From Monopoly to Intellectual Property: Music Piracy and the Remaking of American Copyright, 1909–1971

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In the last decade, intellectual property has been the subject of renewed political debate and scholarly engagement in the United States. Americans have divided over issues ranging from online piracy of music to the digitization of books by Google, while movements such as Copyleft and Creative Commons have emerged to challenge what they see as overly restrictive property rights. The commotion around copyright reflects a real change in the way visual or audio cultural goods have been produced and enjoyed in the late twentieth and early twenty-first centuries. As technologies such as magnetic recording and the Internet made it easier to copy and distribute works, lawmakers responded by strengthening the power of copyright and expanding its scope to cover new kinds of expression.[1]

But copyright reform was more than a reaction to changing technologies. Lawmakers had to weigh competing definitions of the public good and ideas about the purpose of copyright to determine how citizens should be permitted to use cultural works. Music offers a key barometer of changing attitudes toward property rights, as song and sound have sparked legal wrangling from the days of the wax cylinder to the era of the mixtape. Americans have argued for decades over how—and whether—sound recordings could and should be protected by copyright. The passage of the 1971 Sound Recording Act opened the way to a series of wide-ranging reforms: Congress lengthened copyright terms in 1976 and 1998, banned the rental of sound recordings in 1984, and criminalized efforts to circumvent antipiracy mechanisms on media such as compact discs; in 2001 the Supreme Court ruled against networks that permitted the exchange of digitally compressed audio files without the permission of copyright owners. Such laws and rulings reflect a broad consensus that federal protection for recordings is not only appropriate but also essential to the health of the U.S. economy. This article examines how such a consensus emerged in the twentieth-century United States, as the pleas of business for greater protection eclipsed traditional concerns about the monopoly power of copyright. It uses the story of music piracy to trace the arc of American political thought about copyright, showing how jurists and lawmakers gradually accepted a new rationale for property

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[1] Robert S. Boynton, "The Tyranny of Copyright," *New York Times,* Jan. 25, 2004, p. 40.

rights based on the value of a firm's investment in the processes of recording and marketing music to the public.[2]

After Congress declined to provide copyright protection for recordings in 1909, courts and state legislatures reached for alternative ways to protect record companies from having their products copied. By the 1950s, remedies for piracy increasingly focused on the "good will" that the public felt toward a particular recording; when pirates copied records, they unfairly profited from that popularity after the original producers had spent great sums of money to promote the music.

Historians have long recognized the importance of advertising to the political economy of the twentieth century in their examinations of how businesses used advertising to imbue mass marketed products with symbolic value. Record companies sought to control that symbolic value by lobbying for relief from piracy. In conferring ownership rights for sound recordings, Americans forged a new logic of copyright as a beneficial and necessary protection for investment and provided the philosophical foundation for a robust expansion of intellectual property rights in the final decades of the twentieth century.[3]

The idea that anyone could own recorded sound was far from apparent during much of the nineteenth and twentieth centuries. In the 1890s firms copied each other's recordings on wax cylinders and disks, and record collectors began copying rare and out-of-print disks in the 1930s. For a time, "bootleggers" of obscure jazz, classical, folk, and blues recordings enjoyed the major record companies' benign neglect. "It wasn't worth the trouble to put out that moldy stuff," a record executive explained in 1950. "It never sold anyway." Copyright-based industries such as book and music publishing found that they had little clout in Congress during the Progressive Era, and their repeated attempts to pass a copyright law for sound recordings attest to the surprising degree of resistance that record companies encountered during the first half of the twentieth century. In contrast, copyright interests encountered a far more favorable political climate in the late twentieth century, when the producers of intellectual property influenced copyright reform, law enforcement, and international trade negotiations.[4]

In recent years, numerous scholars and activists have challenged the shift toward stronger intellectual property laws. Siva Vaidhyanathan and Lawrence Lessig have documented how corporations successfully broadened the scope and lengthened the duration of their property rights, but they do not account for why legal authorities were so much more solicitous of copyright claims at the end of the twentieth century than at the beginning. Kembrew McLeod and Lee Marshall have suggested that the expansion of intellectual property was rooted in a romantic or individualist conception of the author and his or her right to benefit more or less indefinitely from creative works. However, such arguments neither explain why American copyright law was so weak during the nineteenth-century heyday of individualism and romanticism nor why copyright interests began to achieve substantially greater political gains in the 1960s and 1970s.[5]

[2] Sound Recording Act of 1971, 85 Stat. 391 (1971); Copyright Act of 1976, 90 Stat. 2541 (1976); Record Rental Amendment of 1984, 98 Stat. 1727 (1984); Digital Millennium Copyright Act, 112 Stat. 2860 (1998); Sonny Bono Copyright Term Extension Act, 112 Stat. 2827 (1998); *A&M Records v. Napster,* 239 F.3d 1004 (9th Cir. 2001); *Metro-Goldwyn-Mayer Studios v. Grokster,* 545 U.S. 913 (2005).

[3] Roland Marchand, *Advertising the American Dream: Making Way for Modernity, 1920–1940* (Berkeley, 1985), 348.

[4] Frederic Ramsey Jr., "Contraband Jelly Roll," *Saturday Review,* Sept. 30, 1950, p. 64.

[5] Siva Vaidhyanathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity* (New York, 2001); Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (New York, 2004); Kembrew McLeod, *Owning Culture: Authorship, Ownership, and*

Rather, the proponents of stronger copyright employed a utilitarian argument: to sustain a vital sector of the economy, the state needed to protect the capital invested in cultural goods. Discussions of copyright reform centered more on the practical needs of business than on the romantic invocation of authorship. When they decried piracy, record company spokesmen insisted that their firms should be able to reap the maximum benefit from their investment in producing and marketing costly products such as sound recordings. In the 1960s the efflorescence of piracy on vinyl disks and magnetic tape unified different interests in the music business, which, together, successfully contended that piracy threatened the fiscal soundness of the industry as a whole—that is, the ability of record companies to fund the recording and marketing of music to the public.

By fighting music piracy in the 1960s, the recording industry blazed a trail for other interests that were seeking to expand the scope and strength of American copyright law. Record companies created the template for a broader rethinking of copyright, recasting it as a safeguard for capital investment and an impetus to economic growth rather than a limited incentive for artistic creation. Once Congress and the courts embraced the idea that stronger property rights were a matter of economic necessity, a variety of copyright and patent interests were able to press for further protections under the common rubric of intellectual property, particularly as the U.S. economy foundered on the shoals of deindustrialization, foreign competition, and recession in the 1970s. As the story of sound recording shows, the move toward expansive intellectual property rights resulted from a new way of thinking about the utility of music—and other forms of mediated expression—in the broader economy of the twentieth-century United States. A new concept of ownership that emerged in debates over piracy in the 1950s and 1960s gradually supplanted the progressive tradition of limiting monopolistic rights. Subsequently, the economic turmoil of the 1970s reinforced this robust new regime of intellectual property law, as record companies and other producers of "information" consolidated their political gains.

Reforming Copyright in the Progressive Era

Until the 1970s American copyright law was notoriously limited in nature. The Constitution aimed to "promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." The fledgling Congress modeled its first copyright law, in 1790, on the British system forged in 1710 by the Statute of Anne, which endowed authors with the right, previously held by the printing guilds, to own their written works while imposing a time limit on the duration of that right. Only books, maps, and charts were eligible for copyright protection, while other creative work such as written music was left out. Congress moved to add sheet music in 1831 and photography in 1865, but piracy, particularly of foreign works, remained widespread in the rapidly developing nation. Because it would require substantial alteration of the nation's copyright law, the United States refused to join the 1886 Berne Convention establishing minimum standards of copyright among European nations. America only partially acceded to the convention's demands over

Intellectual Property Law (New York, 2001); Lee Marshall, *Bootlegging: Romanticism and Copyright in the Music Industry* (Thousand Oaks, 2005).

a century later, and American terms of copyright protection—at first a maximum of twenty-eight years, and then fifty-six years—remained significantly shorter than those of other nations until 1976.[6]

For much of its history, American copyright was animated by principles of free competition and commercial incentive. In contrast to the experience of continental Europe, particularly France, American lawmakers and judges tended to speak less in terms of an author's inviolable natural rights and more in terms of maximizing public access to creative works—which could require weaker or stronger property rights, depending on the situation. The legal scholar Jane C. Ginsburg has illustrated how both American and French thinkers mixed moral and pragmatic arguments in their writings on copyright during the revolutionary era of the late eighteenth century; in other words, the French were not solely committed to the idea of transcendent "moral rights," nor did the Americans focus only on the practical aim of providing authors with incentives to furnish the public with useful works. However, the differences between U.S. law (with its limited lifespan and scope) and French copyright (which covered a wider array of works and provided artists with the right to preserve the integrity of their work) remained more significant than the similarities.[7]

