

PART I

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# Music as American Commerce



America's first superstar of music,  
songwriter Stephen C. Foster (1826–1864).  
Foster Hall Collection, Center for American Music,  
University of Pittsburgh Library System



# 1. Music as Property

## —The Early Sheet Music Trade

By the early 1800s, a young American republic had gained footing on the eastern seaboard and turned its eyes to the western frontier. With the Louisiana Purchase in 1803, followed by the Lewis and Clark expedition to the Pacific and back ending in 1806, President Thomas Jefferson began to appreciate the diversity in and sheer size of the continent that was now America's dominion. In this environment, the notion of property meant *land*. As the frontier pushed westward, the yeoman farmer who claimed, cleared, and tilled his parcel became the ideal of the American property owner.

But America was also a place of ideas, where a man could make good with his brain as well as his back. The concept of *intellectual* property, products of the mind as opposed to physical labor, took root in America even before the colonies achieved independence. This was acknowledged as a founding principle of the new republic by the Constitutional Convention of 1787, which recognized, in Section 8 of Article I of the Constitution, that "Congress shall have the power . . . To promote the Progress of Science and Useful arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

President George Washington opened the second session of Congress by observing that "[t]here is nothing that can better deserve your patronage than the promotion of science and literature." Congress responded with the nation's first copyright law, signed by Washington on May 31, 1790, "An Act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies." The law provided a fourteen-year period of exclusivity (renewable for a like period) in which only the author could "print, reprint, publish or vend" copyrighted works, with the right also extending to the author's "executors, administrators or assigns." The statute not only created a federal law of copyright, but also recognized that this form of creative, purely intellectual property could be transferred to others through intestacy or sale.

Just like owners of "real property," authors could exclude those who would trespass or "infringe" upon their rights, and could sell their intellectual assets for value.<sup>1</sup> Equally important, the law provided a basis for "licensing" copyrighted

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1. See William Lichtenwanger, "Music and Copyright Law in the United States," in *MUSIC PUBLISHING AND COLLECTING: ESSAYS IN HONOR OF DONALD W. KRUMMEL* 69–94 (David Hunter ed. 1994).

property—allowing a third party to “print” and “vend” copies of a work for a period of time, in return for the payment of royalties to the author/licensor. In this fashion, Noah Webster, a pioneer of American copyright, licensed his early work *Grammatical Institute of the English Language* to seven different booksellers for use in their respective territories, using the royalty earnings to finance his more famous and lucrative work, *An American Dictionary of the English Language*, known as *Webster’s Dictionary*.<sup>2</sup>

“Maps, charts, and books,” the items explicitly delineated as the subject matter of copyright, each had a direct connection to the “promotion of science and literature,” as urged by the president and reflected in the Constitution. As a music lover and active concertgoer, Washington would likely have had music in mind when he urged Congress to promote literary endeavors, but the first Copyright Act did not specifically include music, particularly folk or popular songs, among protected works, as these had little to do with science or, arguably, “literature.”<sup>3</sup> “Books” concerning music would qualify, as would song collections compiled for religious or educational purposes. But what of early works deposited for registration under the new law, such as *The Rural Harmony, Being an Original Composition, in Three and Four Parts* (1793); *The Kentucky Volunteer, A New Song* (1794), authored by a “Lady of Philadelphia”; or *The Green Mountain Farmer, A New Patriotic Song* by Thomas Paine (1798)? These works were deposited for registration in the first decade of the initial Copyright Act, but whether they were “books” qualifying for protection against infringement is open to doubt, a question that does not appear to have been tested in the courts.<sup>4</sup>

The notion of music as a business was still young and undefined at the turn of the nineteenth century. Traveling minstrels made a rough living on the road, and a small number of educators, instructors, and performers had livelihoods based on musical talent. But nothing existed of what we know of as the music business today—the crafting, promoting, distributing, and selling of music as a consumable product. Printed music (and eventually copyright recognition for music) would fill this gap.

In the late 1700s, publisher owners of printing presses or music type began operating as vanity presses of sorts. Composers were required to pay the costs of producing sheet music editions of up to a few thousand copies, the majority of which the publishers sold in their own stores or shipped to other dealers, keeping the proceeds. Writers were given a portion of the print run to sell for their own

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2. RUSSELL SANJEK, *AMERICAN POPULAR MUSIC AND ITS BUSINESS, THE FIRST FOUR HUNDRED YEARS, VOL. II, FROM 1790 TO 1909*, 26 (1988).

3. Not a musician himself, Washington was a dedicated fan of the musical arts. Before the Revolution, in 1757 he spent a sizable sum purchasing a block of seats for the first public concerts staged in Philadelphia, and later supported the efforts of others in pursuing music lessons and education, including most notably his step-granddaughter, Nelly Custis, for whom he purchased a piano and arranged for lessons. See Barrymore Laurence Scherer, *What George Washington Heard*, WALL STREET J., July 1, 2010.

4. SANJEK, *supra* note 2, at 26.

account to pupils or small, nonmainstream merchants. Only relatively well-to-do composers could afford to bear 100 percent of the risk in such arrangements, and only the most popular works generated meaningful profits for the writer.<sup>5</sup>

Beginning around 1805, improved engraving techniques made it possible to include imagery on sheet music, illustrations of a song's subject matter that would help transform music into a bona fide consumer product. Shortly thereafter, the introduction of lithographic printing dramatically reduced printing costs, truly opening sheet music to the realm of the graphic artist, as well as the budding composer. With these developments, music publishing enterprises grew into a cottage industry: During the first twenty-five years of the new century, more than 10,000 compositions were published in America.<sup>6</sup>

Having arrived on the American scene in the 1780s, "sheet music" (printed on large, folio-sized pages) was the most extravagant and expensive of several music formats available at the time. Oftentimes songs would appear initially as "broadsides"—single sheets of lyrics with no music notation, selling for two cents each. Other formats included "songsters"—pocket-sized lyric books, again without notation, selling for around twenty-five cents, and "anthologies"—larger groups of songs complete with musical notation. A successful broadside might warrant an upgrade to a release as sheet music, which commanded 12.5 cents per page, meaning that a two-page piece "could bring in 25 cents per copy . . . more than ten times what a broadside version would bring, and far more than its per-piece yield in any songster or anthology."<sup>7</sup>

During the first quarter of the nineteenth century, sheet music was something of a luxury, a symbol of status and taste in American homes, displayed atop the piano in the parlor, or in leather-bound portfolios. Much like later formats for *recorded* music (cylinders, discs, and tapes), sheets were prized collectors' items, treasured as much for their look and feel as the music they contained.

