Lift Ev'ry Voice and Sing: Tracing the Legacy of Appropriation of Black Artists Under U.S. Copyright Law

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INTRODUCTION

On Wednesday, November 9th, 2023, Luke Combs took home the coveted "Song of the Year" distinction at the Country Music Awards for the song "Fast Car," making it the first time a Black songwriter has won the award.[1] In reality, Combs is not Black, and the 2023 "Song of the Year" contender was recorded and released nearly thirty-five years ago.[2] Tracy Chapman, a Black queer woman, first released the folk classic "Fast Car" in 1988. The song retells the brutal reality of a young couple dreaming of a better life while struggling to break out of the cycle of poverty after a series of misfortunes in

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1. Gloria Oladipo, *Tracy Chapman's Fast Car Wins Country Song of the Year—35 Years After Its Debut*, GUARDIAN (Nov. 9, 2023), https://www.theguardian.com/music/2023/nov/09/tracy-chapman-fast-car-cma-winner [https://perma.cc/J8UM-9HMV] [https://web.archive.org/web/20241113012200/https://www.theguardian.com/music/2023/nov/09/tracy-chapman-fast-car-cma-winner].

2. Jonathan Bernstein, *Tracy Chapman Just Became the First Black Songwriter To Win the CMA Song of the Year*, ROLLING STONE (Nov. 8, 2023), https://www.rollingstone.com/music/music-country/tracy-chapman-luke-combs-fast-car-song-of-the-year-2023-cmas-1234873495/ [https://perma.cc/8FCY-DXL5] [https://web.archive.org/web/20241005191639/https://www.rollingstone.com/music/music-country/tracy-chapman-luke-combs-fast-car-song-of-the-year-2023-cmas-1234873495/].

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their lives.[3] While Chapman's song received some critical acclaim in the United States after its initial release, reaching the sixth spot on the Billboard 100 chart for a week in 1988, Combs's 2023 cover of "Fast Car" peaked at number two on the same chart and remained in the top 10 for forty-two weeks.[4] Section 115 of the Copyright Act permits artists to reproduce covers of another artist's commercially released music without seeking permission from the original artist.[5] This covering and re-popularization of Tracy Chapman's folk classic is not a rare occurrence, but is rather exemplar of a long tradition of the lifting—or rather appropriation—of Black music for a mainstream audience by white artists.[6] The tale of Black musicians in the United States is one defined by an extensive history of exclusion, exploitation, and most enduringly, appropriation.[7]

From the inception of America itself, the Founding Fathers recognized the value in producing, protecting, and promoting creative works by the public. Enshrined in the Constitution itself, Congress was unanimously granted the power to "promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[8] The enactment of a national copyright law thus stood to foster the development of a competitive American culture, and help to balance the public value of creative works

3. Tina Benitez-Eves, *The Non-Vehicular Meaning Behind Tracy Chapman's 1988 Hit "Fast Car"*, AM. SONGWRITER (May 16, 2024), https://americansongwriter.com/the-non-vehicular-meaning-behind-tracy-chapmans-1988-hit-fast-car/ [https://perma.cc/WGL6-FKC2] [https://web.archive.org/web/20241005191852/https://americansongwriter.com/the-non-vehicular-meaning-behind-tracy-chapmans-1988-hit-fast-car/]; *See also* Aurelie Moulin, *Fast Car by Tracy Chapman: Everything About "Fast Car"*, TRACY CHAPMAN ONLINE (May 28, 2023), https://www.about-tracy-chapman.net/tracy-chapman-fast-car-meaning-fast-car-lyrics-fast-car-videos/#fast-car-meaning [https://perma.cc/L44P-54US] [https://web.archive.org/web/20241221223830/https://www.about-tracy-chapman.net/tracy-chapman-fast-car-meaning-fast-car-lyrics-fast-car-videos/#fast-car-meaning].

4. Luke Combs's rendition of Chapman's song has now charted for sixty-three weeks as of November 24, 2024. *See Tracy Chapman Chart History*, BILLBOARD, https://www.billboard.com/artist/tracy-chapman/chart-history/tlp/ [https://perma.cc/C34K-QLFL] [https://web.archive.org/web/20241005192244/https://www.billboard.com/artist/tracy-chapman/chart-history/tlp/] (last visited Nov. 24, 2024*)*; *Luke Combs Chart History*, BILLBOARD, https://www.billboard.com/artist/luke-combs/ [https://perma.cc/B8BH-2AQR] [https://web.archive.org/web/20241112230318/https://www.billboard.com/artist/luke-combs/] (last visited Oct. 5, 2024).

5. 17 U.S.C. § 115(a)(2).

6. *See* Emily Yahr, *Tracy Chapman, Luke Combs and the Complicated Response to "Fast Car"*, YAHOO ENT. (July 13, 2023), https://www.yahoo.com/entertainment/tracy-chapman-luke-combs-complicated-150744898.html [https://perma.cc/2CSG-DLF8] [https://web.archive.org/web/20230715155921/https://www.yahoo.com/entertainment/tracy-chapman-luke-combs-complicated-150744898.html].

7. While other ethnic and racial subgroups undoubtedly faced struggles in gaining legal recognition and protection for their respective contributions to the development of American popular culture, this Note will focus specifically on the struggle of Black American artists. It will trace the unique fight for Black Americans to gain recognition, protection, and compensation for their inherent involvement in the popularizing of American musical genres and subcultures in light of an extensively documented legal, economic, social, and political struggle.

8. U.S. CONST. art. I, § 8, cl. 8.

with author's property rights in their creations.[9] The eighteenth, nineteenth and twentieth centuries birthed five iterations of the Copyright Act: in 1790, 1831, 1870, 1909, and the modern Copyright Act of 1976.[10] Notably, no version of copyright law has explicitly mentioned race, which aids in perpetuating the idea that copyright is inherently "colorblind." However, copyright law has consistently failed to adequately recognize and protect Black musicians since its inception.[11]

First outlined in the Constitution under the "Copyright clause," the earliest iteration of an intellectual property right did not apply to Black Americans, who—as slaves—were not considered a full person at the time of writing, and therefore unable to own any type of property.[12] To call the system racially neutral would assume that copyright and intellectual property rights have existed within a vacuum—unaffected by the social, cultural, and political structures that have denied Black Americans equal citizenship since America's founding.[13] As Black musical traditions have undoubtedly formed, shaped, and molded the very bedrock of American popular culture, and nearly every genre of music it has produced, the inability for copyright law to adequately rectify shortcomings in the music business through statutory protection has greatly contributed to the persistence of a culture of appropriation within the culture of American music. It is therefore not that Copyright has a "race" problem, it has an *appropriation* problem—one that undeniably and disproportionately impacts Black artists. To best reform the copyright system to address modern issues of appropriation, considering technological advancements in the music industry such as artificial intelligence and the rise of streaming, it is necessary to understand the historical patterns of copyright inequity that have disproportionately affected Black musicians.

The inherently intertwined nature of Black music and Black culture—with Black musical traditions being borne out of the social, political, and economic disenfranchisement of the community throughout history—exacerbates the harm felt by artists who have their work lifted without appropriate compensation. Between the rise of streaming allowing more independent artists to produce music without the legal knowledge that major labels possess, and the generation of artificial intelligence

9. Irah Donner, *The Copyright Clause of the U. S. Constitution: Why Did the Framers Include it with Unanimous Approval?*, 36 AM. J. LEGAL HIST. 361, 362 (1992).

10. *A Simple Guide to U.S. Copyright Law*, COPYRIGHTLAWS.COM (Aug. 22, 2022), https://www.copyrightlaws.com/a-simple-guide-to-u-s-copyright-law [https://perma.cc/WK42-VG9L] [https://web.archive.org/web/20241008203505/https://www.copyrightlaws.com/a-simple-guide-to-u-s-copyright-law/].

11. K. J. Greene, *Copyright, Culture & (and) Black Music: A Legacy of Unequal Protection*, 21 HASTINGS COMMC'NS & ENT. L.J. 339, 340 (1998) (noting that "African-American music artists, as a group, were routinely deprived of legal protection for creative works under the copyright regime.").

12. While there is substantial scholarship, debate, and opinion on the etymological impact and difference between the uses of "African American" versus "Black" to describe Black people in the United States, I will not use the terms interchangeably throughout this Note. I use "African American" to specifically describe to describe Africans that were enslaved and brought to America, and their descendants who reside in America to this day. My use of "Black," however, is inclusive of all racially Black people of the diaspora in the United States regardless of nationally, ethnicity, or ancestral origin. Black will be capitalized, as it incorporates not only a color, but a race, culture, history, and way of existing.

13. *Id.* at 342.

allowing fans to produce music by their favorite artists without the artists' input or knowledge, new technology has created a unique opportunity to alter the existing legal framework of copyright.[14] Specifically, lawmakers have the rare opportunity to reform the existing licensing substructure. Compulsory mechanical licenses in particular have historically perpetuated these behaviors, and in the modern context could potentially aggravate these issues.

This Note will trace the lineage of the structural inequities of copyright law that have generationally impacted Black musicians across genres, arriving to modern day issues and the technological advances that inflame these very inequities. While beginning with a conveyance of the statutory provisions that aided in unequal treatment of Black artists under copyright law is crucial, the focus of analysis and critique will center on copyright law's development of the compulsory licensing scheme and its unique impact on Black artists by questioning the efficacy of the existing licensing structure. Parts I and II will look at the earliest iterations of the Copyright Act: from 1790 to 1909, and the legal status of Black Americans through a series of case studies looking at the Act's effect on Black artists during the emergence of American Popular music in jazz, blues, and rock'n'roll. Part III will examine the creation of modern copyright law against the backdrop of the Civil Rights movement and the emergence of rhythm & blues and hip-hop. Part IV will argue the shortcomings of the 1976 Act and modern challenges that copyright law is unequipped to address and suggest the adoption of an institutional moral right standard for musicians under Copyright law.

The development of artificial intelligence and its ability to replicate the style of artists, alongside the growing presence of digital streaming and independent artistry reinvigorates the continued tradition of the appropriation of Black artists. The modern issues Black artists face in these realms are not occurring in a vacuum but are rather a product of a tradition of imitation, appropriation, and distortion under the copyright scheme—and is therefore pertinent to contextualize the historical treatment of African Americans under intellectual property laws to best address the continuation of these issues in a new generation of music.

