

4-15-2022

Thieves in the Temple: The Scandal of Copyright Registration and African- American Artists

Kevin J. Greene

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Recommended Citation

Kevin J. Greene *Thieves in the Temple: The Scandal of Copyright Registration and African- American Artists*, 49 Pepp. L. Rev. 615 (2022)

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Thieves in the Temple: The Scandal of Copyright Registration and African-American Artists

By Kevin J. Greene*

Abstract

Copyright registration is the currency of copyright transactions in music, film, and television and is essential for pursuing infringement claims and ownership disputes. Despite copyright registration's outsized reach across the copyright spectrum and importance to the copyright industries, the U.S. Copyright Office does not verify claims of copyright authorship or ownership. No express mechanism exists to challenge false copyright registrations in the Copyright Office, and the penalties for falsely claiming copyright authorship are paltry in comparison to the potential gains.

This Article contends that lax copyright registration standards call into question the legitimacy of the registration system and that the shortcomings of the current system are nowhere more salient than in the experience of African-American music artists, from Barrett Strong and Little Richard to Lil Wayne. The copyright disenfranchisement of Black artists wrought by copyright registration validates my contention that copyright formalities like registrations and copyright terminations will always tend to fall heaviest on Black creators.

As it stands, there is little reason to believe that in connection

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with Black legacy artists and hip-hop artists the records of the Copyright Office are accurate or complete. These insights suggest that reform is needed to both police registrations on the front end and increase deterrence of false claims with enforcement mechanisms and penalties on the back end.

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I. INTRODUCTION

Love come quick
Love come in a hurry
There's thieves in the temple tonight
They don't care where they kick
Just as long as they hurt you
There're thieves in the temple tonight¹

This Article hopes to shed light on and spark further exploration of an untold story in copyright jurisprudence—the scandal of a lax copyright registration system that has plagued Black artists with false copyright registrations, resulting in loss of copyright ownership. Perhaps no case illustrates the problem more than the story of Barrett Strong and his hit song *Money (That's What I Want)*.² The year was 1959.³ Berry Gordy founded the label (Motown Records) with an \$800 loan.⁴ Barrett Strong wrote and performed the *Money* song, purportedly as a co-author with Motown founder Berry Gordy and another writer.⁵ The song became Motown's first big hit.⁶

In 1959, Gordy or his agents at Motown registered the copyright with Strong, Gordy, and the other co-author.⁷ However, in “1962 . . . Jobete Music, Motown's song-publishing company, filed an amended copyright with the instruction to remove Strong's name from the copyright.”⁸ Although *Money* has, over the years, produced millions in revenues and has been covered by artists like the Beatles and others, “the pianist and singer Barrett Strong, who

1. PRINCE, *Thieves in the Temple*, on GRAFFITI BRIDGE (Paisley Park Studios 1990).

2. See Erin E. Kaprelian, *Notice and Supplemental Registration: Why the Copyright Office Must Update Its Policies Surrounding Author Notice*, 19 MARQ. INTELL. PROP. L. REV. 121, 126 (2015) (discussing how the copyright system negatively affected Barrett Strong in the case of *Money*).

3. *Id.* (stating that Berry Gordy started Motown Records and Barrett Strong recorded *Money* in 1959).

4. See *Encyclopedia of Detroit: Motown Records*, DETROIT HIST. SOC'Y, <https://detroithistorical.org/learn/encyclopedia-of-detroit/motown-records> (last visited Dec. 27, 2021) (discussing the founding of Tamla Records and later the Motown label, which Berry Gordy, Jr. founded “[w]ith an \$800 loan from his family”).

5. See Larry Rohter, *For a Classic Motown Song About Money, Credit Is What He Wants*, N.Y. TIMES (Aug. 31, 2013), <https://www.nytimes.com/2013/09/01/arts/music/for-a-classic-motown-song-about-money-credit-is-what-he-wants.html> (discussing the process of writing and producing *Money (That's What I Want)*).

6. See *Encyclopedia of Detroit: Motown Records*, *supra* note 4.

7. See Rohter, *supra* note 5.

8. Kaprelian, *supra* note 2 (footnote omitted).

first recorded [*Money*] and, according to records at the United States Copyright Office in Washington, was originally listed as a writer of the song, says that he has never seen a penny of those profits.⁹ Strong did not receive copyright royalties on the hit song.¹⁰ Under the Copyright Act, Strong had three years to contest the change in authorship in the copyright certificate.¹¹ However, at that time, the only way to discover the change would have been to go the Copyright Office in Washington, D.C.¹² The Copyright Office does not notify authors about changes in authorship.¹³

II. COPYRIGHT REGISTRATION: MYTH AND MAGIC

Copyright law embraces both magic and myth.¹⁴ Copyright registration is revered by courts as a kind of magical talisman.¹⁵ A copyright registration only costs forty-five dollars.¹⁶ However, that certificate is exalted and is prima facie evidence of ownership in the two-trillion-dollar copyright industries.¹⁷ Technically, copyright registration is distinct from copyright

9. Rohter, *supra* note 5 (stating that the song *Money*, re-recorded by the Beatles and Rolling Stones did not generate any income for Mr. Strong because the copyright registration no longer lists his name as a writer).

10. *Id.* (noting that Berry and Motown dispute Strong's claim that he authored the song, but witnesses at the time of creation of the song strongly dispute Motown's position).

11. Kaprelian, *supra* note 2 ("Under the policy of the United States Copyright Office, Strong had three years to contest the amendment.") (footnote omitted); 17 U.S.C. § 507(b) ("No civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued.").

12. Kaprelian, *supra* note 2, at 134 (stating that before 1978 an author could "either go to the Library of Congress in Washington, D.C. and search the copyright card catalog in order to see [the] copyright, or . . . pay the Copyright Office a fee to do the search").

13. Kaprelian, *supra* note 2, at 133 & n.71 (stating that when a copyright has multiple authors and therefore owners, anyone can make a change to the copyright without the other owners being notified).

14. See generally Richard H. Jones, *The Myth of the Idea/Expression Dichotomy in Copyright Law*, 10 PACE L. REV. 551, 551–53 (1990) (explaining that the fundamental distinction in copyright law between idea and expression is based on the false premise that an idea can be separate from the expression of that idea).

15. See generally Lauren N. Ross, Note, *The Implications of Fourth Estate v. Wall-Street.com on Copyright Registration*, 52 CONN. L. REV. 451, 467–68 (2020) (discussing the Court's reasoning in *Fourth Estate v. Wall-Street.com* in requiring copyright registration for suits claiming infringement).

16. 37 C.F.R. § 201.3(c) tbl. 1 (2020) (stating the fee for a "[s]ingle author, same claimant, one work, not for hire" as \$45).

17. See STEPHEN E. SIWEK, COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY: THE 2018 REPORT 3 (2018), <https://iipa.org/files/uploads/2018/12/2018CpyrtRptFull.pdf> ("In 2017, the value added by the total copyright industries to U.S. GDP exceeded \$2.2 trillion . . . accounting for 11.59% of the U.S. economy.").

ownership under U.S. copyright law.¹⁸ However, this distinction collapses in light of industry custom and practice.¹⁹

The myth is that copyright protection begins upon creation and fixation of a work within the subject matter of copyright law.²⁰ Registration, according to the myth, is wholly voluntary.²¹ This fable masquerading as fact is easily exposed.²² For the copyright cognoscenti, the movers and shakers of Hollywood and the music industry, copyright registration is synonymous with copyright ownership and protection.²³

Entertainment transactions, including film and music rights acquisitions, transfers of IP, and investments, require due diligence.²⁴ Copyright registration is a key focus in the due diligence and chain of title process: “[a] potential copyright transferee or assignee, or secured party relying upon collateral consisting of copyrights, will want to confirm that the underlying work was properly registered.”²⁵ In copyright industry transactions, whether movie, sound recording, or videogame deals, registration is all-important and central to the quest for chain of title.²⁶ Investors in entertainment projects, record

18. See 17 U.S.C. §§ 201–205 (outlining the requirements for “[c]opyright [o]wnership and [t]ransfer”); 17 U.S.C. § 409 (stating the requirements to apply for copyright registration).

19. See Mose Bracey, Note, *Searching for Substance in the Midst of Formality: Copyright Registration as a Condition Precedent to the Exercise of Subject-Matter Jurisdiction by Federal Courts over Copyright Infringement Claims*, 14 J. Intell. Prop. L. 111, 122–23 (2006) (noting that while copyright registration is optional, creators are strongly incentivized to register their works).

20. Cf. *Fourth Est. Pub. Benefit Corp. v. Wall-Street.com, L.L.C.*, 139 S. Ct. 881, 891 (2019) (stating that until a copyright owner applies for registration, he or she cannot file suit over infringement).

21. See 17 U.S.C. § 408 (stating how to register for a copyright).

22. Compare *id.* § 408(a) (stating that “[s]uch registration is not a condition of copyright protection”), with *Fourth Estate*, 139 S. Ct. at 891 (holding that a plaintiff must wait for the Copyright Office to register or refuse the copyright application before bringing a lawsuit).

23. *Fourth Estate*, 139 S. Ct. at 887 (“Therefore, although an owner’s rights exist apart from registration, registration is akin to an administrative exhaustion requirement that the owner must satisfy before suing to enforce ownership rights.”).

24. Thomas Glen Leo & Gregory Siewett, *Chain of Title Review Is a Major Hurdle for Film Investors*, L.A. DAILY J., July 20, 2006, https://www.sheppardmullin.com/media/article/98_pub587.pdf (discussing that due diligence in connection with an entertainment project is highly important in chain of title issues); see also Derek Dressler, *Special M&A Legal Due Diligence Challenges in the Entertainment & Media Sector*, DESSLER (Sept. 4, 2017), <https://www.desslerpc.com/insights/2017-03-02-some-special-challenges-for-m-a-due-diligence-in-the-entertainment-media-sector> (discussing that due diligence in the entertainment and media sector can be challenging due to the extent of copyright registration and investigation).

25. Leo & Siewett, *supra* note 24.

26. See *id.* (noting that the first question in a chain of title review is what the copyright ownership of the underlying work looks like and that the question of copyright issues is highly important in chain of title investigations).

labels, and film studios demand registration certificates for scripts, soundtracks, compositions, and sound recordings.²⁷

Registration is also key to policing creative rights and ownership in litigation.²⁸ In an infringement or ownership litigation, copyright registration is the key to the courthouse.²⁹ Without a copyright registration or refusal of registration by the Copyright Office, no infringement or ownership claim can be pursued.³⁰ In infringement lawsuits, federal judges' reverence of copyright registrations borders on the realm of fetish.³¹

Copyright registration is the engine of the U.S. Copyright Office, which sits in Washington D.C. as both the strong fortress of copyright and the temple of copyright protection.³² In 2019, the Copyright Office "issued more than 547,000 registrations and recorded 12,550 documents containing 457,731 titles."³³ Professor Litman notes that "[a]n accurate and complete registry of copyrighted works carries important public benefits, and the Copyright Office makes registration records publicly available."³⁴ Yet, the Copyright Office and the registration system is, metaphorically, an unguarded fortress.³⁵ "For

27. See MIRIAM CLAIRE BEEZY, CAVEAT EMPTOR OR "LET THE BUYER BEWARE" APPLYING DILIGENT INVESTOR PRINCIPLES TO TRADEMARK AND COPYRIGHT ISSUES IN MERGERS AND ACQUISITIONS 2–3 (2004), <https://www.martindale.com/matter/asr-88956.pdf> (discussing what the diligent investor in mergers and acquisitions does to ensure the value of an intellectual property project).