American publishers and authors recognized the relative shortcomings of their copyright laws. In 1912 the publisher Richard Rogers Bowker wrote of his efforts to lobby for stronger copyright law, dreaming of a day when America could "enter on even terms the family of nations and become part of the United States of the world." Many of Bowker's allies envied Europe. "I know that in France you cannot play a tune on a hand organ without the permission of the holder of the musical copyright," Brander Matthews told Congress in 1906. Matthews, a Columbia University literature professor, was testifying in favor of stronger copyright protections, but he did not directly say that he would want music to be regulated in the same way in America.[8]

If even scholars such as Matthews, whose writings had been protected since the Copyright Act of 1790, disliked the situation, the pioneers of the sound recording industry felt even more vulnerable to piracy in the late nineteenth and early twentieth centuries. Thomas Edison had devised a way to inscribe sound vibrations on tinfoil in 1877, and intense competition ensued in the following decades as different firms experimented with wax cylinders, wax and shellac disks, and the perforated paper rolls that fed mechanical pianos. As the Columbia Phonograph Company, the Gramophone Company, and other manufacturers fought over the patents for these devices, they paid little attention to the question of who owned the rights to the performances that were contained on a disk or a cylinder. Written music had not been included in the earliest federal copyright law;

[6] U.S. Const. art. 1, sec. 8, cl. 8; Vaidhyanathan, *Copyrights and Copywrongs,* 40, 44; Edward Samuels, *The Illustrated Story of Copyright* (New York, 2000), 31; Paul Goldstein, *Copyright's Highway: From Gutenberg to the Celestial Jukebox* (Stanford, 2003), 46; Henry Hansmann and Marina Santilli, "Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis," *Journal of Legal Studies,* 26 (Jan. 1997), 95, 96–97; Vaidhyanathan, *Copyrights and Copywrongs,* 25.

[7] Jane C. Ginsburg, "A Tale of Two Copyrights: Literary Property in Revolutionary France and America," in *Foundations of Intellectual Property Law,* ed. Robert P. Merges and Jane C. Ginsburg (New York, 2004), 285.

[8] Richard Rogers Bowker, *Copyright, Its History and Its Law: Being a Summary of the Principles and Practices of Copyright with Special Reference to the American Code of 1909 and the British Act of 1911* (Boston, 1912), x. On the quest to universalize copyright law, see Aubert J. Clark, "The Movement for International Copyright in Nineteenth-Century America" (Ph.D. diss., Catholic University of America, 1960). For the testimony of Brander Matthews, see "Stenographic Report of the Proceedings of the Librarian's Conference on Copyright, 1st Session, in New York City, May 31–June 2, 1905," in *Legislative History of the 1909 Copyright Act,* ed. E. Fulton Brylawski and Abe Goldman (1909; 6 vols., South Hackensack, 1976), I, 46.

recorded performances fell completely outside of the scope of copyright until Congress passed a landmark reform bill in 1909, and even then recordings themselves were not copyrightable for the next sixty years.[9]

When Congress took up the question of copyright reform in 1905, the leading lights of the new recording industry joined a bevy of other interests in seeking greater government protection. Famous artists such as the painter John La Farge, the writer Mark Twain, and the bandleader John Philip Sousa came to plead their cases. Virtually all were united in the goal of obtaining a longer copyright term—ideally, a standard of the author's life plus fifty years rather than the then-maximum term of fifty-six years from the date of publication. Spokesmen for the copyright interests pointed out that countries such as Russia had adopted the longer standard, but their argument met with significant resistance in Congress. Rep. William Sulzer quipped that Tsar Nicholas II could afford to provide such a long copyright term because the artist "does not get to live very long" in Russia. The photographers, composers, and novelists who came before Congress also demanded tougher penalties for copyright infringement. The music publisher George Furniss of the Oliver Ditson Company pointed out the difficulty of tracking down the sheet music pirates who had taken his company's hymns, changed the names, and sold altered copies to churches across the country. "It took us a long time to find them," he admitted, "because we were not all churchgoers ourselves."[10]

Music provided perhaps the thorniest problems for Congress. In 1908 the Supreme Court noted in *White-Smith v. Apollo* that song publishers could not prevent player piano companies from using their compositions to make piano rolls. Justice William Day reasoned that the rolls were merely parts of a machine and thus were not subject to copyright law. In his view, the holes punched in a paper roll were simply too different from the types of works traditionally covered by copyright, such as books or photographs—all of which were intelligible to the naked eye. In a concurring decision, though, Justice Oliver Wendell Holmes suggested that the legislative branch settle the issue of how to regulate "mechanical reproductions" of music. "On principle anything that mechanically reproduces that collocation of sounds ought to be held a copy," he wrote, "or, if the statute is too narrow, ought to be made so by a further act." Of course, music publishers and composers wanted to be able to license their compositions to the makers of piano rolls, disks, and cylinders. The recording companies, in turn, wanted to have the unique performances that they paid to have recorded and manufactured protected by copyright, distinct from the underlying composition on which they were based.[11]

Lawmakers in the Progressive Era were reluctant to meet all the demands put forth by various entertainment and media interests. When music publishers proposed to bar church choirs from sharing sheet music, they encountered derision among the members of the U.S. Senate Committee on Patents. Representing the publishers, A. R. Serven declared that permitting churches to share music amounted to "enforced charity." However, the committee chairman reminded Serven that copyright is "direct charity," because the publishers' rights were "purely statutory"—a privilege, not a right, extended to creators

[9] Reebee Garofalo, "From Music Publishing to MP3: Music and Industry in the Twentieth Century," *American Music,* 17 (Fall 1999), 325; Geoffrey Jones, "The Gramophone Company: An Anglo-American Multinational, 1898–1931," *Business History Review,* 59 (Spring 1985), 79; Copyright Act of 1909, 35 Stat. 1075 (1909).

[10] "Arguments before the Committee on Patents, May 2, 1906," in *Legislative History of the 1909 Copyright Act,* ed. Brylawski and Goldman, IV, 19–20.

[11] *White-Smith Music Publishing Company v. Apollo Company,* 209 U.S. 1, 20 (1908).

by the government. A more specific anxiety about the power of monopoly also gave the members of Congress pause. The player piano company Aeolian had made deals with various song publishers to retain the sole rights to reproduce their compositions if the Supreme Court decided in *White-Smith v. Apollo* that the owners of song copyrights could control a song's use by recording companies. This scheme raised the specter of a vast trust that could monopolize the nation's music and dictate how most compositions were performed and recorded; the case seemed part of a trend toward monopolization in all industries, occurring at precisely the time that Edison and his competitors formed a trust to consolidate the patents for film technology and when numerous other industries faced the trust-busting wrath of Theodore Roosevelt's administration. One congressman worried that the piano roll company would create "an absolute and unqualified monopoly" over mechanical reproductions of music, while the composer Victor Herbert decried the Aeolian Piano Company deal as creating a "phonograph trust."[12]

Given the competing interests involved, Congress decided to split the difference between composers and recording companies by devising an ingenious system called "compulsory licensing." Under the 1909 Copyright Act, composers (or publishers who controlled the rights to compositions) could decide who would make the first mechanical reproduction of a work. After the initial recording, though, any other firm could record and sell its own renditions of a song, paying the composer or publisher a flat rate of a few cents for each copy that was manufactured. The system assured composers' right to profit from reproductions of their works, while providing the "talking machine" companies a relatively free hand in selecting the compositions they wanted to record.[13]

The catch, however, was that recorded performances themselves earned no separate copyright of their own. Horace Pettit, representing the Victor Talking Machine Company, insisted that recordings were a "picture of the voice," a "writing upon a record tablet" by a "vibrating pencil." Such a work was just as unique and deserving of copyright as a book or a photograph. If nothing else, he suggested, companies deserved to reap the benefit of their investments. "We might pay Mr. Herbert or Mr. Sousa or Mr. Caruso, or any of the opera singers, a thousand dollars for making a record," Pettit said, and any competitor could exploit the value of their stardom simply by copying the record. His pleas elicited little sympathy from congressmen, who were not eager to expand property rights any more than necessary. The nascent field of sound recording remained in flux, with various formats (cylinders, rolls, disks) still competing for primacy. The close tie of the recording industry and music was not yet fully formed; spoken performances continued to be a major use for "talking machines," and congressmen wondered how one recording company could copyright the performance of a professor's lecture and distinguish it from another company's recording of the same lecture. Would one infringe the other? How different would one performance have to be from another for it to qualify as a distinctive work?

[12] "Arguments before the Committee on Patents," IV, 22; Samuels, *Illustrated Story of Copyright,* 37; "Hearings before the Joint Committee on Patents, December 7–11, 1906," in *Legislative History of the 1909 Copyright Act,* ed. Brylawski and Goldman, IV, 307; Victor Herbert, "Canned Music," *New York Times,* Dec. 19, 1907, p. 8.

[13] Roger W. Erickson, "Copyrights—Mechanical Reproduction of Musical Compositions—Liability of Nonmanufacturing Seller of Unauthorized Recordings," *George Washington Law Review,* 26 (April 1958), 745, 746. For a comprehensive guide to the licensing system, see Harry G. Henn, *The Compulsory License Provisions of the United States Copyright Law, a Study, Prepared for the United States Copyright Office by Harry G. Henn, with Comments and Views Submitted to the Copyright Office* (Washington, D.C., 1957).