I. PART ONE: EARLY COPYRIGHT LAW[15]

Despite the cultural, historical, and social importance of early musical traditions developed by African slaves and their descendants, not only as the basis of Black

14. Joe Coscarelli, *An A.I. Hit of Fake 'Drake' and 'The Weeknd' Rattles the Music World*, N.Y. TIMES (Apr. 19, 2023), https://www.nytimes.com/2023/04/19/arts/music/ai-drake-the-weeknd-fake.html [https://web.archive.org/web/20241008203930/https://www.nytimes.com/2023/04/19/arts/music/ai-drake-the-weeknd-fake.html].

15. There is no definitive record or consensus on when the first copyright was granted to a Black artist, as the U.S. Copyright Office, in its current practice, does not request racial information during copyright registration. Additionally, earlier versions of the Copyright Act included requirements such as citizenship, alongside other legal and social barriers, which often prevented Black artists from accessing copyright protection. These historical challenges will be explored in the following sections.

American culture, but as the predecessor of nearly every American musical genre, protection was not afforded to these works under the earlies iterations of copyright law.[16] The earliest a comprehensive copyright statute, the Copyright Act of 1709 expressly provided protection only to citizens of the United States. The Constitution enumerated the so-called "three-fifths" clause, which considered slaves to be three-fifths of a person.[17] As property themselves, Black slaves were unable to hold or own their property, including intellectual property.[18] Black Americans, regardless of whether they were free or enslaved, were not considered citizens, and therefore lacked the legal standing to register copyrights.[19] The emancipation of enslaved peoples in 1863 and granting of legal citizenship with the passing of the Thirteenth and Fourteenth Amendments in late 1800s led to the first opportunity for Black artists to gain ownership in their work.[20]

The existing legal structures, however, were incompatible with the reality Black artists faced. The Copyright Act of 1870 had stringent formal requirements for protection, including notice, registration, publication, and distribution requirements.[21] In the 1800s, all but three slave states had stringent laws that banned the teaching of slaves to read and write.[22] With much of the formerly enslaved population fully or partially illiterate, proper notation and registration was unrealistic. Additionally, fixation and publication requirements were at odds with Negro spiritual traditions such

16. *See* Greene, *supra* note 11; *see also The 18th Century, Highlight: Congress Passes First Copyright Act*, COPYRIGHT.GOV, https://www.copyright.gov/timeline/timeline_18th_century.html [https://perma.cc/WS7G-FKX6] [https://web.archive.org/web/20241009203053/https://www.copyright.gov/timeline/timeline_18th_century.html] (last visited Oct. 8, 2024) (The first Copyright Act was passed in 1790—a time in which African slaves and their descendants were not considered citizens, or even humans (but rather property), and were therefore unable to protect their works under this law.).

17. U.S. CONST. art. I, § 2, cl. 3.

18. *See* Greene, *supra* note 11, at 346.

19. The Copyright Office lacks historical records as to when the first musical copyright was filed by a Black American, either due to inadequate records or the non-disclosure of race in registration, and available scholarship lacks a clear consensus on who the figure may be. However, the "first commercially black songwriter" is argued to be James A. Bland (1854–1911), who became popular oversees. *See* LARRY STARR & CHRISTOPHER WATERMAN, AMERICAN POPULAR MUSIC: FROM MINSTRELSY TO MP3, 16 (condensed ed., U.S. Dep't of State).

20. *14th Amendment to the U.S. Constitution: Civil Rights (1868)*, NAT'L ARCHIVES, https://www.archives.gov/milestone-documents/14th-amendment [https://perma.cc/5YN3-XWU9] [https://web.archive.org/web/20241111070519/https://www.archives.gov/milestone-documents/14th-amendment] (last visited Oct. 8, 2024).

21. *The 19th Century, Highlight: Supreme Court Decides First Copyright Case*, COPYRIGHT.GOV, https://www.copyright.gov/timeline/timeline_19th_century.html [https://perma.cc/8PM8-NW3R] [https://web.archive.org/web/20241009203409/https://www.copyright.gov/timeline/timeline_19th_century.html] (last visited Feb. 25, 2024).

22. *Literacy as Freedom*, SMITHSONIAN AM. ART MUSEUM: THE AM. EXPERIENCE IN THE CLASSROOM, at 1, https://americanexperience.si.edu/wp-content/uploads/2014/09/Literacy-as-Freedom.pdf [https://perma.cc/AV2R-UWKU] [https://web.archive.org/web/20241009203637/https://americanexperience.si.edu/wp-content/uploads/2014/09/Literacy-as-Freedom.pdf] (last visited Jan. 25, 2024).

as the practice of call and response.[23] This led to two trends that remain pervasive in the entertainment industry's treatment of Black artists. Firstly, convoluted registration requirements led to exploitative contracts and practices that preyed on the vulnerabilities of musicians and failed to adequately compensate them for their work.[24] Secondly, it led to the outright appropriation of Black musical works by white artists who were better versed in the formalities in copyright law and were therefore granted ownership in the works.[25]

A. NOBODY KNOWS DE TROUBLE I'VE SEEN: THE BIRTH OF AMERICAN POPULAR MUSIC (1619–1900)

"Nobody knows de trouble I've seen. Nobody knows but Jesus."

- Unpublished Negro Spiritual[26]

1. The History of Negro Spirituals

African Americans have formed the very bedrock of American popular music culture including inventing and invigorating genres of music from spirituals and jazz to rhythm and blues, rock, and roll, and hip-hop. Arguably, no sub-group of America has been more influential to the creation and development of American culture than Black America.[27] Black music is a direct reflection of the collective Black experience across generations, defined by adaptation, survival, resilience, and the retention of African culture and influences.[28] As such, Black music and Black culture are inherently intertwined—with music generationally employed as a method of expressing freedom, inspiration, and spirituality, which renders the effect of inequity in the law and music

23. "Call and response" refers to an African musical technique, born out of religious and social traditions, in which music is performed in a question-and-answer format, with a leader prompting the audience. This practice continues in Black musical tradition today and is reflected in genres such as gospel, jazz, blues, and rap. *See* Adam Longman Parker, *Afriqua Presents Principles of Black Music: Call & Response*, ABLETON, https://www.ableton.com/en/blog/afriqua-presents-principles-of-black-music-call-response [https://perma.cc/7CC2-JKYR] [https://web.archive.org/web/20241009204010/https://www.ableton.com/en/blog/afriqua-presents-principles-of-black-music-call-response/] (last visited Jan. 25, 2024).

24. *See* Greene, *supra* note 11, at 341.

25. *Id.* at 341 n.4.

26. "Nobody Knows De Trouble I've Seen," is an African American spiritual well-known among the Black enslaved population. Despite being performed for centuries, the spiritual was only first published and registered for copyright in 1917. *See "Nobody Knows De Trouble I've Seen" by Harry Thacker Burleigh*, LIBRARY OF CONGRESS, https://www.loc.gov/item/ihas.200185372/ [https://perma.cc/Y8FB-E8RV] [https://web.archive.org/web/20241105033557/https://www.loc.gov/item/ihas.200185372] (last visited Nov. 4, 2024). The song was later recorded and released by numerous Black musical icons, including Louis Armstrong and Marian Anderson. *See also African American Spirituals*, LIBRARY OF CONGRESS, https://www.loc.gov/item/ihas.200197495/ [https://perma.cc/ZM65-2X2P] [https://web.archive.org/web/20241221225139/https://www.loc.gov/item/ihas.200197495/] (last visited Nov. 25, 2024).

27. See Greene, *supra* note 11, at 361.

28. *Id.* at 362.

business even more detrimental. The earliest of these traditions grew from the folk-song traditions of Black slaves, a sacred fusion between the musical rituals of Africa and the emerging religious versification arising from the difficulties of plantation life.[29] These folk songs were often performed during informal gatherings—performed as celebrations of gospel, recognition of suffering, and even as ways to communicate escape routes.[30] They were not only used for religious purposes, or as freedom songs, but were also sung by enslaved Africans day to day as working tunes.[31] While written collections of these spirituals have been published and passed down, the Negro spiritual was grounded in orality through call and response form between community members.[32] Viewing these spirituals as a form of resistance, communication, and resilience, the songs were regularly banned on plantations throughout the eighteenth century.[33]

2. The Minstrel Show and the Birth of Appropriation

While the earliest forms of Black musical artistry were denied protection under intellectual property laws, the popularity and distinctiveness of early Black music traditions birthed what is arguably the "first distinctively American form of popular culture" leading to "the rise of the modern music industry"—the minstrel show.[34] The practice of minstrelsy consisted of white theatrical and musical performers adorned in blackface, performing songs in the Black traditional style, meant to imitate, parody, and ridicule enslaved Black Africans.[35] The first in a generational, centuries-long tradition of the imitation and appropriation of Black musicians, minstrelsy created an entire entertainment subculture that relied upon the subjugation of Black people, Black culture, and Black creation.[36] Aiming to perpetuate racist stereotypes about Black Americans and their culture, minstrelsy appropriated African American music, dance, and vernacular for the amusement of white audiences. Gaining popularity in the decades surrounding the Civil War, the performance genre became the dominant form

29. David Dante Troutt, *I Own Therefore I Am: Copyright, Personality, and Soul Music in the Digital Commons*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 373, 397 (2010).

30. Gennette Cordova, *Negro Spirituals Are the Foundation of Black American Music, Its Traditions Come Full Circle with Hip Hop*, REVOLT (June 14, 2021), https://www.revolt.tv/article/2021-06-14/51382/negro-spirituals-are-the-foundation-of-black-american-music-its-traditions-come-full-circle-with-hip-hop/ [https://perma.cc/DGS5-6G35].

31. *Id.*

32. *Id.*

33. *Id.*

34. *See* STARR & WATERMAN, *supra* note 19, at 12.

35. *Blackface: The Birth of an American Stereotype*, NAT'L MUSEUM AFRICAN AM. HISTORY AND CULTURE, https://nmaahc.si.edu/explore/stories/blackface-birth-american-stereotype [https://perma.cc/M93Y-8PGM] [https://web.archive.org/web/20241008175116/https://nmaahc.si.edu/explore/stories/blackface-birth-american-stereotype] (last visited Jan. 25, 2024) (Blackface was the offensive practice of using burnt cork or black makeup, alongside tattered clothes and exaggerated behavior as an attempt to resemble Black Africans.).

