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THE NEW COPYRIGHT MANIFESTO: THE CASE FOR REPARATIONS FOR AFRICAN AMERICAN MUSIC ARTISTS

Professor Kevin J. Greene*

I. A SPECTER IS HAUNTING THE AMERICAN MUSIC INDUSTRY

In the dramatic opening of *The Communist Manifesto*, Marx and Engels warned that "[a] spectre is haunting Europe—the spectre of communism."[1] My intellectual property scholarship was the first in the legal academy to highlight that a specter has long haunted the American music industry—the specter of racial inequality and rampant appropriation of the creative works of African American artists. The striking inequality of the treatment of Black artists is an old problem and yet a very current one, given the length of copyright terms. Old music greatly outsells new music.[2] As the frenzy of music catalog sales continues, new harms arise as Black artists who were never compensated or undercompensated are victimized once again.

Black artists experienced commercial exploitation and IP expropriation of their works from the inception of the American music recording industry in the early twentieth century.[3] This treatment stemmed from a complex web of inequitable industry contracts, copyright formalities, and contractual fraud.[4] The deprivation of

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[1] KARL MARX & FRIEDRICH ENGELS, THE COMMUNIST MANIFESTO 47 (Pluto Press 2017) (1848).

[2] *See* Ted Gioia, *Is Old Music Killing New Music?*, ATLANTIC (Jan. 31, 2022, 5:20 PM), https://www.theatlantic.com/ideas/archive/2022/01/old-music-killing-new-music/621339.

[3] *See* Erin Blakemore, *How 'Race Records' Turned Black Music Into Big Business*, HISTORY (May 5, 2023), https://www.history.com/news/race-records-bessie-smith-big-bill-broonzy-music-business.

[4] *See* K.J. Greene, *Intellectual Property at the Intersection of Race and Gender: Lady Sings the Blues*, 16 J. GENDER, SOC. POL'Y & L. 365, 370, 370 n.29 (2008).

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these artists occurred under the banner of racially neutral but hostile judicial legal standards and doctrines.[5] These dynamics created the perfect proverbial storm that deprived Black artists of economic and moral rights for their works, and the loss of millions of dollars, if not more, of generational wealth.[6]

During the "race record" period from the 1920s into the early 1960s, label executives, music publishers, and talent managers engaged in rampant fraud and expropriation of Black artists.[7] As one author notes, "[i]n almost all cases, Race Records were subsidiaries of larger, white-owned labels, or related entertainment companies, that exploited black artists. These companies withheld royalties from black artists and often coerced artists to relinquish rights to their music."[8] These inequitable practices blossomed in the shadow of a common law contract system that turned a blind eye to one-sided deals and soon became normalized for artists of all races.[9]

The examples of this dynamic are too numerous to list here, but one vignette is that of Fred Parris. Parris wrote the song *In the Still of the Night* and recorded it with his bandmates, the Five Satins, in 1956.[10] *In the Still of the Night* went on to "become an iconic doo-wop classic; in fact, it is one of two songs that are credited with inspiring the origin of the word '*doo-wop*' (from the background refrain '*doo-wop*,

[5] K.J. Greene, *Copyright, Culture & Black Music: A Legacy of Unequal Protection*, 21 HASTINGS COMMC'NS & ENT. L.J. 339, 357 (1998).

[6] *See* Blakemore, *supra* note 3 ("It was easier to exploit and underpay black artists than white ones. Many of their songs had never been published, and labels snagged recording rights along with the recordings. Many artists were put on records that gave them pseudonyms or left out their names entirely . . . ."); Greene, *supra* note 5, at 357 n.86.

[7] Greene, *supra* note 4, at 381 (noting that music historians see the 1920s as the age of the Black female blues singer and discussing the story of Bessie Smith, who "sold close to ten million records over the course of her career, but was duped of copyrights in compositions and royalties for record sales by record industry executives and managers").

[8] Karl Ackermann, *The Black Swan: A History of Race Records*, ALL ABOUT JAZZ (July 8, 2019), https://www.allaboutjazz.com/the-black-swan-a-history-of-race-records-by-karl-ackermann.

[9] *See* Jon Blistein & Delisa Shannon, *Bad Contracts Are a Music Industry Standard. Why Haven't They Evolved?*, ROLLING STONE (Nov. 17, 2021), https://www.rollingstone.com/music/music-news/music-industry-bad-contracts-summer-walker-1258695.

[10] Tim Londergan, *In the Still of the Night: The Five Satins; John Sebastian; Boyz II Men*, TIM'S COVER STORY (Oct. 29, 2018), https://timscoverstory.wordpress.com/2018/10/29/in-the-still-of-the-night-the-five-satins-john-sebastian-boyz-ii-men/; Neil Genzlinger, *Fred Parris, Creator of a Doo-Wop Classic, Is Dead at 85*, N.Y. TIMES (Jan. 20, 2022), https://www.nytimes.com/2022/01/20/arts/music/fred-parris-dead.html.

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doo-wah' heard during the sax solo in the break)."[11] It nonetheless received a mere pittance in regard to royalties.[12] Parris, as the composer, received a separate income stream from use of the song and entered into a publishing catalog sale shortly before he died in 2022.[13] This revenue, of course, would not accrue to his bandmates, highlighting copyright law's hostility to performance.

My scholarship explicated the mechanics behind the great heist of the "Black gold" that is African American music, a cultural and economic colossus that is so pervasive that we cannot even imagine American culture without it.[14] No analysis has ever attempted to calculate the economic value and revenue stream attributable to Black music since the inception of the recording industry, but the amount would certainly run into the billions, if not greater.

My work also exposed the IP legal academy's inattention to issues of inequality.[15] My work has shown that the treatment of Black artists is not a sideshow, but is arguably the most pressing issue confronting the legitimacy of the IP system.[16] Economic incentive theory is the predominant theoretical basis for why copyright law is needed.[17] However, economic incentive theory fails to explain the creativity and innovation of Black authors, who were denied credit and compensation under the U.S. copyright regime.[18] The cultural exclusion and devaluation of Black art has

[11] *See* Londergan, *supra* note 10.

[12] *See* DB Kelly, *The Messed Up Truth About the 1950s Music Industry*, GRUNGE (Feb. 28, 2022), https://www.grunge.com/388043/the-messed-up-truth-about-the-1950s-music-industry ("Just that song sold somewhere around 10 million copies, and a decent contract should have given him somewhere in the neighborhood of $100,000 in royalties. (That's a little over $1 million in 2020.) He absolutely didn't get it, and instead, earned just $783.").

[13] *See* Murray Stassen, *Reservoir Acquires Stake in Publishing Catalog of Fred Parris, Founder of the Five Satins*, MUSIC BUS. WORLDWIDE (Dec. 15, 2021), https://www.musicbusinessworldwide.com/reservoir-acquires-stake-in-publishing-catalog-of-fred-parris-founder-of-the-five-satins; Genzlinger, *supra* note 10.

[14] *See* Maya Eaglin, *The Soundtrack of History: How Black Music Has Shaped American Culture Through Time*, NBC NEWS (Feb. 21, 2021, 1:51 PM), https://www.nbcnews.com/news/nbcblk/soundtrack-history-how-black-music-has-shaped-american-culture-through-n1258474.

[15] *See* K.J. Greene, *"Copynorms," Black Cultural Production, and the Debate Over African-American Reparations*, 25 CARDOZO ARTS & ENT. L.J. 1179, 1226 (2008).

[16] *See id.* at 1183 (noting that "the treatment of black artists, much like that of women, exposes the hidden context of subordination in the IP arena").

[17] Alfred C. Yen, *The Interdisciplinary Future of Copyright Theory*, 10 CARDOZO ARTS & ENT. L.J. 423, 425 (1992).

[18] Greene, *supra* note 5, at 358.

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similarly reared its head in the courts.[19] Even when the cases were about Black people, Black artists remained the "'invisible' men and women of copyright jurisprudence."[20] Using the lens of critical race theory, my work exposed the ways that "race-neutral" legal theory, doctrine, and judicial standards facilitated the massive expropriation of Black art forms.[21]

Today, legal scholarship around race and IP is arguably the most important work in the legal academy, although not welcomed by all. Scholars such as Keith Aoki, Anjali Vats and Deidré Keller, John Tehranian, and others have explored the ways that IP has impacted communities of color.[22] As Professors Vats and Keller note:

> Critical Race IP zeros in on one axis of power, race, often using intersectional methods. Drawing on the foundational premises of CRT as a starting point for thinking domestically and internationally about the racial impacts of intellectual property law, Critical Race IP is centered on investigating and interrogating how law protects what Cheryl Harris defines as "white supremacy." In a system of political economy in which intellectual property is increasingly valuable, bringing the principles of CRT to bear on copyright, patent, trademark, and unfair competition analyses are particularly important.[23]

Similarly, Professor Craig notes, "[c]ritical race and feminist theories, building on the insights of critical legal studies, take aim at the law's claimed neutrality, not

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[19] *See* Greene, *supra* note 15, at 1186.

[20] Greene, *supra* note 5, at 340.

[21] *See* Greene, *supra* note 4, at 369–70 (noting that this "scholarship was among the first to show how the structure of copyright law, and the phenomena of racial segregation and discrimination, impacted the cultural production of African-Americans, and how the racially neutral construct of IP has adversely impacted African-American artists").

This was the first law review article to explore critical race theory in connection with African American artists.

[22] *See* Anjali Vats & Deidré A. Keller, *Critical Race IP*, 36 CARDOZO ARTS & ENT. L.J. 735, 736 (2018); John Tehranian, *Towards a Critical IP Theory: Copyright, Consecration, and Control*, 2012 BYU L. REV. 1233, 1240–45 (2012); Keith Aoki, *Distributive and Syncretic Motives in Intellectual Property Law (with Special Reference to Coercion, Agency, and Development)*, 40 U.C. DAVIS L. REV. 717, 719 (2007).

[23] Anjali Vats & Deidré A. Keller, *Critical Race Theory as Intellectual Property Methodology*, *in* HANDBOOK ON INTELLECTUAL PROPERTY RESEARCH 777, 778 (Irene Calboli & Maria Lillà Montagnani eds., 2021) (footnote omitted).

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only for masking its politics, but specifically for its complicity in the construction and ongoing legitimation of racial and gender hierarchies."[24] The rampant theft and misappropriation of the work of Black artists from the blues to hip-hop music leads to only one road to redemption: economic reparations for Black artists. Only through reparations can the specter of inequality be exorcised.

II. COPYRIGHT LAW & THE GHOST OF JELLY ROLL MORTON

Perhaps no example better captures the real-world impact of copyright deprivation than Jelly Roll Morton, the towering jazz innovator and self-proclaimed creator of jazz. "As jazz's first significant composer,"[25] Morton should have died a wealthy man in the same way that our tech founders of today have become financial behemoths.

Instead, because of copyright and contract predation, Morton was denied this wealth:

> One can only imagine his state of mind, having been ripped off by publishers who paid him little or no money in royalties, when he heard his *King Porter Stomp* being played regularly on the radio. Benny Goodman had his first hit with that song and it became a regular part of many big bands' repertoire while its composer was toiling in obscurity and poverty.[26]

Morton spent his final days writing to the U.S. Department of Justice complaining of the cut given to him by his producer, Melrose.[27] He died on July 10, 1941, of heart failure and, like other Black innovators of music, was buried without a headstone.[28]

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[24] Carys J. Craig, *Critical Copyright Law and the Politics of 'IP,' in* RESEARCH HANDBOOK ON CRITICAL LEGAL THEORY 301, 312 (Emilios Christodoulidis, Ruth Dukes & Marco Goldoni eds., 2019).

[25] Scott Yanow, *Jelly Roll Morton: Profiles in Jazz*, SYNCOPATED TIMES (Dec. 28, 2019), https://syncopatedtimes.com/jelly-roll-morton-profiles-in-jazz.

[26] *Id.*

[27] Ron Grossman, *Jelly Roll Morton Walked into the Melrose Brothers' South Side Music Store in 1923. He Got Famous, and Lester Merose Got Rich.*, CHI. TRIB. (Feb. 20, 2023, 2:36 PM), https://www.chicagotribune.com/2023/02/19/jelly-roll-morton-walked-into-the-melrose-brothers-south-side-music-store-in-1923-he-got-famous-and-lester-merose-got-rich.

[28] Sean J. O'Connell, *Jelly Roll Morton, 'Inventor' of Jazz Music, is Buried in Los Angeles*, LAIST: OFF-RAMP (May 28, 2014), https://archive.kpcc.org/programs/offramp/2014/05/28/37627/jelly-roll-morton-inventor-jazz-music-is-buried-in. Joining Morton on the list of unmarked gravesites are pioneers like Bessie Smith and guitar virtuoso Sister Rosetta Tharpe, who "laid in an unmarked grave for nearly 30

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III. A PERSISTENT DYNAMIC OF CREATION AND EXPROPRIATION

The stories of artists and performers such as Jelly Roll Morton reveal a persistent dynamic: Black artistic innovation followed by music industry appropriation.

