

ALEX SAYE  
CUMMINGS

Music Piracy  
and the Remaking  
of American  
Copyright in the  
Twentieth Century

DEMOCRACY  
of  
SOUND

# Democracy of Sound

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*Music Piracy and the Remaking of American  
Copyright in the Twentieth Century*

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ALEX SAYF CUMMINGS

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Published in the United States of America by  
Oxford University Press  
198 Madison Avenue, New York, NY 10016

© Oxford University Press 2013

First issued as an Oxford University Press paperback, 2017

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Library of Congress Cataloging-in-Publication Data  
Cummings, Alex Sayf.  
Democracy of sound : music piracy and the remaking of American copyright in the twentieth century /  
Alex Sayf Cummings.

pages cm

Includes bibliographical references and index.

ISBN 978-0-19-985822-4 (hardcover); 978-0-19-067511-0 (paperback)

1. Copyright—Music—United States—History—20th century.
2. Piracy (Copyright)—United States—History—20th century. I. Title.  
KF3035.C86 2013  
346.7304'82—dc23  
2012041759

# Democracy of Sound

*For Sandy, Barbara, and Darrell*

## ACKNOWLEDGMENTS

This project has come a long way since Joshua Wright, Antonio Del Toro, and I discussed the possibilities of file sharing and free media in the summer of 2004. For most of our lives, access to knowledge had been largely circumscribed by the ability to pay for it. I remembered how my mother, a single parent on a tight budget, had purchased volumes of an encyclopedia series at the grocery store when I was young, in the hope of providing me with a valuable resource; we only made it through the letter D, but I still spent hours thumbing through the volumes we had and learned a lot about Buddhism anyway. The idea that music, history, science, and so many other things of value and merit could be freely available to almost everyone all the time was a remarkable prospect. Wikipedia represented this new world as much as Napster, the music file-sharing network; to me, learning from a free encyclopedia did not seem so different from downloading free songs. This book is a product of its time, a moment in the early twenty-first century when all the structures of publishing, recording, and broadcasting were in flux. Its strengths belong to the many brilliant people who helped me write it; its shortcomings derive from the limits of my own historical vision.

Anyone who writes a book, especially a first one, probably feels like it took a cast of thousands to do so. This volume is no exception. First and foremost, Betsy Blackmar contributed to the doctoral thesis with her tirelessly inquisitive nature. She loved to give me “a hard time,” as she put it, and she did so with a smile. Whatever depth or insight this work might possess owes in large part to her. My other mentor was Barbara Fields—a fierce critic, kindred spirit, and valued ally since I first came to New York from Charlotte. I could always turn to her as a fellow Southerner in the big city. Her impatience with pompous, unreflective jargon dissuaded me from the temptation to lean on fuzzy language, while her intellectual honesty and defiance of conventional wisdom will always be an inspiration. The dissertation also benefited from the perceptive input of Sarah

Phillips, who encouraged me through the first seminar paper that launched the project, as well as Brian Larkin, Andie Tucher, and Eric Foner. And none of it might have been written if not for the inspiring scholars I encountered at the University of North Carolina at Charlotte, including Julie Hicks, Sam Watson, Jeffrey Meyer, John Flower, Kathleen Donohue, and Cynthia Kierner.

No historian can succeed without the generosity and good will of numerous archivists, librarians, and other knowledgeable and helpful professionals. Throughout this project, I have turned to the incomparable Dan Morgenstern of the Institute of Jazz Studies in Newark, who regaled me with stories of his rich life experiences with the musicians, collectors, and other colorful characters who populate the history of music in the twentieth century. At Middle Tennessee State University's Center for Popular Music, I was privileged to receive invaluable assistance from Lucinda Cockrell, Martin Fisher, and Grover Baker, and Mary Lynn Cargill of Columbia University's Butler Library initiated me into the mysteries of congressional committee reports. The boundless enthusiasm of Bill Schurk led to the discovery of a treasure trove of bootlegs at the Music Library and Sound Recordings Archive of Bowling Green State University, while Susannah Cleveland and the rest of the staff have helped me time and time again.

