

Strange Fixation: Bootleg Sound Recordings Enjoy the Benefits of Improving Technology*

David Schwartz**

Introduction

I. The Appeal of Bootlegs to the Collector

A. Where Bootlegs Come From

B. A Pair of Boots

1. The Who, *Stampede*

2. The Beatles, *Unsurpassed Masters Vol. 1 (1962-1963)*

C. Other Record Thieves

II. The Evolution of the Law Against Record Bootlegging

A. The First Record Bootleggers

B. Domestic Law

1. Copyrighting Music

2. The 1909 Copyright Act

3. Common Law Remedies

4. Toward the Protection of Sound

5. The Sound Recording Act of 1971

6. Current Remedies

C. International Problems

III. The Future of Bootlegging

Conclusion

A dramatic performance gives life to the story, and is the property of the interpreter. The great singers and actors of this day give something to the composition that is particularly theirs, and to say that they could not limit its use is to deny them the right to distribute their art, as they may see fit, when they see fit.

-District Judge Isaac M. Meekins([note 1](#))

The bootleg records, those are outrageous. I mean, they have stuff you do in a phone booth. Like, nobody's around. If you're just sitting and strumming in a motel, you don't think anybody's there, you know . . . it's like the phone is tapped . . . and then it appears on a bootleg record. With a cover that's got a picture of you that was taken from underneath your bed and it's got a strip-tease type title and it cost \$30. Amazing. Then you wonder why most artists feel so paranoid.

-Bob Dylan([note 2](#))

Introduction

In July 1969, a new record album by folk-rock musician Bob Dylan appeared in stores. Called *Great White Wonder*, it

was a two-record collection of previously unreleased Dylan recordings from 1961, 1967, and 1969.[\(note 3\)](#) The album signalled a new trend in the recording industry, but neither Dylan nor his exclusive record company, Columbia, had a hand in its release or reaped any of its undoubtedly considerable profits.

Great White Wonder is the first documented bootleg of the rock era. It had been assembled in secret by amateurs for Dylan fans so ravenous for new music that they willingly paid for material that Dylan had recorded primarily for his own use.[\(note 4\)](#) *Great White Wonder* was actually just a new manifestation of a shadowy offshoot of the recording industry that had existed since the turn of the century, but the album's popularity was unprecedented.[\(note 5\)](#) *Great White Wonder* showed that it was possible, even desirable, for music fans to include private tapes and concerts in their own collections and, thus, in their assessment of an artist's work.

Great White Wonder opened the way for countless subsequent bootlegs. A bootleg tape, record, or compact disc (CD) contains music or dialogue by a performer or performers that has never been commercially available. The bootleg is assembled and sold without the consent of the performer or the performer's exclusive record company, and, almost universally, neither the performer nor the contracted record company are reimbursed.[\(note 6\)](#) The sources of bootlegs are: live concerts; television, film, or radio appearances; unreleased studio recordings; and private practice or demonstration performances, often referred to as "demos."[\(note 7\)](#)

As revolutions go, *Great White Wonder* was a humble beginning. The sound quality of the recordings was called "poor."[\(note 8\)](#) The disc came in a blank white cardboard jacket with no identifying marks on the cover.[\(note 9\)](#) Over twenty-five years later, many bootlegs still feature amateurish packaging and an unpleasant sound, but savvy collectors with gamblers' instincts and enough money can often obtain a rare, exceptional bootleg. Many of today's bootlegs boast covers with color photographs or illustrations that could fool the casual browser into thinking the work is sanctioned by the artist. A competent cover does not necessarily indicate competent sound, but the audio quality on some bootlegs is now almost as good as that on official releases. The muffled, monaural, bass-heavy sound that was synonymous with early bootlegs is still prevalent, but some of today's bootlegs are in full stereo. Some bootleggers have taken full advantage of the rapidly improving technology that has swept the legitimate recording industry, and many bootlegs are appearing on CD. Digital audio tape, which offers high-fidelity recording and the promise of no loss of fidelity in subsequent copies, is sure to play a large part in the bootleg industry in the future.

The best bootleg gives the diehard fan a recording that is enjoyable or historic, which, for any number of reasons, an artist or record company has decided not to issue to the public. Despite the fact that bootlegs tap into unreleased material for only a small cadre of serious collectors, bootlegs clearly do hurt artists and record companies. For example, an artist may feel that a bootlegged performance does not accurately reflect his or her talents and should not be heard. A record company may find that its own plans to someday release performances from the past have been derailed by preemptive bootleggers. Whether the bootlegger deprives artists of profits by releasing material that the artist has no intention of releasing anyway is debatable, but, fundamentally, the bootlegger is an unwanted third party who invades the exclusive contractual relationship between an artist and his or her record company. The artist and company lose exclusive control of their property.

This Note examines the world of bootleg records a quarter century after *Great White Wonder*. Part I defines bootlegs and distinguishes them from two other banes of the recording industry—counterfeits and pirates. Part II analyzes the sometimes murky evolution of the law on bootlegs, including the role of international copyright law which is central to this discussion. Signs at the end of 1993 that the European Community (EC) was closing a loophole in German copyright law, and the promise at the end of 1994 of increased protection for copyright holders under the General Agreement on Tariffs and Trade (GATT), are significant victories for the legitimate recording industry and for musicians worldwide. At the same time, reports that record-manufacturing plants in Eastern Europe and Russia are not particular about their clients in the post-Communist world could point to a future source of trouble. Finally, Part III discusses possible solutions. Uniform global copyright laws will benefit musicians, but they and their record companies will never beat bootleggers completely through law enforcement. They should, therefore, aim to make bootleggers irrelevant by devising innovative ways to give fans what they want. Bootleggers have made fortunes for years by selling special-interest recordings to small numbers of devotees. The legitimate recording industry can beat bootleggers at their own game by offering the same thing, with the support of the artists.

I. The Appeal of Bootlegs to the Collector

A. Where Bootlegs Come From

The best source for the bootlegger is radio or television, and there are many listenable bootlegs culled from broadcast concerts and documentaries. Undoubtedly the richest source in this category was the Westwood One Broadcasting Company's weekly series, *The Lost Lennon Tapes*, which aired from 1988 to 1992. As the name implied, the series' selling point was the sanctioned broadcast of unreleased, private recordings from the late John Lennon. Predictably, a flood of bootlegs followed. *The Lost Lennon Tapes* bootleg series was expected to reach forty-two volumes, and it was the best known of the many bootleg compilations from the radio series.[\(note 10\)](#)

Many bootlegs, perhaps most, come from the most readily available source-amateur recordings of concerts. Given that the classical way to record a concert involves smuggling in a miniature recorder and recording from the audience, many bootlegs made this way are unlistenable to all but the most rabid fan. Other recordings can sound quite good, though still easily distinguishable from professional recordings. The ideal amateur recording involves hooking into the concert mixing board, an electronic console that the concert sound engineer uses to balance the sound of the performers' instruments to fit the acoustics of the hall. These types of recordings are rare because they usually require the collusion of the engineer.

Broadcast or concert bootlegs preserve performances that musicians expect to be heard by at least some of the public, if only once. That is not the case with the other chief source for bootlegs-the unreleased home or studio recording. These are tapes that, for a variety of reasons, were recorded but then stored or discarded. Some musicians whose concerts have been thoroughly bootlegged for decades have managed to keep the lid on most of their unfinished or rejected studio activities. Other musicians, such as the Beatles or Bob Dylan, have had their tape vaults thoroughly plundered. The most likely source of this material for bootleggers is disloyal studio insiders such as technicians, although one account says that tapes were stolen from musician Bruce Springsteen's car.[\(note 11\)](#)

Bootleg CDs first appeared in about 1987.[\(note 12\)](#) The first CDs were merely copied from vinyl LP bootlegs, with the crackles and pops synonymous with well-worn vinyl recordings preserved digitally, but material worthy of the new technology soon appeared. Some bootleg CDs feature high-fidelity recordings without the distracting tape hiss or pops that indicate they were lifted from vinyl sources. The CD quality suggests that bootleggers have gained access to the elaborate mixing and noise-reduction technology that is a part of the digital recording age. Digital technology should also potentially improve the sound quality of reissues. Traditionally, if a bootlegger wished to reissue an old bootleg album, he or she merely taped that album and re-pressed it, with a resulting loss of audio fidelity and another layer of surface noise. Digital transfers could vastly increase the bootlegger's ability to faithfully reproduce recordings by stealing from other bootleggers.

An enormous number of bootlegs are available or have been at one time. Indeed, *Hot Wacks*, an encyclopedia of bootlegs, printed fourteen independent editions until 1992, when it printed one last comprehensive edition of 802 pages.[\(note 13\)](#) In 1993, *Hot Wacks* published a first supplement of an additional 208 pages.[\(note 14\)](#) A second supplement was promised in 1994. To give some idea of how freewheeling the bootleg industry is, *Hot Wacks Book XV* and its first supplement list 612 Rolling Stones bootlegs from *Abandoned in Detroit* to *World Tour Live!*[\(note 15\)](#) A book published in 1981, more than half a decade before the first bootleg CD appeared, profiled 612 Beatles bootlegs.[\(note 16\)](#) *Hot Wacks Book XV* estimates that there were, as of 1992, some 1400 Beatles titles.[\(note 17\)](#) The enormous number of bootlegs does not mean that 1400 discrete Beatles performances are preserved. These numbers merely indicate resourceful repackaging and rearranging by bootleggers of a significantly smaller library of illicit material.

A common defense of bootlegging-one which completely ignores the artists' privacy rights-is that rich rock stars will never miss the additional profits. One reporter on bootlegs said this about former Beatle Paul McCartney, "As of July 1993 McCartney's worth was said to be \$636 million. This is the same man opposed to bootlegging because bootlegs take money from his pockets. Right."[\(note 18\)](#) But bootleggers do not just target rich or successful musicians. Groups and individuals most people have never heard of have been bootlegged, including the Bonzo Dog Band (two

bootlegs),([note 19](#)) Roky Erickson (five),([note 20](#)) Mick Taylor (three),([note 21](#)) and Throbbing Gristle (four).([note 22](#))

Rock bands are not bootleggers' only targets. There are many classical and jazz bootlegs, though most of these are probably on tape only.([note 23](#)) Musicians such as the late jazz saxophonist Stan Getz([note 24](#)) and vocalist Nina Simone([note 25](#)) have complained about bootlegs. In early 1993, the United Gospel Industry Council launched a campaign against gospel bootlegs.([note 26](#)) Perhaps the most outlandish bootleg of all was being sold openly by a New York jazz record company at the end of 1994. Called *The Pres Blows*, the eighteen-minute CD features a saxophone performance by President Bill Clinton. He was recorded during an impromptu performance, and without his knowledge, at a Prague jazz club by Radio Prague during his state visit to Czechoslovakia in January 1994. The White House refused to endorse the disc but did not condemn it.([note 27](#))

B. A Pair of Boots

To better illustrate the evolution of bootlegs and to show how easily identifiable they are, here are descriptions of two bootlegs, one from the beginning of the 1980s, the other from the end of that decade.