Congress left all of these questions unresolved in 1909, and, in fact, found them difficult to grapple with as late as the 1960s.[14]

A Judicial Tug-of-War, 1909–1964

Despite numerous attempts, the recording industry did not secure federal copyright protection for its products until 1971. Thus recordings were technically uncopyrightable for decades, and various pirates seized on the apparent loophole in federal law to copy works without permission. Beginning in the 1930s, some bootleggers—particularly jazz collectors—reproduced without incurring any legal reaction out-of-print works that had been abandoned by the major record labels. However, disputes arose over the legitimate use of recordings did arise throughout this period, producing several contradictory legal opinions. In particular, two decisions by courts in New York—*RCA Manufacturing Co. v. Whiteman* (1940) and *Metropolitan Opera Association v. Wagner-Nichols Recorder Corporation* (1950)—epitomized the contrary claims of ownership and creativity involved in the long-running debate. Although these courts split on the question of whether they could constrain piracy in the absence of federal copyright, between the 1930s and 1960s courts recognized a "quasi-property right" for corporations that had invested capital and labor and had expended technology and advertising in the making of records. This new concept of ownership as an open-ended protection for investment, rather than the traditional idea of copyright as a limited incentive for creators to share their work with the public, ultimately influenced a dramatic shift in the nature of copyright law in the 1970s.[15]

The advent of radio broadcasting prompted several key legal battles over the use of recorded sound. Radio might be envisioned as another means of "reproducing" and distributing music without permission, much like the physical copying of records. Victor Herbert joined with other artists to form the American Society of Composers, Authors, and Publishers (ASCAP) in 1914, aiming to regulate the use of written musical compositions in places such as stores and restaurants. In the 1917 case *Herbert v. Shanley Co.,* the Supreme Court ruled that composers were entitled to some remuneration from commercial establishments that played recordings of their compositions to entertain and entreat customers. During the 1920s, that precedent permitted ASCAP to demand royalties from radio broadcasters when they aired musical performances, but the arrangements between ASCAP and the radio stations only dealt with the commercial exploitation of written compositions as embodied in recordings, not the ownership of the recorded performance itself.[16]

The unclear status of sound recordings would not be adjudicated until 1940. Common law had long provided creators with a de facto copyright for their unpublished works, protecting them from appropriation prior to their release to the public. Only published works could be formally registered for federal copyright protection. The definition of "publication," though, was unclear. Recording a performance and pressing it as a record for sale to the public would seem to constitute publication, equal to printing and selling a

[14] "Hearings before the Joint Committees on Patents, June 6–9, 1906," in *Legislative History of the 1909 Copyright Act,* ed. Bryslawski and Goldman, IV, 26–29.

[15] Alex Cummings, "Collectors, Bootleggers, and the Value of Jazz, 1930–1952," in *Sound in the Age of Mechanical Reproduction,* ed. David Suisman and Susan Strasser (Philadelphia, 2009), 95–114; *RCA Manufacturing Co. v. Whiteman*, 114 F.2d 86 (U.S. App. 1940); *Metropolitan Opera Association v. Wagner-Nichols Recorder Corp.,* 199 Misc. 786, 101 N.Y.S.2d 483 (Sup. Ct. 1950).

[16] *Herbert v. Shanley Co.*, 242 U.S. 591 (1917); and Goldstein, *Copyright's Highway,* 68–77.

novel in the marketplace. But was a radio broadcast of a performance a publication of it? Did the artist forgo his "common law copyright"—his right of ownership for works that had not yet been distributed to the public—when a disk was pressed or a performance was broadcast? These questions emerged with the large-scale dissemination of sound via the new medium of radio, and neither the jurisprudence of music nor the legal negotiations of the songwriters through ASCAP addressed the curious status of sound.

In 1940 the U.S. Court of Appeals for the Second Circuit tackled the question of whether an artist or record company could control how recordings were used. In the late 1930s, through the Radio Corporation of America (RCA), the bandleader Paul Whiteman released several records with labels that asserted the music was for private use only, specifically forbidding the purchaser from broadcasting the records. RCA and Whiteman sued radio station WNEW (and its parent company W.B.O. Broadcasting Corporation) for playing several records on the air; the station argued that neither the record label nor the artist had any right to constrain the use of the work. In an elegantly worded decision, Justice Learned Hand struggled to balance these competing claims against the reality of the existing law. He noted that performers did contribute something of value to a recording that distinguished it from the written music on which it was based, although he expressed skepticism about whether the record company could be said to have added elements of creativity to the final product. "This right has at times been stated as though it extended to all productions demanding 'intellectual' effort. . . . For the purposes of this case we shall assume that it covers the performances of an orchestra conductor," Hand wrote, "and—what is far more doubtful—the skill and art by which a phonographic record maker makes possible the proper recording of those performances upon a disc."[17]

Regardless, Hand ruled that courts could not create new property rights where none existed in copyright law, which was the sole province of the federal government. He harked-back to the language of monopoly that had shaped the copyright debate in 1909. "Copyright in any form, whether statutory or at common-law, is a monopoly," Hand declared. "It consists only in the power to prevent others from reproducing the copyrighted work. W.B.O. Broadcasting Corporation has never invaded any such right of Whiteman; they have never copied his performances at all; they have merely used those copies which he and the RCA Manufacturing Company made and distributed." Hand felt that copyright *could* be applied to recordings, but the law simply did not provide for it in 1940. Hand further revealed his skepticism toward concentrated economic power as a leader in antitrust law, most notably in the 1945 case *United States v. Aluminum Company of America*. In a popular speech delivered at a Central Park rally in 1944, Hand suggested that "liberty is the spirit that is not too sure that it is right," and copyright is one such issue where he was reluctant to afford too much certainty to the claims of those who produced creative works.[18]

Other courts, however, continued to encounter difficulty in marking out exactly the "more or less" of state protection, some affirming Hand's skepticism toward quasi-property rights and others aiming to protect creators from "offensive" business practices.

[17] The lawsuit that originally pitted Paul Whiteman and RCA against WNEW eventually evolved into *RCA Manufacturing Co. v. Whiteman,* 114 F.2d 86, at 6.

[18] *Ibid.* at 7–8; *United States v. Aluminum Company of America,*148 F.2d 416 (2nd Cir. 1945); Learned Hand, *The Spirit of Liberty: Papers and Addresses of Learned Hand Collected, and with an Introduction and Notes by Irving Dilliard* (New York, 1952), 189–90.

In the latter group was the court that decided of *Metropolitan Opera Association v. Wagner-Nichols Recorder Corporation* (1950), which broke with *RCA Manufacturing Co. v. Whiteman* by ruling that courts should prohibit commercial behavior that seemed plainly unfair. The New York Supreme Court appealed to a "broader principle that property rights of commercial value are to be and will be protected from any form of commercial immorality." Again, broadcasting provided the occasion for a dispute. The respondent had recorded and sold copies of radio broadcasts by the Metropolitan Opera, even when that organization had already contracted with Columbia Records to market recordings of the Met's music. The American Broadcasting Corporation (ABC) joined Columbia and the Metropolitan Opera as a plaintiff in the case because the Met had also signed an exclusive agreement with ABC to transmit the performances over radio. The Met argued that the Wagner-Nichols Recorder Corporation had reduced both the value of the contracts and their ability to secure similar agreements in the future. The corporation interfered in the contracts between the Met and those who distributed its works, where the agreements had a clear monetary value to the opera company. The respondent also took advantage of the Met's sixty years of "extremely expensive" investment in developing a musical organization with an unparalleled reputation.[19]

Lawyers for the Wagner-Nichols Corporation argued that their client had avoided all the elements of unfair competition, as traditionally understood in the law. It had not "palmed off" it's products as identical to anything actually released by the Met or Columbia Records; indeed, the particular performances that the corporation recorded and sold were not the same ones published by Columbia. Moreover, Wagner-Nichols pointed out that it did not infringe on any federally recognized property right, since the opera company did not own the rights to the compositions performed and Congress had not extended copyright to performances or recordings of them.[20]

The court found these arguments unpersuasive. The fact that Columbia did sell recordings of the opera company's performances meant that the Wagner-Nichols's products might still be mistaken for the Met's recordings that Columbia legitimately produced. More important, the Court considered the activity wrong even without the charge of palming off. "With the passage of those simple and halcyon days when the chief business malpractice was 'palming off' and with the development of more complex business relationships and, unfortunately, malpractices, many courts, including the courts of this State, extended the doctrine of unfair competition beyond the cases of 'palming off,'" Justice Henry C. Greenberg concluded. "The extension resulted in the granting of relief in cases where there was no fraud on the public, but only a misappropriation for the commercial advantage of one person of a benefit or 'property right' belonging to another."[21]

Greenberg's argument went to the root of unfair competition, showing how the recording industry could apply this doctrine to its own quest for copyright protection. The justice compared the cultivation of popularity and celebrity in the music business to the older notion of business reputation. As a matter of common law, the idea of unfair competition grew out of trademark rulings in the nineteenth century, in which one business would sue another for using its name, thus exploiting the "good will" that consumers already felt toward the more established company. For example, suppose that one firm had

[19] *Metropolitan Opera Association v. Wagner-Nichols Recorder Corporation,* 199 Misc. 786. 101 N.Y.S.2d 483, at 796–97 (N.Y. 1950).

