

RECORD PIRACY

The Attempts of the Sound Recording Industry to Protect Itself against Unauthorized Copying, 1890-1978

by Raymond R. Wile

Recent developments in the sound recording industry echo a series of scenes that occurred in the Eighteen-Nineties as the major firms strove unsuccessfully to prevent their recordings from being copied. In October 1898, Calvin G. Child was questioned concerning the Baldwin Cadet Band recordings that he made when he was previously connected with the New England Phonograph Company:

"Were any records purporting to be made by the Baldwin Cadet Band shown to you as having come from the United States Phonograph Company?"

"There was one record purporting to be made by the Baldwin Cadet Band, which was shown to me by Mr. Easton, but which he did not state at first was from the United States Phonograph Company. He asked me if it was a record which I had made, and I told him no. He asked me if I thought the record had been made since I left Boston, and I also told him no. He then asked me what my opinion was in regard to it, and I told him that it was a duplicate, and on his asking me why I thought it was a duplicate I told him that it was made upon a blank of a very light color which had been made since the Cadet Band had made any records...and that all their records were made upon the dark blanks...Mr. Easton then admitted that it was a duplicate which had been sent to him from the United States Phonograph Company."

"After these conversations between you and Mr. Easton...were further duplicates purchased by the Columbia Phonograph Company from the United States Phonograph Company?"

"Yes, sir, frequently."

"And were any of them taken to the factory of the American Graphophone Company at Bridgeport?"

"A number were taken to the American Graphophone Company in Bridgeport and duplicated from and carried in stock by the Columbia Phonograph Company and sold to patrons."¹

We had to cross an iron chain, which was stretched across the passageway and permanently secured in the walls to prevent people going back and forth to or from the store room, in the northwest corner of which there is

a partition set obliquely across the corner....On the other side of the door was painted the words "Positively no Admittance," and beneath the same a rude design of cross bones and a skull. Opening this door with a key the defendant Douglass led affiant and said Deputy Marshall to a triangular hall of small size...Another door opened from the north side of the building. The latter room affiant will herein afterwards refer to 'Leachman's room.' Mr. Douglass opened the door of said room...and affiant and the Deputy Marshall found therein a bench having a line shaft above it and having cylinder record duplicating machines on each side of the bench, four of which machines on the west side of the bench were for ordinary sizes of records, while the fifth duplicating machine on the east side of the bench, was for the duplication [Grand] cylinders...²

Thus testified Charles W. Hills on an 1898 raid directed against record copiers. The inability of the early phonograph industry to produce a commercially feasible method of preparing molded duplicate cylinder records allowed the development of a tradition of unauthorized appropriation of creative work that has persisted until the present time. The sister motion picture industry also suffered from similar practices, such as unauthorized "duping," that made a travesty of the pictorial quality of many of the early productions. Unlike the record companies, the affected movie producers were able to resort to the copyright law through the simple expedient of registering each individual frame as a separate photograph.*

The first phonograph company had no duplicating problems. Edison's recording medium in 1878 was a metal foil that had little durability--the impressions of the sound waves were flattened out after a few playings, and the foil itself often did not survive the act of removing it from the cylinder mandrel. Although there were early attempts to prepare duplicate copies, one even having a patent application filed for it, the inability of Edison and others to make the machine commercial gave no encouragement to copiers.³ When he abandoned his experiments in late 1878 the "talking machine" seemed destined to become a "scientific curiosity" and nothing more.

The situation was changed when Alexander Graham Bell and two associates, Chichester Bell and Charles Sumner Tainter, banded together as the Volta Laboratory Association and be-

*The need to copyright individual frames led to the practice of depositing long strips of photographic prints. These were restored to projectable form in the so-called paper-print program.

gan a concerted effort to improve the phonograph and make it marketable. Among the eventual omnibus patents that resulted from their efforts was one that included a method of preparing duplicate copies.⁴ After attempts to cooperate with Edison failed, the Volta group was left to market its new "graphophone" alone. Edison then decided to resume his phonograph experiments, and after a futile attempt to further develop his original tinfoil concept he appropriated many of the Volta improvements and came out with a competing machine. In 1888 a promoter, Jesse Lippincott, organized the North American Phonograph Company, an organization committed to marketing both machines impartially. Although their contract allowed Edison to experiment with the aim of developing a commercial feasible duplicate record, the major thrust of the company was to market the new talking machines as devices for use in taking dictation.⁵

Edison's attempts to develop a good molded duplicate dragged on during the Nineties. He was able to produce a few experimental molded cylinders in 1889 by a "pour" method, and there is a remote possibility that some of the cylinders being duplicated by the Edison forces from 1891 to 1893 were being copied from molded cylinders. However, it was not until 1897 or 1898 that he was able to produce a fairly consistent duplicate through the so-called "press" method, whereby a blank cylinder was placed inside a heated mold and pressed against the mold's inner surface through the action of a tapered expansive core. After a partial cooling the copy was then rotated out of the mold. The method was too expensive to be commercial but was used to prepare recordings from which cut duplicates could then be produced by pantographic means.⁶

Soon after its organization in 1888, the North American Phonograph Company sold territorial marketing rights to a number of local companies which would be allowed to rent the Bell and Tainter Graphophone or Edison's Phonograph for \$40.00 per annum. Both machines had all the problems of the untried, were opposed by stenographers, and suffered from an initial inability to manufacture a sufficient number of instruments. By 1890 the golden dream of profits was rapidly fading and many of the local companies had to discover additional sources of revenue or face insolvency.⁷ By the time that the Second Convention of Local Phonograph Companies was held in 1891, several had turned to phonograph parlors as a practical solution to their financial woes. The interest of the public in recitations, heart songs and military band music was being satisfied by nickel-in-the-slot machines in such diverse locations as bars, ferry terminals, hotel lobbies or rented stores.⁸ With the unceasing demand of the public for new selections, the

industry was faced with two concurrent needs--for dependable coin-operated machines and for a dependable supply of musical cylinders.