1. The Who, *Stampede*([note 28](#))

Stampede is a perfect example of why musicians and record companies hate bootlegs. As the title suggests, the bootleg is from the Who's December 3, 1979, concert at Cincinnati's Riverfront Coliseum, a concert at which eleven fans were crushed to death when crowds surged into doors before the show began.([note 29](#))

The front cover features a black-and-white photograph of two members of the band performing. The name of a record company, Black Gold Concerts, appears. If the album title is not the giveaway, Black Gold Concerts is another clue to the informed buyer that it is a bootleg because the Who never recorded for such a company. The back cover features another black-and-white photograph, this one of three tired-looking members of the band emerging from hotel rooms the morning after the concert. The poorly reproduced picture was almost certainly lifted directly from a *Time* magazine article that appeared shortly after the Cincinnati concert.([note 30](#)) The back cover accurately lists the album's contents with only minor song misspellings (for example, "I Can't Explain" is called "Can't Explain"). Who songwriter/guitarist Pete Townshend's name is misspelled (as "Townsend"), a much more glaring error. Two standard elements of most legitimate record jackets-record company address and copyright information-are missing. Two discs have been stuffed in a single jacket and, also standard practice at the time, the labels on the discs themselves are blank white.

The discs feature an audience tape of the Cincinnati concert. This recording, one of many that came out of the Who's 1979 North American tour, is probably the worst-sounding of the lot, with the music at times sounding like a background rumble. An audience member talked with the man recording the concert, which is sometimes amusing. The exchange becomes chilling on side three as the listener hears the taper say, "This is outside this coliseum." The listener can also make out "cops" and "gates," almost certainly references to rumors that apparently swept the hall during the performance about the deaths that had occurred outside. To compound the bad taste, the recording ends with an excerpt from local television news coverage of the tragedy.

2. The Beatles, *Unsurpassed Masters Vol. 1 (1962-1963)*([note 31](#))

In contrast to *Stampede*, this Beatles bootleg CD looks and sounds like a sanctioned release. The front cover features a relatively well-known color photograph of the group from the early 1960s. Because the photo is a reduced CD size, imperfections that would point to its amateur origins are hard to detect, though a close examination reveals some graininess in the faces. The record label, Yellow Dog, is a blatant clue of the CD's illegal origins because, as with the Who and Black Gold Concerts, the Beatles were never willingly associated with any such company.([note 32](#))

The back cover correctly lists the songs, including correct author credits as well as correct recording data for each song.([note 33](#)) A note, "Previously available in mono only," refers to a defective batch of these CDs that had previously appeared.([note 34](#)) The back cover also says " 1989 - Manu-factured in EEC." This notice is meant to give

the impression that the compilation is legitimately copyrighted. The symbol indicates that the work is a "phonogram." The notice and the year of first publication are required under the federal copyright statute to indicate that the compilation was sanctioned by the copyright holder.[\(note 35\)](#) The copyright holder's name should appear on the Beatles' *Unsurpassed Masters* CD as well, but does not.[\(note 36\)](#) "Manufactured in EEC," (European Economic Community or European Community) appears where the copyright holder's name should be. The place claim is extremely important, though it may be as big a lie as the publication notice. For the collector, a European record has long been considered a higher-quality product than a U.S. one. For the customs inspector, the notice serves at least two purposes. First, European and U.S. releases often look considerably different so the fact that it is European may help explain its unfamiliarity. Second, the place of origin also points to the widespread differences in international law, a hint that this CD may be legitimate where it was made.[\(note 37\)](#) The disc itself contains a copyright warning around the outer edge[\(note 38\)](#) as well as the word GEMA, the German authors' society that collects royalties for artists. Both the notice and the word are further attempts to mimic sanctioned releases.

The first two tracks of the CD, in mono, as they were undoubtedly recorded, have been available to collectors for years but the sound quality here is nearly perfect. The remaining fourteen tracks are studio outtakes of material from the group's first two albums, a hit single of the period, and abortive attempts at one song that was subsequently abandoned for several years.[\(note 39\)](#) As promised, the tracks are in stereo and sound superb. However, the CD is not for casual listeners. Songs frequently stop in mid-performance and band members make corrections before starting again. The material offers a fascinating overview of musicians at work, but this is not a solid collection of completed songs. It seems to be more a sampling of an artist's sketchbook.

C. Other Record Thieves

Bootleggers are by no means the only operators who unjustly benefit from other people's music. Two other forms of record thievery are "counterfeiting" and "pirating," each of which, bootleg collectors argue, does much more financial harm to the recording industry than does bootlegging.[\(note 40\)](#)

A counterfeit is a copy of a legitimate release whose purpose is usually to trick the buyer into thinking he or she is buying an officially sanctioned recording. Counterfeit records have been made at least since 1904, when a federal district court ruled against a company that was duplicating Victor phonograph records.[\(note 41\)](#) Counterfeits remain a problem for the music industry, perhaps the major problem, according to the Recording Industry Association of America (RIAA), a trade group of record companies. "The development of high-speed and relatively low-priced equipment for duplicating tape recordings has attracted so many people who are willing to violate the law for the enormous profits to be gained, that the very existence of the legitimate recording industry is threatened."[\(note 42\)](#)

Pirated records are unauthorized compilations of previously released material that do not necessarily duplicate the playing order or cover design of official releases. Record labels, company names, and cover designs are original to the pirate. Pirate albums quickly followed the advent of the long-playing (LP) record after World War II. As mainstream record companies reissued back catalogs on LP, which had previously only been available on 78 rpm discs, enterprising fans who were not satisfied with the pace of legitimate reissues assembled their own compilations.[\(note 43\)](#) In the 1950s, pirates became more flagrant and expanded from compiling out-of-print songs to assembling their own collections of popular hits, which, because they did not have to pay musicians or pay royalties, they could then sell more cheaply than legitimate releases.[\(note 44\)](#) A legendary pirate label of the time called itself Jolly Roger and openly advertised its wares.[\(note 45\)](#)

In 1951, at the height of the piracy vogue, record companies organized their own trade association to fight illicit record manufacturers, the Record Industry Association of America.[\(note 46\)](#) The recording industry ultimately won an injunction against Jolly Roger,[\(note 47\)](#) and the practice of openly selling pirated greatest-hits LPs, even in major department stores, dropped off after several years.[\(note 48\)](#) The RIAA continues to play an active role in fighting record theft, through both lobbying and actual identification of bogus goods and their manufacturers.[\(note 49\)](#) Today, however, unauthorized LP or CD compilations of otherwise out-of-print material are still very common.[\(note 50\)](#)

The three terms-counterfeits, pirates, and bootlegs-are often used inconsistently. Further complicating matters is the fact that "piracy" is also the comprehensive term for all three types of records.[\(note 51\)](#) Nor are the terms mutually

exclusive; a single record can be both a pirate and a bootleg by mixing hard-to-find released songs with unreleased material. Bootleggers claim the distinctions are important because the three types of records cause different degrees of financial damage to record companies. Because bootlegs often sound poor or consist of material that for often obvious artistic reasons a musician has deemed unreleasable, bootlegs appeal most to diehard fans who want everything. These completists would probably snap up the artist's entire sanctioned repertoire as well. Counterfeits directly impact sales of an existing product while cheating customers with inferior goods.[\(note 52\)](#) To the extent that a record company may one day re-release obscure tracks by a popular artist, pirates could also cut into future sales.

II. The Evolution of the Law Against Record Bootlegging

A. The First Record Bootleggers

While *Great White Wonder* is a clear dividing line in the history of bootlegs, evidence of surreptitious recordings dates to the beginning of the century and Lionel S. Mapleson, the librarian of the Metropolitan Opera Company in New York. From 1900 to 1904, he recorded performances from a catwalk forty feet above the Met's stage, using two-minute wax phonograph cylinders. Mapleson did not hide his activities nor did he ever sell any of the cylinders. One writer still branded him the "Father of Bootlegging" because the recordings sound so terrible.[\(note 53\)](#) One suggestion why Mapleson stopped recording operas in 1904 is that when professional recording companies approached the Met in 1903 about recording operas, management pressured Mapleson to cease his amateur activities.[\(note 54\)](#)

Cases involving counterfeit records cropped up periodically through the first half of the century, but reported prosecutions of bootleggers would not occur until 1950 with a case involving Mapleson's employer, the Metropolitan Opera. During the 1949-50 season, the opera company broadcast performances over American Broadcasting Company radio stations while under exclusive contract for record releases with Columbia.[\(note 55\)](#) Meanwhile, Wagner-Nichols recorded the radio broadcasts without permission and may have produced as many as eighteen LPs in five months.[\(note 56\)](#) The Met successfully enjoined Wagner-Nichols from producing more LPs.[\(note 57\)](#)

Joseph Krug, another early bootlegger, was tried in federal court in 1954 for taping and pressing radio performances of bandleader Glenn Miller that apparently had never been released legitimately, although the facts of the case do not reveal how or when Krug taped the broadcasts.[\(note 58\)](#) Krug was found liable and had to pay royalties to Miller's publisher and widow.[\(note 59\)](#)

The first solid evidence of the bootlegging of a studio outtake appears in the October 17, 1951, edition of *Variety*. The entertainment industry weekly reported that a Fats Waller pirate included one unreleased track taken from studio vaults.[\(note 60\)](#) The 1956 case of *Gieseeking v. Urania Records* involved pirated records of pianist Walter Gieseeking, who successfully enjoined a record thief from copying his recorded performances.[\(note 61\)](#) Mysteriously, one of Gieseeking's complaints alleged "that defendant has secured certain magnetic tapes containing reproductions of plaintiff's performances and that such tapes were not rendered for such purpose."[\(note 62\)](#) Were they studio outtakes or audience recordings? As with the Glenn Miller case, the facts leave the tape's true source undetermined.

B. Domestic Law

1. Copyrighting Music

The Constitution established a federal interest in protecting copyrights by delegating to Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to authors and inventors the exclusive Right to their respective Writings and Discoveries."[\(note 63\)](#) The first congressional copyright statute, which protected "only maps, charts, and books,"[\(note 64\)](#) was passed in 1790.[\(note 65\)](#) Federal copyright protection was first extended to musical compositions in 1831,[\(note 66\)](#) giving a copyright holder the exclusive right to sell the musical score to particular works.[\(note 67\)](#) Typically, a copyright holder is the composition's author or a music-publishing company. Unless the performer also wrote the composition or otherwise acquired publishing rights, the performer is not the copyright holder.

