

## Comments on the Desirability and Means of Bringing Pre-1972 Sound Recordings under Federal Copyright Jurisdiction

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January 2011

### Introduction

I am a researcher, writer, and educator who specializes in the cultural and technological history of sound media prior to the 1910s. For the past dozen years or so, I have been developing ways to analyze early sound recordings much as cinema historians analyze or “read” early films—that is, as primary sources that can teach us a great deal about the evolution of modern media culture. My ability to work meaningfully in this area depends on extensive and intensive access to early sound recordings themselves, not just for myself, but also for my colleagues and students and for the broader interested public. Here I’m at a distinct disadvantage relative to other cultural historians of the nineteenth and early twentieth centuries. Anyone in the United States who researches novels, plays, poems, motion pictures, or musical compositions published here a century ago has a guaranteed freedom to share and incorporate the primary source material because its date of publication places it unambiguously into the public domain. It would surprise most people to learn that I enjoy no comparable guarantee as a specialist in early sound recordings, even though I’m working with material that was disseminated to the public equally long ago. This fact significantly complicates the uphill struggle which my colleagues and I face as we seek to establish the study of early recorded sound as a legitimate academic field of study on a par with the study of early film. If scholars can confidently access, present, distribute, and “quote” a film such as *Life of an American Fireman* (1902), but can’t do the same with a comparably groundbreaking sound recording such as *An Evening with the Minstrels* (also 1902), it is evident that Americans’ understanding of their own history of media innovation must remain skewed and impoverished.

I am writing in part to endorse the recommendations of the Historical Recording Coalition for Access and Preservation (HRCAP) relative to bringing pre-1972 sound recordings under federal jurisdiction. In particular, I share HRCAP’s position that the United States should adopt a federal copyright term in sound recordings comparable to that found in other countries—say, fifty years. However, I want to make a somewhat more conservative argument here that I’m afraid may otherwise not be presented with sufficient force: simply that sound recordings should not be eligible for *longer* protection than any other category of creative work in the United States. My own comments will center largely on century-old sound recordings—that is, on works that were distributed by their makers to the public during a period from which all other authorized published works now fall unambiguously into the public domain. It is philosophically indefensible for one form of publicly disseminated creative work (sound recordings) to be excluded arbitrarily from a nationwide public domain in pre-1923 publications that includes all other forms of creative work from the same period (even including audiovisual works that

*contain* recorded sounds). To the best of my knowledge, no reasoned justification has ever been put forward for this anomaly. I submit that any viable solution to the current copyright crisis would *minimally* place sound recordings issued to the public before 1923 into a federal public domain, consistent with the treatment of all other published creative works of that period. In 2018 and beyond, the federal public domain in sound recordings and in other published works could then advance simultaneously following the “ninety-five year” rule.

Other comments you receive should adequately address the urgency of copyright reform for preservation and access. I am writing instead to make a couple of specific points that I haven’t seen fully addressed in existing position papers. First, I want to demonstrate just how old the oldest sound recordings are according to 17 USC 101, and hence how extraordinarily long the *de facto* copyright coverage amounts to in most states. Second, I would like to draw your attention to some inconsistencies in how “ownership” of a copyright in a pre-1972 sound recording is presently defined. I am not a lawyer, but my reading of relevant statutes is informed by a familiarity with the very early recording industry that lawyers generally do not possess.

## I. What are the longest and shortest *de facto* state copyright terms in pre-1972 sound recordings?

The present state of chaos is, if anything, understated in the Copyright Office’s own background text: “Currently, pre-1972 sound recordings are protected under a patchwork of state statutory and common laws from their date of creation until 2067 (2047 in California).”<sup>1</sup> It’s true that most state statutes fail to specify a term for intellectual property rights in sound recordings, which therefore expire by default in 2067 under 17 USC 301(c), extended twenty years from 2047 in 1998. However, consider Colorado’s Revised Statutes Sec. 18-4-601 (1.5)—language that dates back many years but was approved without change by the state General Assembly on April 22, 2009:

“Copyright” means the ownership rights that accrue to an owner and relate solely to the common law copyright accruing to such owner. The term “copyright” does not include a federal copyright which inures to the benefit of owners pursuant to Public Law 92-140, as amended by Public Law 93-573, which became effective February 15, 1972. For the purposes of this part 6, no common law copyright shall exist for a period longer than **fifty-six years** after an original copyright accrues to an owner.<sup>2</sup>

Since a common law copyright is traditionally understood to accrue to an owner at the time of fixation (as a means of protecting “unpublished” works, a category that does not intuitively fit widely disseminated sound recordings), the Colorado copyright in sound recordings would appear to expire fifty-six years after the time of recording rather than the time of communication to the public. A sound recording fixed in 1972 would, then, cease to be covered by this state copyright provision in 2028. Thus, the minimum discrepancy between copyright terms in various states would be not twenty years (2047-2067), but thirty-nine years (2028-2067).

The fifty-six-year term in Colorado is anomalous within the United States, but it is close to the fifty-year term that prevails in many other countries, making Colorado (to the best of my

<sup>1</sup> “A Study on the Desirability of and Means for Bringing Sound Recordings Fixed Before February 15, 1972, Under Federal Jurisdiction,” <http://www.copyright.gov/docs/sound/>, accessed December 23, 2010.

