

THE DEMAND FOR OUT-OF-PRINT WORKS AND THEIR (UN)AVAILABILITY IN ALTERNATIVE MARKETS

Paul J. Heald*

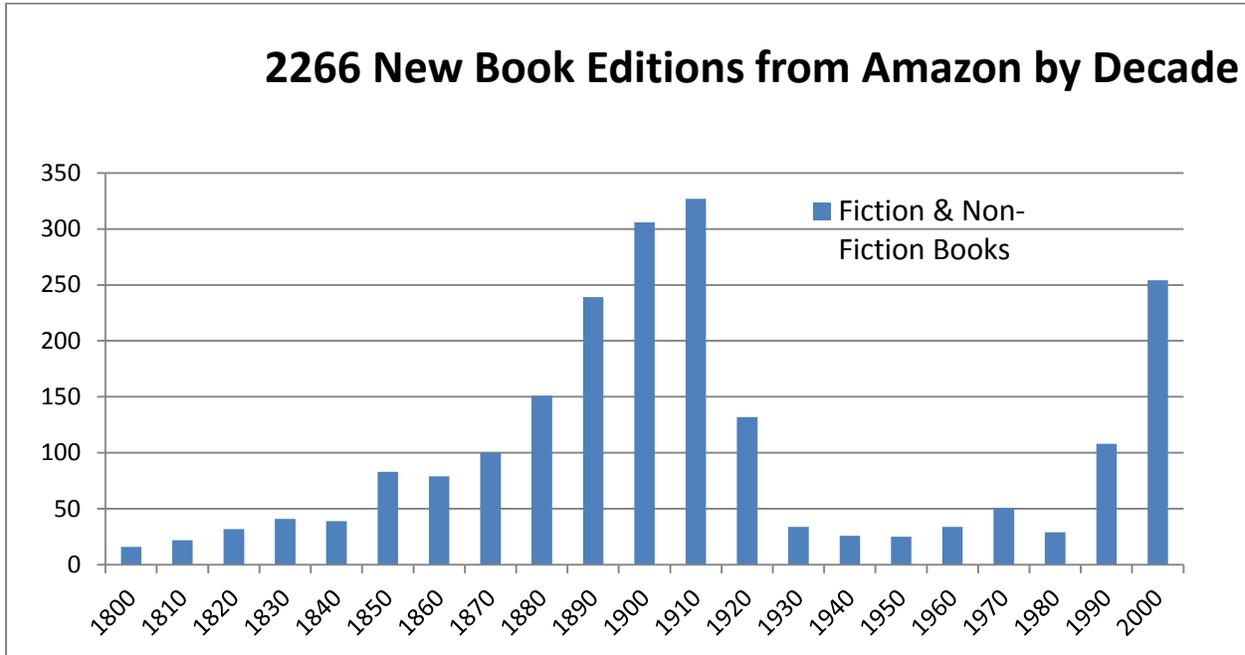
Prior studies demonstrate the shocking unavailability of most books published in the 20th Century, prompting The Atlantic Monthly headline: How Copyright Made Mid-Century Books Vanish. The unavailability of new editions of older works would be less problematic, however, if little consumer demand existed for those works. In addition, the lack of new editions would be much less troubling if the works were easily available in alternative forms or markets. Newly collected data provides evidence of the demand for out-of-print books and then charts the availability of out-of-print works in digital form (eBooks and .mp3), in used book stores, and in public libraries. The situation with books remains dismal, although music publishers on iTunes seem to be doing a much better job of digitizing older works and making them available than do book publishers. Some theories for this discrepancy are offered.

Figure 1 below, taken from a prior study, suggests strongly that copyright law has had a negative effect on the availability of many works published in the 20th Century.¹ It shows the distribution of a random sample of more than 2000 new books for sale by Amazon.com. The striking uptick in the availability of books published *before* 1923 is the result of legal rules that place all works published before that date in the public domain.

**Herbert Smith Fellow & Affiliated Lecturer, Cambridge University; Professor of Law & Raymond Guy James Faculty Scholar, University of Illinois; Professorial Fellow, Bournemouth University (UK), heald@illinois.edu. Thanks to my fabulous research assistants: Anne Lewis, Frank Madden, Laura Meli, Marissa Meli, Carolina Van Moursel, Carlos Ruiz, Jarrett Szczesny, Marc Tan, Dacheng Xie, Xiaoren Xie, Xi Zhao, and for comments provided by Jill Crandall, Greg Mandel, Jason Mazzone, Joe Miller, Arden Rowell, Chris Sprigman, Christian Turner, Tom Ulen, and participants at the 2013 Intellectual Property Scholars Conference, the 2013 Conference on Empirical Legal Studies, and the 2013 conference of the Society for Economic Research in Copyright Issues, especially Clive Bruton. The statistical analysis was performed by PeiBei Shi of the University of Illinois Statistical Consulting Office.

¹ See Paul J. Heald, *How Copyright Makes Books and Music Disappear (and How Secondary Liability Rules Help Resurrect Old Songs)*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2290181. See also, Rebecca Rosen, *The Hole in Our Collective Memory: How Copyright Made Mid-Century Books Vanish*, <http://www.theatlantic.com/technology/archive/2013/07/the-hole-in-our-collective-memory-how-copyright-made-mid-century-books-vanish/278209/>.

Figure 1

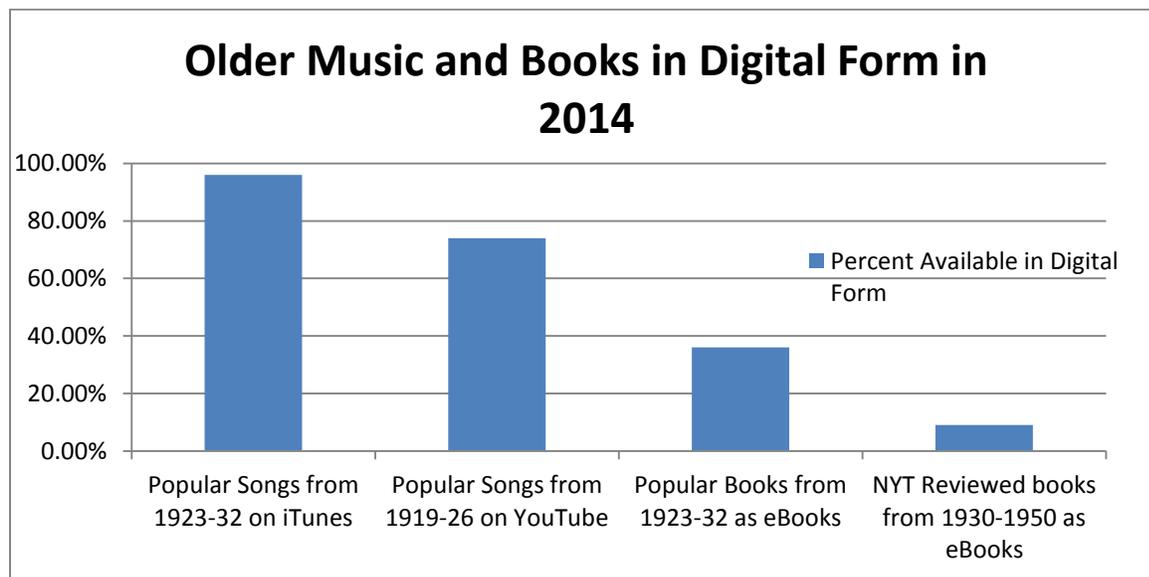


NOTE: Each edition was identified by query with a randomly chosen ISBN number. Since some book titles have multiple ISBN numbers, approximately 50 duplicate titles were excluded. Editions are ordered by decade based on the year of original publication of the underlying work. For example, a 2005 edition of Tom Sawyer is included in the decade of the 1870's, as its initial publication date was 1876.