[20] *Ibid.*, at 791.

[21] *Ibid.*, at 793.

sold quality products for over twenty years, and it also spent money on advertisements to familiarize people with its good name. Another merchant who uses the same name to sell the same kind of product would unfairly benefit from the positive feelings that the original merchant had earned (or stimulated through advertising) for his own business.[22]

A pirate could impinge on and even adversely affect the reputation that a recording artist had developed over time, whether or not the pirate specifically tried to "palm off" its product as identical to any item released by the artist. In this sense, rulings on piracy protected the right of an artist or company to benefit from the good will they had generated among the public—and that notion of good will could easily apply to the popularity enjoyed by a recording artist who was heavily advertised by his label in the sense that the pirate would unfairly exploit the time and energy invested in making a recording popular. Judges could equate the time-honored legal concept of "good will" with the excitement and interest generated by clever and persistent advertising. Both had a "commercial value," Greenberg asserted, to the firms that had cultivated one or the other.[23]

The court in *Metropolitan Opera Association* recognized a right that an artist or recording company could possess outside the scope of copyright, based on a reputation cultivated through years of providing an excellent product or service. In the mid-twentieth century, many American thinkers still rejected the notion that the traditional protections of trademark and unfair competition law could permit an enterprise to assert permanent ownership of a name or symbol made popular by advertising. "The law of trade symbols is of modern development, largely judge-made and only partly codified," Ralph S. Brown, a leading expert on copyright, complained in 1948. "Its impetus comes from the demands of modern advertising, a black art whose practitioners are part of the larger army which employs threats, cajolery, emotions, personality, persistence, and facts in what is termed aggressive selling." Brown found it perverse to provide a corporation with monopoly control of a word or symbol, simply because hype had led consumers to associate some kind of intangible value with it. Brown argued that the purpose of trademark law—to help consumers identify a reliable, quality product by its mark—had very little to do with the popularity that advertisers contrived to distinguish between nearly identical products.[24]

Similarly, when he came to America in the 1940s, the German émigré and theorist Theodor Adorno concluded that advertising was key to the success of popular music. The only way capitalist firms could get the public to like any nondescript song was by promoting it and having it played repeatedly, creating a bandwagon effect that made the listener want to enjoy what was already popular. "Recognition is socially effective only when backed by the authority of a powerful agency," Adorno wrote, soon after settling in America. "That is, the recognition-constructs do not apply to any tune but only to 'successful' tunes—success being judged by the backing of central agencies." He concluded that songs only become valuable after the recording and broadcasting industries have spent money to hype them to the public, fostering familiarity and attachment in the listener: "The musical owner who feels 'I like this particular hit (because I know it)' achieves a delusion of grandeur comparable to a child's daydream about owning the railroad."[25]

[22] Vaidhyanathan, *Copyrights and Copywrongs,* 19.

[23] *Metropolitan Opera Association v. Wagner-Nichols Recorder Corporation,* 199 Misc. 786, 101 N.Y.S.2d 483 at 797–98, 800.

[24] Ralph S. Brown, "Advertising and the Public Interest: Legal Protection of Trade," in *Foundations of Intellectual Property Law,* ed. Merges and Ginsburg, 472, 475.

[25] T. W. Adorno, "On Popular Music," *Studies in Philosophy and Social Science,* 9 (no. 1, 1941), 35–37.

That daydream, nurtured by the corporation, was exactly what a record copier took advantage of without making a contribution. In his *RCA Manufacturing Co.* opinion, Learned Hand hit very near Adorno's analysis of the way familiarity and popularity imbued music with a special value for listeners. "People easily distinguish, or think they distinguish, the rendition of the same score or the same text by their favorites," he concluded, "and they will pay large sums to hear them." Hand recognized that a commercial and, perhaps, a cultural value inhered in popular recordings, but he still believed that conferring property rights on such goods would foster monopoly.[26]

Despite the skepticism of Brown, Hand, and others, after World War II courts increasingly equated expenditure with ownership, especially when a series of cases in the 1960s held that pirates who copied popular music on the new format of magnetic tape (cassettes and cartridges) unfairly exploited the success that record companies had generated for their products through extensive investment. Indeed, when Congress reconsidered copyright for sound recordings in 1971, record industry lobbyists emphasized the argument that pirates took advantage of the advertising money that was spent on popular records—sometimes much more than the actual cost of recording the work. Members of the House Committee on the Judiciary learned, for instance, that, in the early 1970s, a hit album by Crosby, Stills, and Nash cost $80,000 to record and $200,000 to promote.[27]

Judicial precedent in the 1960s, however, did not move in a straight line toward stronger property rights. Instead, courts continued to vacillate between more and less capacious conceptions of how much creative work could be owned exclusively by anyone. Most significant, a pair of Supreme Court decisions in 1964 appeared to limit what kinds of goods could be eligible for any rights of ownership. Although the cases, *Sears, Roebuck, and Co. v. Stiffel Co.* and *Compco Corp. v. Day-Brite Lighting, Inc.,* did not deal with music or recording, their outcome did call into question whether anyone could possess copyright-like rights for works that fell outside the ambit of federal law. Both disputes dealt with lighting fixtures and whether one company could prevent another from copying its distinctive design. Lighting designs did not pass the test of originality to qualify for patent nor did they fall into any of the categories defined in the Copyright Act that dealt with books, pictures, musical compositions, and other conventional works of art. Thus, the distinctive grooves on a lighting fixture were no more protected by federal law than the grooves on a particular recording of a song. The Supreme Court concluded in both *Sears, Roebuck, and Co.* and *Compco Corp.* that state rulings in favor of a plaintiff who complained that a competitor copied its fixture design strayed too far into federal territory. If Congress chose not to protect a certain kind of creative object, the Court concluded, then lawmakers probably meant to leave it open to free use.[28]

In other words, copyright law by any other name was still the province of congressional power. This reasoning derived from a belief in the supremacy of federal authority as well as a bent for leaving as many ideas and expressions in the public domain as possible. "*Sears, Roebuck, and Co.* and *Compco Corp.* applied substantive policy that, beyond being

[26] *RCA Manufacturing Co. v. Whiteman,* 114 F.2d 86 at 5.

[27] *Capitol Records v. Greatest Records,* 43 Misc. 2d 878, 880 (N.Y. Sup. Ct. 1964); *Capitol Records v. Richard W. Erickson,* 2 Cal. App. 3d 526 (Cal. Dist. Ct. App. 1969); *Capitol Records v. Spies,* 130 Ill. App. 2d 429 (1970); U.S. Congress, House, Committee on the Judiciary, *Prohibiting Piracy of Sound Recordings: Hearings on S. 646 and H.R. 6927,* 92 Cong., 1 sess., Sept. 22, 1971, p. 28.

[28] *Sears, Roebuck, and Co. v. Stiffel Co.,* 376 U.S. 225 (1964); *Compco Corp. v. Day-Brite Lighting, Inc.,* 376 U.S. 234 (1964).

precedented at common law, also was characteristic of the era," the legal historian John Shephard Wiley argued. "The Warren Court continued a tradition that was suspicious and fearful of monopolies of any kind and that was impatient with arguments in their defense." As with the unnamed but numerous freedoms covered by the Ninth Amendment to the Constitution, citizens enjoyed a "federal right to copy" all things not specifically limited.[29]

The Consolidation of Property Rights in Recorded Sound, 1966–1971

The 1964 Supreme Court upheld an intellectual tradition that favored curbing property rights in the interest of free competition—the same instinct that had motivated Congress to resist the pleas of music publishers and record companies during the Progressive Era and that had led Learned Hand to limit the ownership of sound in 1940. However, events in the 1960s turned the discourse about music and property rights toward more expansive claims of ownership. The same year that the Supreme Court handed down the *Sears, Roebuck, and Co.* and *Compco Corp.* decisions, both the Beatles and the Phillips electronics company's compact cassette invaded the United States. The year before, Earl Muntz and Bill Lear—the inventors of the four-track and eight-track tape cartridges, respectively—met in Los Angeles, forging a short-lived business partnership that soon dissolved into rivalry as each attempted to get his piece of technology into the dashboards of America's car-crazy teenagers.[30]

As magnetic tape took hold as a mass consumer good in the 1960s, it became easier than ever for Americans to record concert performances and copy and exchange unreleased recordings by popular artists. With tape cassettes and cartridges—cheap, mobile, recordable, and erasable—piracy shifted from the province of jazz and classical music to pop and rock genres. In response, state legislatures and eventually the federal government acted to protect the music industry from widespread appropriation of its products, reimagining the nature of copyright in ways that starkly differed from the limited right that had been envisioned by progressives earlier in the century.[31]

As a hub of the entertainment industry, New York was the first state to pass a law against piracy. Gov. Nelson Rockefeller signed the bill, which went into effect on August 2, 1966. Los Angeles had passed the first ordinance against unauthorized copying of records as early as 1948, and California caught up with New York by passing its own more stringent law in 1968. No other state laws appeared until 1971, when Arkansas, Florida, Pennsylvania, Tennessee, and Texas outlawed unauthorized reproduction of records. Of these, only Tennessee and Texas could be described as having a homegrown music industry, and Tennessee governor Winfield Dunn signed the bill in a photo op, flanked by Nashville music stars. The New York law that started it all was among the weakest, at least in its first iteration. Whereas Tennessee threatened pirates with a $25,000 fine and between one and three years in prison for the first offense, New York mandated a $100

[29] John Shepard Wiley Jr., "Bonito Boats: Uninformed but Mandatory Innovation Policy," *Supreme Court Review* (1989), 285.