28. See Bracey, *supra* note 19 (noting that while copyright registration is optional, creators are strongly incentivized to register their works).

29. See 17 U.S.C. § 411 ("[N]o civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title.").

30. Tom James, *Copyright Enforcement: Time To Abolish the Pre-Litigation Registration Requirement*, 2019 U. ILL. L. REV. ONLINE 100, 100 (2019) (explaining that the Supreme Court has held one cannot pursue an infringement claim unless the Copyright Office has accepted or denied a copyright registration).

31. See generally Kevin Hooper, *Administrative Adjudications and the Various Bases for Court Review in Copyright Registration*, 35 IDEA 129, 137–39 (1994) (explaining how courts are deferential to the Copyright Office's discretion to grant copyright registration).

32. See Ross, *supra* note 15, at 469 (footnotes omitted) ("The Copyright Office is entrusted with the important responsibility of registering copyright claims. In 2018, the Copyright Office received over 600,000 claims. In 2017, the Office received 539,662 claims and issued 452,122 certificates of registration.").

33. U.S. COPYRIGHT OFF., ANNUAL REPORT OF THE U.S. COPYRIGHT OFFICE 4 (2019), <https://www.copyright.gov/reports/annual/2019/ar2019.pdf>.

34. Jessica Litman, *Argument Preview: When Has Registration of a Copyright Claim "Been Made"?*, SCOTUSBLOG (Jan. 3, 2019, 10:10 AM), <https://www.scotusblog.com/2019/01/argument-preview-when-has-registration-of-a-copyright-claim-been-made/>.

35. See *id.* ("The examination is not merely ministerial, but the substantive standards are modest, and the office registers the vast majority of copyright claims that it receives.").

much of its existence, the Copyright Office had one job: registering and tracking copyright ownership. . . . [A task] critical to the proper functioning of the copyright system.”³⁶ If the registration records lack credibility, this purpose is undermined.³⁷

Yet, despite the outsized importance of the almighty copyright registration certificate, little oversight of the copyright registration process exists.³⁸ Given the lack of oversight and scrutiny of registrations, assurance that the records of the Copyright Office are indeed “accurate and complete” is illusory.³⁹ Under the copyright registration system today, most registration applications will “graduate” to certificates as long as the work falls within the subject matter of copyright.⁴⁰ The U.S. Copyright Office expressly disavows verifying authorship in the works it stamps its seal upon:

When, after examination, the Register of Copyrights determines that . . . the material deposited constitutes copyrightable subject matter and that the other legal and formal requirements of this title have been met, the Register shall register the claim and issue to the applicant a certificate of registration under the seal of the Copyright Office.⁴¹

36. MICHAEL WEINBERG, ANNE HALSEY, MART KUHN & W. ADAM THOMAS, A COPYRIGHT OFFICE FOR THE 21ST CENTURY: RECOMMENDATIONS TO THE NEW REGISTER OF COPYRIGHTS 5 (2010), <https://www.publicknowledge.org/files/docs/ACopyrightOfficeforthe21stCentury.pdf>.

37. *See id.* at 4–5 (noting the importance of a credible registry in determining when a work is no longer copyright protected).

38. *See id.* at 3 (stating that with certain exceptions, “all actions taken by the Copyright Office are subject to the Administrative Procedure Act (APA),” which “provides for judicial review of Copyright Office decisions”).

39. *See infra* notes 40–41 and accompanying text (noting that the Copyright Office has modest standards and registers the majority of its claims).

40. *See* U.S. COPYRIGHT OFF., COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 1704 (3d ed. 2021), <https://www.copyright.gov/comp3/chap1700/ch1700-administrative-appeals.pdf>. Historically, the U.S. Copyright Office has an extremely low rate of registration refusals or denials. *Id.* § 1702. The Copyright Office lists the following grounds for refusal of registrations:

The applicant failed to submit a complete application, complete filing fee, and/or complete deposit copy(ies). The work is not fixed in a tangible medium of expression. The work lacks human authorship. The applicant asserts a claim to copyright in a work that is not covered by U.S. copyright law. The work was not independently created. The work lacks the minimum level of creative authorship to support a copyright claim. The work is in the public domain. The work is a sound recording that was fixed before February 15, 1972 (i.e., the date on which sound recordings became eligible for federal copyright protection).

Id. (citation omitted).

41. 17 U.S.C. § 410(a).

The Copyright Act states that copyright registration is “not a condition of copyright protection.”⁴² However, this view is completely out of touch with the realities of the American copyright industries, where registration is an absolute prerequisite to copyright protection.⁴³

The United States Supreme Court recently resolved a circuit split about when copyright registration becomes effective in *Fourth Estate*.⁴⁴ The ruling provides that registration of copyright only becomes effective when the Copyright Office issues a completed registration.⁴⁵ As a result, artists who have not been granted a completed registration are deprived of a forum to prosecute copyright infringement or copyright ownership claims.⁴⁶

The fallout from the *Fourth Estate* decision has already impacted artists of color in profoundly negative ways. Hip-hop artists seeking to sue for copyright infringement were denied a federal forum when they failed to register the composition in a song called *Walk It*.⁴⁷ Similarly, rapper 2 Milly had to withdraw his lawsuit against the maker of the Fortnite videogame series after the *Fourth Estate* ruling.⁴⁸ *Fourth Estate* will wreak havoc on communities of color.⁴⁹

42. *Id.* § 408(a).

43. *See* Ross, *supra* note 15, at 468 (“The Court . . . ‘reaffirmed the general rule that registration must precede an infringement suit’”).

44. *See* Fourth Est. Pub. Benefit Corp. v. Wall-Street.com, L.L.C., 139 S. Ct. 881, 892 (2019) (“‘[R]egistration . . . has been made’ within the meaning of 17 U.S.C. § 411(a) not when an application for registration is filed, but when the Register has registered a copyright after examining a properly filed application.”).

45. *See id.*

46. *Id.* at 886 (“Impelling prompt registration of copyright claims, 17 U.S.C. § 411(a) states that ‘no civil action for infringement of the copyright in any United States work shall be instituted until . . . registration of the copyright claim has been made in accordance with this title.’”).

47. *See* Pickett v. Migos Touring, Inc., 420 F. Supp. 3d 197, 205 (S.D.N.Y. 2019) (hip-hop artist Migos’s copyright infringement claim was dismissed when the musical composition “was not registered at the time the original complaint was filed”); *see also* Eric D. Wong, *What a Copyright Registration Can Tell You About Your Next Infringement Case*, A.B.A. (Jan. 7, 2021), <https://www.americanbar.org/groups/litigation/committees/intellectual-property/practice/2021/copyright-registration-infringement-cases/> (noting that the plaintiff in *Pickett v. Migos Touring* “only registered the copyright in the sound recording and not the musical composition—the ‘music and lyrics’ he contends were infringed. . . . [H]e failed to satisfy the registration precondition announced in *Fourth Estate*, [and] his lawsuit was doomed to dismissal”).

48. *See* Sam Desatoff, *Rapper 2 Milly Drops Lawsuit Against Epic After Supreme Court Ruling*, YAHOO FIN. (Mar. 8, 2019, 9:11 PM), <https://finance.yahoo.com/news/rapper-2-milly-drops-lawsuit-211100446.html> (noting that rapper 2 Milly dropped copyright infringement lawsuit following *Fourth Estate* ruling).

49. *Cf.* K.J. Greene, *Copyright, Culture & Black Music: A Legacy of Unequal Protection*, 21 HASTINGS COMM’N & ENT. L.J. 339, 376 (1998) (noting that historically, the Black community has

In this Article, building upon my work about African-American artists and copyright law, I examine how copyright registration, like other copyright formalities, historically left Black artists at a distinct disadvantage.⁵⁰ The registration system, with its lax policing standards, facilitated the fleecing and expropriation of Black musical works.⁵¹ The treatment of Black artists, as a marginalized group with an outsized impact on the copyright industries, is illustrative of the need for broad reform of the copyright system.⁵²

Registration is complex.⁵³ It is intimidating to artists and also expensive for multiple registrations.⁵⁴ And the myth that registration is not needed pervades the artist community.⁵⁵ Registration is also punitive.⁵⁶ Failing to register leads to harsh consequences, including deprivation of statutory damages and attorney's fees, no presumption of ownership, and copyright termination headaches.⁵⁷ The United States supposedly got rid of harsh copyright

faced disadvantageous treatment via copyright law).

50. For my previous discussion of inadequate copyright protection to African-American music artists, see Greene, *supra* note 49.

51. *Id.* at 380.

52. For my previous contrast of Black artists' significant, trendsetting impact on the music industry alongside structural components of the copyright regime that failed to provide protection for Black artists, see K.J. Greene, *Intellectual Property at the Intersection of Race and Gender: Lady Sings the Blues*, 16 AM. U. J. GENDER, SOC. POL'Y & L. 365, 370–74 (2008).

53. See, e.g., Edward Hasbrouck, *Copyright Registration Should Be Easier, Less Costly*, NAT'L WRITERS' UNION (Sept. 24, 2018), <https://nwu.org/copyright-registration-should-be-easier-not-more-expensive/> (“A writer who wants to register copyright in her Facebook and Twitter feeds and her personal website or blog would have to fill out more than a thousand registration forms a year.”).

54. See *id.* (“[A] single book[] can be registered for \$55 or possibly only \$35. But if the same text is first published in a series of entries in the author's blog, with at least one entry each day for a year, registering copyright in the same work will require a separate application form and fee for the work first published on each date. Currently, that would cost \$55 times 365 days, or \$20,075.”).

55. See generally Dotan Oliar, Nathaniel Pattison & K. Ross Powell, *Copyright Registrations: Who, What, When, Where, and Why*, 92 TEX. L. REV. 2211, 2217–19 (2014) (discussing benefits to creators for registering their work, including increased profits, reduced risk of infringement, reduced costs of due diligence, and more).

56. See Pearl Cohen, *Failure To Register Copyrights in the U.S. Can Bar Statutory Damages for Infringements*, LEXOLOGY (Jan. 30, 2020), <https://www.lexology.com/library/detail.aspx?g=a61d8f97-8289-4170-831d-2a9281e2d965> (“A decision delivered by the Federal Court of Appeals for the Fifth Circuit in Louisiana held that copyright owners which neglect to register the copyright of their work before an infringer's initial infringement of the work are not entitled to statutory damages even for post-registration infringements by the infringer.”).

57. See Oliar et al., *supra* note 55, at 2215–16 (footnotes omitted) (“First, registration is still required prior to bringing an infringement action over a U.S. work. Second, statutory damages and attorney's fees are ‘available as remedies only for works that had been registered prior to their infringement.’ Third, prompt registration—within five years of publication—creates a prima facie evidentiary presumption respecting the validity of the copyrights and the facts stated in the certificate of registration. Fourth, ‘a certificate of registration can be recorded with U.S. Customs and Border

formalities.⁵⁸ Yet such is not the case.⁵⁹ Furthermore, given the importance of registration, standards are shockingly loose.⁶⁰ The Copyright Office does *not* verify ownership or authorship.⁶¹ All these dynamics create a perfect storm for further marginalization of Black artists.⁶²

III. A SNAPSHOT OF MY WORK ON RACE AND IP

Over twenty years ago, I began writing about the impact of race in the Intellectual Property (IP) space.⁶³ At that time, no scholarship existed on this topic.⁶⁴ The genesis of my work was the Black barbershop of my childhood in New York. The Black barbershop is a locus of culture and politics, and I often heard stories of Black artists whose music had been pilfered by the industry.⁶⁵ These stories planted the seeds for my future work in this area and for a cavalcade of scholars who have followed, furthered, and enriched scholarship in this area, including Lateef Mtima, Madhavi Sunder, Olufunmilayo Arewa, David Troutt, Keith Aoki, Deidré Keller, Anjali Vats, Bob Brauneis, and others, making the study of race and IP one of the most fertile and

Protection to prevent the importation of infringing copies.’ Lastly, starting in 2005, certain authors can preregister their claims as a way to curb prerelease infringement.”).