For publishers, the highly profitable "sheet" was the optimal music format, and by the 1820s they turned out more than 600 titles per year.<sup>8</sup> The economics of sheet music publishing favored foreign music, as foreign compositions were not subject to protection under the new American copyright law. Publishers could reproduce foreign songs without regard for payment to authors, and in this sense, the early American music business was built on what its European counterparts considered "pirated" editions of successful overseas material. Publishing American music, on the other hand, required either the acquisition of copyrights, or payment of license royalties, based on retail price (up to 10 percent) or a fixed amount per copy sold, usually two cents.<sup>9</sup>

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5. *Id.* at 4–5.

6. *Id.* at 34.

7. RICHARD CRAWFORD, *AMERICA'S MUSICAL LIFE* 231 (2001).

8. *Id.* at 232, citing SANJEK, *supra* note 2, at 137–38.

9. See CRAWFORD, *supra* note 7, at 232.

A home-grown song needed to be that much “better” than the foreign competition to catch a publisher’s eye. Thus, recognizing songs and songwriters with commercial potential became one of the publisher’s four essential functions as the business of music took hold in America. Recognizing talent, what we now refer to as the “A&R” (for “artists and repertoire”) function, was necessary to build a pipeline of new products and a healthy catalog of reprintable songs that could meet demand. In addition to finding talent, publishers prepared the musical notation and arrangements based on the instrument (typically piano) on which the song was to be rendered, and made the engraving and printing plates necessary to reproduce the song in different printed configurations—broadsides, songsters, and sheet music. Third, publishers had the burden of creating consumer demand for specific songs through marketing and promotion (an aspect of the business that would become competitive and cutthroat through the years), or by positioning music in key distribution channels, such as with music teachers, who purchased at discounted rates for sale to their student customers. And fourth, a publisher needed the logistical wherewithal to physically distribute music to those, other than itself, who could offer sheets for sale to individual customers.

## 2. Copyright in “Musical Compositions”

As shown by the steady increases in publishing ranks during the 1800s, it became apparent that there was money to be made in music. The business was plagued by uncertainty and risk, however, with publishers claiming that “all but a few of [their] products lost money.”<sup>10</sup> One notable early publishing concern, Boston’s Oliver Ditson & Co., complained that “Not one piece in ten pays the cost of getting up; only one in fifty proves a success.”<sup>11</sup> Ditson issued a warning of sorts to the composer community, stating that no author should be surprised by a rejection of his or her song manuscripts, and for songs that were accepted, some writers would be required to “purchase a certain number of copies, to help defray the first expenses and introduce them to the public.”<sup>12</sup>

To justify investments based on such odds, publishers looked for any means of hedging their bets. Investing in copyrights became such a tool. Song ownership provided a means of enforcing exclusivity, keeping potential copyists at bay and helping to preserve the profits flowing from popular songs. As the law did not specifically recognize music as a distinct category of copyright, however, these investments remained uncertain. With help from the book and dictionary author

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10. *Id.* at 232.

11. *Id.*

12. *Id.* at 233.

and publisher Noah Webster, an early proponent of copyright expansion, the legislative landscape took a positive turn for early American songwriters and publishers.

*Webster's Dictionary* was a landmark work the author had published in 1828, at age seventy. The initial term of copyright protection was limited to fourteen years, and was renewable for an additional fourteen only if the author was still living at the end of the first term. Heirs had no right to renew. Unsatisfied with the law, and aware of his own mortality, Webster embarked on the first campaign to extend the term of U.S. copyright protection.

Webster recalled that in the autumn of 1827 (even before his famous work was publicly available), he applied to Representative Ralph Isaacs Ingersoll of Connecticut, urging him to “use his influence” to bring forward a new copyright bill, to which he “very cheerfully complied.”<sup>13</sup> The bill died in the House, however, so before the next session of Congress (1829–1830), Webster prevailed upon William W. Ellsworth, also a representative from Connecticut and a member of its judiciary committee, “to make efforts to procure the enactment of a new copy-right law” that would extend the copyright term and expand authors’ rights.<sup>14</sup> Ellsworth, a Yale-educated attorney who also happened to be Webster’s son-in-law, wrote to lawmakers of the principal European nations, requesting information on the state of copyright in their countries, and from their responses fashioned a report and bill that was approved by the judiciary committee but never came before the House at that session. Frustrated, Webster “determined in the winter of 1830–1831 to visit Washington myself, and endeavor to accomplish the subject.”<sup>15</sup> That he did. Staying in Washington for more than two months, Webster read lectures in the “Hall of Representatives,” which had “no little effect” on a new law coming forward, and lobbied unrelentingly for a more robust copyright law.

On December 17, 1830, Ellsworth produced “Report No. 3” on “Copy-Right,” reflecting on the first copyright act (and an 1802 amendment recognizing “prints” as a protected category) as a positive but incomplete step for authors. The report proposed revisions to remove “discrepancies,” eliminate “useless and burdensome” provisions, and most important, “enlarge the period for the enjoyment of copy-right, and thereby . . . place authors in this country more nearly upon an equality with authors in other countries.”<sup>16</sup> Ellsworth’s primary strategy, one often used to this day by copyright proponents, was to shame Congress into expanding rights to meet those recognized internationally. “While, for most obvious reasons,” he reported, “the United States ought to be foremost among nations in encouraging

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13. NOAH WEBSTER, A COLLECTION OF PAPERS ON POLITICAL, LITERARY AND MORAL SUBJECTS 177 (1843).