36. *Id.*

of entertainment in the mid-to-late nineteenth century.[37] From minstrelsy grew a booming American music publishing business, which included descendant genres such as vaudeville and music hall leading to the establishment of Tin Pan Alley.[38] Tin Pan Alley consisted of sheet music publishing houses that dominated the music industry for nearly a century—producing "plantation songs" and other derivatives of Negro spirituals and African American music traditions.[39] On a larger scale, minstrelsy and its lasting popularity and influence across generations and technological mediums, formed the basis of the continued custom of distorting Black music for the mainstream appeal to white audiences.[40] The eighteenth and nineteenth centuries thus saw the emergence of American Popular music, beginning with the birth of the Negro Spiritual as a method of both entertainment and communication. This period also began a legacy that would impact Black artists for decades to come: the inability for copyright to adequately protect Black artists from a system of appropriation, imitation, and commodification.

II. PART TWO: THE 1909 ACT

The development of a more robust Copyright framework considering rapid change in the entertainment industry greatly altered the story of Black music. The intersections of persistent social, economic, and legal inequality, predatory practices within the music industry, and the failure of copyright law to safeguard Black musicians against these systemic failures continued throughout the early twentieth century. The Copyright Act of 1909 ("The 1909 Act") was the first significant overhaul of the copyright statute in its history. Representing a crucial moment in the development of intellectual property law, the 1909 Act revised and adopted numerous features to address the rapid growth of the musical industry in the beginning of the twentieth century. By the time of the 1909 Act, three distinctively Black music forms had materialized: blues, jazz, and rock and roll.[41] The emergence of these genres ultimately shaped the way music was produced, performed, and consumed. However, the 1909 Act was largely criticized by scholars to be incoherent, inconsistent, and opaque. First, the scope of what constituted a protected work was greatly expanded under this Act to expressly include musical compositions, commercial art, nondramatic literary works, and more.[42] The 1909 Act also provided for a public performance right for musical

37. *See* STARR & WATERMAN, *supra* note 19, at 13.

38. *Id.* at 16. ("Tin Pan Alley" refers to a physical row of publishing houses on West 28th Street in New York City in the 1890s. Following the rising popularity in modern "popular" music, as opposed to classical music, Jewish immigrants created small publishing houses that specialized in producing sheet compositions for this emerging style of music—arranging their offices along 28th Street. Tin Pan Alley music would go on to "dominate[] [the] American music industry for almost 70 years.").

39. *Id.*

40. *See* Troutt, *supra* note 29, at 398.

41. *See* Greene, *supra* note 11, at 353.

42. *1900–1950, Highlight: Congress Passes First Comprehensive Copyright Law of the Twentieth Century*, COPYRIGHT.GOV, https://www.copyright.gov/timeline/timeline_1900-1950.html [https://perma.cc/HKN4-2D7E]

compositions.[43] This meant revenue garnered from records sales, record play, and broadcast transmission of the phonorecords benefitted the owners of the underlying musical composition, normally the music label or publishing company, but not the artists whose performances *were* the record.[44]

Another one of the distinctive, consequential features of the 1909 Act was the establishment of new formality requirements. Under this Act, copyright protection was not automatically granted once an original creation was authored, but rather relied on a complex and convoluted system of notice and registration.[45] While these changes were intended to clearly notify the public as to who retained the rights in a work, they created additional challenges for artists who were unversed in legal jargon and without adequate legal resources. Works that failed to meet the notice requirements automatically fell into the public domain and were open to use by the public.[46] Artists unfamiliar with or lacking the knowledge of the formal requirements for notice, registration, and publication could easily find their works thrust into the public domain—with it, a forfeiture of all of their exclusive economic interests in the works.[47] The stringent registration requirements of prior copyright Acts remained, with notice, deposit, renewal, and fixation requirements working to limit the amount of works that received protection, rather than entering the public domain. These factors worked to the detriment of Black artists that bore the brunt of these formalities.[48] Additionally, under the 1909 Act, the creator of a work was not granted the presumption of ownership, but could rather be claimed by any individual.[49] This disproportionately affected Black artists, whose "highly original, innovative and valuable works" were "frequently found [to be] used or copyrighted by a non-creator who was clever enough to secure copyright on the works."[50] These statutory provisions aided in predatory and discriminatory business practices that exploited the ignorance of Black artists as to the rights in their work and the proper procedure in securing these rights.

Copyright scholar K. J. Greene noted four apparent patterns of appropriation that occurred during this period.[51] The first was creation of works by Black artists, followed by the outright appropriation of the works by major labels and white artists.[52] This pattern was most common in the earliest part of the twentieth century amongst jazz

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[https://web.archive.org/web/20241005133206/https://www.copyright.gov/timeline/timeline_1900-1950.html] (last visited Jan. 25, 2024).

43. *Id.* The 1909 Act did not provide protection for sound recordings until an amendment in 1972, nor did it address the granting of a public performance right for sound recording. With most Black musicians making a living through live performances of their works, their contributions to the music industry were denied adequate protection under the statute.

44. *See* Greene, *supra* note 11, at 368.

45. *Id.* at 353–54.

46. *See* COPYRIGHT.GOV, *supra* note 42.

47. *See* Greene, *supra* note 11, at 354.

48. K. J. Greene, *Thieves in the Temple: The Scandal of Copyright Registration and African-American Artists*, 49 PEPP. L. REV. 615, 629 (2022).

49. *See* Greene, *supra* note 11, at 353.

50. *Id.* at 353–54.

51. *Id.* at 372.

52. *Id.*

and blues musicians who sought no protection for their works, were often illiterate, and were at the whim of carnivorous club owners and promoters.[53] The second of these patterns, and one that covertly remains applicable in the modern music landscape, is creative innovation by Black artists, followed by a usurpation of copyright ownership by labels or managers.[54] A number of famous Black musicians, like Chuck Berry, throughout the twentieth century sold off the rights to their compositions to major labels for immediate compensation, but in the totality of their worth were "absurdly small sums."[55] The last two patterns describe the creation of a new style or genre of music that is then imitated or distorted by white performers (either for entertainment or ridicule) for economic and commercial gain.[56] While meant to protect the creation of artists and promote harmony among a burgeoning music industry, the 1909 Act rather contributed to a continued culture of the exploitation of artists to their moral, cultural, and economic loss.

THE CREATION OF THE COMPULSORY MECHANICAL LICENSE

While rigorous formalities and registration requirements under the 1909 Act created barriers for the protection of Black musicians, it additionally created a legal path for the appropriation of Black musicians for generations to come. The Act notably created copyright law's first compulsory license—a provision that impacted all artists but had a particularly injurious effect on Black artists. This was a provision that significantly impacted the music industry and the dynamics of the compensation scheme for artists.[57] The license was a direct result of the landscape of the music industry at the time: grappling with the rising popularity of phonorecords and allowing for the mass distribution of sheet music due to publishing associations such as that of Tin Pan Alley. The licensing scheme was codified in Section 1(e) of the 1909 Copyright Revision Act stating:

> *[A]s a condition of extending the copyright control to such mechanical reproductions*, that whenever the owner of a musical copyright has used or permitted or knowingly acquiesced in the use of the copyrighted work upon the parts of the instruments serving to reproduce mechanically the musical work, any other person may make similar use of the copyrighted work upon the payment to the copyright proprietor of a royalty of *two cents* on each such part manufactured.[58]

The compulsory mechanical license allowed anyone to reproduce a musical composition that has been distributed to the public, with or without the consent of the

53. *Id.*
54. *Id.*
55. *Id.* at 372–73.
56. *Id.* at 373.
57. *See* Howard B. Abrams, *Copyright's First Compulsory License*, 26 SANTA CLARA HIGH TECH. L.J. 215, 221 (2010).
58. Copyright Act of 1909, Pub. L. No. § 1, 35 Stat. 1075 (1909) (second emphasis added) (prior to repeal by 1976 Act).

copyright owner, so long as a royalty was paid to the copyright owners and other statutory provisions were complied with.[59] The licensing scheme was developed out of a fear throughout the industry over the ownership of a significant number of musical compositions and piano rolls by a single publishing company that could have potentially created a monopolistic power over the recording of music.[60]

The original compulsory licensing scheme had three key features: (1) notice; (2) similarity; and (3) compensation.[61] Once an artist published their musical composition, other artists can also reproduce the song if they provide notice, rather than seek permission, from the copyright owner. While this provision was intended to prevent publishing associations and record companies from creating near-monopolies by acquiring copyright ownership over a significantly sized catalog and barring the recording and public performance of the works, the licensing scheme inherently contradicts the goals of copyright law.[62] From the point of view that copyright aims to incentivize creation by granting artists exclusive rights and limited monopolies in their works, the compulsory licensing scheme subverts this goal by allowing artists to profit off of their works with a mere writing credit and fairly low compensation. In considering the moral rights theories of copyright law that suggest that the law should afford rights to creators because the works are a product of their labor, denying artists control over their works—and who reproduces them—undermines this very principle. In any other medium, the direct copying of someone's existing work would be considered infringement. The compulsory licensing scheme not only permits but *encourages* copying—to the detriment of Black artists who had their works covered and popularized by white artists who could appeal to a wider audience.[63] The provision effectively carves out an exception for infringement and appropriation of non-dramatic music works, which includes American popular songs. The negative effect of this provision is most prevalent in the era of rock and roll, which will be discussed later in this Note.

The 1909 provision specifically states that another person may make "similar use" of a mechanical reproduction, but fails to address whether "similar use" means: an exact reproduction of the musical composition, a new take on the underlying musical composition, or a combination of both. The line between an exact reproduction and a derivative of the original author's works should both facially be considered infringement, but the allowance of either imposes differing consequences on the original artist. While an exact reproduction may usurp the market for the original, as was often the case with the lifting of songs by Black artists, the ability for artists to make a derivative (slightly different, a remix, or adaptation in another genre) infringes upon an entirely different exclusive right of the original author (the exclusive right to prepare a derivative work). Some scholars note that the very creation that results from a

59. H.R. REP. NO. 94-1476, at 106–07 (1976).

60. *See* Abrams, *supra* note 57, at 218.

61. Copyright Act of 1909 § 1(e).

62. H.R. REP. NO. 94-1476, at 107–09.

63. Vincent R. Johnson II, Comment, *Sampling as Transformation: Re-Evaluating Copyright's Treatment of Sampling To End Its Disproportionate Harm on Black Artists*, 70 AM. U. L. REV. F. 227, 235, 261 (2021).

compulsory license is necessarily a derivative work, as a sound recording of an underlying musical composition the party lacks ownership in.[64]

The compulsory licensing scheme in Section 1(3) of the 1909 Act ultimately codified, and created a legal protection, for the lifting of music from the Black community for white artists. This created an avenue for the popularization of white musical icons across genres throughout the twentieth century off of the backs of African American artists who received little credit or compensation for their work. The compulsory license created difficult and contrasting implications for Black artists. On one hand, it augmented the potential for Black artists to gain some form of recognition by larger, mainstream artists covering their work. However, this idea relies on the implication that proper credit was given to the original artist. Black songwriters and composers were often unaware of the value of their publishing rights, which were contractually given to white record companies.[65] Therefore, any significant revenue garnered by the covering of their songs by mainstream artists did not benefit the original creators. On the other hand, compulsory licensing had set industry standards, an industry in which Black artists had unequal bargaining power and often faced discrimination in a white-dominated industry.