I would also like to thank the many institutions that provided material support for my research. Columbia University's Department of History and Graduate School of Arts and Sciences gave me the opportunity to live in one of the world's great cities and enjoy access to the finest intellectual resources for five years, and a fellowship from the Consortium for Faculty Diversity allowed me to continue this work for two years as I finished the dissertation. I was fortunate to receive yet another year of support from the American Council of Learned Societies as a postdoctoral fellow, which freed me from the pressures of teaching as I made the most crucial revisions to the manuscript. Several sections of this book have previously appeared in print; I would like to thank the reviewers and editors for their insightful feedback as well as Oxford University Press and the University of Pennsylvania Press for granting permission to reprint them here. Portions of Chapters 1 and 5 appeared in the *Journal of American History* in a December 2010 essay entitled "From Monopoly to Intellectual Property: Music Piracy and the Remaking of American Copyright, 1909–1971," and part of Chapter 2 appeared as "Collectors, Bootleggers, and the Value of Jazz, 1930–1952" in Susan Strasser and David Suisman, eds., *Sound in the Age of Mechanical Reproduction* (Philadelphia: University of Pennsylvania Press, 2009).

Finally, a number of individuals have pushed this project from dissertation to book. Siva Vaidhyanathan, Charlie McGovern, and a third reviewer gave rich, suggestive, and enlightening comments on the manuscript, and my editor Susan

Ferber has been a terrific partner in the complex and challenging enterprise of publishing a first book. Elaine Rose kindly took time to discuss the life of her father Boris, a fabled yet little-understood figure, and I cannot stress enough how much I appreciate her sharing her stories and records with me. I would also like to extend my thanks to Bill Golden, Francis Pinckney, George Stephanopoulos, and others who enriched this book by sharing their personal experiences. My friends and fellow scholars have contributed enormously by reading the manuscript and offering insightful suggestions; most notably, Ryan Reft and Joel Suarez have been great friends who endured a series of periodic panics and freakouts with good cheer. I owe a debt of gratitude as well to the wonderful coworkers who have advised and guided me through the early stages of my career, particularly Tom Ellman at Vassar College and Rob Baker at Georgia State. Last but far from least are my family—my mother and stepfather, Sandy and Andy Shepherd, and my grandparents, Barbara and Darrell Cummings, who always encouraged learning and creativity from the earliest age and instilled the belief that a working-class kid could go anywhere and accomplish anything. I would also like to thank my father Taher, stepmother Crystal, and brother Jamaal for all their love and support. Saira Mazhar has been my dearest friend since long before this project began to take shape, and her love has sustained both me and the book as life took us from Karachi to Queens and beyond. I hope she some day gets that nictitating membrane she always wanted.



# Democracy of Sound

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## Introduction

Shout out to the bootleggers who supply my shit  
the fans online trying to find my shit  
and to the niggas listening but won't buy my shit  
and catch me in the street and wanna ride my dick  
y'all niggas is the worst, see me like  
"J. Cole homie, can you sign my burnt CD"  
nigga please, an album ten dollars  
you act like it's ten g's  
this food for thought cost the same as 2 number three's  
so at ease with that broke shit  
we all tryna get a dollar boy, no shit

—J. Cole, "The Autograph" (2010)

Like many people, rapper J. Cole is not sure how he feels about music piracy. He praises the bootleggers who copy and sell his mixtapes on the street, but he is impatient with fans who copy his music without paying a dime. As of this writing, "The Autograph" had not been formally put on the market. It was unavailable for sale on iTunes, but one could download it as part of the *Friday Night Lights* "mixtape," a set of electronic files available for free on his website; hear it on college radio; and listen to it on YouTube. The people who distribute his music make it possible for fans to hear him, yet Cole is irked by fans who ask for his autograph on discs they copied themselves. Is it just a matter of disrespect?<sup>1</sup>

Cole is not the first person to have mixed feelings about piracy. Americans have struggled with the problem of unauthorized reproduction—called "piracy," "bootlegging," or "counterfeiting," among other terms, depending on the circumstances—ever since Thomas Edison etched the first sound waves onto tinfoil in his New Jersey lab. Sound recording opened up a variety of new questions about art, economics, and law. Would a wax cylinder or shellac disc

be treated, in legal terms, the same way as a novel or photograph? For much of the last century, the answer was no. Who would own the rights to sound waves—the musicians, singers, or speakers who made the sounds? The producers and engineers who captured the sound and shaped it in the studio? The record label that paid everyone involved? And who was allowed to copy what, and under what circumstances?

