

Legalize Music History: An Argument for the Public Domain

My name is Alex Cummings, and I am an assistant professor at Georgia State University, where I teach legal and political history. My research centers on the evolution of copyright for music and sound, particularly issues of piracy. I feel strongly that current laws overly restrict access to the legacy of American recorded culture. In this comment, I suggest that the Copyright Office recommend changing the status of pre-1972 sound recordings in the interests of education and historical preservation.

Congress has an opportunity to overcome a pointless legal logjam and make America's cultural heritage far more available to the American people. A long-running struggle over music and copyright has resulted in many sound recordings being barred from the public domain, contrary to the intention of the founding fathers and the interests of the listening public. The Constitution's framers meant for creators and inventors to enjoy an incentive to create new works, not a permanent property right to control ideas, expressions, and inventions. Unfortunately, this restrictive situation is the unintended side-effect of laws passed decades ago, by lawmakers unaware of the consequences of their actions.

The recording of sound has long puzzled the makers and interpreters of American law. Proposals for a recording copyright were beset for years by philosophical confusion, the competing interests of various parties in the music industry, and conflicts between state and federal law. Until the Sound Recording Act went into effect in 1972, recordings had no real copyright protection at the federal level. Written compositions had been copyrightable since 1832, but Congress declined on numerous occasions to extend copyright to sound recordings themselves – that is, specific recorded performances of compositions. You could copyright “White Christmas,” but not a particular rendition of the song by Bing Crosby or Worm Murderer and the Ice Spasms. The question first emerged during debates over the Copyright Act of 1909, when Congress decided not to create a new copyright for recordings – which in those days meant wax cylinders, paper piano rolls, and the other products of a recording industry still in its infancy. Although the topic came up many times in the following decades, Congress failed to act until composers, record labels, and unions united in support of reform that created a new property right for recordings in 1971.

Even before 1971, it remained possible for an artist or record company to possess a “common law copyright” for a recording at the state level. (This is the right one had to his work regardless of whether it was formally registered for copyright.) Precedent stretching back to the early nineteenth century made it clear that an author gave up this common law right when a work was “published,” which typically meant being distributed to the public. To get around this fact, record companies have argued since the 1930s that airing a performance on the radio or selling recordings of it was not the same thing as publishing it. While jurists such as Learned Hand disputed this seemingly preposterous notion, courts have increasingly sided with would-be rights-owners over the years, notably in the 2005 *Capital v. Naxos* decision. The result is a circle of logical violence:

1. Pre-1972 recordings are eligible for common law copyright
2. Common law copyright is given up on publication, but pressing and selling a record does not equal publishing it
3. If selling records does not count as publication, then it must be impossible for recordings to lose their common law copyright
4. Thus, there is currently no public domain for recordings

To be fair, Congress has attempted to remedy this odd situation by dictating that all common law copyrights lapse by 2067, but the solution is cold comfort for anyone interested in the sounds of the past. A seminal recording of the human voice from 1860 will end up being covered by copyright for over 200 years, long after its creators and their great grandchildren have vanished from the Earth.

Even with common law copyright, the status of recordings was unclear prior to 1971. American courts and legislatures gradually embraced an expansive interpretation of property rights, but there was little consensus for much of the twentieth century. Record companies found that defending their common law rights in court was expensive, and the outcome uncertain. As a result, they pressed numerous state and local authorities to address the issue of piracy and the general lack of protection for recordings. Los Angeles, with its own local recording industry, was the first to pass a law forbidding unauthorized reproduction of records in 1948. When the advent of magnetic tape led to an increase of record pirating, the state of New York passed an important law in 1967 that forbade anyone to make copies of a record without permission of its original producer – presumably, the company that funded and organized its recording.

Not everyone was pleased with the legislative push against piracy. Broadcasters worried that their own practice of making temporary copies of recordings for use on the air would fall under this sweeping law, turning them into criminals. Meanwhile, record collectors from Manhattan to New Orleans petitioned Governor Nelson Rockefeller not to sign the bill as it was written; they argued that many historically important recordings had long since fallen out of print, as record labels considered the music too obscure to merit continued commercial release. Such music only continued to be available through collectors who made copies on a small scale to supply those who were interested in the antiquarian and esoteric. Music fans had argued for the cultural importance of bootlegging since at least the 1930s, when jazz aficionados dubbed and exchanged copies of classic out-of-print recordings in the interest of historical preservation.

Unfortunately, many states followed New York's lead in the following years, passing broad laws that put recordings permanently out of the public domain. Critics in the 1960s warned that such laws actually violated the Constitution, since the nation's

founding document gave Congress the power to grant creators and inventors the exclusive right to exploit their works only for “limited times.” New York lawyer and record collector Payson Clark made an impassioned case in 1966:

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. 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 ‘30’s whose playing has been felt and heard around the globe.

Gov. Rockefeller did not heed Clark’s plea. The new state laws, passed in the late 1960s and early 1970s, gave record labels a completely unlimited right to control the use of recordings. Although Congress brought recordings made after 1972 under federal copyright – with a term that now lasts the life of the author plus 70 years, or up to 120 years for corporate works – many recordings that otherwise would not be restricted under federal law continue to be “protected” by these state laws. As a result, some of the earliest and most historically important etchings of sound waves from the late nineteenth century remain, at least theoretically, under legal protection. Whereas a book or photograph from the exact same time period would now be in the public domain and freely available, in accord with federal copyright, sound recordings from the early twentieth century remain restricted by state laws.

Such rules set an intolerably high barrier for students, scholars, and the listening public, who will not see many recordings pass into the public domain and become freely available unless Congress acts. Libraries, archives, and other institutions understandably exercise caution in these matters, fearing legal retribution if they permit a patron or researcher to make a copy of a recording for which the owner may be long dead or impossible to determine; the possibility of litigation, however remote, creates a powerful chilling effect. The result is a senselessly restrictive situation in which Americans are denied access to the remnants of their recorded heritage out of fear of phantom rights-owners. Many state laws, after all, forbid reproduction of more than a few copies in the absence of permission from some rights-holder, whoever that might be. In the interests of access, education, and Constitutional freedom, Congress should treat recorded sound just like any other work by bringing state laws in line with federal copyright.