The fleecing of African American music composers and performers took place against a backdrop of intense discrimination in American society.[29]

Black music itself faced racial stereotyping and derision from the outset: "The innovative rhythms and harmonies of early jazz were viewed by some white critics as basically modernized tribal chanting, not valuable American music."[30] Yet in a vignette of bitter irony, despite the racist view that Black music was primitive, white artists such as Paul Whiteman claimed jazz music as their own creation: "[i]n uprooting jazz from its African American culture, Whiteman grossed one million dollars in a single year in the 1920s and was dubbed the 'King of Jazz.'"[31]

IV. EXTRACTIVE BUSINESS PRACTICES AIDED BY COPYRIGHT LAW

The treatment of Black artists and performers in the U.S. music industry can be boiled down to one word: extraction. This does not discount that some individual Black creators obtained wealth in the industry and secured ownership of their works.[32] The entertainment industry has been a major source of revenue for a select

years after her death." TeAnna Atkins, *A Black Woman Pioneered Rock and Roll*, MEDIUM (Feb. 24, 2021), https://medium.com/age-of-awareness/a-black-woman-pioneered-rock-and-roll-sister-rosetta-tharpe-and-the-retrieval-of-her-legacy-faa7f5ec57f2; *see also* Bessie Smith Grave, *Unmarked Since '37, Finally Gets a Stone*, N.Y. TIMES, Aug. 9, 1970, at 54.

[29] Blakemore, *supra* note 3.

[30] Laurel Bettis, *Tough on Black Asses: Segregation Ideology in the Early American Jazz Industry*, 17 HIST. PERSPS. 107, 111 (2012).

[31] Samantha Ainsley, *Black Rhythm, White Power*, 5 MORNINGSIDE REV. 27, 27, 28 (2009) ("Beginning with jazz and leading up to hip-hop, white America has appropriated black music as its own. When whites cannot stake claims to black music—as in the case of hip-hop—the nature of the relationship between mainstream society and African American culture is simply exploitative.").

[32] *See, e.g.*, Allie Nelson, *'Ain't No Mountain High Enough' to Reach Diana Ross's Net Worth In 2024! How the Supremes Singer Made It*, PARADE (Jan. 16, 2024), https://parade.com/celebrities/diana-ross-net-worth; Christian Spencer, *Janet Jackson's Still in Control. Here's How She Amassed a $180M Fortune*, FINURAH (Jan. 13, 2023), https://finurah.com/2023/01/13/janet-jacksons-still-in-control-heres-how-she-amassed-a-220m-fortune; *Sean Combs Leads Four Black Artists as World's Highest Paid Musicians*,

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few Black artists.[33] However, many of the music's greatest pioneers and innovators died impoverished.[34] Extractive industry practices are facilitated by existing legal structures. The "mechanics" of extraction are perfectly legal structures such as copyright assignments, work-made-for-hire provisions, copyright registrations, and copyright doctrine and policy. Added to these was a layer of copyright formalities tailor-made to take advantage of blues and jazz artists deprived of education under segregation.[35]

It might seem unthinkable in 2024 that the "kind of egregious exploitation of a Black artist" that Little Richard experienced in the 1950s could occur today.[36] However, some "Black label executives, entertainment attorneys, and music business professors" believe that "not much has changed."[37] These professionals believe that

> [a]ll too often, major labels prey on young, poor Black artists, offering them lopsided record deals in which the company owns their music in perpetuity. In exchange, they're given cash advances that account for a fraction of what their music will ultimately bring in, and a minuscule percentage of the royalties their music earns.[38]

It merits pointing out that throughout the history of the music business, "Black artists aren't the only ones who get trapped in inequitable deals, and it's certainly possible for a label to take advantage of a poor, under-resourced white artist in the same way."[39] In other words, a system based on extraction encourages harms that transcend categories such as race.

REUTERS (Dec. 6, 2017, 2:43 PM), https://www.reuters.com/article/us-music-highestpaid/sean-combs-leads-four-black-artists-as-worlds-highest-paid-musicians-idUSKBN1E02SB.

[33] *See, e.g.*, Nelson, *supra* note 32; Spencer, *supra* note 32.

[34] *See, e.g.*, Kevin J. Greene, *The Future is Now: Copyright Terminations and the Looming Threat to the Old School Hip-Hop Song Book*, 68 J. COPYRIGHT SOC'Y U.S.A. 45, 45 (2020) ("Many Black creators, such as Jelly Roll Morton, a foundational jazz innovator, died impoverished.").

[35] Greene, *supra* note 5, at 377–78.

[36] Drew Schwartz, *Black Artists Are Still Getting Ripped Off the Way Little Richard Was*, VICE (Oct. 21, 2020, 11:49 AM), https://www.vice.com/en/article/z3vb5j/little-richard-made-millions-it-all-went-to-his-label.

[37] *Id.*

[38] *Id.*

[39] *Id.*

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The travails of these pioneering artists and their treatment under the oppressive yoke of copyright and contract law are at the core of my almost completed fantastical novel on Black music artists and copyright law, *The Copyright House of Horrors*.

V. EXTRACTION OF MARGINALIZED ARTISTS: AN AMERICAN—AND INTERNATIONAL—PROBLEM

Jelly Roll Morton's horrific treatment was emblematic of the treatment of African American artists in the music industry in the early and mid-twentieth century—an industry that would be virtually unrecognizable but for Black innovation in the arts. This treatment resulted from a combination of structural anti-Black racism, and even as it further marginalized Black artists, it also deprived artists of economic opportunity.[40]

In the 1980s for example, the music video channel MTV did not play artists outside of the rock genre, which often meant that Black artists were excluded.[41] David Bowie is often credited with calling out MTV on its exclusion of Black artists because of its singular focus on "rock," but it was actually R&B icon Rick James who did it first.[42]

VI. SLEEPING LIONS: AN INTERNATIONAL PROBLEM

The music industry is an international business, and parallels exist between the treatment of African American artists and marginalized and indigenous peoples in music and the arts. Like Black American artist and performers, indigenous and colonized peoples have experienced appropriation and extraction of their creative designs, songs and stories without consent, compensation, or credit.[43]

The most famous story here is, of course, Solomon Linda, author of *Mbube*, the melody which became the international mega-hit *The Lion Sleeps Tonight*.[44] Linda

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[40] *See* Candace G. Hines, *Black Musical Traditions and Copyright Law: Historical Tensions*, 10 MICH. J. RACE & L. 463, 465 (2005); Greene, *supra* note 5, at 377.

[41] *See* Ramon Hervey II, *When Rick James Fought to Get Black Artists on MTV*, LITERARY HUB (Aug. 19, 2022), https://lithub.com/when-rick-james-fought-to-get-black-artists-on-mtv.

[42] *Id.*

[43] *See* Juan Andrés Fuentes, *Protecting the Rights of Indigenous Cultures Under the Current Intellectual Property System: Is It a Good Idea?*, 3 J. MARSHALL REV. INTELL. PROP. L. 88, 92 (2003).

[44] For a thoughtful analysis of the Linda case, see Dalindyebo Shabalala, *Do We Need Exit Rules for Traditional Knowledge? Lessons from Solomon Linda and the "Mbube"/"The Lion Sleeps Tonight" Case*, 12 QUEEN MARY J. INTELL. PROP. 532 (2022).

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"assigned his worldwide copyright in *Mbube* to the Gallo Record Company for a consideration of 10 shillings."[45] Solomon Linda died in 1962, completely impoverished, while the *Lion Sleeps Tonight* earned tens of millions in royalties.[46] To truly protect "marginalized" artist communities will require re-imagination of the law and practices of the music industry on a global scale.

VII. THE COPYRIGHT/CONTRACT DRAGON AND THE FLAMES OF RACE-NEUTRALITY

Black artistic output found itself consumed in the flames of discriminatory contractual and business practices.[47] The American music business was based on, and perpetuated, institutional racism.[48]

The copyright industries played a central role in this institutional discrimination.[49]

As Professor Peter Menell notes, "the [music] industry has a long and painful history of racial discrimination resulting in structural imbalances."[50] In the music industry, there was often a double whammy of racism, "coon" songs, a perversion of Black musical creations, and the taking away of the rights of creators, and at the same time, more than any other institution, the promotion of horrific stereotypes that linger to this day.[51] Added to this was a heavy layer of exclusion from organizations designed to protect artists.[52] In the early part of the twentieth century, the American

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[45] Owen Dean, *The Return of the Lion*, WIPO MAG., Apr. 2006, at 8, 8.

[46] *See Solomon Popoli Linda, Singer and Composer, Dies*, S. AFR. HIST. ONLINE (Sept. 6, 2022), https://www.sahistory.org.za/dated-event/solomon-popoli-linda-singer-and-composer-dies ("In 2000, a South African journalist, Rian Malan, wrote a feature article for Rolling Stone Magazine that told the story of Solomon Linda. Malan estimated that his song 'Imbube' had earned an estimated 15 million American dollars for its use in 'The Lion King' alone.").

[47] *See* Greene, *supra* note 5, at 341, 362.

[48] *Id.* at 361–71 (discussing the background and history of African American artists and intellectual property, specifically within the context of the American music industry, a history defined by the oppression of these individuals and appropriation of their creative works).

[49] *Id.* at 368–69.

[50] Peter S. Menell, *Reflections on Music Copyright Justice*, 49 PEPP. L. REV. 533, 551 (2022).

[51] *See* Greene, *supra* note 15, at 1189.

[52] *See* Reebee Garofalo, *Media, Technology, and the African American Music Business*, CARNEGIE HALL: TIMELINE OF AFR. AM. MUSIC (2021), https://timeline.carnegiehall.org/stories/media-technology-and-the-african-american-music-business (noting that the "American Society of Composers, Authors, and Publishers (ASCAP), founded in 1914 to reap the fruits of the Copyright Act of 1909, generally skewed

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Society of Composers and Publishers ("ASCAP") had policies that were ostensibly "race-neutral," but that in effect excluded African American composers.[53]

Overlaid on these "consensual" contract doctrines and practices was (and is) copyright law.[54] However, until the 1976 Copyright Act, copyright law was highly technical and formalistic.[55] Copyright law was not designed with the interests of Black artists from an oral tradition in mind.[56] Whether or not copyright policy is explicitly or deliberately racist is not paramount. Rather, "'[a] racist policy is any measure that produces or sustains racial inequity between racial groups.' This definition focuses on outcomes rather than treatments. By doing so, it implies (correctly) that neither racial animus nor individual acts of discrimination are necessary for a policy to be racist."[57]

As I wrote in my satiric poem, "An Ode to the Public Domain," "if solving public domain rules can make pinstripe lawyers at Fox swelter / what hope could there be for the old Blues women and Blues men fresh from Mississippi's Delta?"[58]

its membership toward composers of pop tunes and semi-serious works. Of the society's 170 charter members, only six were African American. Most Black artists were excluded from the Society and thereby denied the full benefits of copyright protection.").

[53] *See id.*

[54] Greene, *supra* note 5, at 341 (detailing that part of "the endemic exploitation of Black artists is the interaction of the copyright regime and the contract regime").

[55] Greene, *supra* note 15, at 1201–02; *see also* LARRY WAYTE, PAY-FOR-PLAY: HOW THE MUSIC INDUSTRY WORKS, WHERE THE MONEY GOES, AND WHY 214–16 (2023) (providing an overview of the Copyright Act of 1909, the applicable statute until the 1976 Copyright Act).

[56] *See* Greene, *supra* note 5, at 356–57, 378.

[57] WILLIAM G. GALE, URBAN-BROOKINGS TAX POL'Y CTR., REFLECTIONS ON WHAT MAKES A POLICY RACIST 2 (Nov. 4, 2021) (quoting IBRAM X. KENDI, HOW TO BE AN ANTIRACIST 18 (2019)), https://www.brookings.edu/wp-content/uploads/2021/11/Reflections-on-What-Makes-a-Policy-Racist-1.pdf.

[58] To access "An Ode to the Public Domain," see *Public Domain Day Party!*, YOUTUBE, at 0:58:10–1:03:30 (Dec. 17, 2020), https://www.youtube.com/watch?v=-EfDubFBdwM&t=1s.

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VIII. CRITICAL RACE THEORY AND COPYRIGHT LAW

I am arguably the first critical race IP scholar. Critical race theory seeks to understand racial and power dynamics by exposing the ways the law masks the subordination of people of color.[59]

My work characterized Black people as the "invisible" men and women in IP scholarship.[60] Critical race theory brings to light what is hidden in the "normal" reality of white spaces.[61] Racism in the United States is no aberration, but a persistent norm.

Using a critical race theory lens, my scholarship exposed the fallacy of a "race-neutral" copyright or IP system.[62] I proposed critical race as the analytic anchor and reparations as the remedy.[63]

A striking and vast gap has always existed between what Black artists created—in essence the music behind the entire music industry, from blues and jazz to house and electronic dance music—and what they received, a mere pittance in comparison to their creative contributions.[64]

IX. THE GREAT MUSIC CATALOG GOLDRUSH: IT'S YESTERDAY ONCE MORE?

The pernicious copyright dynamics of the past continue in the present due to the profoundly long term of copyright law.[65] At this moment, any work created after

[59] *See* Greene, *supra* note 4, at 367 (detailing "four core tenets" of critical race theory, among them the notion that the law both constructs and produces race and race relations so as to support white supremacy).