58. *See id.* at 2215 (footnote omitted) (“[T]he Copyright Act of 1976 dropped the requirement to register, making registration completely voluntary.”).

59. *See* Fourth Est. Pub. Benefit Corp. v. Wall-Street.com, L.L.C., 139 S. Ct. 881, 890–91 (2019) (“Congress . . . reaffirmed the general rule that registration must precede an infringement suit . . .”).

60. Litman, *supra* note 34 (noting the Copyright Office has modest standards for issuing a certificate of registration and registers the majority of claims submitted).

61. *Copyright Registration and Notice*, DIGIT. MEDIA L. (Sept. 10, 2021), <https://www.dmlp.org/legal-guide/copyright-registration-and-notice> (stating that copyright registration does not guarantee copyright ownership, and the Copyright Office will not confirm the accuracy of one’s copyright claim when registering a work).

62. *See generally* Greene, *supra* note 49, at 372 (noting that historically, “the intended model of copyright protection” has not served its ultimate purpose within the African-American musician community).

63. *See id.* at 340 (exploring in 1998 how African-American artists faced significant copyright deprivation).

64. *Cf. id.* (“This article explores a dynamic of Black history and the law largely ignored or overlooked by legal scholars: how African-American music artists, as a group, were routinely deprived of legal protection for creative works under the copyright regime.”).

65. *See* Terry Sinclair Bozeman, *The Good Cut: The Barbershop in the African-American Literary Tradition* (May 28, 2009) (English dissertation, Georgia State University) (ScholarWorks), https://scholarworks.gsu.edu/english_diss/49/ (noting that “the Black barbershop reflects the importance of space in the folk culture of African American males. That is, Black men find a personal and communal refuge from the prejudices and frustrations of the work spaces and the general social spaces outside the barbershop”).

fascinating fields of inquiry in IP scholarship.⁶⁶

My work over the years maps out how African-American artists, while dominating artistic creation of music in the United States from its inception, ended up receiving so little of the fruits of their authorship.⁶⁷ Examining copyright doctrine, I identified the chasm between how Black artists create music and what copyright law requires to secure and maintain protection of creative works.⁶⁸

This all occurs against a backdrop of both broad social discrimination and facial race neutrality in the Copyright Act itself.⁶⁹ However, it is manifest that while an act or a law may be race-neutral on its face, that law can still have a disparate impact on marginalized groups.⁷⁰ My scholarship has examined how copyright doctrine in operation has disparately impacted African-American music artists, through the lens of what I call the “seven deadly sins of copyright,” as explored below.⁷¹

66. See Madhavi Sunder, *Intellectual Property and Identity Politics: Playing with Fire*, 4 J. GENDER RACE & JUST. 69, 69–70 (2000) (discussing the intersection of intellectual property law and protection of cultural identity); Keith Aoki, *Distributive and Syncretic Motives in Intellectual Property Law (with Special Reference to Coercion, Agency, and Development)*, 40 U.C. DAVIS L. REV. 717 (2007); Shubha Ghosh, *Race-Specific Patents, Commercialization, and Intellectual Property Policy*, 56 BUFF. L. REV. 409 (2008); 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 (2010); Olufunmilayo B. Arewa, *Blues Lives: Promise and Perils of Musical Copyright*, 27 CARDOZO ARTS & ENT. L.J. 573 (2010); André Douglas Pond Cummings, *A Furious Kinship: Critical Race Theory and the Hip-Hop Nation*, 48 U. LOUISVILLE L. REV. 499 (2010); Lateef Mtima, *IP Social Justice Theory: Access, Inclusion, and Empowerment*, 55 GONZ. L. REV. 401 (2020); Robert Brauneis, *Copyright, Music, and Race: The Case of Mirror Cover Recordings*, (May 2, 2020) (Research Paper No. 2020-56, George Washington University Law School Legal Studies), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3591113; Anjali Vats & Deidré A. Keller, *Critical Race IP*, 36 CARDOZO ARTS & ENT. L.J. 735 (2018).

67. See, e.g., K.J. Greene, “Copynorms,” *Black Cultural Production, and the Debate over African-American Reparations*, 25 CARDOZO ARTS & ENT. L.J. 1179, 1180–82 (2008) (discussing African-American artists being denied intellectual property protection); Greene, *supra* note 49, at 340 (discussing the copyright regime’s failure to protect the intellectual property of African-American artists).

68. See Greene, *supra* note 49.

69. *Id.* at 343 (recognizing the limitations of the view that copyright jurisprudence is race-neutral when viewed through the historical reality of racial discrimination).

70. See *Yick v. Hopkins*, 118 U.S. 356, 374 (1886) (recognizing that a law that is race-neutral on its face can still violate constitutional norms if applied in a discriminatory fashion).

71. See *infra* Part IV.

IV. THE SEVEN DEADLY SINS OF COPYRIGHT LAW VIS-À-VIS BLACK
ARTISTIC PRODUCTION

The seven deadly sins are a metaphor for the experience of Black artists under copyright law. I have identified the core aspects of copyright law that have resulted in underprotection and sometimes expropriation of the works of Black artists. The seven deadly sins are as follows: (1) originality; (2) fixation; (3) the idea-expression dichotomy; (4) copyright formalities; (5) underprotection of artistic performance; (6) hostile judicial doctrines; and (7) lack of moral rights protections. In the interest of brevity, I explore below three of the “sins”: originality, fixation, and copyright formalities.

A. Originality

Originality is a core requirement for copyright ownership and protection.⁷² The originality requirement is constitutionally ordained and codified in the 1976 and prior Copyright Acts.⁷³ In the seminal case on originality, the U.S. Supreme Court stated that originality is a low standard, requiring only independent creation and a “modicum” of creativity.⁷⁴ I have written how this low standard of creativity has, in conjunction with the idea-expression dichotomy, resulted in underprotection for innovative Black artists.⁷⁵ Copyright law does not prohibit imitation, and the examples of artists outside of the Black community imitating works of Black authors are legion.⁷⁶ As Professor O’Connor has noted, “record companies perennially promoted white artists from Elvis Presley to Iggy Azalea who could perform songs imitating artistic innovations of [B]lack artists. Many copyright experts have been content to live with this system, so long as marginalized artists of color were the ones to suffer the inequity.”⁷⁷

72. See 17 U.S.C. § 102(a) (establishing copyright protections as applying to “original works”).

73. See *id.*; see also Howard B. Abrams, *Originality and Creativity in Copyright Law*, 55 LAW & CONTEMP. PROBS. 3, 12 & n.55 (1992) (discussing the implicit originality requirement in the 1909 Copyright Act).

74. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346 (1991).

75. Greene, *supra* note 49, at 382–83 (discussing the obstacles that the “idea-expression doctrine” has posed to African-American artists gaining protection for their work).

76. See Greene, *supra* note 49, at 380 (discussing how white imitators have reaped the profits of Black creativity).

77. See Sean O’Connor, Lateef Mtima & Lita Rosario, *Overdue Legal Recognition for African-American Artists in ‘Blurred Lines’ Copyright Case*, SEATTLE TIMES (May 20, 2015), <https://www.seattletimes.com/opinion/overdue-legal-recognition-for-african-american-artists-in-blurred-lines-copyright-case/>.

The low originality standard has also been unfairly applied in the context of Black artists, particularly in the hip-hop space.⁷⁸ Courts repeatedly deny claims of authorship in works consisting of short phrases, notwithstanding that such phrases are often central to a song.⁷⁹

B. Fixation

Copyright protection only accrues to works that are fixed—written, filmed, or recorded.⁸⁰ The Copyright Act requires that a work of authorship must be “fixed in any tangible medium of expression, now known or later developed, from which [it] can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”⁸¹ Although “race-neutral,” the fixation requirement has not served the ways Black artists create: improvisation is central to Black cultural production.⁸² “As a result, fixation deeply disadvantages African-American modes of cultural production, which are derived from an oral tradition and communal standards.”⁸³

Historically, the fixation requirement did serious harm to Black artists.⁸⁴ Blues artists tended not to reduce their works to a writing, partly due to the oral and improvisational nature of Black creativity; partly due to illiteracy.⁸⁵ This left these artists vulnerable to unsavory characters who would listen to the works and simply fix and register those works.⁸⁶

78. Greene, *supra* note 49, at 380–81 (discussing the barrier that the low originality standard has posed to African-American artists preventing imitation that rises to plagiarism and copying).

79. See Richard W. Stim, *E.T. Phone Home: The Protection of Literary Phrases*, 7 U. MIAMI ENT. & SPORTS L. REV. 65, 66–67 (1989) (discussing the limitations of copyright protections on short phrases).

80. 17 U.S.C. § 102(a) (establishing that copyright protection only accrues to works that are “fixed”).

81. *Id.*

82. See Marithé Van der Aa, *Improvised Music—An Act of Racial Liberation?*, ATTIC (Sept. 4, 2020), <https://theatticmag.com/features/2364/improvised-music-%E2%80%93-an-act-of-racial-liberation%3F.html> (noting that “[i]t is no coincidence that (free) jazz, originally a [B]lack art form, developed in such a way that music improvisation played (and plays) a central role to its identity”).

83. Greene, *supra* note 52, at 371 (footnote omitted).

84. See Larisa Mann, *If It Ain't Broke . . . Copyright's Fixation Requirement and Cultural Citizenship*, 34 COLUM. J.L. & ARTS 201, 219 (2011) (footnote omitted) (“Copyright law and institutions have undeniably rejected [B]lack artists and their traditions, both explicitly, as with ASCAP not allowing [B]lack members, or implicitly in the contours of copyright that leave out many aspects of musical traditions mainly dominated by people of African descent.”).

85. See Greene, *supra* note 52, at 371 (discussing the barriers that copyright formalities generally posed to illiterate blues artists).

86. See Gregory S. Donat, Note, *Fixing Fixation: A Copyright with Teeth for Improvisational Performers*, 97 COLUM. L. REV. 1363, 1383–84 (1997).

C. Copyright Formalities

The 1909 Copyright Act contained arcane and difficult-to-navigate formalities, including recordation, notice, renewal, and publication.⁸⁷ The 1909 Copyright Act, which remained in effect until 1976,⁸⁸ made compliance with formalities essential for perfecting a creator’s rights.⁸⁹ The 1909 Copyright Act remains an enormously important law today, as any works created after 1926 are still under its shadow.⁹⁰ Under the 1909 Act, only those works that were published and affixed with an official notice of copyright qualified for copyright protection.⁹¹ Historically, “registration prior to publication was a strict prerequisite for protection.”⁹²

The impact of copyright formalities such as notice, deposit, renewal, and registration “served to limit the number of works receiving copyright protection, such that many works immediately entered the public domain upon publication.”⁹³ There can be little doubt that Black artists especially felt the brunt of these arcane procedures and regulations,⁹⁴ some of which would make

87. See An Act to Amend and Consolidate the Acts Respecting Copyright, Pub. L. No. 60–349, §§ 1, 9–10, 13, 18, 23, 44 (1909) (explaining the processes of registering a copyright, filing notice, requesting a renewal, and publishing a work).