<sup>2</sup> “Session Laws of Colorado 2009, First Regular Session, 67<sup>th</sup> General Assembly,” [http://www.state.co.us/gov\\_dir/leg\\_dir/olls/sl2009a/sl\\_185.htm](http://www.state.co.us/gov_dir/leg_dir/olls/sl2009a/sl_185.htm), accessed December 23, 2010, emphasis added.

knowledge) the only state with a copyright term in pre-1972 sound recordings reasonably harmonized with international standards. This also appears to be the only case of a state legislature consciously choosing a term for copyright in pre-1972 sound recordings rather than merely acknowledging the existence of the federal preemption clause (either before or after the twenty-year extension).

How long could a copyright in a sound recording conceivably last under current conditions? The maximum *de facto* term depends on the age of the oldest sound recordings, which hinges in turn on what counts as a “sound recording.” According to 17 USC 101:

“Sound recordings” are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.

The term “fixation” isn’t defined but is presumably intended to mean “recording” in the phonographic sense—that is, documenting sound vibrations in the two dimensions of amplitude and time, rather than in a form such as conventional musical notation. We read further:

“Phonorecords” are material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.

Here the “fixation” of sounds in a “phonorecord” is explicitly not limited to inscriptions intended for mechanical playback; as long as the documented sounds can be “perceived” in any way at all, including “directly” from the inscription itself, the definition covers them. On the other hand, if the “fixation” of sounds is accompanied by “related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment,” then it fits the definition of an “audiovisual work” and isn’t considered a “sound recording” or “phonorecord.”

The definitions of “sound recordings” and “phonorecords” outlined above would unquestionably include *phonautograms*, or automatic inscriptions of sound waves scratched on sheets of soot-blackened paper in the mid-nineteenth century.<sup>3</sup> Nearly fifty phonautograms made by inventor Édouard-Léon Scott de Martinville (1817-1879) survive today from the years 1857 and 1860.<sup>4</sup> It is true that these sound recordings were intended not for playback, but for visual apprehension—people were expected to “read” the waveforms by eye. However, as we’ve seen, the definitions of “sound recordings” and “phonorecords” in 17 USC 101 encompass any mode of perception, including “direct” reading without the aid of machinery. Moreover, several phonautograms have been played back through digital means within the past few years,

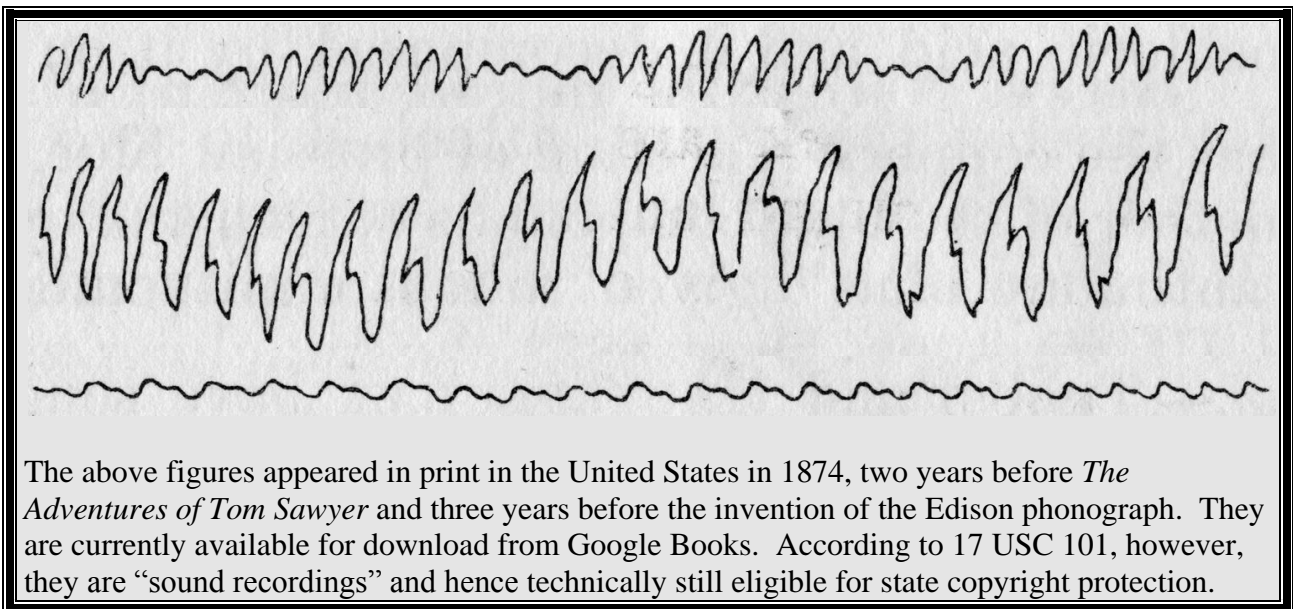
<sup>3</sup> Even earlier inscriptions made by styli attached to sounding tuning forks and the like could be encompassed as well. To the best of my knowledge, the earliest surviving document of this type appears on Plate I accompanying M. G. Wertheim, “De l’élasticité et de la cohésion des métaux,” *Annales de Chimie et de Physique*, 3<sup>rd</sup> Series, 12 (Nov. 1844), 385-454, which apparently represents a pair of waveforms recorded in or before **1842**. If we further accept the WIPO Performances and Phonograms Treaty of 1996, which eliminates automatic fixation from its definition of a “phonogram,” then examples can arguably be found dating back to the **seventeenth century**; see Francis North, *A Philosophical Essay of Musick* (1677).