14. *Id.*

15. *Id.* at 178.

16. H.R. REP. NO. 3, 21st Congress, 2d Session (Dec. 17, 1830).

science and literature, by securing the fruits of intellectual labor, she is, in this thing, very far behind them all, as a reference to their laws will show.”<sup>17</sup>

Ellsworth drew comparisons to establish “that the United States are far behind the States of Europe in securing the fruits of intellectual labor, and in encouraging men of letters.” In Germany, Norway, and Sweden for example, copyright was deemed perpetual, and in Russia, valid for the life of the author plus twenty years. France had recently extended copyright terms to life of the author and fifty years beyond, and under English law, authors were granted a twenty-eight-year copyright term, extendable for life if the author was still living.<sup>18</sup> British law was the subject of additional commentary pertaining to music. “It has furthermore been claimed, and, it seems to your committee,” reported Ellsworth, “that the law of copy-right ought to extend to musical compositions, as does the English law.”<sup>19</sup>

The House took up a bill on January 6, 1831, with the primary debates centered on the proposed term extension to twenty-eight years, renewable by the author, or any heirs, for an additional fourteen. Objectors found such a lengthy “monopoly” difficult to justify, especially in light of the mere fourteen-year term granted to patented inventions. Further, they argued that authors had an “implied contract” with both booksellers and the buying public who, having supported the higher prices commanded by books under copyright, should have an earlier opportunity to distribute works at lower prices, as they fell into the public domain.

Defending the bill, Ellsworth fell back on national pride, insisting that the proposed law would “enhance the literary character of the country, by holding forth to men of learning and genius additional inducements to devote their time and talents to literature and the fine arts.”<sup>20</sup> Similarly, Rep. Huntington supported the bill as an act of “pure justice,” one that “would do honor to the country, and promote, in the most eminent degree, the advancement of all that ennobles and dignifies intellectual man.” As an example of a work worthy of an extended term, he pointed, not surprisingly, to *Webster’s Dictionary*, “that unrivalled work, that monument of learning,” testimony to the “genius of its author.”<sup>21</sup> Rep. Gulian Verplanck of New York went further still, arguing in Lockian terms that copyright was an author’s “natural right” that should be enjoyed in perpetuity; the least that could be done was to extend the right as proposed. The bill was ordered for a “third reading” by a vote of 81 to 31, and eventually passed in the House. Noah Webster recalled that after two readings, the bill passed in the Senate “without debate,” coming into force on February 3, 1831, upon the signature of President Andrew Jackson.<sup>22</sup>

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17. *Id.*

18. *Id.*

19. *Id.*

20. HeinOnline – 7 Cong. Deb. 423–24 (1831); GALE & SEATON’S REGISTER OF DEBATES IN CONGRESS, Jan. 6, 1831, 421–24.

21. GALE & SEATON’S REGISTER OF DEBATES IN CONGRESS, *supra* note 20.

22. WEBSTER, *supra* note 13, at 178.

If music publishers presented any organized support for the new act, it is not apparent from the congressional debates. Rather, it appears the fledgling music publishing industry received a gift of sorts, with the recognition of “musical compositions” coming in on the coattails of the term extension, the main objective of Noah Webster, his son-in-law, and their fellow revisionists of 1831.<sup>23</sup> The only mention of music was in Ellsworth’s report, which asserted that American songwriters should gain parity with their British counterparts, an issue not debated by Congress.<sup>24</sup>

Unbeknownst to many of them, composers and publishers awakened to a new day on February 4, 1831. They were now beneficiaries of a new copyright law that recognized their art form specifically, granting the author of a “musical composition” the “sole right and liberty of printing, reprinting, publishing, and vending” such work for a period of twenty-eight years, renewable for a total of forty-two. Moreover, the new law provided strong remedies against infringement. Violators were required to “forfeit the plate or plates” from which illicit works were printed, deliver up all infringing inventory to the copyright holder, and pay one dollar (to be split evenly between the author and the government) for every copy found in their possession, or shown to have been “printed or published, or exposed to sale, contrary to the true intent and meaning of this act.” Authors could also collect the “full costs” of prosecuting a successful suit for infringement.

With copyright protection confirmed for musical works, American songwriters and publishing entrepreneurs had the framework in place to build careers and businesses. Indeed, the esteemed music and copyright historian D.W. Krummel called the forty-five years “which began with the Jacksonian era and ended with the Reconstruction” the “crucial period in American music publishing,” as output increased dramatically, and the industry spread west beyond the established centers of Philadelphia, Boston, and New York.<sup>25</sup> Beginning around 1845, published titles doubled to around 3,000 per year; they expanded further to 5,000 annually in the 1850s, and increased again to around 8,000 titles per year in the 1860s.<sup>26</sup> In

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23. Ellsworth was made executor of Webster’s estate upon the author’s passing in 1843, and oversaw the sale of his copyright interests to the Merriam organization, from which the *Merriam-Webster’s Dictionary* was born and lives to this day.

24. In stark contrast, recognition of a “composer’s right” in the United Kingdom in 1777 came only after long years of hardscrabble lobbying and litigation, culminating in a case brought by Johann Christian Bach, the eighteenth child of Johann Sebastian Bach, in which Lord Mansfield held a “musical composition” to be a protectable “writing” within the Statute of Anne, the nation’s first copyright law, enacted in 1710. This story is told in compelling fashion, and with thoughtful perspective on modern copyright issues, by Michael W. Carroll in *The Struggle for Music Copyright*, 57 *FLA. L. REV.* 907 (2005).

25. D.W. Krummel, *Counting Every Star; Or, Historical Statistics on Music Publishing in the United States (American Music Bibliography, IV)*, in 10 *ANUARIOS INTERAMERICANO DE INVESTIGACION MUSICAL* 180 (1974).

26. *Id.* With the country’s population roughly doubling each decade between 1830 and the Civil War, it was an opportune time to market a reasonably priced consumer product like sheet music.

