
**THE FUTURE IS NOW: COPYRIGHT TERMINATIONS AND THE
LOOMING THREAT TO THE OLD SCHOOL
HIP-HOP SONG BOOK**

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African-American slaves and their descendants gave the world musical gold in the music that came to be known as the blues.² The blues also birthed several genres including: doo-wop, soul, R&B, funk, and disco music. All Black popular music emanates from the blues, including the most popular music of today — hip-hop.³

The blues and its progeny generated colossal wealth in the United States and abroad. Tragically, that wealth often by-passed its creators, who stood on the lowest rung of the social ladder in a society rife with racial and gender inequality. Black innovators and journeymen alike suffered deprivation under the American copyright system and its partner in crime, common law contract doctrine. Many Black creators, such as Jelly Roll Morton, a foundational jazz innovator, died impoverished.⁴ Even those who did well often received a pittance compared to their actual value of their contributions.

My scholarship pioneered the field of critical race studies in intellectual property. Way back in 1999, I posited that same dynamics underlying the wholesale expropriation of works by African American artists was

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² See Emily Weiler, *The Roots and Impact of Blues Music* WHITWORTH DIGITAL COMMONS (2017), <https://digitalcommons.whitworth.edu/cgi/viewcontent.cgi?article=1001&context=HI241>, (noting that arising from African traditions, “many spirituals, work songs and hollers, now more often referred to as slave songs, became the foundations for the blues.”).

³ William F. Danaher & Stephen P. Blackwelder, *The Emergence of Blues and Rap: A Comparison and Assessment of Context, Meaning and Message*, 17 J. POPULAR MUSIC & SOC’Y 1 (1993) (“Rap music shares its origins with another lower-class music movement: blues music of the 1930’s, 1940’s and 1950’s.”).

⁴ See *Jelly Roll Morton — Final Years of Frustration (1939-1941) As told by Jelly Roll Morton in his letters to R. J. Carew*, JAZZ J. (annotated by George W. Kay), <http://www.doctorjazz.co.uk/page24.html> (noting that Jelly Roll Morton’s “first months in New York were almost catastrophic for him. Suffering from failing health, he roamed the streets of the city in futile attempts to get bookings, sell his latest sheet music and collect royalties from publishers.”). Morton kept a journal of his final years, painting the bleak picture of a man fighting against his music publisher and ASCAP for compensation.

likely to replicate in the treatment of hip-hop artists.⁵ There is a remarkable continuity in the characteristics of the blues men and women of the 1920's and the hip-hop artists of the 1980's — and of today.

The blues was born in the impoverished rural South in the early twentieth century. The harsh laws of segregation cast a shadow of inequality on every aspect of the lives of blues artists.⁶ My scholarship contends that copyright law cannot be separated from social dynamics such as race. I analyzed how copyright law, although “race neutral” on its face, disadvantaged Black musical creators.⁷ Blues artists like Bessie Smith, Howlin' Wolf, Muddy Waters, Ma Rainey and scores of others created works of genius under the shadow of the 1909 Copyright Act, a law rife with standards of protection and technical formalities that devastated copyright ownership and protection for blues and other Black artists.

The 1909 Copyright Act did not have termination provisions. Rather the 1909 Act contained a mechanism called renewal.⁸ Under the renewal provisions of the 1909 Act, authors could exercise two consecutive terms of twenty-eight years in duration.⁹ In theory, authors who signed away copyrights in “unremunerative” contracts involving the initial term could negotiate a better deal for the renewal term twenty-eight years later when the true value of their works would be known.¹⁰ Unfortunately, the renewal provision proved ineffective because the Supreme Court interpreted the law as allowing artists to assign away their renewal rights at any time.¹¹ The current 1976 Copyright Act purports to fix this problem by creating recapture rights through termination and providing that the termination right remains inviolate, “notwithstanding any contract [signed by the artist] to the contrary.”¹² These termination rights allow authors who transfer their copyright rights the ability to undo those transfers during a 5-year window that begins thirty-five years after the transfer in question.¹³

⁵ Kevin J. Greene, *Copyright, Culture and Black Music: A Legacy of Inequality*, 20 HAST. COM. & ENT. L.J. 339 (1999).

⁶ LEROI JONES, *BLUES PEOPLE: NEGRO MUSIC IN WHITE AMERICA* (1963).

⁷ See, e.g., Greene, *Copyright*, *supra* note 4, see also Kevin J. Greene, *Intellectual Property at the Intersection of Race and Gender: Lady Sings the Blues*, 16 AMER. U. J. GENDER, SOCIAL POL'Y & THE L. 365, (2008), Kevin J. Greene, *Papa's Got a Brand-New Bag James Brown, Innovation, and Copyright Law*, in *AFRICAN AMERICAN CULTURE AND LEGAL DISCOURSE* 179 (Loverlie King & Richard Schur eds., 2009).

⁸ See Copyright Act of 1909, Pub. L. No. 60-349, § 23, 35 Stat. 1075, 1080 (1909).

⁹ *Id.*

¹⁰ See H.R. REP. 2222 (1909).

¹¹ See *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643, 657-68 (1943).

¹² See 17 U.S.C. § 203(a)(5).

¹³ See *Id.* § 203(a); 203(a)(3).

Today, many great American musical works, including seminal hip-hop works from the late 1980's and '90' are entering the window of copyright termination. Unfortunately, for very early hip-hop artists like Sugar Hill Gang who in 1979 released the seminal rap record *Rapper's Delight* and Kurtis Blow, who released *The Breaks* in 1980, it is already too late to recapture. And as each year ticks by, another hip-hop artist is likely to find the copyright termination windows closed. Once these windows close, recapture becomes impossible.

This article contends the current promise of copyright recapture is severely attenuated by the formalistic and complex labyrinth of copyright termination provisions, as well as music industry practices, customs, and outright resistance to copyright terminations. Furthermore, the copyright recapture provisions as structured are little more than a travesty that dooms recapture for all but the most sophisticated, well-financed and diligent artists. The current system of copyright terminations disadvantages creators of all colors, but most of all African-American artists, who are both highly innovative and poorly resourced as a class.

If artists fail to navigate the labyrinth of the copyright termination provisions, the rights to their works will remain with the entities that control those rights.¹⁴ Section 203(b) makes clear that, unless effectively terminated within the applicable five-year period, all rights covered by an existing grant will continue unchanged, and that rights under other federal, State, or foreign laws are unaffected.¹⁵ The end result is that corporate conglomerates — record labels and music publishing companies— will retain those works and exercise all rights to them for the balance of the copyright term.

The copyright recapture provisions, as structured are little more than a travesty, ensuring that all but the most sophisticated, well-financed and privileged authors will never exercise termination rights. In this sense, the termination provisions act as a kind of reverse redistribution, taking rights from the least advantaged and conveying those rights to hegemonic corporate interests. Black artists, such as hip-hop artists, will bear the brunt of reverse redistribution. History teaches that “[i]n the grand narrative of freedom and civil rights, the disadvantages that persist are invisible precisely because people in power continuously innovated new forms of dis-

¹⁴ See Melvin D. Nimmer, *Termination of Transfers Under the Copyright Act of 1976*, U. Pa. L.J. 947, 89 (1977) (“If the persons entitled to terminate a grant fail to serve a proper termination notice within the required time, or otherwise to comply with the required formalities, no termination will occur by operation of the provisions of the new Act. The grant will continue in effect unless terminated by its own terms or for other reasons.”).

¹⁵ See 17 U.S.C. § 203(a)(3) (restricting exercise of termination rights to specific five-year window).

crimination.”¹⁶ Analysts have remarked that intellectual property law and policy works as a type of “rent,” which “play[s] a critical role in the increasing concentration of wealth among the already-wealthy few.”¹⁷

As the United States grapples in this moment with the legacy of overt and insidious racial oppression under the banner of the Black Lives Matter movement, the real question is whether the emerging new awareness of racial inequality will reexamine inequality in the copyright regime, and lead to real reform. This is the first article to address the impact of copyright terminations and formalities on Black authors. The only references to race or color in existing legal literature on copyright termination is the “black hole” problem of terminations.¹⁸ Looking back, the fleecing of Black artists since the birth of the music industry merits redress. Looking forward, the time has come for real copyright reform that aligns perfectly with notions of distributive justice, a justice that will benefit all creators regardless of race.

