

Pandora Beats The Turtles' Pre-1972 Copyright Suit

By **Jasmin Boyce**

Law360 (July 27, 2023, 6:53 PM EDT) -- A California federal judge has agreed to let Pandora out of a copyright suit lodged against it by 1960s rock group The Turtles over royalty payments for pre-1972 records, finding that the music duo's infringement claim sunk due to the "absence of a public performance right."

U.S. District Judge Philip S. Gutierrez awarded Pandora Media LLC summary judgment Tuesday in a proposed class action lodged against it by Flo & Eddie Inc. — the duo of Howard Kaylan and Mark Volman, who founded The Turtles — that accused the platform of poaching pre-1972 recordings. Judge Gutierrez found that Flo & Eddie has no viable copyright claim since it lacks "an exclusive right to publicly perform its pre-1972 sound recordings."

According to the order, "courts across this country" have found that the duo's infringement claims "rise and fall with the public performance right."

"The Ninth Circuit has all but said that Flo & Eddie's copying claims against Pandora fail as a matter of law," Judge Gutierrez added. "Thus, even if the court would like to independently consider these claims, its 'hands are tied.'"

Flo & Eddie filed the \$25 million proposed class action against Pandora in October 2014, alleging the streaming service infringed copyrights for songs made before 1972.

In 2015, Judge Gutierrez initially rejected Pandora's motion to strike. But Pandora immediately appealed the decision to the Ninth Circuit, which vacated the ruling in October 2019. The appellate court said in its short opinion that there were unanswered factual questions related to whether the Music Modernization Act preempts Flo & Eddie's claims.

On remand, Pandora told Judge Gutierrez in an October 2020 hearing that the suit should be tossed under California's anti-SLAPP statute because the claims are preempted by the MMA. The state's anti-SLAPP, or strategic lawsuit against public participation, statute stops lawsuits intended to censor or silence critics by burdening them with the cost of a legal fight until they abandon their criticism.

The MMA, enacted in 2018, gives "federalized" protection for pre-1972 recordings, and simultaneously preempted all common-law and state-law claims based on broadcasts made via internet radio, Pandora said at the time. According to the platform, the owners of such recordings, like Flo & Eddie, receive limited royalties for past usage, but the price is the dismissal of these kinds of lawsuits.

But Judge Gutierrez shot down the renewed motion to strike that same month, finding that the streaming service's broadcasting of songs owned by Flo & Eddie doesn't qualify as protected free speech.

Two years later, Pandora sought to be awarded summary judgment in the suit through a November 2022 motion. According to the filing, "Flo & Eddie's claims are no longer novel" nearly a decade after the dispute was initially filed.

"Flo & Eddie's claims fail on the merits as a matter of black-letter copyright law," Pandora contended. "As every other court to consider the issue has found, copying sound recordings as part of operating a lawful digital radio service is fair use as a matter of law. This court should now fully and finally close the door on Flo & Eddie's claims and grant summary judgment in Pandora's favor."

Despite ultimately siding with Pandora, Judge Gutierrez said Tuesday that "the court pauses to acknowledge that Flo & Eddie's argument tracks how copyright ownership is generally understood to operate under federal and state law."

The parties and their respective counsel did not immediately respond to requests for comment on Thursday.

Flo & Eddie and the proposed class are represented by Maryann R. Marzano of Gradstein & Marzano PC, Rohit D. Nath, Kalpana Srinivasan, Stephen E. Morrissey and Steven G. Sklaver of Susman Godfrey LLP, and Evan S. Cohen of Cohen Music Law.

Pandora is represented by Andy Gass, Jessica Stebbins Bina, Elana Nightingale Dawson, Joe Wetzel, Carolyn Homer and Ray Gans of Latham & Watkins LLP.

The suit is Flo & Eddie Inc. v. Pandora Media LLC et al., case number 2:14-cv-07648, in the U.S. District Court for the Central District of California.

--Additional reporting by Lauren Berg. Editing by Scott Russell.