[30] Richard Rashke, *Stormy Genius: The Life of Aviation's Maverick Bill Lear* (Boston, 1985), 254.

[31] On the bootleg record pandemic, see Clinton Heylin, *Bootleg: The Secret History of the Other Recording Industry* (New York, 1994); Greil Marcus, "The Bootleg LP's," *Rolling Stone,* Feb. 7, 1970, pp. 36–38; and "The $100-Million Market in Bootleg Tapes," *Business Week,* May 15, 1971, pp. 132–38.

fine and up to a year in prison. Both forbade "transferring" recorded sounds without the consent of the owner as well as distributing and selling such sounds.[32]

Such laws presuppose that the owner can be clearly identified. This question remained unresolved in federal law at the time, and a congressional attempt to provide a copyright for recordings foundered in 1962. Composers and music publishers, for instance, resisted the idea that someone else would own what was merely a version of their written music. The owner of the sounds could be the performer or the record company, but the state laws seemed to side with the label that produced the original master recording of a performance. In his letter to the governor, Henry Brief of the Recording Industry Association of America (RIAA) cited a series of cases to show that the record company's right to its recordings was well established. A 1909 case, *Fonotipia, Limited v. Bradley Victor Talking Machine Company,* condemned the perennial pirate Wynant Van Zant Pearce Bradley for selling copies of Italian arias that were of lesser quality than the original recordings. This piracy, the New York court suggested, hurt both consumers who purchased the deficient records and the reputation of the recording artists whose performances were inscribed on them. The court in *Metropolitan Opera Association* had ruled that the Wagner-Nichols Recorder Corporation had interfered in a contract by making its own recordings of the opera company's radio broadcasts, because the Met had already arranged with another company to record and sell copies of its performances.[33]

In fact, none of the cases cited by Brief actually held that the record company owned the recordings. Rather, the rulings condemned various instances of copying that were harmful to the public or to the parties in an existing contract, or that otherwise smacked of ill-gotten gains. A copied recording might deceive consumers into thinking it was produced by the original record label, hurting its reputation rather than the pirate's. A recording of an opera broadcast might conflict with the exclusive contract between the opera house and the label designated to release its recordings. Such rulings did little to clarify the actual ownership of the recordings. Though the courts said that one should not reap where one has not sown, they never issued a categorical approval of the notion that the record company, and the company alone, *owned* the recording. Even if the courts had wished to provide such a right, their ability to do so was constrained by the federal government's preemption of copyright law.

By lobbying for the New York law, the RIAA aimed to have the state legislature decisively endorse its own claim to ownership, which was based on its investment in the product. "Many hours of planning and work and the investment of much capital go into the production of a phonograph record," Brief argued. "The end result is a combination of artistic skill and mechanical ingenuity." The right to ownership, it seemed, lay in the *combination* of creativity and capital, courtesy of management. "The master recordings are carried

[32] New York State Legislature, *Laws of the State of New York, 1966* (Albany, 1966), 3313; "Piracy Hearing: Tape Piracy, State of New York before Attorney General Louis J. Lefkowitz," *Performing Arts Review,* 5 (nos. 1–2, 1974), 69–73; "Record, Tape Pirating Bill Signed," *Nashville Banner,* May 11, 1971.

[33] The text of the New York bill specified that "the word 'owner' shall mean the person who owns the master phonograph record, master disc, master tape, master film, or other device used for reproducing recorded sounds on phonograph records, discs, tapes, films, or other articles on which sound is recorded, and from which the transferred sounds are directly or indirectly derived." See New York State Legislature, *Laws of the State of New York, 1966,* 3313. U.S. Congress, House, Committee on the Judiciary, *Copyright Law Revision Part 2: Discussion and Comments on the Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law,* 88 Cong., 1 sess., Feb. 20, 1963, pp. 11–12; Letter from Henry Brief, dated April 28, 1966, Bill Jacket, L. 1966, ch. 982, at 39; *Fonotipia, Limited v. Bradley Victor Talking Machine Company,* 171 F. 951 (U.S. App. 1909); *Metropolitan Opera Association v. Wagner-Nichols Recorder Corporation,* 199 Misc. 786, 101 N.Y.S.2d 483, at 791.

as assets by recording firms," the lobbyist went on to say. "They have a dollar value, and the rights to use them have been sold, leased, traded, and exchanged both domestically and on an international basis." In other words, record companies believed they already possessed a de facto property right, which ought to be codified as de jure.[34]

Payson Clark, a Wall Street attorney and lifelong jazz aficionado, wrote to Governor Rockefeller in June 1966, arguing that the law against unauthorized reproduction would prevent collectors from copying and exchanging the out-of-print recordings that the major labels no longer found profitable to produce. "Properties which are gravely affected with the public interest, in which society has artistic and cultural rights of enormous significance (although no one has yet found them materially rewarding to reproduce) are being locked away from posterity out of a misdirected zeal to keep 'The Beatles' recording royalties from being diluted," Clark wrote. "Let us defend The Beatles' right to riches, if that pleases the Legislature, but *not* by forever suppressing the immortal recordings of America's creative musicians of the 1920's and 1930's whose playing has been felt and heard around the globe." Several jazz collectors from New Orleans joined Clark in urging Rockefeller to veto the bill, as they worried that the New York law would become a model for the rest of the nation.[35]

Beyond expressing the parochial interest of collectors, Clark also pointed out that an antipiracy law would fundamentally change *how* people owned cultural expressions. The ban on copying records conferred on record companies an open-ended right of ownership, whereas the Constitution required that federal copyright could last only for a limited amount of time (a maximum of fifty-six years in 1966). "No nation, to my knowledge, confers a *PERPETUAL proprietary right* in the author or inventor, but rather fixes a reasonable term (sometimes with a renewal privilege which is similarly limited in duration) at the expiration of which the work enters the public domain," Clark observed. "The grave danger in this proposed New York statute is that it employs *criminal sanctions* to confer a unique form of aural or *audio copyright which is vested in perpetuity* in a manner greatly inimical to the public interest." The New York law, in other words, vested in corporations a property right that far exceeded the scope and strength of traditional copyright.[36]

The pleas of the antiquarians and Clark's legal critique did not prevent Governor Rockefeller from signing the bill, an action soon imitated by governors throughout the union. Twenty-seven states passed variously worded antipiracy statutes between 1966 and 1975. When California passed a stringent antipiracy law in 1968 to protect its domestic music industry, a group of North Hollywood tape pirates challenged the legislation. A permanent antipiracy law, they argued, contradicted the constitutional dictate that creators could only control their works for "limited times." The case went all the way to the Supreme Court, where a new conservative majority ruled in favor of the state in the 1973 decision *Goldstein v. California*. With Richard M. Nixon appointees such as William Rehnquist and Lewis Powell siding against Thurgood Marshall and Harry Blackmun, the Court rejected the idea that copyright was solely a matter of federal policy. Chief Justice Warren Burger's majority opinion was a curious blend of states' rights rhetoric and pro-

[34] "An Act to Amend the Penal Law, in Relation to the Unauthorized Copying of Phonograph Records for Sale or for Use for Gain or Profit," dated Feb. 14, 1966, Bill Jacket, L. 1966, ch. 982, at 2.

[35] Letter from Payson Clark, dated June 14, 1966, Bill Jacket, L. 1966, ch. 982, at 30. Emphasis in original. Letter from Durel Black, dated June 22, 1966, Bill Jacket, L. 1966, ch. 982, at 49; Letter from Harry V. Souchon, dated June 22, 1966, Bill Jacket, L. 1966, ch. 982, at 32.

