RESTITUTION OF TRIBAL VOICES
THE MUSIC MODERNIZATION ACT AND TRIBAL POWER OVER TRIBAL RECORDINGS

BY

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A THESIS

Presented to the School of Law
of the University of Oregon
in partial fulfillment of the requirements
for the degree of
Juris Doctor

April 2023

THESIS APPROVAL PAGE

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Title: Restitution of Tribal Voices
The Music Modernization Act and Tribal Power Over Tribal Recordings

This thesis has been accepted and approved in partial fulfillment of the requirements for the Juris Doctor degree in the School of Law by:

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Degree awarded May 2023.

RESTITUTION OF TRIBAL VOICES

THE MUSIC MODERNIZATION ACT AND TRIBAL POWER OVER TRIBAL RECORDINGS

The Orrin Hatch–Bob Goodlatte Music Modernization Act of 2018[1] ("MMA") was, when enacted, the most significant update to U.S. copyright law in two decades.[2] One of the MMA's important changes was to bring more than a century of recordings under the umbrella of federal copyright. In this paper, I argue that in doing so Congress made a small but significant change that could benefit Native American[3] tribes seeking to recover misappropriated intellectual property.

Native Americans have long suffered Westerners' appropriation of their culture. One way this has manifested is in audio recordings, often made in the name of anthropological or ethnographic research, which contain and preserve ceremonies, rituals, or other tribal cultural property.[4] Whether by their use, or availability, or simply by their mere existence, these recordings sometimes prove offensive to Native Americans. The reasons vary with the individual recording: a recording might contain words or music that are sacred and whose playback outside the appropriate context is harmful, or that are intended to be kept secret from outsiders, or that were intended to be ephemeral and not preserved at all. Regardless of the reason—in the end the reason is unimportant—tribes may wish to end their availability to the general public.[5]

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[1] H.R. Res. 1551, 115th Cong. (2018). The MMA includes three separate sections: The bulk of the Act is found in Title I, the Musical Works Modernization Act, which is concerned with licensing of musical works in a digital context. Title II, the focus of this paper, is called the Classics Protection and Access Act. Title III, the Allocations for Music Producers Act, provides for royalty payments to producers of music recordings.

[2] *See* U.S. Copyright Office, Preface to Copyright Law of the United States (Title 17), https://www.copyright.gov/title17/92preface.html

[3] Where practical in this paper I use the term, "Native American" out of respect for those peoples' ancestral title to the continent I also call home. In some cases, I use "Indian" or "Indian Country" as legal terms of art but without endorsement of the admittedly antiquated term.

[4] *See* Trevor Reed, Who Owns Our Ancestors' Voices? Tribal Claims to Pre-1972 Sound Recordings 40 COLUM. J.L. & ARTS 275 (2016)

[5] *See* Trevor G. Reed, Indigenous Dignity and the Right to Be Forgotten 46 B.Y.U. L. REV. 1119 (2021)

Efforts to address misappropriation of physical elements of Native American culture have had some success in courts and Congress,[6] but legal solutions to the issue of tribal intellectual culture have been elusive.[7] Though undoubtedly frustrating to tribes, this is, arguably, a *feature* of the legal framework governing the United States's information policy, which prioritizes the spread of information and the advancement of culture over inherent moral rights of creators.[8] The First Amendment's free speech protection is the first principle of information policy in the United States,[9] and though there are several exceptions, those exceptions are also limited. The founders of the United States were skeptical of censorship, and courts continue that tradition, permitting it only under narrow circumstances.[10] The Constitutional balance inherent in copyright law reflects that tension.

On the other hand, the utilitarian foundation of copyright has been criticized as privileging settler colonies through institutional suppression of minority creators, especially Black and Native Americans.[11] The Berne Convention, the international treaty that today is at the foundation of copyright in nearly every country, including the United States, is itself the product of settler colonialism and came as a direct result of the Scramble for Africa.[12] Most relevant to this paper, Native Americans never consented to the Constitutional framework that was imposed on them. The institutional

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[6] For example, the *Native American Graves Protection and Repatriation Act*, PUB. L. 101-601, 104 STAT. 3048 (enacted November 16, 1990).

[7] *See, e.g.,* MATAL V. TAM, 582 U.S. 218 (2017) (invalidating Lanham Act provision prohibiting federal trademark registration for marks that might disparage persons), PRO-FOOTBALL, INC. V. BLACKHORSE, 709 F. App'x 182 (4th Cir. 2018) (restoring the Washington Redskins football team's trademark in light of *Tam*).

[8] U.S. CONST. ART. I, § 8, CL. 8, "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[.]" *See generally*, James Boyle, THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND. New Haven: Yale University Press, 2006.

[9] U.S. CONST. AMEND. I, "Congress shall make no law . . . abridging the freedom of speech."

[10] *See, e.g.*, BRANDENBURG V. OHIO, 395 U.S. 444 (1969) (incitement), MILLER V. CALIFORNIA, 413 U.S. 15 (1973) (obscenity), NEW YORK TIMES V. SULLIVAN, 376 U.S. 254 (1964) (defamation with actual malice)

[11] *See, e.g.,* Kevin J. Greene, Stealing the Blues: Does Intellectual Property Appropriation Belong in the Debate Over African-American Reparations? (December 1, 2004). TJSL PUBLIC LAW RESEARCH PAPER NO. 05-03, Available at SSRN: https://ssrn.com/abstract=655424 or http://dx.doi.org/10.2139/ssrn.655424; Elizabeth L. Rosenblatt, Copyright's One-Way Racial Appropriation Ratchet, 53 U.C. DAVIS L. REV. 591 (2019); Trevor Reed, Indigenous Dignity and the Right to Be Forgotten, 46 B.Y.U. L. REV. 1119 (2021).

[12] *See generally*, Carolyn Deere Birkbeck, THE WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO): A REFERENCE GUIDE. Cheltenham, UK: Edward Elgar Publishing, Ltd., 2016.

discrimination inherent in copyright has led to calls for copyright reforms as a part of a larger movement toward reparations.[13]

This paper will explore the application of copyright law to tribal recordings[14] in light of the passage of the Music Modernization Act. Part I reviews the development of copyright in sound recordings fixed prior to February 15, 1972 ("pre-1972 sound recordings"), both in the pre-MMA era of state enforcement and the new federal era since passage of the MMA. Part II reviews the law of pre-1972 sound recordings and how it interacts with Federal Indian Law. I conclude that in passing the MMA, Congress, possibly inadvertently, created a cause of action for lawsuits over recordings made on tribal lands, and in the process partly incorporated tribal law into Copyright Law. Finally, Part III explores both the potential the MMA brings to the tribes and the limitations on that potential.

I. Copyright and pre-1972 sound recordings

Federal copyright law is, at its essence, a set of five statutory rights awarded to authors of copyrightable works. Each of those rights empowers owners to exclude others from using their work in a particular way and, consequently, to license those uses. The five exclusive rights are the rights to (1) reproduce the work, (2) prepare derivative works, (3) distribute the work, (4) publicly perform the work, and (5) publicly display the work.[15] Each of these, excepting the public display right, is potentially implicated in the issue of tribal recordings.

Federal copyright attaches to *works* and vests in *authors*. The nature of sound recordings means that defining each of these essential terms is complicated. Sound recordings might simultaneously comprise two, and arguably even three different protectable "works." First, a sound recording might

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[13] *See* Greene, *supra* note 11.

[14] For purposes of this paper, "tribal recordings" are defined as sound recordings whose fixation took place on land that, at the time, was part of a reservation as defined by federal law.

[15] 17 U.S.C. § 106. In addition, § 106A includes a set of rights, sometimes known as "moral rights," over works, such as the right to claim authorship and the right to prevent desecration of the work. Many countries, such as France and Italy, base their copyright systems on a theory of moral rights rather than the Anglo-American utilitarian theory. Though the general theory of moral rights might provide a powerful tool for tribes against use of their culture in those countries, the United States applies moral rights only to a narrowly defined class of visual arts and so are inapplicable to this study.

contain a copyrighted song, and that song—the abstract musical elements arranged in sequence, or the "notes on the page"—is separately copyrightable as a "musical work."[16] Second, a song might be performed by one or more musicians, and that performance, though not presently copyrightable, is protected against unauthorized recording through *sui generis* "anti-bootlegging" statutes.[17] Finally, the "sound recording" itself, this time as a legal term of art, consists of the actual sounds—the sound waves produced during the performance—as fixed in some tangible medium, such as a plastic cylinder or disc, a length of magnetic tape, or a streaming server.[18] This paper concerns only *sound recordings*.[19]

Furthermore, sound recordings are potentially the work of multiple "authors." Sound recording authors might include the performers (whose work is captured), the producers (who organize or pay for the recording), or the recording engineers (who actually capture the sound).[20] Though the Copyright Act specifies that copyright vests in authors, it does not specify which of these parties is the "author" of a sound recording in the first instance, how to determine who is the author, or when there is joint authorship.[21] This leaves unanswered the question of who, absent a contractual agreement between the various stakeholders, has the right to enforce copyrights in recordings at the

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[16] The musical work, for its part, might include other underlying copyrightable works, such as lyrics or samples from other musical works.

[17] 17 U.S.C. § 1101 (civil), 18 U.S.C. § 2319A (criminal).