88. 1950–2000, U.S. COPYRIGHT OFF., https://www.copyright.gov/timeline/timeline_1950-2000.html (last visited Dec. 28, 2021) (explaining that the 1976 Copyright Act “superseded the 1909 [A]ct” and was “the first major revision of the copyright law since 1909”).

89. See Marley C. Nelson, *Debunking Top Copyright Myths—Part One*, THE OHIO STATE U.: U. LIBRS. (Sept. 12, 2016), <https://library.osu.edu/site/copyright/tag/berne-convention/> (“In 1909, the United States expected certain formalities of rights holders in order to receive copyright protection. . . . The 1976 Act superseded and replaced the 1909 Act . . .”).

90. See *The Incredible Shrinking Public Domain*, CTR. FOR THE STUDY OF THE PUB. DOMAIN, <https://web.law.duke.edu/cspd/publicdomainday/2021/shrinking/> (last visited Dec. 28, 2021) (“In 2021, works published in 1925—originally set to enter the public domain in 2001—will finally go into our public domain.”). Some of the works which entered the public domain in 2021 include *The Great Gatsby*; the works of blues pioneer W.C. Handy, composer of the *Saint Louis Blues*; and the works of blues legend Ma Rainey. See Jennifer Jenkins, *Public Domain Day 2021*, CTR. FOR THE STUDY OF THE PUB. DOMAIN, <https://web.law.duke.edu/cspd/publicdomainday/2021/> (last visited Dec. 28, 2021) (discussing some of the works that entered the public domain in 2021).

91. See 1950–2000, *supra* note 88 (“The 1909 [A]ct granted protection to works published with a valid copyright notice affixed on copies. Accordingly, unpublished works were protected by state copyright law, but published works without proper notice fell into the public domain.”).

92. Dotan Oliar & Nicholas Matich, *Copyright Preregistration: Evidence and Lessons from the First Seven Years, 2005–2012*, 55 ARIZ. L. REV. 1073, 1080 (2013) (discussing the registration formality prior to the 1909 Copyright Act).

93. Daniel Gervais & Dashiell Renaud, *The Future of United States Copyright Formalities: Why We Should Prioritize Recordation, and How To Do It*, 28 BERKELEY TECH. L.J. 1459, 1461 (2013) (footnote omitted).

94. See Candace G. Hines, Note, *Black Musical Traditions and Copyright Law: Historical Tensions*, 10 MICH. J. RACE & L. 463, 465 (2005) (“The body of copyright law, with its vast revisions and

Kafka blush.

The 1976 Copyright Act set creation, not publication, as the marker for copyright ownership.⁹⁵ Then, in 1986, the United States decided to join the Berne Convention and modified U.S. copyright law accordingly.⁹⁶ The Berne compliance amendments purportedly loosened the restrictive formalities around registration.⁹⁷ However, copyright formalities, including those around copyright registration, are still very much alive under the 1976 Copyright Act.⁹⁸

I have argued elsewhere that copyright formalities—like registration, publication, and notice—and copyright terminations on artists of color have had a devastating impact on legacy African-American artists.⁹⁹ The arcane technicalities of copyright formalities have caused even major corporations to miss renewal deadlines and botch registration forms.¹⁰⁰

Perhaps more troubling, copyright formalities foster inequality by favoring the well-resourced.¹⁰¹ Scholars have recognized that “formalities

amendments, was originally intended to encourage creativity and protect creators’ work. Yet the Black musical idiom has been and continues to be excluded from such benefits because it does not fit into copyright law’s construction of ownership and composition.”)

95. See 1950–2000, *supra* note 88 (“The 1976 [A]ct extended federal copyright protection to all works, both published and unpublished, once they are filed in a tangible form.”).

96. See Peter S. Menell, *Economic Analysis of Copyright Notice: Tracing and Scope in the Digital Age*, 96 B.U. L. REV. 967, 991 (2016) (footnotes omitted) (“Notwithstanding the long-standing differences between U.S. and Berne Union positions on copyright requirements and national policy autonomy, the U.S. government, aided by its State Department’s domestic diplomacy, ultimately agreed to take the steps necessary to align its copyright law with Berne’s precepts. The Berne Convention Implementation Act (“BCIA”), passed in 1988, effected many of the changes required to bring U.S. copyright law into compliance with the Berne Convention.”).

97. Pamela Samuelson, *Too Many Copyrights?*, COMM’NS OF THE ACM, July 2011, at 29, 29–31, <https://cacm.acm.org/magazines/2011/7/109884-too-many-copyrights/fulltext> (“In the late 1980s, these industries persuaded one of their own President Ronald Reagan that the [United States] needed to join the Berne Convention in order to exercise influence on international copyright policy. And so in 1989, under Reagan’s leadership, the [United States] joined the Berne Convention and abandoned the notice-on-copies and registration requirements that had served the nation well since its founding.”).

98. 17 U.S.C. §§ 401–412 (codifying various copyright formalities, including notice, deposit, and registration); *Copyright Formalities*, INTELL. PROP. CTR. (Aug. 10, 2008), <https://theip-center.com/2008/08/copyright-formalities/> (“In general, while retaining formalities, the 1976 law reduced the chances of mistakes, softened the consequences of errors and omissions, and allowed for the correction of errors.”).

99. Greene, *supra* note 49, at 353–54.

100. See Leon Bass, *Simple Mistake on Copyright Registration Could Cost \$1 Million*, TAFT/ (June 6, 2021), <https://www.taftlaw.com/news-events/law-bulletins/simple-mistake-on-copyright-registration-could-cost-usd1-million>.

101. See Jane C. Ginsburg, 33 COLUM. J.L. & ARTS 311, 339 (2009) (“[T]he high costs of litigation . . . for smaller litigants, may determine whether bringing an infringement action is financially viable.”).

predicate to the existence or enforcement of copyright can serve to shield large copyright owners who routinely comply with formalities from the infringement claims of smaller copyright owners, particularly individual authors, who may lack the information or resources systematically to register and deposit their works.”¹⁰² For the Black artistic community, formalities have stood as a nearly insurmountable obstacle.¹⁰³

Copyright registration provides significant, indeed, extraordinary benefits to authors.¹⁰⁴ A copyright registration is prima facie evidence of ownership.¹⁰⁵ Courts, and industry players, view the certificate of registration as strong evidence of copyright ownership in copyright litigation: “[p]roving the first element of an infringement claim—ownership of a valid copyright—is often done, at least initially, by introducing into evidence a certificate of copyright registration.”¹⁰⁶

In actuality, federal courts worship registrations.¹⁰⁷ A stark example of this is illustrated in a case involving musical artist George Clinton, also known as the “King of Funk.”¹⁰⁸ Clinton was embroiled in a lawsuit against his former law firm regarding legal fees.¹⁰⁹ The law firm had sued Clinton to recover its fee of \$1.7 million.¹¹⁰ Clinton did not have the funds to pay the fee, and

102. *Id.* at 311 (explaining that the cost of copyright formalities protects large companies from smaller copyright owners).

103. See Greene, *supra* note 49, at 353 (explaining that registration formalities under the Copyright Act of 1909 “had a particularly disadvantageous impact on Black artists”).

104. See 17 U.S.C. § 412 (specifying that statutory damages and attorney’s fees for infringement can only be awarded if the work is registered).

105. See *id.* § 410(c) (“In any judicial proceedings the certificate of a registration made before or within five years after first publication of the work shall constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate.”).

106. See Lydia Pallas Loren & R. Anthony Reese, *Proving Infringement: Burdens of Proof in Copyright Infringement Litigation*, 23 LEWIS & CLARK L. REV. 621, 637 (2019).

107. See *Fourth Est. Pub. Benefit Corp. v. Wall-Street.com, LLC.*, 139 S. Ct. 881, 886 (2019) (“[R]egistration occurs, and a copyright claimant may commence an infringement suit, when the Copyright Office registers a copyright.”).

108. See Nathan Leigh, *George Clinton: The King of Funk*, AFROPUNK (June 25, 2011), <https://afropunk.com/2011/06/george-clinton-the-king-of-funk/> (identifying George Clinton as the “King of Funk” and a major influence across various genres of the music industry).

109. *Hendricks & Lewis P.L.L.C. v. Clinton*, 766 F.3d 991, 993 (9th Cir. 2014) (“Hendricks & Lewis (H&L) is a law firm that represented Clinton in various disputes from March 2005 to August 2008. H&L billed Clinton \$3,341,650.32 for its work, received \$1,000,578.87 in payment, and wrote off approximately \$600,000 of the remaining balance. This left \$1,779,756.29 due. H&L initiated arbitration to secure payment of the balance, and an arbitration panel issued an award in favor of H&L.”).

110. *Id.* (explaining the Hendricks & Lewis law firm arbitration to obtain Clinton’s unpaid legal fees).

the law firm took the position that it could levy four iconic sound recordings owned by Clinton.¹¹¹

The district court held that Clinton was not a copyright owner by virtue of his assignment through his loan-out corporation to Warner Bros., which registered the sound recordings as works made for hire.¹¹² The district court, and the Ninth Circuit on appeal, upheld the sale of Clinton's sound recordings to the law firm, refusing to examine whether the initial transfer to Warner Bros. was really a work made for hire and stressing that Clinton did not own anything since he had transferred his rights in the sound recordings to a loan-out corporation.¹¹³ The Ninth Circuit on this point stressed that "Warner Bros. registered the [m]asters as 'works made for hire' within five years of publication, listing 'Warner Bros. Records Inc.' as the 'author' on the registration form."¹¹⁴

Significantly, the Ninth Circuit initially refused to do any examination of whether Clinton was the owner of the sound recordings at issue, citing § 410(c) of the Copyright Act, which provides that a certificate of registration is prima facie evidence of copyright ownership.¹¹⁵ The Ninth Circuit noted that the language of § 410(c) "persuasively supports H&L's argument that, on this ground alone, the district court could reasonably conclude that Warner

111. *Hendricks & Lewis, P.L.L.C. v. Clinton*, No. C12-0841RSL, 2012 WL 5947638, at *1 (W.D. Wash. Nov. 27, 2012), *aff'd*, 755 F.3d 1077 (9th Cir. 2014), *withdrawn from bound volume, opinion amended and superseded on denial of reh'g*, 766 F.3d 991 (9th Cir. 2014), and *aff'd*, 766 F.3d 991 (9th Cir. 2014) ("Hendricks & Lewis therefore seeks appointment of a receiver to take control of the copyrights in four Funkadelic master sound recordings owned by defendant, to sell the copyrights, and to recover the outstanding judgment amounts from the proceeds.").

112. *Id.* at *3 ("The initial agreements between Warner Bros. and Clinton (or his production company) specifically granted the copyrights in the sound recordings to Warner Bros. Thus, Warner Bros. was the original 'author' of the work under both the Copyright Act and the parties' contract. Clinton, who obtained ownership of the sound recordings in 1993 pursuant to a settlement agreement with Warner Bros., is merely an assignee, not the author.").

113. *See Clinton*, 766 F.3d at 998 (affirming the district court's holding that the work made for hire issue need not be resolved because "[t]here is no question that Clinton transferred any interest that he had in the [m]asters to Warner Bros., and[] as part of a settlement arising from unrelated litigation, Warner Bros. subsequently agreed to transfer ownership back to Clinton. These voluntary transfers are a sufficient basis for rejecting Clinton's argument that he enjoys § 201(e) protection as the author of the master sound recordings").

114. *Hendricks & Lewis P.L.L.C. v. Clinton*, 755 F.3d 1077, 1084 (9th Cir. 2014), *withdrawn from bound volume, opinion amended and superseded on denial of reh'g*, 766 F.3d 991 (9th Cir. 2014).