This first protection of musical compositions came forty-six years before Thomas Edison invented the phonograph player.[\(note 68\)](#) These early copyright statutes, therefore, protected the reproduction of written musical notation, rather than the reproduction of actual sound. This distinction is key to the evolution of musical copyright, because in 1908 sound-reproducing technology apparently baffled the Supreme Court. In *White-Smith Music Publishing Co. v. Apollo Co.*, a publisher and copyright holder of written musical scores sued Apollo, who had reproduced the scores on player-piano rolls.[\(note 69\)](#) The Court found for defendant by reasoning that Apollo Company had merely created a piece of machinery-the roll-which was not a copy within the meaning of the copyright act.[\(note 70\)](#) A later court said that the "rationale of the opinion clearly included phonograph records."[\(note 71\)](#)

2. The 1909 Copyright Act

In response to this decision, Congress overhauled the Copyright Act in 1909.[\(note 72\)](#) The Act did not give the copyright holder absolute power over future use. Instead, the Act allowed the copyright holder to select the first person to preserve or "fix" the work on a record or musical roll. Sub-sequent performers could record their own versions of the work, provided they paid a compulsory licensing fee of two cents for each copy of a copyrighted composition which that user reproduced.[\(note 73\)](#) This meant, for example, that if Al Jolson wished to record a song for which Irving Berlin held the copyright and someone else had already recorded it, Jolson's record company would pay Berlin a fee of two cents for each copy of Jolson's version. The license fee is now based on a sliding scale ranging from 4.25 cents per composition or 0.8 cents per minute (for recordings released in 1983) to 6.25 cents per composition or 1.2 cents per minute (for recordings released after 1991). Subsequent to November 1, 1993, this latter rate rises and falls according to changes in the Consumer Price Index.[\(note 74\)](#)

The question left unanswered by the 1909 Act was whether a third party could legally reproduce the copyright holder's original performance by paying the relatively inexpensive compulsory license fee rather than having to record his or her own arrangement or performance. Copyright authority Melville B. Nimmer believed that a third party could indeed copy the original work by paying the compulsory license fee under the 1909 Act.[\(note 75\)](#) One federal district court had held as early as 1912, however, that a counterfeiter "cannot avail himself of the skill and labor of the original manufacturer of the perforated roll or record by copying or duplicating the same."[\(note 76\)](#) The question would return, apparently unresolved, in 1972.[\(note 77\)](#)

3. Common Law Remedies

In the mean time, copyright holders prevailed over record thieves by using traditional common law remedies, principally the equitable doctrine of unfair competition. In *Victor Talking Machine Co. v. Armstrong*, a circuit court in New York had ruled five years before the 1909 Act that counterfeiting was unfair competition.[\(note 78\)](#) Forty-six years later, in the bootlegging case of *Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp.*, a New York state court took the doctrine further.[\(note 79\)](#) In *Metropolitan Opera*, defendant argued that because it issued performances on an original record label (Wagner-Nichols) it was not misrepresenting itself as either the opera company or as Columbia Records, the Met's authorized record company. Defendant further argued that the Met's broadcasts served as a revocation of its exclusive property right in its operas.[\(note 80\)](#) The court rejected both theories. First, it ruled that counterfeiting was not the only form of unfair competition.

The modern view as to the law of unfair competition does not rest solely on the ground of direct competitive injury, but on the broader principle that property rights of commercial value are to be and will be protected from any form of unfair invasion or infringement and from any form of commercial immorality, and a court of equity will penetrate and restrain every guise resorted to by the wrongdoer.[\(note 81\)](#)

The court also dismissed the claim that the Met had waived ownership of its opera performances by allowing them to be broadcast. "At common law the public performance of a play, exhibition of a picture or sale of a copy of the film for public presentation did not constitute an abandonment of nor deprive the owner of his common-law rights."[\(note 82\)](#)

Shortly after the release of *Great White Wonder*, the Bob Dylan bootleg, in 1969, attorneys for Columbia, Dylan, and his publishing company obtained a restraining order against a pressing plant where the record was manufactured, relying on the doctrine of "unfair competition and unjust enrichment." [\(note 83\)](#)

4. Toward the Protection of Sound

A new round of legislation and court cases changed the musical-copyright landscape in the early 1970s. In *Duchess Music Corp. v. Stern*, a federal court revisited the question of whether a manufacturer could pirate (or, presumably, bootleg) an artist's work legally by paying the two cent compulsory license fee. [\(note 84\)](#) The case involved 25,000 copies of a homemade greatest-hits compilation on cassette. [\(note 85\)](#) Defendant argued that she was only required to pay the two cent compulsory license fee because she was making "similar use of the copyrighted work" as provided under the 1909 statute. [\(note 86\)](#) Reversing the district court and citing *Aeolian Co.*, the circuit court ruled that defendant was not, in fact, making similar use of the recordings, but was making the same use of them, which was "clearly outside the scope of the compulsory license scheme." [\(note 87\)](#) Defendant was therefore liable for fines, injunctions, and impoundment and destruction of her equipment. [\(note 88\)](#) By clearly distinguishing the copying of original performances from the recording of new versions, the court seemed to give at least some protection to specific performances rather than merely protecting the author's copyright on the lyrics and the musical notation. [\(note 89\)](#)

In 1973, the Supreme Court considered whether a California law violated the Supremacy Clause of the Constitution [\(note 90\)](#) because it imposed harsher penalties on music pirates than did the 1909 Act, which was constitutionally based. [\(note 91\)](#) In 1970 and 1971, pirates working in California had compiled still more greatest-hits tapes from commercial recordings. [\(note 92\)](#) The pirates were charged with 140 counts of "misappropriation of recorded music for commercial advantage or private financial gain" under California law. [\(note 93\)](#) Writing for a five-member majority, Chief Justice Burger said that the California law did not violate the Supremacy Clause because the Copyright Clause did not provide for exclusive copyright protection under federal law. "[T]he language of the Constitution neither explicitly precludes the States from granting copyrights nor grants such authority exclusively to the Federal Government [U]nder the Constitution, the States have not relinquished all power to grant authors `the exclusive Right to their respective Writings.'" [\(note 94\)](#) This case, then, reinforced states' rights to provide additional remedies in cases of copyright infringement. Chief Justice Burger noted that, at the time, most states did not provide copyright protection. [\(note 95\)](#) According to the RIAA, by 1988, "49 state legislatures and the District of Columbia Council have enacted statutes making it a criminal offense to manufacture, distribute or sell unauthorized duplications of phonograph records and prerecorded tapes." [\(note 96\)](#)

5. The Sound Recording Act of 1971

Congress, meanwhile, amended the 1909 Copyright Act and on February 15, 1972, federal copyright protection was extended to actual musical performances, provided the performances were copyrighted or "fixed" in the first place. [\(note 97\)](#) At the time, lawmakers estimated that piracy in all its guises was an annual \$100 million business. [\(note 98\)](#) The amendment left an enormous gap because it did not protect performances recorded before February 15, 1972. [\(note 99\)](#) This "ambiguity" was noted by then Deputy Attorney General Richard Kleindienst in his testimony on the amendment, which, he said, "leaves to pending or future litigation the validity of state common law or statutes governing the unauthorized copying of existing recordings." [\(note 100\)](#) In other words, the record industry was left with only traditional remedies for theft of its older works. Following a comprehensive revision of the Copyright Act in 1976, penalties for record thievery were stiffened in 1982 [\(note 101\)](#) and again in 1992. [\(note 102\)](#)

6. Current Remedies

Under federal law, a copyright holder maintains "exclusive rights in copyrighted works," [\(note 103\)](#) which includes the right to reproduce the work on record, [\(note 104\)](#) to prepare "derivative works based upon the copyrighted work," [\(note 105\)](#) and to distribute the work. [\(note 106\)](#) There are some exceptions, including the compulsory license provision. [\(note 107\)](#) Criminal sanctions are applicable to "any person who infringes a copyright willfully and for purposes of commercial advantage or private financial gain." [\(note 108\)](#) Anyone who distributes ten or more records, containing even a single violation of a sound recording copyright "with a retail value of more than \$2,500," [\(note 109\)](#) can face

one year in prison([note 110](#)) and/or fines up to \$250,000.([note 111](#)) Second offenders face the same fine and/or ten years in prison.([note 112](#))

By extending copyright protection to sound recordings, the federal government greatly preempted state and equitable rights in the area. Following the first federal protection in 1972, remedies for copyright infringement of sound recordings fixed after January 1, 1978, now lie exclusively in the federal courts([note 113](#)) provided those infringements fall within the scope of 17 U.S.C. 106.([note 114](#)) State remedies are still available for "works" that have not been "fixed in any tangible medium of expression,"([note 115](#)) which only reaches a narrow class of bootlegs, those that feature material that has never been recorded in any form or written down.([note 116](#)) Publishers of works recorded before January 1, 1978, may also seek protection under state law.([note 117](#)) Plaintiffs with ancillary complaints such as loss of reputation or unfair competition may also seek remedies under state law, provided they are not equivalent to rights protected under 17 U.S.C. 106.([note 118](#))

Challenges to the toughened Copyright Act have been unsuccessful.([note 119](#)) At least three bootleg manufacturers have attempted a defense under the first-sale doctrine, which holds that once a legitimate copyright holder conveys title to another of a particular copy of a copyrighted work, that holder relinquishes all rights to that particular copy.([note 120](#)) One defendant argued that his indictment failed to allege that he knew that no first sale had been made. The Court of Appeals in the Seventh Circuit rejected this theory, stating that the first-sale doctrine cannot apply to bootleg records because there can be no lawful sale of bootlegs and, therefore, no lawful transfer of legal title.([note 121](#))

In 1985, the Supreme Court ruled that federal prosecutors had overreached themselves by bringing charges of transporting stolen goods in interstate commerce against a bootlegger.([note 122](#)) The bootlegger, Paul Dowling, allegedly spent about \$1,000 a week on postage to supply bootleg Elvis Presley albums to customers nationwide.([note 123](#)) The Ninth Circuit Court of Appeals upheld his conviction for mail fraud, interstate transportation of stolen property, and conspiracy to transport property interstate.([note 124](#)) Dowling did not contest charges of copyright infringement but he appealed his conviction under the National Stolen Property Act.([note 125](#)) Justice Blackmun, writing for the Supreme Court majority, drew a distinction between "the special concerns implicated by the copyright laws"([note 126](#)) and tangible stolen goods, which are within the traditional purview of the National Stolen Property Act. "[T]he property rights of a copyright holder have a character distinct from the possessory interest of the owner of simple `goods, wares, [or] merchandise,' for the copyright holder's dominion is subjected to precisely defined limits."([note 127](#)) Further concluding that "[C]ongress has not spoken with the requisite clarity,"([note 128](#)) the Court reversed Dowling's stolen-goods convictions.