The pernicious impact of copyright formalities like copyright terminations and copyright registration on African-American creators also shine a harsh and unflattering light on calls by prominent IP academics to “re-formalize” copyright law. Copyright law until 1978 was built on a mountain of technical formalities. The 1976 Copyright Act, contrary to received wisdom did not eliminate copyright formalities. Copyright terminations retain all the characteristics of the old, formalistic approach.

As Professor Tehranian has noted, “[c]opyrighted works are effectively placed into a hierarchy of care that in many ways safeguards creators less vigorously than regimes in other countries. At its core, the current system privileges the interests of repeat, sophisticated, and monied rights holders — rights holders who are invariably also users of content. And it does so at the expense of smaller, less sophisticated creators and

¹⁶ Calvin Schermerhorn, *Why the Racial Wealth Gap Persists, More Than 150 Years After Emancipation*, WASHINGTON POST (June 18, 2019), <https://www.washingtonpost.com/outlook/2019/06/19/why-racial-wealth-gap-persists-more-than-years-after-emancipation>. <https://www.washingtonpost.com/outlook/2019/06/19/why-racial-wealth-gap-persists-more-than-years-after-emancipation>.

¹⁷ Steven M. Teles, *The Scourge of Upward Redistribution*, 46 NATIONAL AFFAIRS (2015), <https://www.nationalaffairs.com/detail/the-scurge-of-upward-redistribution/publications> (noting the increasing importance of intellectual property in generating equality . . .”).

¹⁸ “A “black hole” occurs when a work does not come within the termination rights pursuant to either § 304 or § 203.” Stephen K. Rush, *A Map Through the Maze of Copyright Termination: Authors and Heirs Can Recapture Their Valuable Copyrights* (2018), <https://nvlawllp.com/wpcontent/uploads/2018/05/A-Map-Through-the-Maze-of-Copyright-Termination.pdf>.

authors.”¹⁹ Given the inequality fostered by copyright doctrine and policy, debates over copyright reform must address the disparate and negative treatment of Black artists, the innovators and architects of the American music recording industry.

I. THE RISE OF HIP-HOP MUSIC TO GLOBAL DOMINANCE

In contrast to the rural origins of the blues, hip-hop music emerged in the 1970’s in the South Bronx of New York.²⁰ The innovation of Hip-hop, which emerged from the most marginalized people in America, was built on earlier blues traditions, including spoken words over music. Both blues and hip-hop artists were legally underrepresented and poorly resourced. In the looming battle for copyright recapture, this group of disadvantaged creators now faced off against a highly sophisticated music industry apparatus that existed above all to acquire and retain all rights to copyrighted creative work.

Today, hip-hop music, also known as rap music, is by far the most popularly consumed music in American culture.²¹ Hip-hop is also an international phenomenon. Hip-hop drives American culture, dominating music, fashion, film, television and advertising.²² The pioneering rappers of the late 1970s and early 1980s could little have imagined a world where one of their cohorts would receive a Pulitzer Prize, as rapper Kendrick Lamar did in 2018, or be feted at Harvard University for contributions to American culture, as rapper Queen Latifah was in 2019.²³

¹⁹ John Tehranian, *The EMPEROR Has No Copyright: Registration, Cultural Hierarchy, and the Myth of American Copyright Militancy*, 24 BERK. TECH. L.J. 1399, 1401 (2009).

²⁰ The ascent of hip-hop music is often tied to a “‘block party’ in the West Bronx on Aug. 11, 1973, where a Jamaican-born resident, Clive Campbell — known as DJ Kool Herc — debuted a new style of D.J.-ing. He extended the “breakbeat” of a song by playing copies of the same record on two turntables. The technique had a great effect on dancers at urban parties, who invented breakdancing to go along with the new beats.” Laure Fouquet, *Tracing Hip-Hop’s Phenomenal Rise*, NEW YORK TIMES (July 23, 2015). <https://www.nytimes.com/2015/07/24/arts/international/tracing/hip-hops/phenomenal-rise.htm>.

²¹ See Elias Leight, *Hip-Hop Continued to Dominate the Music Business in 2018*, ROLLING STONE MAGAZINE (Jan. 3, 2018), <http://www.rollingstone.com/music/music-news/hip-hop-continued-to-dominate-the-music-business-in-2018-774422> (noting thatxxxx rap songs, “like rap albums experienced major growth in popularity, rising to account for 2.7 percent of all album consumption.”)

²² See Max Berlinger, *How Hip-Hop Fashion Went from the Streets to High Fashion*, LOS ANGELES TIMES (Jan. 26, 2018), How hip-hop fashion went from the streets to high fashion (noting that “hip-hop players such as Nicki Minaj, Drake, Cardi B, Pharrell and others now dictate major pop-culture and fashion trends.”).

²³ See *Harvard Awards Queen Latifah Medal for Contributions to Black History, Culture Queen Latifah to Receive Harvard Black Culture Award*, U.S.A. TODAY

Arising in the 1970's from the bombed-out shell of the South Bronx (where this author spent much of his childhood), hip-hop reigns as the dominant cultural, and from a music industry standpoint, economic paradigm in the United States, with strong international reach as well.²⁴ A recent acquisition by a major corporation, Hasbro, of the defunct Death Row Label's²⁵ music catalogue for hundreds of millions of dollars, put an exclamation point on the value of the old-school hip-hop catalog's status as an economic juggernaut.²⁶

No clear line of demarcation line marks where "old school" hip-hop music begins and ends. For purposes of this article, the earliest period of old-school or classic hip-hop is located from the late 1970's to the mid-1980's. In that era, artists like Kurtis Blow²⁷, Kool Moe Dee, Salt 'n' Peppa, Eric B. and Rakim, M.C. Lyte ruled the charts. The rappers Run-

(Oct. 23, 2019), <https://www.usatoday.com/story/entertainment/celebrities/2019/10/23/queen-latifah-recognized-harvard-contributions-black-history/4071967002>.

²⁴ See TM Brown, *The Greatest Hip-Hop Songs from Around the World*, BBC MUSIC (Oct. 15, 2019), <https://www.bbc.com/culture/article/20191016-the-greatest-hip-hop-songs-from-around-the-world>.

²⁵ Death Row Records emerged in the early 1990's as the preeminent record label producing "gansta" rap music with iconic artists like Tupac Shakur, Snoop Dogg, Nate Dogg and Dr. Dre. See Luchina Fischer, *The Rise and Fall of Death Row Records*, ABCNews (Jan. 8, 2009), <https://abcnews.go.com/Entertainment/SummerConcert/story?id=5406064&page=1> (noting that Death Row Records was "co-founded in 1991 by controversial music mogul Marion "Suge" Knight [and became] home to some of the biggest names in rap — Dr. Dre, Snoop Dogg and Tupac Shakur — and became one of hip-hop's most influential and profitable labels in its '90s heyday). In 2006, Death Row under its founder and president Marion "Suge" Knight declared bankruptcy, and in 2008, Death Row Records and its music catalog were auctioned in a bankruptcy sale for \$24 million. See *Death Row Records Auctioned for \$24 Mil.*, HOLLYWOOD REPORTER (July 14, 2008), <https://www.hollywoodreporter.com/news/death-row-records-auctioned-24-115607>.

²⁶ See David Evon, *Did Hasbro Toys Acquire Death Row Records?*, SNOPE (Aug. 26, 2019), <https://www.snopes.com/fact-check/hasbro-toys-death-row-records> (noting that the "toy company Hasbro acquired the British company Entertainment One for \$4 billion in August 2019. In addition to getting access to children's programs such as 'Peppa Pig', Hasbro also now owns Death Row Records' catalog."). Entertainment One spent \$280 million to purchase the Death Row catalog in 2013. See Kristen Willis, *Here's Why Jokes Are Flying About Suge Knight's Death Row Records and My Little Pony*, ATLANTIC BLACK STAR (Aug. 26, 2019), <https://atlantablackstar.com/2019/08/26/heres-why-jokes-are-flying-about-suge-knights-death-row-records-and-my-little-pony/> ("Now the label that was famous for signees like Tupac and Snoop Dogg, as well as co-founder Dr. Dre, is aligned with the same brand that brought families Monopoly and kids, Mr. Potato Head.").