Numerous patent applications were filed for coin-operated devices--so many that the Patent Office took two years to settle the twenty to thirty Patent Interferences that were declared as a result of the conflicting claims. In the ensuing shambles a company that had been organized to control the amusement phonograph business--the Automatic Phonograph Exhibition Company--failed.* With the supply of recordings the industry faced a similar problem: there had been no satisfactory method for preparing copies, so that each recording was a unique document. Production was increased when it was realized that additional copies might be made by facing the recording artist with a bank of recording machines numbering from a few to ten or more, depending upon the volume of sound that the performers would produce in the studio. The artist or group would wait for a signal to start, an announcer would repeat the name of the selection and company as many times as there were machines, a signal would be given, and the next recording "round" would begin. A few minutes later all of the electrically driven machines would be turned off, the newly recorded cylinders removed, and a new batch of blanks loaded. The process was repeated until the stock was replenished. Performances were erratic and it is obvious that a premium was placed upon leather-lunged singers and big-toned groups and instrumentalists. The quality of recording would vary between and even within sessions--the latter because the nearest recording horns would capture more sound. The Columbia Phonograph Company recognized this when it specified in some of its earlier catalogs that some records were suited for tube or else horn--listening tubes or reproducing horns. But even with the constant recording activity, the more popular groups such as the United States Marine Corps Band of Washington could not keep up with the incessant demand. The announcements later became more than a device for advertising the source of the recording; they began to be used as evidence of origin to prevent copying by other companies.⁹

With the advent of advertising in the newly formed trade paper, The Phonogram, and the rudimentary beginnings of a "star system," the companies had begun copying one another's

*Automatic had the blessings of the North American Phonograph Company, Edison, and others. Lacking complete patent control it was not able to force the local companies to use its processes.

product.* This was natural, since a popular title might be in great demand and yet it would often take an inordinate amount of time to obtain additional copies--if the original company had it in stock. Each local company had its own resident tinkerer or "expert" whose major function was to maintain the company's machines in working order. These individuals soon began to develop modifications of the existing equipment and provided a body of trained individuals to staff the larger companies as the trade developed. Once such experimenters developed new mechanical methods for copying, any property right inherent in a recording was placed in jeopardy.+

When the North American Phonograph Company's Jesse Lippincott was forced to assign his property for the benefit of creditors in 1891,¹⁰ the American Graphophone Company was able to extricate itself from the obligation to market through North American. Anticipating a rich harvest in the provision of fodder for the slot machines and later for the home entertainment field, the company or its agents began to acquire whatever duplicating patents were available for purchase. Its problem was to be that most methods were easy to develop and usually involved relatively simple modifications to already existing machines. Thus the ownership of the patents was to be continually challenged by new infringements.^

One of the first patents acquired was for a method developed by a native midwestern genius, Leon F. Douglass, who used a closed hearing tube attached between the reproducer of one phonograph and the recorder of another. The closed air column would vibrate and transmit enough sound to produce a muffled copy. [Figure 1.] Douglass received some graphophones in payment and a royalty that was soon changed to a license to make copies under the patent.¹¹ Another early method consisted in having two machines face one another; as a record was played, enough sound was transmitted by the amplifying horn of the first machine so that the second machine's recording horn could pick it up and make a record. This method also produced low-volume copies.

By 1895 a merger between the Columbia Phonograph Company and the American Graphophone Company was completed. Now Columbia and a new offshoot--the Columbia Phonograph Com-

*At least five of the local companies had advertised musical records by the beginning of 1892.

+Leon F. Douglass, Thomas H. Macdonald, Calvin G. Child, Frank L. Capps, and Victor H. Emerson all began as employees of the various local companies.

^By now there was a close liaison between Columbia and the American Graphophone Company.

pany, General—became the marketing organizations for the American Graphophone Company, while the latter continued to be the manufacturer. Once this occurred the program for obtaining duplicating patents was stepped up. The organization soon acquired a partial ownership in a patent developed by Giannini Bettini by which he had been making pantographic copies of his "high-class" recordings. [Figure 2.] The remainder of the patent was retained by the New York Phonograph Company, the local organization which had licensed Bettini to operate. Thomas Hood Macdonald, the Gramophone Company's chief experimenter, also developed and patented a variant pantographic method.¹² [Figure 3.]

