-day practice by countless businesses nationwide. The result urged here by Flo & Eddie, namely that New York independently recognizes—though has never enforced—a common law right of public performance in sound recordings, would contravene all prior experience, undermine settled commercial expectations, and be deeply destabilizing for thousands of businesses, educational institutions, and governmental entities that publicly perform music in New York. Because of the numerous competing public and private interests that must be balanced, the choice to establish such a right should be made, if at all, by the Legislature.

Most of the sound recordings that Pandora, iHeartMedia, and members of CCIA, NYSRA, and NRA perform were created on or after February 15, 1972 ("post-1972 recordings") and are governed exclusively by federal copyright law. *See* 17 U.S.C. §§ 106(6), 301. Congress granted post-1972 recordings a carefully circumscribed right of public performance for the first time in 1995. *See* Digital Performance Right in Sound Recordings Act of 1995 ("DPRA"), Pub. L. No. 104-39, 109 Stat 336. The right applies only to digital performances of post-1972

recordings, such as those made by Pandora and iHeartMedia in connection with their Internet radio service offerings, and therefore does not apply at all to most public performances of sound recordings, such as those made by traditional AM/FM radio broadcasters as part of their "terrestrial" broadcasts or those made by restaurants, bars, retail stores, or thousands of other businesses that play music for their customers to enjoy. The DPRA entitles digital radio broadcasters to a compulsory license at a rate set by a specialized federal tribunal for their digital radio transmissions and related, ancillary reproductions.[1]

Pandora, iHeartMedia, and members of CCIA, NYSRA, and NRA also perform sound recordings fixed before February 15, 1972 ("pre-1972 recordings"). Congress deliberately left these sound recordings unprotected by federal copyright law, despite decades of complaints by the recording industry that radio broadcasters and others were performing the recordings for profit without compensation to record labels or performing artists. For nearly a century, federal legislators, the U.S. Copyright Office, the recording industry, and broadcasters alike uniformly understood that performances of pre-1972 recordings did not require a license under either state or federal law. Terrestrial radio broadcasters

[1] Digital services that offer "on-demand" listening that allows subscribers to choose which songs they will hear and the order in which they will hear them are not afforded a compulsory license for their use of copyrighted sound recordings and must acquire the rights directly from rightsholders. Pandora has announced its intention to add an on-demand product to its suite of offerings.

have never sought permission from, nor paid royalties to, record labels or performing artists to broadcast their recordings.

A determination that New York state law provides a public performance right for pre-1972 recordings would instantly expose thousands of entities doing business in New York—including AM/FM broadcasters, restaurants, bars, bowling alleys, hotels, health clubs, and public and private educational institutions—to copyright infringement liability. The result urged by Flo & Eddie here would be devoid of any of the careful balancing of competing interests that infuses federal copyright law's complex and nuanced treatment of the scope and degree of exclusive rights in the performance of sound recordings for post-1972 recordings. Indeed, Flo & Eddie seeks a far broader scope of rights in pre-1972 recordings under New York law than Congress granted to post-1972 recordings.

Absent the kind of careful tailoring that the legislative branch is uniquely capable of providing, a common law right of public performance would give owners of pre-1972 recordings the unfettered discretion to prevent New York consumers' access to pre-1972 recordings, or to condition such access upon payment of potentially confiscatory license fees. Given the age of pre-1972 recordings, ownership information for many is either unknown or unclear, and fear of infringement liability would further stifle public access to performances of those works. In the interests of promoting digital commerce, as well as in furtherance of

copyright law's paramount interest in fostering wide dissemination of works of creative expression, federal copyright law protects digital radio services, AM/FM broadcasters, restaurants and other businesses that play music for their customers, and the listening public from precisely such barriers.

All prior experience in this field counsels judicial caution in declaring a new and unexpected property right that will directly and adversely affect the operations of thousands of New York entities. The Legislature, rather than a court sitting in common law, is uniquely equipped to balance the competing public policy interests implicated by a performance right in pre-1972 recordings, to determine whether such a significant change in the law is warranted and, if so, to create standards that will protect the interests of all affected parties and industries. Because history, federal law, and common law all indicate that no performance right in pre-1972 sound recordings exists, and because creation of such a right is properly the province of the Legislature, this Court's answer to the certified question should be "No."

## CERTIFIED QUESTION PRESENTED

On April 13, 2016, the United States Court of Appeals for the Second Circuit certified the following "significant and unresolved issue of New York copyright law" to this Court: "Is there a right of public performance for creators of sound recordings under New York law and, if so, what is the nature and scope of

that right?" *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 821 F.3d 265, 267 (2d Cir. 2016); *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, Case No. 15-1164, Doc. No. 198 (May 5, 2016) (accepting certified question).

## INTERESTS OF AMICI

**Pandora.** Pandora is the world's most powerful music discovery platform and the largest provider of Internet radio service in the United States. *See* Pandora Form 10-Q filed Jul. 26, 2016 at 7.[2] Pandora's nearly 80 million active users can access digital streams of the stations they create throughout the United States through Internet-connected devices, such as computers, tablets, smartphones, consumer electronic devices, and, increasingly, automobiles. *Id.* at 22-23. Pandora also owns a terrestrial radio station, KXMZ, which serves the Rapid City, South Dakota market. Pandora is a defendant is several pending cases in which various plaintiffs, including Flo & Eddie, purport to assert state law claims arising out of Pandora's performances of pre-1972 recordings.

**iHeartMedia.** iHeartMedia operates a popular digital music streaming business and is the largest owner of terrestrial radio stations in the United States. iHeartMedia is a defendant in seven pending federal court actions asserting the

[2] Available at https://www.sec.gov/ix?doc=/Archives/edgar/data/1230276/000123027616000085/p-06302016x10q.htm.

same or similar state law claims related to broadcasting pre-1972 recordings as those asserted by Flo & Eddie in this case.

**CCIA.** CCIA is an international, not-for-profit membership organization dedicated to innovation and enhancing society's access to information and communications. CCIA promotes open markets, open systems, open networks, national uniformity in intellectual property regulation, and full, fair, and open competition in the computer, telecommunications, and Internet industries. Its members include some of the world's largest technology and media companies and collectively offer a wide variety of products and services affected by copyright law, including search engines, digital streaming, e-commerce platforms, and social media platforms, to name just a few.[3]

**NYSRA.** The NYSRA, founded in 1935, is the leading business association for the restaurant and hospitality industry in New York State. Comprised of 56,000 establishments, 628,000 employees, and sales of more than $27 billion; it is the cornerstone of the New York State economy, career opportunities, and community involvement. The NYSRA along with its chapters and the NYSRA Educational Foundation work to "Help Restaurateurs Succeed" by offering cost saving benefits, education and advocacy. Many NYSRA members play recorded music for their customers to enjoy while dining.