Copyright interests are prone to paint copying as a cut-and-dried matter of morality. The Motion Picture Association of America runs an ad before movies showing how pirates take food out of the mouths of set painters and other working-class members of the film industry. Record labels say that listeners, through their wanton copying and file sharing, threaten to kill the goose that lays the golden eggs—the creative artist. It is not surprising that these arguments resonate with much of the public. Copying evokes cheating, plagiarism, and unoriginality. Many people, familiar with the ordinary injustices of everyday life, see piracy as just another example of someone getting rich off another person's work. The artist is a worker, "tryna get a dollar," like anyone else.<sup>2</sup>

Such moral convictions may help to explain the hard shift toward stronger copyright laws in America during the last forty years, but they do not account for the many ways in which people copy and use each other's work every day. American law has long recognized, first informally and later by statute, that a certain degree of copying, categorized as "fair use," is acceptable. A teacher can make copies of a poem to discuss in class. I can cite a verse from J. Cole in this book, just as a film critic can quote lines from a movie in a review. And, of course, copyright in the United States has never been an immortal right. The public domain makes freely available all works produced before a certain date, although the ever-expanding scope of property rights has begun to threaten the existence of such a commons of creativity from the past.

The ethics of copying have vexed people since the early days of the printing press. As printing technology spread throughout Europe in the sixteenth century, the possibility of rapidly manufacturing words and images prompted Europeans to develop what would become modern ideas of ownership and authorship. At first, readers did not necessarily link a particular combination of words to a particular author, and printers circulated texts that mutated and evolved through multiple rounds of copying. Soon, however, economics and the politics of censorship intervened. In England, the Crown developed the idea of copyright, granting only the Stationers' Company, a printers guild, the right to produce texts that were approved by the government. Given the religious and political conflicts then unfolding across Europe, a policy that controlled the proliferation of texts was a good bargain for both the government and the printers. Notably, though, the original copyright did not belong to the author but rather to the printer who published a text. Counterintuitive as it may be, this situation

remains familiar to many creative people in today's world, who often do not own the rights to their work.<sup>3</sup>

When Americans began to consider how to run their new country in the 1780s, they looked to the legacy of English copyright for cues. The Constitution made it clear that the federal government had the right to regulate what we would now call "media." In the language of the eighteenth century, it was in the public interest for Congress to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings." The key elements of English law were there: copyright was not a permanent right, but one that would encourage authors to publish by offering the prospect of profit "for limited Times." The first federal copyright law provided only fourteen years of protection, and was limited to books, maps, and charts. Music was not specifically included in the law until 1831.<sup>4</sup>

Copyright, in short, has always been the creature of shifting political interests and cultural aspirations—always incomplete, always subject to change. The United States in the nineteenth century resisted the idea of recognizing the copyrights of other nations, being content to make the cultural fare of Europe cheaply available to its citizens. New media such as photography and sound recording had to be fitted into laws that were primarily written to address works produced by the printing press. As pirates copied sheet music and, later, records, businesses lobbied to have laws passed to protect their products from reproduction; typically, they then pushed for the new protections to be more stringently enforced. At the same time, different interests in the same "business"—for example, songwriters, record labels, radio stations, and jukebox operators—all had different opinions about how works such as songs and sound recordings should be regulated.<sup>5</sup>

Indeed, sound recording set off conflicts over culture and property that profoundly shaped the course of copyright law in the twentieth century. It introduced a kind of medium that could not be perceived with the naked eye. All previous copyrightable works could be seen, whether words on a page, musical notes, or the lines and colors of a photograph. Sound, however, was mechanized; the listener was separated from the content, which was mediated by the stylus and the Victrola horn. Sound also confounded ideas of ownership by making it possible for the same work, a piece of music or a spoken text, to be produced in multiple versions by multiple artists. A hundred players might perform a Joplin rag in a hundred ways, with different instruments, at different speeds, and in different styles. Was each a distinctive work? Americans wrestled with these questions for almost a century following the invention of recording.<sup>6</sup>

Piracy set all these conceptual problems into sharp relief. The early recording industry was perhaps as chaotic as the early days of printing in Europe. Composers clamored to earn income from the recordings made of their music,

while competitors in the “talking machine” business copied each other’s products. As recorded music grew into a mass medium in the early twentieth century, a system of major labels that marketed hits to national markets emerged, organized along much the same lines as corporations that manufactured cars or soap. But listeners and collectors experimented with ways of copying recordings, and tiny markets for bootlegs emerged by the 1930s. Americans toyed with different modes of experiencing music, apart from buying a record or listening to one on the radio; they collected, copied, and shared records; bootlegged live performances and radio broadcasts; and sold rare and ephemeral recordings in samizdat fashion.