The first publicized full-scale attempt to make duplicates occurred when the Edison Phonograph Works announced in 1891 that it was prepared to furnish copies of cylinders on order. Besides copying records that were submitted to the company, it used its method for supplying records needed by the North American Phonograph Company. Some have argued that the operation involved molded duplicates, but close examination of the surviving documentation indicates that a pantographic method was being used. The finished records, while smart in appearance, seem to have been of indifferent sound quality. The practice was cut short by Edison but taken up by the North American Company, which opened a recording and duplicating facility on 25th Street in New York City. At the time the Company went into receivership in 1894 the property was sold to Cleveland Walcutt, the former secretary of the Company, and to Walter Miller, who had been in charge of Edison's duplicating operation when it was located at Silver Lake, New Jersey.¹³

North American's most active competitors were the American Graphophone Company and its marketing arm, the Columbia Phonograph Company, both of whom had recognized the potential in supplying musical records. Columbia, the most active of the local companies, had already established an extensive list of recordings available for sale when its first surviving catalog appeared in February 1890.¹⁴ It was known as an aggressive organization that was accused of invading the territories of rivals and was quick to defend itself against the incursions of others.¹⁵ It was in this situation that the first litigation involving recording rights occurred. As the local licensee of the North American Phonograph Company, Columbia held rights to a territory consisting of the District of Columbia, Maryland, and Delaware. By 1893 the company had already developed several local artists whose fame had spread far beyond the confines of its territory. There was a nationwide demand for luminaries such as John Y. Atlee, the artistic whistler, and

the United States Marine Corps Band.¹⁶ It was at this point that George E. Tewksbury and Leonard Garfield Spencer arrived in Washington intent upon recording the U.S. Marine Corps Band, perhaps Columbia's most popular property. Columbia immediately resorted to the courts, bringing suit in the old Supreme Court for the District of Columbia, arguing that the activity would do the company irreparable harm and petitioning for an injunction against it. The request was speedily granted.* The principle of local recording rights had now been confirmed by the courts and a precedent was established that could be cited later.¹⁷

Soon afterwards a wide-ranging strategy was resorted to in the courts as both American Graphophone and Columbia attempted to control the "talking machine" industry. With basic Tainter patents that covered forms of duplication as parts of their claims as well as the patents that the companies had acquired, they could theoretically have gained complete control. Their activities are somewhat amusing since Columbia was one of the offenders in appropriating others' cylinders; as we have already seen, they acquired cylinders from the United States Phonograph Company, copied them, and then sold the copies as original or "master" quality recordings.¹⁸ Later, American Graphophone labeled the packing crates or barrels in which cylinders were shipped with a minuscule warning: "These blanks are sold for use only with machines licensed by the American Graphophone Company, and must not be used for making duplicate sound-records."¹⁹

One of the first moves in the new campaign was to bring action against the very same United States Phonograph Company. Operating out Newark, New Jersey, the firm was organized in 1893 and began business in January 1894, soon becoming one of the largest suppliers of cut duplicate records in the country. With an aggressive management and the tacit support of the Edison camp to spur the company on, it would obviously soon be engaged in mortal combat with American Graphophone and Columbia. Suit was brought in 1894 in the old United States Circuit Court for the District of New Jersey, an arm of the Federal Court system that specialized in equity cases in New Jersey. American Graphophone asked for relief, citing the Tainter patents as the basis for the action. At the same time suit had also been instituted against Walcutt, Miller & Co., the firm that had taken over the old North American Phonograph Company's New York duplicating and recording plant. This suit was brought in the Circuit Court for the Southern District of New York.

*Despite the injunction it is probable that many of the U.S. Marine Band recordings issued by the United States Phonograph Company owed their origin to the trip.

Attempts were made to obtain preliminary injunctions but in both cases the courts refused to grant them.²⁰

By agreement among all those involved, the testimony taken in the United States Phonograph case could be entered in any of the other similar cases. Also because of the case's importance for Edison it was decided to join it with one that had been previously brought against the Edison Phonograph Works. Evidence taken in either of the cases would have equal weight in the other. Much testimony had been taken and a record of over 800 printed pages had been amassed when the presiding judge died soon after the final hearing of September 1896. Rather than go through the lengthy process of familiarizing another judge with the information that Judge Green had possessed, both Edison and the American Graphophone Company agreed to accept consent decrees or discontinuances in these cases and a large number of others that had been brought in other Federal jurisdictions. This meant that the United States Phonograph case was discontinued without a decision being rendered.

It also meant that the company was vulnerable to further attack. Walcutt, Miller & Co. had now dissolved and was replaced by a new firm, Walcutt and Leeds.²¹ Almost immediately a new series of suits was instituted by American Graphophone against United States Phonograph and Walcutt and Leeds. George E. Tewksbury, the chief backer of United States Phonograph, was also a silent partner in Walcutt and Leeds, and consequently was named as a defendant in both cases. A strong defense was prepared, but now the mental illness that was soon to institutionalize Tewksbury became evident.²² The company was rudderless without its major spokesman and was forced to agree to a consent decree in the latter half of 1899 in which a token damage of one dollar was assessed. Walcutt and Leeds was also forced to accept a similar decision.