[3] A list of CCIA members is available at http://www.ccianet.org/about/members/.

**NRA.** NRA is the leading business association for the restaurant and foodservice industry. Its mission is to help members build customer loyalty, rewarding careers, and financial success. Nationally, the industry is made up of one million restaurant and foodservice outlets with many of its members in the State of New York. Despite being an industry of mostly small businesses, the restaurant industry is the nation's second-largest private-sector employer. Many NRA members also play recorded music for their customers to enjoy while dining.

* * *

Amici thus have significant interests in the resolution of the legal questions in this case, as they affect decisions that they or their members routinely confront in the ordinary course of their businesses and, as to Pandora and iHeartMedia, potential defenses in the various suits against them involving identical or similar claims. Amici submit this brief to provide their perspective on the deleterious consequences that creating an unqualified state common law right of public performance for sound recordings would have for the public's access to the range of music that New York law, like federal copyright law and policy, heretofore has enabled.

## SUMMARY OF ARGUMENT

I. The extensive history of legislative efforts to *secure* federal performance rights in sound recordings reflects the uniform consensus—of the

recording industry, broadcasters, policymakers, and legislators alike—over many decades that no equivalent rights ever existed under state common law. Indeed, it was precisely because the states afforded no protection to sound recordings that proponents of performance rights pursued them before Congress, as early as the 1920s. For more than seventy years, until 1995, Congress declined to create a sound recording performance right of any kind in light of the adverse impact it would have on the entire entertainment industry, throughout which public performances of sound recordings had never been licensed. In light of that history, the suggestion that Flo & Eddie owned an "all-encompassing" public performance right under New York law all along is implausible.

II. The eventual creation in 1995 of a limited federal sound recording performance right illustrates precisely why creating a new state common law performance right would be inappropriate. The tasks of assessing the wide-reaching policy implications and costs of creating a new performance right for sound recordings, determining whether any such right is nonetheless warranted, and, if so, shaping the contours of any such right are ones that must be left to the Legislature. This Court has long held that the complex public policy decisions involved in making significant changes to state law are the exclusive province of the legislative branch. Courts simply are not the proper forum for balancing the competing policy interests at stake in a change of this magnitude.

When Congress ultimately created a digital performance right in 1995 to address the effects of modern technological advances on the recording industry, the new right was carefully circumscribed and applied only prospectively, so as to avoid undue burdens and unnecessary disruption of long-settled industry expectations. Congress limited the new right to "digital audio transmissions," 17 U.S.C. §106(6), exempting traditional terrestrial radio broadcasters and transmitters of audio-visual fare such as films and television programs. Even as to digital radio providers, Congress accompanied the limited new right with a statutory compulsory license to guarantee continued access to covered works. This compulsory licensing scheme established a centralized rate-setting process and vested authority in an industry-wide clearinghouse to administer the license. A specialized tribunal of administrative law judges has exclusive jurisdiction to adjudicate disputes over rates and licensing terms.

In sharp contrast, the common law right sought by Flo & Eddie is completely undefined. The unqualified right Flo & Eddie asks this Court to create would not guarantee public access, exempt traditional users, or accommodate long-established industry practices. Nor, as a practical matter, could these or similar types of balances be achieved through evolution of the common law.

III. If a new common law right of public performance in pre-1972 recordings is announced, numerous constituencies throughout the State will suffer

significant harm without any corresponding benefit to the public in the form of increased access to sound recordings. The *raison d'etre* for copyright protection is to spur the creation of new works, but there can be no such benefit here: creating a new state law right of public performance will not lead to the creation of a single new pre-1972 recording, as that category has been closed for more than four decades. Instead, a new common law performance right will operate only to *reduce* public access to music. Amici and their members, which heretofore have relied on the guaranteed access to sound recordings afforded by the federal copyright statute, may need to remove pre-1972 recordings from their music offerings, to the detriment of listeners. This restriction of access caused by a change in New York law would extend *outside* New York. For example, Pandora and iHeartMedia operate their Internet radio services nationwide, but neither has the technological capability to identify and screen subscribers located in New York at the moment of a given performance. Accordingly, the removal of pre-1972 recordings to avoid liability under New York law will impact listeners in *all* states, including states that have expressly rejected the claimed existence of a public performance right in pre-1972 recordings by statute or judicial decision.[4]

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[4] *See, e.g.*, N.C. Gen. Stat. § 66-28 (2015); S.C. Code Ann. § 39-3-510 (2015). Indeed, outside of New York, although unfair competition and similar doctrines protect against illicit record piracy, state law affords no copyright protection at all to published works under the generally applicable copyright doctrine of "divestive publication." *See, e.g.*, *Kisling v. Rothschild*, 388 So. 2d 1310, 1312 (Fla. Dist. Ct.

Many other constituencies whose day-to-day business in New York involves the performance of sound recordings likewise will be impaired. The unqualified common law right sought by Respondent does not distinguish between digital radio services like Pandora, iHeartMedia, and Sirius XM, and the traditional radio broadcasters historically exempt from the scope of existing performance rights (nor is there any basis to do so in the record of this dispute). Thus, were this Court to answer the certified question in the affirmative, terrestrial AM/FM broadcasters may also require a license to play pre-1972 recordings for the first time in the history of the broadcasting industry. Thousands—perhaps millions—of other entities that operate in New York may also be required to obtain licenses, although many of these small businesses lack the resources even to attempt to license the rights to play pre-1972 recordings for their customers. While the federal copyright law facilitates administratively feasible means of licensing sound recording performing rights by affording an express antitrust exemption to collective licensing, *see* 17 U.S.C. § 114(e), there is no judicial mechanism available to facilitate lawful joint licensing by rights owners here.

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App. 1980) ("The umbrella of protection afforded by a common law copyright folds up and vanishes when the owner of the product 'publishes' it."). *But see Capitol Records, Inc., v. Naxos of Am., Inc.*, 4 N.Y.3d 540 (2005).

## ARGUMENT

### I. The Extensive History Of Legislative Efforts To Secure A Federal Performance Right For Sound Recordings Reflects The Uniform Consensus Over Many Decades That No Common Law Right Exists

This Court has observed that, "[w]hen examining copyright law, a page of history is worth a volume of logic." *Capitol Records, Inc. v. Naxos of Am., Inc.*, 4 N.Y.3d 540, 546 (2005). A page of history eviscerates Flo & Eddie's contention that sound recording owners possess an exclusive, "all-encompassing" right of public performance. *Flo & Eddie*, 821 F.3d at 271. Flo & Eddie has no answer for why such a right, if it existed at all, went unenforced for the better part of a century. Nor can Flo & Eddie explain why its record industry brethren devoted countless efforts over many decades to lobbying Congress to create a performance right as a matter of federal law if they already possessed an unused state law right. It was *precisely because* New York and other states did not recognize performance rights in sound recordings that recording industry and performing artist proponents pursued them before Congress for decades.