[18] In addition, sound recordings are legally distinct from visual media that includes sound. The latter are styled as "audiovisual works" in the Copyright Act. 17 U.S.C. § 101. This paper concerns only true sound recordings (i.e., recordings with no visual component).

[19] Any underlying musical or literary works embodied on the sound recordings, being traditional, and in any case unpublished, are likely in the public domain for copyright purposes. The anti-bootlegging statutes might be applicable if it could be demonstrated a recording was not, in fact, authorized, but that question is beyond the scope of this paper.

[20] *See* H.R. REP. NO. 94-1476, at 56 (1976) ("The copyrightable elements in a sound recording will usually, though not always, involve 'authorship' both on the part of the performers whose performance is captured and on the part of the record producer responsible for setting up the recording session, capturing and electronically processing the sounds, and compiling and editing them to make the final sound recording. There may, however, be cases where the record producer's contribution is so minimal that the performance is the only copyrightable element in the work, and there may be cases (for example, recordings of birdcalls, sounds of racing cars, et cetera) where only the record producer's contribution is copyrightable.").

[21] The only guidance from Congress comes from the House Report for the 1976 Copyright Act (*Id.)*. The Second and Ninth circuits have adopted a rule, based on a Copyright Office interpretation, that joint authorship requires a copyrightable contribution on the part of each author. CHILDRESS V. TAYLOR 945 F.2d 500 (2d Cir. 1991), AALMUHAMMED V. LEE, 202 F.3d 1227 (9th Cir. 2000); *but see* GAIMAN V. MCFARLANE, 360 F.3d 644, 659 (7th Cir. 2004) (joint authorship is not foreclosed by uncopyrightable contributions to a work). *See generally,* 1 NIMMER ON COPYRIGHT § 6.07[A][3] (2022).

moment the recording is fixed. As will be seen, the answer to this unanswered question is a critical one when discussing tribal recordings.

The history of sound recordings is a complicated one, and the historical laws still bear on the present. To begin with, then, a review of the development of sound recordings copyright is necessary.

a. The state era—common law and state statutory protection

Beginning with the advent of sound recording technology in the mid-nineteenth century[22] and continuing through most of the twentieth century, sound recordings were not subject to federal copyright protection.[23] This is not to say they were left completely unprotected. The development of sound recording copyright was a tortuous process as Congress, the courts, and the various industry players struggled to develop an understanding of the intellectual nature of sound recordings and debated the appropriate level of intellectual protection they should be afforded.

During the early years of recording technology, law and policy makers did not perceive a distinction between sound recordings and their underlying works. Sound recordings were largely viewed not as independent works of authorship but as a species of reproduction of the underlying—usually musical—work.[24] Though federal law did protect musical works, it did not initially restrict reproduction in the form of sound recordings, or "mechanical reproductions," at all. Composers such as John Philip Sousa viewed recording technology as a threat to their copyrighted musical works and

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[22] *See* Patrick Feaster. *Enigmatic Proofs: The archiving of Édouard-Léon Scott de Martinville's phonautograms.* 60 TECHNOLOGY AND CULTURE 2supp (April, 2019), S14–S38, S15. ("To prove he had originated the principle of recording sound vibrations..., Scott invoked a venerable archival convention established with precisely such scenarios in mind. On 26 January 1857, he had already deposited a *pli cachet* with the Académie: a sealed envelope containing evidence of his ideas and accomplishments as of that date.")

[23] Bruce Epperson, From the Statute of Anne to Z.Z. Top: The Strange World of American Sound Recordings, How It Came About, and Why It Will Never Go Away, 15 J. MARSHALL REV. INTELL. PROP. L. 1 (2015). Literary or musical works that were contained within the sound recordings were subject to copyright protection, provided they were registered following the appropriate formalities such as registration and publication with notice. *See* U.S. Copyright Office, FEDERAL PROTECTION FOR PRE-1972 SOUND RECORDINGS: A REPORT OF THE REGISTER OF COPYRIGHTS (February 2011), 18. https://www.copyright.gov/docs/sound/pre-72-report.pdf

[24] *See Id.*

pressed Congress for change.[25] The 1909 copyright act[26] was the first to recognize an exclusive right in the creation of mechanical reproductions of a musical work.[27] However, even then the recording, once it was fixed, was not itself subject to copyright in its own right; rather, any royalties that accrued in the recording were owed to the copyright holder of the musical work itself.[28]

Though not subject to *copyright*,[29] recordings were nonetheless protected as unpublished works under state laws. Federal law preempted any similar state laws to the extent—but only to the extent—that they applied to works that were within the reach of the Copyright Act.[30] Since the 1909 Act reached only published works, states were still free to protect unpublished works that had not yet been subject to a term of copyright.[31]

Unlike federal copyright law, common law protection in unpublished works was perpetual and had fewer exceptions.[32] Once a work was published, any state common or statutory law protection was extinguished and replaced with a limited-term federal copyright; once the federal copyright ended, the work could no longer be subject to protection under either federal or state laws and the work entered the public domain. However, prior to publication, a work's common law protection could extend indefinitely.

Sound recordings were treated as unpublished, even though by any common definition they certainly were not—by 1971 annual record sales exceeded $300 million.[33] As a result, sound recordings

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[25] John Philip Sousa, The Menace of Mechanical Music, 8 APPLETON'S MAGAZINE 278–284 (1906).
[26] *An Act to Amend and Consolidate the Acts Respecting Copyright*. PUB. L. 60–349, 35 STAT. 1075, enacted March 4, 1909.
[27] FEDERAL PROTECTION FOR PRE-1972 SOUND RECORDINGS, *supra* note 23 at 7–8.
[28] *Id.*
[29] Though in generic use the term, "copyright," can refer to state statutory and common law protections as well as federal *sui generis* protections, legally speaking copyright properly only applies to federal law. In addition, though the U.S. Code's Title 17 is labeled, "copyrights," strictly speaking the term, "copyright," applies only to chapters 1–8, 12, and 15 of that title. Chapters 9–11 and 13–14 are similar, and often run parallel to copyright, but are not part of the Copyright Act. In this paper the terms, "copyright," and "federal copyright," are used interchangeably; in any case, here they refer exclusively in the strict sense of the term unless otherwise specified.
[30] Epperson, *supra* note 23.
[31] *Id.*
[32] *Id.*
[33] FEDERAL PROTECTION FOR PRE-192 SOUND RECORDINGS, *supra* note 23 at 11.

were subject to a functionally perpetual common law copyright.[34] The question of whether sound recordings should be brought under federal copyright was debated extensively for more than a decade before Congress finally resolved the issue by passing the Sound Recordings Act of 1971.[35] That act, which took effect on February 15, 1972, extended federal copyright to sound recordings, preempting all state laws, but it applied only prospectively.[36] Thus, recordings fixed on or after that date were under the umbrella of federal copyright—copyrightable works (mostly) equal to musical works—but recordings fixed prior to that date continued to be subject to state laws.

Four years later, Congress overhauled its copyright scheme and passed the 1976 Copyright Act, the present version of the Act, which came into effect in 1978.[37] Among many changes, the 1976 Act for the first time instituted a formality-free copyright: copyright protection was made automatic upon completion of the work with or without registration.[38] Alongside this change Congress created federal protection for unpublished works and extinguished all common law copyright, including for unpublished works—except for pre-1972 sound recordings. Sec. 301(c) of the new act provided that

> [w]ith respect to sound recordings fixed before February 15, 1972, any rights or remedies under the common law or statutes of any State shall not be annulled or limited by this title until February 15, 2067. The preemptive provisions of subsection (a) shall apply to any such rights and remedies pertaining to any cause of action arising from undertakings commenced on and after February 15, 2067. Notwithstanding the provisions of section 303, no sound recording fixed before February 15, 1972, shall be subject to copyright under this title before, on, or after February 15, 2067.[39]

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[34] This produced strange results in later years, when sound recordings' protection began to outlast the works that were embodied in them. The song, "Alexander's Ragtime Band," for example, was published in 1911. The song itself entered the public domain in 1986, but recordings of the song that were fixed in 1911 continued to receive protection at common law for many years later.

[35] *An Act to amend title 17 of the United States Code to provide for the creation of a limited copyright in sound recordings for the purpose of protecting against unauthorized duplication and piracy of sound recording, and for other purposes*. PUB. L. 92-140, 85 STAT. 391 (enacted October. 15, 1971).

[36] *Id.*

[37] *An Act for the general revision of the Copyright Law, title 17 of the United States Code, and for other purposes.* PUB. L. NO. 94-553, 90 STAT. 2541, enacted October 19, 1976.

[38] *See, e.g.,* 17 U.S.C. § 401 (prescribed notice of copyright is optional), § 408 (copyright registration is mandatory only for initiation of legal proceedings).

[39] 17 U.S.C. § 301(c) (2015).

In short, pre-1972 sound recordings still were not protected under federal law, but instead the state law protection was preserved. State-level protection was, under the 1976 Act, to remain undisturbed until 2067, at which point the federal law would finally preempt the state law, essentially placing all pre-1972 recordings in the public domain.