[36] Samuels, *Illustrated Story of Copyright,* 205–6; Letter from Payson Clark, dated June 14, 1966, Bill Jacket, L. 1966, ch. 982, at 30. Emphasis in original.

business conviction in which he suggested that California's interest in protecting the Los Angeles music industry was a matter of legitimate local concern. Indeed, California could create a virtually unlimited property right for recording companies, Burger argued, because the "limited times" provision only applied to federal copyright law. Learned Hand and the Warren court had tilted the balance of the copyright debate toward the public domain; given the same choice, Burger decided to err on the side of property.[37]

In the interim, Congress had responded to a rising tide of piracy by passing the long-awaited copyright for sound recordings in 1971. Magnetic tape, formerly confined to the hobbyist medium of reel-to-reel recording, became more widely available with the introduction of four-track and eight-track cartridges as well as the Philips compact cassette in 1962. Beginning with the leak of Bob Dylan's "Basement Tapes" in 1969, a variety of pirate companies began circulating new records by the likes of Dylan, the Beatles, and Jimi Hendrix, transferring tape recordings of studio and concert performances to vinyl for sale to the public. With names such as Rubber Dubber and Trade Mark of Quality, the bootleggers claimed to be organized along communal lines and presented themselves as an alternative to the capitalist music industry, going so far as to send their pirated copies to *Rolling Stone* magazine for review. These countercultural pirates were joined by unabashedly commercial outfits that sold direct copies of popular tapes at convenience stores, flea markets, and other unconventional outlets.[38]

As legislators from Nashville to New York City argued that this insurgent piracy mortally threatened their local industries, Congress set aside its attempt at comprehensive copyright reform and passed a stand-alone measure that protected sound recordings. Rep. Richard Fulton of Tennessee, the self-styled congressman from "Music City U.S.A.," argued that the revenue from popular records made it possible for the industry to invest in new artists and loss-making products. "When one realizes that only one of ten music recordings makes any money at all, it becomes readily apparent how damaging these unauthorized duplications and piracies are," Fulton said. "The recordings that do make money must support the industry." Jack Grossman of the National Association of Record Merchandisers agreed. "The unauthorized duplicator frequently illegally duplicates the best selections from a number of legitimate recordings, puts them on one tape cartridge and in that way produces a tape which is not available anywhere else and with which no legitimate retailer can compete," Grossman told lawmakers. Allowing consumers to get any song they wanted in any format would undermine the whole basis of the industry, which involved hyping up one song to stoke the public's interest in other recordings by the same artist on a full-length record or tape.[39]

If pirates were allowed to shave off the benefits of a record that found public favor, record companies argued, they would be less able to take a chance on other artists, thereby creating a less diverse market. The RIAA president Stanley Gortikov echoed that point in his testimony to the House Committee on the Judiciary in 1971: "The pirate skims the cream of what artists and record companies offer except for one particular ingredient, which he avoids like the plague . . . our risks." According to Gortikov, the cost to record a

[37] *Goldstein v. California,* 412 U.S. 546 (1973); "Piracy Hearing: Tape Piracy," 69–74.

[38] David L. Morton Jr., *Sound Recording: The Life Story of a Technology* (Baltimore, 2006), 161–62; Marcus, "Bootleg LP's," 36, 38; Ed Ward, "The Bootleg Blues: The Rise and Fall of Rubber Dubber Records," *Harper's,* Jan. 15, 1974, p. 35; "Marketing: Revolutionary War," *Time,* June 28, 1971, pp. 72–73; William J. Drummond, "Admitted Music 'Pirate' Tells How Bootleg Market Started," *Los Angeles Times,* July 20, 1971, p. A1.

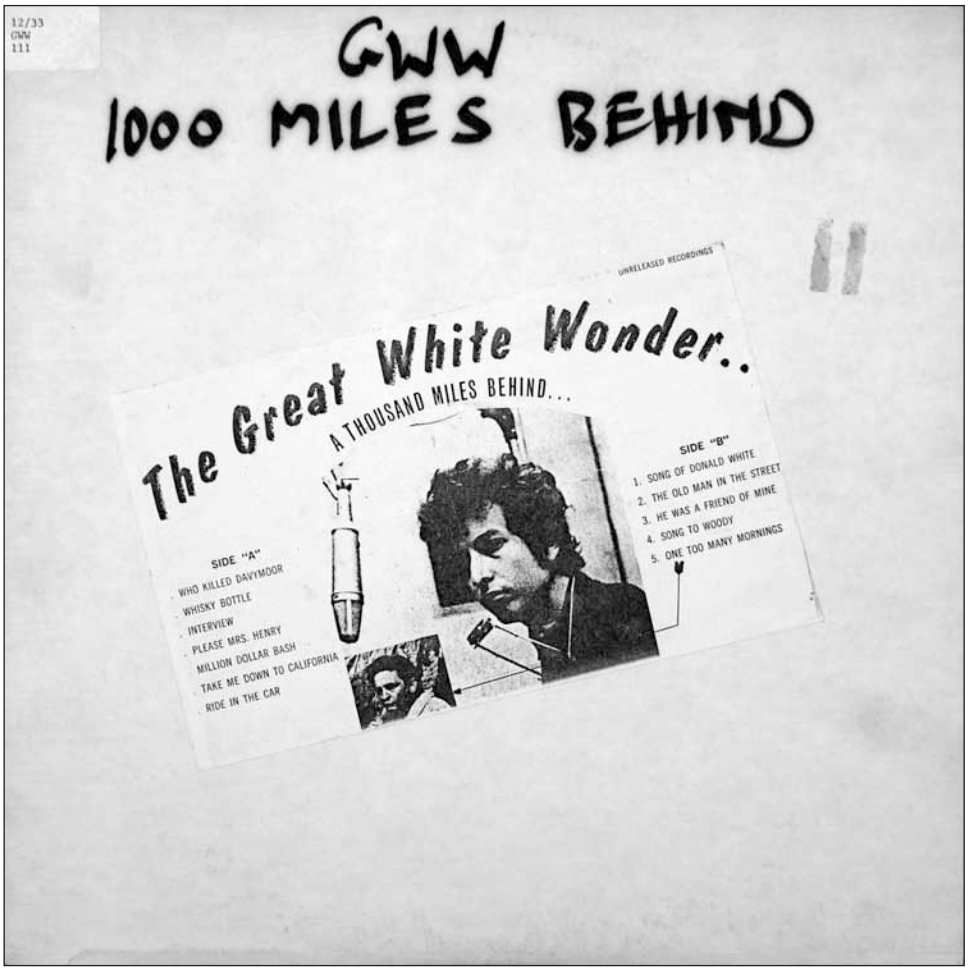
[39] Committee on the Judiciary, *Prohibiting Piracy of Sound Recordings,* 47.

typical album was $55,000. By the time the record landed in the stores, a record company had spent $180,000 to $200,000 on the entire process, meaning that manufacturing, distribution, and promotion of a record took $145,000. Pirates handled both manufacturing and distribution, so the difference lay in recording and promotion. "The pirate can go into business for as little as $500," Gortikov said. "Yet, we can't even take one artist into one studio for one hour for $500."[40]

Spokesmen for several tape pirating outfits, such as North Carolina's Custom Recording Company, suggested the implementation of a compulsory license for recordings, much like the system set up for written compositions in the Copyright Act of 1909. Rep. Abner Mikva, a progressive Democrat from Chicago, asked Gortikov why the RIAA opposed such a provision, which would have allowed competitors to reproduce a company's recordings by paying a flat royalty. "It would yield to the record company inadequate income to recover the cost for the product, and there would be no income from our hit product," Gortikov responded, reiterating the familiar saw about the industry's failure rate. "We would have no source of income to recover the costs of maintaining our business, since about one out of ten records only make money." Mikva asked if the licensing agreement could not be structured in a way that would provide adequate compensation for their initial investment; after all, composers received only two cents for each recording of their songs that a company manufactured. Gortikov held firm: "No; we need the distribution of everything we produce so that the public has ample opportunity to make a choice as to which product is to become a hit. If we are denied access to distribution, we have no skill in developing only hits."[41]

The compulsory license idea went nowhere in Congress, and a bill providing federal copyright for sound recordings passed easily in October 1971. Still, a few legislators recognized the profound conceptual shift that the new copyright for sound recordings signified. Nearly all the arguments put forth by record companies, politicians, retailers, and others for the copyright dealt with the protection of investment. "Presumably, this committee believes record piracy imperils the investment of risk capital. . . . Neither the patent grant nor the copyright grant were intended to protect the separate interest of an entrepreneur's investment of risk capital," Michigan senator Philip Hart said. "They are limited to the protection of authors and inventors for the purpose of encouraging the disclosure of inventions and the publication of writings." Hart, known to his admirers as the "conscience of the Senate," objected to this reasoning in language that echoed the concerns of the Progressive Era. There was a distinction to be made, he suggested, between an incentive for an artist to create and a business's need to recoup its investment in a product. A composer or performer could enjoy an incentive only for a limited time—certainly no more than his or her own lifetime—while a corporation could pursue gains on its investment indefinitely. "Compulsory licensing of whatever right is granted by this bill would at least reduce the scope of the monopoly granted if Congress is unsure of the economic facts for and against this proposal," Hart said. The danger of monopoly, however, preoccupied the minds of congressmen in 1971 far less than a technological menace that seemed to threaten the survival of large, complex industries by exploiting the value of a popular product after it had already been produced and promoted to the public.[42]