A. STRANGE FRUIT: JAZZ, JIM CROW, AND THE RACIAL DIVIDE

> "Southern trees bear a strange fruit. Blood on the leaves, and blood at the Root. Black bodies swingin' in the Southern breeze."
>
> - Strange Fruit, Billie Holiday[66]

1. The Birth of Jazz, Swing, and the Black Blues

The 1909 Act, though representing a substantial reform in copyright law regarding protection and registration, propelled the legal challenges confronting Black musicians into the twentieth century amidst ongoing social, economic, and political struggles for Black Americans. The turn of the twentieth century saw the interplay between Jim Crow segregation, mass migration, and the emergence of a Black cultural and artistic renaissance.[67] One of the most culturally defining by-products of this era was the birth of one of the first American-borne genres of music: jazz.[68] At its very core, jazz is emblematic of America itself: a fusion of culture, language, and exploration. The genre, which emerged from New Orleans in 1900, drew from African American spirituals and blues, ragtime, marching bands, and cultural influences from Europe and the

64. *See* Abrams, *supra* note 57, at 228.

65. *See* Greene, *supra* note 11, at 372.

66. BILLIE HOLIDAY, STRANGE FRUIT (Commodore Records 1939).

67. *Harlem Renaissance*, HISTORY.COM, https://www.history.com/topics/roaring-twenties/harlem-renaissance [https://perma.cc/PB8N-ZKRY] [https://web.archive.org/web/20241005215332/https://www.history.com/topics/roaring-twenties/harlem-renaissance] (last visited Feb. 25, 2024).

68. *See* STARR & WATERMAN, *supra* note 19, at 20.

Caribbean.[69] The rise and popularity of the genre and its distinctive style were largely due to the adaptation of Black artists' music for segregated audiences and the need for new musical forms to overcome economic marginalization after the emancipation and mass migration of former enslaved peoples.[70] Jazz music became, and remained, a cultural-defining platform. It allowed Black Americans to establish a new form of expression, identification, and artistic recognition.[71] Many of the pioneering musicians that aided in the rise in popularity of jazz music had roots in traditional forms of Black music, such as spirituals, religious hymns, and blues, before joining the "Great Migration of blacks fleeing lynching and Jim Crow oppression" and economic liberation in northern and western cities.[72] Coupled with the rapid rise in new technologies that revolutionized the way that people interacted with music, such as radio, television, records, and the 'soundtrack,' the music sector experienced rapid expansion and commercialization.[73]

Despite the popularity and ingenuity of the Jazz and Blues genres, Black musicians continued to face persistent discrimination and appropriation at the hands of white artists and major labels who failed to see the appeal of Black music beyond a Black audience.[74] In the upper echelons of society, Hollywood and the Upper classes adopted Jazz as a subculture that spanned fashion, film, music, and physical beauty aesthetics—showing the continued impact of Black creation on popular culture.[75] While Black jazz musicians, even those who had reached international acclaim, were confined to playing for segregated audiences or on international circuits, jazz-style dance bands consisting of white musicians who performed "watered-down, 'safe' version[s] of jazz" gained widespread popularity among white audiences.[76] The copyright system not only failed to protect Black artists from economic and cultural exploitation, but also exacerbated it by codifying legal protections for the appropriation of their music.

Mirroring the social and political segregation of the Reconstruction and Jim Crow eras, the music industry created distinct markets for music created by white and Black musicians.[77] This contributed to the constantly evolving nature of the genre as a response to the cycle of white producers, publishers, record labels, and club owners adapting the Black musical and performance styles for their audiences, and Black artists

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69. *Id.*

70. *See* Troutt, *supra* note 29, at 409.

71. Erika Lindsay, *Jazz as Part of the African American Cultural Diaspora*, ART BEAT (Mar. 17, 2022), https://artbeat.seattle.gov/2022/03/17/jazz-as-part-of-the-african-american-cultural-diaspora/ [https://perma.cc/QZ3Y-RUBN] [https://web.archive.org/web/20241006003756/https://artbeat.seattle.gov/2022/03/17/jazz-as-part-of-the-african-american-cultural-diaspora/].

72. *See* Troutt, *supra* note 29, at 409.

73. *American Popular Song: A Brief History*, HISTORY MATTERS, https://historymatters.gmu.edu/mse/songs/amsong.html [https://perma.cc/Y62K-Z37K] [https://web.archive.org/web/20241006004045/https://historymatters.gmu.edu/mse/songs/amsong.html] (last visited Jan. 27, 2024).

74. *See* STARR & WATERMAN, *supra* note 19, at 22.

75. *Id.*

76. *Id.*

77. *Id.*

adapting to new musical forms and methods of improvisation to distinguish themselves and "overcome . . . marginalization."[78] For the first half of the twentieth century, labels realizing the value of African-American music to African-American audiences, labels such as Columbia, Paramount, and Okeh garnered significant revenue through the creation of "race music" and "race records"—music exclusively by Black artists for Black artists."[79] It was not that the market for Black music by the greater Black population was novel, but rather it was exploitable by producers and music labels who saw an opportunity to profit off of it. Despite being confined to segregated venues and receiving little air-play across analog mediums, race records were relatively successful and remained the "primary medium for African-American musical expression" in the first half of the twentieth century—leading to national fame for particular Black artists.[80] Despite the commercial success of their music, due to artists' lack of knowledge of copyright law and its protections, and the lack of a centralized system to track the value of records and their royalties, most artists saw little to no compensation for their work.[81]

Educational and political discrimination also played a factor in the incompatibility of Black musical traditions and copyright law's formalities. Jazz and blues music, specifically, which relied on improvisation and stylistic performance, were incompatible with the written notation needed to register many of the compositions that fell under the genre.[82] Therefore, artists who were able to reduce the notation to a written form were granted ownership over the work.[83] Finally, the compulsory mechanical licensing scheme disproportionately affected Black jazz musicians aiming to make a name for themselves in the emerging recording industry.[84] Sound recordings were not protected under the Copyright Act, and therefore under the licensing scheme, meaning that artists had less knowledge of and control over their works being recorded and reproduced elsewhere, and received inequitable (if any) compensation or recognition for their creations. The legislative history outlining Congress' intent for the changes in the 1909 Act illustrates a lack of recognition for the unique and disadvantaged position of Black artists given the social, political, and economic conditions of segregation were not only not considered, but not even mentioned.[85]

78. *See* Troutt, *supra* note 29, at 409.

79. Matthew A. Killmeier, *Race Music*, ENCYCLOPEDIA.COM, https://www.encyclopedia.com/media/encyclopedias-almanacs-transcripts-and-maps/race-music [https://perma.cc/l4xv-evcm] [https://web.archive.org/web/20241008203215/https://www.encyclopedia.com/media/encyclopedias-almanacs-transcripts-and-maps/race-music] (last visited Oct. 12, 2024).

80. *Id.*

81. *Id.*

82. *See Thieves in the Temple*, *supra* note 48, at 628.

83. *Id.*

84. *Id.* at 628 & nn.82, 84.

85. *See generally* E. Fulton Brylawski & Abe Goldman, *Legislative History of the 1909 Copyright Act*, BULL. COPYRIGHT SOC'Y U.S.A. 77 (1976).

B. DON'T BE CRUEL: ROCK 'N' ROLL AND THE ERA OF IMITATION

"The future looks bright ahead. Don't be cruel, to a heart that's true"

- Don't Be Cruel, Written by Otis Blackwell[86]

Deeply rooted in the diaspora of African American musical traditions, rock and roll, which emerged in the mid-twentieth century, evolved into the quintessential story of the appropriation of Black artists throughout American music history, and the inability for copyright law to provide recourse for Black musicians. Artists such as Chuck Berry, Little Richard, and Sister Rosetta Tharpe experimenting with faster-tempo renditions of gospel and rhythm and blues music as early influences of rock and roll music, major labels aimed to take this new style of music, performance, and dance, and popularize it on white singers.[87] As a stark contrast to the resurgence of conservative and traditional values following the World Wars, rock and roll was marketed as a rebellious form of music by white teenagers who desired to distance themselves from the music and culture of their parents' generations.[88] Rock and roll was thus born out of the blatant exploitation of Black artists.[89] Despite marketing efforts by record labels focusing primarily on white youth, rock and roll was a culturally-defining genre that transcended division—appealing to country and city, wealthy and inner city, white and Black.[90] With major record labels no longer being able to deny the commercial appeal and success of Black musicians and rhythm & blues, alongside the rapid growth of the vinyl record business after World War II, music executives aimed to find a way to exploit the market of Black music—without Black artists.[91] Labels practiced "whitewashing" Black rhythm and blues records for wider radio and television play.[92] The genre of rock and roll, which was a vernacular term derived from the Black community as a vulgar euphemism for sex, was borne out of this exploitative practice, and was usurped by white youth as a cultural rebellion and movement.[93]

Early Black rock and roll artists reached mainstream popularity and acclaim, such as Chuck Berry and Little Richard who directly marketed their music to the teenage market and created distinct personas consisting of "outrageous performance [styles] that appealed on a basis of . . . novelty and sexual ambiguity."[94] However, the biggest star of the Era was a white man with a Black style: Elvis Presley.[95] Elvis's "Hound Dog,"

86. ELVIS PRESLEY, *Don't Be Cruel on* HOUND DOG (RCA Victor 1956) (lyrics written by Otis Blackwell).
87. *See* Troutt, *supra* note 29, at 414–15.
88. *Id.* at 415.
89. *See id.* at 410.
90. *See* STARR & WATERMAN, *supra* note 19, at 62.
91. *See* Troutt, *supra* note 29, at 414–15.
92. Arnold Shaw, *Researching Rhythm & Blues*, 1 BLACK MUSIC RSCH. J. 71, 74 (1980) (stating that Rock and Roll is a white derivative of R&B music, which was a sociological product of Black exclusion in the music industry for over a century).
93. *Id.* at 74 & n.8.
94. *See* STARR & WATERMAN, *supra* note 19, at 63.
95. Born in a predominantly Black neighborhood in rural Mississippi to a poor, working class family that was heavily religious, Presley became influenced by gospel and Black musical styles from a young age.