The United States Phonograph Company disappeared soon afterwards when Edison's National Phonograph Company purchased its record stock and equipment.²³ United States Phonograph had at first attempted to transfer its equipment to a Thomas Challenger of Philadelphia. Suit was brought against him and on the basis of previous successes the judge immediately granted an injunction against any attempts at preparing duplicates.²⁴

In addition to New York, Newark, and Philadelphia, the other major trouble center for the American Graphophone Company was Chicago. Several duplicating operations were being conducted there. Chief among these was that of Leon F. Douglass. Despite the fact that he possessed a form of license under the agreement by which he had turned over his "closed tube" process to Edward Easton, the American Graphophone Company brought suit. A preliminary injunction was

speedily granted but was reversed on an appeal by Douglass. However the case was not actively contested by Douglass because in mid-1900 he moved East and became Eldridge R. Johnson's General Manager, and thus was able to assist in the later birth of the Victor Talking Machine Company. By 1902-3 cut duplicates were no longer important, and so Douglass agreed as part of another settlement involving Victor to accept a consent decree with no damages assessed.²⁵

Cut duplicate copies had ceased to be a problem when in 1902 both American Graphophone/Columbia and Edison's National Phonograph Company were able to supply molded records prepared from a hard metallic soap compound. These cylinders, with their increased surface speed and their relatively hard surface, allowed for greater volume and much more faithful reproduction. The problem disappeared, not because of litigation, but because the newer technology made the piracies impractical.

Until 1900 most talking machines were of the cylinder type, and most of these had been supplied with recording devices. But in 1887 Emile Berliner began a long series of experiments designed to result in a machine that used already-prepared laterally-cut disc recordings. He was hampered in his efforts since his system could not use any elements that might infringe on either the Graphophone or Phonograph patents, but by 1889 or 1890 his technology had improved enough so that he was able to market pressed copies in Germany. These records were crude and certainly would not arouse in any counterfeiter the urge to copy, but nonetheless each carried the inscription "Alle Copie-Rechte vorbehalten," which may be translated as "All Copyrights Reserved."²⁶

Additional developmental work was needed before the Berliner records were introduced to the American market in 1894. After several transmutations, the manufacturing activities were assumed in Fall 1895 by the Berliner Gramophone Company, and the marketing was taken on by an advertising genius, Frank Seaman, after the Fall of 1896. Using high pressure techniques, Seaman's National Gramophone Company marketed increasing numbers of machines and records. The success encouraged copying. Joseph Jones, a former employee at Berliner's Washington laboratory, soon applied the knowledge learned there to making duplicates. The proposed infringement was to be twofold. George Conn of musical instrument fame was to manufacture an infringing gramophone--the Wonder--while records would be supplied by the Standard Talking Machine Company under a license from the American Graphophone Company. The Columbia Phonograph Company, General would market the spurious records. The records produced in this infringement were to be identical with already

existing Berliner Gramophone Records, with the significant exception that all marks showing origin or patent information would have been removed. It was even proposed to use the Berliner numbering system but with the prefix 1 added at the beginning.²⁷ Fortunately Jones was unable to obtain a consistent product and the entire operation seems to have disappeared after suit was brought by Berliner.²⁸

Meanwhile, the increasing success of Frank Seaman's National Gramophone Company began to cause dissension. Seaman felt that he was being forced to take all the risks while the Berliner Gramophone Company sat back and reaped a profit based on a portion of its manufacturing costs. An added indignity was that the company did not even engage in the manufacture. The actual work was farmed out to a Camden machine shop operated by Eldridge Johnson, who had previously specialized in a wire book-stitching machine. Johnson received a cost-plus profit, and the Berliner Company then added its own expenses on top of this and received a cost-plus figure.

The contract with the group specified that if Seaman could have the materials supplied at a significantly lower price, he could arrange to be supplied from the lower-priced source as long as he paid the proper royalties. With this incentive, the Universal Talking Machine Company, or Zonophone as it is commonly known, was organized in February 1898 with the ostensible purpose of manufacturing nickel-in-the-slot attachments for gramophones and machines for export. Placed in command was an Orville La Dow, who had at one time worked in the advertising department of the Royal Baking Powder Company and was thoroughly conversant with the production of electrotypes. Under his guidance it was not long before Universal had the capability to copy and issue disc records.²⁹ [Figure 4.] As a result another series of records began to appear on the market with only the title and artist credits given and with all trademark and patent information removed. A careful examination of these recordings revealed the originals to have been Berliner Gramophone discs.³⁰ At the same time Joseph Jones and Albert T. Armstrong had gotten their act together and were issuing other infringing records through simple lateral pantographing. [Figure 5.] These Vocophone records were to be a constant source of irritation for the Berliner groups.³¹

It was one thing to realize that one's product was being appropriated, but quite another to discover a method of suppressing the copying. Almost at the same time a few records appeared in England with the recording angel trademark impressed in the groove area, and in Canada with the familiar dog and gramophone similarly placed. If one of those records were copied the trademark infringement would be obvious; if the record were dubbed it would have inexplica-

ble sound distortions wherever the playback needle had passed over part of the trademark pressed into the original disc. The practice did not become general.³²

Eldridge Johnson, and perhaps Berliner too, experimented with producing records whose spoken announcements continued on into the music itself. By doing this a duplicator would be prevented from blocking out the spoken announcement.³³ Still another technique that was attempted was for a company to position the issue numbers, matrix numbers, and take designations identically on all its masters. Any direct copying by dusting an issued record with graphite (to make it electrically conductive) and then preparing a mold by electroplating would be readily ascertainable in the issued duplicate records.³⁴

At various times attempts were made to register records for copyright but the registration was always refused by the Copyright Office, which reasoned that a recording could not be considered a writing under the terms of the copyright act.³⁵ Since a record was not to have copyright protection, the companies began to consider protecting their product through the use of patents. Actually the groups were attempting to apply a form of mechanical copyright of their own. Protection would be accomplished through the patented recording method or through the patented method of preparing a matrix.