1859, *The Knickerbocker* magazine noted the emergence of an American song-writing voice. It proudly asserted that “[r]eprints of English works used to form the staple of a publisher’s issues, but, with the increase of musical cultivation among us, multitudes of composers have been developed, and our sheet-music publishers now do mostly a copyright business. Many of these copyrights are very valuable.”<sup>27</sup>

### 3. Music Goes to Court

In due course, copyright owners began asserting their rights under the new law. In 1844, the first reported decision involving infringement of a musical composition was resolved by the Circuit Court for the Southern District of New York, which upheld plaintiff William E. Millett’s rights in “The Cot Beneath the Hill,” a parlor song composed in 1841.<sup>28</sup> Millett charged that William Snowden had published the song in the June 1843 issue of his successful New York-based women’s journal, the *Ladies’ Companion*, a monthly magazine said to embrace “every department of literature, embellished with original engravings, and music, arranged for the piano forte, harp and guitar.” Snowden readily admitted to the use, but claimed no wrongful intent, proving at trial “that the music had been copied from a Boston paper by the young man having charge of that department,” that “neither [of them] knew of its being copyrighted,” and that, in any event, the music had been changed slightly from the original.

The court was not moved, stating flatly that “intention could not be taken into view. If a copyright has been invaded, whether the party knew it was copyrighted or not, he is liable to the penalty.” Moreover, “trifling” changes from the original did not “avoid the statute.” The court also made clear that it had no discretion in fixing the penalty. If Snowden infringed the work, he owed one dollar for each sheet proven to be “sold, or offered for sale.” The verdict was for \$625.

Claiming that biased coverage of the trial had “been read by at least half a million in [New York] and immediate vicinity,” Snowden used the pages of the *Ladies’ Companion* to show his readers that “although acting innocently, and in all good faith, we have hazarded a large sum of money for their gratification.” He did so as a demonstration of the publication’s “chivalric devotion” to “the ladies of New York and America,” and their “enlightened tastes.” Snowden complained that his efforts to prove the full circumstances of the matter had been “ruled out by the court.” For example, he pointed out that immediately upon discovering that the music was subject to copyright, a corrective notice was printed identifying Millett as the copyright owner and providing his address for purposes of obtaining a

27. EDITOR’S TABLE, 54 THE KNICKERBOCKER OR NEW YORK MONTHLY MAGAZINE, Dec. 1859, at 668, cited in KEN EMERSON, DOO-DAH! STEPHEN FOSTER AND THE RISE OF AMERICAN POPULAR CULTURE 242 (1997).

28. Millett v. Snowden, 17 F. Cas. 374 (No. 9600) (Circuit Court, S.D.N.Y. 1844).

proper copy of the sheet. Further, adopting what has become a common refrain of music copyright defendants for more than 150 years, Snowden asserted that his actions should be excused because the “infringement” had the effect of “promoting” sales of the original.

At trial, Snowden established that Millett himself had printed only 500 copies of the song, which, according to Snowden, “had scarcely been entered upon by purchasers.” “Our publication of it did him good,” he insisted, “and drew the public’s attention to it. Every lady keeps her collection of music for the purpose of binding, and our pages could not be incorporated with those of regular music-sheets—consequently, if the composition were a superior one, every lady, (after our acknowledgment in our July number,) would send to Mr. Millett for a copy of his music, to be placed with her collection already accumulated. Thus we contend that Mr. Millett has been largely benefitted by the publication in the *Ladies’ Companion* of ‘The Cot Beneath the Hill,’—for which we have been, (very reluctantly I assure you!) made to contribute still further, by a direct tax upon our product. How far we have been to *blame*, in the business, we leave our readers to judge.”<sup>29</sup> As Snowden and his colleagues quickly discovered, the new copyright law had teeth.

A year later in 1845, music copyright assumed a higher profile, when Supreme Court Chief Justice Roger Taney, sitting as a trial judge with the Maryland Circuit Court, presided over a jury trial in the case of *Reed v. Carusi*.<sup>30</sup> The case revealed the complexities that could arise from a seemingly simple proposition—the ownership and alleged infringement of “The Old Arm Chair,” a tear-jerking sentimental ballad based on lyrics written by an English poet, Elizabeth Cook, in 1838, and set to music by the composer and performer Henry Russell. A Londoner, Russell promoted the song in New York and Boston area performances, bringing it to the attention of the music publishing firm of Oakes and Swan, who acquired the copyright in early 1840. In 1841, it transferred the rights to Benjamin W. Thayer of Boston, who in turn assigned the copyright to Boston music publisher George P. Reed in December 1842.<sup>31</sup>

Even before Reed purchased the copyright in Russell’s version of the song, Samuel Carusi, an Italian-born musician, composer, and publisher operating in

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29. LADIES’ COMPANION, Vol. 19–20, available at [http://books.google.com/books?id=PhkAAAAAYAAJ&printsec=frontcover&source=gbs\\_navlinks\\_s#v=onepage&q=&f=false](http://books.google.com/books?id=PhkAAAAAYAAJ&printsec=frontcover&source=gbs_navlinks_s#v=onepage&q=&f=false).

30. *Reed v. Carusi*, 20 F. Cas. 431, 8 Law Rep. 410 (No. 11,642) (Circuit Court, D. Md.—Nov. Term, 1845). At the time, Supreme Court judges literally “rode circuit,” sitting as trial judges in various federal circuit courts. Sitting in the same capacity in 1861, Chief Justice Taney delivered the decision in *Ex Parte Merryman*, rebuking President Lincoln’s suspension of the writ of habeas corpus during the Civil War. Four years earlier, Taney had delivered the Supreme Court’s decision in *Dred Scott v. Sandford*, ruling that African Americans could not be considered citizens of the United States, which was viewed by many to be an indirect cause of the war.

31. See Frank McCormick, *George P. Reed v. Samuel Carusi: A Nineteenth Century Jury Trial Pursuant to the 1831 Copyright Act*, (Digital Commons@University of Maryland School of Law) (Jan. 10, 2005), available at [http://digitalcommons.law.umaryland.edu/mlh\\_pubs/4/](http://digitalcommons.law.umaryland.edu/mlh_pubs/4/).