Record companies began to pursue performance rights in sound recordings before Congress as early as the 1920s, without success. H.R. Rep. No. 104-274, at 10 (1995); *see, e.g.*, H.R. 10434 § 37, 69th Cong., 1st Sess. (1926). From the outset, these efforts were met with strenuous opposition from traditional broadcasters, which explained the adverse effects that such rights would have on

their industry. For example, during the 1932 general revision hearings, the National Association of Broadcasters ("NAB") opposed performing rights by observing that, at the time, "a station [that] broadcasts a phonograph record" is "responsible" to the composer "but not to the manufacturer of the phonograph record."[5] *General Revision of the Copyright Law: Hearings on H.R. 10976 Before the H. Comm. on Patents*, 72nd Cong. 193 (1932) (statement of Louis G. Caldwell, Chairman, NAB). The NAB testified that the extension of performing rights to sound recordings "would be very prejudicial to the smaller broadcasting stations," which would become subject to "two license fees" or "may find that he is forbidden to play phonograph records altogether." *Id.* The bill was not passed.

As another example, in 1947, a bill was introduced that would have extended copyright, including performing rights, to sound recordings. H.R. 1270, 80th Cong. (1947). Performers again bemoaned the absence of any public performance right under existing law by arguing that "use of records . . . has become standard practice with hundreds of radio stations," to which the performer "has *no rights at all* beyond an original agreement with the manufacturer." *Authorizing a Composer's Royalty in Revenues from Coin-operated Machines and to Establish a Right of Copyright in Artistic Interpretations: Hearings Before*

[5] Federal copyright law for centuries has afforded a right of public performance to the compositions underlying sound recordings. *See, e.g.*, Act of Feb. 3, 1831, ch. 16, § 1, 4 Stat. 436.

*Subcomm. on Patents, Trade-marks, and Copyrights of the H. Comm. on the Judiciary on H.R. 1269, H.R. 1270, and H.R. 2570*, at 6 (Comm. Print 1947) (emphasis added).[6] Broadcasters and author-composers, on the other hand, vigorously opposed the bill because it "would make the control go away entirely from the creator and . . . put it into the hands of the maker of the record," who "would then be in a position to control whether it was played or not played in a juke box . . . [or] in recorded form over the air." *Id.* at 49. The bill was "adversely reported." 93 Cong. Rec. D406 (daily ed. July 21, 1947).

Almost two decades later, in 1965, the Register of Copyrights submitted to Congress a Supplementary Register's Report explaining the latest bill seeking sound recording copyright. *See Supplementary Register's Report on the General Revision of the U.S. Copyright Law* (1965), *available at* 9 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright*, App. 15 (Lexis 2013) ("*Supplementary*

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[6] Indeed, because performing artists were well aware that there were no performance rights in sound recordings under state or federal law, the American Federation of Musicians organized boycotts against the recording of new music in an effort to force broadcasters, bars, and hotels to pay such fees when their music was played or to hire live performers who were otherwise being displaced by uncompensated performances of recorded music. *See* GEOFFREY C. WARD, JAZZ: A HISTORY OF AMERICA'S MUSIC 310 (2012); MICHAEL JAMES ROBERTS, TELL TCHAIKOVSKY THE NEWS: ROCK 'N' ROLL, THE LABOR QUESTION, AND THE MUSICIANS' UNION, 1942–1968 (Duke Univ. Press 2014). Eventually, every major recording company agreed to pay royalties to the union for each record sold, but recording artists continued not to be paid for radio "spins." Robert A. Gorman, *The Recording Musician and Union Power: A Case Study of the American Federation of Musicians*, 37 Sw. L.J. 697, 704 (1983-1984).

*Register's Report*"); H.R. 4347, 89th Cong. (1965); S. 1006, 89th Cong. (1965). The Register explained that although there was "little dispute" that sound recordings should be afforded exclusive reproduction and distribution rights, the extension of any "exclusive rights of public performance" in sound recordings remained "explosively controversial." *Supplementary Register's Report*, at 51. The Report concluded:

> [W]e cannot close our eyes to *the tremendous impact a performing right in sound recordings would have throughout the entire entertainment industry.* 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.

*Id.* at 51-52 (emphasis added).

In 1967, the House Judiciary Committee, when reporting the latest sound recording copyright bill, echoed the Register's sentiments on the prevailing consensus against the extension of performing rights to sound recordings. H.R. Rep. No. 83, at 65 (1967). The Committee explained that it "believe[d] that the bill, . . . in denying rights of public performance, represents the present thinking of other groups on that subject in the U.S. and that further expansion of the scope of protection for sound recordings is impracticable." *Id.*

Finally, in 1971, in line with this prevailing consensus, Congress extended limited copyright protection to sound recordings for the first time, on a prospective

basis, but declined to include a right of public performance. Sound Recording Act of 1971, Pub. L. No. 92-140 § 1(a), 85 Stat. 391 ("SRA of 1971"). As Congress explained, the purpose of the new "limited copyright" for post-1972 recordings was "protecting against unauthorized duplication and piracy. . . ." 117 Cong. Rec. 2002 (daily ed. Feb. 8, 1971). In the preceding years, advances in duplicating technology had led to a "rapid increase" in sound recording piracy. *Id.* A few states had enacted statutes "intended to suppress record piracy," while other states fell back on common law unfair competition theories to provide relief for piracy. S. Rep. No. 92-72, at 4 (1971). By extending federal copyright to sound recordings, Congress sought to unify the law against record piracy and eliminate the confusion between proliferating state laws on the issue. *See id.*; H.R. Rep. No. 92-487, at 2-3 (1971). As Congress later observed, it did "not grant[] the rights of public performance [in 1971], on the presumption that the granted rights would suffice to protect against record piracy." H.R. Rep. No. 104-274, at 11 (1995).

No doubt, if state law *had* extended public performance rights to sound recordings at the time, Congress would have had no qualms about extending those same rights to post-1972 recordings. Indeed, Congress similarly would have sought to unify the law on the topic of performance rights, just as it did with reproduction rights. Moreover, if performance rights had existed at state law in 1971, Congress's decision *not* to extend the performance right to post-1972

recordings would have dramatically diminished the rights of record owners going forward. Recent Supreme Court precedent had suggested that the extension of federal copyright protection would preempt (and extinguish) any existing state-law protection, *see Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 229 (1964), and five years later, Congress made that preemption explicit, *see* 17 U.S.C. § 301(a). And yet the legislative record is devoid of any outcry by recording industry representatives over such diminishment because they shared the uniformly held view that there were no state law performance rights for sound recordings.