[60] Greene, *supra* note 5, at 340.

[61] *See* Greene, *supra* note 4, at 367.

[62] *See* Greene, *supra* note 5, at 343 (noting that an "underlying assumption of race-neutrality pervades copyright scholarship" but "not all creators of intellectual property are similarly situated in a race-stratified society and culture"). "The history of Black music in America demonstrates the significant inequality of protection in the 'race-neutral' copyright regime." *Id.*

[63] *See* Greene, *supra* note 15, at 1216–26.

[64] *Id.* at 1182–94 (analyzing "African-American creativity, invention and innovation" to detail how this culture provided so much, yet received so little, in the early American music industry).

[65] *See* 17 U.S.C. § 304 (setting the term of copyright for copyrights in existence as of January 1, 1978); 17 U.S.C. § 302 (setting the duration of copyright for works created on or after January 1, 1978).

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1927 could still be under copyright.[66] Music industry practices, and the structure and function of copyright law, replicate inequality.

Today, the world of music is witnessing the sale of music publishing and sound recording catalogs encompassing the work of legendary Black artists at an unprecedented rate.[67] Music is the preeminent asset in the world of Wall Street.[68]

X. IN WITH OLD (MUSIC)

There is an economic reason for this catalog sale frenzy, typically involving older songs: "[o]ld songs now represent 70% of the U.S. music market, according to the latest numbers from MRC Data, a music-analytics firm. . . . The new music market is actually shrinking. All the growth in the market is coming from old songs."[69] Two truths are obvious here. One, old music from past decades is very valuable, and two, catalog sales are tainted money.

There is strong evidence that many of the performers and composers behind this music have never been compensated or were wrongfully undercompensated and credited.[70] Singer Ruth Brown was so prolific in record sales that they called Atlantic Records "the house that Ruth built."[71] Yet Brown had to engage in extensive litigation to collect royalties from Atlantic.[72] Despite a series of chart-toppers 1950s, Brown, in her own words, "got about $69 a tune for those records . . . against what was supposed to be a 5% royalty. But I saw very little in the way of royalties, because

[66] *See id.* § 304.

[67] *See* Okla Jones, *Tina Turner and Other Legendary Black Musicians Who Sold Their Publishing Rights*, ESSENCE (Oct. 12, 2021), https://www.essence.com/entertainment/tina-turner-and-other-legendary-black-musicians-who-sold-their-publishing-rights/.

[68] *See, e.g.*, Hope King & Sara Fischer, *Music is a Hot New Wall Street Asset*, AXIOS (Apr. 27, 2021), https://www.axios.com/2021/04/27/music-rights-streaming-copyright (noting that "[f]rom the investor standpoint, the life of a copyright is long [and the] volatility is low—especially when investing in a large music catalog—and the tide is rising, driven by streaming.").

[69] Gioia, *supra* note 2.

[70] *See* Greene, *supra* note 5, at 341 ("Black artists as a class consistently received inadequate compensation, credit, and recognition for original works.").

[71] Bill Dahl, *Ruth Brown Biography*, ALLMUSIC, https://www.allmusic.com/artist/ruth-brown-mn0000806877/#biography (last visited Aug. 28, 2024).

[72] Leonard Feather, *Ruth Brown's Battle Royal*, L.A. TIMES (July 3, 1988), https://www.latimes.com/archives/la-xpm-1988-07-03-ca-8887-story.html.

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everything was being charged off against them—musicians, studio costs, arrangements, packaging, giveaway records."[73]

XI. THE "SEVEN DEADLY SINS" OF COPYRIGHT LAW

Copyright law originated in England with the Statute of Anne in 1710,[74] and was not created with the interests of African Americans in mind. Like the notorious O.J. Simpson glove, copyright doctrines and requirements often did not fit the way African American artists produce music. The "seven deadly sins" are copyright law doctrines that unfairly discriminate against Black artists.[75]

The "sins" are as follows:

1. **Fixation**:

Copyright law insists that creators fix (i.e., write or otherwise record) works in a tangible form.[76] Copyright law's fixation requirement again was not created with the interests of Black norms of musical production and clashed with the improvisational roots of Black music.[77]

Fixation also facilitated the outright copying of Black performances that were unfixed.[78] Examples of this abounded in the early music industry, where roving scouts of record labels loitered in southern juke joints, copying works by illiterate or poorly educated Black artists.[79]

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[73] *Id.*

[74] WAYTE, *supra* note 55, at 210.

[75] I first identified the majority of these seven sins in Kevin J. Greene, *Thieves of the Temple: The Scandal of Copyright Registration and African-American Artists*, 49 PEPP. L. REV. 615, 627–33 (2022).

[76] 17 U.S.C. § 102(a) ("Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."). "Specifically, the work must be fixed in a copy or phonorecord 'by or under the authority of the author' and the work must be 'sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."' U.S. COPYRIGHT OFF., COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 305 (3d ed. 2021) (quoting 17 U.S.C. § 101).

[77] *See* Greene, *supra* note 5, at 378–79 (noting the tension between the fixation requirement and Black artists' "oral tradition").

[78] *Id.* at 380 (discussing how copyright law "clearly promotes imitation," a fact that in practice meant "Black innovators in music have been powerless to prevent white imitators from capitalizing on their ground-breaking efforts").

[79] *See* Hines, *supra* note 40, at 476–77.

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2. **Originality**:

Copyright only protects "original" works of authorship.[80] The originality standard is a minimal one: virtually anything more creative than the arrangement of numbers in a phone book could theoretically satisfy the standard.[81]

Here, there were clear parallels with the common attitude that Black music was a "primitive" music of the jungle.[82] Courts, for example, have repeatedly held that "short [musical] phrases," a staple of Black music forms, are insufficiently original to be protected.[83]

3. **The Idea-Expression Dichotomy**:

Copyright law's idea expression is an unwieldly, almost metaphysical doctrine. It states that copyright never protects ideas[84]—only the expression of ideas. The doctrine impacted Black artists by prohibiting the protection of musical performance styles and allowing innovative musical creations to be imitated freely.[85]

In practice, the idea-expression dichotomy deemed the works of great innovators and pioneers as mere ideas, giving their works less protection.[86] Musical style, for example, is considered an unprotectable idea under copyright law.[87] Examples abound where a white artist got rich imitating the style of a Black artist,

[80] *See* 17 U.S.C. § 308.

[81] *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 363–64 (1991) (holding that copyright law "does not afford protection from copying to a collection of facts that are selected, coordinated, and arranged in a way that utterly lacks originality").

[82] Greene, *supra* note 15, at 1190 n.55 (discussing how many critics of rock 'n' roll referred to the genre as "jungle music" and "primitive" with clear racial implications riddling their critiques).

[83] Greene, *supra* note 75, at 628.

[84] *See* 17 U.S.C. § 102(b) ("In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.").

[85] *See* Greene, *supra* note 5, at 380.

[86] *See* K.J. Greene, *Papa's Got a Brand New Bag: James Brown, Innovation, and Copyright Law*, *in* AFRICAN AMERICAN CULTURE AND LEGAL DISCOURSE 177, 178 (Lovalerie King & Richard Schur eds., 2009) ("When an artist is so innovative that his or her idiom becomes a 'style,' the idea-expression dichotomy of copyright law effectively allows mere imitators to usurp the true innovator.").

[87] *See* Greene, *supra* note 5, at 383.

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with the case of Otis Blackwell and Elvis Presley front and center.[88] In such cases, no compensation is due to the innovator.[89]

4. **Performers Unprotected**:

Copyright in musical works extends to both musical compositions and sound recordings.[90] Interestingly, sound recordings did not receive federal copyright protection until 1972.[91] Let that sink in—federal copyright law did not protect records from the inception of the recording industry until 1972, and yet the music industry was "America's most popular and profitable form of entertainment from 1800 to the end of the last century."[92]

Copyright protects sheet music, which requires literacy of musical notation, something poor blues artists did not know.[93] Copyright law also protects sound recordings since the early seventies, but Black people have had less access to resources such as loans and capital needed to create record labels.[94]

Copyright law does not grant rights to performances that are not fixed on a sound recording or in sheet music.[95] This lack of protection for performance has proven to be an enormous burden on the oral tradition of Black artists.[96]

Copyright rewards authors of fixed works, but generally excludes performers, who historically were left to the mercy of unscrupulous and extractive industry contracts.[97]

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[88] Greene, *supra* note 75 at 640.

[89] *See id.* at 639–40.

[90] WAYTE, *supra* note 55, at 213, 216.

[91] Even then, protection for sound recordings under the 1971 Sound Recording Act came with a catch: the record had to have been published with a copyright notice "on or after February 15, 1972" to get the protection. *See* U.S. COPYRIGHT OFF., CIRCULAR 56, COPYRIGHT REGISTRATION FOR SOUND RECORDINGS 6 (2021), https://www.copyright.gov/circs/circ56.pdf.

[92] *Id.*; *see also* Greene, *supra* note 4, at 372.

[93] *See* Greene, *supra* note 15, at 1201.

[94] *See id.* at 1197; David Suisman, *Co-workers in the Kingdom of Culture: Black Swan Records and the Political Economy of African American Music*, 90 J. AM. HIST. 1295, 1299–1300 (2004).

[95] *See* Greene, *supra* note 15, at 1199–1200; Greene, *supra* note 5, at 380.

[96] *See* Greene, *supra* note 75, at 628.

[97] *See* Greene, *supra* note 5, at 380–81.

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In contrast, Europe provides much stronger protection to performers of copyrighted works.[98]

5. **The Devastating Impact of Copyright Formalities**:

The 1909 Copyright Act governed musical compositions from 1909 to 1978.[99] The 1909 Act is still very much in play given the long duration of the copyright term.[100] Currently, works created after 1927 are still potentially under copyright and the authority of the 1909 Copyright.[101] These include works from the 1930s, 1940s, 1950s, 1960s, and 1970s.

The 1909 Act (still in effect today) was rife with austere and arcane formalities.[102]

5.1 **Copyright Renewal**:

Renewal was one heck of a thorny formality under the 1909 Act.[103] The copyright term was split into a bifurcated term of twenty-eight years.[104]

To get the second half of the copyright term, a copyright owner had to expressly petition the Copyright Office to claim the second half.[105]

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[98] *Id.* at 346–47 (noting how in Europe, not only the economic rights of artists, as is the American method, but also their moral rights are protected); *see also* Daniel Tencer, *Europe's Artists and Labels Could Lose $137M Annually to US Recorded Music Rightsholders if EU Law Isn't Changed, Trade Groups Warn*, MUSIC BUS. WORLDWIDE (Nov. 29, 2023), https://www.musicbusinessworldwide.com/europes-artists-and-labels-could-lose-137m-annually-to-us-recorded-music-rightsholders-if-eu-law-isnt-changed-trade-groups-warn.

[99] *See* WAYTE, *supra* note 55, at 216 (noting the Copyright Act of 1976 went into effect in 1978 and superseded the Copyright Act of 1909).

[100] *See* 17 U.S.C. § 304(a) (allowing copyright holders in existence before 1978 to extend their copyright by 28 years or 67 years, depending on detailed circumstances).

[101] *See* Greene, *supra* note 75, at 629.

[102] *Id.*

[103] *Id.* at 629–30 (noting that "copyright formalities such as . . . renewal . . . 'served to limit the number of works receiving copyright protection,'" a fact that especially impacted Black artists).

[104] WAYTE, *supra* note 55, at 215 (noting that the 1909 Act allowed for a twenty-eight-year copyright with the opportunity to renew for a second term of equal length).

[105] *See* U.S. COPYRIGHT OFF., CIRCULAR 6A, RENEWAL OF COPYRIGHT 1 (2021), https://www.copyright.gov/circs/circ06a.pdf (explaining that the owners of works protected prior to 1978 "had to file a renewal application before the end of the twenty-eighth year to extend copyright protection into the renewal term"

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If the copyright owner failed to submit the paperwork on time, the work fell automatically into the public domain, lost forever.[106] An enormous number of works were not renewed under the 1909 Act.[107] Even if Blues and other marginalized artists were positioned to get copyright registrations, the renewal formality often precluded protection for a second copyright term.[108]

5.2 **Copyright Notice and Registration**:

Among the deadliest formalities to Black artists were copyright registration and copyright notice. Publication of a work without a copyright notice meant the work was dedicated to the public domain.[109] This fate almost happened to Dr. King's famous "Dream Speech."[110]

Copyright registration is a formality. Registration provides many added benefits and is required to institute an infringement or copyright ownership lawsuit. However, as operationalized, copyright registration has proven punitive to "marginalized" communities.[111]

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or protection "ended on the twenty-ninth anniversary date of the original term, and the work entered the public domain").

[106] *Id.*; *see also* Greene, *supra* note 15, at 1202.

[107] *See* Greene, *supra* note 34, at 52.