Washington, D.C., and Baltimore, had created his own arrangement of “The Old Arm Chair,” by arranging Cook’s lyrics to the tune “New England,” a song written by I.T. Stoddard and owned by Carusi. Carusi registered the copyright in his version of “The Old Arm Chair” in late October 1842.<sup>32</sup> Soon thereafter, Reed discovered Carusi’s version in the market, and prepared to sue for infringement, hiring John H.B. Latrobe as counsel, a prominent attorney known for representing the Baltimore and Ohio Railroad Company, with personal connections to leading politicians and jurists, including Chief Justice Taney. The suit came to trial in November 1845, with Carusi represented by William Frick and Francis Brinley. Instead of the near literal copying at issue in *Millett*, the complaint alleged that Carusi’s version of “The Old Arm Chair” was “substantially the same” as Reed’s. Reed sought \$2,000 in damages.

Chief Justice Taney was joined by Judge Upton S. Heath in conducting the trial, but Taney led the proceedings and eventually delivered the “instructions” (equivalent to an opinion) of the court. A legal observer of the day concluded that in “disclosing the views of the chief justice, upon a statute but little subject of judicial exposition, as to musical compositions, it is an interesting case.”<sup>33</sup> Indeed, the testimony unfolded in interesting fashion, with both sides presenting expert witnesses to opine on the degree of similarity between the arrangements. Further, over Carusi’s objection, Taney allowed John Cole, a professional singer, to sing both versions in open court for the jury’s consideration.

Carusi first argued that the plaintiff did not own an “original” composition, asserting that Russell borrowed his song from two older tunes, “The Blue Bells of Scotland” and “The Soldier’s Tear.” Second, even assuming a valid copyright, Carusi maintained that his version was sufficiently different from Russell’s to avoid infringement, as it was based on Carusi’s own copyrighted tune, “New England.” Both arguments were based on the “derivative” nature of popular song, another refrain asserted by copyright defendants over the years.

In accordance with local practice in Maryland, at the close of the evidence the attorneys presented “prayers,” the legal propositions supporting their client’s position. In *Reed*, Chief Justice Taney rejected both sides’ prayers and drafted his own instructions for the jury to follow in evaluating the facts. First, Taney held that “the defendant is not liable to this action, unless the jury find that Russell was the author of the musical composition” (i.e., that the song was “original” to Russell and not copied from earlier works). Assuming original authorship, Taney opined that Carusi could not be liable for infringement unless the “main design” of the songs was the same, or that Carusi had altered Russell’s composition with the intent of evading the law. Further, even if the songs were materially the same, Carusi could avoid liability by proving independent creation—that his song “was the effort of his own mind, or taken from an air composed by some other person, who was not a plagiarist of Russell.” Turning to the statute of limitations, Taney instructed that Carusi could be

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32. *Id.* at 4.

33. *Reed v. Carusi*, Note 1, from 8 Law Rep. 410.

liable only if the action was brought within two years of the infringement, and (contrary to the statute) advised the jury that in determining damages, they should find the number of copies printed “within two years before the suit was brought.”

The jury reached its verdict on November 8, 1845, finding Carusi liable for \$200. *Reed v. Carusi* was widely viewed as a significant test of the copyright law as applied to musical compositions, establishing important precedent still looked to for guidance.<sup>34</sup> Able counsel had represented both parties before the Chief Justice of the Supreme Court, in groundbreaking litigation as to the standards for originality, infringement, viable defenses, and damage awards. Indeed, in a rare showing of post-verdict solidarity, Reed’s counsel supported Carusi’s request for a pardon of the government’s half of the damage award. In crafting a recommendation on the issue, William S. Marshall, U.S. Attorney for the District of Maryland, noted that “the case was one which excited the curiosity of the bar” in general, and gave his personal view that Carusi had acted in good faith. On February 3, 1846, President James K. Polk pardoned Carusi’s debt of \$100 to the United States, finding him a “fit subject for executive clemency.”<sup>35</sup>

## 4. The First Superstar of American Song

Surviving as a professional songwriter in the mid-nineteenth century was a difficult proposition. John Hill Hewitt, author of popular songs from the 1820s through the Civil War, maintained that songwriting was not worthwhile “[f]or the simple reason that it does not pay the author,” not to mention the fact that “the publisher pockets all, and gets rich on the brains of the poor fool who is chasing that *ignis fatuus*, reputation.”<sup>36</sup> Making music pay was even more difficult for nonperformers. As composer Henry Russell recalled, “There was no such thing as a royalty in those days, and when a song was sold it was sold outright. Had it not been that I sang the songs myself, and so in a certain measure conducted to their popularity, the payment for their composition would have meant simple starvation.”<sup>37</sup>

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34. The *Reed* decision has been cited as recently as 1998 in the majority opinion in *Feltner v. Columbia Pictures Television*, 523 U.S. 340 (1998), in support of the proposition that juries, not judges, should measure statutory damages in copyright cases.

35. McCormick, *supra* note 31, at 18–19.

36. JOHN H. HEWITT, *SHADOWS ON THE WALL OR GLIMPSES OF THE PAST. A RETROSPECT OF THE PAST FIFTY YEARS* 66 (1877), cited in EMERSON, *supra* note 27, at 139–40.