<sup>4</sup> There are fifty items total listed in Patrick Feaster, “Édouard-Léon Scott de Martinville: An Annotated Discography,” *ARSC Journal* 41:1 (Spring 2010):43-82, but one dates from 1853/54, and another dates from 1859.

demonstrating beyond doubt that they are also “playable” sound recordings. Although phonautograms are arguably both “audible” and “visual,” they are not “audiovisual works” because the images are not “intrinsically intended to be shown” using special devices.

According to the definitions in 17 UCS 101, then, “sound recordings” and “phonorecords” exist dating back to at least the year 1857. In a state such as New York, according to plausible interpretations of *Capitol vs. Naxos*, these would enjoy copyright protection until 2067, giving them a *de facto* term of 210 years, or 154 years longer than the maximum term of coverage recognized by the state of Colorado—an astonishing discrepancy. This would also amount to a term of 188 years after the creator’s death, or 118 years longer than the “life plus seventy years” term generally accorded to works of individual authorship being created today (Scott’s phonautograms weren’t “corporate” creations).

The situation is complicated further by the fact that numerous phonautograms appeared in print during the nineteenth century. The first European books to contain actual phonautograms of airborne sounds were published in 1860.<sup>5</sup> The first examples duplicated commercially in the United States appeared in 1868 as illustrations in a physics book.<sup>6</sup> These particular recordings had originated in France, but the first American-made sound recordings to appear in print followed just six years later, in 1874.<sup>7</sup> The earliest recognizable phrases in spoken English available for listening today were recorded by Eli Whitney Blake, Junior, at Brown University, and published as waveform plates in American and British scientific journals in 1878.<sup>8</sup> Such



<sup>5</sup> Karl Vierordt, *Grundriss der Physiologie des Menschen* (Frankfurt am Main: Meidinger Sohn & Comp., 1860), 255; A[dolphe] Ganot, *Traité élémentaire de physique expérimentale et appliquée et de météorologie*, 9th ed. (Paris: chez l’auteur-éditeur, 1860), 209-210.

<sup>6</sup> [Adolphe] Ganot, *Elementary Treatise on Physics Experimental and Applied*, transl. E[dmund] Atkinson, 3rd Edition (New York: William Wood and Co., 1868), 231. The first (1863) and second (1866) English editions appear only to have been published in London.

<sup>7</sup> Chas. A. Morey, “The Phonautograph,” *American Journal of Science and Arts* 8 (Aug. 1874), 130-31.

<sup>8</sup> E. W. Blake, Jr., “A method of recording Articulate Vibrations by means of Photography,” *American Journal of Science and Arts* 116 (July 1878), 54-59; *Nature* 18 (July 25, 1878), 338-340. The recordings may be heard at <http://www.phonozoic.net/blake-eli-w.html>.



print publications continued long after the establishment of a commercial recording industry. In March 1898, a complete gramophone disc of an after-dinner speech by politician Chauncey M. Depew was reproduced in ink as part of an advertisement in *Cosmopolitan*. This work plainly fits the definition of “sound recording” for purposes of copyright, and it is even playable—I know this because I’ve played back parts of it myself from a digital scan, and Depew’s speech is quite intelligible. The rest of the March 1898 issue of *Cosmopolitan* is unambiguously in the public domain—all the text, all the photographs, all the hand-drawn illustrations. But would Google Books or Hathi Trust be compelled to omit the page with the gramophone recording from free online distribution because it is a “phonorecord” according to the definitions of 17 UCS 101? The current legal situation makes this scenario seem quite possible. Similarly, several important books on experimental phonetics by Edward Wheeler Scripture, published in 1902 and 1906, contain numerous plates of waveforms transferred mechanically from commercial gramophone discs.<sup>9</sup> These plates, too, are “phonorecords” according to 17 UCS 101, and I’ve successfully played back recognizable sounds from them. The plates are essential to understanding Scripture’s text. Can Hathi Trust legally offer these century-old books for download in New York, including the sound recordings? The letter of the law would suggest otherwise.

As these examples show, the anomalous copyright status of sound recordings can impact even the copyright status of seemingly “safe” print materials such as books and scholarly journals published long before 1923. Moreover, further problems of this kind may lie ahead. The first automatically generated sound spectrograms began to appear in print in the mid-1940s, in books and journals that will otherwise begin entering the public domain about the year 2040.

<sup>9</sup> Edward Wheeler Scripture, *The Elements of Experimental Phonetics* (New York: Charles Scribner’s Sons, 1902); *Researches in Experimental Phonetics: The Study of Speech Curves* (Washington, D. C.: Carnegie Institute, 1906).