The state/federal dichotomy in protection of sound recordings created some anomalies by comparison musical works, of which they had initially been thought a part.[40] In some respects, sound recordings received stronger protection than musical works. Though musical works created prior to 1972 were limited to at most 75 (later extended to 95) years of copyright from the date of first publication, sound recordings were protected much longer, in extreme cases more than 200 years after the recording was fixed.[41] Copyright in musical works depended on publication with a compliant copyright notice and, if published prior to 1965, the term would expire if not renewed in its last year.[42] State protection of sound recordings, on the other hand, attached on fixation and did not require renewal, similar to the automatic nature of copyright under the 1976 Act. In addition, musical works were subject to statutory exceptions and registration requirements that largely did not exist at the state level.

By contrast, musical works received stronger protection in other circumstances. State level protection was generally limited to criminal penalties and actual damages, while federal laws provided for statutory damages of up to $30,000 per infringement.[43] In addition, the 1976 Act included an exclusive right to public performance of musical works, but not of copyrighted (i.e., post-1972) sound

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[40] Though the United States treats sound recordings as fully copyrightable works, many countries continue to view sound recordings as derivative works, affording them "related rights," which are distinct from, and more limited than copyright.
[41] Originally, the date of preemption was February 15, 1947, because the copyright term for works published prior to the 1976 Act was still set by the 1909 Act at 75 years. Congress was, essentially, preserving state protection in all pre-1972 sound recordings until the last of those, the recordings fixed in 1972, reached that term (1972+75=2047). When Congress passed the Copyright Term Extension Act in 2002, extending that term to 95 years, they also extended the preemption date by 20 years to 2067.
[42] *See* Cornell University Library, COPYRIGHT TERM AND THE PUBLIC DOMAIN.
https://guides.library.cornell.edu/copyright/publicdomain
[43] 17 U.S.C. § 504(c).

recordings.[44] Later, Congress added an exclusive right to public performance of copyrighted sound recordings through digital, but not analog transmission.[45] Thus, for example, radio stations broadcasting copyrighted musical works embodied in copyrighted sound recordings were required to pay royalties only on the musical works if they were broadcasting over the AM/FM band.[46] If they streamed the sound recordings, they were required to pay royalties on both.[47] But for pre-1972 recordings there was no such requirement—no state provided a public performance right in their protection of sound recordings, so no royalty was required for broadcasting them, digitally or otherwise.[48]

Congress's motivation for preserving the carve-out for pre-1972 recordings that they closed for other unpublished works is unclear, but it also bears mentioning at this point. There appears to have been concern that retroactively bringing sound recordings under federal copyright would inadvertently place all such recordings immediately into the public domain.[49] This concern was mistaken,[50] but it is reflective of Congress's explicit intention to allow sound recording owners to continue to profit from their properties. Regardless of its motivation, a musical work and a recording of the same work from the same year received radically different treatment under the law. These differences created a new debate over federalizing pre-1972 sound recordings that would remain alive for another four decades.

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[44] 17 U.S.C. §§ 106, 301(c).
[45] *Digital Performance Right in Sound Recordings Act*, PUB. L. 104-39, 109 STAT. 336, effective Feb. 1, 1996.
[46] FEDERAL PROTECTION FOR PRE-192 SOUND RECORDINGS, *supra* note 23.
[47] *Id.*
[48] *See, e.g.,* FLO & EDDIE, INC. V. SIRIUS XM RADIO, INC., 28 N.Y.3d 483 (2016), FLO & EDDIE, INC. V. SIRIUS XM RADIO, INC., 229 So.3d 305 (Fla. 2017); see generally, U.S. Copyright Office, Survey of State Criminal Laws: Pre-1972 Sound Recordings, https://www.copyright.gov/docs/sound/20111212_survey_state_criminal_laws_ARL_CO_v2.pdf.
[49] 1 NIMMER ON COPYRIGHT § 2.10(B)(1)(a)(i) (2022)
[50] *Id.*

b. The federal era—the Music Modernization Act

Congress finally federalized pre-1972 recordings in 2018 with the passage of the Classics Protection and Access Act (CPAA), Title II of the Orrin Hatch–Bob Goodlatte Music Modernization Act. Rather than retroactively applying copyright to pre-1972 recordings, though, Congress created a *sui generis* right for owners of pre-1972 recordings that closely followed, but was not identical to federal copyright.[51] For most purposes, the effect is the same as if Congress had fully federalized copyright in pre-1972 sound recordings—under the CPAA, owners of pre-1972 sound recordings can sue for infringements of all the same rights that a copyright holder can, and users have many, though not all, of the same defenses.[52] However, there are differences between copyright proper and the CPAA protection that are relevant for a discussion of pre-1972 tribal recordings.

Most importantly for purposes of this study, the CPAA allowed Congress to provide protection to pre-1972 recordings without affecting the prior owners of the rights to the recording. In the state era, each state determined for itself who constituted the default owner of rights in a sound recording. Most states enacted criminal statutes defining the "owner," for purposes of record piracy,[53] but they varied as to how they defined the term. Among the 48 states that provided some level of statutory definition of ownership,[54] most provided that the owner of the rights to a recording was the owner of the "sounds" contained in the recording, leaving the underlying question—who owns the sounds?—to the courts.[55] However, several states departed from this pattern. Thirteen states followed

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[51] Tyler Ochoa, An Analysis of Title II of Public Law 115-264: The Classics Protection and Access Act (Guest Blog Post), Technology and Marketing Law Blog (October 24, 2018). https://blog.ericgoldman.org/archives/2018/10/an-analysis-of-title-ii-of-public-law-115-264-the-classics-protection-and-access-act-guest-blog-post.htm.

[52] *Id.*

[53] Most states' statutes were limited to criminal provisions. California, uniquely, enacted civil statutes governing pre-1972 sound recordings. CAL. CIV. CODE ANN. § 980 (West)

[54] Indiana and Vermont did not enact statutes, leaving everything to the common law. SURVEY OF STATE LAW TEXTS, https://www.copyright.gov/docs/sound/20110705_state_law_texts.pdf.

[55] As discussed, *infra*, it remains an open question as to whether ownership of "sounds" begins at the time they were produced (by performers) or when they were captured (by recording engineers' microphones).

the rule, articulated in *Pushman v. New York Geographic Society,*[56] that, absent an explicit reservation of rights at the time of transfer, ownership of intellectual rights follows the owner of the physical item (in this case the master recording).[57] Eleven states provided an alternate definition of ownership as constituting the party that possessed the right to authorize the making of the recording,[58] and one state (Delaware) incorporated the Geneva Phonograms Convention and its definition.[59] Nationally, the result is that the question of who owned the rights to a recording depended on which state's laws applied.

While state laws focused on "owners" of rights, federal copyright, as already discussed, vests in authors.[60] The term, "author," is also undefined, but it may be presumed the term does not contemplate all of the definitions for "owner" used by the states.[61] Had the CPAA simply incorporated pre-1972 recordings into the existing copyright regime, some owners of sound recording rights (in some states) would likely have lost their rights as a result of the change in definition. Parties that previously had settled expectations of their rights (even as uncertain as the state system was) might have discovered that they had lost those rights because they were not the initial "authors" as contemplated by the federal law. This would have been understandably unpopular for the affected parties and might have constituted unconstitutional takings.[62]

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[56] HOVSEP PUSHMAN V. NEW YORK GEOGRAPHIC SOCIETY 287 N.Y. 302 (N.Y., 1942), *reaff'd by* GREENFIELD V. PHILLES RECORDS, INC., 98 N.Y.2d 562 (2002). The "Pushman Doctrine" has fallen out of favor and is explicitly superseded by federal law, but it still controls any transfers made prior to the effective date of the 1976 Act, and in states where the doctrine applied in 2018 it remains the controlling principle for pre-1972 recordings.

[57] Eric J. Harbeson, ONLINE ACCESS TO INSTITUTIONAL RECORDINGS: AN ANALYSIS OF COPYRIGHT ISSUES, 37, fn 87 (Thesis: C.A.S., University of Illinois, 2012). http://scholar.colorado.edu/amrc_facpapers/2

[58] *Id.* at fn 89.

[59] Formally known as the *Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms*. The United States is a signatory and ratified the convention in 1974. In turn, the convention does not define ownership, but the treaty text places obligations on countries to protect "producers." https://www.wipo.int/treaties/en/ip/wppt/summary_wppt.html

[60] 17 U.S.C § 201.

[61] For example, the Copyright Act explicitly abrogates the *Pushman* doctrine, providing that "[o]wnership of a copyright . . . is distinct from ownership of any material object in which the work is embodied." 17 U.S.C. § 202.

[62] Concerns about chain of title were among the most urgent arguments brought by the recording industry in opposition to federalizing copyright in pre-1972 sound recordings. *See* A STUDY ON THE DESIRABILITY OF AND MEANS FOR

In the end, Congress decided to punt the question of who owns a sound recording back to the states. The CPAA provides simply that the owner of the rights to a pre-1972 recording under the CPAA is the party that owned the rights the day before the CPAA came into force.[63] Congress's decision to preserve the status quo for pre-1972 recordings means that the state-level ownership focus remains in place and that states and their courts are responsible for determining what ownership meant on October 10, 2018, the day before the effective date of the CPAA. The next section explains why this last provision—it literally forms the last words of CPAA—is critical to tribal interests in pre-1972 recordings made on their lands.