²⁷ Kurtis Blow was the first solo rap artist to reach gold sales status. See Michael Saponara, *40 Years of 'The Breaks': Kurtis Blow Remembers the 'Dream World' Surrounding Rap's First Gold Hit*, BILLBOARD (June 14, 2020), <https://www.billboard.com/articles/columns/hip-hop/9401176/kurtis-blow-the-breaks-anniversary>.

DMC dominated the era. This was the so-called “golden age” of hip-hop, and continued through the early to mid-1990’s.

Notable from this period was the cornucopia of remarkable women rappers. These included Roxanne Shante, Salt ‘n’ Pepa, Lil’ Kim, MC Lyte, Queen Latifah, and Missy Elliot. There was no shortage of rap groups with outstanding offerings, including Getto Boys, Too Short, De La Soul, Tribe Called Quest, Public Enemy, Heavy D, the Fat Boys, NWA, Snoop Dogg, Dr. Dre, and many others. The two stand-out rappers of that era, almost universally agreed, were Tupac Shakur and Biggie Smalls. With all the great music, came the shadow of copyright. Many of these listed artists ended up in copyright litigation. *Hip-hop* was always in the shadows.

These old-school hip-hop artists paved the way for today’s rap artists, who continue to borrow heavily from the old-school innovations. Old-school hip-hop is critically acclaimed. A poll of music critics picked eighteen of the twenty-five greatest rap songs from the period of 1979 to 1995 as the best of hip-hop.²⁸

Many music critics wax poetic over the “Golden Age” of rap—as one noted, “[f]rom 1979 to its pinnacle golden era in the mid-1990s, hip-hop experienced a meteoric rise to popularity . . . the golden era was filled with lyrical mastery, innovation in beat production, diversity in style and content, and a push toward popular media.”²⁹ Given the tremendous use of hip-hop across the spectrum of entertainment and advertising, and the profitability digital streaming, the actual and potential value of these works in the aggregate is staggering.

II. BEFORE COPYRIGHT TERMINATIONS—THE DRAGON OF COPYRIGHT RENEWAL UNDER THE 1909 COPYRIGHT ACT

It has been said that copyright formalities are dead after the Berne Convention revisions to U.S. Copyright law. Nothing could be further from the truth.³⁰ The copyright recapture provisions, old and new, are rife with technical and formalistic mechanisms. These mechanisms have huge

²⁸ Brown, *supra* note 24.

²⁹ Christopher Vito, *Just Say No to 360s: Hip-Hop’s Claim of Economic Exploitation*, SPRINGER (Feb. 2, 2019), <https://link.springer.com/book/10.1007/978-3-030-02481-9>.

³⁰ In 2019, the U.S. Supreme Court held that a completed copyright registration is a requirement to institute a copyright infringement suit in federal court, a decision which essentially reinstates registration as a formality. *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com*, 139 S. Ct. 881 (2019.) And publication is still a critical component in the copyright termination provisions and the provisions on statutory damages and attorney’s fees.

substantive effects on who ends up owing creative works subject to termination. Copyright recapture under the termination provisions does not occur automatically, but rather requires artists to take very specific and highly technical steps and actions. The termination procedures, like the copyright formalities of old, are cold and unforgiving. Artists must pay heed and properly execute these formal procedures. Whether by neglect or mistake, if artists fail to act seasonably and diligently, their right to recapture, the only inalienable right under copyright law, is irrevocably lost.

The roots of the 1976 Copyright Act's provisions on copyright terminations lie in the predecessor 1909 Copyright Act. Under the 1909 Act, which remained in effect until 1978, copyright authors received two independent twenty-eight terms of copyright for a total of fifty-six years.³¹ Under the 1909 Act, to receive the additional twenty-eight years under the renewal regime, the copyright claimant had to formally apply for copyright renewal.³²

The renewal provisions of the 1909 Act caused all manner of difficulties for copyright owners, individual authors, and corporate owners. A copyright author's or owner's failure to renew copyright after the twenty-eight-year renewal provision in a timely manner led to the work being dedicated to the public domain under the 1909 renewal provisions.³³ These formalities were a common feature of the 1909 Copyright Act. Failure to comply with copyright formalities like registration, notice and publication resulted in loss of copyright ownership. Under the obtuse renewal regime even large corporate entities like Fox Television botched attempts to exercise renewal rights.³⁴ If copyright owners failed to renew timely under the 1909 Act the work was injected into the public domain, a work free for the public to use.

The idea that renewal would provide benefits to artists was soon proved mistaken. First, the cantankerous renewal procedure was sparsely used by authors. A large percentage of eligible works were never renewed.³⁵ Second, the U.S. Supreme Court eviscerated the value of the

³¹ See Copyright Act of 1909, Pub. L. No. 60-349, § 23, 35 Stat. 1075, 1080 (1909).

³² See *Id.*

³³ See Edward Samuels, *The Public Domain in Copyright Law*, 41 J. COPYRIGHT SOC'Y 137 (1993). In 1992, Congress eliminated the renewal requirement even for works created before 1978.

³⁴ Fox's failure to renew the 1943 television series *Victory at Sea* resulted in a lawsuit before the U.S. Supreme Court when Fox, having failed to retain copyright by renewal, attempted to protect its rights by suing Dastar for trademark infringement for repackaging the film footage and distributing it under a different title. See *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003).

³⁵ See William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471, 473 (2003) (noting that "fewer than 11 percent of the

renewal right. It held that artist could sign away the renewal term for copyrighted works.³⁶ The Supreme Court case of *Fred Fisher Music* involved the renewal term in the song *When Irish are Smiling*. In blessing the assignment of renewal terms by contract the court ironically, perhaps comically, endorsed coercive assignment of artist renewal rights. At the same time, the Court commented that coercive assignments of artist renewal terms could make the courts “instruments of injustice by lending their aid to the enforcement of an agreement . . . under such coercion of circumstances that enforcement would be unconscionable.”³⁷

The Supreme Court then proceeded to enforce the assignment of renewal terms under the rubric of freedom of contract. The *Fisher* decision was contrary to the congressional policy underlying the 1909 Copyright Act renewal provision. The decision harmed those authors who lacked bargaining authors power because the economic value of their work had yet to be proven, the class of authors the renewal provisions were enacted to protect.”³⁸

III. THE 1976 COPYRIGHT ACT REVISIONS AND THE BIRTH OF SECTION 203

The revisions that led to the Copyright Act of 1976 involved decades of negotiations between various constituents in the copyright industries. These included music and book publishers, record labels, radio stations as well as music composers and writers. Professor Litman’s work masterfully analyzed the lengthy negotiations leading up to the 1976 Copyright Act. This task illuminated the legislative history of the 1976 Act. Professor Litman noted that the language of the Act “evolved through a process of negotiation among authors, publishers, and other parties with economic interests in the property rights the statute defines.”³⁹

As Professor Litman notes, in 1955, the Copyright Office formed advisory panels to decide how to revise the renewal provisions of the 1909 Act. The advisory panels “eventually swelled to include ‘more than a hundred persons, representing almost everyone who had any real interest [in the subject of copyright reversion/recapture].”⁴⁰ Thus, a relatively small

copyright registered between 1883 and 1964 were renewed at the end of their twenty-eight-year term, even though the cost of renewal was small.”).

³⁶ *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643, 657-68 (1943) (holding that authors can assign away their interest in the second 28-year copyright renewal term).

³⁷ *Id.*

³⁸ Note, *The Errant Evolution of Termination of Transfer Rights and the Derivative Works Exception*, 48 OHIO STATE L.J. 897, 900 (1987).

³⁹ See Jessica D. Litman, *Copyright Compromise and Legislative History*, 72 CORNELL L. REV. 857, 861.

⁴⁰ *Id.*, at 872.

group of copyright industry insiders decided the fate of the vast majority of artists.