Although these represent data as graphs of time versus frequency rather than time versus amplitude, they are still “playable”—I have played back intelligible speech and other sounds myself from numerous examples created during the 1940s. The book *Visible Speech* (1947) might not fully enter the public domain in 2042 because it contains sound recordings in this format, including spectrograms made by the authors from commercially issued discs.<sup>10</sup>

Similarly, federally copyrightable “audiovisual works” can contain recorded sounds which had previously been fixed and published as “sound recordings,” and which might therefore be considered derivative works incorporating preexisting material that falls under state jurisdiction until 2067. This could jeopardize the public domain status of century-old works of sound cinema, the visual elements for which may or may not survive:

- Specific standard commercial musical cylinders were marketed in conjunction with specific Edison kinetophone films in 1895.<sup>11</sup>
- Siegmund Lubin’s Cineophone films of 1904 were distributed with standard commercial “Monarch Records” manufactured by the Victor Talking Machine Company.<sup>12</sup>
- The earliest lip-sync Cameraphone films were similarly distributed with standard commercial gramophone discs, circa 1907-8.<sup>13</sup>

Thus, pioneering “audiovisual works” can be implicated in the copyright status of early sound recordings too, even though they might seem to be safely under the jurisdiction of the U. S. Copyright Act. Hypothetically, a restored Cineophone sound film from 1904 could be shown or sold in Colorado but not in New York.

There is no provision in 17 UCS 101 that would exclude items from the “sound recording” category on the grounds that they weren’t originally intended for playback. Even if that weren’t the case, however, the earliest examples intended for playback would still be quite old. The collections of the National Museum of American History contain numerous sound recordings in directly “playable” formats dating back to 1881.<sup>14</sup> Commercially manufactured recordings on Edison wax cylinder were being openly advertised for sale by May 1889,<sup>15</sup> and I have seen specimens in private hands dating from later that year. In 2067, these first commercially manufactured recordings will be 178 years old.

<sup>10</sup> Ralph K. Potter, George A. Kopp, Harriet C. Green, *Visible Speech* (New York: D. Van Nostrand Co., 1947).

<sup>11</sup> Advertisement reproduced in facsimile in Rick Altman, *Silent Film Sound* (New York: Columbia University Press, 2004), 82.

<sup>12</sup> Joseph P. Eckhardt, “The Effect is Quite Startling: Siegmund Lubin’s Attempts to Commercially Exploit Sound Motion Pictures, 1903-1914,” *Film History* 11 (1999), 411. Specific discs used were HAPPY DAYS IN DIXIE by Charles P. Lowe (Victor 212, mx. B-1555); OUR OWN MAKE POLKA by Jules Levy (Victor 2496, mx. B-521); BANJO ’LIZE FROM NEW ORLEANS (Victor 2547, mx. B-633); DAISY DONOHUE by Arthur Pryor’s Band (Victor 2608, mx. B-846); and MILITARY SERENADE by Charles D’Almaine, mx. B-1253).

<sup>13</sup> Scott Eyman, *The Speed of Sound: Hollywood and the Talkie Revolution, 1926-1930* (New York: Simon & Schuster, 1997), 27-8. At least one title of a Cameraphone short corresponds to a well-known phonographic descriptive sketch: CON CLANCY’S CHRISTENING (mentioned in “The Academy of Music,” *Evening Times* [Cumberland, Maryland], Sept. 2, 1908, p. 8).

<sup>14</sup> Judging from an exploratory visit I made in December 2010, there are likely to be roughly two hundred recordings at the NMAH from the decade of the 1880s.

<sup>15</sup> “North American Phonograph Company Price List of Supplies No. 1,” May 28, 1889, *Thomas A. Edison Papers: A Selective Microfilm Edition*, henceforth TAEM, ed. Thomas E. Jeffrey, microfilm (Frederick, Maryland: University Publications of America, 1985—), 128:7.

By incorporating a few historic sound recordings into this document, on the understanding that it will be made available online, I am consciously engaging in an act of civil disobedience. I doubt any reasonable person would find my inclusion of these recordings objectionable, given their dates of publication (1874, 1898, 1906), and they certainly help to substantiate and illustrate my argument. Nevertheless, I am not protected by the fair use provisions of the U. S. Copyright Act, and I have neither sought nor obtained permission from any potential rightsholders. In short, this very document is an example of a publication that the current legal situation could technically impede.

HRCAP's proposal that the United States should repeal 17 USC 301(c) and adopt a federal copyright term in pre-1972 sound recordings comparable to that found in other countries, such as fifty years, would satisfy my concerns. Failing that, I would recommend amending 17 USC 301(c) as follows:

With respect to sound recordings fixed before February 15, 1972, **but after October 27, 1923**, any rights or remedies under the common law or statutes of any State shall not be annulled or limited by this title **for a period of ninety-five years from the date of fixation**. The preemptive provisions of subsection (a) shall apply to any such rights and remedies pertaining to **sound recordings fixed before October 27, 1923**, or to any cause of action arising from undertakings commenced **ninety-five years or longer after the date of fixation**. Notwithstanding the provisions of section 303, no sound recording fixed before February 15, 1972, shall be subject to copyright under this title before, on, or after February 15, 2067.