37. HENRY RUSSELL, *CHEER! BOYS, CHEER! MEMORIES OF MEN AND MUSIC* 198–99 (1895), cited in EMERSON, *supra* note 27, at 140. Handbills promoting 1841 concerts by New Hampshire’s Hutchinson Family Singers asked the question: “When foreigners approach your shores, You welcome them with open doors, Now we have come to seek our lot, Shall native talent be forgot?” Early performances did not draw enough interest to earn a profit (at twelve-and-a-half cents a ticket), but like bands in the modern era, the group persevered through difficult times by staying on the road, honing their performing and writing talents, as well as their image. By 1843 the group had positioned themselves (quite legitimately given their background as four—of sixteen!!—siblings) as promoting the virtues of family and

Despite these odds, during this time the growing American music industry produced the first superstar of American popular songwriting—Stephen Collins Foster. Born near Pittsburgh on July 4, 1826, the eighth of ten children, by the time of the 1831 Copyright Act (recognizing “musical compositions” as a distinct category of copyright) Foster was showing signs of a budding musical talent, marching around the family home banging a drum and whistling “Auld Lang Syne.”<sup>38</sup> Foster’s musical education began by eavesdropping on his sisters’ lessons, and by age ten he was a capable performer on the flageolet (a small woodwind) and piano. He soaked up a variety of musical influences, ranging from orchestrated music to the “Jim Crow” performances of Thomas Dartmouth “Daddy” Rice, whose blackface minstrel shows Foster experienced in Pittsburgh and as a riverboat traveling companion to his mother on visits down the Ohio River to see friends in Cincinnati, Louisville, and points between.

Foster was especially close to his older brother Morrison, and the two attended a variety of cultural events. In early 1843, they went to hear Henry Russell, the famous ballad singer and composer of “The Old Arm Chair,” a performance that left a lasting impression on Stephen, inspiring his first efforts as a songwriter.<sup>39</sup> Russell’s favorite American writer was George P. Morris, the author of numerous poems including “Open Thy Lattice, Love.”<sup>40</sup> After hearing Russell in concert, sixteen-year-old Stephen set “Lattice” to a lilting romantic melody, and sent the results to music publisher George Willig in Philadelphia, probably paying for the privilege of publication. Willig issued a two-page sheet, without title page, misspelling the writer’s name as “L. C. Foster.” In this inauspicious fashion Stephen Foster debuted as a published songwriter (coincidentally, at about the same time George Reed, owner of the copyright in Russell’s arrangement of “The Old Arm Chair,” was proceeding to trial against Samuel Carusi). Foster’s art, and the law that would enhance its commercial value, were coming of age together.

At the age of twenty in 1846, Foster moved to Cincinnati, acting as bookkeeper for Irwin & Foster, his brother Dunning’s partnership with Archibald Irwin, Jr., a brokerage of sorts that arranged for shipping of cotton and other goods on the Ohio River.<sup>41</sup> Stephen was a meticulous record keeper, and the position suited him well. The bustling city also provided plenty of exposure to the melting pot of musical influences that traveled the river along with the hard goods of traditional com-

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religion, and against the vices of alcohol and sins of slavery. The Hutchinsons struck a broad enough nerve to succeed as uniquely “American” antebellum performers, and after adopting a more overt abolitionist stance in 1843, went on to achieve phenomenal success as performers (and songwriters) in the 1840s and 1850s. Deeply researched and tautly written, Scott Gac’s *SINGING FOR FREEDOM: THE HUTCHINSON FAMILY SINGERS AND THE NINETEENTH-CENTURY CULTURE OF REFORM* (2007) tells the Hutchinsons’ story in fine style.

38. JOHN TASKER HOWARD, *STEPHEN FOSTER: AMERICA’S TROUBADOUR* 368 (1934).

39. *Id.* at 115.

40. SANJEK, *supra* note 2, at 73.

41. EMERSON, *supra* note 27, at 111–12.

merce. Before long, Foster struck up a relationship with William C. Peters, a music publisher with locations in Cincinnati and Louisville. Foster began turning out a steady stream of songs, including the successful “Uncle Ned,” and in 1848 his first runaway hit, a “glorious bit of nonsense”<sup>42</sup> that would become one of the most performed and (later) recorded songs in the entire American repertoire, “Oh! Susanna.” Foster’s relationship with Peters was not exclusive, and Foster had given out numerous manuscript copies of the song to minstrel performers and others. As a result, between 1848 and 1851 no fewer than twenty-one versions of “Oh! Susanna” were entered for copyright by an array of purported owners, including many of the leading publishers of the day—William Peters, William Millet (who had enforced his copyright in “The Cot Beneath the Hill” in the first reported court decision addressing musical compositions), Oliver Ditson, and C. Holt. Foster received payments from some, but certainly not all of the versions that flooded the market. His first hit served as an object lesson against the practice of distributing too many manuscripts before publication.

On the other hand, the distributed manuscripts served as effective promotion, and soon the highly infectious “Oh! Susanna” appeared in the repertoire of virtually every traveling minstrel show. Written in dialect and including lyrics that would be deemed racist and offensive today, the song was tailored to blackface minstrel performers, and was soon embraced by high- and low-brow audiences alike. But what took the song to unprecedented levels was its association with the California gold rush. In January 1848, gold was discovered at Sutter’s Mill, followed by the treaty with Mexico that ceded California and New Mexico to the United States. The rush was on, and by the following year the trails were packed with westward travelers with a gleam in their eye and a single song in the heart, as “Oh! Susanna” became the unofficial anthem of the forty-niners, a connection still firmly in place as late as 1923, when the song was featured as the theme of *The Covered Wagon*, Paramount studios’ filmed version of the pioneer movement, heralded as the first truly epic Western film. And the pioneer band sang,

It rained all night the day I left;  
The weather it was dry,  
The sun so hot I froze to death;  
Susanna, don’t you cry.

Oh! Susanna, don’t you cry for me,  
For I’ve come from Alabama wid—  
My banjo on my knee.<sup>43</sup>

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42. HOWARD, *supra* note 38, at 144.

43. The film’s promotional program reprints Foster’s original lyrics, including the shocking second verse: “I jumped aboard de telegraph, and trabeled down de ribber; de ‘lectric fluid magnified, and killed five hundred nigga.”