The detailed work of Professor Litman showed that the legislative process behind the copyright termination provisions was a tortured compromise. Record labels and publishers wanted copyright terminations to be difficult. Various interest groups fought for position and robustly debated over the contours of copyright recapture.⁴¹

However, IP legal scholars have not examined this reality: African American creators were excluded from the decades-long negotiations over copyright revision and copyright terminations. This was true under both Copyright Acts, demonstrating that copyright law and policy cannot be separated from the cross-currents of race and identity. In 1909, as the NAACP was formed in response to lynching's across America, an all-white Congress enacted a sweeping new copyright act, the 1909 Copyright Act, without input from the African-American creators. Meanwhile, all indications pointed to a Copyright Office that was rife with gender and racial discrimination.⁴²

The legislative negotiations for what would become the 1976 Copyright Act began in 1955. In 1955, when Congress decided to revise the 1909 Copyright Act, segregation was still rampant in America. Emmett Till, a fourteen-year-old boy, was lynched in Mississippi.⁴³ Rosa Parks refused to give up her seat on a bus. Dr. Martin Luther King was leading the Montgomery Bus Boycott.⁴⁴ In the music scene, rock 'n' roll pioneer Chuck Berry released his hit *Maybellene* on the Chess Record Label — and only in 1986 was he listed as the sole composer.⁴⁵ There is no evi-

⁴¹ *Id.* at 888-93 (describing negotiations over work made for hire treatment, renewal, and termination for the 1976 Act).

⁴² “In 1971, then Registrar Abraham Kaminstein announced his retirement, and [Barbara] Ringer applied for the position but was passed over for a male colleague. She sued the Librarian of Congress on that the position had been denied to her because she was woman and because she had advocated for African-Americans who were being discriminated against in the Library of Congress.” Ringer, who went on to become the first woman Registrar of Copyrights prevailed on her claims. Rachel Kim, *Celebrating Women in Leadership at the Copyright Office*, COPYRIGHT ALLIANCE (Mar. 8, 2018), <http://www.Copyrightalliance.org>.

⁴³ See Abby Callard, *Emmett Till's Casket Goes to the Smithsonian*, SMITHSONIAN MAG. (Nov. 9, 2009), <https://www.smithsonianmag.com/arts-culture/emmett-tills-casket-goes-to-the-smithsonian-144696940>.

⁴⁴ See THE MARTIN LUTHER KING, JR. RESEARCH AND EDUCATION INSTITUTE, <https://kinginstitute.stanford.edu/encyclopedia/montgomery-bus-boycott> (last visited May 19, 2021).

⁴⁵ Although Berry was the sole composer of the song, when he “finally got his hands on a copy of the record, he saw he was listed as only one of three songwriters. Alan Freed, the disc jockey who had so aggressively promoted the song, was another. The third was Russ Fratto, a man he'd never heard of. Trading credit for

dence that any African-Americans participated in these legislative negotiations. African Americans were deprived of the opportunity to add their insights, objections or long-standing experiences of copyright deprivation to the debate on copyright revision.

The exclusion of African-American creators from the levers shaping copyright policy is in no way some fringe issue. In the American music industry African-American creators innovated virtually every musical genre that fueled the music industry subsists on. In a word, Black artists and innovators ARE the American music industry. The glaring absence of the interests of these artists in shaping the process raises serious questions about its legitimacy, particularly when there was and is a huge gap between the contributions of African-American artists and their reward under copyright law.

The copyright termination provisions came out of a long process of copyright debate, revision and legislation. All the large stakeholders affected by copyright revision took their places at the table. All that is, except one group with an outsized interest, even if they didn't know it — African-American artists. The process was unrepresentative, and the legal academy of scholars have also failed to address its implications. The stark exclusion of African-American creators is dissonant, given their contribution to music industry revenues. Because of institutional racism, a group with a massive stake in issues of copyright protection, ownership and recapture had no input regarding how the new Copyright Act should look. Black creators, a group ravaged by the 1909 Act, had no opportunity to improve it.

IV. *THE 1976 COPYRIGHT TERMINATION PROVISIONS: A FIGHT AGAINST "UNREMUNERATIVE TRANSFERS"*

The 1976 Act eliminated the bifurcated fifty-six-year term of duration in the 1909 Act, replacing it with a unitary term of life of the author plus fifty years.⁴⁶ For corporate owners, the 1976 Act established a duration of seventy-five years from date of creation.⁴⁷ The new 1976 Act eliminated the renewal provision of the old 1909 Act and replaced renewal with the copyright termination provisions found today in 17 U.S.C. § 203.⁴⁸

airplay, known as payola, was a common practice at the time, especially when the song was by a black artist." See Jesse Wegman, *The Story Of Chuck Berry's 'Maybellene'*, NPR (July 2, 2000), <https://www.npr.org/2000/07/02/1076141/maybellene>.

⁴⁶ See 17 U.S.C. §302 (1976 version) (providing for a copyright term of life plus 50 years).

⁴⁷ See *id.*

⁴⁸ The 1999 Copyright Term Extension Act ("CTEA") added on twenty years of additional copyright protection for individuals. The CTEA changed the duration

Congress stated that the purpose of the termination provisions was to give authors/creators a second chance of realizing the value of and monetizing their works.⁴⁹ Congress recognized that artists are generally unsophisticated and would occupy a poor negotiating position in initial contracts with music publishers and record labels. Remarkably, the copyright recapture provisions are the only in place in the entire Copyright Act that expressly recognize inequality, as well as the unfavorable bargaining position authors/creators are in at the outset of their career when the deals are being signed.

At the time of the 1976 Act copyright revisions, the Register of Copyrights was particularly concerned about what he called “unremunerative transfers.” These are transfers by unsophisticated artists to larger entities like record labels and music publishing companies.⁵⁰ For this reason, Congress made the right to terminate and recapture copyrights inalienable.⁵¹ The 1976 Copyright termination provisions rebuked the *Fred Fisher Music* case, where the Supreme Court held that authors could sign away their renewal term.

The Register of the Copyright’s “major concern about lengthening the renewal term was that authors should benefit from it.”⁵² In hindsight, this concern seems ironic, given how terrible the copyright termination provisions resulted for authors. Professor Litman, a leading copyright scholar, recognized the complex mechanics of the termination provisions make the termination right “largely illusory.”⁵³

V. *THE TORTURED MECHANICS OF COPYRIGHT TERMINATIONS UNDER 17 U.S.C. § 203*

Scholars unanimously agree that the copyright termination provisions are unwieldy and overly complex. The complexity of the provisions

for corporate works to either ninety-five years from publication to one hundred twenty years from creation. Pub. L. No. 105-298, 112 Stat. 2827 (1998) (amending 17 U.S.C. §§ 301–304).

⁴⁹ See Chase A. Brennick, *Termination Rights in the Music Industry: Revolutionary or Ripe for Reform?*, 93 N.Y.U. L. REV. 786, 788 (2018) (noting that [w]hen Congress created the termination right, it intended to give authors a second chance after having made a disadvantageous deal, either because of the author’s lack of bargaining power or inability to foresee the work’s potential market value.”).

⁵⁰ See Pamela Samuelson, *Notice Failures Arising from Copyright Duration Rules*, 96 BOS. U. L. REV. 667, 679 (2016) (noting that the “Register remained firm about the need to protect authors against unremunerated transfers which had proven to be the ‘the most explosive and difficult issue’ of the copyright revision process.”).

⁵¹ See 17 U.S.C. § 304(c)(5) (2006); see also *Stewart v. Abend*, 495 U.S. 207, 218 (1990).

⁵² Samuelson, *supra* note 49, at 673.

⁵³ Jessica Litman, *Real Copyright Reform*, 96 IOWA L. REV. 1, 36 (2010).

presents “a daunting challenge to an author or successor looking to terminate.”⁵⁴ To further cloud matters, “[d]espite being law for almost four decades, the terminations of transfer provisions of the [1976 Copyright] Act have led to limited jurisprudence to date.”⁵⁵ However, legal scholars have not widely considered the deleterious copyright termination conundrum as it impacts African-American artists and those similarly situated to them. As I have stated elsewhere, African-American creativity and innovation are the laboratory of intellectual property, both shaping IP and being (typically) adversely impacted by IP formalities such as termination.

Under the 1976 Copyright Act recapture provisions in section 203, an artist who has transferred her rights to an entity such as a record label or music publishing company can, in theory, reclaim those rights thirty-five years from the date of the transfer/grant or forty years from the date of publication. To recapture, the artist must draft a notice (actually a set of notices) perfect in form and content, serve that notice on the transferee, and record the notice in the U.S. Copyright Office.⁵⁶

Artists must serve notices of copyright termination on transferees between no more than ten and no less than two years before the effective date of termination.⁵⁷ This is one set of the copyright termination’s “windows.” Another window is a five-year period after the termination date.⁵⁸ The copyright termination provisions set forth who is eligible to terminate copyright transfers.⁵⁹ The general formula states “the author, if living, is the person eligible to exercise a termination interest.”⁶⁰ The termination right is also descendible: “if the author is deceased, the termination interest will be divided among the author’s widow or widower, children and grandchildren.”