To further clarify the Court's ruling, Justice Blackmun compared the government's tactics against Dowling to a case the Court had previously considered. That case involved a magazine, the *Nation*, which had published unauthorized excerpts from former President Gerald Ford's then soon-to-be-published memoirs.([note 129](#)) Under the government's theory of the *Dowling* case, the *Nation* would have been guilty of interstate transportation of stolen goods for mailing magazine subscriptions when, of course, the magazines themselves were not stolen.([note 130](#))

Dowling and his accomplice, Richard Minor, had also been convicted of copyright infringement under 17 U.S.C. 506(a) as had another bootlegger, George Powell Jr.([note 131](#)) Powell was also convicted of conspiracy under 18 U.S.C. 371. Powell had sold Bruce Springsteen and Blondie bootlegs to an FBI agent. Provided that the artists copyrighted them by fixing them, the specific performances on both bootlegs would have been protected by the 1971 amendment to the 1909 Copyright Act because both recordings were made after 1972.([note 132](#))

Dowling and Minor, however, had specialized in Elvis Presley bootlegs and most of the tracks dated from the late 1950s.([note 133](#)) Did the 1971 amendment apply to those songs? Unfortunately, any arguments the bootleggers may have made on that issue are unreported. Both bootleggers conceded their copyright convictions and concentrated on fighting their stolen-goods convictions on appeal. Justice Blackmun did hint that the question is unresolved: "[M]ost of the sound recordings involved in this case, as opposed to the musical compositions performed, are *apparently* not protected by copyright."([note 134](#))

Pre-1972 sound recordings are, indeed, apparently not given copyright protection. As we have seen, however, state

laws can be used effectively by record companies and artists to prosecute bootleggers as can traditional principles of unfair competition. Companies may also successfully argue that the bootleggers are violating the 1909 Copyright Act by reproducing copyrighted arrangements of notes and lyrics. Further, companies could argue that the bootleggers do not qualify for a compulsory license because the bootleggers' use is not similar but the same.

C. International Problems

The United States has significantly strengthened musical copyrights over the last twenty years. The rest of the world has done so to varying degrees, but corners of the world offer havens for bootleggers. In 1985, for example, Live-Aid organizer Bob Geldof complained that 1.5 million copies of bootleg Live-Aid tapes had been made in Indonesia, while that government was indifferent to or even endorsed the practice.[\(note 135\)](#)

Bootleg cassettes are now a major problem in the former Soviet satellite nations. Warsaw has been called "the pirate capital of Europe."[\(note 136\)](#) Sir John Morgan, president of the International Federation of the Phonographic Industry, complained that after he and Czechoslovakian President Vaclav Havel attended a Rolling Stones concert in Czechoslovakia, they found peddlers selling tapes of the previous night's concert outside.[\(note 137\)](#)

While bootleggers seem rampant in the developing countries, their activities are mostly limited to cassettes because they apparently do not yet have the elaborate equipment needed to manufacture records or CDs. That situation will inevitably change. For now, the professional bootlegging center of the world lies in Western Europe. Western European countries have all signed one or more of a number of international copyright treaties. The most important of these are the Universal Copyright Convention, the Berne Convention for the Protection of Literary and Artistic Works, and the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations.[\(note 138\)](#)

The current version of the Universal Copyright Convention was ratified in Paris on July 24, 1971, and took effect in the United States on July 10, 1974.[\(note 139\)](#) Under Section 1 of Article II of the convention:

Published works of nationals of any Contracting State and works first published in the State shall enjoy in each other Contracting State the same protection as that other State accords to works of its nationals first published in its own territory, as well as the protection specially granted by this Convention.[\(note 140\)](#)

Under Section 2 of Article II, unpublished work is given similar protection.[\(note 141\)](#)

The Berne Convention was first ratified on September 9, 1886, but the United States did not sign for 102 years, until October 31, 1988.[\(note 142\)](#) Under that convention, "authors of literary, musical and artistic works have the exclusive right of authorizing the reproduction of their works, in any manner or form (Article 9(1)), and the Convention expressly provides that any sound or visual recording shall be considered as a reproduction for the purposes of the Convention (Article 9(3))."[\(note 143\)](#) The Rome Convention extended the protection that Berne gave copyright holders to "performers, producers of phonograms and broadcasting organisations," but the United States has not signed the treaty, first ratified in 1961.[\(note 144\)](#)

Despite the fact that Germany signed all three conventions, a loophole in German copyright law allows some bootleg records to be sold openly. In 1985, the federal supreme court in Karlsruhe in the former West Germany ruled that under Article 25 of German copyright law,[\(note 145\)](#) recordings were not protected in Germany if the country where the recording took place did not sign the Rome Convention.[\(note 146\)](#) The case involved a bootleg of a Bob Dylan concert in Italy, but the court said it was impossible to tell whether the concert had been recorded before Italy ratified the Rome Convention in 1975.[\(note 147\)](#) In order for non-signers of the Rome Convention to gain protection in Germany, they would have to make their recordings in Germany to qualify for protection under Sections 1 or 2 of Article II of the Universal Copyright Convention, which requires Germany to provide the same protection as it gives its own nationals. Alternatively, the country could also enter into an official reciprocity agreement with Germany.[\(note 148\)](#) The 1985 court ruling established a "pro-tection gap" and essentially created legal bootlegs in Germany. Such manufacturers, unlike their United States counterparts, won most challenges in German courts.[\(note 149\)](#)

German concertgoers were generally forbidden to record concerts, but, once they had surreptitiously obtained tapes, German bootleg manufacturers worked confidently and in the open. One even solicited orders for a Bruce Springsteen bootleg, *Live in Frankfurt, 1992*, two weeks before Springsteen played Frankfurt.[\(note 150\)](#) Managing directors of German bootleg companies such as the Swingin' Pig (distributed by Perfect Beat), Imtrat, and MCM Tontraeger freely discussed their operations at the time. "Most of the material comes from the United States and the average sale per title is between 1,000 and 3,000 units. The really big names like Dire Straits can sell up to 20,000," said MCM Tontraeger's Torsten Hartmann.[\(note 151\)](#) Hartmann also pointed out that his label paid mechanical royalties, the German equivalent of the U.S. compulsory license fee, just like legitimate record companies.[\(note 152\)](#) The German bootleg market was estimated to be worth about 120 million marks (\$85.7 million) in 1991 alone.[\(note 153\)](#)

The record company for British musician Phil Collins, Warner Music, brought a test case involving *Phil Collins Live USA*, an Imtrat bootleg. In March 1992, a Munich district court referred the case to the European Court of Justice in Luxembourg.[\(note 154\)](#) That September, the German government stated that all members of the European Community should receive the same protection as German artists. This endorsement is in line with Article 7 of the Treaty of Rome, which prohibits discrimination between European Community members.[\(note 155\)](#)

As the case worked its way through the European Court, the legitimate record industry won several battles in Europe between 1992 and 1994. A court in Lausanne, Switzerland, ruled that although that country was not a signer of the Rome Convention, Swiss copyright law did protect sound recordings of foreigners.[\(note 156\)](#) Dutch record stores were warned by that country's equivalent of the RIAA—the NVPI—not to handle bootlegs, most of which came from Germany and Italy. Many such dealers apparently thought they could sell these records legally because they were being sold legally in Germany and Italy.[\(note 157\)](#) In Germany, Dire Straits's record company, Polygram, prevailed in court on its theory that a performance by a European Community member should be protected in Germany no matter where it was recorded. The case involved a Perfect Beat bootleg, *Dire Straits European Tour 1992*, which had been recorded in Switzerland.[\(note 158\)](#) In 1993, the Danish record industry sued Denmark's only CD for making bootlegs of U.S. artists. To get around any possible protection gap, the industry sued under Denmark's Marketing Act of 1992, which "forbids actions that are in conflict with professional marketing practices."[\(note 159\)](#) In the face of these crackdowns and preceding new trade agreements, Italian bootleggers who had long worked with impunity, found themselves facing an unaccustomed crackdown in the summer of 1994.[\(note 160\)](#)

On October 20, 1993, the Court of Justice of the European communities handed down its opinion in the Phil Collins case.[\(note 161\)](#) The court held that German copyright law did indeed violate the non-discrimination provision of Article 7 of the Treaty of Rome.[\(note 162\)](#) This decision would seem to say that German record manufacturers can no longer legally produce bootlegs by bands whose members are from nations in the European Community. This is a solid victory for some of the biggest rock stars including the Rolling Stones, Dire Straits, Phil Collins, and the former members of the Beatles. The decision apparently does not prevent these companies from manufacturing bootlegs from artists who are citizens elsewhere, such as artists from the United States.

That problem may have been solved less than two months later when, on December 15, 1993, 117 nations, including the United States and Germany, signed the General Agreement on Tariffs and Trade (GATT).[\(note 163\)](#) Article 14 of the treaty, "Protection of Performers, Producers of Phonograms (Sound Recordings) and Broadcasting Organizations," may go a long way toward stopping the international bootleggers.[\(note 164\)](#) Section 1 of the article explicitly gives performers (as opposed to publishers, authors, or record companies) "the possibility of preventing . . . the fixation of their unfixed performance and the reproduction of such fixation."[\(note 165\)](#) In other words, the recording of live performances or the compilation of unreleased studio tapes seems to be forbidden, and the artist maintains control over such performances or tapes. Section 3 also allows broadcasters to prohibit the fixation of broadcasts, a seeming prohibition against the practice of bootlegging broadcast concerts.[\(note 166\)](#) Section 5 establishes these protections for fifty years after the performance of the material.[\(note 167\)](#) United States participation in GATT required congressional approval, which came at the end of 1994.[\(note 168\)](#)

III. The Future of Bootlegging

Bootleg authority Tom Schultheiss has speculated that the recording industry is not really hurt by bootleggers because

fans who collect bootlegs buy everything an artist's legitimate record company issues anyway.[\(note 169\)](#) He even proposes that some bootlegs help the recording industry by broadening public interest in a particular musician and by preserving historic performances that may be technically imperfect.[\(note 170\)](#)

The argument may have some merit, but refutations are easy as well. The Who's most infamous concert is preserved, but the band certainly cannot be happy that it is on an album called *Stampede*. The Presley estate is probably glad that even Presley's rarest recordings are treasured by fans, but it is undoubtedly not pleased that there is a bootleg called *Elvis' Greatest Shit!*[\(note 171\)](#) Still, attitudes on bootlegs vary widely among artists. The Grateful Dead, a California-based band that perennially sets attendance records at its concerts but records albums infrequently, allows fans to tape their concerts and even provides special areas for them to do so.[\(note 172\)](#) This encouragement is not an endorsement of the bootleg industry but an attempt to promote tape trading among fans rather than bootleg selling by outsiders. "It's fine with us if tapes are swapped, shared or traded-as long as it's not done for money," said Grateful Dead spokesman Dennis McNally.[\(note 173\)](#) Other bands such as Metallica[\(note 174\)](#) and the Mission[\(note 175\)](#) have also invited fans to tape concerts. At the other end of the tolerance spectrum is Live-Aid organizer Bob Geldof, who once said that purchasers of bootleg cassettes from Indonesia of the Live-Aid concerts were literally killing the Ethiopian refugees for whom proceeds from the concerts were intended.[\(note 176\)](#) On a slightly less hysterical note, a successful early-1990s rock band from Seattle, Nirvana, announced it would no longer perform unreleased songs in concert for fear of bootlegging.[\(note 177\)](#)