Manufacturers began to supply their recordings with a limited-use notice soon after the turn of the century. The first Victor Records of 1901 and 1902 carried the inscription: "This record is leased for the purpose of producing sound directly from the record, and for no other purpose; any attempt at copying or counterfeiting will be construed as a violation of this condition and as a basis for legal proceedings." Beginning with the box labels produced after April 1902, Edison Records warned against copying: "Licensed for direct reproduction of sound only and not for duplication." Columbia Disc records carried similar warnings: "This record is sold under the express condition that it shall not be copied or duplicated and that the full right of property or possession reverts to the Columbia Phonograph Co. upon violation of this condition." Even so, litigation to uphold this concept does not seem to have occurred. If cases did occur, they were either not reported by the usual legal reporting services or else resulted in consent decrees. A diligent examination of the dockets of several possible Federal jurisdictions shows no such actions.

It was the Victor Talking Machine Company that was able to discover an effective approach to dealing with copying. The same Albert T. Armstrong of the Wonder infringements was now operating as the American Vocophone Company and supplying inexpensive machines for the "scheme goods" (premium)

trade. In order to provide records for these machines, Armstrong was dubbing Victor recordings and reissuing them on a disc which carried a red label that vaguely reminded one of the regular Victor label. But Victor had patented the concept of labeling a record with a red paper wafer and brought suit against Armstrong charging "unfair competition." The Federal judges agreed, and a new concept for the suppression of record copying was established.³⁶

Winant V. P. Bradley, who had already been involved in some of the old Zonophone copying, hit upon a new scheme in 1908. As it became obvious that Congress would not include records under the general revision of the Copyright Law, he decided to issue duplicates of records made outside the United States. If these were purchased abroad, and if matrices were then made by direct metallic deposit after graphiting the surfaces, he reasoned that the American companies would have no recourse. Each record was frankly labeled, "This record is a duplicate of an original record made by [name of artist]," and also carried a notice that "This record is manufactured and sold for use on mechanical feed machines only." Bradley could not help it if owners of Victor and Columbia machines, instead of Talk-o-phone owners, were to purchase and use the discs. The action came at a critical juncture since the potential for damage was great, and both Victor and Fonotipia's American agent Columbia brought suit in the Federal Circuit Court for the Eastern District of New York. The court agreed in both cases that there was unfair competition and issued injunctions ordering the remaining stock of records and matrices destroyed. That the practice was halted almost immediately is attested to by the scarcity of examples of Bradley's Continental label.³⁷

Although there were small-scale operators willing to copy any recording that might not be traced, there was also one major company challenging both Victor and American Graphophone-Columbia. The Leeds and Catlin Company had been formed out of a reorganization of the old Walcutt and Leeds Company at the turn of the century. The new company soon emphasized disc records and began a commercial career that was to end only in 1909. It too attempted to circumvent local patents by confining its product mainly to copies of recordings that had been made abroad, particularly those emanating from France. The two major rivals brought suit against Leeds and Catlin, and the entire first decade of the century was occupied with the suits. The Victor action was fought all the way to the Supreme Court, which eventually ruled against Leeds and Catlin. With this, and with the success of the American Graphophone Company in its suit, the company slipped into receivership, and the court-appointed Master was to find little in assets with which to satisfy the judgments.³⁸

Other methods were also utilized to prevent copying or to insure the legitimacy of a record. The Società Italiana di Fonotipia made it a practice for its artists to sign the original wax matrices so that each pressing would bear this attestation of authenticity. Also a rubber stamp would be made up so that each label would carry the rubber-stamped signature of the artist. For a short period Columbia also had artists sign some of the matrices in this manner. The German Odeon label used an ingenious device: the cutter was set for each record so that a small area of land would appear between predetermined grooves. If a copy were made, the existence of this area would identify the source as an Odeon. The practice does not seem to have been adopted in America, although Odeon matrices were pressed here.

As we have seen, attempts were made to register records under the provisions of the Copyright Act by claiming that a record was a "writing" under the terms of the Act. The Register of Copyrights refused to entertain this interpretation of the law. When the piano roll manufacturers did succeed in obtaining registration, the sound recording industry determined to have a remedy through legislation. The Victor Talking Machine Company was even prepared to present a bill to Congress to end the unauthorized copying of its records. On hearing that a move was then underway for the general revision of the copyright laws, Horace Pettit (Victor's lawyer), Frank Dyer of the National Phonograph Company, and Paul Cromelin of Columbia decided to join informally with the Music Publishers' Association in order to be heard.³⁹ Later a formal trade group was organized as the American Musical Copyright League, headed by Paul H. Cromelin of the Columbia Phonograph Company. The League attempted to counteract the damage being done by the Aeolian Company, a piano roll manufacturer.⁴⁰ Aeolian, in anticipation of a formal copyright recognition of the rights of musical publishers to limit the use of sheet music compositions, had been quietly acquiring exclusive performing rights from any publisher who was willing to sign.