The complexity of the termination process is mind dizzying, including correctly selecting the date in which the grant can be terminated. Separate, and even more complex rules, apply to works by joint authors and derivative works.⁶¹ And questions abound about what works can, and cannot be terminated. At the outset, copyright terminations require strict

⁵⁴ R. Anthony Reese, *Termination Formalities and Notice*, 96 B.U. L. REV. 894, 898 (2016).

⁵⁵ Robert Meitus, *Commentary: Revisiting the Derivative Works Exception of the Copyright Act Thirty Years After Mills Music*, 5 IP THEORY 60, 71 (2005).

⁵⁶ See 17 U.S.C. § 203(a)(4) (prescribing how termination may be effected).

⁵⁷ See *id.* § 203(a)(4)(A).

⁵⁸ See *id.* § 203(a)(3).

⁵⁹ See *id.* § 203(a)(1)-(2).

⁶⁰ See SHELDON W. HALPERN, HOWARD ABRAMS & DAVID E. SHIPLEY, *COPYRIGHT: CASES & MATERIALS* 587 (1992); see also 17 U.S.C. § 203(a)(1)-(2) (specifying those entitled to exercise termination rights).

⁶¹ See 17 U.S.C. § 203(a)(1) (specifying how joint authors may exercise termination rights).

attentions to various dates: “the most basic analysis of whether a transferred copyrighted work is eligible for termination requires four main dates:

1. the date of the work’s creation;
2. the date of the work’s publication (if applicable);
3. the date of copyright registration (if applicable); and,
4. the date of the transfer or assignment.”⁶²

So much for the notion that copyright formalities of publication and registration are dead!

The Code of Federal Regulations (“CFR”) in § 201.10 sets forth procedures for issuing copyright termination notices. However, and unbelievably, the U.S. Copyright Office “does not provide printed forms for the use of persons serving notices of termination” required by the CFR.⁶³ But it does set forth the requirements in five dense pages, covering notice procedures for terminations under the 1909 and 1976 Copyright Act Termination provisions. The Copyright Office does provide Form TCS (Notice of Termination Cover Sheet) for recordation of copyright termination notices with the Copyright Office.⁶⁴ The form itself is invalid if it fails “to comply with Copyright Act’s statutory requirements . . . and the Office’s regulations . . . and instructions.”⁶⁵ If a party incorrectly files the notices, the outcome could be catastrophic, requiring a re-do that could result in the windows closing.

Professor Reese, the uncontested academic king of copyright termination law, has outlined the many steps that an author, at a minimum, is required to follow, and it is revelatory:

- identify who holds the right to terminate, and,
 - if the right is held by multiple parties, identify and correctly compute their proportionate shares, and get the holders of more than one-half of the shares to agree to terminate;
 - calculate the time period during which termination can occur and choose an effective termination date in that period;
 - calculate the time period during which advance notice must be served on the party whose rights are being terminated;
 - identify and locate the party on whom the advance notice must be served; and

⁶² Julia Wu & Eric Malmgren, *Grappling with the Most Notoriously Complex Provision in U.S. Copyright Law*, AUTHORS ALLIANCE (Oct. 26, 2017), <https://www.authorsalliance.org/2017/10/26/grappling-with-the-most-notoriously-complex-provision-in-u-s-copyright-law/>.

⁶³ 37 CFR §201.10 (2021).

⁶⁴ Form TCS, <https://www.copyright.gov/formtcs.pdf>.

⁶⁵ *Id.*

- draft a proper termination notice, serve it properly, and record a copy of it in the U.S. Copyright Office before the effective date.”⁶⁶

Each of these steps is fraught with the potential for missteps. Inherent in the copyright termination provisions are some preposterous assumptions. The provisions presuppose that an author, in the music business, typically a twenty-something year old, would plan ahead thirty-five years into the future at the time of signing a contract transferring her copyrights. The provisions imagine 20-something artists, unsophisticated in contracts and copyright, looking far ahead and calendaring dates deep into the future.

A practical but critical issue that often arises (but one that is not discussed in academic literature) is the conundrum of finding the original transfer contract, which is needed to effectuate copyright terminations. Every termination is based on the “grant”, that is the contract, transferring ownership to a music publishing or record label. What if the artist cannot locate the original transfer contract? I encountered this very issue last year in attempting to help one of the most iconic 1980’s-era rap groups pursue copyright recapture. Typically, a sophisticated transferee such as a record label or major music publishing company would retain copies of all contracts and transfers of copyright. But in the early hip-hop industry, many independent record labels and publishers kept far from immaculate records, begging the question: what if no one can find the original contract/transfer, or the music publisher refuses to convey the original transfer agreement?

In the 1980’s and ‘90’s, many labels sprang up that were not well-managed, and the original contracts were not easy to find. Perhaps worse, there is evidence that some of the hip-hop labels of that era (as in other eras) behaved in horribly unethical ways.⁶⁷ History shows that even labels

⁶⁶ See R. Anthony Reese, *Termination Formalities and Notice*, 96 BOS. L. REV. 895, 898 (2016).

⁶⁷ Naima Cochrane, *Industry Rule No. 4080: Are Bad Record Deals Unethical, Or Just Part of the Game?*, BILLBOARD MAGAZINE (Feb. 6, 2020), <https://www.billboard.com/articles/columns/hip-hop/8550339/badrecord-label-deals-mase-kelis-90s> (The singer “Kelis said she was “blatantly lied to and tricked” by “the Neptunes and their management and their lawyers and all that stuff” when she signed her initial deal. The ‘Milkshake’ singer says she was told: “[we] were going to split the whole thing 33/33/33.” When she realized she wasn’t making any money off of her albums, only her touring, she says she questioned her deal. “Their argument is: ‘Well, you signed it.’ I’m like: ‘Yeah, I signed what I was told, and I was too young and too stupid to double-check it.’”).

owned and operated by African Americans treated artists no better than white-controlled labels and did not advance racial empowerment.⁶⁸

Even more troubling, if an artist cannot locate the contract that transfers copyright, there is no formal provision or mechanism requiring a record label or publishing company to turn over the transfer. If a label or music publisher, for example, declined to provide a copy of the original transfer, the artist could pursue a declaratory judgment action in federal court. But these actions are very expensive and beyond the means of ordinary people. And in the Ninth Circuit, at least, if the artist does not prevail on the declaratory judgment action, she could be liable for paying the defendant's attorney's fees.⁶⁹ This author has often joked that if Congress had wanted to devise a copyright termination mechanism that would virtually ensure most authors could never recapture their rights, Congress could have done little better than section 203 and its companion sections.

The copyright recapture provisions were fashioned by special interest groups, led by corporate entities like record labels and film studios. This dynamic reflects that "many of the most powerful forms of upward-redistributing rent-seeking take place in obscure decision-making contexts."⁷⁰ The termination provisions that emerged from that context were unreflective of a major constituent group, African-American music artists, who have powered the music industry from its inception. The dynamics of race and class in America augur that Black artists are likely to be disproportionately hurt by the termination provisions, but they are not alone.

Despite the ability of artists to terminate rights in songs and sound recordings since 2013, "[t]he stampedes of recording artists seeking to regain control of their sound recordings that many thought would flood the courts has not come to pass; or at least not of yet."⁷¹ And there is evidence that many artists from the old-school hip-hop era and beyond are completely unaware that a right to recapture their works even exists.

⁶⁸ See Stuart Tully, *Buying and Selling Out: African-American Ownership of Record Labels in the Twentieth Century*, LSU DIGITAL COMMONS (2016) (contending that "black-owned record labels ultimately became indistinguishable from any other label, and demonstrate the futility of believing racial uplift can come through a consumer enterprise.").

⁶⁹ See *Doc's Dream, LLC, v. Dolores Press, Inc.*, No. 18-56073, (9th Cir. May 6, 2020) (holding that attorney's fees as provided for under the Copyright Act apply to declaratory judgment actions).