115. *See id.*; 17 U.S.C. § 410(c) ("In any judicial proceedings the certificate of a registration made before or within five years after first publication of the work shall constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate. The evidentiary weight to be accorded the certificate of a registration made thereafter shall be within the discretion of the court.").

Bros. was the initial author and owner of the [m]asters.”¹¹⁶ In its published opinion, the Ninth Circuit removed reference to § 410(c).¹¹⁷ The reasons for this removal were not explained by the Ninth Circuit.¹¹⁸

D. Copyright Registration Basics

An application for copyright registration must meet three essential requirements: (1) “a completed application form,” (2) “a nonrefundable filing fee,” and (3) “a nonreturnable deposit” containing a “copy or copies of the work.”¹¹⁹ Registration is effective when the Copyright Office issues a registration certificate, and the relevant date of the application is when the Office receives all the necessary elements “regardless of how long it took to process the application and mail the certificate of registration.”¹²⁰

V. SUPPLEMENTARY REGISTRATIONS: THE BLACK GATE IS CLOSED

For an artist seeking to correct an existing registration, the obstacles are daunting.¹²¹ Despite the importance of registration as an indicia of copyright ownership, there are severe limits on correcting an already-filed registration.¹²² One such limit is competing registrations for the same work.¹²³ The Copyright Office only grants one registration per work.¹²⁴ The Office will reject an application when a competing “second basic registration is submitted for the same version of the work.”¹²⁵

116. *Clinton*, 755 F.3d at 1084.

117. *See* *Hendricks & Lewis P.L.L.C. v. Clinton*, 766 F.3d 991 (9th Cir. 2014).

118. *Compare Clinton*, 755 F.3d 1077 (discussing the persuasive language of § 401(c)), *with Clinton*, 766 F.3d 991 (omitting any discussion of § 401(c) without explanation).

119. *See* U.S. COPYRIGHT OFF., CIRCULAR 1: COPYRIGHT BASICS 5 (2021), <https://www.copyright.gov/circs/circ01.pdf> (describing the process of registering for a copyright).

120. BROOKE WENTZ & MARYAM BATTAGLIA, MUSIC RIGHTS UNVEILED 7 (2018); *see* U.S. COPYRIGHT OFF., CIRCULAR 2: COPYRIGHT REGISTRATION 6 (2021), <https://www.copyright.gov/circs/circ02.pdf> (describing the effective date of registration).

121. *See generally* U.S. COPYRIGHT OFF., CIRCULAR 8: SUPPLEMENTARY REGISTRATION (2021), <https://copyright.gov/circs/circ08.pdf> (explaining the process for amending, correcting, or clarifying an existing copyright registration).

122. *See id.* at 5–6.

123. *See* U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 1802.7(B) (3d ed. 2021) [hereinafter COMPENDIUM] (highlighting the consequences in the event that there is a conflicting copyright transfer involving the same work).

124. *See* CIRCULAR 8, *supra* note 121, at 1 (highlighting the Office’s policy of one registration per work).

125. *Id.*

“Supplementary registration is the only legal mode permitting authors and claimants” to correct or amplify the information on a basic registration.¹²⁶ Per the Copyright Office, “[s]upplementary registration does not cancel or replace the original registration or the registration number. Nor does it change or remove the information contained in the original registration.”¹²⁷

Supplementary registrations are designed to correct errors in the original registration, such as spelling errors in the basic registration, to make name or address changes, and to make changes in a title to work.¹²⁸ More ominously, a supplemental registration can add a missing author or co-claimant and clarify the claim to copyright in the work.¹²⁹ Supplementary registrations cannot be used to reflect changes in the ownership of a work or to challenge the validity of a basic registration.¹³⁰ Indeed, there is no established mechanism to challenge a false registration through the U.S. Copyright Office.¹³¹

VI. AIN’T NOBODY GOT TIME FOR THAT: CRIMINAL PENALTIES FOR FALSE COPYRIGHT REGISTRATIONS: 17 U.S.C. § 506(E)

Criminal penalties are theoretically possible for false copyright claims; however, enforcement under 17 U.S.C. § 506(e) is nonexistent.¹³² In filing a copyright registration application, applicants must make a “declaration . . . that the information provided within the application is correct to the best of [the applicant’s] knowledge.”¹³³ Generally, the Office “accept[s] the facts stated in the application.”¹³⁴ If a party lies on a copyright registration, two possible avenues exist to remedy it. The first is a criminal copyright statute: 17 U.S.C. § 506(e).¹³⁵ The purpose of this statute is to “ensure the accuracy

126. *Id.*

127. *Id.*

128. *Id.* at 2.

129. See COMPENDIUM, *supra* note 123, § 1802.6(D) (“If two or more authors created the work and some of the authors of were not named in the basic registration, the names of the missing authors may be added to the registration record with a supplementary registration.”).

130. See CIRCULAR 8, *supra* note 121, at 3.

131. See *Stopping Copyright Infringement*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/help/faq/faq-infringement.html> (Mar. 10, 2010) (describing the Copyright Office as an office of records and registration, not an office that enforces laws or investigates claims of copyright infringement).

132. Jason Mazzone, *Copyfraud*, 81 N.Y.U. L. REV. 1026, 1029–30 (2006).

133. 37 C.F.R. § 202.3(e)(3)(iii) (2020).

134. COMPENDIUM, *supra* note 123, § 309.2 (noting the Office’s general practice in regard to “facts stated in the application”).

135. 17 U.S.C. § 506(e).

of’ copyright applications.¹³⁶

“To establish a violation of § 506(e), the government must prove”: “(1) that a false representation; (2) of a material fact; (3) was knowingly made; (4) in a copyright application or any written statement filed in connection with an application.”¹³⁷ However, § 506(e) has two deficiencies. First, as a criminal statute, § 506(e) has no private right of action; only the government can bring a case under the statute.¹³⁸

Secondly, the penalties under the statute are ridiculously low: “[v]iolations are punishable by a fine of up to \$2,500.”¹³⁹ The amount of the penalty cannot possibly serve as a deterrent to an unscrupulous registrant.¹⁴⁰ The statute is also rarely, if ever, enforced. My research has uncovered no evidence that the federal government has brought a claim against anyone, ever, under § 506(e).¹⁴¹

VII. FRAUD ON THE COPYRIGHT OFFICE: 17 U.S.C. § 411

The criminal road to fighting back against copyright registration fraud is, as explained above, essentially closed. The federal government is not prosecuting perpetrators for false copyright filings. And in any event, the penalties on the criminal side are minimal.¹⁴² As noted previously, the Copyright Office does not verify claims of copyright ownership.¹⁴³ Further, the Copyright Office “accepts the facts stated in the registration materials, unless they are contradicted by information provided elsewhere in the registration materials or in the Office’s records.”¹⁴⁴

136. *Criminal Resource Manual 1801–1899, 1856. Copyrights—False Representations—17 U.S.C. § 506(e)*, U.S. DEP’T OF JUST. ARCHIVES, <https://www.justice.gov/archives/jm/criminal-resource-manual-1856-copyrights-false-representations-17-usc-506e> (Jan. 17, 2020) [hereinafter *Criminal Resource Manual*] (describing the purpose of 17 U.S.C. § 506(e)).

137. *Id.*

138. *Id.*

139. *Id.*

140. See Mihailis E. Diamantis, *Sentencing Fraud*, COMPLIANCE & ENFORCEMENT (Oct. 3, 2017), https://wp.nyu.edu/compliance_enforcement/2017/10/03/sentencing-fraud/.

141. See generally *Ricketts v. CBS Corps.*, 439 F. Supp. 3d 1199, 1225–26 (2020) (dismissing a plaintiff’s § 506(e) claim for not asserting violations of those provisions); *One Treasure Ltd. v. Richardson*, 202 F. App’x 658, 661–62 (2006) (dismissing plaintiff’s claim for lack of relevance); see also *Mazzone*, *supra* note 132, at 1037.

142. See *supra* note 139 and accompanying text.

143. See *supra* notes 38–41 and accompanying text.

144. COMPENDIUM, *supra* note 123, § 602.4(C) (noting the Office’s general practice regarding facts stated in the application).

Even more shockingly, “the [Copyright] Office does not conduct investigations or make findings of fact to confirm the truth of any statement made in an application.”¹⁴⁵ Combine the lax oversight around copyright registrations with the low penalties for knowing misstatements on a registration, and the result is a recipe for fraud.¹⁴⁶ The potential for false copyright registrations is even more salient given the long influence of organized crime in the American music industry.¹⁴⁷

However, in § 411 of the Copyright Act, Congress provided a remedy for false copyright filings.¹⁴⁸ Section 411(b)(1) states:

A certificate of registration satisfies the requirements of this section and section 412, regardless of whether the certificate contains any inaccurate information, unless—(A) the inaccurate information was included on the application for copyright registration with knowledge that it was inaccurate; and (B) the inaccuracy of the information, if known, would have caused the Register of Copyrights to refuse registration.¹⁴⁹

VIII. “HUSTLING” REGISTRATION ERRORS: INVALIDATING A REGISTRATION UNDER § 411(B)(1)

A possible sanction for knowingly including false information on a copyright registration is a declaration of invalidity by the courts.¹⁵⁰ However, courts rarely invalidate copyrights.¹⁵¹ Courts that have construed § 411(b)

145. *Id.* Professor Gervais makes a powerful point about copyright registration: “copyright registration does nothing to ensure that the work was not plagiarized, or that it does not substantially copy another existing work.” Gervais & Renaud, *supra* note 93, at 1495.

146. *See supra* Part VI (discussing the lax framework of criminal penalties for copyright fraud and how it does not serve as a deterrent for fraud).

147. *See, e.g.*, WILLIAM KNOEDELSEDER, *STIFFED: A TRUE STORY OF MCA, THE MUSIC BUSINESS, AND THE MAFIA* (1993); Richard Harrington, *Making Music with the Mob*, WASH. POST (Apr. 11, 1993), <https://www.washingtonpost.com/archive/entertainment/books/1993/04/11/making-music-with-the-mob/615b947e-ef2c-40e7-b53d-9cfe0d56f42f/>.

148. 17 U.S.C. § 411 (establishing a remedy for false copyright filings).

149. *Id.* § 411(b)(1).

150. *Id.*; *see* Morton David Goldberg & Richard Dannay, *Fraud on the Copyright Office: Its Use and Misuse as a Defense in Copyright Infringement Actions*, 44 N.Y.U. L. REV. 540, 542 (1969) (demonstrating that courts can use invalidity as a possible sanction for false copyright registration).

151. *See, e.g.*, Roger D. Blair & Thomas F. Cotter, *The Elusive Logic of Standing Doctrine in Intellectual Property Law*, 74 TUL. L. REV. 1323, 1372 n.225 (2000) (noting that “the existing case law” reveals that “copyrights are invalidated only rarely in litigation”).

have been inconsistent.¹⁵² The Eleventh Circuit has held that to invalidate a registration, a claimant must demonstrate actual fraud.¹⁵³ In a case involving the hip-hop song *Hustlin'* by rapper Rick Ross,¹⁵⁴ the district court, of its own accord, found fault with errors in the plaintiff's three copyright registrations.¹⁵⁵

Plaintiff Rick Ross held three registrations issued for the *Hustlin'* song.¹⁵⁶ The first copyright registration incorrectly stated that the work was unpublished.¹⁵⁷ The second registration provided an incorrect date of creation, specifying the creation date was 2006 when it was actually 2005, and "did not disclose that there was a prior registration."¹⁵⁸ The third copyright registration contained the same errors as the first two, botching the date of creation and not disclosing the two prior registrations.¹⁵⁹ After chastising the district court for bringing up these issues on its own, the Eleventh Circuit set forth three elements required to prove copyright registration fraud: "(1) the application must contain inaccuracies, (2) the inaccuracies must be material, and (3) the applicant must have the required scienter of intentional or purposeful concealment."¹⁶⁰

Rick Ross prevailed against invalidation of his copyright.¹⁶¹ The Eleventh Circuit found that Ross did not defraud the copyright office and that the errors should not result in invalidation.¹⁶² The court noted that "[r]appers are

152. 17 U.S.C. § 411(b) (stating the statutory law for copyright registration and infringement protections).