[40] *Ibid.*, 56, 25.
[41] *Ibid.*, 57.
[42] The October 1971 act was titled "An Act to Amend Title 17 of the United States Code to Provide for the Creation of a Limited Copyright in Sound Recordings for the Purpose of Protecting against Unauthorized Duplica-



An unknown label released this bootleg record, one of many different compilations of Bob Dylan's "basement tapes" to circulate under the title the *Great White Wonder*, beginning in 1969. The disk has the same blank aesthetic as many of the *Great White Wonder* records, with a paper label listing the album title and the song tracks glued to the front of the sleeve. *Courtesy Music Library and Sound Recordings Archive, Bowling Green State University.*

The Pivot toward Stronger Intellectual Property Rights

The recording industry's 1971 victory opened the door to a series of reforms that centered on the economic utility of "intellectual property," broadly defined. Record companies returned to Congress numerous times to press for tougher penalties for infringement, winning easy approval of their agenda. In 1976, when Congress passed the first omnibus copyright law since 1909, industries ranging from publishing to recording won a variety of long-desired reforms—including a term that lasted for the author's life plus fifty years,

tion and Piracy of Sound Recording, and for Other Purposes." See *Congressional Quarterly Almanac: 92nd Congress, 1st Session, 1971* (Washington, 1972), 860; Sound Recording Act of 1971, 85 Stat. 391 (1971). For Senator Philip Hart's comments, see Committee on the Judiciary, *Prohibiting Piracy of Sound Recordings,* 75. On Hart's career, see Michael O'Brien, *Philip Hart: The Conscience of the Senate* (East Lansing, 1995).

the prevailing term in most European countries. The 1980s saw the issue of intellectual property become part of the agenda of U.S. trade negotiators for the first time as the administrations of Ronald Reagan and Bill Clinton lobbied hard for stronger protections of U.S. products such as music, movies, and software abroad, particularly in the developing world. A series of additional copyright reforms, such as the Sonny Bono Copyright Term Extension Act and the Digital Millennium Copyright Act of 1998, further lengthened terms and strengthened penalties.[43]

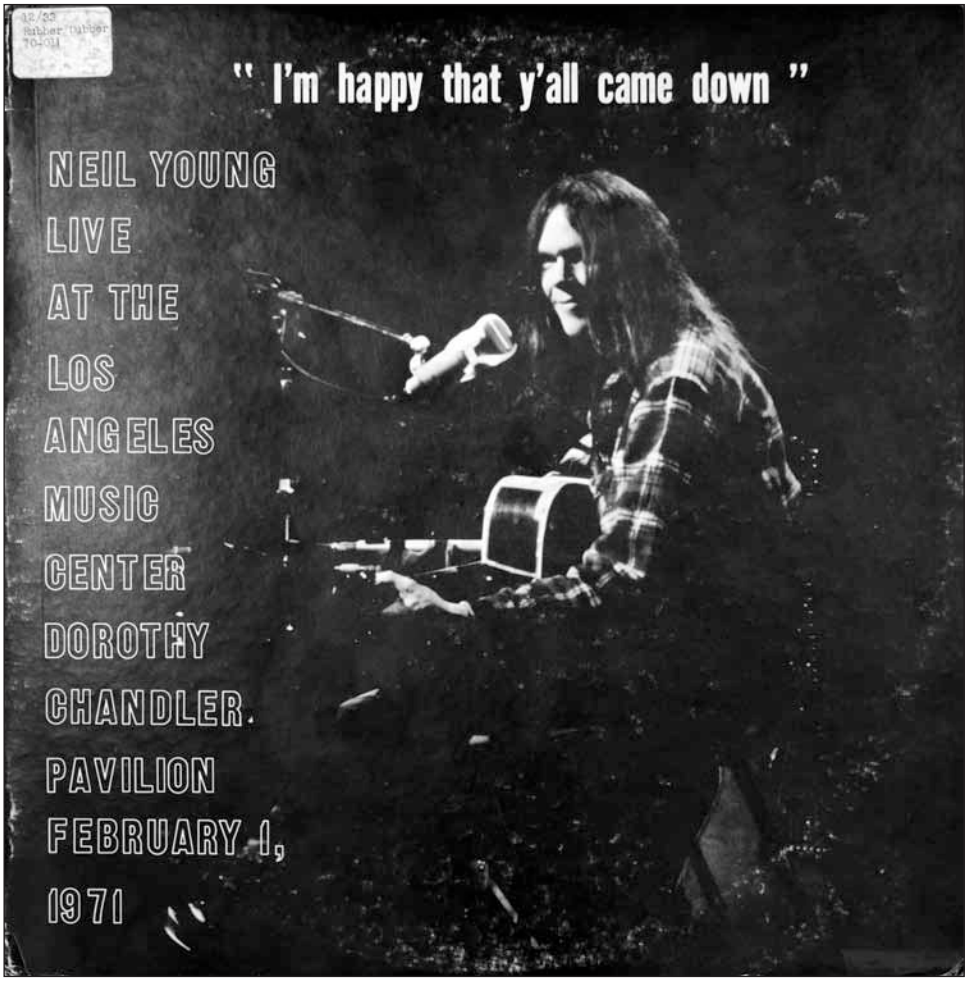
The key intellectual leap that reshaped copyright law, though, occurred years before these reforms. Before Congress would grant greater protection to copyrighted works or the executive branch would make intellectual property a top priority in trade negotiations, political leaders had to accept the premise that the purpose of copyright was to protect American business—specifically, the entertainment industry—and the value of its investments in talent, technology, and advertising. Early in the twentieth century, lawmakers resisted demands for a longer copyright term while providing composers with only limited control over the recording of their songs; the makers of piano rolls and phonograph records received no right to control the reproduction of their works. By the 1960s, lawmakers and jurists increasingly accepted the notion that such companies deserved the sole right to reap the value of the money they spent hiring, recording, and promoting artists to the public. This strain of thought appeared most boldly in the antipiracy laws passed by states in the 1960s—which seemed to contradict the constitutional limitation on copyright by providing record companies the right to prevent the copying of their recordings indefinitely. The underlying rationale, though, shaped the subsequent reforms of the 1970s, including the passage of the first federal copyright for sound recordings in 1971 and an extensive overhaul of the Copyright Act in 1976.

Indeed, national leaders in the 1970s implicitly accepted arguments about the importance of culture industries to the nation's economic well-being. The 1976 act provided a copyright term of the author's life plus fifty years, or seventy five years for a work created by a corporation, while removing the requirement that works had to be registered with the United States Copyright Office to receive protection—thereby ensuring that no works would automatically default into the public domain for lack of registration. Members of Congress expressed a pragmatic view of copyright as a tool to aid the numerous industries that had emerged since the last major legal reform in 1909. "The tremendous growth in communications media has substantially lengthened the commercial life of a great many works," Rep. Edward Hutchinson said on the House floor in 1976. "A short term is particularly discriminatory against serious works of music, literature, and art, whose value may not be recognized until after many years." Hutchinson did not consider the possibility that the public might benefit from "serious works" being freely and cheaply reproduced. Rather, society would prosper only if such works were protected for a longer period of time.[44]

How did recording companies—and the entertainment industry more broadly—manage to achieve these long-desired gains? First, the increasing availability of magnetic tape technology, particularly in the 1960s, triggered a greater degree of piracy than had existed

[43] "Record Piracy Act OK'd," *Chicago Tribune,* Sept. 26, 1974, p. 8; James Robison, "Record Industry's No. 1 Enemy—The Bootleggers," *Chicago Tribune,* Feb. 9, 1975, p. 32; Eduardo Lachica, "U.S. Companies Curb Pirating of Some Items but by No Means All," *Wall Street Journal,* March 16, 1989, p. A1; Sonny Bono Copyright Term Extension Act, 112 Stat. 2827 (1998); Digital Millennium Copyright Act, 112 Stat. 2860 (1998).

[44] Rep. Edward Hutchinson quoted in *Congressional Record,* 94 Cong., 2 sess., Sept. 22, 1976, p. 31981.