which is one of the best-selling single records of all time, and his highest-selling song, became emblematic of the rock genre itself and shattered records that remain untouched in the twenty-first century.[96] The song simultaneously topped the pop, country, and rhythm and blues charts, highlighting the genre-bending appeal of the song's style. The song, however, was first recorded and published by pioneering Blues singer Big Mama Thornton, three years before Elvis's release.[97] While Thornton received acclaim for the song in the rhythm and blues space, she did not own copyright in the musical composition, and her sound recording in the record was not protected under the 1909 Act.[98] She received a $500 payment for the song, and never received royalties for the song despite the song being the one of the most popular songs in history.[99]

This was not the only occasion in which Presley covered and popularized songs by Black artists, and the practice arguably erased the significant contributions of many of the early Black figures in rock and roll music. Artists like Ray Charles did not see Presley's imitation of Black musical styles as flattery or particularly beneficial to the Black musical community—noting that Black singers like Nat King Cole were attacked for playing the very music Presley became famous for—*Black* music.[100] The pattern of appropriation at the expense of Black artists that continued through Elvis's career reflects the broader pattern of exploitation and erasure of African American artists that has existed in the entirety of American musical history. While Elvis's popularity is not solely attributed to his adoption and use of Black style and music, his popularity at the expense of those artists perfectly illustrates the legal and social inequalities under copyright law and the broader music industry. Exploitative practices that prevented Black artists from retaining any ownership in their music, a lack of fair compensation for their work, stringent formalities under copyright law, and statutory provisions that allowed for the lifting of Black music by white artists contributed to the unequal protection of Black musicians and their works.[101] Additionally, the lack of protection

These influences not only revealed themselves in his gyrating dancing style, gospel sound, or stage presence, but also in the direct covering of records by Black blues artists. *See* STARR & WATERMAN, *supra* note 19, at 63.

96. *See generally Elvis Presley,* BILLBOARD, https://www.billboard.com/artist/elvis-presley/ [https://perma.cc/7F27-5WM6] [https://web.archive.org/web/20241113222149/https://www.billboard.com/artist/elvis-presley/] (last visited Jan. 28, 2024). *See also Achievements,* GRACELAND, https://www.graceland.com/achievements [https://perma.cc/D2RD-EUU9] [https://web.archive.org/web/20241123010908/https://www.graceland.com/achievements] (last visited Dec. 21, 2024).

97. Michael Sporke, *"Hound Dog"—Big Mama Thornton (1953)*, LIBRARY OF CONGRESS (2016), https://www.loc.gov/static/programs/national-recording-preservation-board/documents/HoundDog.pdf [https://perma.cc/95C2-8JCW] [https://web.archive.org/web/20241007230458/https://www.loc.gov/static/programs/national-recording-preservation-board/documents/HoundDog.pdf] (last visited Oct. 11, 2024).

98. *Id.*

99. Yohana Desta, *Elvis: What Did Black Artists of the Era Really Think of Presley?*, VANITY FAIR (June 24, 2022).

100. *Id.*

101. *See* Greene, *supra* note 11, at 371.

for sound recordings under the 1909 Act's compulsory mechanical licensing further denied Black musicians the legal avenues to control the use and appropriation of their music by other artists. The defining process of early mainstream rock and roll was the appropriation, sanitation, imitation, and commodification of popular Black music styles.

C. A CHANGE IS GONNA COME: THE CIVIL RIGHTS MOVEMENT, MOTOWN, AND THE BIRTH OF THE BLACK MUSIC MECCA

"It's been a long, a long time comin;, but I know a change gon' come."

- A Change Is Gonna Come, Sam Cooke[102]

Gaining popularity against the backdrop of the Civil Rights movement, continued widespread segregation, and the assassination of Dr. Martin Luther King, soul and rhythm and blues music became more than just a method of entertainment, but rather saw a return to the very origins of the African American musical traditions as sources of strength, hope, and resilience. The genre itself became one of the foremost expressions of Black resilience in the face of continued oppression, injustice, and segregation. Many of the acclaimed songs produced during this period reflected these themes of hope and freedom, becoming the soundtrack for the fight for equality. While the 1950s and 1960s were largely defined by a social, cultural, and political fight for freedom, a shift was also occurring for Black artists in the music world.

Rhythm and blues became one of the first genres of the twentieth century to transcend the "race record" distinction, to reach national acclaim and widespread radio play.[103] Smaller labels recognized the value in R&B to appeal to a younger audience, and forged relationships with Black musicians to increase visibility and profitability.[104] In response to existing performing rights organizations, such as the American Society of Composers, Authors and Publishers ("ASCAP"), which had previously denied their services to Black artists in collecting royalties and distributing licensees, Broadcast Music, Inc ("BMI"), concerted efforts into bringing R&B to the masses, representing the rights of over 90% of the weekly R&B radio hits.[105] The only music licensing organization to devote such efforts to Black artists, BMI represented nearly every pioneer of both rhythm and blues and rock and roll.[106] Despite the popularity and acclaim that rhythm and blues received across national airways, this led to the banning of these records on white stations, and the appropriation and whitewashing of popular

102. SAM COOKE, A CHANGE IS GONNA COME (RCA Victor 1964).

103. *See* Troutt, *supra* note 29, at 415.

104. *Id.*

105. *BMI's Timeline Through History*, BMI, https://www.bmi.com/about/history [https://perma.cc/JV9P-LQGQ] [https://web.archive.org/web/20241002053546/https://www.bmi.com/about/history] (last visited Jan. 28, 2024).

106. *Id.*

records by Black artists for these stations.[107] This spurred the resurgence in the mass production of "racial covers" of Black records by white artists and groups despite demand for the original works.[108] One scholar, David D. Troutt, specifically cites the compulsory licensing scheme under the 1909 Act as the fodder for this practice, noting that "[w]ithout the ability to make white covers of Black songs under [the licensing provision] . . . the industry would have had to alter its racist behavior sooner" by "playing black [records], signing black . . . artists to major labels, and expanding the opportunities for popular and financial recognition for black musical authors."[109]

This era also saw a shift in the dynamics of the music industry, with the formation of Black records that aimed to produce records for a widespread audience. In 1959, Berry Gordon launched the soul music record label, Motown, a nod to Detroit as the "motor town."[110] The label successfully contributed to the racial integration of American popular music as an entirely African-American led, run, and produced label that created records of mass appeal.[111] The label became the largest Black-owned corporation in the country, and became a hit-factory, producing some of the greatest artists of the time: from Stevie Wonder, to Marvin Gaye, and the Jackson 5.[112] While many of the inequities of decades and generations past still remained, such as catering to white consumer tastes and unequal ownership of copyright between labels and artists, Motown still marked the beginning of a shift within Black musical culture from both an industrial and artistic perspective.[113]

In contrast to its predecessors, the 1909 Copyright Act introduced significant changes to the landscape of existing copyright law. Unlike prior legislation, which often lacked comprehensive provisions and enforcement mechanisms, the 1909 Act sought to codify and streamline copyright regulations, providing creators with more robust protections for their works. However, as seen through the experience of pioneering Black artists on the forefront of jazz, rock and roll, and rhythm and blues, these statutory advancements perpetuated the systemic barriers that impeded Black artists ability to gain credit, compensation, and protection for their works. While the 1909 Copyright Act underwent a number of amendments in the 1950s and 1960s to keep pace with technological and industry developments that occurred during the twentieth

107. *See* Troutt, *supra* note 29, at 417.

108. *Id.*

109. *Id.* (footnotes omitted).

110. *Motown,* DICTIONARY.COM, https://www.dictionary.com/browse/motown [https://perma.cc/G7DL-7F5S] [https://web.archive.org/web/20240721021220/https://www.dictionary.com/browse/Motown] (last visited Feb. 21, 2024); *Classic Motown*, CLASSIC MOTOWN, https://classic.motown.com/timeline/ [https://perma.cc/Q3P7-79AB] [https://web.archive.org/web/20240910013540/https://classic.motown.com/timeline/] (last visited Feb. 20, 2024)

111. *Classic Motown*, *supra* note 110.

112. *Id.*; Troutt, *supra* note 29, at 419–20.

113. *See* Troutt, *supra* note 29, at 419–20.

century, the Act underwent a major revision leading to the Copyright Act of 1976 ("the 1976 Act"), which is now the reigning, modern framework for copyright law.[114]

III. PART THREE: THE MODERN COPYRIGHT ERA

A. THE COPYRIGHT ACT OF 1976

Despite the evolution from the 1909 Act to the 1976 Act, Black artists continue to face challenges in the face of changing technological advancements, highlighting ongoing disparities and struggles within the music industry. The 1976 Act was signed into law by President Gerald Ford on October 19, 1976, and went into effect on January 1, 1978.[115] All works created prior to this date were still subject to the Copyright Act of 1909, as that was reigning law during its creation and the new Act would not be applied retroactively, only prospectively.[116] The 1976 Act represented a new philosophy for copyright law in the United States, reasserting legislative supremacy in intellectual property, rather than reliance on courts and judge-made law to determine boundaries of protectability. This led to comprehensive codification of judge-made rule to give doctrines legislative authority, and to create national uniformity on several issues. Aside from greatly expanding the subject matter subject to copyright protection and creating the threshold of an "original creation fixed in a tangible medium," one of the largest changes reflected in the Act was the simplicity of the statute's formalities. Firstly, federal copyright protection was now automatically granted for all original works once they are fixed in a tangible form, regardless of whether or not they are published or registered.[117] While registration becomes a prerequisite for an infringement action under 17 U.S.C., it is no longer a requirement for protection.[118] This addition also removes the need for a copyright notice, as all works that meet the protectability threshold are presumed to be protected under copyright law. Additionally, deposit requirements are rendered moot as most works are exempted. Other provisions, such as the length of the term of protection and renewal periods, codified defenses to claimed infringement, and provisions for new forms of protection (namely the internet) were also reflected in the new act.

1. Sound Recording Rights

Section 114 of the 1976 Copyright Act creates an express provision outlining the exclusive rights in sound recordings, which were not granted copyright protection

114. *1950–2000, Highlight: Congress Passes the Current Copyright Act*, COPYRIGHT.GOV, https://www.copyright.gov/timeline/timeline_1950-2000.html [https://perma.cc/BW3E-YALP] [https://web.archive.org/web/20241006181046/https://www.copyright.gov/timeline/timeline_1950-2000.html] (last visited Jan. 29, 2024) [hereinafter, 1950–2000 Timeline].