Media coverage of bootlegs and bootleggers has been surprisingly positive over the years. There have even been many glowing reviews of individual bootlegs in the mainstream press. In 1970, *Rolling Stone* magazine called what was believed to be the first Rolling Stones bootleg, *LIVE r Than You'll Ever Be*, "one of the finest albums of 1969."[\(note 178\)](#) Almost twenty years later, rock star Prince's *The Black Album* made several critics' year-end best lists despite the fact that Prince had shelved the album in the United States before release, prompting bootleggers to issue it instead.[\(note 179\)](#) In 1986, *Rolling Stone* published an article about a new ten-record Bob Dylan bootleg, *Ten of Swords*,[\(note 180\)](#) which prompted Columbia Records to temporarily withhold advertising from the magazine.[\(note 181\)](#) The arrival of bootleg compact discs prompted another round of publicity.[\(note 182\)](#)

Musicians have fought back in a variety of ways, including parodies of bootlegs.[\(note 183\)](#) Over the years, artists have released live albums to forestall bootlegging.[\(note 184\)](#) Paul McCartney rushed to release a live album after his appearance on the MTV television program *Unplugged*, even calling it *Unplugged: The Official Bootleg*.[\(note 185\)](#) but he could not stop underground circulation of an unedited videotape of his performance, which included unreleased songs and mistakes.[\(note 186\)](#) The late Frank Zappa, an often eccentric California musician, took the process a step further. In 1991, he located ten bootlegs of his work and simply released them himself, complete with variable sound quality and original bootleg art with typos, in a series called *Beat the Boots!*[\(note 187\)](#) With much less fanfare, the Replacements, a band from Minneapolis, had pulled a similar stunt years earlier by confiscating a bootlegger's tape at a concert and issuing it on cassette themselves.[\(note 188\)](#)

Meanwhile, the recording industry worked closely with law enforcement officials who staged well-publicized raids across the country.[\(note 189\)](#) This tactic has impacted the sale of bootlegs at record conventions, which are usually held in public halls and feature a wide array of dealers. In the early- to mid-1980s, record conventions were the place to go for the latest bootlegs. By the early 1990s, bootlegs were almost impossible to find at conventions.[\(note 190\)](#)

Bootlegs are still plentiful elsewhere, including in many smaller record stores. They are usually billed as "imports" and prices for single CDs range from \$25 to \$35. Bootlegs are also advertised openly in periodicals. The January 6, 1995, issue of *Goldmine*, a national record-collector's magazine, contains many examples. Mail-order dealers in California, Kansas, Maryland, Massachusetts, and New York all listed recognizable bootleg records by title in the issue, billing them not as bootlegs but as "rare" or "imports."[\(note 191\)](#) Meanwhile, a group based in Holland seeks "good quality live tapes"[\(note 192\)](#) and a firm in Germany bills itself as "your original source for live Euro CD's."[\(note 193\)](#)

Conclusion

Clearly, bootlegs are here to stay. Worldwide suppliers have jumped in to fill the gap left by vigorous enforcement in the United States. Perhaps the term "bootleg" is apt: Federal authorities are having about as much luck eradicating

bootleg music as they had eradicating bootleg liquor during Prohibition.

Uniformity in world copyright laws will go a long way toward blocking bootlegs or at least driving their cost even higher. It will probably not be enough. The best way the record industry can fight bootlegging is by giving the public what it seems to want. This Note has already discussed several albums that appear to have been prompted by bootlegs. There are many others. It is appropriate that Bob Dylan has led the way with the release of *The Bootleg Series Vols. 1-3*, a three-CD compilation of material that had perennially popped up on bootlegs. [\(note 194\)](#) He promises more. Similarly, Capitol Records released the double CD *The Beatles Live at the BBC* at the end of 1994. [\(note 195\)](#) That set enjoyed excellent sales, debuting on the *Billboard* chart in the third spot [\(note 196\)](#) even though virtually all of the material and much more had been available on high-quality bootlegs for almost a decade. [\(note 197\)](#)

Even these samples may not be enough, however, because the fanatic bootleg collector is a completist. Frank Zappa knew this when he issued so many discs in his *Beat the Boots* series. A top German bootlegger hinted at the solution: "Why don't they release live material by their artists on cheap cassettes? If they did this, they could put us out of business." [\(note 198\)](#) He may be on to something. Record companies must consider combing further through the unreleased archives of their artists and finding material that is artistically viable.

Artists would have to approach their repertoire with a minimum of ego and a realistic consideration of what he or she would not mind seeing available. [\(note 199\)](#) These songs or performances could then be offered by mail order to fans who want them, to save record companies from accusations of scraping the bottom of the barrel if they release such things in large quantities for sale over the counter.

Alternate methods of distribution are available, or soon will be. In 1993, IBM and Blockbuster Entertainment announced a joint venture in which customers could use booths at Blockbuster stores to create personalized CDs. The system was promised by the end of 1994. [\(note 200\)](#) If two such well-established companies believe such an innovation is viable, record companies should be considering a similar method for ardent fans to tap into their favorite artists' unreleased material.

The Internet is also a future forum for the transmission of music. By the beginning of 1994, unknown bands were passing along their music to anyone with the right computer equipment. [\(note 201\)](#) Toward the end of the year, the Rolling Stones broadcast part of a concert on the Internet. The results were mixed but were clearly a taste of things to come. [\(note 202\)](#) Record companies and artists are beginning to put the latest technology to work for them rather than having it work against them.

The well-publicized raids of domestic bootleggers and the international treaties will not close the bootleg market. Only when record companies devise innovative ways to supply the demand will they reap some of the rewards that bootleggers are unfairly taking from them and their artists. Only then will the record companies really "beat the boots."

Notes

- An earlier version of this Note was the winner of the 1994 ASCAP Nathan Burkan Memorial Competition at the Indiana University School of Law-Bloomington. [Return to text](#)
 - B.A. Franklin and Marshall College, 1984; candidate for J.D. Indiana University School of Law-Bloomington, 1995. Thanks to Indiana University Associate Professor of Law Fred H. Cate, Mary T. Lane, Donald Sauter, and Reuben Schwartz for information and advice. [Return to text](#)
1. *Waring v. Dunlea*, 26 F. Supp. 338, 340 (E.D.N.C. 1939). The case concerned an unlawful radio broadcast of copyrighted performances. [Return to text](#)
 2. *Bob Dylan, Biograph* 16 (Columbia Records 1985) (ellipses in original) (the page references are from the book that accompanies the album). [Return to text](#)

3. Hot Wacks Book XV: The Last Wacks 215 (Bob Walker ed., 1992) [hereinafter Hot Wacks XV]. [Return to text](#)
4. The manufacturers were "two L.A. freaks," according to one contemporary source. John Morthland & Jerry Hopkins, *Bootleg: the Rock & Roll Liberation Front?*, in The Rolling Stone Rock 'n' Roll Reader 745 (Ben Fong-Torres ed., 1974). The Morthland and Hopkins article originally appeared in the Feb. 7, 1970, issue of *Rolling Stone*. [Return to text](#)
5. Given the secretive nature of the bootleg industry, sales figures are impossible to pin down accurately. *Hot Wacks XV: The Last Wacks*, an encyclopedia of bootlegs, asserts that "claims [that *Great White Wonder*] sold some 350,000 copies are extremely unlikely." Hot Wacks XV, *supra* note 3, at B. The book also lists three re-pressings of the album on different labels, a sure sign of its popularity. *Id.* at 215. [Return to text](#)
6. In this Note, the term "record" refers to a finished product on vinyl or CD. Similarly, the term "bootleg" refers to a finished bootleg product on either of the formats, as well as on cassette. Other stolen intellectual property is frequently called "bootleg" but the vast international market in bootleg video and computer software is beyond the scope of this Note. [Return to text](#)
7. This definition follows Justice Blackmun's overview in *Dowling v. United States*, 473 U.S. 207, 209-10 n.2 (1985). The case is discussed *infra* at notes 122-34 and accompanying text. [Return to text](#)
8. Morthland & Hopkins, *supra* note 4, at 745. Robbie Robertson, one of the musicians who played on the 1967 sessions, said the source was "a tape of a tape of a tape of a dub of a tape." Dylan, *supra* note 2, at 15. Each time a recording on non-digital (analog) tape is transferred to another tape, an often noticeable loss of fidelity occurs. [Return to text](#)
9. Hot Wacks XV, *supra* note 3, at B. [Return to text](#)
10. Belmo's Beatleg News, Oct. 1993, at 4. The fact that a well-produced, though small (this issue was eight pages) quarterly magazine is devoted to just one group's bootlegs illustrates how popular bootlegs are among collectors. [Return to text](#)
11. Phil Vettel, *Bootlegs: Sound May Vary, but Illegality Is Clear*, Chi. Trib., June 29, 1986, (Arts), at 8. [Return to text](#)
12. Bruce Eder, *Now They're Bootlegging CDs*, Newsday, Mar. 19, 1988, 2, at 9. [Return to text](#)
13. Hot Wacks XV, *supra* note 3. [Return to text](#)
14. Hot Wacks Book (Bob Walker ed., Supp. I 1993) [hereinafter Hot Wacks Supp.]. [Return to text](#)
15. Hot Wacks XV, *supra* note 3, at 540-89; Hot Wacks Supp., *supra* note 14, at 130-35. This is 138 more bootlegs than had been listed in the previous edition, published just two years earlier. Hot Wacks Book XIV 339-72 (Bob Walker ed., 1990). [Return to text](#)
16. Charles Reinhart, You Can't Do That-Beatles Bootlegs & Novelty Records (1981). Capitol Records's official CD compilation of (more or less) every song the Beatles sanctioned for release runs to just 18 discs. [Return to text](#)
17. Belmo, *The Beatles-the Very Best of the Beatlegs*, in Hot Wacks XV, *supra* note 3, at F. [Return to text](#)
18. Belmo's Beatleg News, *supra* note 10, at 4. [Return to text](#)
19. Hot Wacks XV, *supra* note 3, at 102. The band was a British musical comedy act of the 1960s. [Return to text](#)
20. *Id.* at 245-46. Erickson was the leader of the influential but low-profit 1960s cult rock band the Thirteenth Floor Elevators, which has been bootlegged at least six times. *Id.* at 674. He now lives in poverty in Texas. Richard Leiby, *The Elevator Doesn't Stop Here Anymore: Music Legend Roky Erickson, Godfather of the Psychedelic*