This amendment would create a public domain in sound recordings that equitably matches the dates of the public domain for published works in other media. It would not resolve all the issues raised by HRCAP, but it would eliminate the most egregious absurdities, such as the New York state copyright term of 210 years for phonograms.

This amendment would place both published *and unpublished* sound recordings into the public domain, but the same is also true of the current wording of 17 USC 301(c), which would place all sound recordings fixed before February 15, 1972, into the public domain on February 15, 2067, whether published or not. My suggestion is therefore no broader in principle than the current provision—it simply substitutes a sliding cut-off date for a fixed cut-off date.

The proposed amendment would also require the date of fixation for each individual recording to be established as a basis for defending or challenging its status as a work under copyright or in the public domain. In practice, this may sometimes be difficult to accomplish. However, Colorado's statute already presumes that it will be possible to determine whether or not any given sound recording was fixed more than fifty-six years ago, and the U. S. Copyright Act in its current form similarly assumes it will be possible in 2067 to show whether or not a given recording was fixed before February 15, 1972. Thus, existing provisions already require interested parties to establish dates of fixation for pre-1972 recordings. Here, too, I am not proposing anything particularly new.

The only remaining objection I can foresee to my proposed amendment would be an industry claim that sound recordings inherently deserve a longer term of copyright than *any other form of creative expression*. However, I don't believe such a claim would have merit.

## II. How is “ownership” of copyrights in pre-1972 sound recordings currently defined in the United States, and how might it best be defined for purposes of a federal copyright?

It’s well known that federal copyrights belong to authors or creators or to their heirs or assignees and don’t depend on the continued ownership or survival of any specific physical object (such as an original book manuscript or an original photographic negative). Occasionally a state statute follows a similar logic, as we see in the California Civil Code: “The author of an original work of authorship consisting of a sound recording initially fixed prior to February 15, 1972, has an exclusive ownership therein until February 15, 2047.”<sup>16</sup> This also seems to be true of common law copyrights. Although the “authors” or “creators” of sound recordings obviously include performers, the 1932 court case *Ingram v. Bowers* has been understood as establishing that a performer implicitly conveyed any common law copyright in commercial master sound recordings to the company that had fixed them, regardless of whether this was made explicit in a contract:

As to both matrices and records the second contract is too clear for question; it provides that Caruso “grants all rights in and to” them. The first contract contained no such words, but we think that the result was the same. In it he only agreed “to make these records,” meaning of course, to sing into the recording apparatus, and the Victor Company, to pay him a royalty as records made from the resulting matrices were sold. The company was to manufacture both; prima facie they became its chattels like anything else of its make. If it was intended to give Caruso an interest in them, some such reservation was to be expected, and there was none.... If there be a copyright...it became embodied in the matrices, as a literary composition is embodied in its text. Any putative monopoly would do no more than prevent the copying of these, and it passed with the property in them. It was not impliedly reserved separate from them, for that would have interfered with their full enjoyment which the manufacturer was certainly to have.<sup>17</sup>

When Tim Brooks writes that the present patchwork of state laws is “universally interpreted to grant permanent ownership of recordings to the creating entities until such time as federal copyright law takes over in 2067,” he accordingly identifies “creating entities” by default with recording companies, assessing whether given sound recordings are or aren’t currently “protected” primarily in terms of whether an unbroken corporate lineage can be found linking an original recording company to a company that still exists today. Brooks concludes, rather grimly, that rightsholders defined in this way have made virtually *none* of the recordings from the early period I study “legally” available to modern-day audiences: “For periods before 1920, the percentage approaches zero.”<sup>18</sup>

However, the standard of “ownership” I’ve described so far is not the only one that is currently in force. Most unauthorized duplication statutes for pre-1972 sound recordings state that the copyright protection they afford belongs to the owner of a master recording, which is defined in turn as a *physical object* that had a specific role in the manufacturing process. For example, the unauthorized duplication statute in California’s Penal Code defines an “owner” as:

<sup>16</sup> California Civil Code, Section 980.

<sup>17</sup> 57 F.2d 65; misidentified as “*Ingram v. Roberts*” in Robert W. Clarida, “Pre-1972 Sound Recordings,” <http://www.legallanguage.com/legal-articles/clarida007/>, accessed Jan. 28, 2011.

<sup>18</sup> Tim Brooks, *Survey of Reissues of U. S. Recordings* (Washington DC: Council on Library and Information Resources, August 2005), <http://www.clir.org/pubs/reports/pub133/pub133.pdf>, accessed Jan. 29, 2011, quotations from pp. 12, 13.



the person who **owns the original master recording embodied in the master phonograph record**, master disc, master tape, master film or other article used for reproducing recorded sounds on phonograph records, discs, tapes, films or other articles on which sound is or can be recorded, and from which the transferred recorded sounds are directly or indirectly derived; and “master recording” means the original fixation of sounds upon a recording from which copies can be made.<sup>19</sup>

Maine’s equivalent definition of an “owner” is even more straightforward:

the person who **owns the master phonograph record**, master disc, master tape, master file 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 recorded sounds are directly or indirectly derived.<sup>20</sup>

Hawaii incorporates similar wording directly into the body of its statute:

It shall be unlawful for any individual, firm, partnership, corporation or association to transfer or cause to be transferred, without the consent of **the person who owns the master phonograph record**, master disc, master wire, master tape, master film or other device or article from which the sounds are derived, any sounds recorded on a phonograph record, disc, wire, tape, film, or other article on which sounds are recorded, with intent to sell or cause to be sold, or use or cause to be used for profit through public performance the article onto which such sounds are recorded.<sup>21</sup>

These state statutes (and the many others that resemble them) assign a copyright in a sound recording to the current owner of its physical embodiment in an original master phonorecord. For their purposes, one must by definition “own” the source recording “embodied” in an originating “article” or “device.” This is consistent with the finding in *Ingram v. Bowers*, quoted above, that the common law copyright in master sound recordings “passed with the property in them.” In short, much existing law seems to support a view that a copyright in a pre-1972 sound recording accrues to whoever physically owns the corresponding physical master. At the same time, there seems to be a “common sense” belief that such ownership translates in practice into ownership of copyrights by the companies that historically offered the recordings for sale (or, in practice, by their successor companies). This may reflect an assumption that commercial recording companies will have preserved original master recordings in their vaults and could, if necessary, produce them on demand to demonstrate “ownership” of the corresponding copyrights, such that the two standards for “ownership” are mutually consistent. However, this assumption doesn’t hold up well when we consider the earliest products and practices of the American commercial recording industry. As a result, there are currently at least two potentially contradictory standards for “ownership” of copyrights in pre-1972 sound recordings in force in the United States.

When commercial recording first began, all recordings offered to the public for sale were *originals*. In other words, someone who purchased a United States Marine Band cylinder from the Columbia Phonograph Company in early 1890 received not a mere duplicate of a master recording which the company retained, but the master recording itself—at that time, no

<sup>19</sup> California Penal Code 653h, boldface added.

<sup>20</sup> Maine Revised Statutes, Title 10, Part 3, § 1261-3, boldface added.

<sup>21</sup> Hawaii Revised Statutes §482C-1, boldface added.

commercially viable method of duplication had yet been devised. Some imperfect duplication methods were soon put into use, but it continued to be accepted as axiomatic that “the original record of any artist is more desirable than the duplicate,”<sup>22</sup> and during the late 1890s numerous small recording companies in New York City and elsewhere continued to manufacture and sell high-quality “originals” to exhibitors and audiophiles. The Universal Phonograph Company even adopted the phrase “come and take the records off the rack as they are being made” as a trademark,<sup>23</sup> and the trade press reported:

Customers are invited to take records off the rack while the band is playing, if they doubt the fact that every record going out of his office is original. It is this popular policy that has earned for the records the repute of the best on the market, not only here but in all parts of the world and more particularly in England, where they bring \$1.25 each.<sup>24</sup>

Under the unauthorized duplication statutes mentioned above, a copyright in a surviving cylinder of this sort would belong to *the current owner of the physical master cylinder*, rather than to the company that originally sold it or to a successor company. This interpretation is consistent with the actual industry practices of the time: recording companies such as Columbia that held patent rights in duplication systems would routinely purchase the “originals” sold commercially by other companies in order to use these as masters for duplication, without seeking further authorization.<sup>25</sup> On the other hand, the performers of this period do not seem to have implicitly conveyed any mass-duplication rights to the companies who recorded them, as presumed by *Ingram v. Bowers*. To the contrary, performers who believed they were making only a certain number of “originals” for a company to sell directly to the public, but then learned that a company was actually duplicating their work, are reported to have been “outraged” and accused the company of “pilfering,” a charge which at least one company acknowledged was valid.<sup>26</sup> Overall, the recording practices of this early period are strikingly inconsistent with some basic assumptions the law has made about intellectual property in commercial sound recordings.

During the 1890s, two basic methods of cylinder duplication were employed commercially in the United States: tube duplication and pantographic duplication. The technical details don’t matter in this context; the salient fact is that both methods of duplication caused master recordings to wear out quite rapidly. According to different sources, a single master cylinder yielded between twenty-five and two hundred duplicates for sale.<sup>27</sup> Under these

<sup>22</sup> *Phonoscope* 3:2 (Feb. 1899), 12.

<sup>23</sup> Advertisement, *Phonoscope* 3:1 (Jan. 1899), 18.

<sup>24</sup> *Phonoscope* 3:2 (Feb. 1899), 13.

<sup>25</sup> In 1892, for example, the Columbia Phonograph Company was duplicating “originals” manufactured and sold commercially by the Ohio Phonograph Company, over that company’s objections (*Proceedings of the Third Annual Convention of the National Phonograph Association of the United States, Held at Chicago, June 13, 14, 15, 1892* [n. p.: (1892)], 82). The Edison Records of mid-1897 appear to have been sourced similarly from “originals” manufactured and sold commercially by the United States Phonograph Company of Newark, New Jersey (Raymond R. Wile, “Duplicates of the Nineties and The National Phonograph Company’s Bloc Numbered Series,” *ARSC Journal* 32:2 [Fall 2001], 189).

