

Folk Music, Copyright, and the Public Domain

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1. Freezing the Public Domain

For many folk musicians, the public domain is a vital source of raw materials. At the same time, musicians are sometimes confused about the copyright status of older material, assuming that a song or tune is traditional when in fact it is still protected by copyright. The United States Supreme Court recently struck down a challenge of the Sonny Bono Copyright Term Extension Act (CTEA), an attack led by proponents of sustaining and expanding the public domain. The CTEA decreases, or at least delays, access to works that would otherwise become freely available for creators to incorporate into new works. Under prior law, songs from the 1920s, a musically active era that contains the roots of what are now called Bluegrass and Old Time Music, would be entering the public domain during the next few years. Following the *Eldred v. Ashcroft* decision, works currently protected by copyright will remain protected until 2019, putting the public domain into deep freeze for another sixteen years.

The *public domain* is that body of work that is unprotected by copyright and is available to everyone to use. Creative works enter the public domain when the term of copyright protection ends. Over the past 100 years, the duration of copyright protection has been increased numerous times. Under current law, any song composed and published before 1923 is in the public domain, but more recent works are likely protected by copyright. In the 1990s, the Disney Corporation was concerned that the copyright on the first *Steamboat Willie* cartoon, Mickey Mouse's debut, would expire in 2004. So Disney, along with other entertainment conglomerates, lobbied to pass the CTEA to postpone the inevitable movement of Mickey from proprietary to public. Opponents of the CTEA argued that by extending the duration of copyright protection by an additional twenty years, the law interferes with the growth of, and access to, the public domain. There are also arguments about corporate control of cultural icons.

2. When Traditional Music Isn't

Folk musicians who perform or arrange older songs or tunes need to be aware of the copyright status of their source materials. A *copyright* is actually a bundle of rights. A musician who creates a song can control copying, distribution, and arranging of the song. If an existing work is protected by copyright, you must procure permission (a *license*) from the owner of the work before using it. Musicians also earn royalties for public performances, such as radio airplay, of their songs. Unless you are working from a source published before 1923, you should assume a work is protected by copyright, even if it is thought of as “traditional.” Mistakes have been made, leading to costly disputes. Three notable examples are discussed below: *Happy Birthday*, *How Can I Keep From Singing?* and *Tom Dooley*.

In 1976, the Copyright Act underwent a major revision. Combined with the CTEA, the duration of copyright of a work created by a person is now the *life of the author plus seventy years*. Prior law was somewhat more complex. Works published prior to 1923 entered the public domain in 1998, but works published in 1923 or later are potentially protected until the end of 2018. This protection depends on timely compliance with a number of procedures, including proper copyright notice (the c in a circle © symbol, along with the year and owner's name) and filing of renewals, so there are some works from 1923 to 1964 that have nevertheless entered the public domain. The notice and renewal requirements have been eliminated for newer works, but must still be considered to determine the status of older works.

Arrangements and adaptations are called *derivative works*. Many folk musicians incorporate traditional material into new songs and arrangements. A copyright can be claimed in any original elements added to a public domain work. When, for example, Johnny Cash created a new version of the traditional song *Delia's Gone*, he got a copyright in whatever new words, instrumental arrangements, or changes to the tune he made. He can't prevent someone else from making their own derivative version of the same public domain song, but he can prevent others from copying, distributing, or arranging *his* derivative version for the rest of his life, and then his heirs can continue this protection for an additional seventy years.

Happy Birthday is protected by copyright and earns about \$2 million in royalties every year. The tune was composed in 1893 by sister teachers Patty and Mildred Hill. A copyright was registered in 1935 that, with the current extensions of duration, ensures protection for decades to come. Note that prior to the 1976 revision of the Copyright Act, federal copyright protection began upon *publication*. So even though *Happy Birthday* was composed before 1923, its later date of publication with proper notice allowed it to qualify for the CTEA term extension, and thus continued protection. AOL Time Warner now owns the rights and earns a royalty for every public performance of *Happy Birthday*. You can sing it at home without charge, but restaurants that have staff sing the song must hold a license from the ASCAP performing rights society, and movies that include the song must pay a licensing fee.