115. *Id.*

116. *Id.*

117. *Id.*

118. 17 U.S.C. § 408.

until 1972.[119] Sound recordings being denied protection prior to the 1976 Act primarily affected artists who were making significant contributions to the emerging field of recorded music. Following the added protection for sound recordings in 1972, music publishers brought actions against compulsory license users that not only duplicated the musical composition, but also the sound recording as well. For example, in *Duchess Music Corp v. Stern*, the Ninth Circuit found that even compliance with the compulsory license statutory provisions would not allow a direct reproduction of the sound recording without permission of the copyright owner, as the licensing scheme only covered the underlying musical compositions.[120] While this increased some of the protections of the copyright owner, this would only benefit the original artist if they retained ownership of their work. However, this was a right that many Black musicians were deprived of due to predatory business practices and ignorance of copyright formalities.[121]

Section 114 grants exclusive rights to sound recordings, but only: reproduction rights, derivative work rights, distribution rights, and a public performance right.[122] The reproduction rights afforded in this section do not refer to covers that imitate the performance embodied in the record, but are rather confined to a replication of the actual sounds of the original work, as well as the right to rearrange, remix, or alter the sequence of their original work as a derivative work. This specifically references the practice of sampling. Importantly, the rights afforded to sound recordings do not cover the "independent fixation" of other sounds that imitate or are similar to the protected sound recordings, likely a codification of the independent creation defense often brought in music infringement cases.

2. The Amended Compulsory License

The compulsory mechanical license, despite attempts to the contrary, survived the major revision of copyright law and was codified in Section 115 of the Copyright Act of 1976. This section provided that: "In the case of nondramatic musical works, the exclusive rights provided by . . . section 106, to make and to distribute phonorecords of such works, are subject to compulsory licensing under the conditions specified by this section."[123] Subsection (a) describes the requirements for those seeking a compulsory license: requiring that the record has already been published and distributed, and that the primary purpose in making the reproduction is for distribution to the public for

119. 1950–2000 Timeline, *supra* note 114.

120. Duchess Music Corp. v. Stem, 458 F.2d 1305 (9th Cir. 1972), *cert. denied*, 409 U.S. 847 (1972). *See also* Edward B. Marks Music Corp. v. Colo. Magnetics, Inc., 497 F.2d 285 (10th Cir. 1974) (for the proposition that courts around the country similarly read the statue to provide a sort of first right to the owner of a copyright in a musical composition, giving them "absolute control" over who may record the composition. However, this Court notes that once a composer or copyright owner grants a license for another to use the musical composition, than "any other person may make similar use of the copyrighted work" through the compulsory licensing provisions in the statute).

121. *See* Killmeier, *supra* note 79.

122. 17 U.S.C. § 114(a).

123. 17 U.S.C. § 115.

private use.[124] It is unclear precisely what defines "private use" in a digital, streaming world but there have yet to be actions brought countering this language. The new language expressly included sound recordings—denying compulsory licenses to sound recordings fixed by another person without their express license and permission.[125] Most importantly, the new licensing provisions expressly allowed artists seeking to cover an existing work the ability to alter the arrangement of the song to align with their particular style, so long as the "basic melody or fundamental character of the work" remains unchanged.[126] The subsection also denies copyright protection to the new arrangement as a derivative work *without the express permission of the copyright owner* in the underlying musical composition.[127] The scheme retains the notice and registration requirements of the 1909 Act, and allows for record companies to obtain licenses to distribute the new works digitally.[128] Those who fail to comply with the provisions are subject to actions of infringement amongst other limitations.[129] Additionally, the royalty rates were raised to 7.1 cents per unit, or 1.35 cents per minute of playing time (whichever amount is larger) and allowed for copyright owners to negotiate their own rates.[130]

While the amended licensing scheme addressed concerns raised in relation to the 1909 scheme, a number of issues still remain unresolved under the existing licensing scheme as technology advances and our methods of consumption evolve. In testimony before Congress to amend the compulsory licensing scheme in 2004, the Register of Copyrights, Marybeth Peters, argued that the current scheme failed to reflect the changing nature of technology and the rights of artists in an increasingly digital world.[131] Peters notes that the 1909 compulsory licensing scheme was rarely invoked outside of the context of piracy, as sound recordings did not fall within the purview of the licensing scheme, and most artists went ahead and covered songs without stringently following the provisions of the statute.[132]

The Reporter notes that when considering the amended structure, the House Judiciary Committee found that the current system was "unnecessarily burdensome on copyright owners," and royalty rates were too low to be effective—which led to the aforementioned changes in the scheme's structure.[133] Therefore, while compulsory licensing necessarily effected the entirety of the music industry, and impacted artists of

124. 17 U.S.C. § 115(a)(1)(A)(i).
125. 17 U.S.C. § 115(a)(1)(B)(ii).
126. 17 U.S.C. § 115(a)(2).
127. *Id.*
128. 17 U.S.C. § 115(b)(3).
129. *Id.*
130. 17 U.S.C. § 115(c)(1). *See* 37 C.F.R. § 255.3(i). (The most recent amendment to § 255.3 Adjustment of Royalty Rate, found in section (m), raised the royalty rate for "phonorecords made and distributed on or before January 1, 2006" to "either 9.1 cents, or 1.75 cents per minute of playing time, whichever amount is larger".)
131. *Section 115 Compulsory License: Hearing Before the Subcomm. on Cts., The Internet, and Intell. Prop. of the H. Comm. on the Judiciary*, 108th Cong. 2 (2004) (statement of Marybeth Peters, Register of Copyrights) [hereinafter, Statement of Peters].
132. *Id.*
133. *Id.*

all races, the Black musical community was particularly affected by the amended scheme in two ways. Section 115 outlines that an artist or party interested in re-recording or covering a musical composition or sound recording will not need to seek a compulsory license under two circumstances.[134] The first exclusion applies if the original work is in the public domain because the copyright has expired or *"the work was created before March 1, 1989, and the author or copyright owner failed to comply with formalities necessary to maintain the copyright."*[135] Under the 1909 Act, which affected works created until 1978, and throughout the history of musical creation within the Black community, the formalities of copyright registration have created barriers for adequate protection.[136] As discussed in Parts I and II, Black artists are likely to have less ownership and control over their music, including both the musical compositions and sound recordings, due to historical and systemic inequities within the music industry.[137]

Despite provisions of the licensing scheme sustaining much of the harm that artists faced in previous generations, Congress did *attempt* to address the changing nature of the music industry and how the provision may affect artists. Noting the changes in music consumption and technological developments with the rise of the internet presenting new challenges to the licensing framework, Congress adopted "The Digital Performance Right in Sound Recordings Act of 1995."[138] The amendment granted copyright owners an exclusive public performance right by means of digital transmissions and "reaffirmed mechanical rights of songwriters and music publishers in the new world of digital technology."[139] This allows copyright owners to license out both the sound recording and the underlying musical composition to interested parties. However, while the licensing process was amended to compensate for changes in digital music consumption, it has failed to meet the current moment considering rapid technological advancement that is drastically changing the way we create, produce, distribute, and consume music, setting the stage for Black musicians to again bear the brunt of these statutory shortcomings.

IV. PART FOUR: REFORMING THE COMPULSORY LICENSING SYSTEM

The constant tension between technological advancement and copyright law has become increasingly burdensome on creatives whose rights are not adequately adapting at the rate in which technology is. This historical tension has challenged the efficacy of the compulsory mechanical licensing system to adapt quickly enough to these rapidly evolving technologies in order to protect the rights in their works and their economic interests bound in those rights. In an era of music defined by sampling, streaming, and a rise in artificial intelligence's use in the creative process, the 1976 compulsory

134. Lisa Weiss, *Music Licensing*, WESTLAW PRACTICAL LAW INTELL. PROP. AND TECH. (last visited Nov. 18, 2024).

135. *Id.* (emphasis added).

136. *See supra* Part II.

137. *Id.*

138. *See* Statement of Peters, *supra* note 131.

139. *Id.*

licensing scheme, and its amendments, have failed to respond to the implications of these technologies on this right. This undoubtedly will affect marginalized artists, especially Black artists, who have historically borne the brunt of copyright law's shortcomings and pitfalls.

As these technologies influence changes in the music industry, the legal gaps formed from the inadequacy of the licensing scheme risk reigniting the inequities that Black artists faced historically—from protection to compensation and appropriation. While all artists are technically subject to the pitfalls of the licensing scheme, the impact on Black artists in light of historical and generational inequities in protection and the inherent intertwined nature of Black music and culture will again disproportionately affect Black musicians. As seen in the continued legal battles of Black artists to have the unauthorized uses of their works by white artists, this issue remains as pertinent as ever.[140] While many of the novel legal issues surrounding these technologies prevent quick and efficient legislation from being enacted, simple amendments to the Section 115 compulsory licensing system can protect artists from exploitation and appropriation in the interim.

A. BLURRED LINES: STREAMING AND SYSTEM INTELLIGENCE IN THE ERA OF HIP-HOP

Although Black artists at the dawn of the twenty-first century made significant progress in gaining adequate protection for their contributions to American popular culture, the changing landscape of the music industry in the twenty-first century implicates new legal issues that threaten the livelihoods of Black artists. The issues of appropriation are largely governed by Sections 114 and 115 of the Copyright Act of 1976, which consider the exclusive rights afforded to sound recordings and the licensing system that governs the use of other artists' musical compositions and sound recordings.[141] While the licensing system was amended and updated after the 1909 Act's

140. *See generally* Bright Tunes Music Corp. v. Harrisongs Music, Ltd., 420 F. Supp. 177 (S.D.N.Y. 1976) (African-American songwriter Ronnie Mack composed the hit song "He's So Fine" for the African-American girl group, "The Tops." The composition and sound recording were copyrighted by the company Bright Tunes who brought suit claiming that the successful song "My Sweet Lord," performed by former Beatle George Harrison plagiarized their work. Harrison's songs used the same two motifs as the Tops' song and the harmonies of both songs are identical. Additionally, Harrison admitted to being aware of the group's song and was found liable for "subconscious" copying of the composition.); Newton v. Diamond, 388 F.3d 1189 (9th Cir. 2004) (Plaintiff Newton, a prominent African American flutist who owned the composition rights to his work, but not the rights to the sound recording, had his work sampled in a song by white, rap rock group "Beastie Boys." The defendants licensed the use of the recording but did not license the underlying composition from Newton. The court found that the use was de minimis and therefore not actionable. Newton therefore received no compensation for the use of his composition.); Structured Asset Sales, LLC v. Sheeran, 120 F.4th 1066 (2d Cir. 2024). (A partial owner in the royalties from African-American soul singer, Marvin Gaye, sued English singer Ed Sheeran claiming that his song "Thinking Out Loud" infringed on the copyright in Marvin Gaye's "Let's Get It On." The court, however found that Gaye's song was protected only as defined in the sheet music deposited with the Copyright Office under the 1909 Act. The court found the chord progression and syncopated rhythm to be unprotectable musical building blocks and insufficiently original to warrant copyright protection. It emphasized that overprotecting basic musical elements would "stifle creativity.")