Figure 1 shows that some publishers are willing to issue new editions of pre-1923 (public domain) books and suggests that they would be willing to offer new editions of books first published in the post-1923 era; however, subsisting copyrights in those works reduces the likelihood of their re-appearance. In other words, due to the extreme length of copyright, many books are likely to stay out of print. This paper examines the demand for out-of-print books and music and analyzes data from digital and used goods markets that could potentially satisfy that demand by providing equivalent substitutes. Finally, Part III offers several reasons why in the

book publishing market--unlike the music publishing market--copyright still seems to stymie the reappearance of old books, as evidenced in the graph below:

Figure 2



I. THE DEMAND FOR OUT-OF-PRINT WORKS

If consumer demand for the millions² of out-of-print works were zero, then the story told by Figure 1 would be quite banal. If publishers cease production when demand evaporates, then the graph merely depicts the correlation between the age of a work and its value. However, Figure 1 itself suggests that rights holders do not perfectly satisfy demand for their works. Availability spikes for pre-1923 works, suggesting that some pent-up demand exists for older works, at least when cheap and efficient print-on-demand publishers can offer them without having to negotiate for the right to copy. Before 1998, when a new set of out-of-print titles fell into the public domain every year, the more valuable ones were quickly picked up and made

² A search for out-of-prints books on www.booksinprint.com on January 23, 2014, returned 3,297,267 editions. This is almost undoubtedly a vast undercount as Books in Print relies on data from publishers willing to provide information on their titles.

available.³ This opportunistic business model suggests some rents were being left uncollected, unless firms publishing public domain works consistently operate at a loss. Nonetheless, calculating precisely the demand for books and music is extremely difficult. Publishers consider sales data to be confidential and are unwilling to share it with researchers, making estimates of the size of the unmet demand for out-of-print works speculative. Part III will suggest why copyright owners do not meet demand.

Calculating demand is tricky, but one recent paper takes a random sample of out-of-print books available in Kindle format and compares them to a sample of similar out-of-print books that are unavailable as eBooks.⁴ The study then analyzes sales data of the out-of-print books available in Kindle versions and calculates the value of the out-of-print book.⁵ Using a Bayesian Propensity Score Matching technique, the authors estimate that making almost 2.7 million out-of-print books available as eBooks would generate \$740 million in revenue and \$860 million in consumer surplus.⁶

One might also consider the used book market as an indicator of consumer demand for older works. Figure 3 below plots the availability of editions by the decade of their publication at the world's largest on-line marketplace for used books: Abebooks.com. According to the Online Booksellers Association, over 13,500 used book dealers sell on Abebooks, which was

³ See Paul J. Heald, *Property Rights and the Efficient Exploitation of Copyrighted Works: An Empirical Analysis of Copyrighted and Public Domain Fiction Bestsellers*, 92 MINN. L. REV. 1031, 1044-45 (2008) (studying 334 books and finding that after 2001 significantly more of the public domain books were in print and by significantly more publishers).

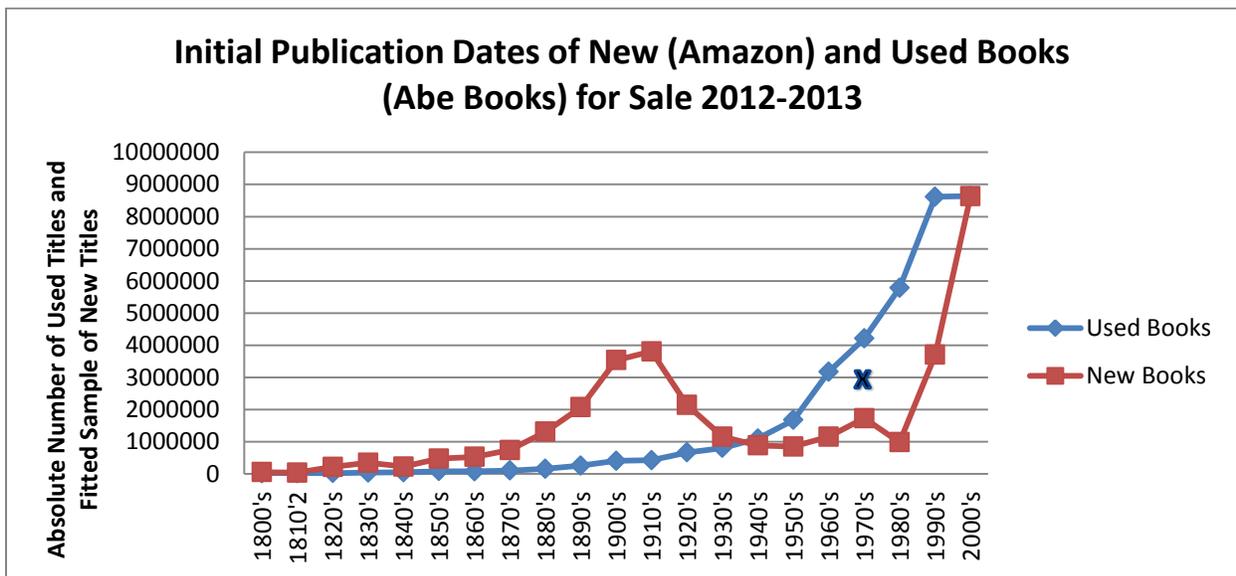
⁴ See Michael D. Smith, Rahul Telang, and Yi Zhang, *Analysis of the Potential Market for Out-of-Print eBooks*, available at <http://ssrn.com/abstract=2141422> (posted August 2012).

⁵ *Id.* at 9-14.

⁶ *Id.* at 1.

acquired by Amazon in 2009.⁷ Used booksellers typically buy books in order to sell them at a profit, and their inventories are indicative of their purchasing decisions and their belief that consumer demand exists for the volumes that they offer. Figure 3 below depicts all the volumes of all the editions available from Abebooks.com for the years 1800-2010. Not surprisingly, the number of volumes available from each decade decreases as the books age, but it does not drop nearly so steeply as the number of new books available on Amazon over the same time period. The figure below fits and overlays the downward-sloping curves for new and used books.