II. Pre-1972 Tribal sound recordings

Who owns tribal recordings? Presently, thirty-four states have at least one federally recognized tribe within its territory. As a result of Congressional actions during the Termination Era, there were both more tribes and more and larger reservations during the early years of the sound recording era when many of the tribal recordings at issue were fixed. If the owner of the rights created in the CPAA is the party that owned the rights to the recording on the day before enactment, then who owns pre-1972 sound recordings that were made on what was at the time tribal land? The question is deceptively complex, and the answer is complicated by the uncertain and highly contested nature of the relationship between tribes, states, and the federal government. Reservation lands are located within state borders, but tribes assert inherent sovereignty over their land, and the federal government holds ultimate title to reservation lands, which it holds in trust for the tribes.[64]

BRINGING SOUND RECORDINGS FIXED BEFORE FEBRUARY 15, 1972, UNDER FEDERAL JURISDICTION, Comments of Recording Industry Association of America (RIAA) and American Association of Independent Music (A2IM) https://www.copyright.gov/docs/sound/comments/initial/20110131-RIAA-and-A2IM.pdf.

[63] 17 U.S.C. § 1401(l)(2). ("The term "rights owner" means—(A) the person that has the exclusive right to reproduce a sound recording under the laws of any State, as of the day before the date of enactment of this section; or (B) any person to which a right to enforce a violation of this section may be transferred, in whole or in part, after the date of enactment of this section[.]")

[64] *See generally,* 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, Introduction [Excerpted and Reprinted from 1982 ed.] (2019)

Resolution of the question of ownership is key to understanding the impact of the CPAA on tribal recordings. In this section, I argue that state laws did not apply to tribal recordings at all in at least some and possibly any of the states, and that federal law does not step in to provide an answer to the ownership question. The remaining choice, and the only viable solution, is to apply tribal law to determine ownership.

a. State laws on reservations.

The first question is whether states' laws apply to tribal recordings in the first place.[65] As discussed, *supra*, when the CPAA took effect nearly every state had some form of written statute governing pre-1972 recordings, mostly in their criminal codes.[66] Because the CPAA did not cause a change in the ownership of recordings, if state laws did apply to recordings made on reservations, then those laws might continue to define the ownership of tribal sound recordings. However, if state laws didn't apply then one would have to look to federal or tribal laws to determine who owns a recording.

Indian reservations, in theory at least, are not a part of any state.[67] The principle of tribes' sovereignty over their land has eroded over time, but courts nonetheless continue to uphold the tribal sovereignty in principle, if not always in practice.[68] Congress has the power to vest states with jurisdiction over Indian Country within their boundaries if they choose, but they must do so expressly. Absent express Congressional action, the general rule is that states do not have jurisdiction over reservations.[69] The Supreme Court in *Williams v. Lee* described the rule as springing both from federal

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[65] Another, more challenging question is what laws applied at the time of fixation of a given recording. This is a fact specific question that might arise in the context of litigation but that is beyond the scope of this study.

[66] SURVEY OF STATE CRIMINAL LAWS, *supra* note 48. The states that didn't, Indiana and Vermont, also do not have any federally recognized tribes within their borders.

[67] *See, generally*, 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 3.04[1] (2019)

[68] *See* YSLETA DEL SUR PUEBLO V. TEXAS, 142 S. Ct. 1929 (2022) ("Native American Tribes possess 'inherent sovereign authority over their members and territories.'")

[69] 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 7.03 (2019) ("Absent clear federal authorization, state courts lack jurisdiction to hear actions against Indians arising within Indian country"); *but see* OKLAHOMA V. CASTRO-HUERTA, 142 S.

preemption based on Congress's constitutional jurisdiction over Native Americans[70] and from "the right of reservation Indians to make their own laws and be ruled by them."[71] Either principle can, on its own strength, defeat state claims to jurisdiction on reservations, though federal preemption has priority over tribal sovereignty.[72] Every rule, of course, has its exceptions, and this rule is no different.

Where nonmember activities on reservations are concerned, as is primarily the case in the facts contemplated by this study, each sovereign's interests must be balanced against the other. Many such cases arise under one or more sovereign's taxation power. In *White Mountain Apache Tribe v. Bracker*, for example, the State of Arizona imposed taxes on a logging company doing business with the tribe entirely while on reservation land.[73] The Supreme Court held that the federal interests in a regulatory scheme aimed at supporting the tribe outweighed the state's taxation interest and invalidated the tax based on federal preemption. Somewhat by contrast, in *Arizona Dep't of Revenue v. Blaze Const. Co.*, the Court found that taxation of a contract between a nonmember entity and the federal government on tribal land was subject to state taxation.[74] Thus, though *Bracker* was decided on federal preemption in the context of a comprehensive federal program, the principal distinction with *Blaze Construction* appears to be the element of tribal sovereignty and the tribes' interest in managing their internal affairs. Courts continue to use *Bracker's* balancing of federal, tribal, and state interests in cases involving nonmember activity on reservations.

Bracker balancing is an uneasy fit with protection of pre-1972 sound recordings because at least one and often two of the three sovereigns do not assert an interest. As discussed *supra*, prior to 2018, most of the states enacted statutes governing pre-1972 recordings, but Congress expressly exempted

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Ct. 2486 (2022) ("the Court's precedents establish that Indian country is part of a state's territory and that, unless preempted, States have jurisdiction over crimes committed in Indian country.")

[70] U.S. CONST. ART. I, § 8, cl. 3, "Congress shall have the power . . . to regulate Commerce with . . . the Indian Tribes."

[71] 358 U.S. 217, 220 (1959)

[72] WHITE MOUNTAIN APACHE TRIBE V. BRACKER, 448 U.S. 136, 143 (1980)

[73] *Id.*

[74] 526 U.S. 32 (1999)

pre-1972 recordings from preemption. Some tribes may have had protection in their codes, but it is unlikely every tribe did.[75] A court, then, might be faced with balancing interests in pre-CPAA state laws where neither the federal nor tribal laws have weighed in. However tempting it might be to take both Congress's and the tribes' silence as deference to the state's law, this would be an error.

Laws governing pre-1972 sound recordings are, in the end, about enforcement of a private property right. Whose property is at issue, of course, is dependent on the state and how it defines ownership. A court in Oklahoma, where ownership is dependent on who owns the master copy of the recording, would analyze the property right differently from a court in California, where ownership is based on the common law owner of the sounds.[76] But therein lies the problem. Property and how it is managed, though not the same as sovereignty, is nonetheless an essential element of sovereignty.[77] In the context of tribal land, courts have recognized this principle through their acknowledgement of, for example, the power to exclude.[78] If management of tribal real property is an incident of sovereignty, it follows that tribal intellectual property should be as well.

The question of whose law governs pre-1972 recordings, then, is not a small question on an obscure matter only copyright enthusiasts could love; it is a major question, determining who gets to make the property laws on reservations. Framed in this way, and with Congress silent, tribal interests in their own self-government clearly outweigh any state interests in enforcing their intellectual property schemes on reservations. It follows, *a fortiori,* that tribal interests have priority when tribes have enacted

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[75] A survey of tribal codes would be necessary to confirm this, but that is outside the scope of this paper.

[76] SURVEY OF STATE CRIMINAL LAWS, *supra* note 48.

[77] *See generally* Morris R. Cohen, PROPERTY AND SOVEREIGNTY*,* 13 *Cornell L. Rev.* 8 (1927); *see also*, IN RE DECORA, 396 B.R. 222, 225 (W.D. Wis. 2008) ("The right of the Nation to distribute its own assets as it sees fit is central to self-governance")

[78] BRENDALE V. CONFEDERATED TRIBES & BANDS OF YAKIMA INDIAN NATION, 492 U.S. 408 (1989) (Tribes have power to exclude nonmembers from geographically defined areas), MERRION V. JICARILLA APACHE TRIBE, 455 U.S. 130 (1982) (Power to exclude cannot be bargained away, and the tribe may always raise it.); *see also* PUB. SERV. CO. OF NEW MEXICO V. BARBOAN, 857 F.3d 1101 (10th Cir. 2017) (holding a state, via its public utility company, cannot seize trust land through its eminent domain power); *see generally* 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 6.03 ("A state ordinarily may not regulate the property or conduct of tribes or tribal-member Indians in Indian country.")

codes governing pre-1972 recordings. However, this would create a statutory vacuum where the relevant tribe had not codified a protection scheme. In those cases, tribal common law would presumably have applied.

Though Congress was silent as to pre-1972 recordings, they have used their authority and delegated jurisdiction to states more generally. Because the CPAA is exclusively civil in nature,[79] the most important such delegation for purposes of this study is Public Law 83-280 (P.L. 280).[80] Enacted in 1953, P.L. 280 placed concurrent jurisdiction on some states ("Mandatory P.L. 280 states") over most tribal lands within their boundaries. [81] P.L. 280 also provided an option for other states to assume such jurisdiction unilaterally ("Optional P.L. 280 states"), though Congress later amended the law to require tribal consent before a state assumed jurisdiction over it. P.L. 280 states' jurisdiction included both criminal and civil jurisdiction, though importantly it did not extinguish tribal courts' jurisdiction over civil actions (or some crimes) that occurred on a reservation, especially where both parties were Indians.[82]

Congress appears to have given P.L. 280 states criminal jurisdiction over reservations with respect to pre-1972 recordings. As discussed, *supra*, most states' only statutory authorities are criminal in nature. The Supreme Court has held that P.L. 280's criminal provisions reach only criminal prohibitory laws. Where a state merely regulates the activity, rather than banning it outright, P.L. 280

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[79] See 17 U.S.C. § 1401(a)(1), providing for civil remedies in §§ 502–505, but not for criminal penalties in § 506. The CPAA appears to have preempted any state criminal enforcement, § 1401(e)(2), but the preemption language makes that uncertain, and in any case that question is beyond the scope of this paper.