In an adverse Congressional reaction to these moves, the efforts to include recordings in the new act failed. At the same time, in a decision in the case of White-Smith Music Publishing Company versus the Apollo Company, the Supreme Court held that a sound recording was not a copy and that the authors had no right to control recordings of their works under existing law. Horace Pettit, sensing eventual defeat, quietly withdrew his proposal for conferring copyright in recordings, stating that the White-Smith decision caused him to doubt its constitutionality.⁴¹ Consequently, the final report on H.R. 28192, which resulted in the 1909 Copyright Act, states:

It is not the intention of the committee to extend the right of copyright to the mechanical reproductions themselves, but only to give the composer or copyright proprietor the control, in accordance with the provisions of the bill, of the manufacture and use of such devices.⁴²

Thus the recording-copyright question was effectively closed for nearly 50 years.⁴³

At the end of the First World War the disruptions caused by that conflict were to create a new problem. Prior to the outbreak of war, the Victor Talking Machine Company and the Gramophone Company had matrix exchange agreements with each other, and a German sister company (Deutsche Grammophon) providing pressing facilities for the Gramophone Co. During the war Deutsche Grammophon was seized as alien property by the German government and sold to Polyphon of Leipzig, and by 1918 it was a separate operating entity. In a desperate attempt to obtain needed foreign exchange, Polyphon issued a long list of records derived from Victor matrices, as well as Gramophone Company productions to which Victor held American rights. The pressings were quite good and were sold in the United States on a much lower price scale than the regular Victor pressings. Victor brought suit against the American distributor, the Max Hesslein Opera Disc Company, and a decision was rendered in favor of Victor in 1923.⁴⁴ In this case the classic elements were present for a common law case of unfair competition:

1. Plaintiff and defendant must have been engaged in competition with each other;
2. Defendant must have appropriated a business asset that complainant had acquired by the investment of skill, money, time, and effort; and
3. Defendant must have fraudulently "passed off" or "palmed off" the appropriated asset as the plaintiff's, thereby confusing the public as to the source of the goods.⁴⁵

Even so, many Gramophone Company recordings for which Victor did not exercise its American publication rights were issued before the practice was halted, thus giving modern record collectors an opportunity to acquire recordings that might otherwise be much rarer.*

*An example is Caruso's 1903 Milan recording of "Mi par d'udir ancora" (Bizet: Les Pêcheurs de perles), issued on Opera Disc 76062, which was assigned a Victor number but apparently never issued on that label.

The new electrical recording process, controlled by only a few licensing firms, made it relatively easy to police the industry in the mid-Twenties. But the continued dislocations caused first by the impact of radio and then by the onset of the Great Depression almost sounded the death knell of the recording industry. Sales slipped to such an extent that at the low point in 1933 the manufacturers are said to have produced only \$2,500,000 worth of recordings with a retail value of \$5,500,000.⁴⁶ The market was such that there was no incentive to cheat.

By the end of the Thirties small-scale incidents again began to occur. The United States Record Corporation had dubbed many of its classical recordings from Telefunken records as they had appeared on the Czech Ultraphon label. Later that company collapsed, and its own original artists lost all royalty rights to their recordings, so that cuts by such performers as Jan Peerce appeared on a multitude of derivative labels. There was a possible recourse for these performers once the practice began to apply common law precepts to recorded property. The artist was considered a holder of rights who might sue to enforce them.⁴⁷

During World War II Telefunken records were also dubbed onto an American label called Radiofunken, and I am fairly certain that no payment was made to the American Alien Property Custodian. Soon after the end of the war I lent a copy of a Chaliapin recording to a friend who was involved with the Stinson label. Afterwards my record was returned along with a new Stinson issue complete with the legend "recorded in the USSR," even though it derived from an English session. To the uninitiated the copying might not have been evident, since a 12" original issue had been squeezed onto a 10" copy. The unavailability of many classic jazz performances also caused some small-scale appropriations, such as reissues on the Biltmore label, that supplied the wants of jazz collectors.

It was with the development of the long-playing record, and the concurrent switch to tape as a means of driving a cutting lathe, that copying again became a real threat to the industry. This was compounded by the willingness of both Columbia and RCA Victor to supply custom pressings. Excess pressing facilities elsewhere also created opportunities for the less than ethical operator. During the early Fifties many performances appeared with thinly disguised artist credits, and recordings that had their origin in "iron curtain" countries were often simply appropriated. The American Colosseum label republished dozens of Russian, Czech, and Polish recordings, actually boasting on its record jackets that no royalties were being paid--these were the McCarthy years. And the Record Corporation of America brought out on

its Allegro, Royale, Plymouth, and Gramophone labels many unauthorized off-the-air recordings from European radio, including Wagner's Der Ring des Nibelungen from the 1953 Bayreuth Festival. Somehow even this paled in the light of the audacity of one entrepreneur who supplied reissues of jazz performances under the Jolly Roger label. Here one could obtain classic jazz performances deriving from such sources as the Columbia Phonograph Company or the Victor Talking Machine Company, pressed on shiny new 10" long-playing records by the Custom Pressing Division of RCA Victor. The practice was discontinued but at the expense of several red faces at Victor Custom.

As the industry during the 1960s became more and more concerned with the concept of the super hit, the practices of the early days were refined and modernized. Now there would be no attempt to sell a production under another label. Record labels would be copied and a new counterfeit made by taping a regular pressing directly. The spurious production, all but identical with the original, would then be passed off through regular channels.

The development of the tape cassette format also proved a boon for the unethical, since it took but a small investment to set up an operation that could drain off thousands of dollars from the legitimate producer and the recording artist. Business Week on May 15, 1971 estimated that there might be as much as a \$100,000,000 market in bootleg tapes.⁴⁸ These activities, as well as those involving discs, resulted in a concerted effort by the Recording Industry Association of America to end the practices through legislative redress. At first a series of individual anti-pirating and anti-counterfeiting laws were passed by individual American states; afterwards Congress passed the first American legislation granting copyright protection to American recordings. The Sound Recording Act was considered an interim measure since it was intended to include such legislation in the general revision of the Copyright Act. The new copyright act took effect on January 1, 1978.