⁷⁰ Teles, *supra* note 17.

⁷¹ See Tuneen Chisolm, *Whose Song is That? Searching for Equity and Inspiration for Music Vocalists Under the Copyright Act*, 19 YALE J. L. & TECH. 274, 323 (2018).

VI. FROM MOVIES TO SOUND RECORDINGS: AT GROUND ZERO OF “BATTLEGROUNDS TERMINATION”

Hollywood screenwriters of hit motion pictures have initiated copyright terminations that have the potential to impact the bottom line of major record labels and film studios.

Unlike most blues and hip-hop artists, screenwriters tend to be more sophisticated and conversant with legal devices. Motion pictures are works made for hire, and are one of the nine categories listed in the Copyright Act that are not subject to termination.⁷² Because motion pictures are works made for hire, producers, directors, actors and others involved in motion picture production can never seek copyright recapture for these works. However, in contrast to the movie itself, a motion picture script is literary work or work of performing arts that can be terminated under the Copyright termination provisions.⁷³

A screenwriter of the hit film “Nightmare on Elm Street” successfully exercised termination rights to the script in a decision affirmed in federal court.⁷⁴ Screenwriters for other hit movies are also effectuating termination notices for films such as *Beetlejuice*, *Die Hard*, *Who Framed Roger Rabbit*, and the *The Terminator*.⁷⁵ The rash of movie screenplay terminations “threatens to unsettle who owns the ability to make sequels and reboots of iconic films from the mid- to late-’80s.”⁷⁶ Movie industry people, including screenplay writers, are typically more sophisticated than hip-hop artists in copyright matters.

On the music side, copyright terminations have become a battleground between record labels seeking to retain sound recordings, and artists seeking to recapture those works. By long-standing custom and practice, record labels “take the position that as a matter of law, all sound recordings (also known as ‘masters’) created during the term of the contract fall within the subject matter and scope of the exclusive recording

⁷² See 17 U.S.C. § 203(a) (excepting works made for hire from termination).

⁷³ See Michael Henry Davis, *The Screenwriter’s Indestructible Right to Terminate Her Assignment of Copyright: Once a Story is ‘Pitched’ a Studio Can Never Obtain All Copyrights in the Story*, 18 CARDOZO ARTS & ENT. L.J. 93 (2000).

⁷⁴ *Horror, Inc. v. Victor Miller*, Case 3:16-cv-01442-SRU (D. Conn. Oct. 9, 2018).

⁷⁵ Jeff Sneider, *Studios May Lose ‘Die Hard,’ ‘Terminator,’ ‘Beetlejuice’ Rights as Authors Cite Copyright Law*, COLLIDER (Oct. 2, 2019), <https://collider.com/terminator-die-hard-beetlejuice-rights-may-revert-toauthors-under-law>.

⁷⁶ Eriq Gardner, *Real-Life ‘Terminator’: Major Studios Face Sweeping Loss of Iconic ‘80s Film Franchise Rights*, HOLLYWOOD REPORTER (Oct 2, 2019), <https://www.hollywoodreporter.com/thr-esq/real-life-terminator-major-studios-face-sweeping-loss-iconic-80s-film-franchise-rights-1244737>.

agreement and shall be deemed to be property of the label from the moment of fixation.”⁷⁷

Major label record industry contracts routinely and as a matter of custom and practice specify that the artist creative output is a work made for hire, and that alternatively, if found not to be a work made for hire that the able artist transfers and assigns all rights to the record label.⁷⁸ Professor Yen points out that there are a number of ways for rightsholders to evade copyright termination through what might be called “creative” contracting methods.⁷⁹ Nonetheless, music artists are fighting back and pursuing copyright terminations. For major artists like Sir Paul McCartney and Prince, beginning the termination process is a game that leads, invariably, to a seat at the table to renegotiate a new and better deal.⁸⁰ But major labels are vehemently resisting the termination efforts of lesser artists, as illustrated by a pair of class action lawsuits by artists against both Universal Music Corp. and Sony Music Corp.⁸¹

Ground zero of the battle is whether sound recordings are terminable under section 203 of the Copyright Act. In several lawsuits, the class of plaintiffs allege that “while the Copyright Act confers upon authors the valuable ‘second chance’ that they so often need, the authors of sound

⁷⁷ See Hector Martinez, *Cash from Chaos: Sound Recording Authorship, Section 203 Recapture Rights and a New Wave of Termination*, 4 PACE INTELL. PROP. SPORTS & ENTER. L. FORUM 445, 459 (2014) (contending that “any key member of recording artist that signed the recording contract is a bona fide author of a sound recording for purposes of claiming standing in order to effectuate a termination of transfer of grant under Section 203 of the 1976 Copyright Act”).

⁷⁸ See Kathryn Starshak, *It’s the End of the World as Musicians Know It, or Is It?: Artists Battle the Record Industry and Congress to Restore Their Termination Rights in Sound Recordings*, 51 DEPAUL L. REV. 71, 111 (2001) (noting that “record companies [frequently] will attempt to ensure that the artist’s recordings are the property of the company by including provisions in the contract that the recordings are being created on a work-for-hire basis.”).

⁷⁹ See Alfred C. Yen, *Private Ordering and Notice Failure in the Context of Termination*, 96 BOS. U. L. REV. (2016). Professor Yen notes “that a party could acquire the copyright to a work and evade termination using two kinds of writings. The acquiring party could ask the author to agree explicitly to work made for hire treatment on the premise that she is an employee who will, or did, create the work while acting within the scope of her employment. Alternatively, an acquirer could ask the author to recite that the work is a Special Work and agree to work made for hire treatment.”

⁸⁰ McCartney sued Sony/ATV in 2017 to recapture rights in compositions sold to Michael Jackson, and subsequently acquired by Sony. Sony soon capitulated, and the parties settled the issue on terms apparently satisfactory to all parties. See *Paul McCartney Finally ‘Gets Back’ His Beatles Copyrights*, PACE INTELL. PROP., SPORTS & ENT. L. FORUM (Oct.29, 2018), <https://pipself.blogs.pace.edu/2018/10/29/paulmccartney-finally-gets-back-his-beatles-copyrights>

⁸¹ See *Waite v. UMG Recordings, Inc.*, case no. 1:19-cv-01091 (S.D.N.Y. July 13, 2020).

recordings . . . who have attempted to avail themselves of this important protection have encountered not only resistance from many record labels, they have been subject to stubborn and unfounded disregard of their rights under the law. . . and willful copyright infringement.”⁸²The class of plaintiffs allege that record labels like Sony and Universal Music Group “routinely and systematically refuse to honor [termination notices].”⁸³

At the epicenter of battleground termination are sound recordings. Composers have had success in effectuating copyright terminations. Composers began the recapture process in 2014, and their first case resulted in a resounding victory, at least on the surface. It involved the compositions of Victor Willis, the motorcycle cop character in the 1970’s group “Village People.” A French producer claimed to own the rights to the compositions. Even worse, a co-producer, Henri Belolo registered copyrights as the co-writer of the Village People catalog. That Village People catalog included enormously valuable hit songs like *YMCA*, *Macho Man.*, and *In the Navy*. The ugly underbelly of the Village People termination case reveals rapacious music industry practices that force artists to share copyright credit.

Willis sued to recapture his share of the compositions, and to remove one of the purported co-writers, Henri Belolo. Willis prevailed in both instances⁸⁴. In 2015, a federal jury in San Diego decided that “Belolo [was] not a joint author of thirteen of the twenty-four disputed works – including the famous party hit “Y.M.C.A.” – and awarded Willis 50 percent of the copyrights to those 13 songs.”⁸⁵ It thus seems clear that composers who resolutely and correctly navigate the labyrinth of the copyright termination provisions will succeed in recapturing rights to songs. It also seems clear that such success will be the exception and not the norm for most artists. As Professor Bartow has noted, Victor Willis had a spouse who was an attorney and “was lucky enough to have half a million dollars at his disposal to spend on lawyers.”⁸⁶

⁸² *Id.*

⁸³ *Id.*

⁸⁴ See Scorpio Music (Black Scorpio) S.A., Dec 27, 2016, Case No.: 11-cv-01557-BTM(RBB) (S.D. Cal., Dec. 27, 2016); see also Eriq Gardner, “Village People Singer Victor Willis Breaks Silence About Copyright Lawsuit Win (Exclusive)”, *Hollywood Rptr.*, May 11, 2012, noting that [s]ongs by the Village People continue to earn millions of dollars per year . . . [and that Willis . . . stands to benefit significantly as his revenue share on the group’s songs could potentially increase from 12-20 percent to 50 percent.”