In early 1849, Foster reached out to additional publishers. He was not yet an established writer, but the novelty of “Oh! Susanna” was ringing in the ears of every American, and making its way around the world, from Germany to as far away as the wandering minstrel singing in the streets of New Delhi—exotic places Stephen himself would never visit.<sup>44</sup> Foster interested a leading New York publisher, Firth, Pond & Company, in his work, selling them two songs in 1849, in return for payment in the form of fifty copies of each for the author to sell on his own account.<sup>45</sup> Things went smoothly, and later in the year Foster entered into the first of several agreements with Firth, under a more favorable two-cent royalty arrangement. At about the same time, Stephen made a similar agreement with F.D. Benteen of Baltimore. With these contracts in hand, Foster left Cincinnati and returned home to Pittsburgh, a capable young songwriter on the verge of true success. His confidence and potential must have made him a more attractive bachelor, and after a short courtship he married Jane McDowell on July 24, 1850. Almost nine months later, a daughter Marion was born on April 18, 1851, the couple’s only child.

Initially, the pressures of a young family motivated Stephen further, and he entered a period of great productivity. During the first half of 1850 he produced eleven songs, including “Camptown Races” (published originally in dialect as “Gwine to Run All Night”), another rollicking novelty along the lines of “Oh! Susanna,” wisely promoted through the live performances of E.P. Christy, the composer, singer, and impresario whose name became synonymous with minstrel shows. Christy’s Minstrels performed in blackface, an excellent fit for Foster’s tunes, many of which were written in Negro dialect and positioned as “plantation songs.” The following year, the same combination of a dialect song written for and promoted through Christy made “Old Folks at Home (Swanee River)” the third massive hit of Foster’s burgeoning career, and another of America’s best known melodies.

By September 1852 Firth, Pond & Co. boasted that “Old Folks at Home” was “one of the most successful songs that has ever appeared in any country,” sales having reached 40,000 copies. Firth offered some perspective on these sales figures in a paid advertisement in *The Musical World*: “When the reader takes into consideration the fact, that, fully one half of all the sheet music published proves to be a total failure—that three thousand copies of an instrumental piece and five thousand copies of a song, is considered a *great sale*, he can form some idea of the surpassing popularity of the ‘Old Folks at Home.’” Two years later Firth updated the numbers, claiming sales of more than 130,000 copies of “Old Folks at Home,” plus 90,000 of “My Old Kentucky Home,” 74,000 of another dialect tune, “Massa’s In the Cold Ground,” and 48,000 for “Old Dog Tray,” the latter in less than six months.<sup>46</sup>

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44. HOWARD, *supra* note 38, at 144–45.

45. *Id.* at 153.

46. *Id.* at 207.

These regular and sustained successes led to renewed contract negotiations with Firth, Pond & Co. In May 1853, the parties signed an agreement that provided increased royalties for Foster, in return for exclusivity. The arrangement did not last: In December 1854 another agreement was reached, eliminating Firth's exclusivity and giving Foster the most favorable terms of his career—10 percent (2.5 cents) on most previously published songs, and all future compositions published through Firth, with the publisher to pay for (and not recoup) all expenses associated with bringing the sheets to market. Firth was also obligated to pursue infringers, splitting any proceeds with Foster. In return, the contract allowed the publisher to register copyrights in its own name, and provided explicitly that Firth was to have the “sole and exclusive right of proprietorship over the music published according to this contract.”<sup>47</sup> The agreement marked the height of Foster's career, reflecting terms available only to the most successful writers.

Foster apparently enjoyed working with Firth, Pond & Co., for, despite their nonexclusive arrangement, he gave Firth all but one of his songs penned during the contract period. The exception was the beautiful, yet haunting, “Comrades, Fill No Glass for Me,” published through Miller & Beacham of Baltimore on November 23, 1855. “Comrades” was a temperance song, demonstrating Foster's awareness of the dangers of alcohol. By this time, he had learned of such dangers firsthand, having separated from his wife and family for nearly a full year (before reuniting), a rift caused, at least in part, by Stephen's drinking. Foster biographer John Tasker Howard chose to believe that Stephen was not yet a confirmed alcoholic in 1855, and simply wrote a tune “he knew would strike a chord in the so-called temperance circles.”<sup>48</sup> A more objective conclusion is that the song was Foster's public acknowledgement of a demon he could not control, the title asking his friends (“boon companions”) to refrain from serving him, though he was too often serving himself.

There is little doubt that alcohol began to dominate Foster's life by 1855, putting a strain on family relations as well as finances, leading to questionable decisions concerning his valuable copyrights.<sup>49</sup> For several years, a steady stream of royalties had provided ample income, but Foster was spending even more, often taking advances against anticipated quarterly earnings. In January 1857, he made a dramatic move by taking stock of his previously published songs, determining their earnings to date, then bundling and selling his future royalties to Firth, Pond & Co. for a discount to their estimated value. The transaction netted Foster \$1,872.28.<sup>50</sup> He then went through the same process with F.D. Benteen publishers, netting an additional \$200 for the future value of the sixteen songs previously published with them. Foster appears to have been prudent with the proceeds, paying off bills and

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47. *Id.* at 244–50.

48. *Id.* at 253.

49. See EMERSON, *supra* note 27, at 203–04.

50. HOWARD, *supra* note 38, at 270.

supporting his family. But his marriage was strained, and by the middle of the year Stephen and Jane had separated again.

In February 1858, Foster negotiated another deal with Firth, Pond & Co. His leverage had diminished, and though he maintained a royalty rate of 10 percent on future songs, Firth demanded, and received, exclusivity. In addition, there were safeguards intended to limit advances, but Foster still managed to get himself in debt to Firth, his advances far outweighing royalties from songs actually delivered. By early 1860, the situation had become dire, and Foster saw another royalty bundling and sale as his only option. On August 9, 1860, he again assigned to Firth all his future interest in the sixteen songs published under the existing contract for \$100 each. Soon thereafter, Foster moved to New York, closer to his regular source of income, but without his family and with his drinking problem growing more extreme. By this time, Foster had earned a little more than \$15,000 as a professional songwriter, an average of nearly \$1,400 annually since 1849. He had little to show for it.