Figure 3



NOTE: The used book curve indicates the absolute number of used books for sale in 2013 by their publication years (as offered by Abebooks) including all sellers listing on the web site. The new book curve estimates the percent of new books for sale on Amazon by decade of initial publication. The new book curve is fitted to the graph using a multiplier generated by dividing the number of used books from the 2000's offered by Abebooks by number of new books from 2000's in the Amazon sample.

⁷ See Chris Volk, *The Pros and Cons of Abebooks.com for Buyers and Sellers*, available at [http://www.ioba.org/newsletter/archive/8\(2\)/toolbox2.php](http://www.ioba.org/newsletter/archive/8(2)/toolbox2.php) (IOBA Standard, the on-line journal of the Independent On-Line Booksellers Association).

The downward-sloping curve depicting used books for sale over time is not nearly so steep as the curve depicting new books for sale over the same period. As a proxy for demand, the used book curve shows that demand is sensitive to the age of the book, as one might expect, but not nearly so sensitive as with new books. The gap between the two curves, indicated by x , may suggest a demand for works that is being satisfied by the used book sellers that is not being satisfied by publishers. Although the size of that demand cannot be quantified in real terms, it seems quite clear that a continuing demand for older works exists that is not being satisfied by publishers of new editions. Interestingly, at least one study suggests that the market for used books does not suppress the market for new editions of the same books because “used books are poor substitutes for new books for most of Amazon’s customers.”⁸ The study finds that cross-price elasticity between the markets is only .088, suggesting strongly that the existence of a used book market does not discourage publishers from reprinting older books.⁹

Unfortunately, evidence of demand for out-of-print music is more difficult to document. No equivalent of the Books-in-Print database¹⁰ exists for music, and there is no megamarketplace like Abebooks for used sheet music. Sales and licensing data are considered confidential by music publishers, and ASCAP refused to provide the author with airtime data for famous old songs. Moreover, due to amendments to U.S. copyright law, no sound recordings will fall into the public domain until 2067,¹¹ which makes comparing sets of copyrighted and uncopyrighted recordings virtually impossible. Nonetheless, data presented below in Part II.D demonstrates a continuing demand for 385 bestselling songs from 1919-26. More than 70% of

⁸ See Anindya Ghose, Michael D. Smith, & Rahul Telang, *Internet Exchanges for Used Books: An Empirical Analysis of Product Cannibalization and Welfare Impact*, 17 INFORMATION SYSTEMS RESEARCH 3 (2006).

⁹ *Id.*

¹⁰ www.booksinprint.com (providing publication information on millions of in-print and out-of-print books).

¹¹ See 17 U.S.C. § 301(c) (2006) (extending protection to pre-1972 sound recordings to the year 2067).

them have been uploaded to YouTube with an average number of views of approximately 75,000 per song.¹²

II. *Alternative Markets for Out-of-Print Works*

If works that are out-of-print and unavailable in new copies can be easily obtained in other forms elsewhere, then the phenomenon of “missing books” on Amazon would hardly be a cause for alarm.

A. The Market for Out-Of-Print Books in eBook Format

The ease and low cost of digitizing older texts suggests that many out-of-print books might reappear exclusively as eBooks, thereby satisfying latent demand and solving any availability problem. In fact, data on bestselling public domain books from 1913-22 show that eBook publication of old texts is attractive to many publishers. In 2014, 94% of 165 public domain bestsellers from 1913-22 were available in eBook format, up from 48% in 2006.¹³ An aggressive and competitive market for publishing public domain eBooks is currently thriving.

Data on the eBook availability of copyrighted bestsellers from the same era tells a different story. Of 167 bestsellers from 1923-32 still under copyright, only 27% (45/167) had been made available as eBooks by 2014. And of those 45 copyrighted eBooks, only one was out-of-print in hard copy format. Even in the eBook market, copyright status seems to stand as a significant impediment to satisfying demand. In fact, the availability gap between public domain and copyrighted bestsellers is even larger in the eBook market than in the in-print market. An earlier study reported that as of 2006, 98% of the 165 bestsellers from 1913-22 were in print,

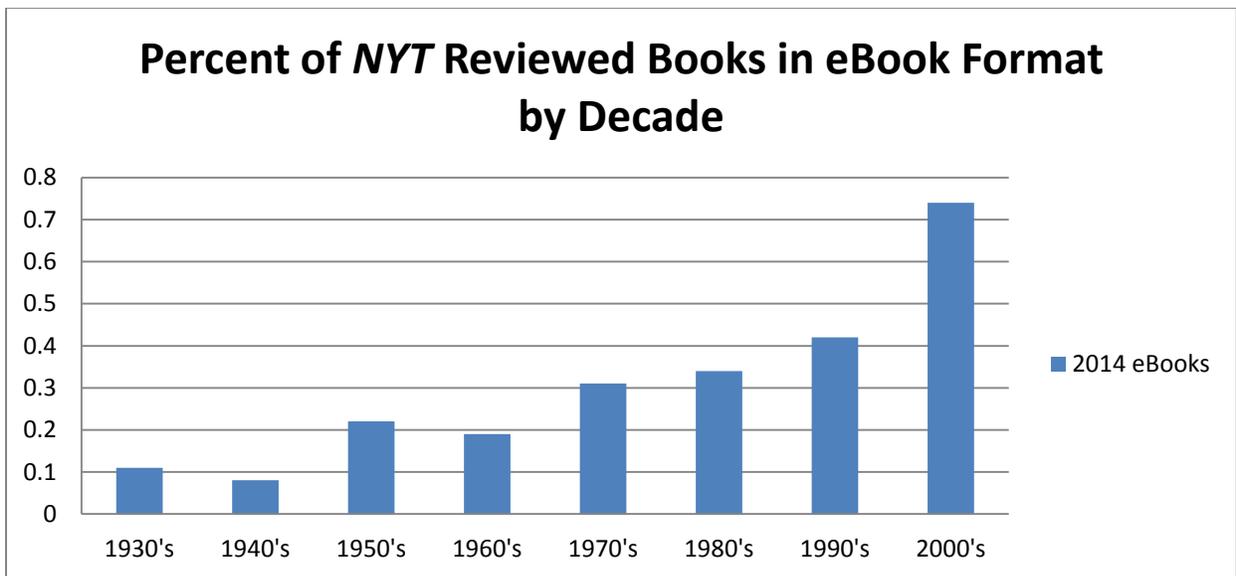
¹² See *infra* section II.D.3.

¹³ This data updates figures reported in Heald, *supra* note 16.

while 78% of the 167 copyrighted bestsellers were in print, a significantly smaller difference than the present eBook gap.¹⁴

Since the eBook data from 1923-32 bestsellers is based on the market for less than 200 works of fiction published over a 10-year period, a further study was conducted of a sample of 950 fiction and non-fiction books reviewed in the *New York Times Book Review (NYTBR)* from 1930-2009.¹⁵ Of most interest, perhaps, is the number of out-of-print books from the sample that are now available in eBook form. Of the 292 *NYTBR* books (31%) that are currently out-of-print, only 26 (9%) were available for purchase as an eBook in January 2014.¹⁶ Figure 4 below charts the availability of all of the *NYTBR* titles in eBook format.

