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2 **UNITED STATES COURT OF APPEALS**  
3 **FOR THE SECOND CIRCUIT**

4  
5 August Term, 2015

6  
7 Argued: February 2, 2016

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9 Question Certified: April 13, 2016

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11 Certified Question Answered: December 20, 2016

12  
13 Decided: February 16, 2017

14  
15 Docket No. 15-1164-cv  
16

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

20  
21 *Plaintiff-Appellee,*

22  
23 – v. –

24  
25 SIRIUS XM RADIO, INC., a Delaware Corporation,

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27 *Defendant-Appellant,*

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29 DOES, 1 THROUGH 10,

30  
31 *Defendants.*  
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33  
34 Before: CALABRESI, CHIN, and CARNEY, *Circuit Judges.*  
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36 Defendant-Appellant Sirius XM Radio, Inc., appeals from the November 14, 2014  
37 and December 12, 2014 orders of the United States District Court for the Southern District  
38 of New York (McMahon, *J.*) denying its motions, respectively, for summary judgment and  
39 for reconsideration in connection with Plaintiff-Appellee Flo & Eddie, Inc.’s copyright  
40 infringement suit. *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, No. 13-cv-5784 (CM), 2014 WL  
41 7178134 (S.D.N.Y. Dec. 12, 2014) (denial of motion for reconsideration); *Flo & Eddie, Inc. v.*  
42 *Sirius XM Radio, Inc.*, 62 F. Supp. 3d 325 (S.D.N.Y. 2014) (denial of motion for summary  
43 judgment). We previously concluded that the appeal raised a significant and unresolved  
44 issue of New York law that is determinative of this appeal: Is there a right of public

1 performance for creators of pre-1972 sound recordings under New York law and, if so, what  
2 is the nature and scope of that right?

3 We certified this question to the New York Court of Appeals. *Flo & Eddie, Inc. v.*  
4 *Sirius XM Radio, Inc.*, 821 F.3d 265 (2d Cir. 2016). The Court of Appeals accepted  
5 certification and responded that New York common law does not recognize a right of public  
6 performance for creators of pre-1972 sound recordings. *Flo & Eddie, Inc. v. Sirius XM Radio,*  
7 *Inc.*, 2016 WL 7349183 (N.Y. Dec. 20, 2016).

8 In light of this ruling, we REVERSE the district court’s denial of Appellant’s motion  
9 for summary judgment and REMAND with instructions to grant Appellant’s motion for  
10 summary judgment and to dismiss the case with prejudice.

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26 Inc., in support of *Defendant-Appellant*

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30 PER CURIAM:

31 On September 3, 2013, Flo & Eddie, Inc. (“Appellee”), a California corporation that  
32 asserts it owns the recordings of “The Turtles,” a well-known rock band with a string of hits  
33 in the 1960s, sued Sirius XM Radio, Inc. (“Appellant”), a Delaware corporation that is the  
34 largest radio and internet-radio broadcaster in the United States. The suit was brought on  
35 behalf of itself and a class of owners of pre-1972 recordings; it asserted claims for common-  
36 law copyright infringement and unfair competition under New York law. In particular,  
37 Appellee alleged that Appellant infringed Appellee’s copyright in The Turtles’ recordings by

1 broadcasting and making internal reproductions of the recordings (e.g., library, buffer and  
2 cache copies) to facilitate its broadcasts.

3 In due course, Appellant moved for summary judgment on two grounds. Appellant  
4 contended first that there is no public-performance right in pre-1972 recordings under New  
5 York copyright law, and hence that its internal reproductions of these recordings were  
6 permissible fair use. Second, Appellant argued that a state law public performance right, if  
7 recognized, would be barred by the Dormant Commerce Clause. On November 14, 2014,  
8 the District Court (McMahon, *J.*) denied this motion. *Flo & Eddie, Inc. v. Sirius XM Radio,*  
9 *Inc.*, 62 F. Supp. 3d 325, 330 (S.D.N.Y. 2014).

10 On the first issue, the court concluded that New York does afford a common-law  
11 right of public performance to copyright holders, and that Appellant’s internal reproductions  
12 were correspondingly not fair use. *Id.* at 344-46. On the second issue, the court found that  
13 the recognition of a performance right did not implicate the Dormant Commerce Clause. It  
14 noted that, pursuant to *Sherlock v. Alling*, 93 U.S. (3 Otto) 99 (1876), such a right did not  
15 constitute a “regulation” of commerce. *Flo & Eddie, Inc.*, 62 F. Supp. 3d at 351–53.

16 Soon after, Appellant, with new counsel, filed a motion for reconsideration of the  
17 November 14, 2014 order. In the alternative, it asked the District Court to certify its  
18 summary judgment order for interlocutory appeal. The District Court denied Appellant’s  
19 motion for reconsideration, *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, No. 13-cv-5784, 2014  
20 WL 7178134 (S.D.N.Y. Dec. 12, 2014), but did certify both the summary judgment and  
21 reconsideration orders for interlocutory appeal, *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, No.  
22 13-cv-5784, 2015 WL 585641 (S.D.N.Y. Feb. 10, 2015).

1 Appellant then petitioned us to permit the interlocutory appeal, which we did. *Flo &*  
2 *Eddie, Inc. v. Sirius XM Radio, Inc.*, No. 15-cv-497, 2015 WL 3478159 (2d Cir. May 27,  
3 2015). After extensive briefing and oral argument, we concluded that the appeal raised a  
4 significant and unresolved issue of New York law that is determinative of this appeal: Is  
5 there a right of public performance for creators of pre-1972 sound recordings under New  
6 York law and, if so, what is the nature and scope of that right?

7 Accordingly, we certified this question to the New York Court of Appeals. *Flo &*  
8 *Eddie, Inc.*, 821 F.3d 265. The Court of Appeals accepted certification, and on December  
9 20, 2016, responded that New York common law does not recognize a right of public  
10 performance for creators of pre-1972 sound recordings. *Flo & Eddie, Inc. v. Sirius XM Radio,*  
11 *Inc.*, 2016 WL 7349183 (N.Y. Dec. 20, 2016).

12 Following the Court of Appeals' answer, we ordered the parties to submit letter briefs  
13 addressing the effect of the Court of Appeals' decision on the appeal before this court. In its  
14 letter brief, Appellee argued that the Court of Appeals "did not resolve [Appellant's] liability  
15 for unauthorized copying of [Appellee's] recordings and engaging in unfair competition by  
16 publicly performing those copies for profit, which the District Court had identified as  
17 separate and independent grounds for finding [Appellant] liable." Letter Brief for Appellee,  
18 *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 821 F.3d 265 (2d Cir. 2016) (No. 15-1164), ECF  
19 No. 215.

20 In our opinion certifying the question to the Court of Appeals, however, we noted  
21 and held that

22 The fair-use analysis applicable to this copying . . . is bound up  
23 with whether the ultimate use of the internal copies is  
24 permissible. As a result, the certified question *is determinative* of  
25 Appellee's copying claims . . . . Similarly, Appellee's unfair-

1 competition claim depends upon the resolution of the certified  
2 question.

3  
4 *Flo & Eddie, Inc.*, 821 F.3d at 270 n.4 (emphasis added).

5 The answer to the certified question being determinative of the other claims, we  
6 REVERSE the district court's denial of Appellant's motion for summary judgment and  
7 REMAND to that court with instructions to grant Appellant's motion for summary  
8 judgment and to dismiss the case with prejudice.

A True Copy

Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals, Second Circuit

 Catherine O'Hagan Wolfe