[108] *See* Greene, *supra* note 15, at 1202 ("The creators of blues music typically did not have the literacy, savvy, legal representation or the wherewithal to navigate the complexities of the 1909 Copyright Act.").

[109] *See* Greene, *supra* note 5, at 353–54.

[110] *See* Aaron Moss, *The Copyright Legacy of Martin Luther King*, COPYRIGHT LATELY (Jan. 13, 2023), https://copyrightlately.com/martin-luther-king-copyright.

> Shortly after his "I Have a Dream" speech was delivered in August 1963, King moved for a preliminary injunction preventing record companies from selling copies of the speech. The defendants, Mister Maestro, Inc. and 20th Century Fox Records argued that, because King had distributed advance copies of the speech to the press without restricting them from reproducing or distributing it further (and without the copyright notice required under copyright law at the time), the speech was in the public domain.

Id.

[111] *See* Greene, *supra* note 75, at 631.

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An example of this is the rash of lawsuits filed by Black artists against the video game *Fortnite* for appropriation of dance moves.[112] Each case was dismissed for lack of copyright registration.[113]

The 1976 Copyright Act eliminated copyright renewal for works created after 1978.[114] In its place, the 1976 Copyright Act included recapture provisions called copyright terminations.[115] I have documented how the copyright recapture system is byzantine and deliberately created to make recapture prohibitively difficult.[116]

6. **Lack of Moral Rights Protections**:

Moral rights are distinct from economic rights and are part of America's obligation under international IP treaties, including the Berne Convention signed by the United States in 1988.[117] Moral rights dictate that artists receive credit for their work and that their works cannot be distorted in ways that harm an artist's reputation.[118]

Moral rights recognize that artists invest their personality into works and retain those rights even when works are sold. Two key moral rights are the right to credit

[112] *See* Sharona Sternberg, *Dance, Fortnite, and the "Epic" Battle for Copyright Protection*, JD SUPRA (Jan. 9, 2024), https://www.jdsupra.com/legalnews/dance-fortnite-and-the-epic-battle-for-2009534.

[113] *Id.*

[114] *See* Greene, *supra* note 5, at 354 (noting that the 1976 act "effectively eliminated the traditional rigid formalities" previously imposed on copyright law); *see also* WAYTE, *supra* note 55, at 216 (specifying that the elimination of these formalities went into effect on January 1, 1978).

[115] *See* Greene, *supra* note 34, at 55–56.

[116] *Id.* at 55–68.

[117] Berne Convention for the Protection of Literary and Artistic Works art. 6bis, Sept. 9, 1886, *amended* at Paris, Sept. 28, 1979, S. Treaty Doc. No. 99-27 [hereinafter Berne Convention]; *see* Samuel Jacobs, Note, *The Effect of the 1886 Berne Convention on the U.S. Copyright System's Treatment of Moral Rights and Copyright Term, and Where That Leaves Us Today*, 23 MICH. TELECOMMS. & TECH. L. REV. 169, 170 (2016).

[118] Berne Convention, *supra* note 117, at art. 6bis(1) ("Independently of the author's economic rights, and even after the transfer of the said [sic] rights, the author shall have the right to claim authorship of the work and to object to any distortion . . . which would be prejudicial to his honor or reputation.").

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and the right to preserve the artistic integrity of their works.[119] Black music artists found their works distorted and were, on a mass scale, deprived of proper credit.[120]

7. **The Compulsory License**:

The compulsory license originated in the 1909 Copyright Act and continued in the 1976 Act.[121] It provides that whenever a composer releases their composition on a sound recording to the public, any other artist can re-record the song, provided the artist pays compensation to the composer.[122]

In theory, the cover of a song would be a boon to the composer of the song, who is entitled under our copyright system to receive mechanical royalties whenever a "cover" record is physically manufactured and performance royalties whenever the song is publicly performed.[123]

However, in the racialized music industry, Black performers often found their works covered by white artists and deprived of copyright benefits.[124] In essence, the compulsory license was weaponized against Black artists.[125] As Professor Brauneis notes, "major [record] companies decided that they needed to produce recordings featuring white artists. That was likely due to a confluence of many factors, all of which manifested racial prejudice in one way or another. Most directly, many members of the record-buying public would not buy recordings by African Americans."[126]

It has been noted that:

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[119] Greene, *supra* note 5, at 347.

[120] *See* Greene, *supra* note 15, at 1181 (noting that "[f]or many generations, black artists as a class were denied the fruits of intellectual property protection—credit, copyright royalties, and fair compensation").

[121] *See* WAYTE, *supra* note 55, at 214–15 (noting that the compulsory license was introduced under the 1909 Act); Howard B. Abrams, *Copyright's First Compulsory License*, 26 SANTA CLARA COMPUT. & HIGH TECH. L.J. 215, 225 (2010).

[122] *Compulsory License*, CORNELL LEGAL INFO. INST. (Jan. 2022), https://www.law.cornell.edu/wex/compulsory_license.

[123] *See* WAYTE, *supra* note 55, at 144–45, 233–40.

[124] *See* Greene, *supra* note 5, at 368–70.

[125] Robert F. Brauneis, *Copyright, Music, and Race: The Case of Mirror Cover Recordings*, *in* THE CAMBRIDGE HANDBOOK OF INTELLECTUAL PROPERTY AND SOCIAL JUSTICE 183, 188 (Steven D. Jamar & Lateef Mtima eds., 2024).

[126] *Id.* at 189.

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> [i]n the early days of rock 'n roll in the 1950s there were numerous situations where owners of established record labels took what was popular within the smaller market of African-American music and found white artists to re-record or "cover" the originals. These cover versions took everything from lyric to arrangement and with access to the broader market and wider record distribution became better known and generated far more profit than the originals. In many cases, the cover artists became famous while the originators remained unknown . . . .[127]

One example of this involved the Crew-Cuts, "one of the first (perhaps even THE first) white vocal groups to reap the benefits of covering recordings of black performers and exposing those songs to a wider audience."[128]

> The Crew Cuts [sic] . . . scored a No. 1 hit with their cover of "Sh-Boom" in the early 1950s. The song, however, was originally written and recorded on a small independent label by an African-American doo-wop group called The Chords. The Crew Cuts [sic] got the fame and money, while the Chords and their creative original faded into obscurity.[129]

A more nebulous example involves Big Mama Thornton.[130] Jerry Leiber and Mike Stoller wrote the song *Hound Dog* specifically for her;[131] she recorded it in 1952 and it was released the next year by Peacock Records.[132] Emblematic of the tortured music industry practices of the time, Peacock owner Don Robey "originally registered *Hound Dog* listing himself and Thornton as authors, then amended the

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[127] *Professor Sheds Light on Lesser-Known Great African-American Musicians*, PENN STATE: NEWS (Jan. 27, 2010), https://www.psu.edu/news/arts-and-entertainment/story/professor-sheds-light-lesser-known-great-african-american-musicians [hereinafter *Professor Sheds Light*].

[128] *The Crew-Cuts*, TIMS: THIS IS MY STORY, https://tims.blackcat.nl/messages/crew_cuts.htm (last visited Aug. 28, 2024).

[129] *Professor Sheds Light*, *supra* note 127.

[130] *See generally Becca Anderson, Big Mama Thornton: "Stronger Than Dirt,"* BLOG OF AWESOME WOMEN (Jan. 12, 2020), https://theblogofawesomewomen.wordpress.com/2020/01/12/big-mama-thornton-stronger-than-dirt-2 ("At the height of her careers [sic], Thornton held center stage singing, drumming, and blowing harmonica with rhythm n' blues luminaries Muddy Waters, B.B. King, Eddie Vinson, and Janis Joplin").

[131] *Id.*

[132] Brian Lukasavitz, *Blues Law: Hound Dog vs. Bear Cat*, AM. BLUES SCENE (Apr. 10, 2020), https://www.americanbluesscene.com/2014/03/blues-law-hound-dog-vs-bear-cat.

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copyright to credit Leiber, Stoller, and [bandleader Johnny] Otis," who had "falsely told Robey he was a writer of the song and that he had the power of attorney for Leiber and Stoller," still teenagers at the time.[133] It took a court case to remove Otis's credit; "the sole credit of authorship went to Leiber and Stoller."[134]

Leiber and Stoller, "whose families both moved to Los Angeles in their teens, grew up in love with African-African [sic] culture, soaking up all they could about their shared obsession with rhythm and blues. Not only did they live among the culture, they also studied it."[135]

The songwriting duo claimed they had written the song "in less than fifteen minutes."[136] As Leiber recalled, "I was beating out a rhythm we called the 'buck dance' on the roof of the car . . . . We got to Johnny Otis's house and Mike went right to the piano . . . didn't even bother to sit down. He had a cigarette in his mouth that was burning his left eye, and he started to play the song."[137]

When it was finished, he went on, "We took the song back to Big Mama and she snatched the paper out of my hand and said, 'Is this my big hit?' And I said, 'I hope so.'"[138] When she started crooning "like Frank Sinatra," Leiber told her "'It don't go that way.' And she looked at me like looks could kill and said—and this was when I found out I was white—'White boy, don't you be tellin' me how to sing the blues.'"[139]

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[133] *Id.*

[134] *Id.*

[135] David J. Lawson, *Don't Talk Back: The Hidden Social Criticism of the Coasters and Songwriters Leiber and Stoller*, MUSEUM OF AMERICANA: A LITERARY REV., https://themuseumofamericana.net/dont-talk-back-the-hidden-social-criticism-of-the-coasters-and-songwriters-leiber-and-stoller-essay-by-david-j-lawson (last visited Aug. 28, 2024).

[136] Jacob Uitti, *Who Wrote the Controversial-Yet-Classic Blues Rock Song, "Hound Dog"?*, AM. SONGWRITER (Jan. 18, 2024), https://americansongwriter.com/who-wrote-the-controversial-yet-classic-blues-rock-song-hound-dog.

[137] *Id.*

[138] Terence McArdle, *'Hound Dog' Lyricist Co-Write Hits for Presley, the Drifters*, WASH. POST, Aug. 24, 2011, at B6.

[139] *Id.*

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Thornton's record was wildly successful.[140] Thornton's record "stayed at No. 1 on the Billboard R&B chart for seven weeks in 1953 and sold almost two million copies."[141] Afterwards, Thornton "sometimes blurred the story enough to imply that she had been robbed" of credit, telling one writer in 1971 "I first saw some lines on a paper bag and I threw in a few hollers to make it go."[142] For her work, Thornton received $500 in payment.[143]

Of course, Elvis covered "Hound Dog," as the compulsory license permits, and the rest is history. Despite his remarkable success with the song, "Presley never acknowledged any debt to Big Mama for his knockoff of *Hound Dog*, and she would recount an occasion when he declined to perform with her, likely out of consideration for his white Southern fan base."[144]

A TEN-POINT PLAN TO BEGIN TO CLOSE THE RACIAL JUSTICE GAP IN COPYRIGHT AND THE ENTERTAINMENT INDUSTRY

1. Have the U.S. Copyright Office Take a Leading Role in Advancing Racial Justice, Including Advocacy for Reparations for Black Music Artists

The U.S. Copyright Office undertakes many functions such as oversight of copyright registrations and advising the U.S. government and courts on copyright policy.[145] The head of the Copyright Office is the Register of Copyrights,[146] who is "statutorily designated as Congress' copyright expert and is the steward of a creative

[140] *See* Nancy Prater, *Alabama Native 'Big Mama' Thornton Made 'Hound Dog' A Hit Before Elvis*, ALA. NEWS CTR. (Mar. 31, 2021), https://alabamanewscenter.com/2021/03/31/alabama-native-big-mama-thornton-made-hound-dog-a-hit-before-elvis.

[141] *Id.*

[142] Cynthia Shearer, *The Thinning of Big Mama*, OXFORD AM. (Feb. 15, 2017), https://oxfordamerican.org/magazine/issue-95-winter-2016/the-thinning-of-big-mama.

[143] Prater, *supra* note 140.

[144] Shearer, *supra* note 142.

[145] *Overview*, U.S. COPYRIGHT OFF., https://www.copyright.gov/about (last visited Aug. 28, 2024).

[146] *Id.*

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economy that represents $1.2 trillion of GDP."[147] However, the U.S. Copyright too is a part of American society.

The Copyright Office has its own dark history of racial and gender bias. Barbara Ringer, a white woman, became the first female Register of Copyright in the 1970s, but it took an antidiscrimination proceeding in the EEOC and a federal lawsuit to get her there.[148] In addition to allegations of rampant sexism in the U.S. Copyright Office, the EEOC appeals examiner also noted that "definitive weaknesses exist in the Library of Congress with respect to recruiting and promoting black employees."[149]

Ringer's EEOC proceeding exposed a severe pattern and practice of gender and racial discrimination in the U.S. Copyright Office (then part of the Library of Congress).[150] This was a 1970s case, but there is every reason to believe that the problem was longstanding.[151] Ringer's EEOC claim alleged discrimination based on gender, but also on race.[152] Specifically, Ringer alleged that she was discriminated against based on her advocacy for hiring and promoting Black workers in the office.[153]

Ringer noted that the Copyright Office showed an entrenched and "demonstratable bias against any white [person] such as myself who has been characterized as 'pro-black' in personnel matters, or who is willing to speak-out

[147] Amy Hinojosa, *A Strong Copyright Office Protects Independent and Diverse Creators*, HUFFPOST (Apr. 24, 2017, 3:18 PM), https://www.huffpost.com/entry/a-strong-copyright-office-protects-independent-and_b_58fe48e3e4b086ce589813e7.