Figure 4



NOTE: The chart uses the date each book was reviewed, not its publication date; however, the *NYTBR* typically reviews books close to their publication dates. The percent recorded is the number books with

¹⁴ See Heald, *supra* note 3 at 1040-41.

¹⁵ The sample consists of the first book reviewed in the *New York Times Book Review* in the first issue of each month. Since the University of Illinois Library does not have an absolutely complete collection, the first book reviewed in the second or third issue of a particular month was sometimes used. In some cases, entire months were missing, which reduced the total sample to 950 (instead of 960).

¹⁶ Print status and eBook availability data were collected at both at booksinprint.com and amazon.com.

eBook versions are available on Amazon or Books-In-Print divided by the number of reviewed books sampled from each decade (approximately 120).

Of course, both the list of bestsellers from 1923-32 and the *NYTBR* sample are skewed toward more prominent books, but the higher potential demand for those works makes their absence in the eBook market all the more striking and reemphasizes the negative effect of copyright on availability. In the absence of copyright, surely one could find a publisher providing eBook versions of popular classics like *The Gulag Archipelago*, *Gentlemen Prefer Blondes*, and *The Magnificent Obsession*.

B. The Market for Used Books

The sample of books reviewed in the *NYTBR* from 1930-2010 generated a list of 292 out-of-print books. This list of out-of-print books created the opportunity to learn whether the used book market might supply a significant number of replacement volumes. All 292 titles were queried on the world's two largest marketplaces for used books, Abebooks and Amazon, and the number of volumes available from each seller was recorded.¹⁷ If reasonably priced used editions of out-of-print books are easy to obtain, then any negative effect of copyright on the new book market might be partially alleviated.

Given that Abebooks and Amazon contain the inventory of at least 13,500 used book dealers, a decent snapshot of the market was obtained. The out-of-print *NYTBR* titles from the 1930's, 1940's and 1960's had approximately enough used volumes available to satisfy the needs of a single classroom: 31, 32, and 39 volumes on average available per title. Titles from the 1950's averaged 74 available volumes, while titles from the 1970's to 2000's fared rather better, with 136, 190, 148, and 171 volumes available on average. The casual reader or researcher

¹⁷ Since most large used book sellers offer their books on both Amazon and Abebooks (owned by Amazon), the largest number of volumes offered by either was used.

seems to have good access to out-of-print *NYTBR* titles in a used book format, although adequate numbers of older titles do not appear sufficient to satisfy potential classroom needs in many cases.

Optimism about the market for used books, however, should be tempered for three reasons. First, research on price elasticity by Ghose, Smith, and Telang (2006) found that “used books are poor substitutes for new books for most of Amazon customers.”¹⁸ Although one might doubt this conclusion in some book sub-markets, for example, university textbooks, their paper suggests that the market for out-of-print books might not be wholly satisfied by used book substitutes. Second, the distribution of used volumes on Abebooks demonstrates that substituting used books for new in the classroom situation is unwieldy, since most sellers only carry one volume. For example, Abebooks offers more than 388 volumes of Willa Cather’s *Shadows on the Rock*, but those volumes are held by 366 different sellers. Buying in bulk is therefore clumsy.

Finally, and most importantly, the sample of *NYTBR* books is significantly skewed toward prominent and culturally important publications, books that are more likely to be collected by used book sellers. One measure of the prominence of the titles in the sample can be seen in the holdings of the Chicago Public Library system. Let’s consider only the oldest 470 titles reviewed between 1930-1970. During that period, more than 2.14 million books were registered with the copyright office, a rough proxy for the number of books published from 1930-1970. The Chicago Public Library system shows approximately 160,000 books (7%) in its collection from the same 40-year period. Yet, of the 950 *NYTBR* books published from 1930-1970, more than 58% are contained in the library holdings. The *NYTBR* books are clearly more prominent than the average book published at the same time. More research needs to be done on

¹⁸ See *supra* note 8 at 3.

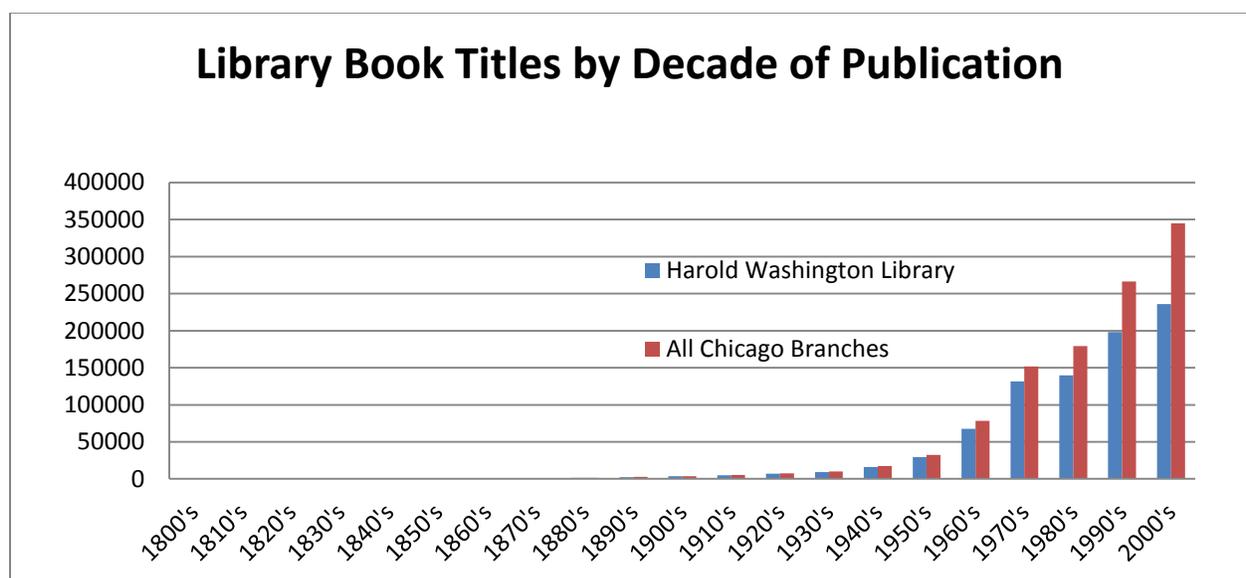
the availability of more typical and obscure books from the mid-twentieth century before concluding that the used book market fully satisfies the demand for older books.

C. Public Libraries

Googlebooks, operating without the constraint of copyright, has made millions of books published before 1923 available for free download. Given the ready access to digital versions of pre-1923 books in the United States, it would be difficult to conclude that digital public domain books are suffering from an availability crisis, although these .pdf versions are not as readable or as well-formatted as an eBook or an in-print edition.