Notwithstanding the creation in 1995 of a federal performance right for post-1972 recordings, *see* Point II *infra*, and literally *billions* of unchallenged public performances of pre-1972 recordings by radio broadcasters, digital services, and others, there was no suggestion that state law provided a right of public performance for those older recordings. In fact, during the lead-up to the DPRA in 1995, the Chairman and CEO of the Recording Industry Association of America testified before Congress that "[u]nder existing law, record companies and performers . . . *have no rights* to authorize or be compensated for the broadcast or other public performance of their works." *See The Digital Performance Right in Sound Recordings Act of 1995: Hearing on H.R. 1506 Before the H. Judiciary Subcomm. on Courts & Intellectual Property*, 104th Cong. (1995), 1995 WL 371088 (testimony of Jason S. Berman, Chairman and CEO, RIAA) (emphasis

added). As recently as 2011, the Register of Copyrights reported that, "[i]n general, state law does not appear to recognize a performance right in sound recordings." UNITED STATES COPYRIGHT OFFICE, REPORT OF REGISTER OF COPYRIGHTS, FEDERAL COPYRIGHT PROTECTION FOR PRE-1972 SOUND RECORDINGS 44 (Dec. 2011) ("2011 REGISTER'S REPORT ON PRE-1972 RECORDINGS").

Recognizing an exclusive right of public performance in New York for these older recordings now would be nothing short of a seismic change in the common law.

## II. The Legislature, Not The Courts, Must Balance The Competing Interests And Make The Policy Judgments Involved In Creating An Exclusive Right Of Public Performance For Pre-1972 Recordings

This Court, when faced with analogous requests to create or change the common law, has repeatedly held that "some social problems 'are best and more appropriately explored and resolved by the legislative branch of our government.'" *Hall v. United Parcel Serv. of Am., Inc.*, 76 N.Y.2d 27, 34 (1990); *accord Murphy v. Am. Home Prods. Corp.*, 58 N.Y.2d 293, 302 (1983). The resolution of "complex societal and governmental issues" involves "'policy-making and discretionary decisions that are reserved to the legislative and executive branches.'" *Campaign for Fiscal Equity, Inc. v. State*, 8 N.Y.3d 14, 28 (2006) (quoting *Klostermann v. Cuomo*, 61 N.Y.2d 525, 541 (1984)). Particularly where there are competing interests at stake, the decision whether to make "a significant

change in our law is best left to the Legislature." *Murphy*, 58 N.Y.2d at 301; *see Hall*, 76 N.Y.2d at 34. To be sure, the courts develop the common law. But they usually do so by "deciding cases and settling the law more modestly," not by "dramatic promulgation[s]" that effect a "sweeping [] change" in the law. *Norcon Power Partners, L.P. v. Niagara Mohawk Power Corp.*, 92 N.Y.2d 458, 467 (1998).

The difference is one of institutional competence, as this Court has explained. "Procedurally, courts are limited to viewing the problem as presented in a litigated case within the four corners of its record," as further "confined by the rules of procedure, legal relevance, and evidence." *Norcon*, 92 N.Y.2d at 467 (quoting Charles D. Breital, *The Lawmakers*, 2 Benjamin N. Cardozo Memorial Lectures 761, 788 (1965)). In contrast, "[t]he Legislature has infinitely greater resources and procedural means to discern the public will, to examine the variety of pertinent considerations, to elicit the views of the various segments of the community that would be directly affected, and in any event critically interested, and to investigate and anticipate the impact of imposition of [ ] liability." *Murphy*, 58 N.Y.2d at 302. Thus, "drastic" "law creation" by courts is "often said and thought to be an invalid encroachment on the legislative branch." *Norcon*, 92 N.Y.2d at 468 (citation omitted).

Measured against these well-established parameters, the decision whether to announce a New York right of public performance in pre-1972 recordings falls squarely within the province of the Legislature for at least three reasons. First, deference to the Legislature is appropriate here because the law of copyright has always "reflect[ed] a balance of competing claims upon the public interest." *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975); *see also MGM Studios, Inc. v. Grokster Ltd.*, 545 U.S. 913, 928 (2005) ("The more artistic protection is favored, the more technological innovation may be discouraged; the administration of copyright law is an exercise in managing the trade-off."). In *Twentieth Century Music Corp.*, the U.S. Supreme Court rejected an effort to expand the exclusive performance rights of owners of musical works. *Id.* at 162. In deferring to legislative action, the Court observed: "Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. . . . The sole interest of the United States and the primary object in conferring the monopoly . . . lie in the general benefits derived by the public . . . ." *Id.* at 155-56 (quotation omitted). In certifying the question to this Court, the Second Circuit recognized that similar concerns are at issue here. "New York's interest in compensating copyright holders" must be balanced against the "clear costs" that would be imposed by announcing a performance right. *Flo & Eddie*, 821 F.3d at

270. The resolution of these competing interests is a "value judgment" and a "public policy choice." *Id.* at 270-71; *see also Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 62 F. Supp. 3d 325, 353 (S.D.N.Y. 2014) (acknowledging the "broader policy problems" presented). Such an "issue, involving perception and declaration of relevant public policy . . . [is] best and more appropriately explored and resolved by the legislative branch of our government." *Murphy*, 58 N.Y.2d at 302.

Second, the announcement of a New York performance right is a task "best left to the Legislature" because it would be "a significant change in our law." *Murphy*, 58 N.Y.2d at 301. New York has never imposed liability for unlicensed public performances of pre-1972 recordings. *See Flo & Eddie*, 821 F.3d at 269-70. As such, users "have 'adapted to an environment in which they do not pay for broadcasting pre-1972 sound recordings,'" and recognizing a performance right in pre-1972 recordings would "'upset those settled expectations' of radio broadcasters" and numerous other industries. *Id.* at 270 (quoting *Flo & Eddie*, 62 F. Supp. 3d at 352). A new public performance right would not only disrupt reasonable, investment-backed expectations but also, as the District Court acknowledged, potentially subject companies to retroactive damages notwithstanding decades of acquiescence by Flo & Eddie and the rest of the recording industry. *See Flo & Eddie*, 62 F. Supp. 3d at 352 (recognizing that a New York common law public performance right would "upend the analog and

digital broadcast industries" and "expos[e] [other broadcasters] to significant liability").

Third, legislative deference is required for the creation of a new, exclusive right of public performance for pre-1972 sound recordings because, as in *Murphy v. American Home Products*, "the definition of its configuration if it is to be recognized" is "of no less practical importance" than the "the fundamental question whether such liability should be recognized in New York" at all. 58 N.Y.2d at 301. The narrow performance right that Congress ultimately granted to owners of post-1972 recordings in 1995 demonstrates why a sound recording performance right is ill-suited to development as a matter of common law and must be crafted, if at all, by the legislative branch. After seventy years of declining to extend performance rights to sound recordings, Congress altered its course in the mid-1990s specifically to alleviate the "effects" that "new technologies" like digital radio broadcasting were beginning to have on the recording industry. H.R. Rep. No. 104-274, at 12 (1995). As the Senate assured in reporting the legislation, the new right would "do nothing to change or jeopardize the mutually beneficial economic relationship between the recording and traditional broadcasting industries," which had "grown and prospered with the availability and use of prerecorded music." S. Rep. No. 104-128, at 15 (1995). Instead, the "legislation [was] a *narrowly crafted response* to one of the concerns expressed by

representatives of the music community, namely that certain types of subscription and interactive audio services might adversely affect sales of sound recordings and erode copyright owners' ability to control and be paid for use of their work." *Id.* (emphasis added).