[80] *An act to confer jurisdiction on the States of California, Minnesota, Nebraska, Oregon, and Wisconsin, with respect to criminal offenses and civil causes of action committed or arising on Indian reservations within such States, and for other purposes.* PUB. L. 83-280, 67 STAT. 588. Enacted August 15, 1953.

[81] *Id.* Initially, mandatory P.L. 280 states were California, Minnesota (except the Red Lake reservation), Nebraska, Oregon (except the Warm Springs reservation), and Wisconsin (except the Menominee reservation). The carve-out for the Menominee reservation was subsequently removed Alaska subsequently added to the list of mandatory states. Nine optional states had assumed some level of jurisdiction by 1968. 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.06 (2019).

[82] P.L. 280, *supra* note 80.

does not authorize state jurisdiction.[83] In the case of record piracy statutes, the statutes clearly are prohibitory, and so are subject to P.L. 280.[84]

P.L. 280 also likely, though less certainly, gave states jurisdiction over civil causes of action. Common law causes of action likely existed under each the states' common laws, and California, a mandatory P.L. 280 state, also enacted civil statutes governing pre-1972 recordings. P.L. 280 does expressly provide the relevant states with adjudicatory authority over civil causes of action arising "between Indians or to which Indians are parties."[85] As with criminal provisions, P.L. 280 civil jurisdiction is limited to adjudicatory causes of action;[86] however, any common law case arising over pre-1972 recordings would necessarily be adjudicatory.

However, the civil provisions in P.L. 280 contain two exceptions, each of which could lead a court to find that P.L. 280 doesn't apply to state sound recordings laws. The first disclaims "alienation [or] encumbrance of any real or personal property . . . belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States[.]"[87] The second, and more likely applicable exception states that tribal ordinances and customs are to "be given full force and effect in the determination of civil causes of action" when they "are not inconsistent with any applicable civil law of the State." The first exception would apply only if "personal property" were held to include intellectual property, a question to which the statutory context does not provide an obvious answer. However, tribal code that establishes its own scheme for protection of pre-1972 tribal recordings clearly would not be inconsistent with state laws. Likewise, tribal custom surrounding pre-1972 recordings would not be inconsistent with state laws to the extent it involves an Indian plaintiff.

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[83] CALIFORNIA V. CABAZON BAND OF MISSION INDIANS, 480 U.S. 202 (1987)
[84] Many states, including all P.L. 280 states, do provide exceptions to their record piracy laws, but they do not take the form of regulation. For example, some states provide exceptions for educational use, or use by libraries. But these exceptions probably are not sufficient to classify the statutes as regulatory.
[85] 28 U.S.C. § 1360.
[86] YSLETA DEL SUR PUEBLO V. TEXAS, 142 S. Ct. 1929 (2022)
[87] 28 U.S.C. § 1360(b)

In sum, state statutory and common laws surrounding pre-1972 tribal recordings were, at the time of the CPAA's enactment, something of a patchwork. A handful of states' criminal laws probably applied to some, but not all of the reservations within their borders, and their civil laws also may have applied, though with possible exceptions. Those states' treatment of sound recording ownership varied. In the rest of the states, record piracy laws probably were unenforceable against activities that took place on reservations.

Recent Supreme Court activity may threaten this analysis. In particular, the Supreme Court in *Oklahoma v. Castro-Huerta* held that, contra longstanding precedents, inherent federal jurisdiction over tribes has never been exclusive but concurrent with the states.[88] The ruling effectively abrogated *Worcester*' holding that States have no inherent authority over tribes on tribal land. This ruling could in theory be extended to find that state record piracy laws, by default, apply concurrently to tribes on reservations. Still, even if *Castro-Huerta* does not prove to be an improvident ruling, it is unlikely to change the analysis of state-tribal relations vis-à-vis copyright laws. *Castro-Huerta* was decided on facts that, though not subject to the Major Crimes Act, were nonetheless inarguably criminal in nature.[89] Though most state copyright statutes form a part of their criminal code, copyright is generally civil in nature and litigation has generally arisen as a civil matter under the state's common law (though still framed by the criminal statutes).[90] Courts are overall more deferential to tribes with respect to civil laws, as they are more closely tied to their internal affairs and inherent sovereignty.

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[88] 142 S.Ct. 2486. The case of *Brackeen v. Haaland*, currently before the Court, threatens further violence to the principle of tribal sovereignty, though it is unlikely to affect this study.

[89] *Id.*

[90] *See, e.g.* CAPITOL RECORDS, INC. V. NAXOS OF AMERICA, INC., 830 N.E.2d 250 (N.Y. 2005); GOLDSTEIN V. CALIFORNIA, 412 U.S. 546 (1973); FLO & EDDIE, INC. V. SIRIUS XM RADIO, INC., 821 F.3d 265 (2d Cir.); SHERIDAN V. IHEARTMEDIA, INC., 255 F. Supp. 3d 767 (N.D. Ill. 2017).

b. Federal law on reservations

Where state laws did not apply, did federal law apply to pre-1972 recordings made on reservations? There is no question that Congress may expressly provide for laws of general application to apply on tribal land.[91] However, neither the Copyright Act nor the CPAA expressly state that they apply on reservations. Courts have not yet addressed whether Congress's silence should cause federal copyright laws to apply on reservations or not.

Tribal recordings occupy a curious space within copyright law. The Copyright Act does not expressly apply on reservations, nor do the *sui generis* provisions of the CPAA.[92] Courts are split as to whether laws of general applicability such as these apply on reservations by default, or whether Congress must expressly abrogate tribal sovereignty for a law to apply. However, courts need not resolve that split to resolve the tribal recordings problem, because under the CPAA actions must be brought under federal law. Prospective tribal plaintiffs looking to bring actions under the CPAA unquestionably may bring copyright actions against non-members in federal court under the Copyright Act,[93] and prospective non-tribal defendants can be sued under federal copyright laws by any plaintiff, both foreign and domestic.[94] Even if federal copyright laws applied on reservations, federal law did

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[91] At least not since UNITED STATES V. KAGAMA, 118 U.S. 375 (1886), upholding the constitutionality of the MAJOR CRIMES ACT OF 1885 and, along with CHAE CHAN PING V. UNITED STATES, 130 U.S. 581 (1889), establishing the plenary power of Congress to legislate within its territory. As discussed, *infra*, there may have been more doubt about that question in the early days of the United States.

[92] Neither the text of Title 17 nor any of the legislative reports accompanying the Copyright Act of 1976 includes any references to tribes or reservations.

[93] Federal law protects, *inter alia*, all copyrightable works published in the United States, as well as any works published in nations that are treaty parties as required by its participation in the Convention for the Protection of Literary and Artistic Works (the "Berne Convention"). 17 U.S.C. § 104(b). The Copyright Act protects copyrighted works published on reservations as they are published in the United States; however, even in the unlikely event it didn't on that basis, it certainly would protect tribal recordings on the basis of its obligations as in that instance the tribes must be incorporated into the Berne Convention as treaty partners. *See generally*, 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 18.05 (2019).

[94] For an extensive analysis of the general question, *See* Trevor Reed, Creative Sovereignties: Should Copyright Apply on Tribal Lands, 67 J. COPYRIGHT SOC'Y USA 313 (2021)

not apply to pre-1972 recordings prior to the CPAA because federal law did not apply to pre-1972 recordings at all.

Federal courts, however, have exclusive jurisdiction to hear cases under the CPAA. This raises the question of who has federal standing to bring an infringement claim under the CPAA. To sue under federal law, the plaintiff must suffer an "injury in fact" that is "concrete and particularized."[95] Under the Copyright Act, that means the plaintiff must be the owner of at least one of the exclusive rights in the copyrighted work.[96] Under the CPAA, that corresponds to being the owner of one of the exclusive rights in a "covered activity."[97] A federal court hearing a case would need some basis for determining whether the plaintiff owns the exclusive right that has been infringed, which requires a determination of whether the plaintiff owned the right prior to the CPAA's passage.