Public libraries cannot make copyrighted works freely available in digital form, but they do maintain an important reservoir of physical works. Figure 5 below suggests that one major public library, the Chicago Library System, makes some books available that are not offered in new copies on Amazon. Although the number of volumes from each decade declines steadily over time, the drop is not nearly so precipitous as in Figure 1, suggested that books disappear from the Amazon bookshelf before they disappear from a large metropolitan library.

Figure 5



NOTE: Total Chicago Public Library system holdings and total holdings at the largest downtown branch were searched by decade of book publication date (as reported by the library). The library search engine reports a 1995 edition of an 1895 book as published in 1995, which skews the curve toward newer books.

Despite the availability of many titles, the holdings still constitute a relatively small percentage of the books published in each decade. For example, the 79 branches of the Chicago Library system offer only 33,000 titles of the approximately 500,000 published in 1950's.¹⁹

Of most interest may be the number of out-of-print books that are preserved for the public in libraries. The Chicago library system does an imperfect job of collecting even the more prominent titles from the twentieth century. Of the 292 out-of-print books in the *NYTBR* sample, only 55% may be obtained from one of Chicago's libraries. The availability rate of those books varies significantly by decade: 1930's (35%), 1940's (29%), 1950's (57%), 1960's (30%), 1970's (62%), 1980's (78%), 1990's (82%), 2000's (79%).

D. Digital Music and YouTube

Data from Brooks (2005) suggested that many older musical titles were missing in the markets for CD's and digital music downloads.²⁰ He found that only 14 percent of famous historical recordings from 1890-1964 had been digitized by their owners (22 percent had been digitized by others, almost certainly without authorization).²¹ This suggested that looking for old tunes from that era on iTunes or on CD's might be futile; however, testing whether Brooks' findings hold true in 2014 is difficult. The Amazon advanced search function for music does not

¹⁹ More books, however, originally published 1950's may be available. The library web site search engine reports publication date of the edition it holds, not the original publication date of the title, so a book from 1952 that was reprinted in 1962 is charted above in the decade of the 1960's. Of course, some the books currently listed in the decade of the 1950's would have been 1940's reprints, and so on. This cascading effect undoubtedly skews the overall curve upward somewhat.

²⁰ See TIM BROOKS, NAT'L RECORDING PRES. BD., LIBRARY OF CONG., SURVEY OF REISSUES OF U.S. RECORDINGS 7-8 & 7 tbl. 4 (2005) (demonstrating that copyright owners had made only an average of 14% of popular recordings from 1890 to 1964 available on CD's, while non-owners had made 22% of them available to the public on CD's).

²¹ *Id.*

allow searching by the author of a musical composition, only by title and artist. In addition, searching by title does not permit the use of quotation marks to tie words together. So, searching for the 1926 hit “Yankee Rose” returns 27 results that contain the words “yankee” and “rose” somewhere on the page, with apparently no results containing “yankee rose” conjoined.

The search function on iTunes, the world’s most important marketplace for digital music, is less researcher- and consumer-friendly. The current version of iTunes completely lacks an advanced search function, so it’s impossible to limit a search to title, artist, or composer. For example, a search for the 1926 hit “Yankee Rose” returns 40 hits, topped by several versions by David Lee Roth of what looks to be a rock tune from the ‘80’s.²² One of the hits does identify an album entitled “Retro-Specht (1925-31),” which likely contains the 1926 song by Holden and Frankel, but without access to composer information, one can only make an educated guess. Searching becomes impossible for songs with more common titles, as with other hits from 1926 entitled “Horses,” “Babyface,” “Lucky Day,” “Mississippi,” or “Valentine.” Finally, although the iTunes API allows somewhat greater precision in searching, the absence of an ISBN-like system for identifying music makes generating a truly random sample of what is on the iTunes “shelf” extremely difficult.

Nonetheless, one can get an idea of the extent of iTunes holdings by searching only the titles of older songs that have uniquely worded titles. A sample search of unique sounding titles in the iTunes database suggests that music publishers, unlike book publishers, have done a comprehensive job of digitizing their back catalogs since the 2005 Books report. Using a database of popular songs from 1913-32 from in a previous study,²³ five songs were selected alphabetically from the end of the list for each year which had long and probably unique titles

²² See [http://en.wikipedia.org/wiki/Yankee_Rose_\(song\)](http://en.wikipedia.org/wiki/Yankee_Rose_(song)).

²³ See Heald, *supra* note 3.

(for example, “Where Did Robinson Crusoe Go with Friday on Saturday Night?” (1916) and “When Yankee Doodle Learns to Parlez-Vous Francais” (1917)). Of those 100 obscure old hits, 84 were available on iTunes as song downloads, most of them with recordings from multiple artists.²⁴ As opposed to books, the digital revolution seems to be ameliorating the problem of missing older songs (at least for those that were among top-selling 60 or 70 in a particular year). The sampled songs are listed in Appendix A.

More evidence of increased availability can be found on web sites like YouTube, where individuals with copies of musical recordings can upload them for free without rendering the website liable.²⁵ Under either the Digital Millennium Copyright Act safe harbor provisions²⁶ or analogous common law rules,²⁷ YouTube appears to be neither directly²⁸ nor secondarily²⁹ liable

²⁴ See Appendix B for a list of the songs and their iTunes availability.

²⁵ See *Viacom Int’l Inc. v. YouTube, Inc.*, No. 07 Civ. 2103, 2013 WL 1689071 (S.D.N.Y. Apr. 18, 2013) (granting Google summary judgment in lawsuit brought by Viacom suing YouTube for hosting infringing uploads). Although the Viacom litigation is still on appeal, much academic commentary has concluded that YouTube will prevail in cases where it lacks actual knowledge that uploaded material is infringing. Edward Lee, *Decoding the DMCA Safe Harbors*, 32 COL.-VLA 233 (2012); Jordan Sundell, *Tempting the Sword of Damocles: Reimagining the Copyright/Dmca Framework in a UGC World*, 12 MINN. J.L. SCI. & TECH. 335, 337 (2011); Jennifer M. Urban & Laura Quilter, *Efficient Process or “Chilling Effects”?* *Takedown Notices Under Section 512 of the Digital Millennium Copyright Act*, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 621 (2006); Andrey Spektor, *The Viacom Lawsuit: Time to Turn Youtube Off?*, 91 J. PAT. & TRADEMARK OFF. SOC’Y 286, 290-91 (2009).