141. 17 U.S.C. §§ 114, 115.

six-decade-long governing of the issue to address many of the concerns that effectively propelled the appropriation of Black artistry, disproportionately impacting Black artists, these changes are becoming less effective in light of technological trends arising in the music industry.

In keeping with the tradition of Black artists at the forefront of innovative change at the outset of the development of new musical genres, the creation of the hip-hop genre by Black artists in the late twentieth and early twenty-first centuries has once again greatly altered the music industry, becoming the most popular genre in the country.[142] Hip-hop returns to the very roots of the Black musical tradition: drawing upon and fusing existing music to express the Black experience and social, political, and economic conditions of the community in a quasi-improvisational oral tradition. This merging of historical musical traditions reflects a continued practice of referential development in Black musical history, and the inherent intertwined nature of Black culture and Black music.[143] Access to cheap technology and oral instrumentation, alongside a growing movement of Black-led labels cognizant of discriminatory mainstream practices within the industry, birthed a strong sense of entrepreneurship amongst the hip-hop community.[144] This allowed artists to retain ownership over their works and allowed for unrestrained experimentation across the genre—contributing to its sustained popularity.[145]

1. The Streaming Era: Spotify, Apple Music, and the Decline of Radio

One of the key technological advancements of the early twenty-first century that played a key role in cementing the success of hip-hop in American Pop Culture is the evolution of digital music streaming.[146] Streaming and the rise of digital music platforms have altered the very model at the core of the music industry: both in the way that artists create, the way labels operate, and the way the public consumes music. Major music labels no longer maintain control over music distribution, and thus no

142. Candace G. Hines, *Black Musical Traditions and Copyright Law: Historical Tensions*, 10 MICH. J. RACE & L. 463, 487 (2005) (noting that, influenced by the disco-funk of the 1970s, the rise of spoken poetry in urban communities in the 1980s, and the sustained popularity of rhythm and blues, this fusion of spoken word and musical traditions arose in the New York inner-city communities at the end of the twentieth century.). *See also* Charlie Zhang, *Hip Hop Deemed Most Popular Genre of 2020,* HYPEBEAST (July 15, 2020), https://hypebeast.com/2020/7/hip-hop-most-popular-genre-2020-streaming-sales-data-info [https://perma.cc/9P5G-2GFY] [https://web.archive.org/web/20230102224759/https://hypebeast.com/2020/7/hip-hop-most-popular-genre-2020-streaming-sales-data-info].

143. *See* Greene, *supra* note 11, at 365–66.

144. *See* Troutt, *supra* note 29, at 427–28.

145. *Id.*

146. Ryan Smith, *Hip Hop and the Evolution of Music Streaming: From MP3s to Blockchain*, WRITING BY RYAN (Mar. 20, 2023), https://www.writingbyryan.com/hip-hop-and-the-evolution-of-music-streaming-from-mp3s-to-blockchain/ [https://perma.cc/PXE7-VDHP] [https://web.archive.org/web/20240525083111/https://www.writingbyryan.com/hip-hop-and-the-evolution-of-music-streaming-from-mp3s-to-blockchain/].

longer act as gatekeepers and necessary intermediaries between artists and the public.[147] With independent artists, labels, and songwriters now able to directly access and harness the power of the internet to reach wide audiences, the ability to effectively monitor the unlicensed use of music in covers and samples on streaming sites is continually diminishing to the detriment of the original artists.

While the licensing scheme in § 115 was amended to include blanket licenses for digital audio transmissions, the covert threat to the compulsory licensing scheme is what streaming *allows* for artists.[148] With labels and publishing companies no longer acting as necessary intermediaries between artists and the public, well-versed in the ins and outs of the intellectual property legal structures and copyright law, many artists are now independently producing music to be released directly to the public.[149] While this allows many of these artists to retain full ownership of their compositions and sound recordings and allows them to circumvent the often-predatory practices of the music industry, it also leads to (ideally, innocent) infringement due to the lack of knowledge or comprehension of the technicalities of copyright law. While many independent artists use covers of popular songs to build a following, doing so under the compulsory licensing system without proper notice and credit could expose the artists to legal repercussions they may not be equipped or resourced-enough to handle.

2. Artificial Intelligence: Attribution and Appropriation

In April 2023, a song surfaced across social media platforms called "Heart on My Sleeve," and became an instant hit amongst fans of Drake and The Weeknd—the two artists featured on the track.[150] However, the artists did not create the song, nor did they lend their voices to someone else's composition—their voices were digitally cloned using artificial intelligence without the artists' permission. The track garnered nearly one million hits before being taken down by various platforms for potential copyright infringement.[151] Novel questions concerning copyright and intellectual property implications in the development of artificial intelligence have prevented Congress, and the Copyright Office, from taking preemptive action to protect artists' intellectual property and livelihoods.

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147. Gary Graham et al., *The Transformation of the Music Industry Supply Chain*, 24 INT'L J. OPERATIONS & PROD. MGMT. 1087, 1090 (2004).

148. *See* 17 U.S.C. § 115(d)(1)(A).

149. Grant Rindner, *How Streaming Changed Rap*, COMPLEX (Nov. 19, 2019), https://www.complex.com/music/a/grant-rindner/how-music-streaming-changed-rap [https://perma.cc/JXP6-6HKR] [https://web.archive.org/web/20230804122705/https://www.complex.com/music/a/grant-rindner/how-music-streaming-changed-rap].

150. Noah A. McGee, *AI-Generated Music Is Creating Black Art Without Black Input*, ROOT (Apr. 19, 2023), https://www.theroot.com/ai-generated-music-is-creating-black-art-without-black-1850353845 [https://perma.cc/H8LC-TNSZ] [https://web.archive.org/web/20240802003852/https://www.theroot.com/ai-generated-music-is-creating-black-art-without-black-1850353845].

151. *Id.*

The 1976 Copyright Act, which codified existing common law, is regularly amended to update regulatory provisions and registration requirements to reflect new advancements in the realm of creation.[152] However, as new technologies evolve faster than legislation can adapt, questions about traditional concepts of authorship, ownership, and infringement are emerging with increasing urgency. The newest of these debates, surrounding the use of artificial intelligence, namely generative artificial intelligence, poses new questions and debates around how this generated content will affect artists, authors, and creatives, who will own the computer-generated data, and how artists will protect their works-questions that are fundamental to the existence of our current intellectual property systems.[153]

Generative Deep Learning is a specific subset of Artificial Intelligence that uses available training sets of data, which contain examples of the entities that will be used as a beginning point for the generation of new data that is outputted.[154] The sets of data act as training sets in which information can be extracted; however, the data that is contained in these sets may be protected by copyright, such as artworks, poems, articles, and other forms of literary works.[155] One key feature of GDL processing, which lies at the crux of its potentially troublesome legal implications, is that the processing technique learns directly from the whole work as it exists in its expressive forms (which are protected by copyright), not through the study of small features or underlying ideas (which are not protected by copyright).[156] Generative deep learning techniques are trained on a large amount of data, some of which may be protected by copyright, especially in case of musical compositions, but they allow for the generation of new samples that are similar to the training data which could either warrant its own distinct copyright protection or could constitute an infringement.[157]

Beyond questions of resulting ownership or potential infringement, the rise of artificial intelligence also implicates issues of licensing, royalties, and proper credit. When fans, eager for new material from their favorite artists, use artificial intelligence to generate music "in the style" or voice of these artists, they may inadvertently infringe on the artists' musical compositions and sound recordings, likely without providing proper notice to the artist for authorization for the use of their work.[158] This reinvigorates issues that have been consistent across the history of Black music—the

152. U.S. COPYRIGHT OFF., COPYRIGHT LAW OF THE UNITED STATES viii (2022).

153. *Artificial Intelligence and Intellectual Property Policy*, WIPO, https://www.wipo.int/about-ip/en/artificial_intelligence/policy.html. [https://web.archive.org/web/20240926232019/https://www.wipo.int/about-ip/en/artificial_intelligence/policy.html] (last visited Feb. 3, 2024).

154. Giorgio Franceschelli & Mirco Musolesi, *Copyright in Generative Deep Learning*, 4 DATA & POL'Y, e17-1–e17-2 (2022).

155. *Id.* at e17-2.

156. *Id.*

157. *Id.*

158. Jonathan Coote & Don McCombie, *AI-Generated Music and Copyright*, CLIFFORD CHANCE, https://www.cliffordchance.com/insights/resources/blogs/talking-tech/en/articles/2023/04/ai-generated-music-and-copyright.html [https://perma.cc/Z7FH-NTK9] [https://web.archive.org/web/20241006081754/https://www.cliffordchance.com/insights/resources/blogs/talking-tech/en/articles/2023/04/ai-generated-music-and-copyright.html] (last visited Feb. 13, 2024).

desire to create Black music, without Black artists. When Black artists have just begun to emerge from the centuries-long industrial, social, political, and economical subjugation and discrimination, the inability for copyright law to adequately address the new technology is reinvigorating these patterns of appropriation to the detriment of Black musicians.

B. A CREATOR-CENTERED SOLUTION TO THE LICENSING WOES OF THE COPYRIGHT LEGAL SCHEME

1. A Moral Right for Musicians: The Assurance of Attribution and Integrity Through a Voluntary Licensing System

To ensure that creators, artists, and musicians are centered in the search for a solution to the continually rising tensions between technological advancements, licensing, and the music industry, Congress should follow its own acknowledgement of the importance of artist control through the recognition of a moral right of attribution for musical artists. The underlying moral-rights approach to justifying intellectual property rights suggests that the law should afford protection to creators because works are products of their labor, and thus a form of property deserving of robust ownership protections.[159] This is the theory that generally underlies the European approaches to copyright protection, however the United States has remained highly inconsistent on its treatment of creator's moral rights—prioritizing commercial, corporate, and capitalist interests instead.[160] However, the recognition of a moral right for musicians would not be unprecedented or impracticable. In 1990, Congress passed the Visual Artists Rights Act ("VARA"), which granted artists of qualifying visual works a right of attribution and integrity in their works.[161] This statute grants the owners the right to claim authorship in their works, to prevent the use of their name as the author of works they have not created, as well as rights in the preservation and destruction of their works. These moral rights afford protection for the artist's personal, non-economic interests in receiving attribution for their work and in preserving the work in the way it was created even after its sold or displayed.[162] There

159. Betsy Rosenblatt, *Moral Rights Basics*, BERKMAN KLEIN CTR. (1998), https://cyber.harvard.edu/property/library/moralprimer.html [https://perma.cc/4L9E-YUVX] [https://web.archive.org/web/20240921211925/https://cyber.harvard.edu/property/library/moralprimer.html] (last visited Oct. 10, 2024).