The only study of copyright and pre-1972 tribal recordings was published by Professor Trevor Reed in 2016, before the CPAA was introduced to Congress. Reed argued that the Copyright Act should have governed pre-1972 tribal recordings, preempting state laws entirely, because tribes possess "inherent sovereignty over their membership and territory, including the power to legislate and adjudicate in civil matters," and so tribal lands are by default subject only to federal law.[98] As to the ownership question, Reed argued that the question would be resolved by federal common law. Reed noted that, despite the holding in *Erie v. Tompkins* that there is no federal general common law, Indian Law remains an area in which federal common law persists.[99]

Though Reed's analysis of *Erie* may have been correct, the superiority of federal common law would have been fatal to any lawsuits prior to the CPAA because the Copyright Act explicitly

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[95] LUJAN V. DEFS. OF WILDLIFE, 504 U.S. 555, 560 (1992)
[96] *See, e.g.,* FATHERS & DAUGHTERS NEVADA, LLC V. ZHANG, 284 F.Supp. 3d 1160 (D. Ore. 2018) (there is no "right to sue" independent of ownership of one of copyright's exclusive rights.)
[97] 17 U.S.C. § 1401(a)
[98] Reed, *supra* note 4.
[99] *Id.* at FN 16, *citing* ERIE R.R. CO. V. TOMPKINS, 304 U.S. 64 (1938), *but see* NATL. FARMERS UNION INS. COMPANIES V. CROW TRIBE OF INDIANS, 471 U.S. 845, 850 (1985) (acknowledging the continued existence of a federal common law).

disclaimed any coverage for most pre-1972 sound recordings.[100] If Reed was correct that federal law preempted state laws and that the Copyright Act did, in fact, exclusively govern tribal recordings, then the result is pre-1972 tribal sound recordings had no protection at all.

c. Resolving ownership of pre-1972 tribal recordings

The CPAA changed half of that bleak result by creating a federal interest in all pre-1972 recordings, but it did not resolve the ownership problem. Because there is no pre-CPAA federal common law, a federal court might look to other jurisdictions for help in making an ownership determination, but it is important to remember that no such law would be binding—this would be a case of first impression for federal courts.

A tempting first source for ideas would be state laws, which governed most pre-1972 recordings (including, possibly, some tribal recordings). Partly because the Copyright Act explicitly rejects the object-owner theory, a court would most likely look to the common law rule, adopted by the majority of state states, that the default owner is the owner of the sounds. The antecedent question of who owns the sounds, however, has never been resolved.

Reed and others argue the common law rule is that the ownership of sounds vests in the creators of the performances contained within the recording. However, though it is a plausible theory, it is not supported by any precedent. State-level infringement has not been litigated *in any state* in a way that tests that state's definition of ownership. Though a more comprehensive survey is needed, an initial survey of fifty states and the District of Columbia no cases where ownership of the rights to a recording was in dispute.[101] In the absence of binding or even persuasive precedent in any published

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[100] 17 U.S.C. § 301 (2015). Some pre-1972 recordings were protected by federal law. Pre-1972 recordings with at least one rights holder that was not a United States national and were not in the public domain in the source country were fully subject to federal law, not a state law. *Uruguay Round Agreements Act*, PUB. L. 103-465, 108 STAT. 4809, effective December 8, 1994.

[101] This is unsurprising: state statutes were, with the exception of California, exclusively criminal in nature. Though tribal recordings are valuable for research purposes, their commercial value is not generally sufficient to inspire piracy on a scale that would justify a criminal action. Most recordings that inspire piracy are commercial recordings for whom the ownership is fixed not by statute but by contract.

state court opinion, there is little support to the theory that the performers are the default owners, especially given that state definitions varied from state to state.[102]

Furthermore, no state explicitly states this default rule, nor can it be assumed through a plain language understanding. Analogous facts either contradict or at least question the assumption of such a default rule. At the federal level, the legislative history for the 1976 Copyright Act suggests—but does not make explicit—a default rule that sound recordings are presumptively a joint work of the performer and the recording engineer or producer.[103] Looking to other media by analogy, it is the photographer, not the model, that is the author of a photograph, and it is generally the producers, not the actors, that are the authors of audiovisual works.[104]

As an aside, it is fortunate for tribes that the performer-owner rule has not been established as the default rule. If it were, only the actual performers or their heirs would have standing to sue. The nature of the recordings—many are more than a century old and documentation as to performers was poor—is such that any enforcement under the performer-owner rule would be difficult and inefficient. Moreover, tribes would have fared no better under the *Pushman* Doctrine rule, since master recordings are not generally held by the prospective plaintiffs. This, after all, the essential problem: tribes don't possess the original recordings, and so they can't control their use.

State laws provide only a vague common law framework, and so are of little to no help. Furthermore, state courts would be an unwise choice as well as likely unwelcome advisor on matters regarding tribes. Though the United States has hardly been a reliable trustee for the tribes over its

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[102] For a detailed study of the ownership, *see* Eric J. Harbeson, *Ownership in Institutional Sound Recordings*. International Federation of Library Associations, Helsinki, Finland (August 14, 2012) http://scholar.colorado.edu/amrc_facpapers/3

[103] *See* H.R. REP. 94-1476 (1976), *supra* note 20 at 56. ("The copyrightable elements in a sound recording will usually, though not always, involve "authorship" both on the part of the performers whose performance is captured and on the part of the record producer responsible for setting up the recording session, capturing and electronically processing the sounds, and compiling and editing them to make the final sound recording. There may, however, be cases where the record producer's contribution is so minimal that the performance is the only copyrightable element in the work, and there may be cases (for example, recordings of birdcalls, sounds of racing cars, et cetera) where only the record producer's contribution is copyrightable.")

[104] *See Id.* at 154 (contemplating a photographer's registration of multiple photographs as a single author).

history, it is the states that have consistently been tribes' "deadliest enemies."[105] Relying on state laws for a question involving tribal culture would be yet another blow against tribal sovereignty. There is only one entity with the authority to settle, definitively, how cultural property vests on tribal lands, and that is the tribe itself.

The only remaining possibility is also best solution. The court must apply tribal law. Prior to the CPAA, applying the law of the tribe was of course an option for state courts (if the state courts had jurisdiction), though that result was unlikely. Under the CPAA, applying tribal law is the one and only option. Though a federal court presented with a CPAA action involving a pre-1972 tribal recording could in principle attempt to apply tribal law itself, federal courts are not generally likely to be competent to apply tribal law. Both for this reason and out of a tradition of comity established by several previous courts, the court should therefore certify the question of ownership to a tribal court.[106] The actual question of how tribal law would determine ownership is beyond the scope of this study. However, it seems likely that, in many cases, the tribal court would find that the tribe itself owned the property.[107]

The law as written supports this conclusion; the policy behind the law demands it. The CPAA was enacted with the intent to provide protection to pre-1972 recordings, and also to provide a nationally uniform system of protections for those recordings, consequences for misusing them, and exceptions to those exclusive rights.[108] By preempting state laws it also clearly intended to create a system that was uniform throughout the country. Applying state laws for determining ownership has

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[105] OKLAHOMA V. CASTRO-HUERTA 142 S. Ct. 2486, 2514 (2022), (Gorsuch, J., dissenting) (*quoting* United States v. Kagama, 118 U.S. 375 (1886))

[106] *See, e.g.,* EX PARTE KAN-GI-SHUN-CA (OTHERWISE KNOWN AS CROW DOG), 109 U.S. 556 (1883) (criminal cases prior to the Major Crimes Act), NATIONAL FARMERS UNION INSURANCE CO. V. CROW TRIBE OF INDIANS, 471 U.S. 845 (1985) (Where tribal courts have civil regulatory jurisdiction, federal court jurisdiction is appellate only after exhaustion of tribal remedies), IOWA MUTUAL INSURANCE CO. V. LAPLANTE, 480 U.S. 9 (1987) (Civil jurisdiction of tribal courts over non-Indians on reservation presumptively lies with tribal courts).

[107] *See* Reed, *supra* note 4 at 307.

[108] Hence the name of the bill, the Classics *Protection* and *Access* Act.

the opposite effect: it reduces (or even removes) protection for an entire class of authors, and it does so with greater inconsistency than did the *status quo ante*. It is far more difficult to conceive Congress intending this bizarre carve out than it is that Congress merely was—as it often has been—careless in failing to consider the impact of the bill on reservations.

More to the point, though up to this point this paper has assumed the possibility of state law applicability in some cases, such as in P.L. 280 states, this also is untenable. If a Court determined states' laws could apply, the result would be to preserve the patchwork of laws that the CPAA was designed to correct. Even more than with non-tribal recordings, doing so would preserve a dizzying array of disparate outcomes.

Comparing each state's sound recordings ownership theory to its jurisdictional relationship to tribes in its border (*see* Appendix), the chaos that results from allowing state laws to continue to govern is immediately clear. A recording might be owned by a tribe, or the performers, or some other entity entirely due solely on an accident of which state hosts the reservation where the recording was made. Worse still, the results might vary within a state depending on the tribe or even, impossibly, on the location the fixation within the reservation. Ownership of a recording made on the Warm Springs reservation in Oregon—a mandatory P.L. 280 state—would be determined by the tribe, while a recording made on the Grand Ronde reservation would be owned by whoever possesses the master recording. Ownership of a recording made on the Fort McDermot Reservation would depend on whether the recording was fixed on the Oregon or the Nevada side of the reservation. In addition to partially restoring tribes' voice in controlling their culture, applying tribal law to ownership of pre-1972 tribal recordings is the only way to ensure that the law of pre-1972 tribal recordings is predictable and fair.

III. Implications

If tribes are responsible for determining how ownership of pre-1972 recordings vests on their reservations, what are the implications for tribes or for those that have been or are making use of their recordings? Were courts to determine that tribal courts are the exclusive forum for determining ownership of pre-1972 tribal recordings, the result would likely be generally positive for tribes for two reasons.

First, tribes now have standing on their own to bring actions against users of pre-1972 tribal recordings. As the National Congress of American Indians (NCAI) and others have argued, part of the problem with pre-1972 recordings is that the performers—whom Reed and others have presumed to be the owners of the rights—were unaware that they had an ownership interest in recordings that were being exploited.[109] Because the owner of the rights is the only party with standing to bring a lawsuit, the tribes were, prior to the CPAA, powerless against the use of recordings taken by early researchers. If, as this paper contemplates, the tribe itself were the owner, then tribe would have standing to sue and could bring a more coordinated approach to solving the problem. Infringement actions that previously were either unlikely due to lack of knowledge or impossible due to lack of standing would now be possible.