153. *Roberts v. Gordy*, 877 F.3d 1024, 1030 (11th Cir. 2017) (holding that "in order to invalidate a registration . . . the applicant must have the required scienter of intentional or purposeful concealment").

154. See generally Bruce Britt, *Rick Ross, Miami's 'Teflon Don,'* BROADCAST MUSIC, INC. (Jan. 13, 2011), https://www.bmi.com/news/entry/rick_ross_miamis_teflon_don. The song appeared on Ross's debut album *Port of Miami* in 2006. *Id.* The album "shot to #1 on the pop and r&b charts. Fueled by its distinctive 'everyday I'm hustlin'' refrain, [*Hustlin'*] became the first ringtone ever to be certified platinum by the RIAA for sales of 1 million copies before the associated album had even been released." *Id.*

155. *Roberts*, 877 F.3d at 1031. "Specifically at issue in the litigation was the beat drop 'every day I'm shuffling,' which defendants argued was a parody protected by the fair use doctrine." Tal Dickstein & Ava Badiee, *Roberts v. Gordy*, LOEB & LOEB LLP (Dec. 15, 2017), <https://www.loeb.com/en/insights/publications/2018/01/roberts-v-gordy>.

156. *Roberts*, 877 F.3d at 1026 (stating that Ross held three registrations for *Hustlin'*).

157. *Id.* at 1027 (discussing the first copyright registration).

158. *Id.*

159. *Id.* (discussing the issues with the third copyright registration).

160. *Id.* at 1030 (stating the copyright registration fraud test in the Eleventh Circuit).

161. *Id.* at 1031 (holding that the copyright registration was valid).

162. *Id.* (holding that Ross did not defraud the copyright office because he lacked the necessary scienter to invalidate the registration).

skilled in poetry and rhythm—not necessarily in proper copyright registration procedures.”¹⁶³

In contrast, in the Ninth Circuit, a party seeking to invalidate a copyright registration does not have to show intent to defraud.¹⁶⁴ Rather, the party seeking to invalidate the registration must show that “the inaccuracy of the information, if known, would have caused the Register of Copyrights to refuse registration.”¹⁶⁵

In *Gold Value International Textile, Inc. v. Sanctuary Clothing, L.L.C.*, the inaccurate information on the application was about publication of the work.¹⁶⁶ The Ninth Circuit in *Gold Value* described the test it applies: (1) a plaintiff’s certificate of registration contains inaccurate information; (2) “the inaccurate information was included on the application for copyright registration”; and (3) the inaccurate information was included on the application “with knowledge that it was inaccurate.”¹⁶⁷

Under Ninth Circuit precedent, “a district court is required to submit a request to the Register of Copyrights ‘to advise the court whether the inaccurate information, if known, would have caused [it] to refuse registration.’”¹⁶⁸ In *Gold Value*, the Copyright Office, upon review, opined that it would not have registered the work if it had known of the representation of publication.¹⁶⁹

A year later, the Ninth Circuit in *Unicolors*

flatly rejected the district court’s requirement that H&M demonstrate that Unicolors intended to defraud the Copyright Office at the time of its application filing[] and pointed to the Ninth Circuit’s 2019 ruling in *Gold Value [International] Textile, Inc. v. Sanctuary Clothing, LLC*, where it

163. *Id.* at 1030.

164. *Gold Value Int’l Textile, Inc. v. Sanctuary Clothing, L.L.C.*, 925 F.3d 1140, 1146–48 (9th Cir. 2019) (discussing the Ninth Circuit’s stance on intent to defraud in copyright registration invalidation).

165. *Id.* at 1144.

166. *Id.* at 1143 (quoting 17 U.S.C. § 411(b)) (discussing how the inaccurate information on the application was about the publication of the design collection).

167. *Id.* at 1144 (citing 17 U.S.C. § 411(b)).

168. *Unicolors, Inc. v. H&M Hennes & Mauritz, L.P.*, 959 F.3d 1194, 1197 (9th Cir. 2020) (quoting 17 U.S.C. § 411(b)); Sarah Bro, *Copyright Office, Not Courts, Determines Validity of Registrations Containing Inaccurate Information*, NAT’L L. REV. (June 10, 2020) (citing *Unicolors, Inc. v. H&M Hennes & Mauritz, L.P.*, 959 F.3d 1194, 1197 (9th Cir. 2020)), <https://www.natlawreview.com/article/copyright-office-not-courts-determines-validity-registrations-containing-inaccurate>.

169. *Gold Value*, 925 F.3d at 1143.

clarified that there is no such intent-to-defraud requirement for copyright registration invalidation (and in doing so, rejected a series of Ninth Circuit cases that imply an opposite conclusion).¹⁷⁰

IX. DARK HISTORY OF AFRICAN-AMERICAN ARTISTS AND COPYRIGHT REGISTRATION

Black artists innovated virtually every genre of popular music in the United States, going back to the ragtime era of the late 1800s to hip-hop music today.¹⁷¹ The influence of Black artists is so vast that “[d]escribing the African-American influence on American music in all of its glory and variety is an intimidating—if not impossible—task. African-American influences are so fundamental to American music that there would be no American music without them.”¹⁷²

Because the creators of these works were legally unsophisticated and often illiterate, copyright formalities such as registration put them at a severe disadvantage.¹⁷³ Grafted onto the legal requirements of copyright law were predatory music industry practices that required sharing of copyright ownership and credit.¹⁷⁴ By giving copyright ownership or royalties to noncreators, typically whites, these practices acted as a wealth transfer out of the pockets of Black artists and the Black community.¹⁷⁵ In the extended “race record” era of music production, where Black artists were offered different contractual terms and royalties than white artists, the burden fell heaviest on Black

170. Bro, *supra* note 168.

171. Neela Kartha, Comment, *Digital Sampling and Copyright Law in a Social Context: No More Colorblindness!!*, 14 UNIV. OF MIA. ENT. & SPORTS L. REV. 218, 219–24 (1997) (providing a history of the influence of Black artists on music in the United States, genre by genre).

172. Steven Lewis, *Musical Crossroads: African American Influence on American Music*, SMITHSONIAN MUSIC (Sept. 2016), <https://music.si.edu/story/musical-crossroads>.

173. See Greene, *supra* note 49, at 354 (noting that the 1909 Copyright Act included complex requirements for copyright registration, causing “artists unfamiliar with legal requirements” to lose out on “their economic rights to copyright protection”); cf. Hines, *supra* note 94, at 476 (discussing how the 1909 Copyright Act required “a standard written musical notation of the work” to be submitted with copyright registration, causing literacy to prevent Black rag musicians from profiting from their work).

174. See Greene, *supra* note 49, at 377 (discussing predatory music industry practices).

175. Greene, *supra* note 49, at 353–54 (discussing how under the 1909 Copyright Act, registration “could list a claimant other than the author as the copyright owner,” which caused many Black artists to share copyright ownership with “a non-creator who was clever enough to secure copyright on the works”).

innovators in music.¹⁷⁶

Credit sharing meant that African-American composers had to share copyright with noncreators.¹⁷⁷ For example, Elvis Presley was not a composer.¹⁷⁸ Many of his greatest hits, including *Don't Be Cruel*, *All Shook Up*, and *Return to Sender* were penned by Otis Blackwell, an African-American composer.¹⁷⁹ *Don't Be Cruel* was the first of three songs for which Blackwell shared writing credit with Presley.¹⁸⁰ According to Blackwell, “I was told that I would have to make a deal [to share writing and copyright credit with Presley]. . . . Many have argued that Presley’s management virtually stole half of the writer royalties on [*Don't Be Cruel*], all of which should have gone to Blackwell.”¹⁸¹ This type of copyright fraud, layered with a thick coat of discrimination, was part of a pattern and practice in the American music industry.¹⁸²

Similarly, Little Richard was bamboozled by producers into sharing song-writing credit for his seminal hit *Tutti Frutti*.¹⁸³ According to Little Richard,

176. See Matt Stahl & Olufunmilayo Arewa, *Denying Black Musicians Their Royalties Has a History Emerging Out of Slavery*, CONVERSATION (May 12, 2021, 1:18 PM), <https://theconversation.com/denying-black-musicians-their-royalties-has-a-history-emerging-out-of-slavery-144397> (noting that Black recording artists have historically been dealt “adverse contractual terms”); Erin Blakemore, *How ‘Race Records’ Turned Black Music into Big Business*, HISTORY, <https://www.history.com/news/race-records-bessie-smith-big-bill-broonzy-music-business> (Feb. 22, 2019) (discussing the “race record” history of music production).

177. See Greene, *supra* note 49, at 341, 354–55.

178. *8 Elvis Presley Facts So Crazy You Might Not Believe Them*, PLAYBACK.FM, <https://playback.fm/trivia/crazy-elvis-facts> (last visited Dec. 28, 2021) (“Elvis recorded more than 600 songs in his music career but did not write a single song (impossible to confirm, but he was given co-writing credit on many songs because his label demanded songwriters give up 50% of the credit before Presley would record it.”); see also, *Elvis Presley Music*, ELVISPRESLEYPHOTOS.COM, <https://www.elvis-presley-music.com.au/ep-music.html> (last visited Dec. 28, 2021) (“Elvis, through his own publishing companies (Elvis Presley Music, Gladys Music, Whitehaven Music[,] and Elvis Music, Inc.) was part owner (typically half or third) of a great many of the songs he recorded and even some songs he did not record.”).

179. *Otis Blackwell . . . His Music Fueled the Elvis Machine in the Fifties*, ELVIS HISTORY BLOG, <http://www.elvis-history-blog.com/otis-blackwell.html> (last visited Dec. 28, 2021).

180. *Id.*

181. *Id.*; see ERIC CHARRY, A NEW AND CONCISE HISTORY OF ROCK AND R&B THROUGH THE EARLY 1990S, at 55 (2020) (quoting *Otis Blackwell, 70; Wrote Hits for Presley and Others*, N.Y. TIMES (May 9, 2002), <https://nytimes.com/2002/05/09/arts/otis-blackwell-70-wrote-hits-for-presley-and-others.html>).

182. See, e.g., Greene, *supra* note 49, at 375–76 (explaining how in practice the copyright system in America discriminates against African-American artists).