Congress carefully tailored the new right to precisely target these "concerns of record producers and performers regarding the effects that new digital technology and distribution systems might have on their core business without upsetting the longstanding business and contractual relationships among record producers and performers, music composers and publishers and broadcasters that have served all of these industries well for decades." S. Rep. 104-128, at 13 (1995); *see also* H.R. Rep. No. 104-274, at 12 (1995). As the Senate Report explained: "In deciding to grant a new exclusive right to perform copyrighted sound recordings publicly by means of digital audio transmission, *the Committee was mindful of the need to strike a balance among all of the interests affected thereby.*" S. Rep. No. 104-128, at 15 (1995) (emphasis added). The Senate noted that the "balance [struck] is reflected in the various limitations on the new performance right." *Id.* at 16; *see* 17 U.S.C. §§ 106(6), 114(d), 114(f), 801-805.

Thus, the complex statutory system that today governs the administration of the narrow federal performance right was the result of a number of considered policy judgments by Congress to limit and regulate the new right to protect the

various interests at stake. 17 U.S.C. §§ 106(6), 114, 801-805. First, the new right applied prospectively only, affording the many affected industries the opportunity to bring their businesses into compliance with the new law without punishing them for past, lawful conduct. *See* SRA of 1971, at §§ 2(3), 6. Second, Congress exempted a number of long-settled industries that historically performed records from the scope of the right—including traditional radio broadcasts, whether digital or analog, and transmissions "within a business establishment, confined to the premises or the immediately surrounding vicinity." 17 U.S.C. § 114(d)(1)(A), (C)(ii). Third, Congress simultaneously enacted a comprehensive compulsory licensing system to facilitate administration of the new right. *See* U.S.C. § 114(d)(2). The compulsory license guarantees public access to covered sound recordings and centrally regulates the applicable rates and other terms. *Id.*; *see* H.R. Rep. No. 104-274, at 14, 22-23 (1995). These licensing provisions prevent a rights-holder from unilaterally foreclosing access to previously available works, and thereby guarantee the public's continued access to digital radio. *See* 17 U.S.C. § 114(d)(2), (f). The compulsory license scheme also establishes detailed procedures by which "reasonable rates and terms of royalty payments" for the licensed transmissions will be determined. 17 U.S.C. § 114(f). And it addresses a host of other complex considerations involved in the licensing process, such as the antitrust implications of collective negotiation, 17 U.S.C. § 114(e); the division of

licensing proceeds among the various rights-holders that may hold interests in a recording, *id.* at § 114(g); and the terms of licensing a sound recording to an affiliated entity, *id.* at § 114(h).

Congress additionally established an intricate system of oversight for the new federal performing rights. It vested authority in the Copyright Royalty Board ("CRB") to adjudicate disputes over licensing rates and terms. *See* 17 U.S.C. §§ 114(f), 801-805. The CRB in turn designated SoundExchange as the sole organization authorized to collect and distribute royalties for exclusive rights in sound recordings. *See generally* 37 C.F.R. §§ 380, 382-84 (2014).[7] And, the U.S. Copyright Office maintains a central registry of copyright holders, through which the relevant rights-owners for post-1972 recordings may be identified.

In stark contrast to this comprehensive federal statutory scheme, the common law public performance right sought by Respondent lacks any structure or limitation whatsoever. Respondent purports to possess natural property rights in its sound recordings that are "all-encompassing." *Flo & Eddie*, 821 F.3d at 271;

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[7] In the recent spate of cases over the use of pre-1972 sound recordings, plaintiffs have repeatedly argued that SoundExchange is *not* authorized to collect and allocate royalties for such recordings. *See, e.g.*, Complaint at 6, *Sheridan v. iHeartMedia, Inc.*, No 1:15-cv-6747, Dkt. No. 1 (S.D.N.Y. filed Aug. 25, 2015); Complaint at 6, *Sheridan v. Sirius XM Radio, Inc.*, No. 2:15-cv-7576, Dkt. No. 1 (D.N.J. filed Oct. 19, 2015); Revised Master Complaint at 10, *In re iHeartMedia Pre-1972 Sound Recording Litigation*, No. 2:15-cv-4067, Dkt. No. 45 (C.D. Cal. filed Apr. 7, 2016).

*see also* Flo & Eddie's Mem. of Law in Opp'n to Sirius XM's Mot. for Summ. J. at 12, *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 62 F. Supp. 3d 325 (S.D.N.Y. 2014) (No. 13 Civ. 57684 (CM)) (arguing that "under New York law . . . the right and ability to exclude others from profiting from a recording is unqualified"). This entirely unrestricted right would contravene all prior experience under the existing federal performing rights system. There would be no exemptions for traditional industries like AM/FM broadcasters and small businesses. No compulsory licensing scheme to ensure continued access for emerging, innovative platforms. No specialized deliberative body to hold hearings and tailor the right to accommodate the competing interests of different constituencies. No specified organization to facilitate licensing or collect royalties. And no protection from federal antitrust scrutiny to allow such a private organization or other private solutions to emerge. *See* 17 U.S.C. § 114(e) (granting an antitrust law exemption for the collective negotiations of license terms and rates for sound recordings covered by the DPRA).

All of these costs and uncertainties that would result from the announcement of a common law public performance right illustrate precisely why this is not the kind of right to be announced by judicial fiat. The formidable task of creating any new right, while accommodating long settled industry expectations, appropriately addressing the varied circumstances of public performance, and creating the

necessary administrative infrastructure, is one for the Legislature alone. *Murphy*, 58 N.Y.2d at 301.