Second, the mere fact that tribal law is the applicable law, regardless of how the tribal court answered the question in a given set of circumstances, would itself arguably provide a boost to tribal sovereignty, both as against the individual states and even in their relationship with the United States. If this paper's conclusions are correct, then the CPAA is unusual by, in effect, incorporating tribal law by reference. Thus, every American, including non-Indians acting outside of Indian Country, would

[109] *See* FINAL RULE REGARDING THE NONCOMMERCIAL USE EXCEPTION TO UNAUTHORIZED USES OF PRE-1972 SOUND RECORDINGS: Comments of the National Congress of American Indians, https://downloads.regulations.gov/COLC-2018-0008-0023/attachment_1.pdf.

in this admittedly small way be subject to tribal law across the country. Symbolically, and possibly practically, this seems like a step forward.

Copyright is an imperfect solution for tribes. It cannot turn back the clock or remove an offensive recording from existence.[110] However, its nature brings with it advantages as well. Copyright's potential power comes from its grant, to copyright owners, of restrictive power over *use* of works. If the harm to tribes comes primarily from offensive uses of the recordings, it is those uses—such as reproduction, performance in public, commercial distribution—over which copyright is designed to give owners of rights power.

However, if the CPAA's provisions provide some relief to tribes, it admittedly falls well short of complete relief. Anyone wishing to use the CPAA to prevent offensive uses by applying copyright in general, and the CPAA in particular, must contend with the incomplete nature of copyright protection. As discussed *supra*, the limitations on copyright form an essential part of the copyright system and at least in some cases are Constitutionally mandated. Copyright's nature as an exception to the First Amendment is easy to overlook, perhaps because it is obvious. Though courts have been forced to derive most free speech exceptions from common law or tradition, the Copyright Clause (also called the "Progress Clause") stands unique as an explicit, textual exception.[111] But that tension means that copyright's reach is limited.

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[110] Tribes seeking to block all access to a recording, or even to eliminate it entirely, might pursue recovery of the physical recordings themselves. In cases where the recording exists only in the form of a master recording or a handful of copies, this might be an effective strategy—if the tribe could recover all copies of a recording, they could, after all, dispose of or destroy those copies and effectively remove the recording from the public memory permanently. However, in many—perhaps most—cases, this is impracticable, either because the copies cannot all be found or because the recordings are in digital form and have too many copies, spread across too many servers to contain them all.

[111] U.S. Const. Art. 1, Sec. 8, Cl. 8. "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."

The Constitution, for example, authorizes Congress to provide copyright protection only for "limited times."[112] Though there are exceptions (notably for bootleg recordings),[113] generally all copyright protection eventually ends, including copyright in pre-1972 sound recordings. As discussed *supra*, this is a feature of the CPAA, not a bug: the creation of an effective public domain for sound recordings was among the provisions users' groups fought for the hardest.[114] Under the CPAA, the term of protection for pre-1972 sound recordings is based on the year of "publication," and lasts as follows:[115]

Date Published	Expires
Before Jan. 1, 1923	Jan. 1, 2022
Jan. 1, 1923 – Dec. 31, 1946	100 years after publication
Jan. 1, 1947 – Dec. 31, 1956	110 years after publication
Jan. 1, 1957 – Feb. 14, 1972	Feb. 15, 2067

The term of protection in unpublished recordings, their not having a publication date, also runs through February 15, 2067. The determination of publication status is complex[116] and beyond the scope of this paper, but many tribal recordings at issue are likely legally unpublished, in which case they would retain protection at least for another half-century. However, protection for the earliest recordings, if they were found to have been published, will already have expired under the CPAA's terms.

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[112] U.S. Const. Art. I, § 8, cl. 8. There is no such limitation on the states, but as state copyright is preempted that venue is closed to tribal copyright. Congress likely could provide much broader protection for tribal culture, with much narrower than the copyright system, but it would have to do so expressly.

[113] 17 U.S.C. § 1101; *see also* U.S. v. JEAN MARTIGNON, 492 F.3d 140, 150–151 (2nd Cir., 2007), and U.S. v. MOGHADAM, 175 F.3d 1269 (11th Cir., 1999) (upholding the constitutionality of perpetual protection on different grounds)

[114] *See* Eric J. Harbeson, The Orrin Hatch–Bob Goodlatte Music Modernization Act: A guide for sound recordings collectors (2020) at 11–15.
https://www.loc.gov/static/programs/national-recording-preservation-plan/publications-and-reports/documents/Hatch-Goodlatte-Music-Modernization-Act_Guide-for-Sound-Recording-Collectors.pdf

[115] *Id.* at 11.

[116] Though the statute does not explicitly raise it, one additional question concerns whether the recording received an "authorized" publication. A court would likely find that an unauthorized publication does not constitute publication, in which case the longer term of protection would apply.

In addition to the limited times requirement, copyright is not absolute in its scope. The Copyright Act includes numerous exceptions, one of the most significant being the doctrine of fair use, which permits uses of a work without the owner's permission for purposes "such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research."[117] As many of the uses made of tribal recordings will fall under the rubric of scholarship and research, the ability of plaintiffs to stop use of tribal recordings may be limited.[118] Analysis of the fair use doctrine in this context is beyond the scope of this paper.[119]

An additional limitation, unique to the CPAA and to pre-1972 recordings, is the "non-commercial use exception," which creates a provisional safe harbor for would-be users of pre-1972 recordings.[120] The safe harbor is only available for works that are not subject to commercial exploitation, as determined by the user's "good faith, reasonable search" to find the recording commercially.[121] Many pre-1972 tribal recordings likely are not being commercially exploited, and based on the earlier conclusions those that are likely are being exploited by a party other than its rightful owner. Though the general non-commerciality of tribal recordings would seem to open tribal recordings to non-commercial uses under this safe harbor, the exception is also defeasible due to a provision in the statute allowing a party to stop a use through a written objection with the copyright.[122] The CPAA also gives extended freedom to libraries and archives wishing to use pre-1972 sound

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[117] 17 U.S.C. § 107.

[118] One factor a court considers in making a determination of fair use is "the nature of the copyrighted work." Though traditionally that factor asks only whether the work is creative or factual and whether it is unpublished or published, a court could consider a recording's nature as a work of indigenous cultural property as a factor weighing against a finding of fair use. *See* Robert Kasunic, *Is That All There Is? Reflections on the Nature of the Second Fair Use Factor*, 31 COLUM. J.L. & ARTS 529 (2008).

[119] Reed discusses some of the strong arguments against applying fair use, and in particular interpreting the second fair use factor. *See* Reed, *supra* note 4 at 304.

[120] 17 U.S.C § 1401(c)

[121] *Id.*

[122] In my report on the CPAA for the National Recording Preservation Board I argued that this requirement was not, in fact, mandatory under the CPAA, even while I acknowledged that it is an ethical obligation of libraries and archives. Though an exploration of the question is beyond the scope of this paper, I now acknowledge that my claim in that report may not be supported by my findings here. Harbeson, *supra* note 114 at 40.

recordings, though this, too, can be prevented through a written objection filed with the Copyright Office.[123]

To the extent the CPAA brings some consistency and even simplicity in determining ownership pre-1972 tribal recordings by deferring the question to the tribes, in doing so it also injects a new layer of complication, in that it is unclear how to resolve ownership or transfer of title (if any occurred) when the tribe does not exist in the same form it did when the recording was made. More than 200 tribes in the United States do not presently have federal recognition but nonetheless existed during at least the early recording era.[124] Some recordings were likely made on reservations that were later disestablished by Congress, or were subject to allotment. Some tribes, of whom recordings were likely made, were terminated by Congress during the Termination Era. Because a chain of title would need to be shown in a CPAA action, recordings affecting these tribes and reservations would be a complicated matter.

Finally, it bears noting that tribal claims to ownership in pre-1972 sound recordings will upset previously settled expectations of reliance parties. Though the Copyright Office's report suggests an assumption that the rule Congress adopted would preserve the status quo,[125] if this paper's findings are correct there is at least one aspect in which they failed to do so. Those parties might challenge tribal ownership as unconstitutional takings under Fifth Amendment. An analysis of that argument is beyond the scope of this paper, but it would need to be considered prior to any action taken by a tribe to enforce its rights.

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[123] Harbeson, *supra* note 114 at 29.

[124] Alexa Koenig & Jonathan Stein, Federalism and the State Recognition of Native American Tribes: A Survey of State-Recognized Tribes and State Recognition Processes Across the United States, 48 SANTA CLARA L. REV. 79 (2008)

[125] FEDERAL PROTECTION FOR PRE-1972 SOUND RECORDINGS, *supra* note 23 at 148 ("Determining ownership of pre-1972 sound recordings by deferring to the ownership as of the effective date of federalization would avoid creating new questions regarding ownership but instead would preserve the *status quo*, including any disputes regarding ownership that may or may not exist at the time of enactment.")