NOTES

1. Testimony of Calvin G. Child, October 5, 1898, on behalf of defendant in American Graphophone Company versus the United States Phonograph Company, et al. (U.S. Circuit Court for the District of New Jersey. In Equity No. 4005 on Patent No. 341,287). Questions 29 & 30. Edison National Historic Site (ENHS).

2. "Affidavit of Charles W. Hills" in American Graphophone Company versus Talking Machine Company, Polyphone Company, Leon F. Douglass, Silas F. Leachman and

Henry B. Babson (U.S. Circuit Court. Northern District of Illinois. Northern Division. In Equity No. 25186)(Printed appeal record, p. 47-48). National Archives Regional Center (NARC)—Chicago.

3. A certified copy of the application of William B. Hollingshead, March 14, 1878 was included as a part of his testimony in American Graphophone Company versus Leeds and Catlin Company, Edward F. Leeds, I. Allan Sankey and Henry Leeds (U.S. Circuit Court for the Southern District of New York. In Equity No. 8570). NARC--Bayonne.

4. Patent 341,287, claims 4, 14, 15, 16.

5. Exhibits D & E attached to Affidavit of Jesse H. Lippincott in Thomas A. Edison against Ezra T. Gilliland and John C. Tomlinson (U.S. Circuit Court. Southern District of New York. In Equity No. 4652). ENHS and NARC--Bayonne.

6. Patent 713,209.

7. See New England Phonograph Company, Minute Book, Feb. 20, 1890, May 8, 1890, and June 20, 1890, for example. ENHS.

8. The first issue of The Phonogram for January 1891 contained a letter from Edward D. Easton in which he described the progress of the Columbia Phonograph Co. (11/10/90), p. 24. The issue for April 1891 carried a long article concerning Columbia in which the musical cylinder business was mentioned. pp. 88-92 passim.

9. An excellent account of the techniques used in recording appeared as "To the Ends of the Earth: The Columbia Phonograph Company," Progress, 19 April 1894, pp. 82-84. (There are no reported library holdings of this date. An electrostatic copy was kindly supplied by Robert A. Truax.)

10. Reported on in The Phonogram (April 1891): 84-85.

11. See correspondence in American Graphophone Company versus Talking Machine Co.... The Douglass patent was No. 475,490.

12. The papers transferring the ownership of the Bettini patent were never formally registered with the Patent Office. The share of the New York Phonograph Company was later secretly acquired by Thomas A. Edison. Beggini Patent No. 488,681. MacDonald No. 559,806.

13. See American Graphophone Company versus Cleveland Walcutt, Walter Miller, and Henry J. Hagan (U.S. Circuit Court for the Southern District of New York. In Equity, No. 5966). Defendant's Papers in opposition to Motion for Preliminary Injunction. ENHS Legal Box No. 34.

14. See note 8. The first surviving list dates from February 1890. There is an electrostatic file of copies of early Columbia catalogs at the Rodgers and Hammerstein Archive of Recorded Sound, Library of the Performing Arts, Lincoln Center, New York.

15. See National Phonograph Association, Proceedings of the Third Annual Convention, 1892, pp. 80-86 passim. ENHS.

16. See Tim Brooks, "Columbia Records in the 1890's: Founding the Record Industry," ARSC Journal 10:1 (1978): 1-36.

17. Columbia Phonograph Company versus The North American Phonograph Company, George E. Tewksbury and Leonard Garfield Spencer (U.S. Supreme Court for the District of Columbia. No. 14580. Equity Docket 35). Washington National Records Center (WNRC)—National Archives Annex.

18. American Graphophone Company versus the United States Phonograph Company, Victor H. Emerson, individually and as President and George E. Tewksbury, individually and as Treasurer (U.S. Circuit Court, District of New Jersey. In Equity No. 3668), Record. An incomplete printed copy exists at ENHS. Also NARC—Bayonne.

19. "Testimony of Edward D. Easton, Sep. 6, 1899," in American Graphophone Company versus United States Phonograph Company and George E. Tewksbury (U.S. Circuit Court, District of New Jersey. In Equity No. 4005 on Patent 341,287), p. 14. NARC—Bayonne.

20. American Graphophone Company versus United States Phonograph Co.... (U.S. Circuit Court, District of New Jersey. In Equity No. 3668); American Graphophone Company versus Walcutt and Miller et al. (U.S. Circuit Court for the Southern District of New York. In Equity No. 5966). ENHS and NARC—Bayonne.

21. Ibid. For the organization of Walcutt and Leeds see American Graphophone Co. versus Walcutt and Leeds (U.S. Circuit Court for the Southern District of New York. In Equity 6542). NARC—Bayonne.

22. Details of Tewksbury's illness may be found in the ENHS document files, particularly in letters of S.S. Ott. The information concerning the commitment is found in American Gramophone Company versus Unites States Phonograph Company and George E. Tewksbury (U.S. Circuit Court, District of New Jersey. In Equity No. 4005).