## III. The Declaration Of An Unqualified Common Law Performance Right Would Unleash Widespread, Inequitable Burdens On Numerous Industries

As the District Court acknowledged in this case, the common law public performance right in pre-1972 recordings sought by Respondent is simply "unprecedented . . . and will have significant economic consequences." *Flo & Eddie*, 62 F. Supp. 3d at 352. Common law performance rights "raise[] the specter of administrative difficulties in the imposition and collection of royalties, which would ultimately increase the costs consumers pay to hear broadcasts, and possibly make broadcasts of pre-1972 recordings altogether unavailable." *Id.* at 344. Further, "[o]ther broadcasters, including those who publicly perform media other than sound recordings, will undoubtedly be sued in follow-on actions, exposing them to significant liability." *Id.* at 352. If other states follow suit "or if holders of common law copyrights insist on licensing performance rights on a state-by-state basis . . . it could upend the analog and digital broadcasting industries," altogether. *Id.*

The unqualified performance right in pre-1972 recordings that Flo & Eddie seeks would overturn a century's worth of accepted industry practice, carefully preserved by Congress, overnight. Entire industries, developed over decades

according to reasonable and justifiable expectations, should not face this kind of upheaval and the threat of significant retroactive liability because of a judicially created common law right. Below, we address a mere sampling of the deleterious and impractical consequences that would flow from the announcement of a new common law performance right, and the resulting self-censorship that no doubt would restrict public access to performances of pre-1972 recordings across a variety of industries.

A. Satellite And Internet Radio Services

To date, digital radio service providers like Pandora and iHeartMedia have been assured access to sound recordings for performance over their services. Although post-1972 recordings have been vested with the performance right since 1995, Pandora, iHeartMedia, and similar services are guaranteed access to those recordings pursuant to the compulsory license provisions of Sections 112 and 114 of the Copyright Act. *See* Part II *supra*. As a result, satellite and Internet radio providers have structured their business models on the assumption that they will not be required to individually negotiate a license for each of the millions of records available as part of their radio offerings.

A New York common law public performance right would come without any comparable guarantee of access to records by satellite and Internet radio services. Instead, Amici Pandora and iHeart Media and similar companies would

be required to identify and negotiate with the owner of each pre-1972 recording on its service. The recording industry itself has acknowledged the infeasibility of broadcast services negotiating individual licensing rates with each sound recording owner. *See* "Comments of Recording Industry of America (RIAA) and American Association of Independent Music (A2IM)," at 24-28, *In the Matter of: Fed. Copyright Protection of Sound Recordings Fixed Before Feb. 15, 1972*, Dkt. No. 2010-4, U.S. Copyright Office (Jan. 31, 2011). Pre-1972 recordings are, by now, at least forty-four years old. Discerning who, if anyone, continues to own rights in them will be a near impossible task. Record labels go out of business. Artists and bandleaders die without clear heirs. There is no central registry of sound recording owners, nor is there any organization authorized to administer state law rights collectively, like SoundExchange is authorized to do at the federal level. Users could expend significant time and resources obtaining licenses and *still* face infringement liability when a new party comes along and claims to be the rightful owner. The potentially prohibitive transaction and compliance costs of individually licensing the rights to myriad records at least four-decades old will force digital radio providers to reduce or, in some cases, eliminate the transmission of pre-1972 recordings, which will be a loss to service providers, rightsholders in the recording, rightsholders in the underlying composition, and the public alike.

Further, because Pandora and iHeartMedia operate their services on a nationwide basis, a New York public performance right will impair these services in all fifty states. Any digital broadcasts of pre-1972 recordings received in New York will be rendered unlawful—even if those broadcasts are lawful where made. Digital broadcasters will be required to either develop technology that will allow them to identify in which states their millions of subscribers are located and block subscribers located in New York from hearing pre-1972 recordings (to the extent such technology is even possible) or pull pre-1972 recordings from their services altogether, even in those states that have expressly rejected the existence of the right Respondent asserts. *See, e.g.*, *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, No. 13-23182-CIV, 2015 WL 3852692, at *5 (S.D. Fla. June 22, 2015) ("[T]he Court finds that Florida common law does not provide Flo & Eddie with an exclusive right of public performance in The Turtles' sound recordings."), *question certified by Flo & Eddie, Inc. v. Sirius XM, Inc.*, --- F.3d ----, 2016 WL 3546433, at *6 (11th Cir. 2016); N.C. Gen. Stat. § 66-28 (2015); S.C. Code Ann. § 39-3-510 (2015). In this way, a common law public performance right threatens to substantially restrict the public's access to pre-1972 recordings not only in New York but nationwide.

B. Traditional Radio Broadcasters

In contrast to the carefully circumscribed federal digital performance right, Flo & Eddie seeks a common law performance right that would apply equally to traditional radio broadcasters. *Flo & Eddie*, 62 F. Supp. 3d at 338, 352. But, as the District Court noted below, "not paying royalties for public performance of sound recordings was an accepted fact of life in the broadcasting industry for the last century." *Id.* at 340. Indeed, far from demanding license fees for radio broadcasts, record labels have historically encouraged them because "[e]xposure of music recordings to the buying public through free broadcasting [was] a critical part of the promotion of records, tapes, CDs, music videos, and concert tickets . . . ." *Testimony of the NAB Before the H. Judiciary Comm. Subcomm. on Courts & Intellectual Property: Hearing on H.R. 1506*, §A (June 21, 1995). In fact, "[t]he recording industry spen[t] mi[ll]ions of dollars *promoting* their product to broadcasters" because airplay drove sales. *Id.* at §§ A, C (June 21, 1995) (emphasis added).

In recognition of these historical relationships and practices, Congress extended a performance right solely to sound recordings performed by "digital audio transmission" and not to performances by terrestrial radio broadcasters. S. Rep. No. 104-128, at 15 (1995); *see* 17 U.S.C. § 106(6). As a policy matter, traditional broadcasting simply did not present the problems that the federal

performance right was designed to address. S. Rep. No. 104-128, at 15 (1995) (Congress intended to extend copyright only to "digital transmissions" of sound recordings, "without imposing new and unreasonable burdens on radio and television broadcasters, which often promote and *appear to pose no threat to, the distribution of sound recordings*") (emphasis added).

To this day, traditional broadcasters do not pay for the public performance of any record. Indeed, the record in this case confirms that Flo & Eddie never even asked terrestrial radio stations to pay royalties or ask its permission to play its pre-1972 recordings, despite being well aware that its records have been broadcast for decades. Nevertheless, Flo & Eddie indiscriminately demands an unqualified common law performance right that would apply to terrestrial broadcasters as well. *Flo & Eddie*, 62 F. Supp. 3d at 338.

The declaration of such a right would "upend the . . . broadcasting industr[y]" and trigger "profound economic consequences." *Id.* at 338, 352. Radio stations, having never been required to license the record play that is their sole business, will not have allocated the resources or built the infrastructure necessary to do so now. Broadcasters would be forced to choose between attempting to identify and negotiate with individual rights-holders for *each* record—an enormously burdensome task—or face wholly uncertain liability in defending

against lawsuits premised on an entirely undefined right. Faced with such options, broadcasters may choose to stop playing pre-1972 records altogether.