[148] Lisa Berardi Marflak, *Barbara Ringer's Legacy of Fighting for Equity at the Copyright Office: An Interview with Amanda Levendowski*, LIBR. OF CONG.: BLOGS (Nov. 19, 2021), https://blogs.loc.gov/copyright/2021/11/barbara-ringers-legacy-of-fighting-for-equity-at-the-copyright-office.

[149] Barbara A. Ringer, ED 065142, at 16 (Equal Emp. Opportunity Comm'n Aug. 10, 1972) (Appeals Examiner's Findings and Recommended Decisions), https://files.eric.ed.gov/fulltext/ED065142.pdf.

[150] *Id.* at 8, 16.

[151] *Id.* at 29 (noting the examiner's findings that "there is a consistent pattern of discrimination which restrict [sic] the mobility of women to high-level positions . . . and that there is a consistent pattern of racial discrimination insidiously designed and effectively practiced to inhibit the progression of blacks to positions of greater responsibility and higher grades in the Library of Congress").

[152] *Id.* at 5, 16.

[153] *Id.* at 23–24.

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openly on the problems and seek to enforce the published policies of the Library of Congress with respect to equal opportunity."[154]

The U.S. Copyright Office today has taken steps toward a more diverse workplace, but is not without its share of critics, who contend that the Copyright Office is a casualty of corporate capture.[155] These critics allege that "the Copyright Office typically sides with the interests of rightsholders—in particular, large entertainment industries and other corporate rightsholders—over the interests of other stakeholders, from consumers and technology providers to libraries and academics."[156] Critics argue that "the Copyright Office has played an increasingly central role in policymaking—and it has not been a neutral advocate."[157]

In contrast to the favorable treatment of large corporate interests, there is little to no evidence that the U.S. Copyright Office has stood up for Black artists. The Copyright Office had to have known the adverse impacts imposed on marginalized communities caused by copyright formalities and the brazen expropriation of the works of Black artists. A raft of news articles and of case law highlights inequality—from Elizabeth Cotten, folk pioneer of *Freight Train*, to Ronnie and the contractual fleecing of the iconic rock group Ronnie and the Ronettes—was there for all to

[154] *Id.* at 24.

[155] MEREDITH ROSE, RYAN CLOUGH & RAZA PANJWANI, PUB. KNOWLEDGE, CAPTURED: SYSTEMIC BIAS AT THE U.S. COPYRIGHT OFFICE 1 (Sept. 8, 2016), https://publicknowledge.org/wp-content/uploads/2021/11/Final_Captured_Systemic_Bias_at_the_US_Copyright_Office.pdf.

[156] *Id.* at 2.

[157] Kerry Sheehan, *Let's Make the Copyright Office Less Political, Not More*, ELEC. FRONTIER FOUND. (Mar. 27, 2017), https://www.eff.org/deeplinks/2017/03/lets-make-copyright-office-less-political-not-more ("The Copyright Office has repeatedly put forward policy proposals and legal analyses that have tended to favor the interests of a particular segment of copyright owners (particularly major media and entertainment companies) over other constituencies.").

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see.[158] When read in light of the Office's history throughout at least the 1970s, the evidence of racial animus is damning.[159]

In 2020, the Copyright Office made a remarkable statement by hosting an event exploring "how people from historically disadvantaged communities benefit from copyright law to the advantage of communities as a whole."[160] This conversation occurred only months before the heinous murder by police of George Floyd in 2020, an event that reached even the halls of the U.S. Copyright Office.[161]

This Manifesto calls on the U.S. Copyright Office to lead the initiative to explore the ways that systemic bias and inequality infest the system, and to devote the same resources given to big movies and television studios and record labels to so-called marginalized groups.

2. **Defang the Dragon of Copyright Formalities and their Pernicious Impact on Black Creators**

Copyright formalities are procedural gatekeepers, hoops that copyright creators must jump through to receive copyright protection and benefits.[162] Many believe (erroneously) that copyright formalities fell into the dustbin of history with the

[158] As a child of eleven or so, Elizabeth Cotten wrote the iconic folk song, "Freight Train." *See* David Cheal, *Freight Train—How Elizabeth Cotten's Song Was Revived by the Skiffle Boom*, FIN. TIMES (Aug. 29, 2022), https://ig.ft.com/life-of-a-song/freight-train.html. Although one hundred percent composed by Cotten, "Freight Train" "was in general circulation and was treated as a folk standard." *Id.* Two men in England recorded the song and claimed copyright in it. *See* Allyson McCabe, *How Elizabeth Cotten's Music Fueled the Folk Revival*, NPR (June 29, 2022, 5:00 AM), https://www.npr.org/2022/06/29/1107090873/how-elizabeth-cottens-music-fueled-the-folk-revival ("[A]n out-of-court settlement gave Cotten only a third of the songwriting credit . . . . Though the royalty terms were never made public, at the time it was customary for music publishers to take a 50% cut, likely leaving Cotten with only a fraction of the song's true worth. Meanwhile, other artists continued releasing 'Freight Train,' including Peter, Paul and Mary, who rerouted the song to New York City in 1963. With a lyrical shout-out to Bleecker Street, they credited the song to Paul Stookey, Mary Travers, Elena Mezzetti and producer Milton Okun."). For the story of the Ronettes, see Robert F. Worth, *A Sad Song for the Ronettes: Court Reverses Royalty Rights*, N.Y. TIMES (Oct. 18, 2002), https://www.nytimes.com/2002/10/18/nyregion/a-sad-song-for-the-ronettes-court-reverses-royalty-rights.html.

[159] *See* Ringer, *supra* note 149, at 16.

[160] *See Copyright & Social Justice*, U.S. COPYRIGHT OFF., https://www.copyright.gov/copyrightmatters/social-justice2020 (last visited Aug. 29, 2024).

[161] *Library Opens New Web Archive Collection, Features Programs for Black History Month*, LIBR. OF CONG.: NEWSROOM (Feb. 1, 2023), https://newsroom.loc.gov/news/library-opens-new-web-archive-collection--features-programs-for-black-history-month/s/4c044eea-aff2-40cf-8c6e-c48cb3104a2f.

[162] *See* Greene, *supra* note 34, at 46, 48.

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phasing out of the 1909 Copyright Act and the enactment of the 1976 Copyright Act,[163] particularly the 1986 amendments to conform to international treaties and practices.[164] As I have written elsewhere: "Nothing could be further from the truth."[165] In 2024, copyright formalities, a vestige of the 1909 Copyright Act, are still very much alive.[166]

Copyright formalities historically created a perfect storm for the expropriation of works by Black artists.[167] The 1909 Act was rife with formalities, requiring de facto literacy and a high level of legal sophistication to avoid the loss of copyright to the public domain.[168]

In the modern era, we are witnessing, in real time, the re-disenfranchisement of Black creativity.[169] This is an area in dire need of both serious reform and redress to achieve social justice and equity for the architects and innovators of the American music industry—Black men and women.

False copyright registrations of Black music, including forced joint authorship credit, have been a staple of the music industry from Jelly Roll Morton to Lil Wayne, aided and abetted by a copyright registration system that facilitates fraud.[170] At the

[163] Maria A. Pallante, *The Curious Case of Copyright Formalities*, 28 BERKELEY TECH. L.J. 1415, 1416 ("Did we get it right in 1909 (and earlier) when we made formalities such a central part of our copyright law? Or did we get it right in 1976 . . . when we gradually relaxed and removed them?").

[164] Greene, *supra* note 34, at 51.

[165] *Id.*

[166] *Id.* at 51–52.

[167] *Id.* at 46.

[168] Greene, *supra* note 5, at 354.

[169] Greene, *supra* note 34, at 47.

[170] *See* Greene, *supra* note 75, at 646–47; *The New Copyright Law Manifesto: UW Law's 2022 Distinguished Shidler Lecturer Kevin J. Greene of Southwestern Law School, On How Music Industry Practices, and the Structure and Function of Copyright Law, Replicate Inequality and Expropriate the Creativity of Marginalized Artists*, Univ. of Wash. Sch. of L.: Discovery (Dec. 7, 2022), https://www.law.uw.edu/news-events/discovery/season-5/the-new-copyright-law-manifesto (click "Show Transcript"; *see also* Ben Feilich, *"A Milli?" More Like 51 'Milli:' Lil Wayne Suing His Label, Cash Money, for $51M*, SUFFOLK: J. OF HIGH TECH. L. BLOG (Feb. 19, 2015), https://sites.suffolk.edu/jhtl/2015/02/19/a-milli-more-like-51-milli-lil-wayne-suing-his-label-cash-money-for-51m.

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other end of the spectrum, the harsh requirement of copyright registration for rights enforcement victimizes artists from underserved communities.[171]

Ostensibly, copyright terminations are the salve for inequitable music industry contracts (i.e., standard contracts).[172] However, the promise of copyright recapture is all but illusory except for the most sophisticated and well-financed artists.[173] The old-school hip-hop music catalog is now in the copyright termination window,[174] but how many hip-hop artists even know that recapture exists, much less how to navigate the byzantine provisions of 17 U.S.C §§ 203 and 304?

3. **Audit the Records of the U.S. Copyright Office**

The Copyright Office explicitly says that it does not vet or verify claims of copyright ownership or co-ownership.[175] This is an extraordinary paradox for an institution that places the bright red seal of the federal government on a document that is prima facie evidence of copyright ownership.[176] My scholarship has explored the rampant practice of copyright fraud that plagues Black artists in the music industry.[177]

Given what we know about the persistent deprivation of copyright ownership of Black artists through copyright fraud, there is no reason to trust that the registration system has any degree of credibility.

That is why I'm calling for an audit of copyright records to redress the rampant copyright registration fraud that has bedeviled Black artists and for strong verification of all copyright registration claimants.

4. **Mandate Credit for Performers**

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[171] Greene, *supra* note 34, at 48.

[172] *See id.* at 54.

[173] *Id.* at 47.

[174] *Id.*

[175] *See* U.S. COPYRIGHT OFF., *supra* note 76, § 503.2 ("Although the U.S. Copyright Office does not investigate the truth of the claims asserted in the application, it does verify that the asserted authorship facts are consistent with the facts contained in the deposit copy(ies) or elsewhere in the registration materials."); *see also Copyright Registration and Notice*, DIGIT. MEDIA L. PROJECT, https://www.dmlp.org/legal-guide/copyright-registration-and-notice (last visited Aug. 29, 2024) ("Bear in mind that when you register a work, the Copyright Office does not validate the accuracy of your copyright claim.").

[176] *See* Greene, *supra* note 75, at 619–20.

[177] *Id.* at 639–47.

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The United States is an outlier in how it treats performers (as opposed to composers) of works, which is, in essence, horribly.[178]

Up until 2003, trademark law provided a measure of protection to performers by allowing them to sue for deprivation of credit under the Lanham Act.[179] If a movie studio excluded an actor from the credits, for example, the actor could sue under trademark law for lack of attribution.[180]

However, the U.S. Supreme Court, in an opinion by Justice Scalia, eviscerated those protections in a 2003 case.[181]

Since that time, there is no legal requirement to provide credit to performers outside of a contract or a union/guild provision.[182] This lack of protection for credit is inconsistent with international IP norms and has historically been a persistent problem for Black artists. Black artists created jazz, but were often denied credit for it, while white bandleaders in the 1930s, '40s, and '50s benefited financially and were lauded.[183]

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[178] *See supra* notes 103–04 and accompanying text.

[179] *See* Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 28–29 (2003).

[180] *See* Tyler T. Ochoa, *Introduction: Rights of Attribution, Section 43(A) of the Lanham Act, and the Copyright Public Domain*, 24 WHITTIER L. REV. 911, 912 (2003).

[181] *Dastar*, 539 U.S. at 37 (concluding that the phrase in question in the Lanham Act "refers to the producer of the tangible goods that are offered for sale, and not to the author of any idea, concept, or communication embodied in those goods").

[182] *See* U.S. COPYRIGHT OFF., CIRCULAR 30, WORKS MADE FOR HIRE 1 (2024), https://www.copyright.gov/circs/circ30.pdf ("For legal purposes, when a work is a 'work made for hire,' the author is not the individual who actually created the work. Instead, the party that hired the individual is considered both the author and the copyright owner of the work.").