3. How Can I Keep From Singing? Goes Public

In 1991, the singer Enya (now heard on the movie soundtrack *Lord of the Rings*) was sued for copyright infringement after including a version of *How Can I Keep From Singing* on the album *Shepherd Moons*. Apparently, she assumed that the song was a “traditional Shaker hymn,” failing to realize that not only was it not Shaker, but one of the verses was composed in the 1950s.

The origins of *How Can I Keep From Singing* are, like many “traditional” songs, murky. Pete Seeger made it his signature closing song in the 1960s and 1970s. He learned his version from Doris Plenn in 1956. Plenn had learned it from her grandmother, who claimed it had been written in the early days of the Quaker church, 250 years before. Others, however, credit the words to Robert Lowry, who lived in Philadelphia and New Jersey from 1826-1899. Whatever the truth is, words published before 1923 are in the public domain so Enya was free to use and modify those older verses.

The trouble sprang from an additional new verse written by Plenn in the 1950s. Enya used it as her final stanza. The court decided in Enya’s favor, saying that Plenn lost her copyright for failure to follow the rules under the Copyright Act of the time. This is no longer true, but before 1989 copyright notice had to be placed on works to protect the owner’s rights. After learning the song from Plenn and receiving her blessing to promulgate it, Seeger published the song. He described the entire song as “traditional”

and left off the copyright notice. Because Seeger presented the new verse as being public domain, the court decided that Plenn had lost her rights and Enya could use the verse without paying royalties. Although Enya won the case, costly litigation could have been avoided by more thorough research.

4. Tom Dooley Wins His Share

A different result was reached after the Kingston Trio, in 1963, adapted what they thought was a public domain song. The song *Tom Dooley* is traceable to a specific historical event. In 1866, Tom Dula murdered Laura Foster, was tracked down by Bob Grayson, and subsequently hanged. In 1938, Frank Proffitt, at the time a farmer living in the mountains of North Carolina, sang a version of *Tom Dooley* to folk song collectors Anne and Frank Warner. Proffitt had grown up hearing his father play the song. His grandmother knew and lived near the real Tom Dula. In 1947, the song was published in Alan Lomax's book *Folk Songs U.S.A.*, credited as "words and melody adapted and arranged by Frank Warner." In 1952, Warner recorded his version for Elektra Records. Six years later, the Kingston Trio recorded *Tom Dooley*—claimed as an arrangement of a traditional song and without mention of Warner, Proffitt or *Folk Song U.S.A.*—and sold over three million copies.

The publisher of *Folk Song U.S.A.* sued the Kingston Trio for copyright infringement. Before a private settlement was reached, expert testimony suggested that the Trio version of *Tom Dooley* was derived from the copyright protected version printed in *Folk Song U.S.A.* The Trio could have stayed out of trouble by learning the song from a public domain version, but in apparently relying on Warner's derivative adaptation, they were forced to settle the lawsuit. To this day, the heirs of Proffitt, the Warners, and Lomax (through his publisher) continue to receive royalties for *Tom Dooley*.

5. Don't Assume Songs Are Public Domain

So what is the lesson in all this? Pragmatically speaking, you are unlikely to get sued for copyright infringement at a pub sing in the United States or Canada (although it may be a different story in England). Venues that host concerts or open mikes, however, need to have licenses from ASCAP and BMI to cover public performances of songs

protected by copyright. The number of songs included may be much larger than you realized. Certainly, if you intend to record a song you think is in the public domain, or want to use a song from the 1920s in a film, check on the copyright status. If you can not trace the published source of your version to before 1923, you risk committing copyright infringement. Musicians should register their new works with the Copyright Office. While registration is not mandatory, it helps potential licensees find you, and allows you to recover legal fees and statutory damages if someone uses your work without permission. Finally, look for owners of creative content to expand their control over works through the use of trademark law, an issue the Supreme Court is now considering in the *Dastar* case.

References

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To license *Happy Birthday*:
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Official Enya web site: <http://www.enya.com/>
For more on Frank Proffitt and *Tom Dooley* read the book: Anne Warner, *Traditional American Folk Song from the Anne and Frank Warner Collection* (1984).

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