183. See *id.* at 376 & n.173 (“Rock pioneer Little Richard sold his publishing rights to the record company for fifty dollars, and part of that deal seems to have included the addition of a mystery name . . . to the songwriting credits.” (quoting JIM DAWSON & STEVE PROPES, WHAT WAS THE FIRST ROCK AND ROLL RECORD? 189 (1992))); see also Carlie Porterfield, *How Little Richard Was Exploited by a Bad Record Deal and Never Fully Cashed In*, FORBES (May 9, 2020, 4:12 PM),

“[t]he publishing rights were sold to the record label before the record was even released. [*Tutti Frutti*] was sold to Specialty for \$50.”¹⁸⁴

The dynamic of registration fraud and Black artists is not mentioned in copyright law cases. But it is buried in otherwise famous cases. For example, *Merchant v. Levy* is a famous case on the issue of the copyright statute of limitations.¹⁸⁵ The plaintiff Merchant was one of the Teenagers in the iconic doo-wop group Frankie Lymon and The Teenagers.¹⁸⁶ In 1956, the group scored a hit record with their song *Why Do Fools Fall in Love (Fools)*.¹⁸⁷ *Fools* became a pillar of rock and roll, and Frankie Lymon and The Teenagers deeply influenced legendary artists from Ronnie Spector, the Beach Boys, and Diana Ross to the Jackson 5 and George Clinton, the King of Funk.¹⁸⁸

In *Merchant*, the plaintiffs unsuccessfully challenged predatory copyright practices, alleging that the defendant, Roulette Records, Inc., “participated in wrongfully withholding from [p]laintiffs their interest in the copyright [of *Fools*].”¹⁸⁹ The Second Circuit in *Merchant* noted that

Merchant and Santiago [were] two of the original members of the singing group “The Teenagers,” which was formed in 1955. Plaintiffs testified that in 1955 they jointly wrote the initial version of the song *Fools*. Frankie Lymon made a number of changes to the song when he subsequently joined the group, which then became known as “Frankie Lymon and The Teenagers.” The jury found that Merchant, Santiago, and Lymon were co-authors of *Fools*.¹⁹⁰

<https://www.forbes.com/sites/carlieporterfield/2020/05/09/how-little-richard-was-exploited-by-a-bad-record-deal-and-never-fully-cashed-in/?sh=793d0f3a4d96>.

184. See Porterfield, *supra* note 183.

185. 92 F.3d 51 (2d Cir. 1996).

186. *Id.* at 52.

187. *Id.* at 52–53 (identifying *Fools* as a hit song, which was recorded in 1956 by The Teenagers).

188. See Shaun Ponsonby, *Why Do Fools Fall in Love—Frankie Lymon and the Most Important Song in Pop History*, GETINTOTHIS (Feb. 10, 2017), <https://www.getintothis.co.uk/2017/02/fools-fall-love-frankie-lymon-important-song-pop-history>. See generally Nathan Leigh, *George Clinton: The King of Funk*, AFROPUNK (Jun. 25, 2011), <https://afropunk.com/2011/06/george-clinton-the-king-of-funk/> (“George Clinton’s name is synonymous with funk. The mastermind behind the supergroup Parliament-Funkadelic (now known as the P-Funk All Stars), Clinton released 19 albums from 1970 [to] 1981 that defined funk and kickstarted the Afrofuturist movement. In a career that’s spanned over 50 years, he’s influenced everything from NWA to the Red Hot [Chili] Peppers, from Fishbone to the Big Boys, and been sampled by nearly every hip hop artist in the history of the genre.”).

189. *Merchant*, 92 F.3d at 53 n.1.

190. *Id.* at 52.

However, the owner of the record company that recorded *Fools*, George Goldner, registered the copyright for *Fools* in his and Lymon's names, telling the youths that only two authors could be on the registration.¹⁹¹ Goldner later wrote to the Copyright Office in 1965 and asserted "that [Morris] Levy, rather than Goldner, had coauthored *Fools* with Lymon."¹⁹² The Copyright Office then changed the ownership of *Fools*, in essence handing the copyright to "Levy's company, Big Seven Music."¹⁹³

In court, both Merchant and fellow Teenager Santiago testified that Morris Levy had threatened them when they inquired about royalties.¹⁹⁴ Levy did not write *Fools* but, as was customary in the "race record" music industry, insisted on copyright credit.¹⁹⁵

When questioned about how he ended up being credited as a writer on *Fools* (recorded by "a group Levy had met only months *after* the song had been recorded"), Levy outlined his own creative process: "You get together, you get a beat going, you put music and words together. I think I would be misleading you if I said I wrote songs, per se, like Chopin."¹⁹⁶ Levy in essence admitted that he was not a songwriter of *Fools*.¹⁹⁷ Yet, the Second Circuit held that the three-year statute of limitations barred Merchant's claim.¹⁹⁸ "Although *Fools* became a massive hit and continues to be popular today (Diana

191. *Id.* The artists "relied upon Goldner to handle the formalities of copyrighting the song, and . . . Goldner informed them that only two of the three authors could be listed on the copyright. Subsequently, Goldner filed the [*Fools*] copyright with the Copyright Office in 1956, listing himself and Lymon as sole co-authors." Gary Johnson, *Frankie Lymon's Tombstone Blues 6: The Decisions*, MICH. ROCK & ROLL LEGENDS: DR. J'S BLOG (Apr. 22, 2021, 10:37 AM), <https://michigan-rockandrolllegends.com/index.php/blog/422-frankie-lymon-s-tombstone-blues-pt-6-the-decisions>.

192. *Merchant*, 92 F.3d at 53. "Morris Levy . . . had been claiming copyrights for years, collecting royalties on songs he didn't write by Chuck Berry, Tommy James[,] and many others." *Why Do Fools Fall in Love?*, SONGFACTS, <https://www.songfacts.com/facts/frankie-lymon-the-teenagers/why-do-fools-fall-in-love> (last visited Dec. 28, 2021).

193. *Merchant*, 92 F.3d at 53 (footnote omitted).

194. *Id.* (stating plaintiffs testified that Levy threatened Santiago in 1969 and threatened to kill Merchant in 1977).

195. *See id.* ("Goldner stated that Levy, rather than Goldner, had co-authored *Fools* with Lymon. The copyright registration was amended to reflect this statement and, thereafter, the copyright was held by Levy's company . . .").

196. Jonathan Karp, *The Hit Man*, JEWISH REV. OF BOOKS (2016), <https://jewishreviewof-books.com/articles/2144/the-hit-man/> ("Called upon in court to explain how he contributed to the epic hit [*Why Do Fools Fall in Love*] by Frankie Lymon and the Teenagers . . . Levy outlined his own creative process . . ."). Interestingly, Levy was also instrumental in the distribution of the iconic rap hit *Rapper's Delight* for the Sugar Hill Record Label in the late 1970s. *Id.*

197. *See id.*

198. *Merchant*, 92 F.3d at 52.

Ross [later] recorded a popular version), [The Teenagers] have never received any royalties from their claimed co-authorship of *Fools*.”¹⁹⁹

A. Victor Willis, Y.M.C.A., and False Copyright Registrations

In 2012, Victor Willis, the front man, lead singer, and composer for the iconic 1970s group the Village People became one of the first artists to successfully terminate his grant of rights under the 1976 Copyright Act’s recapture provisions.²⁰⁰ Willis composed the hit songs *Y.M.C.A.*, *Macho Man*, and *In the Navy* as a member of the Village People.²⁰¹

The narrow issue in the case *Scorpio Music S.A. v. Willis* was “whether, in a case where joint authors of a work transfer their respective copyright interests through separate agreements, a single author may alone terminate his separate grant of his copyright interest in the joint work or whether a majority of all the authors is necessary to terminate that grant.”²⁰² His victory in navigating the treacherous maze of copyright termination formalities was widely, and rightly, celebrated as a landmark win for composers.²⁰³

However, less known or discussed was a false copyright claim lurking in

199. *Id.* at 53 (stating that The Teenagers were not compensated for their co-authorship of *Fools*).

200. *Scorpio Music S.A. v. Willis*, No. 11-cv-1557, 2012 WL 1598043, at *1–2 (S.D. Cal. May 7, 2012) (“Defendant Victor Willis is the original lead singer of the Village People. This lawsuit concerns Willis’s attempt to terminate his post–1977 grants to Can’t Stop Music of his copyright interests in 33 musical compositions”); *see also* *Scorpio Music (Black Scorpio) S.A. v. Willis*, No. 11cv1557, 2013 WL 790940, at *1 (S.D. Cal. Mar. 4, 2013) (clarifying that plaintiffs filed an amended complaint to limit Willis’s recovery upon termination of the copyright Act in 2012).

201. *Scorpio Music*, 2012 WL 1598043, at *1.

202. *Id.* at *2.

203. *See, e.g.*, Amy Gilbert, Note, *The Time Has Come: A Proposed Revision to 17 U.S.C. § 203*, 66 CASE W. RES. L. REV. 807, 829 (2016) (“As one commentator has noted, ‘[t]o say this decision will send shock waves through the record industry [as] artists [are] seeking to take back their copyrights is an understatement.’” (quoting Eriq Gardner, *Village People Songwriter Victor Willis Wins Case over Termination of ‘Y.M.C.A.’ Rights*, HOLLYWOOD REP. (May 8, 2012, 10:32 AM), <http://www.hollywoodreporter.com/thr-esq/village-people-ymcalawsuit-victor-willis-321576/>); Leslie A. Gordon, *Jury Sides with ‘the Cop’ in Copyright Question over a Village People Hit*, A.B.A. J. (July 1, 2015, 4:40 AM), https://www.abajournal.com/magazine/article/jury_sides_with_the_cop_in_copyright_question_over_a_village_people_hit (identifying the *Scorpio Music* case decision as a “‘bright light’ on the deficiencies of the Copyright Act [of 1976]”); Eriq Gardner, *Village People Songwriter Victor Willis Wins Case over Termination of ‘Y.M.C.A.’ Rights*, HOLLYWOOD REP. (May 8, 2012, 10:32 AM), <https://www.hollywoodreporter.com/business/business-news/village-people-ymca-lawsuit-victor-willis-321576/> (describing the *Scorpio Music* case as impactful); Larry Rohter, *A Copyright Victory, 35 Years Later*, CNBC (Sept. 13, 2013, 4:33 PM), <https://www.cnbc.com/2013/09/11/ymca-songwriter-victor-willis-wins-copyright-case.html> (“I’m hoping that other artists will get a good lawyer and get back the works that a lot of us gave away when we were younger, before we knew what was going on.” (quoting Victor Willis)).

Willis's copyright termination battle.²⁰⁴ At a trial in San Diego, a jury decided that one of the authors listed on the copyright certificate for *Y.M.C.A.* and other compositions was, in fact, not a creator of the works.²⁰⁵

It seems unlikely that this issue of false registration would ever have been exposed but for the copyright termination battle.²⁰⁶ It will be interesting to see if other false co-author registrations will surface in the context of copyright terminations.²⁰⁷

B. Baby Got Backed Up: The Statute of Limitations and Ownership Claims

As *Merchant v. Levy* illustrates, the statute of limitations foreclosing copyright ownership claims, coupled with the Copyright Office not verifying ownership claims in registrations, has produced unfair results.²⁰⁸ A more recent example involved an ownership claim over the 1990s hit rap song *Baby Got Back*.²⁰⁹ Sir Mix-a-Lot created the song in 1992; however, D.J. Punish claimed to have been a cocreator of the song.²¹⁰ D.J. Punish claimed he was unaware that the song had been registered solely in the name of Sir Mix-a-

204. See Eriq Gardner, *Odd Legal Question du Jour: Was 'Y.M.C.A.' Originally French?*, HOLLYWOOD REP. (Mar. 6, 2013, 2:36 PM), <https://www.hollywoodreporter.com/business/business-news/odd-legal-question-du-jour-426365/> (“Willis claims that one of the co-authors, Henri Belolo, didn't contribute to the authorship or lyrics of 24 of the compositions.”).

205. See *Willis v. Scorpio Music (Black Scorpio) S.A.*, No. 15-cv-1078, 2016 WL 3460282, at *1 (S.D. Cal. June 24, 2016) (“After a jury trial in February 2015, the Court issued a judgment that decreed that: (1) Belolo is not a joint author of 13 of the 24 Disputed Works (the ‘13 Compositions’), including [*Y.M.C.A.*] . . .”).