[183] *See* Zola Philipp, *The Social Effects of Jazz*, CUNY: YORK COLL. DEP'T OF ENG., https://www.york.cuny.edu/english/writing-program/the-york-scholar-1/volume-6.1-fall-2009/the-social-effects-of-jazz (last visited Aug. 29, 2024) ("Black jazz musicians were less credited for their invention and innovation of jazz music. Jazz music created a sense of identity, originality, and social cohesion among black musicians, but they were seldom credited with inventing it. Kofsky believes that this refusal of whites to credit blacks is because they refused to equate anything valuable with African Americans. According to Miles Davis, this is the case because 'the white man likes to win everything. White people like to see other white people win . . . and they can't win when it comes to jazz . . . because black people created this. In addition, whites became more famous than blacks because of their unwillingness to give blacks credit for their talents. Means too believes that black jazz musicians experienced a lot of resentment because they felt that they did not always receive acknowledgement for their accomplishments, while whites were granted titles such as 'King of Swing' and 'King of Jazz.' Again this social effect of jazz was

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The issue of credit is vital to musicians and other performers, such as dancers, as explored below.

4.1 **Black Dance, Appropriation and Social Media**

In 2021, a *Netflix* producer approached me about providing input around copyright issues in the world of dance and social media, and the problem of appropriation of Black dance. *TikTok*, a social media app, has emerged as a leading venue for dancers showcasing their talents.[184] However, as I like to say, *TikTok* "would not last a day" without the creative input of Black dancers, often teenage girls.

The Copyright Act of 1976 provided, for the first time, protection for choreographic works,[185] with a twist of implicit bias. The Copyright Office has taken the position that copyright law does not protect "social dance" steps.[186] This position effectively foreclosed registration for Black dance until recent years: "social dance steps" in America are driven by Black creators, from the Cakewalk in the late nineteenth century to the Twist,[187] but historically these creators received neither copyright nor credit.

Black creators have been behind dozens of dance crazes, from the Cakewalk and the Charleston to the Twist and the Mashed Potato.[188] Black dancers continue to be at the vanguard of popular dance.[189] These dance reels have become a staple on

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a result of greed by whites, and it created anger, fear and resentment among black jazz musicians.") (citations omitted).

[184] *See* Margaret Fuhrer, *TikTok is Dead (Maybe). Long Live TikTok Dance.*, N.Y. TIMES (Apr. 7, 2023), https://www.nytimes.com/2023/04/07/arts/dance/tiktok-dance-evolution.html.

[185] Jill Vasbinder, *There's a Long History of Dances Being Pilfered for Profit—and TikTok Is the Latest Battleground*, THE CONVERSATION (July 23, 2021, 8:13 AM), https://theconversation.com/theres-a-long-history-of-dances-being-pilfered-for-profit-and-tiktok-is-the-latest-battleground-164215.

[186] *See* U.S. COPYRIGHT OFF., *supra* note 76, § 805.5(B).

[187] Regan Shrumm, *Who Takes the Cake? The History of the Cakewalk*, SMITHSONIAN: NAT'L MUSEUM OF AM. HIST. (May 18, 2016), https://americanhistory.si.edu/explore/stories/who-takes-cake-history-cakewalk; Jennifer Rosenberg, *The Twist: A Worldwide Dance Craze in the 1960s*, THOUGHTCO. (Sept. 23, 2019), https://www.thoughtco.com/the-twist-dance-craze-1779369.

[188] *See Blues Dancing and Its African American Roots*, UNIV. OF ILL. URBANA-CHAMPAIGN: SPURLOCK MUSEUM, https://www.spurlock.illinois.edu/exhibits/online/blues/history.html (last visited Aug. 29, 2024).

[189] *See* Vasbinder, *supra* note 185.

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social media, including *TikTok*, Instagram, and *YouTube*, and other creative spaces.[190]

However, Black dancers on social media have experienced deprivation of credit for their creations, adding their names to a "long list of women and people of color whose choreography and dance work have been pilfered for profit—a story that dates back to the origins of jazz dance in the 19th and early 20th centuries."[191]

> Despite its distaste for black dancers, [the television show American] Bandstand frequently showcased black music, with many black artists making their television debut on the show; however, these performers were restricted from associating with the show's white dancers. As many originally black dances such as "the strand" were popularized on the show by white dancers, the dancers were barred from disclosing that the choreography was created by their black classmates. Former *Bandstand* dancer Jimmy Peatross recalled that, [sic] "young America watched and danced with enthusiasm, oblivious to the debt of gratitude owed to the black community."[192]

Today, companies including *TikTok* and the gaming company Epic Games and its game *Fortnite* continue the discriminatory and extractive practices of the past of credit deprivation for Black dance:

> Despite the long passage of time since the Jazz Age, it's easy to spot similar patterns of appropriation in Epic's handling of *Fortnite*'s Emotes [in-game dance moves that players can purchase]. Dances that originated in black spaces, that were born specifically from circumstances associated with growing up black in this country, are lifted, intact, and slotted neatly within *Fortnite*'s endless, heavily monetized library. Their cultural significance is stripped away and used to

[190] *See, e.g.*, Ava Basset, *How Has Social Media Impacted the Dance Industry?*, MEDIUM (Apr. 28, 2023), https://medium.com/@abasset2/how-has-social-media-impacted-the-dance-industry-3096112e0778.

[191] Vasbinder, *supra* note 185.

[192] Marisa E. Balanda, Bodies Without the Burden: White Appropriation and Exploitation of Black Appearance and Culture 4 (May 9, 2020), https://cupola.gettysburg.edu/cgi/viewcontent.cgi?article=1943&context=student_scholarship (undergraduate student paper, Gettysburg College).

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> superficially spice up the game as a whole, without giving needed context to the art and style of what is being appropriated.[193]

While the dance moves have been financial manna for the coffers of *TikTok* and gaming companies like Epic Games, the dancers driving the trend remain uncredited and uncompensated.[194]

Black *TikTok* dancers went so far as to strike in 2021.[195]

5. **Make Copyright Terminations Automatic**

The copyright termination system does more than hurt the dreams and aspirations of creators from marginalized communities. It affirmatively serves as a tool of wealth extraction from such artists.[196]

Victor Willis was the "cop" character and lead vocalist from the iconic band the Village People.[197] In 2012, Willis reclaimed his rights in hit songs such as *Macho Man* and *YMCA*.[198] However, few understand that Victor Willis "only knew that he had termination rights because his spouse, an attorney familiar with copyright law,

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[193] Yussef Cole, *Fortnite's Appropriation Issue Isn't About Copyright Law, It's About Ethics*, VICE (Feb. 11, 2019, 3:55 PM), https://www.vice.com/en/article/a3bkgj/fortnite-fortnight-black-appropriation-dance-emote.

[194] *See* Veracia Ankrah, *COMMENTARY: Black Creatives Receive Short End of Stick When Work Taken, Not Credited*, GLOB. NEWS (May 20, 2021, 9:49 AM), https://globalnews.ca/news/7819642/commentary-black-creatives-work-credit ("Black content creators [on social media] rarely reap the benefits of their labour and often have their work stolen by white creatives.").

[195] *See* Sharon Pruitt-Young, *Black TikTok Creators Are on Strike to Protest a Lack of Credit for Their Work*, NPR (July 1, 2021, 11:00 PM), https://www.npr.org/2021/07/01/1011899328/black-tiktok-creators-are-on-strike-to-protest-a-lack-of-credit-for-their-work ("Tired of not receiving credit for their creativity and original work—all while watching white influencers rewarded with millions of views performing dances they didn't create—many Black creators on TikTok joined a widespread strike last week, refusing to create any new dances until credit is given where it's due.").

[196] *See* Greene, *supra* note 34, at 47.

[197] *Id.* at 63.

[198] *See* Eriq Gardner, *Village People Songwriter Victor Willis Wins Case Over Termination of 'Y.M.C.A.' Rights*, HOLLYWOOD REP. (May 8, 2012, 10:32 AM), https://www.hollywoodreporter.com/business/business-news/village-people-ymca-lawsuit-victor-willis-321576.

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notified him" and he was "lucky enough to have half a million dollars at his disposal to spend on lawyers."[199]

Most minority artists do not even know that they have the right to recapture their works under copyright law.[200] And even if they do, many lack the resources to pursue the recapture of their works.[201] Because the possibility of copyright termination hangs over many types of entertainment agreements, it is safe to assume that large stakeholders of entertainment properties have calculated that possibility, in essence betting against the likelihood of most artists pursuing terminations.

That is why I am proposing that Congress make the copyright termination process automatic, with minimal notice requirements. As Professor Evans notes,

> U.S. termination laws are of little value to artists across the board. Without automatic reversion and a shorter period before authors can even begin the process of termination, most of the value of the copyrights has long been extracted before the notice period begins. The exceptions are the truly exceptional artists with global recognition, star power, and perennial hits (recall Victor Willis, Prince, and Anita Baker . . .).[202]

The United States does not have far to look to see how automatic reversion might work. Our neighbor Canada has exactly such a system.[203]

This step would effectively place the burden on music labels, music publishers, and movie studios. These are sophisticated companies who almost certainly have done the math themselves. Rather than forcing artists to know about copyright

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[199] Ann Bartow, *Using the Lessons of Copyright's Excess to Analyze the Political Economy of Ssection 203 Termination Rights*, 6 TEX. A&M J. PROP. L. 23, 30 (2020).

[200] *See id.*; Tonya M. Evans, *De-Gentrified Black Genius: Blockchain, Copyright, and the Disintermediation of Creativity*, 49 PEPP. L. REV. 649, 656–57 (2022).

[201] *See* Greene, *supra* note 34, at 47.

[202] Evans, *supra* note 200, at 671 (footnotes omitted).

[203] *See* Francois Larose, Naomi Zener, Tamara Céline Winegust & Mitchel Fleming, *The Copyright Ownership Boomerang: Automatic Reversionary Interests in Canada*, BERESKIN & PARR: INSIGHTS (Mar. 30, 2022), https://bereskinparr.com/news-insights/insights/the-copyright-ownership-boomerang-automatic-reversionary-interests-in-canada (noting that the Canadian Copyright Act "provides an author's estate with a reversionary interest in the copyright in work assigned or exclusively licensed by the author during their lifetime. The interest is triggered automatically. It kicks in at the end of 25 years after the author's death, with few exceptions.").

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terminations in the first place, and then to calculate the timeframe for termination (an intensely arduous task), let the institutional repeat players with all the resources and information notify artists.

6. **Provide Just Compensation to Artists and Performers**

Contracts of course play a key role in the exploitation of copyrights.[204] The mechanics of extractive business practices include false and fraudulent copyright assignments, works-made-for-hire provisions, royalty underpayments, and forced shared copyright credit, as well as egregious standard record company deductions.

At this writing, South Africa ("SA") is debating legislation that would require major movie studios, video game companies, and movie studios to pay just compensation to creators.[205] South Africa's "Copyright Amendment Bill has been systematically opposed by prominent sectors of creative industries over the last six years, at national and international levels."[206]

The SA copyright revision generated a firestorm, with both the United States and the European Union applying to pressure "to postpone the legislation with threats of tariffs and withdrawing investment."[207] The legislation provides for fair compensation, fair use provisions, and "additional remuneration rights for authors and performers," sparking harsh reaction from large copyright stakeholders.[208] This suggests that calls for music industry reparations will cause great resistance from record labels and publishers.

Nonetheless, the United States should be the leader in promoting fair compensation for artists, the start to end the endless cycle of extraction and appropriation.

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[204] *See, e.g.*, Greene, *supra* note 34, at 71–72 (noting how "egregious recording contracts impacted black and white artists alike").

[205] *See* Laura Kayali, *How the U.S. and European Union Pressured South Africa to Delay Copyright Reform*, POLITICO (June 28, 2020, 11:24 PM), https://www.politico.com/news/2020/06/28/copyright-reform-south-africa-344101.

[206] *South African Copyright Reform Rumbles On*, INT'L PUBLISHERS ASS'N (Feb. 1, 2023), https://www.internationalpublishers.org/copyright-news-blog/1310-south-african-copyright-reform-rumbles-on.

[207] *See* Kayali, *supra* note 205.

[208] *See id.*

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Due to the extraordinary long copyright duration, works from decades past are still under copyright and still generating revenue.[209] Because of racism and discrimination, Black artists did not receive fair compensation for their art.[210] Little Richard, for example, sold the rights to his hit song *Tutti Frutti* to Specialty Records for fifty dollars:

> Over the years, the song made millions of dollars for Specialty's owner, a white man named Art Rupe—but Richard received only a fraction of the proceeds. Rupe bought "Tutti Frutti" for $50, and paid Richard half a cent for every copy it sold. According to Richard's biographer, an unknown white artist in those days typically made ten times that much.[211]

These practices continued through the 1970s, '80s, and '90s. Consider the case of the iconic group TLC from the 1990s:

> While Arista Records and LaFace Records said that they [TLC] had gotten a pretty standard agreement, their terms were nothing less than shocking. Their 1991 contract netted them 7 percent on the sale of each album . . . after the record company deducted the price of things like promotional costs. Then, the group didn't get paid until the studios got reimbursed for studio time and a slew of other expenses: by the time that was done, they got about 20 cents per album to split three ways.[212]

Unfair and exploitative contracts have persisted since the inception of the recording industry.[213] These contracts exist behind a wall of secrecy—the entertainment

[209] *See* 17 U.S.C. §§ 302, 304.