This recording of a concert by Neil Young is typical of many Rubber Dubber records that documented performances by Jimi Hendrix, Elton John, and others in the early 1970s. Recorded in 1971, this disk was made eight months before a bill providing federal copyright protection for sound recordings was passed by Congress. *Courtesy Music Library and Sound Recordings Archive, Bowling Green State University.*

in preceding decades, when bootleggers distributed copies of blues, classical, and jazz recordings to small numbers of fans and organized crime occasionally pirated a pop hit. The long-standing mutual suspicion that prevailed among composers, record companies, and musicians' unions diminished as these groups united to fight the common enemy of piracy. Similarly, a variety of industries (including book publishers, music publishers, record companies, movie studios, and software makers) formed alliances in the 1970s, as all rallied for the first time behind the banner of "intellectual property." As the political scientists Christopher May and Susan K. Sell have noted, that phrase appeared only once in federal court records before 1900 and not at all between 1900 and 1930. As late as the 1960s, "intellectual property" could be found only nine times in court reports, yet usage

of the term increased during the following decades, from forty-one appearances in the 1970s to eight hundred appearances in the 1990s.[45]

The move toward greater protection of music and other kinds of intellectual property also dovetailed with an emerging discourse about a "post-industrial society" in the United States. As early as the 1950s, economists such as Nelson Foote and sociologists such as Daniel Bell promoted the idea that the United States was moving away from a manufacturing base to a service-oriented economy. Meanwhile, companies such as IBM and RCA used their advertising in the 1960s to frame this new kind of economy in terms of information technology, touting the benefits of an emerging "information revolution." Even the Students for a Democratic Society's 1962 Port Huron Statement assumed that the United States was headed for a "remote control economy" in which more people worked in labs and fewer in factories. If information was the product Americans would make when they went to work every day, it made sense for it to be protected from appropriation.[46]

This line of argument only grew more persuasive as the United States faced economic recession in the 1970s and early 1980s, bolstering the claims of entertainment industry representatives who implored lawmakers to act in their defense. The piracy of American products around the world suggested that the United States could turn to its movie studios, record labels, and software designers to provide new sources of growth, but only if such goods were protected from appropriation. "We are going to bleed and bleed and hemorrhage unless this Congress at least protects one industry that is able to retrieve a surplus of trade and whose total future depends on its protection from the savagery of this machine [Sony Corporation's videocassette recorder]," the movie industry lobbyist Jack Valenti testified in 1982. In supporting a bill that would penalize pirates with a $250,000 fine and a five-year prison term, the Walt Disney Company's Peter F. Nolan reminded the House Committee on the Judiciary of the detriment that video piracy could cause his company and the economy at large. "You can see that a lot of jobs and a lot of investment capital are riding on your bill," Nolan argued.[47]

Again, however, the trend toward stronger intellectual property rights cannot be explained away just because entertainment interests learned to lobby more effectively or because academics began to speculate about a postindustrial information society. This shift was first enabled by a change in the way Americans understood music and other forms of expression. To think of any kind of work—a novel, a photograph, or a wax cylinder—as simply different types of "information" or "intellectual property" would not have made

[45] For a story on Mafia-related piracy, see "Two Dealers Charged in Disk Bootlegging," *New York Times,* June 11, 1960, p. 21. On united efforts to combat piracy, see Committee on the Judiciary, *Prohibiting Piracy of Sound Recordings,* 59. On "intellectual property," see Christopher May and Susan K. Sell, *Intellectual Property Rights: A Critical History* (Boulder, 2006), 18.

[46] Nelson N. Foote and Paul K. Hatt, "Social Mobility and Economic Advancement," *American Economic Review,* 43 (May 1953), 365; Daniel Bell, *The Coming of Post-industrial Society: A Venture in Social Forecasting* (New York, 1973), 17, 27–30; Alain Touraine, *The Post-industrial Society: Tomorrow's Social History; Classes, Conflicts, and Culture in the Programmed Society* (New York, 1971); "RCA Exhibit Is Tied to Information Revolution," *New York Times,* Sept. 22, 1967, p. 77; Students for a Democratic Society, *The Port Huron Statement* (New York, 1962), 19.

[47] Jonathan Fuerbringer, "Slow Unemployment Decline Foreseen by Job Experts," *New York Times,* Oct. 17, 1982, p. CNE1. For the testimony of Jack Valenti, see *Hearings before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary, House of Representatives, Ninety-seventh Congress, Second Session, on H.R. 4783, H.R. 4794, H.R. 48089, H.R. 5250, H.R. 5488, and H.R. 5705, Home Recording of Copyrighted Works, April 12, 13, and 14, Aug. 11, Sept. 22 and 23, 1982* (Washington, 1983), http://cryptome.org/hrcw-hear.htm. U.S. Congress, House, Committee on the Judiciary, *Copyright/Cable Television: Hearings on H.R.1850, Part 2,* 97 Cong., 1 and 2 sess., 1982, p. 1568.

This mid-1970s recording consists of live performances by the punk artist Patti Smith. Released on the bootleg label Ze Anonym Plattenspieler, it illustrates how bootlegging persisted after the passage of federal copyright protection for sound recordings in 1971. *Courtesy Music Library and Sound Recordings Archive, Bowling Green State University*

sense to many Americans at the start of the twentieth century. The holes in a piano roll and the grooves on a wax cylinder struck neither the Supreme Court nor Congress as sufficiently similar to other copyrighted works to merit protection. Indeed, recorded sound remained outside the ambit of federal copyright for over sixty years, leaving lawyers and record companies to advance a separate argument that the value of a recording's popularity or an artist's fame deserved some kind of protection, perhaps indefinitely. This kind of quasi–property right lacked the constitutional restrictions inherent in copyright and could potentially protect a company's investment perpetually. Thus the debates over music piracy and sound recording set the template for future copyright reforms that favored longer terms of protection and tougher restrictions on the copying of creative works in the interest of protecting business from predation by pirate competitors and consumers with cassette decks.

In a sense, the inclusion of "fair use" in the 1976 Copyright Act represented an exception to this broader pattern of expanding the power of rights owners. Common law had long recognized a limited right to reproduce copyrighted works for purposes such as commentary and education; a critic can quote from the work under consideration in a review, for example, or a teacher can distribute copies of a poem to students in a classroom. However, federal copyright law had never formally endorsed this exception to a rights owner's exclusive control of a work. As Paul Goldstein has documented, increasing use of the photocopier began to test the limits of fair use in the 1960s, especially when publishers of scientific journals questioned libraries' practice of making copies of scholarly articles for researchers. In response to such controversies, Congress laid out general guidelines for evaluating if a use qualified as fair, including the nature of the use (for example, for teaching), the amount of the work copied, and the effect of the reproduction on the potential market for the work.[48]

While Congress's embrace of fair use did reinforce a vital freedom for users of copyrighted works, it is important to recognize that the reform codified rights that already existed in practice. Indeed, in defining the contours of fair use, Congress followed the logic of copyright as a protection for a work's commercial value, permitting use only if it did not adversely affect its potential market. Prior to these reforms, the copyright system did not ensure that a creator would capture the value of a work. If a work was not formally registered for copyright, then it lapsed into the public domain; the creator forfeited the right to benefit from it, no matter how popular or profitable it subsequently became. In the 1950s and 1960s, record companies contended that they had generated a value in their products that they deserved to reap whether the recordings were technically copyrightable or not.

The artist figured little in these debates, and then only in terms of the commercial value of his reputation or popular appeal. The Metropolitan Opera Company argued that pirates should not be free to exploit the value of its reputation by recording and distributing copies of its radio performances. Similarly, the RIAA petitioned legislators in the 1960s and 1970s to protect the industry from freeloaders who swooped in to capture the value of a hit record after it was already popular. The industry's desire to prevent others from profiting from the bankability of popular performers and recordings prefigured the increasing importance of recognizable names and images in the political economy of the late twentieth-century United States. The sociologists Celia Lury and Adam Arvidsson have shown how businesses successfully won stronger protection against any use of a trademark that might "dilute" its value, as brands, logos, and other properties came to represent a greater proportion of corporate assets in the 1980s and 1990s.[49]

This way of thinking about value and property crept into American copyright law by way of the debate over sound recordings. The copyrighting of recorded sound validated a rationale for ownership that had evolved in courts and state legislatures over several decades. Once it became possible to think of the sound encoded in vinyl grooves or magnetized particles as a copyrightable expression, numerous other kinds of "information" could also be eligible for inclusion in intellectual property law. Critics have condemned the transformation of all kinds of ideas and expressions into property, which

[48] Goldstein, *Copyright's Highway*, 78–128.

[49] Celia Lury, *Brands: The Logos of the Cultural Economy* (New York, 2004), 108–9; Adam Arvidsson, *Brands: Meaning and Value in Media Culture* (New York, 2006), 6.

Jean-Francois Lyotard described as "the transformation of language into a productive commodity . . . and the establishment of a unit of measure that is also a price unit—in other words, information." Soon even biological material fell under the same rubric of intellectual property that encompassed words, sounds, and images; in a landmark 1980 decision, *Diamond v. Chakrabarty,* the Supreme Court brushed aside concerns that expanding the scope of patent to include genetically engineered bacteria would create new monopolies on life itself, preferring to broaden property rights rather than limit them. A similar logic had underlain the copyrighting of sound years before. As the value of recordings seemed threatened by new media and piracy, the music industry united in support of a new rationale for copyright—one that aimed to protect the value of capital, favored longer periods of protection, and expanded property rights to new and different kinds of expression. This set of priorities set the terms for American discussions of intellectual property at the start of the twenty-first century.[50]

[50] Jean-Francois Lyotard, "Rules and Paradoxes and Svelte Appendix," trans. Brian Massumi, *Cultural Critique,* 5 (Winter, 1986–1987), 217; Gary Stix, "Owning the Stuff of Life," *Scientific American* (Feb. 2006), 76–83. *Diamond v. Chakrabarty,* 447 U.S. 303 (1980).