- Sound, Survived the '60s. Sort of*, Wash. Post, June 23, 1991, at F1. [Return to text](#)
21. Hot Wacks XV, *supra* note 3, at 671-72. Taylor was briefly a member of the Rolling Stones. One bootleg title reflects his subsequent fate: *May I Have a Record Contract. Id.* at 671. [Return to text](#)
 22. *Id.* at 674-75. Throbbing Gristle was a British band of the late 1970s. [Return to text](#)
 23. David Lister, *Underrated: The Case for Bootlegging: The Battle of Britten*, Independent, June 1, 1994, at 24 (discussing bootleg CDs of British composer Benjamin Britten); Dirk Sutro, *Owner of Local Jazz Label Has Plenty of Headaches*, L.A. Times, Aug. 6, 1991, (Calendar), at F2. [Return to text](#)
 24. Clive Davis, *Bossa Man Is No Fragile Reed*, The Times (London), July 26, 1990, available in LEXIS, News Library, Arcnws file. *Hot Wacks* lists Getz's bootlegged compact disc. Hot Wacks XV, *supra* note 3, at 268. [Return to text](#)
 25. James Gavin, *The Mahogany Voice Endures and So Do the Private Battles*, N.Y. Times, Aug. 8, 1993, 2, at 24. [Return to text](#)
 26. Lisa Collins, *In the Spirit*, Billboard, Apr. 3, 1993, at 39, 39. [Return to text](#)
 27. Richard Harrington, *Clinton, on the Record: Bootleg CD of Prague Sax Session Released*, Wash. Post, Nov. 19, 1994, at C1. [Return to text](#)
 28. The Who, Stampede (Black Gold Concerts). [Return to text](#)
 29. *11 Killed in Stampede Before Rock Concert in Cincinnati Arena*, Wash. Post, Dec. 4, 1979, at A22. [Return to text](#)
 30. *The Stampede to Tragedy*, Time, Dec. 17, 1979, at 88, 88. [Return to text](#)
 31. The Beatles, Unsurpassed Masters Vol. 1 (1962-1963) (Yellow Dog 1989). The title is surely a parody of Capitol Record's official two-volume *Past Masters* series. [Return to text](#)
 32. Aside from an occasional exception, most bootleg labels make no effort to look legitimate. In fact, the label often calls attention to the record's fly-by-night origins. An earlier example is a prolific bootleg label of the early 1970s, Trade Mark of Quality, which featured the label name wrapped around an illustration of an enormous hog in profile. [Return to text](#)
 33. Mark Lewisohn, The Beatles: Recording Sessions (1988). The book chronicles the group's studio activity day by day. [Return to text](#)
 34. Belmo, *supra* note 17, at G. [Return to text](#)
 35. 17 U.S.C. 402(a), (b)(1)-(2) (1988). [Return to text](#)
 36. 17 U.S.C. 402(b)(3) (1988). A legitimate example: "This compilation 1988 EMI Records Ltd." The Beatles, Past Masters Volume Two (Capitol Records 1988). [Return to text](#)
 37. If the disc were made in Germany, it probably was legal there at the time. *See infra* notes 135-67 and accompanying text. [Return to text](#)
 38. The warning reads: "All rights of the producer and/of [sic] the owner of the work reproduced reserved. Unauthorized copying, hiring, lending, public performance and broadcasting of this record prohibited." [Return to text](#)
 39. The song was "One After 909," a Lennon-McCartney composition from the late 1950s that was not officially

- released until the group's posthumous 1970 LP, *Let It Be*. [Return to text](#)
40. Hot Wacks XV, *supra* note 3, at B. Many writers argue that home taping for personal use harms record company profits most of all. Tom Schultheiss, *Everything You Always Wanted to Know About Bootlegs, but were too Busy Collecting Them to Ask*, in Reinhart, *supra* note 16, at 409. [Return to text](#)
 41. *Victor Talking Mach. Co. v. Armstrong*, 132 F. 711 (S.D.N.Y. 1904). The case offers a fascinating overview of the state of recording technology at the time, just 27 years after the invention of the phonograph. *See infra* note 68. [Return to text](#)
 42. Recording Indus. Ass'n of Am., Inc., Sound Recording Piracy-A Guide to Federal Investigations and Prosecutions 1.7 (1988). [Return to text](#)
 43. Note, *Piracy on Records*, 5 Stan. L. Rev. 433, 434 (1953). This note offers an at-times delightful look at the early 1950s record collector. The author, for example, identifies the pirates of the time this way: "Our story begins with the jazz enthusiasts, that intense cult aptly described as 'jazz addicts.'" *Id.* [Return to text](#)
 44. Schultheiss, *supra* note 40, at 402. [Return to text](#)
 45. Note, *supra* note 43, at 436. [Return to text](#)
 46. *Id.* at 438. Later, the name became the Recording Industry Association of America. [Return to text](#)
 47. *Id.* at 439. [Return to text](#)
 48. *See Shapiro, Bernstein & Co. v. Sam Goody*, 248 F.2d 260 (2d Cir. 1957), *cert. denied*, 355 U.S. 952 (1958). The widespread availability of cheap cassettes in the early 1970s gave the greatest-hits pirates another brief lease on life. *See infra* notes 83-96 and accompanying text. [Return to text](#)
 49. Stan Soocher, *He's the No. 1 Bane of Pirates: CD Copies Worry the Music Business*, Nat'l L.J., June 19, 1989, at 1, 1. [Return to text](#)
 50. Multi-volume series with lurid covers and names like *Sin Alley* (four volumes on labels such as Big Daddy, Cornball, and Sleaze), *Desperate Rock 'n' Roll* (at least 16 volumes on labels such as Flame), and *Las Vegas Grind* (four volumes on labels such as Strip) compile otherwise virtually lost rock and jazz material from the 1950s and 1960s from small or regional record labels that have almost universally gone out of business. At the beginning of 1994, CD copies of *Las Vegas Grind* were being sold at a Washington, D.C. area branch of one of the largest record chains in the country. [Return to text](#)
 51. This Note avoids using "piracy" as a catch-all phrase. [Return to text](#)
 52. One article dealing with counterfeiting stated that record companies lost a total of \$1.5 billion to record thieves in 1992. James Cox, *Bootlegging Billions-U.S. Loses Ground in Crackdown*, USA Today, Mar. 9, 1993, at 1B. [Return to text](#)
 53. Schultheiss, *supra* note 40, at 399. About four hours of Mapleson's recordings survive and have been preserved on a six-LP set. Lionel S. Mapleson, The Mapleson Cylinders (The New York Public Library at Lincoln Center/Rodgers and Hammerstein Archives of Recorded Sound 1985). [Return to text](#)
 54. David Hall, *The Mapleson Cylinders-a Historical Introduction*, in Mapelson, *supra* note 53. Another explanation is that cylinders accidentally dropped from the catwalk were endangering performers below. *Id.* [Return to text](#)
 55. *Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp.*, 101 N.Y.S.2d 483, 486 (N.Y. Sup. Ct. 1950), *aff'd* 107 N.Y.S.2d 795 (1951). [Return to text](#)
 56. *Id.* at 487. [Return to text](#)

57. *Id.* at 500. [Return to text](#)
58. *Miller v. Goody*, 125 F. Supp. 348 (S.D.N.Y. 1954). Miller died in 1944, during World War II. The bootlegged recordings were billed as broadcasts, among the last Miller made, that were beamed directly to the combat troops. *Id.* at 352. [Return to text](#)
59. *Id.* [Return to text](#)
60. *Even the Waxing Diskleggers Get Bootlegged; Newcomers Muscle in*, *Variety*, Oct. 17, 1951, at 1, 1. [Return to text](#)
61. *Giesecking*, 155 N.Y.S.2d 171 (N.Y. Sup. Ct. 1956). [Return to text](#)
62. *Id.* at 172. [Return to text](#)
63. U.S. Const. art. I, 8, cl. 8. [Return to text](#)
64. *See Goldstein v. California*, 412 U.S. 546, 562 (1973). [Return to text](#)
65. Act of May 31, 1790, ch. 15, 1 Stat. 124 (repealed 1831). [Return to text](#)
66. Act of Feb. 3, 1831, ch. 16, 4 Stat. 436 (repealed 1870). [Return to text](#)
67. *Goldstein*, 412 U.S. at 564. [Return to text](#)
68. Edison announced his invention in the November 17, 1877, issue of *Scientific American*. Matthew Josephson, Edison 162 (1959). [Return to text](#)
69. *White-Smith*, 209 U.S. 1 (1908). Piano rolls are long scrolls of paper with holes punched in them, which, when inserted in a player piano, make the piano play compositions according to the sequence of holes. [Return to text](#)
70. *Id.* at 18. [Return to text](#)
71. *Shapiro, Bernstein & Co. v. Goody*, 248 F.2d 260, 262 (2d Cir. 1957), *cert. denied*, 355 U.S. 952 (1958). [Return to text](#)
72. Copyright Act of 1909, ch. 320, 35 Stat. 1075, *superceded by* Copyrights Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. 101-1010 (1988 & Supp. V 1993)). [Return to text](#)
73. 17 U.S.C. 115(c) (1988), *amended by* 37 C.F.R. 255.2 (1994). [Return to text](#)
74. 37 C.F.R. 255.2 (1994). [Return to text](#)
75. Melville B. Nimmer, *Photocopying and Record Piracy: Of Dred Scott and Alice in Wonderland*, 22 UCLA L. Rev. 1052, 1060 (1975). [Return to text](#)
76. *Aeolian Co. v. Royal Music Roll Co.*, 196 F. 926, 927 (W.D.N.Y. 1912). [Return to text](#)
77. *Duchess Music Corp. v. Stern*, 458 F.2d 1305 (9th Cir.), *cert. denied*, 409 U.S. 847 (1972); *see infra* notes 84-89 and accompanying text. [Return to text](#)
78. *Victor Talking Mach.*, 132 F. 711 (S.D.N.Y. 1904). [Return to text](#)
79. *Metropolitan Opera*, 101 N.Y.S.2d 483 (N.Y. Sup. Ct. 1950), *aff'd* 107 N.Y.S.2d 795 (1951). This was bolstered