<sup>26</sup> F. W. Gaisberg, *The Music Goes Round* (New York: Macmillan, 1942), 19; Edward B. Marks, *They All Sang: From Tony Pastor to Rudy Vallée* (New York: The Viking Press, 1935), 104.

<sup>27</sup> Edison’s laboratory estimated it could produce 100 duplicates from each master cylinder (Alfred Tate to Edison, Jan. 13, 1892 [TAEM 133:400]), and Walter Miller asserted that “you cannot get over two hundred” (*Proceedings of Second Annual Convention of Local Phonograph Companies of the United States, Held at New York, June 16, 17 & 18, 1891* [New York: Linotype Reporting & Printing Co., (1891)], 89). By the late 1890s, a performer later recalled, “from each master they could make from twenty-five to seventy-five duplicates before the master wore out” (J. S.

circumstances, it was technologically impossible for a recording company to invest in stockpiling a “back catalog.” Worn-out master cylinders became economically useless and were presumably shaved (i.e., erased) several times for reuse as blank media and ultimately discarded. In short, cylinder masters of the 1890s were strictly ephemeral and no longer exist, except perhaps in very rare instances that would be difficult to authenticate. Therefore, any copyright that ordinarily accrues to the owner of a physical master recording would not seem to apply to these earliest duplicates any more than to directly-sold “originals” of the same period.

Until 1902-3, master disc recordings similarly yielded only a thousand or so copies before they had to be replaced.<sup>28</sup> After this point, however, new methods greatly expanded the number of cylinders or discs that could be generated from a single master recording, and companies accordingly began to treat the production of masters as long-term (or at least medium-term) investments. Among other things, this innovation “jumped the price of the singers’ services, until it was fixed at \$40.00 for each number,” as one performer later recalled,<sup>29</sup> implying that previous compensation agreements between performers and recording companies had presupposed sharp technological limitations on the number of duplicates it was possible to manufacture—again, contrary to the assumptions of *Ingram v. Bowers*. It is worth noting that nearly all performers of the early period made recordings in return for flat fees rather than “royalties,” such that their estates would have no continued financial interest in the recordings today under original contracts, where contracts even existed.<sup>30</sup>

A company might conceivably have preserved in its vaults a back catalog extending back to the first years of the twentieth century which unauthorized duplication statutes would protect today through continued “ownership” of the physical masters. Nevertheless, reality is often quite different:

- In 1910, the *New York Times* reported of the Victor Talking Machine Company: “The original matrix [i.e., master disc recording] is not used for printing the disks but is stored away in a fireproof vault where, in all human probability, it will be just as good as ever centuries from now. There are 18,000 such records in the Camden vault. Mr. Johnson’s dream that a great voice need never die is pretty thoroughly realized.”<sup>31</sup> But: “In the early 1960s, the RCA Victor Camden warehouse was demolished. Along with it untold numbers of wax and metal disc vault masters, lacquer discs, and rehearsal recordings were bulldozed into the Delaware River.”<sup>32</sup> In other words, the Victor Talking Machine

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Macdonald [“Harry Macdonough”] to Ulysses J. Walsh, Feb. 9, 1931, facsimile in Tim Gracyk, *Companion to the Encyclopedia of Popular American Recording Pioneers, 1895-1925: Rare Items from the Recording Industry’s Early Decades* [Granite Bay, California: Tim Gracyk, (n.d.)].

<sup>28</sup> This is the maximum figure cited in G. K. Cheney, “Process of Duplicating Matrices,” U. S. Patent 783,176, filed June 6, 1903, granted Feb. 21, 1905. Known production figures for the Victor Talking Machine Company tended to fall in the 200-2000 range; see Ted Fagan and William R. Moran, *The Encyclopedic Discography of Victor Recordings, Pre-Matrix Series* (Westport, Connecticut: Greenwood Press, 1983).

<sup>29</sup> Ulysses J. Walsh, “Reminiscences of ‘S. H. Dudley,’” *Phonograph Monthly Review* 6 (Jan. 1932), 63.

<sup>30</sup> Operatic stars such as Enrico Caruso were rare exceptions. The first “popular” artist to receive a royalty-based contract in the United States appears to have been the comic monologist Cal Stewart, in another exceptional case; see Agreement between Cal Stewart and Thomas A. Edison, Inc., May 16, 1911, reproduced in facsimile in Randy McNutt, *Cal Stewart: Your Uncle Josh* (Fairfield, Ohio: Weathervane Books, 1981), 45.

<sup>31</sup> “How a Man with an Idea Made Millions in Twelve Years,” *New York Times*, Aug. 28, 1910, Sunday Magazine, p. 9.

<sup>32</sup> Donald Christiansen, “Nuts About Nipper,” <http://www.todaysengineer.org/2008/Aug/backscatter.asp>, accessed Jan. 28, 2011.

Company's corporate successor RCA Victor intentionally destroyed its main physical repository of early master recordings.

- One important early American disc record label was Zon-o-phone. The Universal Talking Machine Manufacturing Company that produced this label was purchased in 1903 by the Victor Talking Machine Company. But in 1912, all of the company's masters were punitively destroyed by court order following an adverse ruling in a lawsuit brought by the rival Columbia Phonograph Company.<sup>33</sup>

In the case of these destroyed master recordings, Sony Music Entertainment would no longer seem to fit the legal definition of a copyright "owner" under the unauthorized duplication statutes I've mentioned, even though it is the corporate successor to the Victor Talking Machine Company.