²⁶ See 17 U.S.C. § 512(c)(1) (limiting liability to injunctive and equitable relief unless the service provider has actual or constructive knowledge, derives financial benefit, or does not remove infringing material). Most cases applying the DMCA have found Internet service providers in positions analogous to YouTube to qualify for the DMCA safe harbor. See *Perfect 10, Inc. v. CCBill, LLC*, 488 F.3d 1102, 1114 (9th Cir. 2007); *UMG Recordings, Inc. v. Veoh Networks, Inc. (UMG I)*, 620 F. Supp. 2d 1081, 1088 (C.D. Cal. 2008); *Io Group, Inc. v. Veoh Networks, Inc.*, 586 F. Supp. 2d 1132, 1148 (N.D. Cal. 2008); *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1110-11 (W.D. Wash. 2004). See also *Viacom Int’l Inc. v. YouTube, Inc.*, No. 07 Civ. 2103, 2013 WL 1689071 (S.D.N.Y. Apr. 18, 2013) (“But the governing principle must remain clear: knowledge of the prevalence of infringing activity, and welcoming it, does not itself forfeit the safe harbor. To forfeit that, the provider must influence or participate in the infringement.”).

²⁷ For a discussion of the common law approach to liability for on-line platforms, see Alfred Yen, *Third-Party Copyright Liability After Grokster*, 91 MINN. L. REV. 184 (2006); see also Brett White, *Viacom v. Youtube: a Proving Ground for DMCA Safe Harbors Against Secondary Liability*, 24 ST. JOHN’S J. LEGAL COMMENT. 811, 814-21 (discussing common law safe harbors as applied to YouTube).

for infringement until it receives notice from a complaining copyright owner.³⁰ This creates a potential market for older musical works that remain available to consumers if the copyright owner is willing to monetize the upload or otherwise tolerates the infringement.

In order to measure whether YouTube functions as an alternative market for old songs and to measure the possible effect of copyright law on availability within that market, a list of 385 hit songs from 1919-1926 was identified from prior research and each song was queried on YouTube. Roughly half of the compositions (1919-22) are in the public domain, and roughly half (1923-26) are not. Seventy percent of the public domain compositions had songs on YouTube while 77% of the copyrighted compositions from 1923-26 had songs on YouTube. The public domain compositions averaged 9.8 uploaded songs, and the copyrighted compositions averaged 14 uploads. Copyright status seems to provide little impediment to the availability of these 385 old songs on YouTube. One point of caution: Attributing the increased availability of songs from the period 1923-26 to their copyright status is almost certainly premature. Previous data had suggested that songs on the more recent side of the 1923 divide were intrinsically more popular.³¹ Indeed, the songs from the period 1923-26 averaged 112,000 total views, while the

²⁸ See *Cartoon Network, LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008) (finding cable company not liable for making system available for customers to copy programs remotely on its servers); *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, 907 F. Supp 1361 (1995) (finding on-line platform that provided open storage for uploaded material was not directly liable for infringement unless it committed a voluntary act beyond merely making space available); Andrey Spektor, *The Viacom Lawsuit: Time To Turn Youtube Off?*, 91 J. PAT. & TRADEMARK OFF. SOC'Y 286, 290-91 (2009) (no direct infringement by YouTube).

²⁹ Since most cases hold that on-line platforms like YouTube qualify for DMCA safe harbor provisions, the application of other secondary liability doctrines like contributory liability and vicarious liability remains underdeveloped. Commentators have made persuasive arguments that YouTube lacks the requisite mental state and control over the infringer to be held liable under historical principles of secondary liability. See Yen, *supra* note 97; see also White, *supra* note 97, at 811, 814-21 (discussing common law safe harbors as applied to YouTube).

³⁰ Since liability requires actual knowledge, it is possible that such knowledge could come from a source other than the copyright owner (e.g., YouTube's own Content ID program).

³¹ See Paul J. Heald, *Bestselling Musical Compositions (1913-32) and Their Use in Cinema (1968-2008)*, 6 REV. ECON. RES. ON COPYRIGHT ISSUES 31, 37 (2009) (studying 1294 popular songs from 1913 to 1932

songs from 1919-22 averaged only 39,000 total views. Differential popularity best explains why somewhat more songs from the copyrighted set have a YouTube presence. In the YouTube market, copyright status may simply not matter, at least for formerly popular songs of more than a certain age.

In sum, between iTunes and YouTube, old music--at least hits from the past--seems to be quite readily available to consumers. However, as noted above, the present difficulty of taking a random sample of songs from iTunes and analyzing them by date of initial publication makes it impossible to know whether the availability curve for music in general suffers significantly from the missing works phenomenon.

III. IMPEDIMENTS TO AVAILABILITY

Given iTunes and YouTube data, it appears that book publishers are not making their back catalogs as available as are music publishers. As already noted, only 27% of bestselling books from 1923-32 have been published as eBooks,³² while 84% of bestselling music from the same era can be bought in digital form on iTunes. This paper cannot offer a complete investigation of the differences in the music and book-publishing industries, but several explanations for the difference merit consideration.

A. Print Publishing Business Models

Printing physical books is costly, and until a publisher adopts a print-on-demand format, it will be willing to incur the expense of printing and storing books only if it foresees a pre-set minimum demand for the edition. One recent estimate suggests that publishing business models

as they appeared in films released from 1968-2008 and finding that while songs from 1913-32 were all under copyright, the songs from 1923-32 were significantly more likely to appear in movie soundtracks.).

³² See *supra* note 14 and accompanying text.

require a residual demand of 500-1000 books in order to justify keeping a book in print.³³ Such minimums render many older books ineligible for reprinting. Even when sufficient demand is foreseen, a 1979 change in tax law by the Court in *Thor Power Tool v. Commissioner*³⁴ provided additional motivation for keeping inventory in book warehouses to a minimum. The decision changed the rules for writing down business inventory and required publishers to assign for tax purposes the full sales price on all their books, regardless of the rate of present sales or prospects for future full-price sales. According to one commentator, “*Thor Power* eliminated a tax dodge, and thereby made it more expensive for publishers to carry inventory from year to year. As a result, publishers have cut print runs in order to minimize inventory. They have also become quicker to dispose of inventory — i.e., pulp it — before the end of the fiscal year.”³⁵ The decision may help explain the sudden drop in book titles available on Amazon in the 1980’s as compared to the 1970’s. In any event, rigid business models and changes in tax law suggest one reason why hard cover books are not more frequently re-printed.

B. *Boosey & Rosetta*

Business model minimum print runs and tax law do little to explain why book publishers have not embraced eBooks as a low cost and convenient way to make their back catalogs available. Two prominent contract cases, however, may help explain why music publishers have been so active and book publishers relatively dormant.

³³ See Michael D. Smith, Rahul Telang, and Yi Zhang, *Analysis of the Potential Market for Out-of-Print eBooks*, available at <http://ssrn.com/abstract=2141422> (posted August 2012) (p. 2).

³⁴ 439 U.S. 522 (1979) (limiting the write down a taxpayer can take on inventory that is unlikely to sell quickly or at its current market price).

³⁵ Kevin O’Donnell, *How Thor Power Hammered Publishing*, <http://www.sfwa.org/2005/01/how-thor-power-hammered-publishing/> (last visited, Jan. 28, 2014) (detailing the effect of *Thor Power* on the size of book publisher inventories).