IV. Conclusion

In sum, prior to the passage of the CPAA, tribal recordings' ownership was uncertain. Where a state had civil jurisdiction, a court might have allowed a performer whose voice was embodied in a pre-1972 tribal recording to sue under the state's laws (depending on the state), or it might even have applied tribal own laws on the basis of comity, but a defendant might equally have argued tribal recordings were exclusively federal and as such were unprotected due to the Copyright Act's explicit exclusion of pre-1972 recordings. The CPAA reversed this: it created explicit protection for pre-1972 tribal recordings and, because it retained the pre-CPAA common law ownership, defers the question of ownership to the tribal authority, most likely to the tribal common law, possibly allowing tribes to assert ownership over all such recordings that originate from their peoples.

If these conclusions are correct, they appear to have escaped the notice of both Congress and the Copyright Office. None of the legislative history for the CPAA discusses tribal recordings. The Copyright Office's report on pre-1972 sound recordings makes a passing reference to the existence of ethnographic recordings made from the Passamaquoddy, Zuni and Hopi tribes, but otherwise does not discuss tribal recordings or rights.[126] The Copyright Office did consider tribal rights during its rulemaking for the noncommercial use exception; however, though the Office did include contacting tribes as a required step in the process for establishing a recording isn't being commercially exploited, the final rule and supporting justification does not appear to contemplate tribal ownership of the recordings. Rather, the Office appears to assume that performers on a recording are the default owner, and that contacting tribes is necessary because the individual owners may not be aware that their property is being exploited.[127] The Office's apparent conclusion that establishment of tribal authority

[126] FEDERAL PROTECTION FOR PRE-1972 SOUND RECORDINGS, *supra* note 23, at 52.
[127] *Final Rule: Noncommercial Use of Pre-1972 Sound Recordings That Are Not Being Commercially Exploited,* 84 FEDERAL REGISTER 14249 (Apr. 9, 2019)

over pre-1972 tribal recordings would exceed its regulatory appears to suggest that it does not view the CPAA as establishing tribal possession as a matter of law.[128]

Similarly, tribal advocacy organizations and individuals made a similar assumption in their communications with the Office during the rulemaking process on the non-commercial use exception.[129] In its comments on the proposed rulemaking, the NCAI expressed dismay at the passage of the CPAA, arguing that in federalizing pre-1972 sound recordings the United States failed to follow its obligations under Article 31 of the United Nations Declaration on the Rights of Indigenous Peoples.[130] Profs. Reed, Anderson, and Gray, in their comments, repeated Reed's argument that, "ownership interests in pre-1972 ethnographic sound recordings are presumed to have vested in and remained with the performers who recorded them under the common-law rule."[131] Contemporaneous tribe-oriented criticism of the law also decried the law's further colonization of tribal property.[132] Perhaps the drafters of the CPAA also operated under the assumption that ownership rights vested in the performers, and perhaps they did not intend to partially subject pre-1972 tribal recordings to tribal law. But even if Congress's intent was to further encroach on tribal cultural property (it seems more likely they failed to consider it), they appear to have done the opposite.

Copyright, it should be said, is not intended as a means to accomplish what is essentially a form of censorship, and Congress does not normally encourage its use in this way. Courts have consistently interpreted the U.S. Constitution's grant of power to Congress "to promote the progress of science and the useful arts," to include the Framers' intent that the purpose of copyright is to

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[128] *Id.* ("The Office must also be careful, however, not to exceed its regulatory authority, by, for example, . . . declaring that tribal law governs Pre-1972 Sound Recordings of American Indian and Alaska Native tribes[.]").
[129] Comments of National Congress of American Indians, *supra* note 109.
[130] *Id.*
[131] FINAL RULE REGARDING THE NONCOMMERCIAL USE EXCEPTION TO UNAUTHORIZED USES OF PRE-1972 SOUND RECORDINGS: Comments of Drs. Trevor G. Reed, Jane Anderson, and Robin Gray, https://downloads.regulations.gov/COLC-2018-0008-0024/attachment_1.pdf.
[132] *See, e.g.*, Graham Lee Brewer, Is a new copyright law a 'colonization of knowledge'?, HIGH COUNTRY NEWS (March 5, 2019)

encourage the production of creative work, not to stifle it.[133] The Framers of the Constitution disliked monopolies, but recognized their necessity as a means to an end, namely the public's benefit by having access to—and eventually ownership of—the creative works produced.[134] The Constitution's grant of monopoly powers only for "limited times" reflects that purpose.[135]

However, as Reed and others have correctly noted, Native Americans never signed on to the Constitution's utilitarian view of intellectual property.[136] Congress has the power to provide more robust framework for protection of tribal cultural property. Their power includes extension of existing intellectual property laws, creation of *sui generis* laws such as the CPAA, or laws that follow a more direct approach such as the Native American Graves Protection and Repatriation Act (NAGPRA). Congress, it can also be argued, should address the issue of stolen culture directly. Unintentional loopholes in law are a sign of a bad law.

However, in the meantime tribes, in all likelihood, own the recordings made on their lands. The CPAA, rather than being a further trampling on the rights of Native Americans, may in fact prove to represent a positive development, allowing them—even if in a small way—to reclaim their stolen culture.

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[133] *See* CAMPBELL V. ACUFF-ROSE MUSIC, INC., 510 U.S. 569, 575 (1994)

[134] *See, e.g.,* GOLAN V. HOLDER, 565 U.S. 302, 345 (2012) (Breyer, J., diss.) ("This 'exclusive Right' allows its holder to charge a fee to those who wish to use a copyrighted work, and the ability to charge that fee encourages the production of new material. In this sense, a copyright is, in Macaulay's words, a 'tax on readers for the purpose of giving a bounty to writers'—a bounty designed to encourage new production.")

[135] *See, e.g.,* ELDRED V. ASHCROFT, 537 U.S. 186, 187 (2003)

[136] *See* Reed, *supra* (passim); *see also* Trevor Reed, "Indigenous Dignity and the Right to Be Forgotten," 46 B.Y.U. L. REV. 1119 (2021) (passim).

Appendix—comparison of state sound recordings laws and tribal jurisdiction[137]

	Ownership theory			State jurisdiction		
	Sounds	Physical Object	Right to record	Jurisdiction	State authority?	Conferred by
Alabama		Yes	Yes	General	No	
Alaska		Yes		General	Yes	Mandatory P.L. 280
				Metlakatla Indian Tribe	No	
Arizona		Yes	Yes	General	No	
California		Yes		General	Yes	Mandatory P.L. 280
				Hoopa Valley Tribe	Federal Concurrent	
Colorado		Yes		General	No	
				Southern Ute Tribe	Partial	Optional P.L. 280
Connecticut	Yes			General	No	
				Mashantucket Pequot	Yes	P.L. 98-134
				Mohegan Nation of Connecticut	Yes	P.L. 98-134
Florida		Yes	Yes	General	Yes	Optional P.L. 280
Idaho		Yes		General	Partial	Optional P.L. 280
Louisiana		Yes		General	No	
Maine	Yes			General	Yes	25 U.S.C. 1721, P.L. 102-171
Massachusetts	Yes			General	No	
				Mashpee Wampanoag Tribe	No	
				Wampanoag Tribe of Gay Head	Yes	P.L. 100-95
Michigan		Yes		General	No	
Minnesota	Yes			General	Yes	Mandatory P.L. 280
				Red Lake	No	
				Bois Forte	No—retroceded	
				White Earth Ojibwe	Concurrent	
				Mille Lacs Band of Ojibwe	Concurrent	
Mississippi	Yes			General	No	
Montana		Yes		General	No	
				Salish/Kootenai	Partial (felony only)	
Nebraska	Yes			General	Yes	Mandatory P.L. 280
				Santee Sioux Tribe	No	
				Winnebago Tribe	Civil only	
				Omaha Tribe	Traffic only	
Nevada	Yes			General	No	
New Mexico		Yes		General	No	
New York		Yes	Yes	General	Yes	25 U.S.C. §§ 232, 233
North Carolina		Yes	Yes	General	No	
North Dakota		Yes		General	No	
				Spirit Lake Tribe	Criminal only	60 Stat. 229
Oklahoma	Yes			General	No	
Oregon		Yes		General	Yes	Mandatory P.L. 280
				Warm Springs Tribe	No	
				Umatilla	No—retroceded	
				Burns Paiute	No—retroceded	
Rhode Island	Yes		Yes	General	Yes	P.L. 95-395
South Carolina		Yes		General	Yes	P.L. 103-116

[137] Source: Carole Goldberg, Tribal Jurisdictional Status Analysis, TRIBAL COURT CLEARINGHOUSE (2010), https://www.tribal-institute.org/lists/tjsa.htm

	Ownership theory			State jurisdiction		
	Sounds	Physical Object	Right to record	Jurisdiction	State authority?	Conferred by
South Dakota		Yes		General	No	
Texas		Yes		General	Yes	P.L. 97-429, P.L. 100-89
Utah		Yes		General	No	
				Paiute Indian Tribe	Yes	P.L. 96-227
Washington		Yes		General	Partial	Optional P.L. 280
				Tulalip	Partial	
				Chehalis	Partial	
				Quileute	Partial	
				Swinomish	Partial	
				Colville	Partial	
				Quinault	Partial	
				Suquamish/Port Madison	Partial	
Wisconsin		Yes		General	Yes	Mandatory P.L. 280
				Menominee	No—retroceded	
Wyoming		Yes		General	No	