[210] *See* Hines, *supra* note 40, at 465 (arguing that "the Black musical idiom" does not enjoy the benefits of copyright law "because it does not fit into copyright law's contruction of ownership and composition").

[211] Schwartz, *supra* note 36.

[212] *See* DB Kelly, *Insane Times Music Artists Were Screwed Over By Their Recording Companies*, GRUNGE (July 16, 2022, 9:18 PM), https://www.grunge.com/227415/insane-times-music-artists-were-screwed-over-by-their-recording-companies.

[213] *See id.*

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industry is arguably the most secretive of all industries.[214] While contractual exploitation of early blues, jazz, and rock artists is well known, there are other more recent genres that remain unexamined.

6.1 **Exploitation in the House Music Scene**

The house music scene is yet another genre created by Black artists, in the 1970s and '80s.[215] In a recent lawsuit, house music pioneers Larry Heard and Robert Owens received some measure of justice against their label, Trax Records.[216] The Chicago artists "argued that despite the label generating 'millions of dollars in income stemming from their exploitation of the compositions and recordings', neither Heard nor Owens had ever been paid a cent—so they sued, for copyright infringement."[217]

Artist DJ Pierre contends that the larger music industry is to blame for the plight of house music pioneers, claiming that Trax's "exploitative business practices were for decades tacitly held up and supported by an industry that was only interested in profits."[218] In Pierre's words,

> I think also we should talk about how the industry, maybe not so much the media, but how all the publishers and labels and people that wanted to license stuff and

[214] *See* Aryan, *Unveiling the Dark Side of the Music Industry: Exploitation, Mental Health, and Challenges*, MEDIUM (Aug. 16, 2023), https://medium.com/coinmonks/unveiling-the-dark-side-of-the-music-industry-exploitation-mental-health-and-challenges-90ede4afc94b.

[215] Rund Abdelfatah, Ramtin Arablouei, Cristina Kim & Devin Katayama, *From the Warehouse to the World: Chicago and the Birth of House Music*, NPR (Mar. 2, 2023, 12:19 AM), https://www.npr.org/2023/03/02/1160484070/chicago-birth-of-house-music (showing that house music "was indeed invented by Black and primarily gay DJs in Chicago in the late 1970s and 80s. Since that time, house has evolved; it has gotten bigger, it has gotten whiter, it has made a lot of people a lot of money.").

[216] Lauren Martin, *'It Gives Me Peace': House Legends Larry Heard and Robert Owens on Winning Their Trax Legal Battle*, GUARDIAN (Aug. 25, 2022, 11:06 AM), https://www.theguardian.com/music/2022/aug/25/ihouse-legends-larry-heard-robert-owens-trax-legal-battle-copyright.

[217] *Id.*; *see also* Niall Byrne, *Larry Heard and Robert Owens Win Court Case to Take Ownership of House Music Classics*, NIALLER (Aug. 26, 2022), https://nialler9.com/larry-heard-and-robert-owens-win-court-case-to-receive-royalties-from-house-music-classics.

[218] Harold Heath, *A History of Trax Records and the Fight for Chicago's House Pioneers' Royalties*, DJ MAG (Mar. 7, 2023, 11:00 AM), https://djmag.com/features/history-trax-records-and-fight-chicagos-house-pioneers-royalties.

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> use the material, kind of turned a blind eye and kept throwing money that way, even though they knew for a fact that this money was never getting to us.[219]

7. **Condition Catalog Sales on Redress for Past Exploitation**

Musical works and the rights to them have become a coveted asset on Wall Street.[220] A massive purchasing of music publishing and recording catalog sales has been underway for many years.[221]

The problem: many of the artists and performers, particularly Black legacy artists, were either never paid in the initial contracts or were grossly underpaid.[222] Today, works published after 1926 are still eligible for copyright protection.[223]

Additionally, many Black artists were forced to share copyright credit, if not outright defrauded of copyright in their works.[224]

That is why I am proposing that all catalog sales of legacy artists come with the preexisting liabilities that reflect discriminatory practices in the music industry.

8. **Hollywood and the Music Industry to Issue a Formal Apology to Black Creators and Performers**

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[219] *Id.*

[220] *See* Tim Ingham, *Music Catalogs Are Selling for Serious Cash. Now Wall Street Wants In*, ROLLING STONE (Jan. 13, 2021), https://www.rollingstone.com/pro/features/music-catalogs-are-selling-for-serious-cash-now-wall-street-wants-in-on-it-1113766.

[221] *Id.* ("Wall Street mammoths have gotten involved in the inner workings of the music business. In 2016, BlackRock (a company with $7.8 *trillion* in assets under management) led a $300 million investment into Primary Wave—money that was subsequently spent on legendary music catalogs like Bob Marley's. Elsewhere, the Core Equity Partners fund of Blackstone acquired US collection society SESAC in 2017 for a deal rumored to be in the region of $1 billion. And in 2019, Morgan Stanley quietly picked up producer royalties from Kanye West collaborator Jeff Bhasker for a rumored $60-plus million, in a deal brokered with a Morgan-side 'buddy' of Bhasker's manager, Neil Jacobson.").

[222] *See* Greene, *supra* note 15, at 1181.

[223] Copyright protection lasts a long time, and very old works may be under copyright protection today: "To date works published in 1923, 1924, 1925 and 1926 have entered the public domain. This process will continue until 2057 when, finally, works published in 1961 will enter the public domain." Since then, works published in 1927 and 1928 have also entered the public domain. *See* Lee Gesmer, *When Does a Copyright Expire?*, MASS. L. BLOG (Mar. 18, 2022), https://www.masslawblog.com/copyright/when-does-a-copyright-expire.

[224] Greene, *supra* note 34, at 63; Greene, *supra* note 75, at 646.

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This is a needed step on the road to redress. The institutional entertainment industry must acknowledge its role in promoting racism and stereotyping. As one analyst notes:

> The art of the apology matters more than ever now that an increasing number of white comedians and creators are being made to reckon with racially insensitive material from their pasts. The Black Lives Matter protests occurring across the country since the death of George Floyd in May have brought renewed attention to the deep inequalities that exist across the American media, from the lack of diversity in newsrooms and major magazines to streaming services that program movies and TV shows containing racist imagery.[225]

9. **Provide a Mechanism to Challenge False Copyright Registrations and Inequitable Music Contracts**

Currently, there is no private right of action to challenge false copyright registrations.[226]

10. **Provide Reparations for Black Music Artists**

The goals of reparations for African American music artists are twofold:

a) To redress past (but ongoing injustices); and

b) to transform the future.

Professor Roy Brooks is a leading expert on African American reparations. Brooks proposes an "atonement" model of reparations for past injustices.[227] Brook's analysis consists of two key elements. First, Brooks contends that atonement for slavery and

[225] *See* Ethan Alter, *Hollywood's 'Bottomless Pit' of Blackface: Why It Has Taken So Long for White Creators and Comedians to Apologize*, YAHOO! (June 30, 2020), https://www.yahoo.com/video/hollywood-blackface-white-creators-comedians-apologies-130027705.html.

[226] Greene, *supra* note 75, at 634–35 (noting that 17 U.S.C. § 506(e), a "criminal copyright statute," can only be brought by the government—and "the penalties under the statute are ridiculously low," hardly deterring "an unscrupulous registrant").

[227] *See* ROY L. BROOKS, ATONEMENT AND FORGIVENESS: A NEW MODEL FOR BLACK REPARATIONS, at ix (2004).

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Jim Crow discrimination requires a genuine apology.[228] Secondly, the perpetrator of the injustice must provide reparations.[229]

XII. INTERNATIONAL LAW AND REPARATIONS

The United Nations sets forth standards and conditions under which nation-states should pay reparations.[230] The General Assembly adopted the resolution "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law" without a vote.[231]

XIII. FORM OF REPARATIONS:

The United Nations has set forth standards for reparations for violations of human rights.[232] The Human Rights Committee of the United Nations notes that "where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations."[233]

XIV. REPARATION EXAMPLES

A. For Jewish Holocaust Victims:

"Germany started making reparations payments to Holocaust survivors back in the 1950s, and continues making payments today. Some 400,000 Jews who survived

[228] *Id.* at 144 ("Apology, most importantly, is an *acknowledgment* of guilt rather than a punishment for guilt. When a government perpetrates an atrocity and apologizes for it, it does four things: confesses the deed; admits the deed was an injustice; repents; and asks for forgiveness. All four conditions are essential to taking personal responsibility.").

[229] *See id.*

[230] *See* U.N. GAOR, 60th Sess., 64th plen. mtg. at 10, U.N. Doc. A/60/PV.64 (Dec. 15, 2005).

[231] *Id.*

[232] *See* INT'L COMM'N OF JURISTS, THE RIGHT TO A REMEDY AND REPARATION FOR GROSS HUMAN RIGHTS VIOLATIONS: A PRACTITIONER'S GUIDE, at xii (2018).

[233] Hum. Rts. Comm., Gen. Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, art. 16, U.N. Doc. CCPR/C/21/Rev. 1/Add. 13 (May 26, 2004).

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the Nazis were still alive in 2019. That year, Germany paid $564 million to the Claims Conference, which handles the payments."[234]

B. Articulable Harms:

The harms to Black artists in the American music industry were both economic and personal, a massive violation of economic and moral rights, a vicious pastiche of personal heartache and financial roadblocks. The evidence shows that "what is now a global, multibillion-dollar music industry has, in many ways, built itself and prospered on the exploitation of not just Black music, but the musicians who birthed it."[235]

In the early days of the music industry, Black artists experienced rampant discrimination and economic exploitation:

> [Blues music in the 1920s] was recorded . . . by white scouts who traveled the South with portable disk recorders searching out interesting street musicians or porchfront amateurs. They would usually pay them a few bucks for their time, and then sell the material to record labels further north. Mayo Williams and A.C. Speir were two of the best-known scouts who discovered such legends as Charley Patton, Son House and Blind Blake. It's estimated that about 20,000 "race" records, mostly of country blues, gospel, preaching and comedy, were produced between 1922 and 1932.
>
> Only a few bigger labels paid royalties to these rural artists, usually just a fraction of a cent per disc. Some scouts never bothered explaining the concept to the artists, and got rich by pocketing royalties on hundreds of records for years (with the labels presumably thinking that they were going to pass them on to the performers.) The labels often took even further advantage of these itinerant singers: Gennett, for example, was known to create pseudonyms for its artists when pressing records on budget labels commissioned by chain stores like Kresges.[236]

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[234] Vic Rosenthal & Scott Russell, *Holocaust Survivors Receive German Reparations to This Day*, MINN. COUNCIL OF CHURCHES (Feb. 8, 2021, 2:20 PM), https://www.mnchurches.org/blog/2021/02/18/holocaust-survivors-receive-german-reparations-day.

[235] *See* Denise Oliver Velez, *Black People Create, White People Profit: The Racist History of the Music Industry*, DAILY KOS (June 14, 2020, 9:00 AM), https://www.dailykos.com/stories/2020/6/14/1948464/-Black-people-create-white-people-profit-The-racist-history-of-the-music-industry.

[236] A Voice., *History of the Record Industry, 1920–1950s*, MEDIUM (June 8, 2014), https://medium.com/@Vinylmint/history-of-the-record-industry-1920-1950s-6d491d7cb606.

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Black women from Josephine Baker to Tina Turner have faced unique and additional burdens as both women and Black women.[237]

XV. BLACK SWAN RECORDS AND INSTITUTIONAL DISCRIMINATION

For their part, African American music entrepreneurs faced severe barriers to entry in the early recording industry.[238] The evidence is clear that entrenched institutional discrimination in banking reduced Black homeownership during the age of recording (the 1920s),[239] a leading indicator of general wealth.[240] All of this was a residual of the sharecropping system that arose in the southern United States after slavery.[241]

The racialized and predatory habits and practices arising from the sharecropping system would eventually spill over into other areas, such as retail and banking.[242] Under the sharecropping system, "African-American sharecroppers were not given any sales receipts or itemized statements and were routinely cheated at settlement."[243] It was open season on Black people in the post-slavery era, in which,

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[237] *See* Christina Turner, *How Racism Pushed Tina Turner and Other Black Women Artists Out of America*, PBS NEWS (Apr. 22, 2021, 8:57 PM), https://www.pbs.org/newshour/arts/how-racism-pushed-tina-turner-and-other-black-women-artists-out-of-america ("When Turner parted ways with Ike Turner in all respects—marriage and musical collaboration—and sought to make it as a solo artist in the 1970s, she faced resistance from the music industry and mainstream white American audiences. . . . 'A Capitol executive . . . called her an N-word douchebag and did not want to put her work out, this phenomenal voice that is a voice of a generation.'").

[238] *See* Ashawnta Jackson, *The First Black-Owned Record Label in the U.S. Wanted to "Uplift" Black People Through Music*, MEDIUM (Feb. 22, 2018), https://medium.com/timeline/black-swan-first-black-owned-record-label-a93f66ee164.