- by the Supreme Court's ruling in *International News Service v. Associated Press*, in which the Court ruled that the International News Service could not freely help itself to the Associated Press's news stories. *International News Serv.*, 248 U.S. 215 (1918). [Return to text](#)
80. *Metropolitan Opera*, 101 N.Y.S.2d at 488. [Return to text](#)
 81. *Id.* at 492. [Return to text](#)
 82. *Id.* at 494. [Return to text](#)
 83. Morthland & Hopkins, *supra* note 4, at 745. The plant was being used by bootleg copycats who were re-pressing the album because the original manufacturers apparently had, to use the parlance of the age, "split to Canada." *Id.* at 746. [Return to text](#)
 84. *Duchess Music*, 458 F.2d 1305 (9th Cir.), *cert. denied*, 409 U.S. 847 (1972). This question had been addressed 60 years earlier in *Aeolian Co. v. Royal Music Roll Co.*, 196 F. 926 (W.D.N.Y. 1912). [Return to text](#)
 85. *Duchess Music*, 458 F.2d at 1307. The infringed artists included Elvis Presley, Johnny Cash, Burt Bacharach, Mick Jagger, Joni Mitchell, and Buck Owens. *Id.* at 1306-07. [Return to text](#)
 86. *Id.* at 1310. [Return to text](#)
 87. *Id.* Professor Nimmer later disagreed with this holding. *See* Nimmer, *supra* note 75. [Return to text](#)
 88. *Duchess Music*, 458 F.2d at 1308. [Return to text](#)
 89. Four years later, the same court would make similar short work of a strange group of pirates who bought tapes and records by popular artists and then retaped them, electronically altering them through echo, speed, and the addition of new synthesizer sounds. These were then marketed on eight-track tapes as new versions by a band called Sound 8. These pirates were found guilty of copyright infringement. *United States v. Taxe*, 540 F.2d 961 (9th Cir. 1976), *cert. denied*, 429 U.S. 1040 (1977). As an indication of judicial disapproval of record thievery, the court ruled that a prosecutor's labeling of one of the defendants as a "scavenger" and a "parasite" was supported by the evidence. *Id.* at 968. [Return to text](#)
 90. U.S. Const. art. VI, cl. 2. [Return to text](#)
 91. *Goldstein v. California*, 412 U.S. 546 (1973). [Return to text](#)
 92. *Id.* at 548. [Return to text](#)
 93. Cal. Penal Code 653h (West Supp. 1994). [Return to text](#)
 94. *Goldstein*, 412 U.S. at 560. [Return to text](#)
 95. *Id.* at 558. [Return to text](#)
 96. Recording Indus. Ass'n of Am., Inc., *supra* note 42, at 1.1. Vermont is the lone state hold-out. Schultheiss, *supra* note 40, at 404. [Return to text](#)
 97. Sound Recording Act of 1971, Pub. L. No. 92-140, 85 Stat. 391 (1971). The *Duchess* and *Goldstein* cases involved criminal activity that occurred before February 15, 1972, and were not subject to the 1971 Act. [Return to text](#)
 98. H.R. Rep. No. 487, 92d Cong., 1st Sess. (1971), *reprinted in* 1971 U.S.C.C.A.N. 1566, 1567. Lawmakers acknowledged that deriving an accurate figure for the illegal record trade poses the same challenges as any other widespread illegal activity. *Id.* This estimate of loss had increased to \$1.5 billion 20 years later. *See* Cox, *supra*

note 52, at 1B. [Return to text](#)

99. Sound Recording Act of 1971, Pub. L. No. 92-140, 85 Stat. 391 (codified at 17 U.S.C. 106(3) (1988)). Most of the rock musicians mentioned in this Note so far-Bob Dylan, the Beatles, the Who-as well as many others who remain very popular with fans and bootleggers, such as Jimi Hendrix and the Doors, are generally regarded as having done their best or only work before February 15, 1972. [Return to text](#)
100. H.R. Rep. No. 487, *supra* note 98, *reprinted in* 1971 U.S.C.C.A.N. at 1578. [Return to text](#)
101. Piracy and Counterfeiting Amendments Act of 1982, Pub. L. No. 97-180, 96 Stat. 91 (1982), *amended by* Criminal Penalties for Copyright Infringement, Pub. L. No. 102-561, 106 Stat. 4233 (1992) (codified at 18 U.S.C. 2319 (1988)). [Return to text](#)
102. Criminal Penalties for Copyright Infringement, Pub. L. No. 102-561, 106 Stat. 4233 (1992) (codified at 18 U.S.C. 2319 (1988)). The amendment deletes the penalties available in the former 18 U.S.C. 2319 in favor of the more stringent penalties of 18 U.S.C. 2320. [Return to text](#)
103. 17 U.S.C. 106 (1988). The Author is indebted to Donald J. Valdez, Associate Director of Anti-Piracy, Criminal Regional Anti-Piracy Counsel, of the RIAA, for providing the RIAA's recommended prosecutors' guidelines. Recording Indus. Ass'n of Am., Inc., *supra* note 42, at 8.1-8.7. [Return to text](#)
104. 17 U.S.C. 106(1) (1988). [Return to text](#)
105. 17 U.S.C. 106(2) (1988). [Return to text](#)
106. 17 U.S.C. 106(3) (1988). [Return to text](#)
107. 17 U.S.C. 115(a) (1988). [Return to text](#)
108. 17 U.S.C. 506(a) (1988). 17 U.S.C. 501(a) (Supp. V 1993) defines a "copyright infringer" as anyone who violates any of the exclusive uses under 17 U.S.C. 106 (1988). [Return to text](#)
109. 18 U.S.C. 2319(b)(1) (Supp. V 1993). [Return to text](#)
110. 18 U.S.C. 2319(b)(3) (Supp. V 1993). [Return to text](#)
111. 18 U.S.C. 2320(a) (1988). [Return to text](#)
112. 18 U.S.C. 2319(b)(2) (Supp. V 1993). [Return to text](#)
113. 17 U.S.C. 301 (1988 & Supp. V 1993). [Return to text](#)
114. 17 U.S.C. 301(a) (1988). [Return to text](#)
115. 17 U.S.C. 301(b)(1) (1988). [Return to text](#)
116. Copyright Act, H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5747. [Return to text](#)
117. 17 U.S.C. 301(b)(2) (Supp. V 1993). [Return to text](#)
118. 17 U.S.C. 301(b)(3) (Supp. V 1993). John Lennon, for example, successfully argued that under the New York Civil Rights Law, his reputation was injured by a record company that issued an album of his unfinished tapes in a jacket featuring an old, blurry photo of him. *Big Seven Music Corp. v. Lennon*, 554 F.2d 504, 512 (2d Cir. 1977). Lennon used 51 of New York's civil rights law. N.Y. Civ. Rights Law 51 (McKinney 1992). [Return to text](#)

119. *See* *United States v. Heilman*, 614 F.2d 1133 (7th Cir. 1980) (aligning itself with other circuits, the Seventh Circuit upheld copyright penalties against pirates); *United States v. Taxe*, 540 F.2d 961 (9th Cir. 1976), *cert. denied*, 429 U.S. 1040 (1977) (holding that alterations of original recordings through studio trickery is not sufficient to avoid piracy charges). [Return to text](#)
120. *United States v. Powell*, 701 F.2d 70, 72 (8th Cir. 1983). Two other cases involving unsuccessful applications of the first-sale doctrine are *United States v. Moore*, 604 F.2d 1228 (9th Cir. 1979), a greatest-hits pirate, and *United States v. Minor*, 756 F.2d 731 (9th Cir.), *vacated*, 473 U.S. 991 (1985), a bootlegger, discussed further *infra* note 131 and accompanying text. [Return to text](#)
121. *Powell*, 701 F.2d at 73. [Return to text](#)
122. *Dowling v. United States*, 473 U.S. 207 (1985). [Return to text](#)
123. *Id.* at 212. [Return to text](#)
124. *United States v. Dowling*, 739 F.2d 1445 (9th Cir. 1984), *rev'd*, 473 U.S. 207 (1985). [Return to text](#)
125. 18 U.S.C. 2314 (1988 & Supp. V 1993). [Return to text](#)
126. *Dowling*, 473 U.S. at 225. [Return to text](#)
127. *Id.* at 217 (brackets in original). [Return to text](#)
128. *Id.* at 229. [Return to text](#)
129. *Harper & Row Publishers v. Nation Enter.*, 471 U.S. 539 (1985). [Return to text](#)
130. *Dowling*, 473 U.S. at 226. [Return to text](#)
131. *United States v. Minor*, 756 F.2d 731, 733 (9th Cir.), *vacated*, 473 U.S. 991 (1985); *United States v. Dowling*, 739 F.2d 1445, 1447 (9th Cir. 1984), *rev'd*, 473 U.S. 207 (1985); *United States v. Powell*, 701 F.2d 70, 71 (8th Cir. 1983). [Return to text](#)
132. The Springsteen bootleg, *Great White Boss, Bottom Line 8/15/75*, was a concert from 1975. The Blondie bootleg, *Little Doll*, consisted of a 1979 live performance plus studio demo tapes by this American band, which had a number of hits in the late 1970s and early 1980s. *Hot Wacks XV*, *supra* note 3, at 96. [Return to text](#)
133. *Dowling*, 473 U.S. at 210 n.3 (noting a 1976 Presley concert among the bootlegs). [Return to text](#)
134. *Id.* at 211 n.4 (emphasis added). [Return to text](#)
135. Live-Aid consisted of two major concerts, one in Philadelphia, the other in London, as well as smaller ones around the world. They were held July 13, 1985, to raise money for famine relief in Ethiopia. The concerts were broadcast over television and radio. [Return to text](#)
136. Nicholas Soames, *The Arts: Counterfeit Sounds of Music-Pavarotti or Pop, Warsaw Has It Illegally Taped. Nicholas Soames Reports on Forgery*, *Daily Telegraph*, Jan. 25, 1992, at 127, 127. [Return to text](#)
137. *Id.* [Return to text](#)
138. Gillian Davies, Private Copying of Sound and Audio-Visual Recordings 67 (1984). [Return to text](#)
139. The treaty is reproduced at 17 U.S.C. 104 (1988). [Return to text](#)

140. *Id.* [Return to text](#)
141. *Id.* [Return to text](#)
142. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 828 U.N.T.S. 221 (showing revisions through July 14, 1967) [hereinafter Berne Convention]; *see also* Deborah Ross, Comment, *The United States Joins the Berne Convention: New Obligations for Authors' Moral Rights?*, 68 N.C. L. Rev. 363, 364 (1990) (offering valuable insights on the century-long delay). [Return to text](#)
143. Berne Convention, *supra* note 142, at 239 (footnotes omitted). [Return to text](#)
144. International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, Oct. 26, 1961, 496 U.N.T.S. 43. [Return to text](#)
145. Mike Hennessey, *GEMA Orders Halt to Disputed Beatles Discs*, Billboard, Dec. 19, 1992, at 38, 38. [Return to text](#)
146. Mike Hennessey, *Superstar Sets Slip Thru Protection Gap in Germany*, Billboard, Aug. 8, 1992, at 1, 41. The decision was upheld by Germany's federal constitutional court in 1990. [Return to text](#)
147. *Id.* [Return to text](#)
148. *Id.* At the time of the article, the only country to enter into such an agreement with Germany was Indonesia. *Id.* [Return to text](#)
149. *Id.* [Return to text](#)
150. Mike Hennessey, *German Music Biz Cheered by Moves to Plug 'Protection Gap,'* Billboard, Sept. 26, 1992, at 8, 58. [Return to text](#)
151. Hennessey, *supra* note 146, at 41. Dire Straits is a British band. [Return to text](#)
152. *Id.* [Return to text](#)
153. Hennessey, *supra* note 150, at 58. [Return to text](#)
154. *Id.* [Return to text](#)
155. Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 7, 298 U.N.T.S. 3, 17. The Treaty of Rome established the European Community in 1957. The treaty must be distinguished from the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations of 1961. *See supra* note 144. [Return to text](#)
156. *See* Mike Hennessey, *Swiss See Higher \$ Peaks With New Copyright Ruling*, Billboard, Dec. 19, 1992, at 1, 42. [Return to text](#)
157. Willem Hoos, *Dispatches From the Bootleg Battle; Dutch Dealers Get Warning*, Billboard, Dec. 12, 1992, at 40, 40. [Return to text](#)
158. *See* Hennessey, *supra* note 145, at 38, 40. [Return to text](#)
159. *See* Kai Roger Ottesen, *Bootlegs Spur Danish Suit*, Billboard, Sept. 11, 1993, at 56, 57. [Return to text](#)
160. *See* Jeff Clark-Meads, *IFPI Raid May Have Netted 60,000 Pirate Discs in Italy*, Billboard, July 9, 1994, at 6, 6; Jeff Clark-Meads, *IFPI Tightens Loophole for Italian Bootlegs*, Billboard, July 2, 1994, at 60, 60. [Return to text](#)