C. Restaurants, Bars, And Other Small Businesses

A third group of traditional record users—which the District Court did not even acknowledge—includes the many thousands (perhaps millions) of New York small business owners that routinely play records for their customers' enjoyment. Restaurants, bars, retail establishments, and other businesses do not pay a royalty to perform sound recordings of any kind on their premises or in the immediate vicinity. Indeed, Congress specifically exempted many of them from the scope of the federal right even as to the compositions underlying the sound recordings, freeing them from any licensing obligations in relation to their performances of recorded music whatsoever. *See* 17 U.S.C. §§ 110, 114(d)(1)(C)(ii).

Here again, an unqualified and all-encompassing common law performance right will overthrow accepted and long-settled practices for which liability has never attached. For the first time in history, any restaurant or diner or bowling alley in New York would be susceptible to suit for playing pre-1972 recordings on the premises. Small businesses, in particular, lack the resources to identify and negotiate licenses with individual rightsholders. They are susceptible to accidental infringement and they may self-censor other content too. As a result, in order to avoid potential liability, many smaller establishments may be forced to stop

playing pre-1972 recordings for their customers, thereby limiting public access to these recordings.

D. Local Television Broadcasters And Cable Television System Operators

In addition to constraining *intentional and knowing* users of pre-1972 recordings, a new common law public performance right implicates a vast number of *unintentional and unknowing* users that only transmit performances of sound recordings as part of other services. For example, because the federal performance right in post-1972 recordings is limited to "digital audio transmissions," 17 U.S.C. § 106(6), local television broadcasters do not need a license to perform the copyrighted sound recordings synchronized with the audio-visual programming they transmit. But, under an unqualified common law performance right, they may be required to license pre-1972 recordings. Because much of the programming broadcast on local television is produced by third parties, broadcasters may not even know which sound recordings are being performed, let alone whether they are pre-1972 recordings, or who owns them. *See Meredith Corp. v. SESAC LLC*, 1 F. Supp. 3d 180, 187-88 (S.D.N.Y. 2014) ("As a practical matter, a television station cannot negotiate separately with the holder of the rights to each copyrighted work within each of its programs.") (discussing analogous problem for musical compositions). Even though Congress has exempted audio-visual transmissions from the performance right afforded to sound recordings under federal copyright

law, television broadcasters now would risk liability under a New York common law performance right.

The same is true of cable system operators who retransmit such local broadcasts. A retransmission of a public performance is itself a public performance. But, under federal law, cable system operators do not need a license for secondary performances of sound recordings featured in the television programming that they retransmit. Accordingly, cable system operators currently have no system in place for identifying sound recordings that might subject them to liability. In order to prevent future state law liability, retransmitters would need to create and implement procedures to screen all content for pre-1972 sound recordings, and negotiate licenses or self-censor content accordingly. The resulting transaction and compliance costs would be enormous, if not insurmountable, and self-censorship to avoid potential liability would further reduce the storehouse of content available to the public.

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And the list goes on. A host of other entities, ranging from online service providers to non-commercial entities, such as municipalities, educational institutions, and museums, among others, publicly perform music. The policy implications of subjecting all such entities to a New York state law performance right are equally far-reaching. These myriad, complex policy considerations raised

by the effects of any new right upon widely varied, competing interests must be left to the Legislature to resolve. They fall far outside the institutional competence of a court at common law.

## CONCLUSION

For the foregoing reasons, and the reasons set forth in Sirius XM's briefing, this Court should answer the certified question in the negative and hold that there is no right of public performance for owners of pre-1972 sound recordings under New York law.

Dated: New York, New York
September 1, 2016

Respectfully submitted,

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*iHeartMedia, Inc.*

# Exhibit 1

## Subsidiaries of iHeartMedia, Inc.

1567 Media, LLC
AMFM Broadcasting, Inc.
AMFM Broadcasting Licenses, LLC
AMFM Operating, Inc.
AMFM Radio Licenses, LLC
AMFM Texas, LLC
AMFM Texas Broadcasting, LP
AMFM Texas Licenses, LLC
Austin Tower Company
Capstar Radio Operating Company
Capstar TX, LLC
CC Broadcast Holdings, Inc.
CC CV LP, LLC
CC Finco, LLC
CC Finco Holdings, LLC
CC Licenses, LLC
CCHCV LP, LLC
CCOI Holdco Parent I, LLC
CCOI Holdco Parent II, LLC
CCOI Holdco Sub I, LLC
CCOI Holdco Sub II, LLC
Christal Radio Sales, Inc.
Cine Guarantors II, Inc.
Citicasters Co.
Citicasters Licenses, Inc.
Clear Channel Adshel, Inc.
Clear Channel Airports of Georgia, Inc.
Clear Channel Airports of Texas, JV
Clear Channel Brazil Holdco, LLC
Clear Channel Broadcasting Licenses, Inc.
Clear Channel Electrical Services, LLC
Clear Channel Holdings, Inc.
Clear Channel Interstate, LLC
Clear Channel Investments, Inc.
Broader Media, LLC
Broader Media Holdings, LLC
Clear Channel Metra, LLC
Clear Channel Metro, LLC
Clear Channel Mexico Holdings, Inc.
Clear Channel Outdoor, Inc.
Clear Channel Outdoor Holdings, Inc.
Clear Channel Outdoor Holdings Company Canada
Clear Channel Peoples, LLC
Clear Channel Real Estate, LLC
Clear Channel Real Estate Services, LLC
Clear Channel Spectacolor, LLC
Clear Channel Worldwide Holdings, Inc.
Clear Channel/Interstate Philadelphia, LLC
Critical Mass Media, Inc.
Eller-PW Company, LLC
Exceptional Outdoor Advertising, Inc.
Get Outdoors Florida, LLC
iHeartMedia + Entertainment, Inc.
iHeartMedia Capital I, LLC
iHeartMedia Capital II, LLC
iHeartCommunications, Inc.
iHeartMedia Management Services, Inc.
iHeartMedia Tower Co. Holdings, LLC
iHM Identity, Inc.
Interspace Airport Advertising International, LLC

IN-TER-SPACE Services, Inc.
Katz Communications, Inc.
Katz Media Group, Inc.
Katz Millennium Sales & Marketing, Inc.
Katz Net Radio Sales, Inc.
Keller Booth Sumners Joint Venture
Kelnic II Joint Venture
M Street Corporation
TTWN Networks, LLC
TTWN Media Networks, LLC

Adshel (Brasil) Ltda
Adshel Ltda
Adshel Mexico
Adshel New Zealand Ltd.
Adshel Street Furniture Pty Ltd
Aircheck India Pvt. Ltd.
Allied Outdoor Advertising Ltd.
Arcadia Cooper Properties
Barrett Petrie Sutcliffe London Ltd.
Barrett Petrie Sutcliffe Ltd.
C.F.D. Billboards Ltd.
CCH Holding BV
CCO International Holdings BV
CCO Ontario Holdings, Inc.
China Outdoor Media Investment (HK) Co., Ltd.
China Outdoor Media Investment Inc.
Cine Guarantors II, Ltd.
Cine Movile SA de CV
Citysites Outdoor Advertising (Albert) Pty Ltd.
Citysites Outdoor Advertising Pty Ltd.
Citysites Outdoor Advertising (South Australia) Pty Ltd.
Citysites Outdoor Advertising (West Australia) Pty Ltd.
Clear Channel CAC AG