⁸⁵ See Bianco Bruno, *Latest Village People Song Spat Dismissed*, COURTHOUSE NEWS SERVICE (Jan. 22, 2016), <https://www.courthousenews.com/latest-village-people-song-spat-dismissed>.

⁸⁶ See Ann Bartow, *Using the Lessons of Copyright’s Excess to Analyze the Political Economy of Section 203 Termination Rights*, 6 TEX. A&M J. PROP. L. 23, 30

Copyright provides separate copyrights in compositions and sound recordings. In battleground termination, sound recordings are another matter entirely. As the UMG litigation shows, record labels stand ready, and well-financed, to fight to the death to prevent the recapture of sound recording. In *Johansen v. Sony Music Ent., Inc.*, Sony posited numerous and highly technical theories to thwart a class action copyright termination suit.⁸⁷ Sony asserted that the sound recordings “are works made for hire,” and thus not subject to termination.”⁸⁸ Sony challenged the form as well as the timeliness of the notices. Judge Ramos rejected Sony’s arguments on a motion to dismiss on the complaint due to lack of timeliness and form.⁸⁹

Similarly, in the Universal class action suit, Universal asserted a myriad of theories to obstruct termination. It is clear that the major labels have a strategy as they make the exact same arguments in both class action lawsuits. Labels point to contract language conveying rights in perpetuity to the label in sound recording deals. Labels cite the work made for hire language in sound recording contracts, arguing that works made for hire are ineligible for termination. The *Waite* court rejected Universal Music’s arguments that the class of plaintiff’s claims were time-barred under the copyright statute of limitations.⁹⁰

Major record labels also endeavor to weaponize the very *act* they encouraged artists to do in the 1970’s and ‘80’s against those artists now. Record labels, for tax and other reasons, encouraged sound recording performers to enter into “loan-out deals” to minimize risks to artist assets.⁹¹ Those same labels now assert that since most recording artists in the 1970’s and 1980’s formed loan-out companies to hold their IP and royalty entitlements, the artists are not entitled to terminate their record label agreements. The labels contend that since those rights were transferred—

(2020). The author notes: “[t]his termination rights saga had a happy ending for Victor Willis but it is not at all clear that other authors will experience similar triumphs over seasoned, well-funded corporate intermediaries anxious to retain control over creative works and even more determined not to cut authors into the revenue streams that these works generate.” *Id.* at 31.

⁸⁷ See Opinion and Order, *Johansen, et al v. Sony Music Ent. Inc.*, 19 Civ. 1094 pg. 3, (ER)(S,D,N.Y. 2020), file:///C:/Users/Kevin/Downloads/Johansen%20v%20Sony%20(2).pdf.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Waite v. Universal Music Grp.*, 50 F. Supp. 3d 430, 439 (S.D.N.Y. 2020).

⁹¹ See Tonya M. Evans, *Statutory Heirs Apparent? Reclaiming Copyright in the Age of Author-Controlled, Author-Benefiting Transfers*, 119 W. VA. L. REV. 297, 322-323 (2016),

ironically at the behest of labels—the labels claim that the individual performers have no right to terminate.⁹²

As at least one analyst has noted, these assertions by the labels seem specious at best. An artist who transfers her rights to another entity is ineligible to recapture her copyright. However, “[m]any musicians set up loan-out companies to enter into recording deals on their behalf and these shell entities are simply agents and proxies, mere extensions of the artists themselves. Based on accepted industry practice, [labels] cannot argue in good faith that an artist’s loan-out company is anything other than the artist itself.”⁹³

Record labels also assert other bases for denying terminations of transfer. The statute of limitations is one such basis. The statute of limitation for copyright claims is three years from the time the claim accrues. The labels contend that claims contesting ownership are barred by the statute of limitations.⁹⁴ This issue also arose in the Scorpio case. There, Willis contended one of the three copyright claimants in the Village People catalog, “Henri Belolo, was not an author of twenty-four of the thirty-three compositions in dispute and therefore Willis’ share is 50% for those compositions.”⁹⁵

The defendants asserted that copyright’s three-year statute of limitations applied to terminations, contending Willis should have pursued termination as soon as Scorpio contested ownership of the compositions. The court rejected this argument. Now Willis, the “cop” character in the Village People has recaptured his ownership share in songs like *Macho Man*, *In the Navy*, and the iconic song played at weddings, sports events and parties, *YMCA*. A rare victory for an African-American artist of his era.

⁹² See Aaron J. Moss & Kenneth Basin, *Copyright Termination and Loan-Out Corporations: Reconciling Practice and Policy*, 3 HARV. J. SPORTS L. 55, 57 (2102) (noting that “[a]rtists who, for tax reasons, have utilized so-called “loan-out corporations” (entities by which artists “loan out” their own personal services to employers) may find that they have unwittingly nullified their own copyright termination rights by rendering their creative efforts “works for hire, “and therefore ineligible for termination.”).

⁹³ See Scot Alan Burroughs, *Terminators, Mount Up!: Section 203 and Copyright Recovery (Part I)* (May 15 2019), <https://abovethelaw.com/2019/05/terminators-mount-up-section-203-and-copyrightrecovery-part-i>.

⁹⁴ *Waite*, 50 F. Supp. 3d 430.

⁹⁵ See Pamela Chestek, *Don’t Wait for Termination to Claim Copyright Ownership*, (Mar. 26, 2013, <https://propertyintangible.com/2013/03/dont-wait-for-termination.html>).

VII. ACADEMIC PERSPECTIVES AND THE RACIAL DIVIDE

The racial divide reflects the gulf between whites in America and African-Americans. Academic discourse on copyright terminations has until recent years been bereft of any acknowledgement of the impact of copyright law on African-American artists. Critical analysts have posited that the American music industry has historically functioned as “‘a colonial system’ a colonial system because of the gross fiscal advantage and explicit racism exacted on [African-American] artists by their record companies and handlers.”⁹⁶ In fact the copyright termination provisions are just one of what the author terms “the seven deadly sins of copyright law” that devastated African-American creators from the 1909 Act to the present.⁹⁷

According to the American Bar Association’s own statistics, the legal profession is the “least diverse of all the professions.”⁹⁸ The Intellectual Property Section of the Bar is even less diverse vis-à-vis Black lawyers, as is the IP legal academy.⁹⁹ There is little doubt that this is a contributing factor as to why IP scholars have not, until recently, analyzed issues without regard to dynamics of race and gender. Indeed, no scholar has undertaken an analysis of copyright terminations as they relate to African-American authors.

Professors Reese and Loren have done impressive and important work in the area of copyright terminations. However, their work does not recognize the unique historical burdens of copyright formalities on Black artists. For example, Professor Loren recognizes the complexity of the copyright termination provisions requires resources and the retention of experienced counsel.¹⁰⁰ She goes off track in this author’s view, however,

⁹⁶ See Jennifer C. Lena, *Meaning and Membership: Samples in Rap Music, 1979-1995*, 32 *POETICS* 297, 301 (2004).

⁹⁷ The seven deadly sins: 1. Fixation; 2. Originality; 3. Idea-Expression; 4. Copyright formalities; 5. Credit deprivation; 6. False copyright registrations; 7. Hostile judicial interpretations. David M Adler, *The Seven Deadly Sins of Copyright*, <https://indiefilmaw.wordpress.com/2010/04/08/the-seven-deadly-sins-of-copyright/>.

⁹⁸ Allison E. Laffey & Allison Ng, Diversity and Inclusion in the Law: Challenges and Initiatives (May 2, 2018) <https://www.americanbar.org/groups/litigation/committees/jiop/articles/2018/diversity-and-inclusion-in-the-law-challenges-and-initiatives/> (“Despite the increased emphasis on diversity and inclusion within the legal field over the past decade or so, the legal profession remains one of the least diverse of any profession.”).