Virtually all personal and direct accounts of Foster's activities ceased after his move to New York, and rumor and myth cloud his final years. He clearly was not well-suited to big city life, which enabled his drinking and caused his health to deteriorate steadily. Some claim to have observed Foster writing and selling songs on demand for "paltry sums," to satisfy an "insatiable appetite for liquor."<sup>51</sup> As the Civil War raged, Foster hunkered down with a bottle in his Manhattan cocoon, writing music. If nothing else, he was prolific in his final years, with more than half of his published songs written between 1860 and 1864. Few were worth more than the small sums paid for them, but there were striking exceptions, including one more American classic, "Beautiful Dreamer," written in the final period of his life and copyrighted posthumously by William A. Pond & Co. (a successor to Firth) shortly after Foster's death on January 13, 1864. Foster had suffered a fall in his modest room in the Bowery, gashing his neck and bruising his head. His first friends on the scene plied him with alcohol, "which seemed to help him a lot," and got him to Bellevue hospital for professional treatment.<sup>52</sup> But it was too late. Life had caught up with Stephen Foster at the age of 37.

On hearing the news, brother Morrison and widow Jane hurried to New York. Morrison paid \$1.25 for Stephen's medical care and to retrieve his belongings—a coat, pants, vest, hat, shoes, overcoat, and a small leather purse containing thirty-eight cents and a piece of scrap paper bearing five handwritten words, "Dear friends and gentle hearts," perhaps the last song fragment that appeared in the mind of Stephen Foster.

Having bundled and sold his royalty streams, Foster died without any ongoing interest in his songs, so he had nothing to will to Jane and daughter Marion. But legal issues arose when Foster's copyrights came up for renewal in succeeding years,

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51. *Id.* at 314.

52. *Id.* at 342.

bringing an unexpected windfall to his heirs. Many of Foster's copyrights had changed hands due to publisher buyouts and mergers. Most significantly, Firth, Pond & Co. dissolved in 1863, with Stephen's works going to its successors, Firth, Son & Company and William A. Pond & Company.<sup>53</sup> Firth remained in business for only a short time before selling out to the growing publishing powerhouse, Boston's Oliver Ditson & Company. Thus, when Foster's copyrights approached the end of their initial term, Ditson and Pond controlled many of the songs. Among those controlled by Ditson was "Old Folks at Home," for which the authorship was less than clear, due to the publication of the work originally in association with blackface performer E.P. Christy, who was credited as the writer in early editions. (Such arrangements were not unusual, since public performances were acknowledged as the best, if not the only, kind of promotion for stimulating sales of sheet music. Foster and his publishers had developed relationships with E.P. Christy and others for precisely this reason.)

Foster's songs had become popular through widespread performances, but even hit songs faded over time. There was no "oldies" radio format to keep a song alive and in front of new generations of buyers. When live performances waned, sales did too. And so it was with Foster's songs, even the mega-hits that had brought him fame and fortune. As it happened, however, fortune was not done smiling on the songs of Stephen Foster.

In the fall of 1870, Swedish prima donna Christine Nilsson made her first trip to America, giving regular concerts for the next two years, returning in 1873–1874, and in succeeding years until her retirement in 1888. As reported in the music trades, Nelson heard "Old Folks at Home" soon after her arrival in America. Struck by the "plaintive melody and touching words," she learned and began performing the song in her concerts, giving "renewed interest" to a song published nearly twenty years earlier, when Nilsson was just eight years old.<sup>54</sup> Oliver Ditson capitalized immediately, issuing a special edition of the sheet, featuring a portrait of the singer. Its economic interest peaked by the resurgence in sales, Ditson looked more closely at the copyright term and saw an opportunity for renewal income. Thus, in the spring of 1879, Ditson corresponded with Foster's widow, Jane (by then remarried, to Matthew Wiley), seeking to clarify ownership of "Old Folks" (even the Nilsson reissue claimed authorship by E.P. Christy). The publisher offered participation of three cents per copy (more than Foster himself had ever received) should she be willing and able to assist with copyright renewal.<sup>55</sup>

Copyrights of the day were valid for twenty-eight years, but could be renewed for another fourteen by the author or his heirs. With "Old Folks At Home" set to expire in July 1879, Ditson offered Jane the royalty or a flat upfront payment of \$100.

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53. *Id.* at 350.

54. *Id.* at 349–50.

55. *Id.* at 350–51.

She wisely turned the letter over to Morrison, who responded by confirming his brother's authorship of "Old Folks," and by pointing out that "the copy rights of a number of his best songs run out next year, and each year for several years yet."<sup>56</sup> On behalf of Jane and Marion (then married to Walter Welsh), he offered to renew the copyrights and allow Ditson to continue publishing the titles it held, in return for an advance of \$100 against a royalty of three cents per sheet. Ditson readily agreed.<sup>57</sup> Morrison followed the same course with William A. Pond & Company, which after significant haggling agreed to the same terms of \$100 in advance against a three-cent royalty, in return for renewal rights in more than twenty compositions they controlled, including "My Old Kentucky Home" and "Hard Times Come Again No More." It gave Morrison great pleasure to administer his brother's renewed copyrights on behalf of Jane and Marion, which he did until the final \$.45 cents of royalty receipts trickled in from sales of "Gentle Annie" in 1898, when the last of the renewal terms expired. By this time, the songs had generated more than \$4,000 for Stephen's heirs.<sup>58</sup>

The structure of early American music copyright emerges in the career and legacy of Stephen Foster. Foster's genius was embodied in valuable copyrights, which, although owned by publishers, provided a steady stream of royalty revenue for the author, predictable income that served as the basis for creative (if ill-advised) financing in the form of bundling and selling future earnings, an early form of securitization. Although Foster sold his future interests for immediate cash, the law did protect longer-term interests by allowing copyright renewals only by the author or his heirs. Not everything he penned was renewed: the wheat was separated from the chaff of his songwriting after a song's initial term of twenty-eight years. Many of his works, however, had value well beyond their day. Accordingly, publishers came calling at renewal time, and Foster's heirs were rewarded for their participation. By the end of the century, the balance of Stephen Foster's incredible oeuvre fell into the public domain, where the songs continue to resonate today, one of the greatest contributions to American popular culture.

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56. *Id.* at 352.

57. *Id.*

58. *Id.* at 354–55.