160. Roberta Rosenthal Kwall, THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES 53 (Stanford Univ. Press 2010).

161. 17 U.S.C. § 106(A).

162. Sharon Forscher, *The Visual Artists Rights Act of 1990,* PHILADELPHIA VOLUNTEER LAWYERS FOR THE ARTS, at 1 (2008) https://www.cabq.gov/artsculture/public-art/documents/visualartistsrightsact_philadelphiavolunteerlawyersarts.pdf [https://perma.cc/JN5X-AGUE] [https://web.archive.org/web/20240727211802/https://www.cabq.gov/artsculture/public-art/documents/visualartistsrightsact_philadelphiavolunteerlawyersarts.pdf] (last visited Oct. 10, 2024).

are various provisions as to what works are protected under the Act and when the rights under the Act can be invoked by the author.

In a country with a robust history of appropriation, imitation, and distortion of musical works at the ridicule and expense of Black artists who have made invaluable contributions to American popular culture, the adoption and recognition of a moral right for musicians would allow them to control and prevent the use of their music for ways in which it was not intended while preserving the original work. This provision could be solely used as a caveat to the existing compulsory licensing system that would instead opt for a voluntary licensing system when dealing with artists seeking to make covers of existing works. If the right was recognized in the 1909 Act, the continual economic deprivation of Black artists whose works were exploited by white, mainstream artists, could largely have been avoided. Additionally, artists who are concerned about their works being used by artificial intelligence systems to either train their models or create new works would therefore have a statutory right to prevent the use of their work by both the individual and the corporation behind the technology. Furthermore, this could allow artists to set their own royalty rates, rather than falling victim to a rate that is unlikely to reflect economic changes and inflation.

While the reality of a voluntary licensing system could potentially become convoluted due to the sheer amount of musical works produced, the formation of an independent licensing body, that would allow artists to license their works out and review licensing requests, could adequately address the issues raised in this Note concerning technological advances considering the historical treatment of Black artists under the licensing scheme. Akin to the creation of ASCAP and BMI out of the royalty and licensing schemes in the 1909 Act, this independent body could regulate the uses of mechanical reproductions for musical compositions and sound recordings—helping independent artists to navigate the legal complexities of licensing, allowing for permission for sample licensing to be consolidated into one body, and allowing musicians to opt out of having their works being used in artificial intelligence systems.

2. Amending the Music Modernization Act

In recognizing the issues that technological advancements are creating or exacerbating for musicians, Congress passed the Music Modernization Act ("MMA") in 2018 to harmonize the existing statutory licensing scheme with the changing needs of creators in the age of digital streaming.[163] Prior to the law's enactment, in order for digital streaming services to provide music to their customers, the platforms would be required to have to seek licensing on an individual song-by-song basis or through private negotiations with record labels and publishing companies to "reproduce and distribute the musical works."[164] The MMA created a blanket licensing system for

163. Orrin G. Hatch-Bob Goodlatte Music Modernization Act, H.R. 1551, 115th Cong. § 102 (2018); *The Music Modernization Act*, COPYRIGHT.GOV, https://www.copyright.gov/music-modernization/ [https://web.archive.org/web/20241113100227/https://www.copyright.gov/music-modernization/] (last visited Feb. 21, 2024).

164. *Id.*

digital music services to download or stream records.[165] Additionally, the statute formed the "mechanical licensing collective" ("MLC"), to distribute royalties procured through digital music platforms in a central database and to distribute digital licenses. Prior to this service, artists hoping to cover music bore the responsibility of seeking out the rights holders in the composition of interest, and registering the necessary notices, a process that was often ignored.[166]

For songwriters and copyright holders, royalties can only be received on songs that are registered in the MLC's system. The blanket license created by the MMA, however, now allows any artist who desires to distribute covers of an existing song *solely on an interactive audio platform*, will be covered without the need for a compulsory mechanical license.[167] This license is limited to the distribution of cover songs on interactive, digital audio formats, but does not cover physical copies of the record, the distribution of the song to non-interactive music services such as Apple or Amazon, and digital covers distributed on other sites that do not elect to operate under the blanket license scheme under the MLC.[168] Additionally, it does not cover samples, nor covers of existing records that change the basic melody or fundamentally change the original work.[169] Thus, if the artist intends to sell or distribute the record through a physical phonorecord, the traditional compulsory licensing scheme requirements in 17 U.S.C. § 115 applies.[170] Therefore, the existing convoluted and ineffective compulsory licensing provisions of § 115 still exist, but were further complicated through the introduction of the Music Modernization Act—likely to the continued detriment of artists.

The Act solely addresses the impact of streaming on the compulsory licensing scheme and the implications of digital streaming on the exclusive rights of copyright holders on services that are a party to the blanket license. The MMA, however, fails to address the overall impact of compulsory licensing on artists, and the unique burden

165. *The Music Modernization Act §115*, COPYRIGHT.GOV, https://www.copyright.gov/music-modernization/115/ [https://perma.cc/37B9-WLMH] [https://web.archive.org/web/20240927011541/https://copyright.gov/music-modernization/115/] (last visited Feb. 21, 2024).

166. *What Is the Music Modernization Act?*, SONGTRUST, https://blog.songtrust.com/what-is-the-music-modernization-act [https://perma.cc/A59N-ZSFU] [https://web.archive.org/web/20240926165417/https://blog.songtrust.com/what-is-the-music-modernization-act] (last visited Feb. 25, 2024).

167. *Id.*; Holland Gormley, *The Breakdown: What Songwriters Need To Know About the Music Modernization Act and Royalty Payments*, LIBRARY OF CONGRESS BLOGS, (Apr. 13, 2020), https://blogs.loc.gov/copyright/2020/04/the-breakdown-what-songwriters-need-to-know-about-the-music-modernization-act-and-royalty-payments/ [https://perma.cc/9EFN-GHLJ] [https://web.archive.org/web/20240927230208/https://blogs.loc.gov/copyright/2020/04/the-breakdown-what-songwriters-need-to-know-about-the-music-modernization-act-and-royalty-payments/].

168. *What Is the Music Modernization Act (MMA)?*, EASYSONG, https://support.easysong.com/hc/en-us/articles/360061317833-What-Is-The-Music-Modernization-Act-MMA [https://web.archive.org/web/20240420232903/https://support.easysong.com/hc/en-us/articles/360061317833-What-Is-The-Music-Modernization-Act-MMA] (last visited Nov. 5, 2024).

169. *Id.*

170. *See* Gormley, *supra* note 167.

placed on Black artists in a long legacy of musical and cultural appropriation. Firstly, the new digital-covering system created by the MMA is still compulsory—artists are given no control over how their music is covered, and who it is covered by. While it may create an avenue for centralized compensation for the rightsholders, it fails to necessarily protect the artists' interest in how their work is used or copied. Additionally, the Act fails to address the use of works on Streaming services for training and use in artificial intelligence systems and platforms. To fully protect artists' work and integrity, not only should the licensing system be amended to reflect a centralized, voluntary system across digital, physical, and analog systems, but Congress should additionally introduce the recognition of a moral right for artists under the existing copyright scheme. For Black artists who have traditionally had their works appropriate or imitated to the appeal of mainstream artists for generations, the continuation of the legal sanctioning of otherwise infringing behavior under the existing licensing perpetuates this cruel legacy.

V. CONCLUSION

The Black musical experience encapsulates the broader narrative of Black history in America, illustrating a story of appropriation, exploitation, and inequality. Despite having often found their autonomy, livelihoods, and culture mocked, imitated, and appropriated throughout history, these artists have illustrated the very image of resilience. Denied credit, compensation, and acknowledgment in the generational cycle of marginalization and exploitation, Black artists have routinely adapted and shifted to continue to not only use music as an expression of the Black experience, but to continue to create as society takes. In the modern legal landscape, the issue of appropriation and undue profiting from the work of Black artists persists, and continually raises questions about the efficacy of the current copyright infrastructure and its ability to protect the rights of Black musicians. While copyright law operates under supposed "color-blind" neutrality, the system has historically been unable to recognize, respond, and reform the system to better address the social hierarchies and inequities that prevent equal protection for the works of these artists.

From the groundbreaking, industry shifting, and culture-defining contributions through the creation of jazz, rhythm and blues, rock and roll, and now hip-hop, Black artists have continually supported the development of American Popular culture despite the challenges presented by existing intellectual property law. Now, the evolving digital landscape, characterized by streaming platforms and emerging technologies like artificial intelligence, presents both opportunities and challenges for artists. These advancements implicate legal and economic threats to the viability and autonomy of their livelihoods as artists and will undoubtedly and disproportionately affect marginalized communities. However, considering the historical treatment of Black artists under copyright law, and advancements that implicate novel legal questions, intellectual property law is existing in a pivotal moment, with the ability to right historical wrongs and promote equity within the music industry.

This Note proposed a multifaceted approach to addressing these historical, systemic issues that have pervaded genres and generations of Black music. Central to this approach is the adoption and recognition of a moral right for musical artists—an acknowledgement of the intrinsic connection between creator and creation. The recognition of this right would grant artists the right to control the use and exploitation of their works, empowering them to retain autonomy in their works and fair economic distribution. Additionally, the adoption of a voluntary licensing system would grant artists further control over the use and appropriation of their works, while also bolstering a new generation of collaboration and relationships between artists, creators, and the industry to look to the future of music and licensing. By empowering artists to take control of the use of their works, the voluntary licensing system would allow independent artists to better navigate the complexities of the music industry submerged in a digital age, while also promoting innovation and collaboration across generations and genres.

The modern challenges facing Black artists in the music industry today are neither novel nor isolated, but are rather a continuance of a broader, historical tradition of social and societal injustice in the realm of music. By reimagining intellectual property law to directly address these issues and rectify the sins of its past through revolutionary approaches to understanding the digital music age, copyright law can once and for all, truly be just.