206. See Gordon, *supra* note 203 (discussing the “convoluted area of law” addressed in the *Willis* case).

207. See generally COMPENDIUM, *supra* note 123, § 1802.6(F) (“A supplementary registration may be used to correct an error in the basic registration If the wrong claimant was named in the basic registration . . . a statement may be added to the registration record to clarify that the name provided in the basic registration is incorrect . . .”).

208. *Merchant v. Levy*, 92 F.3d 51, 52 (2d Cir. 1996) (denying copyright claim based on statute of limitations); see also COMPENDIUM, *supra* note 123, § 503.2–3 (“The U.S. Copyright Office only examines the authorship that is explicitly claimed in the application. It does not examine any authorship that is not claimed in the application, and therefore, no *prima facie* presumption should apply to unclaimed authorship that appears in the work.”).

209. See *Ford v. Ray*, 130 F. Supp. 3d 1358, 1359 (W.D. Wash. 2015) (noting how David Ford—D.J. Punish—alleged he provided the “beats” and “scratching” for *Baby Got Back* but later discovered that Sir Mix-a-Lot had filed copyright registrations that did not identify him as a joint author).

210. See Bill Donahue, *Sir Mix-a-Lot Cut Former DJ Out of Royalties, Suit Says*, LAW360 (Mar. 23, 2015, 5:37 PM), <https://www.law360.com/articles/634143/sir-mix-a-lot-cut-former-dj-out-of-royalties-suit-says> (explaining David Ford's claims against Sir Mix-a-Lot). See generally Complaint at 8–10, *Ford v. Ray*, 130 F. Supp. 3d 1358 (W.D. Wash. 2015) (No. 15-cv-00432) (detailing Ford's claims against Ray and their working relationship).

Lot.²¹¹

When rapper Nicki Minaj used a sample of the song on her hit record *Anaconda*, D.J. Punish sued, seeking to get on the registration.²¹² However, his claim was dismissed pursuant to the statute of limitations.²¹³ Even worse, in a blistering opinion, the district court awarded attorney’s fees to Sir Mix-a-Lot, stating that “Plaintiff’s claim is frivolous or, at the very least, motivated by an unfair desire to cash in on the efforts of another.”²¹⁴

“Whatever his contributions to the sixteen joint works, plaintiff remained silent for two decades, never asserting that he was an author until a lucrative license was obtained by defendant.”²¹⁵ Did D.J. Punish co-author *Baby Got Back*? We will never know, but the real question is how many registered copyrights do not reflect true ownership of the works listed.

C. “Lifting” Jackie Wilson: Manager Nat Tarnopol

The music industry, from its inception, has been connected to notorious mobsters and organized crime.²¹⁶ Jazz great Louis Armstrong was in essence controlled by mobsters early in his career.²¹⁷ Many mobsters exercised their influence in the music industry from jazz to rock music and hip-hop, but perhaps no one more so than Nat Tarnopol.²¹⁸ Nat Tarnopol was a record producer who worked with some of soul’s greatest artists, including Jackie

211. See Donahue, *supra* note 210 (“Unbeknownst to Ford . . . [Sir] Mix-a-Lot filed copyright applications for . . . many of the songs that ‘wrongly identified himself as the sole-author of the work’ and made no mention of his DJ.”).

212. *Id.* (noting how Ford discovered the problem when Nicki Minaj made headlines over how similar her *Anaconda* sounded to *Baby Got Back*).

213. See *Ford*, 130 F. Supp. 3d at 1361–62 (“[Ford’s] claim of ownership to the tracks on *Mack Daddy* is therefore barred by the three[-]year statute of limitations.”).

214. *Id.* at 1364; see June Williams, *Rapper Gets Fees for Frivolous Lawsuit*, COURTHOUSE NEWS SERV. (Oct. 29, 2015), <https://www.courthousenews.com/rapper-gets-fees-for-frivolous-lawsuit/>.

215. *Ford*, 130 F. Supp. 3d at 1364; see Williams, *supra* note 214. The judge was Judge Lasnik, the same judge who decided *Hendricks & Lewis, P.L.L.C. v. Clinton*, which authorized the expropriation of George Clinton’s rights in his music. See *Hendricks & Lewis, P.L.L.C. v. Clinton*, No. C12-0841RSL, 2012 WL 5947638, at *1 (W.D. Wash. Nov. 27, 2012).

216. See Harrington, *supra* note 147 (exploring the history of the mob’s involvement with the music industry).

217. See Chris Jones, *Behind a Great Trumpeter, the Notorious Joe Glaser*, CHI. TRIB. (Jan. 29, 2016, 5:00 AM), <https://www.chicagotribune.com/entertainment/theater/ct-armstrong-jones-ae-0131-20160128-column.html> (discussing Armstrong’s “gangster” manager, Glaser).

218. See Harrington, *supra* note 147; see also Robert Davis, *Jackie Wilson Story, Nat Tarnopol, Brunswick Records*, SOUL-PATROL, <https://soul-patrol.com/jackie-wilson-story-nat-tarnopol-brunswick-records/> (last visited Dec. 28, 2021) (describing Tarnopol’s role in musicians’ careers).

Wilson and the Chi-Lites.²¹⁹ Tarnopol was indicted on federal charges, along with other music industry executives, for defrauding artists on Tarnopol's Brunswick label.²²⁰

Tarnopol ultimately prevailed against federal charges of wire fraud and tax evasion on appeal, but the Third Circuit, although reversing the verdict, had no doubt that artists on the Brunswick label were routinely defrauded.²²¹ Tarnopol engaged in clear examples of registration fraud, infamously adding his unborn son's name to music credits on Jackie Wilson's composition *Doggin' Around*.²²² Jackie Wilson's music still generates royalties today for Sony Music, which acquired the CBS records catalog.²²³

D. Hip-Hop Registration Shenanigans: Cash Money and Lil Wayne

There is no reason to believe that false copyright registrations in the music context are merely a relic of some distant past. In 2015, the rapper Lil Wayne sued his co-joint venture partner Birdman and Birdman's record label, Cash Money Records, for missed royalty payments.²²⁴ In the litigation, discovery revealed that under the Cash Money–Young Money joint venture agreement the copyrights to Lil Wayne's music were to be registered jointly to both entities.²²⁵ However, the copyrights to Wayne's songs were registered solely in

219. See Richie Unterberger, *Nat Tarnopol Biography*, ALL MUSIC, <https://www.allmusic.com/artist/nat-tarnopol-mn0000371694/biography> (last visited Dec. 28, 2021) (stating that Tarnopol's label "became an important force in soul" in the '60s and '70s with Jackie Wilson, Gene Chandler, Barbara Acklin, and the Chi-Lites).

220. See *id.*

221. *United States v. Tarnopol*, 561 F.2d 466, 476–77 (3d Cir. 1977), *abrogated by* *Griffin v. United States*, 502 U.S. 46 (1991).

222. See FREDRIC DANNEN, *HIT MEN: POWER BROKERS AND FAST MONEY INSIDE THE MUSIC BUSINESS* 106 (1990) ("[Tarnopol] had taken ruthless advantage of Jackie Wilson The writing credit for Wilson's [*Doggin' Around*] is listed to Paul Tarnopol, Nat's son, who wasn't born when the song was recorded.")

223. See *Chapter 22 CBS/Sony Records Is Established in First Round of Capital Deregulation*, SONY, <https://www.sony.com/en/SonyInfo/CorporateInfo/History/SonyHistory/2-22.html> (last visited Dec. 28, 2021) (detailing Sony's history leading up to its acquisition of CBS Records Inc.).

224. See Zara Golden, *Everything You Need To Know About Lil Wayne's Lawsuit Against Cash Money*, *FADER* (Jan. 29, 2015), <http://www.thefader.com/2015/01/29/everything-you-need-to-know-about-lil-waynes-complaint-against-cash-money>; see also *Complaint* at 11–19, *Young Money Ent. L.L.C. v. Cash Money Inc.*, 2015 WL 351308 (S.D.N.Y. 2015) (No. 15-cv-00614) (describing Lil Wayne's claims against Cash Money Records).

225. See Alison Fensterstock, *Lil Wayne vs. Cash Money: Lawsuit Documents Surface Online*, *NOLA.COM*, https://www.nola.com/entertainment_life/music/article_53f84f54-8224-5a86-8fa4-7eda031f5f85.html (July 17, 2019, 1:50 PM) (detailing the lawsuit).

Cash Money's name.²²⁶

X. PROPOSED REFORMS

The African-American artist experience is full of stories of false registrations and nonauthors claiming copyright ownership as joint authors.²²⁷ The registration records of the Copyright Office lack any credibility.²²⁸ Only an audit would restore credibility. Further, Copyright registration should be made optional for artists.

As Professor Tehranian has noted, while sophisticated corporate owners take full advantage of registration, “[in] sharp contrast, unsophisticated creators, like individual artists, typically do not timely register their works and are often left with little except moral force and the uncertain threat of injunctive relief to enforce their [IP] rights.”²²⁹ Artists who choose not to register should not be deprived of a federal forum merely because they lack sophistication and access to information.²³⁰ The U.S. Copyright Office should move to a system closer to trademark law. The Trademark Office reviews every trademark registration, scrutinizing applications to ensure that the registrations comply with the Lanham Act.²³¹

Perhaps more importantly, given the disparate impact of registration on communities of color, the Copyright Office should undertake an audit of all music produced during the “race record” era of the recording industry to verify copyright ownership in sound recordings and musical compositions.²³²

Until such time that the Copyright Office verifies ownership claims, there is little reason to have confidence in the registration system, a Wild West

226. See Golden, *supra* note 224 (noting that Lil Wayne alleged that “Cash Money failed to register the copyright of the Young Money Label recordings in both Cash Money and Young Money names”); see also Complaint, *supra* note 224, at 9.

227. See Greene, *supra* note 49, at 356–58 (“Music scholars have noted that Black artists, as a class of performers, routinely found their works appropriated and exploited by publishers and managers.”).

228. See *supra* Part III; see also notes 36–41 and accompanying text.

229. John Tehranian, *The Emperor Has No Copyright: Registration, Cultural Hierarchy and the Myth of American Copyright Militancy*, 24 BERKELEY TECH. L.J. 1399, 1407 (2009) (noting that “[s]ophisticated, routine creators—generally corporations in content-creation industries—timely register their works and therefore enjoy generous remedies against infringers”).

230. See *supra* Part III.

231. See generally Lanham Act, 15 U.S.C. § 1051 (detailing the trademark registration process).

232. See Denise Oliver Velez, *Black People Create, White People Profit: The Racist History of the Music Industry*, DAILY KOS (Jun. 14, 2020, 6:00 AM), <https://www.dailykos.com/stories/2020/6/14/1948464/-Black-people-create-white-people-profit-The-racist-history-of-the-music-industry> (discussing the control exercised over Black artists during the “race record[]” era).

where there is no accountability.²³³ These undertakings would not be cheap and would be time-consuming.²³⁴ However, certifying the integrity and veracity of the copyright registration system, with its monumental impact on copyright ownership and wealth, should be paramount over cost and time spent.

233. See *supra* Parts VI, VII.

234. See Tehranian, *supra* note 229, at 1411 (citing the “2007 Report of the Economic Survey conducted by the American Intellectual Property Law Association,” which found that the mean cost of taking a relatively small instance of copyright infringement to trial in the United States was \$310,000, but for “middle-of-the-road” infringement cases, that figure rose to \$749,000).