This book asks how American society dealt with the prospect of uncontrolled copying in a century when culture industries rose to new prominence in the nation’s economy. From the time Wynant Van Zandt Pearce Bradley bootlegged Italian arias to the leak of Bob Dylan’s basement tapes, the United States emerged as an industrial world power. As piracy became more ubiquitous in the 1960s and 1970s, Americans began to discern the outlines of a new post-industrial economy, one geared toward producing the very expressions that pirates copied. Early on, copying was everyday business in a disorganized, developing record industry. In time, piracy moved to the fringes of the music business and later reemerged as a mortal threat to it, with the introduction of technologies such as the compact cassette (1963) and the online file-sharing network Napster (1999). The legal suppression of new forms of copying and sharing reflects changing trends in American political culture, revealing the shift from a hands-off cultural policy that emphasized free competition (copy and compete) to a more aggressive stance that protected capital investment in the name of economic growth.<sup>7</sup>

Capitalism has always made more with less, whether it is the labor and time necessary to make a shoe or the land needed to make a bushel of wheat. Culture is no different. Alongside the arc of industrial to post-industrial—from manufacturing, that is, to “information”—one can also trace a line from mass production to mass reproduction. Printing made it possible to turn music from an ephemeral experience, a performance, to a text that could be manufactured en masse. The innovations of Edison and Emil Berliner, who invented a technique for mass-producing disc records, did the same for sound. The industries built by the entrepreneurs who followed them sought to sell as many copies of a few records to as many people as possible, maximizing the capacity of a label’s factories and sales force. Then, with growing access to media such as magnetic tape and the Internet, the record industry lost its near monopoly on the means of production, and bootlegging was no longer confined to a small number of collectors and underground labels. Piracy and home recording are new frontiers of production, harnessing labor and technology to make more music—more CDs,

more MP3s, more performances circling the world—than ever before. Seen this way, the travails of the music industry in the twenty-first century look like a classic instance of the perennial capitalist problem of overproduction.<sup>8</sup>

Music posed some of the earliest and stiffest challenges to the nascent information economy for several reasons. Music is compact; for pirates in the 1890s, a piece of sheet music was easier to copy than a novel, and an audio file today is typically smaller than a movie file. Music is social, something that people want to share with each other and experience together. Courtship, for instance, frequently involves the mix CD, the concert, the quoting of lyrics in a love letter. One friend wants to tell another about a new and little-known artist, to share in the fruits of a good find. This social dimension of music emerged when Americans began to collect records in the 1930s, archiving and at times copying the legacy of recorded music up to that time; it was clear when listeners circulated copies of rock outtakes, Grateful Dead concerts, and hip-hop bootlegs later in the century. Such practices have, at times, pushed the music industry to adapt to consumer interests, although retaliation in the courts and Congress was a more common response.<sup>9</sup>

Journalists and many scholars have been keen to draw bright lines between different types of copying, distinguishing, for instance, a concert “bootleg” from a “counterfeit” of an officially released record.<sup>10</sup> To some extent, these distinctions have merit. Scale and intent matter; a person who tapes a copy of an LP for two friends is different from a Mafia-run factory that produces thousands of copies of the same recording. When classical aficionados traded recordings of operas that had never been officially released by a label, they were documenting moments in cultural history that might otherwise have been lost. The vocalists who appeared on such recordings might not have been happy about their work being recorded and distributed without their consent, but this bootlegging can be credited with serving a greater interest than profit alone.

This book treats all kinds of copying as points along a spectrum of unauthorized reproduction. British sociologist Lee Marshall has defined piracy as “the unauthorised copying of a published work,” in part to emphasize that bootlegs, his chosen subject, are documents of performances that had never been officially published, such as concert recordings. For Marshall, bootlegs should be treated differently from purely commercial pirated or counterfeit works, since these records supplement rather than substitute for music that is already on the market. In other words, bootlegs do not hurt the record company’s bottom line since the person who is interested in buying a live disc of Phish or Prince is almost always a fan who will buy their official releases as well.<sup>11</sup>

The difference between “piracy” and “counterfeiting” has been somewhat fuzzier. Many critics attempt to justify bootlegs to carve out a legal or ethical space for a certain degree of copying, but pirated works have less often benefited

from such advocacy. Typically, a counterfeit is an unauthorized copy that attempts to pass itself off as the “real thing,” mimicking the packaging and style of the original release, whereas a pirate recording may include previously published material but with a different cover, title, or track listing. According to this definition, a counterfeit would be an unlawful copy of the Beatles’ *Revolver*, while a tape compilation called *Ten Golden Beatles Hits* would be a pirated work.<sup>12</sup>