In *Boosey & Hawkes Music Publishers, Ltd. v. The Walt Disney Company*,³⁶ the Second Circuit considered the claim that Disney had exceeded its license to use Stravinsky's *The Rite of Spring* in "one motion picture" when it converted *Fantasia* from film to video format in the early 1990's. At the time Stravinsky licensed the music to Disney (1939), the home video format did not exist, and Disney had not included broad language in the agreement claiming the right to exploit *Fantasia* and its soundtrack in non-film formats that might be developed in the future. According to Boosey, Stravinsky's licensee, "one motion picture" meant the movie could be exploited in the only format known at the time, acetate-based film produced for viewing in theaters. Despite the lack of any language about exploitation in as-yet-to-be-developed technologies, the Second Circuit found for Disney. Converting old music to new formats did not require the licensee to negotiate a new license with the copyright owner.

The case seems to apply to music publishers who want to convert vinyl albums into a digital format that can be sold on iTunes. A song on vinyl and a song on a CD or on iTunes are consumed in similar ways, and they are produced for the same purpose, although Boosey argued that the film format referenced in the Disney license anticipated a public viewing in a theater, whereas the new video technology enabled the quite different context of private home viewing. *Boosey* is very strong precedent that in the case of music, the conversion from vinyl or tape to .mp3 format does not require the renegotiation of a license with the copyright owner. Music publishers can proceed with the digitization of their back catalog without competing to re-sign authors or hiring lawyers to renegotiate and write new contracts. Research has revealed no cases holding that music publishers must renegotiate in order to digitize their vinyl back catalogs.

³⁶ 145 F.3d 481 (2d. Cir. 1998).

The situation for book publishers is substantially the opposite. In the landmark case of *Random House v. Rosetta Books*,³⁷ the Second Circuit held that Random House had to renegotiate deals with its authors in order to publish their hard copy books in eBook format. Without Random House's permission, William Styron's estate and Kurt Vonnegut had granted permission to Rosetta to publish their works as eBooks. The contracts stated that Random House had the right to publish their works "in book form," but that phrase was not read to encompass the work in digital form. In other words, if Random House wanted to publish Vonnegut and Stryon in eBook format, it would have to renegotiate the contracts in competition with other interested publishers. The decision, of course, relies heavily on the language of the individual contracts, but Random House's form book contracts were likely not substantially different from those used by other book publishers. In any event, research reveals no subsequent opinions freeing publishers from the need to find rights holders, compete, and negotiate in order to publish their eBooks.

Risk aversion is probably hindering the development of a rich body of case law on the issue of old media and new technological formats, but the story told by the divergent opinions in *Boosey* and *Rosetta Books* has significant power to explain why so many more old hit songs have found their way to iTunes than old books have found their way to the Kindle Store. If book publishers have to renegotiate and music publishers do not, then one would expect to see more digital versions of older music than digital version of older books.

C. Digitization Costs

Another advantage that the music industry may have is the lower cost of digitization. A vinyl album or audio master tape can be converted directly to a consumable digital form and be made available almost immediately. A book, on the other hand, can be scanned quite easily, but

³⁷ 150 F. Supp.2d 613 (S.D.N.Y. 2001), *aff'd* 283 F.3d 490 (2002).

in order to be marketed as a professional-looking eBook (as opposed to a low quality, camera-like image of the original book), the scanned text needs to be manipulated with word processing software to reset the fonts and improve the appearance of the text. And given that the best optical scanning software can leave glitches in the text, an eBook intended for mass market distribution should also be proofread for typographical errors.³⁸

D. Comparative Marketplace Efficiencies and Information Costs

The market for older music may also be more robust than the market for older books. Songs seldom play for more than four minutes, and they can be previewed in part on iTunes and often listened to for free in their entirety on YouTube. They are easily discovered on the radio or on on-line services like Pandora and easily and quickly consumed, often for less than a dollar. In 2012-13, approximately consumers paid over \$16 billion to download songs from iTunes, while Amazon reported only \$4 billion in eBook sales.³⁹ The comparative attractiveness and efficiencies present in the music marketplace may provide more of an incentive for music publishers to digitize, as opposed to book publishers.

CONCLUSION

Whatever the reasons for differences in the book and music publishing industries, the lack of availability of books from the post-1923 portion of the 20th century is startling. Senator Orrin Hatch argued in defense of the 1998 term extension that maintaining the availability and distribution of works is at the heart of the meaning of “progress” in the Copyright Clause of the Constitution.⁴⁰ He was absolutely correct about the purpose of copyright, but utterly wrong

³⁸ <http://ocr-software-review.toptenreviews.com/>.

³⁹ Market data available at www.statista.com (fee paid service).

⁴⁰ See Orrin D. Hatch & Thomas R. Lee, “*To Promote the Progress of Science*”: *The Copyright Clause and Congress’ Power to Extend Copyrights*, 16 HARV. J. L. & TECH. 1, 7 (2002) (“the founding-era

about how to solve the problem of missing works. Copyright term extensions have clearly prevented the development of a market for re-printing the massive number of “missing” works from the 20th century. If availability matters, then further attempts to extend the copyright term should be resisted, not encouraged. Copyright was not designed by the framers of the Constitution as a means by which Congress could make books disappear.

understanding of “progress” clearly extends to the dissemination or distribution of existing artistic works”). *Cf.* U.S. CONST., art. 1, §8, cl. 8 (“Congress shall have the power To . . . promote the Progress of Science and useful Arts, securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”); L. RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE (1968); (discussing historical understandings of the word “science”).

APPENDIX A:

SONGS WITH UNIQUE NAMES FROM 1913-32 ON iTUNES

YEAR	ITUNES	SONG TITLE	COMPOSER(S)
1913	y	When You're All Dressed Up and No Place to Go	Burt &Hein
1913	n	When You Play in the Game of Love	Goodwin & Piantadosi
1913	y	Where Did You Get That Girl?	Kalmar & Puck
1913	y	You're a Great Big Blue Eyed Baby	A. Seymour Brown
1913	n	You've Got Your Mother's Big Blue Eyes	Irving Berlin
1914	n	When You're Wearing the Ball and Chain	Smith &Herbert
1914	y	When You Wore a Tulip and I Wore a Big Red Rose	Mahoney &Wenrich
1914	y	Wein, Du Stadt meiner Traume	Rudolf Sieczynski
1914	y	You're More Than the World to Me	Branen &Solman
1914	n	You Planted a Rose in the Garden of Love	Callahan & Ball
1915	n	We'll Have a Jubilee in My Old Kentucky Home	Goetz & Donaldson
1915	n	What a Wonderful Mother You'd Be	Goodwin & Piantadosi
1915	y	When I Leave the World Behind	Irving Berlin
1915	y	You'd Never Know the Old Home-Town of Mine	Johnson & Donaldson
1915	n	You'll Always Be the Same Sweet Girl	Sterling & Von Tilzer
1916	y	What Do You Want to Make Those Eyes at Me For?	McCarthy, Johnson & Monaco
1916	n	When the Black Sheep Returns to the Fold	Irving Berlin
1916	y	Where Did Robinson Crusoe Go with Friday on Saturday Night?	Lewis & Young; G. Meyer
1916	y	Yacka Hula Hickey Dula (Robinson Crusoe, Jr.)	Goetz, Young & Wendling
1916	y	You Can't Get Along with 'Em or Without 'Em	Clarke & Fisher
1917	y	When Yankee Doodle Learns to Parlez Vous Francais	Hart & Nelson
1917	y	Where the Black-Eyed Susans Grow (Robinson Crusoe, Jr.)	Radford & Whiting
1917	y	Where the Morning Glories Grow	Kahn & Egan; Whiting
1917	y	The White Peacock	Charles Tomlinson Griffes
1917	n	Whose Little Heart Are You Breaking Now?	Irving Berlin
1918	y	We Don't Want the Bacon-What We Want is a Piece of the Rhine	Carr; Russell & Havens
1918	y	When Alexander Takes His Ragtime Band to France	Bryan, Hess & Leslie
1918	n	When You Look Into the Heart of a Rose	Gillespie and Methven
1918	y	Why Do They All Take the Night Boat to Albany	Young & Lewis; Schwartz
1918	y	Would You Rather Be a Colonel With an Eagle on Your Shoulder	Mitchell & Gottler
1919	y	Wait Till You Get Them Up in the Air, Boys	Brown & Von Tilzer
1919	n	What'll We Do on a Saturday Night--When the Town Goes Dry	Harry Ruby
1919	y	The World is Waiting for the Sunrise	Lockhart & Seitz
1919	y	You're a Million Miles From Nowhere	Lewis & Young; Donaldson
1919	y	Your Eyes Have Told Me So	Kahn & Van Alstyne
1920	y	Who Ate Napoleons with Josephine When Bonaparte Was Away?	Alfred Bryan & Goetz
1920	n	The Wooing of the Violin (Some Colonel)	Smith &Herbert
1920	y	The Wreck of the "Julie Plante"	Drummond & O'Hara
1920	y	You Oughta See My Baby	Turk & Ahlert
1920	y	A Young Man's Fancy	Anderson; Yellen & Ager
1921	y	The Wang, Wang Blues	Mueller, Johnson & Busse
1921	y	When Big Profundo Sang Low "C"	Bohannon & Botsford

1921	y	When Buddha Smiles	Freed & Brown
1921	y	When Francis Dances with Me	Ryan & Violonsky
1921	y	When the Honeymoon Was Over	Fred Fisher
1922	n	Throw Me a Kiss	Hirsch, Buck, Stamper & Yvain
1922	y	Toot, Toot, Tootsie! (Bombo)	Kahn, Erdman & Russo
1922	y	Way Down Yonder in New Orleans	Creamer & Layton
1922	y	When the Leaves Come Tumbling Down	Richard Howard
1922	y	You Remind Me of My Mother (Little Nellie Kelly)	George M. Cohan
1923	n	Two Little Magpies	John Barnes Wells
1923	y	When It's Nighttime in Italy, It's Wednesday Over Here	Kendis & Brown
1923	y	When You Walked Out Someone Else Walked Right In	Irving Berlin
1923	y	Who'll Buy My Violets?	Goetz & Padilla
1923	y	Yes! We Have No Bananas	Silver & Cohn
1924	y	Ritual Fire Dance	Manuel De Falla
1924	n	Sometime You'll Wish Me Back Again	E. Austin Keith
1924	y	West of the Great Divide	Whiting & Ball
1924	y	When You and I Were Seventeen	Kahn & Rosoff
1924	y	Where the Lazy Daisies Grow	Cliff Friend
1925	y	That Certain Party	Kahn & Donaldson
1925	y	Ukelele Lady	Kahn & Whiting
1925	y	Waters of Perkiomen	Dubin & Klickmann
1925	y	Who Takes Care of the Caretaker's Daughter While the Caretaker's	Chick Endor
1925	y	Yes Sir, That's My Baby	Kahn & Donaldson
1926	y	Tamiami Trail	Friend & Santly
1926	y	A Tree in the Park (Peggy-Ann)	Hart & Rodgers
1926	y	When the Red, Red Robin Comes Bob, Bob, Bobbin' Along	Harry Woods
1926	y	Where'd You Get Those Eyes	Walter Donaldson
1926	y	Where do You Work-a John?	Weinberg, Marks & Warren
1927	y	There's a Cradle in Caroline	Lewis & Young; Ahlert
1927	n	There's Something Nice About Everyones	Terker & Bryan; Wendling
1927	y	Thou Swell (A Connecticut Yankee)	Hart & Rodgers
1927	y	The Varsity Drag (Good News)	De Sylva, Brown, & Henderson
1927	y	What Do We Do On a Dew-Dew-Dewy Day	Johnson, Tobias & Sherman
1928	y	Where is the Song of Songs for Me	Irving Berlin
1928	y	Where the Shy Little Violets Grow	Kahn & Warren
1928	y	You're the Cream in My Coffee (Hold Everything)	DeSylva, Brown & Henderson
1928	y	You Took Advantage of Me (Present Arms)	Hart & Rodgers
1928	y	You Wouldn't Fool Me (Follow Thru)	DeSylva, Brown & Henderson
1929	y	The Wedding of the Painted Doll	Freed & Brown
1929	y	When It's Springtime in the Rockies	Woolsey, Taggart & Sauer
1929	y	When the Organ Played at Twilight	Wallace; Campbell & Connelly
1929	y	You Don't Know Paree (Fifty Million Frenchmen)	Cole Porter
1929	y	Zigeuner (Bitter Sweet)	Noel Coward
1930	y	So Beats My Heart for You	Ballard, Henderson & Waring
1930	y	Swingin' in a Hammock	Seymour & O'Flynn; Wendling
1930	y	The Waltz You Saved for Me	Kahn; King & Flindt
1930	y	Would You Like to Take a Walk?	Dixon & Rose; Warren
1930	y	You Brought a New Kind of Love to Me	Fain, Kahal & Norman
1931	y	When Yuba Plays the Rumba on the Tuba	Herman Hupfeld

1931	y	Where the Blue of the Night Meets the Gold of the Day	Turk, Crosby & Ahlert
1931	y	You Didn't Have to Tell Me--I Knew it All the Time	Donaldson
1931	y	You Forgot Your Gloves (The Third Little Show)	Eliscu & Lehak
1931	y	You Try Somebody Else	DeSylva; Brown & Henderson
1932	y	Underneath the Harlem Moon	Gordon & Revel
1932	y	Willow Weep for Me	Ann Ronell
1932	y	Wintergreen for President	Gershwin and Gershwin
1932	y	You're an Old Smoothie	DeSylva, Whiting & Brown
1932	y	You're Getting to Be a Habit with Me	Dubin & Warren