Common law copyright, the California Civil Code quoted above, and federal copyright in post-1972 recordings all define "ownership" purely in terms of authors, creators, and employers or their heirs or assignees. On the other hand, state unauthorized duplication statutes use a very different model for establishing "ownership" that would *not* accord protection in certain cases:

- When master recordings were marketed directly to the public, as with the sale of "originals" during the 1890s.
- When master recordings used for duplication were ephemeral and routinely "wore out," as during the 1890s.
- When master recordings have been punitively destroyed by court order, as in the case of Zon-o-phone.
- When a company has intentionally destroyed or disposed of otherwise "permanent" master recordings, as in the case of the Camden warehouse demolished in the 1960s.

The last of these cases is the most interesting, since it furnishes a mechanism for rewarding conscientious custodianship while simultaneously punishing the past or future destruction of cultural heritage. If pre-1972 sound recordings are brought under federal copyright, this mechanism might be advantageous to borrow. Consider that existing federal copyrights in works published between 1923 and 1963 only remain in effect today if they were formally renewed (with exceptions for foreign works), such that the holder of a copyright had to exert a token effort to keep it alive, taking some responsibility for it and showing some continued investment in it. It would not seem equitable for copyrights in sound recordings from this period to remain automatically in force when the same is not true of copyrights in other categories of work (books, movies, etc.). The voluntary destruction or discarding of a master recording might thus be treated as equivalent to failing to renew a copyright. In both cases, the behavior shows that the "owner" at a critical juncture in time did not consider the asset worthy of maintenance into the future. The Copyright Office should consider requiring that a recording company demonstrate physical ownership of a pre-1972 master recording used at some stage in the original manufacturing process as a prerequisite for pursuing a legal claim based on ownership of the corresponding copyright. (Of course, the loss of an original master recording is even more catastrophic from the standpoint of cultural heritage than the mere failure to renew a copyright, because the work itself can no longer be recovered in optimal form.)

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<sup>33</sup> Allan Sutton, *A Phonograph in Every Home: The Evolution of the American Recording Industry, 1900-19* (Denver, Colorado: Mainspring Press, 2010), 86.

As I've shown, the "ownership" of copyrights in pre-1972 sound recordings is defined inconsistently at present, even within individual states (such as California), so there is no agreed-upon standard for a federal copyright to adopt. Rather, some basis for ownership of federal copyrights in pre-1972 sound recordings would need to be chosen and made explicit. According to the definition found in most unauthorized duplication statutes, many of the very early commercial sound recordings I discussed earlier in this document would seem to have no copyright "owners" because physical master recordings do not survive or never existed in the first place. Carrying this definition of ownership over into a federal copyright in pre-1972 sound recordings would create added incentive for recording companies to take steps to preserve holdings of historical and cultural importance, perhaps following the model of Universal Music Group with its recent large deposit of master recordings with the Library of Congress. This, I suggest, is the type of activity the American people should reward, as contrasted with RCA Victor's notorious demolition of its Camden warehouse with all the master recordings inside.

When a company has preserved an original pre-1972 master recording, it is in a position to contribute to the public good by making available the best possible version of that recording in terms of audio quality. Conversely, when it has discarded or destroyed an original master, it no longer has any such advantage in this area because it no longer possesses an earlier generation of the recording than those which were distributed to the public. Anyone seeking to reissue the recording today, including the originating company, would need to start from scratch with a commercial copy and would face identical technical and economic demands relating to its transfer, restoration, and publication. In the absence of royalty-based contracts (which, as I've pointed out, were extremely rare in the early history of the industry), Sony Music Entertainment would need to invest precisely the same labor and expenditure as any other party in order to reissue an early Victor recording whose master was destroyed in the Camden warehouse. Other parties would neither be getting a "free ride" at Sony's expense nor diminishing the value of assets Sony has diligently maintained.

The work involved in transfer and restoration is considerable, and also highly skilled. In terms of the actual economics of reissuing the very early sound recordings with which I'm most concerned, it is these *new* investments that are practically significant, and not the investments made by originating companies a century ago (and long since written off). This industry in transfer and restoration warrants encouragement, regardless of who carries it out, so long as it is done well. One mechanism for accomplishing this would be to extend copyright protection to *restorations* of very early sound recordings as new post-1972 works, even though these are generally understood to lack the requisite originality; nevertheless, exclusive copyrights in early sound recordings do not appear to be necessary as incentives for such work, judging from the thriving and highly regarded reissue industry in Europe. In any case, even if such work can't be protected by copyright, it is still desirable that it should not be impeded by copyright.

By establishing a reasonable public domain in very early sound recordings, through whatever means and on whatever basis, Congress would foster the ability of small, independent American reissue companies to compete internationally with their European counterparts—since it is such small companies that are, in practice, doing most of this work. By failing to do so, Congress would perpetuate a status quo in which sound recordings are eligible for state copyright for as long as 210 years, an absurdity that is likely to breed contempt for copyright in general.