These terms, while helpful to a degree, do not always fit real recordings very well. Pirate tapes and disks jumble together officially released material with live performances and studio outtakes, blurring the line between bootleg and pirate. An online “torrent” file that allows a user to download hundreds of files by one artist does not discriminate either. Indeed, the idea of a counterfeit recording matters little online. Moreover, the critical issue of intent—is the copying done for profit, for the love of the music, for the greater good?—is not always clear. Bootleg labels that reproduced old recordings of Blind Lemon Jefferson or Bix Beiderbecke in the 1950s might have meant to make a profit, but they were also making it possible for people to discover music that had been neglected by the major labels.<sup>13</sup>

For this reason, the words “bootleg” and “pirate” are used more or less interchangeably in this book. Whatever a copier’s intent, he or she is always copying something produced by someone else without permission. This characteristic defines all pirate works—even the use of “samples” that grew out of hip-hop culture in the 1970s, when DJs learned to mix parts of different records together. A tape recording of a DJ set at a Bronx roller rink may contain parts of Kool and the Gang and James Brown; it is both a copy of those artists and a bootleg of the DJ who combined them. Piracy defies categorization just as easily as it confounds legal judgment.

This book begins in the late nineteenth century, when a new “talking machine” industry struggled to find its footing and legal regulations were practically nonexistent. Artists had to defend themselves against unauthorized use of their name and their recorded performances, while various companies experimented with different formats and paid composers nothing for the music they recorded. At this point, it was far from clear that sound recording would become a chiefly musical endeavor. Chapter 1 follows the evolution of piracy, the music industry, and legal thought about what constituted property and theft. The conclusion reached by Congress—that composers deserved to benefit from recordings of their work but that record companies did not enjoy a copyright for their recordings—set up a struggle over property rights that unfolds over the next five decades. Chapter 2 examines how collectors, listeners, and entrepreneurs took advantage of this legal gray zone to rerelease old and out-of-print recordings, beginning in the 1930s. These activities landed bootleggers in court, but the results were often indecisive. Chapter 3 traces the rise of magnetic recording



as a new medium for sound, from its humble origins on wire in the 1880s to the eventual success of the high-fidelity market after World War II. Tape recording offered devotees of genres like opera new ways to copy and exchange classical music, a taste that appealed to a minority of well-heeled consumers, before the advent of the four-track, eight-track, and compact cassette in the 1960s opened up recording to a much broader—and younger—audience.

The second half of the book explores the impact of piracy as it mutated from the practice of a select few with esoteric tastes into a potentially mass market, triggering political action and legal reforms that define the contours of intellectual property law to this day. Chapter 4 follows the spread of piracy to pop music, particularly rock, as a young generation embraced both tape technology and radical rhetoric to position bootlegging as part of a general social ferment in the late 1960s. A moment of possibility opened between 1969 and 1971, when a large, creative, and unruly pirate market operated parallel to the mainstream music industry, and a copyright for recordings finally passed in Congress. Although the intentions of bootleggers were often less than noble, the alliance between bootlegging and counterculture produced a legacy that documented much of the music of the age on illicit records.

The flamboyance of the bootleggers, though, came at a price. States and then the federal government granted unprecedented protections to recordings, as composers, musicians, and labels united against the common foe of rampant piracy, a battle that unfolds in chapter 5. The Supreme Court offered its endorsement of the new property rights, which in many cases went well beyond anything previously passed and arguably impinged on the limitations of copyright set out in the Constitution. Chapters 6 and 7 bring the story into the 1970s and 1980s, as pirates in the United States adapted to a newly hostile legal climate, developing new networks of production and exchange. New genres such as jam music and hip-hop challenged ideas of ownership, and piracy reached epic proportions in the developing world.

The reaction was both predictable and paradoxical. “Intellectual property,” a relatively novel term in the 1970s, became the subject of organized political pressure, as the Reagan and Clinton administrations embraced copyright as an issue in trade negotiations. Laws became more punitive, yet piracy remained nearly as pervasive as ever, even as new technologies (such as the compact disc) were introduced to stem the problem. People continued to tape, pirate, and exchange. The advent of widespread Internet access paved the way for the compressed audio file (most prominently, the MP3) in 1993 and a new era of unconstrained panic and lawlessness with the rapid rise of the file-sharing network Napster.

In the early twenty-first century the public continues to flout the demands of copyright interests to control how their products are produced and distributed, but new businesses have emerged that attempt to reconcile the yen for free