161. Collins v. Imtrat Handelsgesellschaft mbh (C-92/92 1993), *translated in* 1994 Fed. Sentencing Rep. 166 (Oct. 20, 1993). A companion case involved live recordings made in the late 1950s of British singer Cliff Richard. Patricia Im-Und Export Verwaltungsgesellschaft mbH v. EMI Electrola GmbH (C-326/92 1993), *translated in* 1994 Fed. Sentencing Rep. 166 (Oct. 20, 1993). [Return to text](#)
162. *See European Court Blocks German Copyright Law, Helps Artists Stop Bootleg Sales*, 10 Int'l Trade Rep. (BNA) No. 43, at 1839 (Nov. 3, 1993). [Return to text](#)
163. *See Peter Behr, 117 Nations' Representatives Approve Historic Trade Pact*, Wash. Post, Dec. 16, 1993, at A41. [Return to text](#)
164. 33 Int'l Legal Materials 1197, 1202 (Sept. 1994). [Return to text](#)
165. *Id.* [Return to text](#)
166. *Id.* [Return to text](#)
167. *Id.* at 1202-03. [Return to text](#)
168. *See* Martin Kasindorf, *Clinton Signs GATT; Says U.S. Must now Lead Global Economy*, Newsday, Dec. 9, 1994, at A17; David E. Sanger, *Senate Approves Pact to Ease Trade Curbs; A Victory for Clinton*, N.Y. Times, Dec. 2, 1994, at A1. [Return to text](#)
169. Schultheiss, *supra* note 40, at 406. [Return to text](#)
170. *Id.* [Return to text](#)
171. Bill Brownstein, *King of Fans Owns 1,000 Elvis Albums*, The Gazette (Montreal), Apr. 5, 1992, at D3. The album, on a record label called Dog Vomit, purports to gather Presley's worst songs, such as "There's no Room to Rhumba in a Sports Car," "Yoga Is & Yoga Does," and "Dominic the Impotent Bull." Because Presley purportedly died from a prescription-drug overdose, the set also reportedly includes a photocopy of one of Presley's prescriptions. Hot Wacks XV, *supra* note 3, at 493. [Return to text](#)
172. *See, e.g.*, Rose Apodaca Jones, *Jerry's Kids: Young Deadheads Aren't in it for the Nostalgia*, L.A. Times, Jan. 13, 1995, at E1. [Return to text](#)
173. Randy Lewis, *Record Bootleggers Tap Niche in Music Market*, L.A. Times, Nov. 9, 1990, at F25. Hot Wacks Book XV lists 128 bootlegs for the Grateful Dead. Hot Wacks XV, *supra* note 3, at 270-79. Hot Wacks Book Supplement 1 lists an additional 26. Hot Wacks Supp., *supra* note 14, at 48-51. Presumably there would be even more bootlegs if homemade tapes were not in such wide circulation. [Return to text](#)
174. Jon Bream, *Metallica Still a Heavy Hitter*, Star Trib., Nov. 8, 1991, at 1E. Metallica is a long-lasting heavy-metal rock band. [Return to text](#)
175. Mike Nicholls, *Do It Yourself Bootlegs*, The Times (London), Mar. 3, 1990, *available in* LEXIS, News Library, Arcnws file. The Mission is a British rock band. [Return to text](#)
176. *Pirate Copies Trim Live Aid Income*, L.A. Times, Dec. 7, 1985, 5, at 8. On its face, Geldof's claim that these bootlegs killed refugees by siphoning away donations is preposterous because no official records or videos of the Live-Aid concerts were ever offered for sale. However, Geldof's denunciations did encourage the Indonesian government to apply pressure to the cassette producers who, in turn, donated \$27,000 to famine relief. *Live Aid Cassette Bootleggers to Make Donation to Project*, UPI, Dec. 18, 1985, *available in* LEXIS, News Library, Arcnws File. [Return to text](#)
177. Patrick MacDonald, *No Longer Nodding, Nirvana Gets Set to Invade the Coliseum*, Seattle Times, Sept. 11,

- 1992, at 10. [Return to text](#)
178. Morthland & Hopkins, *supra* note 4, at 745. [Return to text](#)
179. See *Charting the Best; 1988 Records*, Boston Globe, Dec. 22, 1988, at 10. The artist formerly known as Prince and his record company finally offered the album for sale as a limited edition for about six weeks at the end of 1994 and beginning of 1995. See, e.g., Geoffrey Himes, *Prince's 'Black' Sees Light of Day*, Wash. Post, Dec. 7, 1994, at C7. [Return to text](#)
180. Michael Goldberg, *Bootleg Bob-Dylan Set Creates a Stir; CBS not Amused*, Rolling Stone, Apr. 10, 1986, at 13, 13. [Return to text](#)
181. Richard Harrington, *CBS Records Takes on Rolling Stone; Ads Pulled; Magazine to Limit its Coverage*, Wash. Post, Apr. 15, 1986, at C1. [Return to text](#)
182. See Mark Robison, *CD Bootlegger*, Gannett News Service, Nov. 2, 1989, available in LEXIS, News Library, Arcnws File; Roger Catlin, *Bootleg CD Clarity Is a Cloud Over Artists*, St. Petersburg Times, May 2, 1989, at 1D; Bruce Eder, *Bootlegging the Stars; Latest CDs Bypass Vinyl*, Newsday, Nov. 19, 1988, at 9. [Return to text](#)
183. The Who, Live at Leeds (MCA Records 1970) and Aerosmith, Live Bootleg (Columbia Records 1978) are two examples of official mimicry. [Return to text](#)
184. Greg Kot, *Richards and the Stones Are Still on a Roll-Solo Work Helps Hold Band Members Together*, Chi. Trib., Dec. 22, 1991, (Tempo), at 1, 1 (citing Keith Richards & the X-Pensive Winos Live at the Hollywood Palladium, Dec. 15, 1988 (Virgin Records 1991)); Bruce Wallace, *Defying the Bootleggers*, Maclean's, Nov. 24, 1986, at 59, 59 (citing Bruce Springsteen and the E Street Band, Live/1975-85 (Columbia Records 1986)); Morthland & Hopkins, *supra* note 4, at 746 (citing John Lennon/Plastic Ono Band, Live Peace in Toronto (Apple Records 1970)). Much of the Bob Dylan material that came out on *Great White Wonder* was eventually released legitimately. Bob Dylan, The Basement Tapes (Columbia Records 1975). [Return to text](#)
185. Paul McCartney, Unplugged: The Official Bootleg (Capitol Records 1991). [Return to text](#)
186. A classified advertisement for the video appeared in fan magazines in the fall of 1991. 13 Beatlefan No. 3, 1991, at 41. [Return to text](#)
187. Guy Garcia, *If You Can't Beat 'em . . . ; Music Rip-off Artists Go Upscale With CDs but the Stars Fight Back With Bootleg Albums of Their Own*, Time, July 8, 1991, at 44, 44. [Return to text](#)
188. The Replacements, The Shit Hits the Fans (Twin/Tone Records 1984). [Return to text](#)
189. See, e.g., Marla Cone, *Police Seize Records, Tapes at Swap Meet; Bootleg Music: More Than 10,000 Illegal Recordings and Other Merchandise Valued at About \$100,000 Were Confiscated in the Buena Park Raid*, L.A. Times, Oct. 29, 1990, at B1; George Paaswell, *Are They Rock Fans or Pirates?; Bootleg Collectors Run Afoul of the Law*, Orlando Sentinel Trib., Jan. 8, 1990, at C1; *Four Facing Charges in Record Scheme*, UPI, Nov. 16, 1987, available in LEXIS, News Library, Arcnws File (four bootleggers and pirates arrested outside Baltimore). [Return to text](#)
190. During a conversation at a record convention at an Indianapolis hotel on March 26, 1994, one dealer told the Author that he no longer brings bootlegs to conventions because of the "climate right now." The dealer then provided an extensive mail-order catalog of bootlegs to the Author. At the same venue on December 17, 1994, however, the Author did observe one dealer openly selling bootlegs. [Return to text](#)
191. An issue of *Goldmine* from a year earlier, January 21, 1994, seemed to contain far fewer domestic advertisements for bootlegs. This is far from scientific analysis, but it is possible that the trade is growing despite crackdowns. See also Garcia, *supra* note 187. [Return to text](#)

192. Goldmine, Jan. 6, 1995, at 137 (advertisement). [Return to text](#)
193. *Id.* at 164 (advertisement). [Return to text](#)
194. Bob Dylan, The Bootleg Series Vols. 1-3 (Columbia Records 1991). [Return to text](#)
195. The Beatles Live at the BBC (Capitol Records 1994). [Return to text](#)
196. *See, e.g.*, Arlene Vigoda, *Spy Report*, USA Today, Dec. 19, 1994, at 9A. [Return to text](#)
197. The two most well-known are The Beatles at the Beeb Vols. 1-13 (Beeb Transcription Records 1987-1990) (13 LPs) and The Beatles, The Complete BBC Sessions (Great Dane Records ca. 1994) (9 CDs). [Return to text](#)
198. *Superstar*, *supra* note 146, at 41. [Return to text](#)
199. Bob Dylan apparently went through this process with a song called "Blind Willy McTell." In 1984, when the song was recorded but unreleased, he told *Rolling Stone* he did not think he had recorded it right. Rolling Stone, June 21, 1984, at 14, 23. It was later cited as a highlight of *The Bootleg Series. Records of the Year*, The Times (London), Dec. 8, 1991, *available in* LEXIS, News Library, Arcnws File. [Return to text](#)
200. *B'Buster to Bow Custom CDs*, Reuters News Service, Apr. 13, 1994, *available in* LEXIS, News Library, Curnws File. [Return to text](#)
201. Barry Walters, *The Internet Is a Punk Rocker Now*, S.F. Examiner, Feb. 27, 1994, at D3. [Return to text](#)
202. Neil Strauss, *Rolling Stones Live on Internet: Both a Big Deal and a Little Deal*, N.Y. Times, Nov. 22, 1994, at C15. [Return to text](#)