23. The sale of the U.S. Phonograph Company is documented in the ENHS document files.

24. See letters of Thomas Challenger in the ENHS document files.

25. Several suits were brought in Chicago. The major one was American Graphophone Company versus Talking Machine Company, Polyphone Company, Leon F. Douglass, Silas F. Leachman and Henry B. Babson (U.S. Circuit Court, Northern District of Illinois, Northern Division. In Equity No. 25186). NARC—Chicago

26. See APM: The Antique Phonograph Monthly 5:9, pp. 1, 3.

27. See Wonder catalog. Recorded Sound Section--Library of Congress--Vertical Files.

28. U.S. Gramophone Company versus Standard Talking Machine Co. et al. (U.S. Circuit Court for the Southern District of New York. In Equity No.6919). NARC--Bayonne.

29. See testimony of Oliver La Dow in American Graphophone Company versus Leeds and Catlin et al. (U.S. Circuit Court for the Southern District of New York. In Equity No. 8570). NARC--Bayonne.

30. For example see testimony of William H. Nafey in Frank Seaman versus Berliner Gramophone Co. (Printed appeal record, pp. 255-59). WNRC--National Archives Section.

31. Ads for these records constantly appeared in The Phonoscope. See also U.S. Gramophone Company versus The American Talking Machine Company and Albert T. Armstrong (U.S. Circuit Court for the Southern District of New York. In Equity Nos. 7432, 7433, 7434). NARC--Bayonne.

32. The author saw an example with the recording angel at the Royal Scottish Museum Phonograph Centenary exhibition, and a copy with the His Master's Voice trademark at the Berliner exhibition at the Library of Congress, February 1978.

33. See APM: The Antique Phonograph Monthly 3:6 (June-July 1975): 6-7 .

34. The testimony of William H. Nafey (see note 30) provides an example.

35. See Barbara A. Ringer, "The Unauthorized Duplication of Sound Recordings," in U.S. Congress, Senate, Committee on the Judiciary, Copyright Law Revision, Studies.... Study No. 26, p. 4.

36. Victor Talking Machine Co. versus The American Vitaphone Co. and Albert T. Armstrong (U.S. Circuit Court for the Southern District of New York. In Equity No. 8838). NARC--Bayonne.

37. Fonotipia Limited and the Columbia Phonograph Company, General versus Winant V. P. Bradley (U.S. Circuit Court for the Eastern District of New York. In Equity No. 5-92); Victor Talking Machine Company versus Winant V. P. Bradley (U.S. Circuit Court for the Eastern District of New York. In Equity No. 5-94). Both NARC--Bayonne.

38. Victor Talking Machine Co. and U.S. Gramophone Co. versus Leeds and Catlin Co. (U.S. Circuit Court for the Southern District of New York. In Equity No. 8797 on patent 543,543); American Graphophone Company versus Leeds and Catlin Co., Edward F. Leeds, I. Allen Sankey and Henry Leeds (U.S. Circuit Court for the Southern District of New York. In Equity No. 8570 on patents 714,651 and 688,739). NARC--Bayonne.

39. See U.S. Congress, Senate, Committee on Patents, Arguments...on the Bills...to Amend and Consolidate the Acts Respecting Copyright June 6, 7, 8 and 9, 1906, p. 154.

40. Letter of Auto-Grand Piano Co. to Paul H. Cromelin introduced into hearings showed the existence of the League. U.S. Congress, Senate, Committee on Patents, Copyright Hearings, December 7 to 11, 1906..., p. 345.

41. See Ringer, "Unauthorized Duplication," p. 4.

42. Ibid., p. 5.

43. Ibid., p. 5.

44. Ibid., p. 17. Also Victor Talking Machine Co. versus Max Hesslein Opera Disc Company (U.S. District Court for the Eastern District of New York).

45. Ringer, "Unauthorized Duplication," p. 17.

46. Record Industry Association of America, Inc. Statement in Opposition to the Recommendation of the Register of Copyrights that the Compulsory License for the Recording of Music be Eliminated from the Copyright Act, app. E, p. 56.

47. The application of common law copyright is discussed in Ringer, "Unauthorized Duplication."

48. "Marketing--The \$100 million market in bootleg tapes," Business Week, 15 May 1971, as introduced in U.S. Congress, House, Committee on the Judiciary, Prohibiting Piracy of Sound Recordings, p. 44.

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There is an extensive literature in legal periodicals concerning unauthorized duplication, but I have used little of it, preferring to base my discussion on examination of the surviving records at the National Archives Regional Centers where obsolete case records have been stored. These appear in the Record Group 21. Cases have been utilized from the following centers:

Bayonne--Eastern District of New York, Southern District of New York, District of New Jersey

Philadelphia--Eastern District of Pennsylvania

Chicago--Northern District of Illinois. Northern Division

Washington National Record Center--Western District of Virginia (Harrisonburg)

Some of the papers emanating from the law offices of Howard Hayes were turned over to the Edison National Historic Site in the mid Fifties by William Pelzer. These supplement the above.

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complete absence of quotations from secondary sources in this article.

National Phonograph Association. Proceedings of the Third Annual Convention, 1892. (As far as I know, the copy owned by the Edison National Historic Site is unique. The Site kindly provided an electrostatic copy.)

APM: The Antique Phonograph Monthly. This little journal consistently provides a wealth of information concerning the industry.

The Phonogram (1891-1893). There is no complete file in existence. A complete run of the periodical may be pieced together by using copies at the Engineering Societies Library, the New York Public Library Periodicals Division, the Edison National Historic Site, the Library of Congress, and the National Museum of History and Technology.

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