[239] Douglas S. Massey, Jacob S. Rugh, Justin P. Steil & Len Albright, *Riding the Stagecoach to Hell: A Qualitative Analysis of Racial Discrimination in Mortgage Lending*, 15 CITY & CMTY. 95, 118, 120 (noting that "banks generally refused to lend to black borrowers," one of the "institutionalized private mechanisms of discrimination [that] built the modern black ghetto and perpetuated segregation through the 1920s").

[240] *Unpacking the Black Wealth Gap—Historical Lessons of Credit Discrimination in Understanding Your Customers*, CONSUMER FIN. PROT. BUREAU, at 9 (Feb. 23, 2020), https://files.consumerfinance.gov/f/documents/cfpb_unpacking-black-wealth-gap-part-2_webinar-slides_2022-02.pdf.

[241] *Id.* at 15–17.

[242] *Id.* at 68–70.

[243] *Id.* at 28.

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as one man recollected, white "men who are honorable in their dealings with their white neighbors will cheat a Negro without feeling a single twinge of their honor."[244]

Similarly, the banking system engaged in rampant discrimination against Black homebuyers.

> While the home financing system was a challenge to all consumers, African Americans faced additional barriers. Banks simply refused to lend [to] African Americans. Even if a bank did make a mortgage loan to African Americans, the terms and conditions were onerous compared to whites. Typically, African-American borrowers were charged interest rates and fees at least double those offered to whites.[245]

These pervasive forms of racial discrimination in access to capital diminished the chance for generational wealth for Black music entrepreneurs.[246] Some record companies refused to record their songs.[247] Others refused to issue records by African Americans.[248]

Black Swan Records, established in 1921, was the first Black-owned record company.[249] Harry Pace, the founder and head of Black Swan Records, "built a strong team to run the label: jazz musician Fletcher Henderson was his musical director and band leader, and classical composer William Grant Still was his arranger. The Black Swan roster included renowned blues singers Alberta Hunter and Trixie Smith, and the highly influential pianist James P. Johnson."[250]

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[244] *Id.* (noting that a study of sharecroppers in South Carolina "found that 101 out of 118 stated that they were 'cheated badly by their white "bosses"'").

[245] *Id.* at 42.

[246] *See id.* at 13.

[247] *See* Suisman, *supra* note 94, at 1302.

[248] *Id.* at 1296.

[249] *See* Nellie Gilles & Mycah Hazel, *Radio Diaries: Harry Pace and the Rise and Fall of Black Swan Records*, NPR (July 1, 2021, 6:09 PM), https://www.npr.org/2021/06/30/1011901555/radio-diaries-harry-pace-and-the-rise-and-fall-of-black-swan-records.

[250] *Id.*

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Pace launched Black Swan Records in 1921, the same year as the infamous Tulsa race riots.[251] The label faced egregious racial discrimination.[252] As historian David Suisman writes, "[w]hen Pace tried to persuade phonograph companies to record African Americans performing non-blues material, he was told that white prejudice made it commercially impossible."[253]

Black Swan Records held much promise for the advancement of Black music and artists in the United States.[254] Harry Pace purchased "his own recording and pressing company so he wouldn't have to rely on white-owned pressing facilities, but it only landed Black Swan in massive debt. Meanwhile, wealthier, white recording companies like Columbia and Paramount were beginning to record more blues tracks, increasing the competition."[255] This wonderful company in the end could not overcome the strictures of institutional racism.[256]

XVI. OPPORTUNITIES LOST: THE RISE AND FALL OF VEE-JAY RECORDS

The 1950s saw a repeat of the failure of a Black record label. Vee-Jay Records is a Black record label most have never heard of that rose to spectacular heights in the 1950s and early 1960s.[257] Vee-Jay's story began in 1953, when an African American woman,

> Vivian Carter Bracken and her husband, James, borrowed $500 from a pawnbroker because they wanted to record a group they'd found in Gary, Ind., where they owned a record store. They took their initials, V and J, and Vee-Jay Records was born. Right away, they had success—so much so that they had to lease the record, *Baby, It's You* by the Spaniels, to another label for distribution. But it was a Top 10 hit, and by the time the group's second record came out a year

[251] *Id.*

[252] *See* Suisman, *supra* note 94, at 1306.

[253] *Id.* at 1302.

[254] *See id.*

[255] Gilles & Hazel, *supra* note 249.

[256] Suisman, *supra* note 94, at 1322.

[257] *Vee-Jay Records, est. 1953*, MADE IN CHI. MUSEUM, https://www.madeinchicagomuseum.com/single-post/vee-jay-records/ (last visited Aug. 29, 2024).

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> later, the Brackens were on firmer financial ground and had a crossover hit on their hands.[258]

Vee-Jay Records signed early doo-wop artists, including the El Dorados and the Dells.[259] By 1961, Black-owned Vee-Jay Records "was one of America's top labels, with a strong jazz catalog, some top gospel groups, and Jerry Butler, Jimmy Reed, John Lee Hooker and Betty Everett cranking out hit after hit."[260]

Incredibly, Vee-Jay Records ended up with the distribution rights to the Beatles in 1962, in essence an afterthought to a deal for the rights to Australian artist Frank Ifield's hit single *I Remember You*.[261]

> Vee Jay [sic] released several Beatles singles and their first U.S. album, to lukewarm success until the group appeared on the nationwide *Ed Sullivan Show*.
>
> Then Beatles' sales skyrocketed. Capitol Records, who had earlier turned down the Beatles, started filing lawsuits against Vee Jay to get the group back . . . . The cost of defending the lawsuits, in addition to Ewart Abner's poor financial management and gambling habit, wiped out Vee Jay's money and credit, and put the company out of business.[262]

Black-owned record labels from Black Swan to Vee-Jay Records swam in the shark-infested waters of institutional racism. These labels "lacked in-house plant distribution networks and sufficient promotional budgets. Distribution was a major issue; many Black record companies had to rely on white record companies to

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[258] *The Rise and Fall of Vee-Jay Records*, NPR (Jan. 15, 2008, 11:57 AM), https://www.npr.org/2008/01/15/18112344/the-rise-and-fall-of-vee-jay-records.

[259] *Id.*

[260] *Id. See also Vee-Jay Records*, CONCORD, https://concord.com/labels/vee-jay-records/ (last visited Aug. 29, 2024) ("The catalog includes over 5,000 master recordings from renowned artists such as Little Richard, John Lee Hooker, Betty Everett, Jimmy Reed, Jerry Butler, The Staple Singers, Gene Chandler, and The Dells, among many others. Classic Vee-Jay tracks include Chandler's early '60s #1 hit 'Duke of Earl,' John Lee Hooker's iconic 'Boom Boom,' The Staples Singers' 'Uncloudy Day,' (with a 12-year old Mavis on lead vocal), Jimmy Reed's inimitable 'High and Lonesome' and Betty Everett's 'The Shoop Shoop Song (It's in His Kiss),' to name just a few.").

[261] *See* Louise Hillery, *Vivian Carter: From Gary Roosevelt High School to Introducing the Beatles*, UNTOLD IND. (July 5, 2018), https://blog.history.in.gov/vivian-carter-from-gary-roosevelt-high-school-to-introducing-the-beatles.

[262] *Id.*

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distribute their records, leaving them at the mercy of those white companies."[263] The obstacles and barriers to entry for Black businesses resulted in lost generational wealth to the community.[264]

XVII. COSTS OF HARMS

There has never been an attempt to calculate the economic or personal cost of harms to Black artists. As Professor Mtima posits,

> [i]n the commercial entertainment industry alone, it is probably impossible to tally, much less make reparation in connection with the billions of dollars that African American and other marginalized artists and entertainers have been robbed of through the unauthorized and inequitable exploitation of their aesthetic genius, and the concomitant manipulation of the copyright law.[265]

However, there would be no better time to pursue reparations for African American artists: today's music industry is booming.[266]

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[263] Alonzo Kittrels, *Back in the Day: Black-Owned Record Labels Didn't Start with Motown*, PHILA. TRIB. (May 30, 2023), https://www.phillytrib.com/lifestyle/back_in_the_day/back-in-the-day-black-owned-record-labels-didnt-start-with-motown/article_a1740bc5-d413-5430-920f-b74197bce1d9.html.

[264] *See* Regina S. Baker & Fenaba R. Addo, *Barriers to Racial Wealth Equality*, HUM. RTS. MAG., Feb. 2023, at 2, 2–3.

[265] *See* Lateef Mtima, *Copyright Social Utility and Social Justice Interdependence: A Paradigm for Intellectual Property Empowerment and Digital Entrepreneurship*, 112 W. VA. L. REV. 97, 123 (2009).

[266] *See* Murray Stassen, *Universal Music Generated $2.93bn in Q2—Boosted by Sales from Superstars Like Taylor Swift and King & Prince*, MUSIC BUS. WORLDWIDE (July 26, 2023), https://www.musicbusinessworldwide.com/universal-music-group-generated-2-93bn-in-q2-boosted-by-sales-from-superstars-like-taylor-swift-and-king-prince. In the second quarter of 2023,

> [Universal Music Group] generated revenues of EUR €2.697 billion (USD $2.93bn) during the quarter across all of its divisions (including recorded music, publishing and more). That Q2 revenue figure was up 8.8% YoY at constant currency.
>
> Amongst the other key highlights in UMG's Q2 were a 13% jump in the company's subscription streaming revenues, and 12.1% growth in its 'Merchandising and Other' revenue segment.
>
> Universal's overall recorded music revenues for Q2 2023 (including streaming plus physical etc.) were €2.080 billion ($2.26bn), up 10.9% YoY at constant currency.

Id.

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XVIII. DIFFICULTY OF CALCULATION

Music reparations would be difficult to calculate, but not nearly as difficult as slavery reparations. Slavery reparations focus on the lost wages and labor of the slaves, and most scholars calculate these in the trillions.[267]

XIX. ELIMINATING THE RACIAL WEALTH GAP

Scholars "[William] Darity and [Kirsten] Mullen consider the racial wealth gap to be the 'most robust indicator of the cumulative economic effects of white supremacy in the US.' As a result, they say that reparations should aim to eliminate the racial wealth gap between Black and white families in the US."[268] Studies consistently show that African Americans have a net worth that is greatly lower than their white counterparts.[269] Reparations for Black music are clearly a critical part of eliminating the wealth gap.

CONCLUSION

This Article sets forth the first ten-point plan to eradicate inequality in the music industry vis-à-vis African American music artists. Central to this project is an apology from the entertainment industry and economic justice in the form of reparations. Reparations are seen by some as a radical mechanism,[270] but they are a

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[267] *See, e.g.*, Samara Lynn & Catherine Thorbecke, *What America Owes: How Reparations Would Look and Who Would Pay*, ABC NEWS (Sept. 27, 2020, 10:00 AM), https://abcnews.go.com/Business/america-owes-reparations-pay/story?id=72863094 (noting that the profits from slavery by one professor's calculation amount to "$16.4 trillion, $17 trillion, and $17.7 trillion" in 2019 currency, "at 4%, 5%, and 6% interest rates . . . respectively").

[268] *See* Aaron White, *Reparations Would Shake Up American Capitalism—and That's a Good Thing*, NAT'L AFR.-AM. REPARATIONS COMM'N (May 25, 2021), https://reparationscomm.org/reparations-news/reparations-would-shake-up-american-capitalism-and-thats-a-good-thing ("[T]here has been no progress in 'reducing income and wealth inequalities between Black and white households over the past 70 years.' According to the Urban Institute, between 1983 and 2016 the median Black family's wealth grew from $13,324 to $17,409. Meanwhile, over that same period a typical white family's wealth grew from $105,369 to $171,000.").

[269] *See* William "Sandy" Darity & Kirsten Mullen, *Black Reparations and the Racial Wealth Gap*, BROOKINGS INST. (June 15, 2020), https://www.brookings.edu/articles/black-reparations-and-the-racial-wealth-gap (noting that the "average Black household has a net worth $800,000 lower than the average white household").

[270] *See, e.g.*, Armstrong Williams, *Opinion, Slavery Reparations Are a Divisive Waste of Time*, THE HILL (Mar. 1, 2021, 3:00 PM), https://thehill.com/opinion/civil-rights/540812-slavery-reparations-are-a-divisive-waste-of-time.

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conservative idea. Reparations are no more than a remedy for unjust enrichment, one of the common law's oldest concepts.[271]

The reforms suggested here, like the laws against discrimination that sprung from the Civil Rights Movement, are designed to help Black artists but would empower artists of all races. The great heist of Black artistic innovation is an old story, but one that continues to be re-spun due to long copyright terms and continued deprivations. The song remains the same—but with a renewed commitment to justice for all, we can change the tune.

[271] *See Developments in the Law—The Intellectual History of Unjust Enrichment*, 133 HARV. L. REV. 2077, 2077 (2020) ("The idea of 'unjust enrichment' . . . includes any treatment of an unequal transfer of value that operates as a source of obligation separate from obligations arising from consent or wrongdoing. This separate source of obligation can be identified as far back as the Roman Empire.").

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