Metro Networks Communications, LP
Metro Networks Services, Inc.
Miami Airport Concession LLC
Milpitas Sign Company, LLC
Outdoor Management Services, Inc.
Premiere Networks, Inc.
SmartRoute Systems, Inc.
Sunset Billboards, LLC
Terrestrial RF Licensing, Inc.
TLAC, Inc.
Tower FM Consortium, LLC

Cinemobile Systems International NV
Clear Channel International BV
Clear Channel International Holdings BV
Clear Channel Adshel AS
Clear Channel Affitalia SRL
Clear Channel AWI AG
Clear Channel Baltics & Russia AB
Clear Channel Banners Ltd.
Clear Channel Belgium Sprl
Clear Channel Brazil Holding S/A
Clear Channel (Central) Ltd.
Clear Channel Chile Publicidad Ltda
Clear Channel CV
Clear Channel Danmark A/S
Clear Channel Entertainment of Brazil Ltda
Clear Channel Espana SLU
Clear Channel Espectaculos SL
Clear Channel Estonia OU
Clear Channel European Holdings SAS
Clear Channel Felice GmbH
Clear Channel France SAS
Clear Channel GmbH
Clear Channel Hillenaar BV
Clear Channel Holding AG
Clear Channel Holding Italia SPA

Clear Channel Holdings CV
Clear Channel Holdings, Ltd.
Clear Channel Hong Kong Ltd.
Clear Channel Infotrak AG
Clear Channel International Ltd.
Clear Channel Interpubli AG
Clear Channel Ireland Ltd.
Clear Channel Italy Outdoor SRL
Clear Channel Jolly Pubblicita SPA
Clear Channel KNR Neth Antilles NV
Clear Channel (Midlands) Ltd.
Clear Channel NI Ltd.
Clear Channel (Northwest) Ltd.
Clear Channel Norway AS
Clear Channel Outdoor Company Canada
Clear Channel Outdoor Hungary KFT
Clear Channel Outdoor Mexico SA de CV
Clear Channel Outdoor Mexico, Operaciones SA de CV
Clear Channel Outdoor Mexico, Servicios Administrativos, SE de CV
Clear Channel Outdoor Mexico, Servicios Corporativos, SE de CV
Clear Channel Outdoor Pty Ltd.
Clear Channel Outdoor Spanish Holdings SL
Clear Channel Overseas Ltd.
Clear Channel Pacific Pte Ltd.
Clear Channel Aida GmbH
Clear Channel Ofex AG
Clear Channel Plakatron AG
Clear Channel Poland SP .Z.O.O.
Clear Channel Sales AB
Clear Channel Sao Paulo Participacoes Ltda
Clear Channel (Scotland) Ltd.
Clear Channel Schweiz AG
Clear Channel Singapore Pte Ltd.
Clear Channel Smartbike SLU
Clear Channel South West Ltd.
Clear Channel South America S.A.C.
Clear Channel (South West) Ltd.
Clear Channel Suomi Oy
Clear Channel Sverige AB
Clear Channel Tanitim Ve Iletisim AS
Clear Channel UK Ltd
Clear Channel UK One Ltd.
Clear Channel UK Two Ltd.
Clear Channel UK Three Ltd.
Clear Media Limited
Comurben SA
CR Phillips Investments Pty Ltd.
Eller Holding Company Cayman I
Eller Holding Company Cayman II
Eller Media Asesorias Y Comercializacion Publicitaria Ltda
Eller Media Servicios Publicitarios Ltda
Epiclove Ltd.
Equipamientos Urbanos de Canarias SA
Equipamientos Urbanos Del Sur SL
Equipamientos Urbanos - Gallega de Publicidad Disseno AIE
FM Media Ltd.
Foxmark (UK) Ltd.
Giganto Holding Cayman
Giganto Outdoor SA
Grosvenor Advertising Ltd.
Hainan Whitehorse Advertising Media Investment Company Ltd.
Illuminated Awnings Systems Ltd.
Interspace Airport Advertising Australia Pty Ltd.
Interspace Costa Rica Airport Advertising SA
Interspace Airport Advertising Curacao NV

Interspace Airport Advertising Netherlands Antilles NV
Interspace Airport Advertising West Indies Ltd.
Interspace Airport Advertising New Zealand Ltd.
Interspace Airport Advertising Grand Cayman
Interspace Airport Advertising Trinidad & Tobago Ltd.
Interspace Airport Advertising TCI Ltd.
KMS Advertising Ltd.
L & C Outdoor Ltda.
Mars Reklam Producksiyon AS
Maurice Stam Ltd
Media Monitors Dominican Republic
Media Monitors (M) Sdn. Bhd.
Ming Wai Holdings Ltd.
More O'Ferrall Ireland Ltd.
Multimark Ltd.
Nitelites (Ireland) Ltd.
Nobro SC
NWP Street Limited
Outstanding Media I Stockholm AB
Paneles Napsa. S.A.
Parkin Advertising Ltd.
Perth Sign Company
Phillips Finance Pty Ltd.
Phillips Neon Pty Ltd.
Postermobile Advertising Ltd.
Postermobile Ltd.
Premium Holdings Ltd.
Premium Outdoor Ltd.
Publicidade Klimes Sao Paulo Ltda
Racklight SA de CV
Radio Computing Services (Africa) Pty Ltd.
Radio Computing Services (NZ) Ltd.
Radio Computing Services (SEA) Pte Ltd.
Radio Computing Services (Thailand) Ltd.
Radio Computing Services (UK) Ltd.
Radio Computing Services Canada Ltd.
RCS Radio Computing China, Inc.
Radio Computing Services of Australia Pty Ltd.
Radio Computing Services (India) Pvt. Ltd.
RCS Europe SARL
Regentfile Ltd.
Rockbox Ltd.
Service2Cities
Shelter Advertising Pty Ltd.
SIA Clear Channel Latvia
Signways Ltd.
Sites International Ltd.
Storm Outdoor Ltd.
Street Furniture (NSW) Pty Ltd.
Team Relay Ltd.
The Canton Property Investment Co. Ltd.
The Kildoon Property Co. Ltd.
Torpix Ltd.
Town & City Posters Advertising. Ltd.
Tracemotion Ltd.
Trainer Advertising Ltd.
UAB Clear Channel Lietuva
Urban Design Furniture Pty Ltd
Vision Media Group UK Limited
Vision Posters Ltd.