⁹⁹ See J. Shontavia Johnson, Tonya M. Evans & Yolanda M. King, *Diversifying Intellectual Property Law: Why Women of Color Remain “Invisible” and How to Provide More Seats at the Table*, 10 *LANDSLIDE* (2018) (noting that “[a]ccording to American Intellectual Property Data, the IP field is overwhelmingly white and male.”). https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2017-18/march-april/diversifying-intellectual-property-law/.

¹⁰⁰ Lydia Pallas Loren, *Renegotiating the Copyright Deal in the Shadow of the “Inalienable Right to Terminate*, 62 *FLORIDA L. REV.* 1329 (2010).

when she asserts, as have other IP scholars in the context of copyright formalities, that only those artists who value their work will pursue terminations.¹⁰¹

Professor Loren contends “[s]ome argue that the specific steps required to exercise a termination right make it extremely difficult for authors and their families to actually terminate an agreement and even attribute that to the powerful lobby industries that opposed the termination rights. However, freedom of contract and sanctity of contract should not be easily overridden. Clear rules with established protocols for termination are an appropriate trade-off.”

For African-Americans, the notion of freedom of contract has mostly been a canard. The premise appears to be that because “a contract is the result of the free bargaining of parties who are brought together by the play of the market and who meet each other on a footing of social and approximate economic equality, there is no danger that freedom of contract will be a threat to the social order as a whole.”¹⁰² However, given the long history of oppression suffered by African-Americans, it is impossible to accept the premise of equality on which this premise rests. The case for preserving freedom of contract is not nearly so strong as Professor Loren asserts.

Similarly, assertions that copyright terminations promote the creation of works under a utilitarian incentive theory simply collapse in the context of African-American authors. Professor Loren, for example, asserts that “[t]he termination right permits the author and the author’s family to re-examine any transfer thirty-five years later and determine if the deal struck resulted in appropriate compensation or otherwise was a satisfactory arrangement. Thus, termination rights help fulfill the utilitarian goal of dissemination of creative works.”¹⁰³

That goal is completely overshadowed in the face of social inequality. Early blues and rock artists lacked representation and were often illiterate or semi-literate.¹⁰⁴ The 1990’s and 1980’s inner-city rap artists like the

¹⁰¹ *Id.* at 1354. “The reality is that the termination rights will be exercised only for very successful works with commercial staying power.”

¹⁰² Fredrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 630 (1943).

¹⁰³ *Id.* at 1349.

¹⁰⁴ See Paul Oliver, *Blues Research: Problems and Possibilities*, 2 J. MUSICOLOGY 377, 380 (1983) (noting that “[f]ew blues singers can read or write”); see also Hisham Melhem, *Blues, the Devil’s Music*, *Alarabiya News* (May 15, 2020), <https://english.alarabiya.net/views/news/world/2015/05/18/Blues-the-Devil-s-music>. (noting that “[m]ost of the great Delta blues singers were illiterate or had rudimentary education, and none of them studied music”).

bluesmen before them, also lacked resources.¹⁰⁵ To imagine these creators, as youths, would make these kinds of calculations, and have the wherewithal to navigate the Byzantine copyright termination process is fairly preposterous. The incentive theory of copyright as it relates to the recapture right is untenable against such a background.

VIII. STREAMING AND ADVERTISING AND THE OLD-SCHOOL HIP-HOP CATALOG

Digital music streaming has revitalized the music business. Rap music leads the music industry in revenues, as hip-hop has become the dominant musical genre in the U.S. and globally Hip-hop and R&B music account for over one-third of all digital¹⁰⁶ streaming revenues.¹⁰⁷ Leading artists like Nicki Minaj, Drake and Kanye West produce industry-leading streaming numbers. The number one playlist on Spotify is “Rap Caviar.”¹⁰⁸ A relatively new app, Tik-Tok, has taken a leading role in promoting streaming of hip-hop music.¹⁰⁹

Investment bankers salivate over the future of hip-hop, projecting that “music revenue is going to double to about \$131 billion by 2030. . . [and] music streaming sales are dominated by hip-hop artists such as Drake, Kendrick Lamar, The Weeknd, Migos and Cardi B.”¹¹⁰

Hip-hop is also front and center in the domains of film, television and advertising, where the music is widely used. Rap music, more than any other genre, has been at the forefront of advertising. Analysts note that

¹⁰⁵ See Edward C. Burkes, *Bronx Rate of Poverty is the Highest*, N.Y. TIMES (Nov. 4, 1972), <https://www.nytimes.com/1972/11/04/archives/bronx-rate-of-poverty-is-the-highest.highest.html>

¹⁰⁶ “The growing popularity of hip-hop was a contributor to a massive 72% increase in on-demand audio streaming in the U.S. But it’s not just a U.S. trend: Hip-Hop in the streaming era has gone mainstream around the world.” Gary Smith, *Hip-Hop in the Streaming Era: A New Generation Takes Over*, MUSIC INDUSTRY INSIGHTS (Apr. 25, 2019), <https://insights.midem.com/music-business/hip-hop-in-the-streaming-era>.

¹⁰⁷ Paul Resnikof, *Hip-Hop + R&B Account for 1 Out of Every 3 Music Streams in America*, DIGITAL MUSIC NEWS (July 9, 2018), <https://www.digitalmusicnews.com/2018/07/09/hip-hop-rap-music-streaming-2018>.

¹⁰⁸ *How a Hit Happens Now: The Most Influential Playlist in Music is Spotify’s Rap Caviar, Which Turns Mixtape Rappers into Megastars*, VULTURE.COM (2017), <https://www.vulture.com/2017/09/spotify-rapcaviar-most-influential-playlist-in-music.html>.

¹⁰⁹ TikTok has become a force in music distribution. “No emerging app helped break more songs in 2019 than TikTok with a global reach of 500 million users tuning into its short-form video clips.” U.S. MUSIC: NIELSON MID-YEAR REPORT, U.S. 2019 (2019), <https://www.nielsen.com/wp-content/uploads/sites/3/2019/06/nielsen-us-musicmid-year-report-2019.pdf>.

¹¹⁰ Kori Hale, *Goldman Sachs Bets on Hip-Hop and Millennials for Music Revival*, FORBES (Feb. 6, 2019), <http://www.forbes.com>.

“[f]rom insurance commercials to ads for Wrigley’s gum, more and more companies are looking to up their cool factor [by using rap music in television advertising]”.¹¹¹

The use of music in advertising is a billion-dollar business, and one that can enrich music artists. Missy Elliott, Lil Dicky and Future are just a few of the big names whose music has shown up in some of the best commercials on TV.¹¹² The highlight of the 2019 Superbowl was a Mercedes-Benz ad featuring the song *Stand-Up* by the rapper Ludacris.¹¹³ Ludacris scored a hit with the song in 2003. Later, he and coproducer Kanye West were sued for copyright infringement by an obscure group called IOF.¹¹⁴

However, music advertising revenue can be a double-edged sword for artists. On the one hand, ad appearances are lucrative, and come without the tortured accounting practices of record industry contracts. On the other, they can cheapen or tarnish an artist’s legacy. The iconic 1990s rap duo Salt n Pepa appeared in a Geico Insurance commercial in 2014 performing their monster 1987 hit, *Push-It*.¹¹⁵ Salt n Pepa did not write the song — it was written by famous hip-hop producer Herby “Luvbug” Azor.¹¹⁶ As mere performers, the rap duo would receive payments for appearing in the commercial. But as non-composers they would not be

¹¹¹ See K C. Orcutt, *21 Times Rappers Provided the Soundtrack for TV Commercials*, XXL (July 16, 2016), <https://www.xxlmag.com/rappers-music-tv-commercials>.

¹¹² *Id.*

¹¹³ See Rania Aniftos, *Ludacris Makes Life a Little Less Boring in Mercedes-Benz Super Bowl Commercial: Watch*, BILLBOARD MAGAZINE (Feb. 1, 2019), <https://www.billboard.com/articles/news/8496167/ludacris-mercedes-benz-commercial-watch>.

¹¹⁴ The unknown musical group IOF claimed that Ludacris appropriated the phrase “just like that” from their composition, a claim rejected at trial and proving once again that “nobodies” cannot prevail in copyright infringement cases. See Natalie Finn, *Ludacris, Kanye West Tell “Stand Up” Story: Ludacris and West Testify That They Had No Knowledge of the Song a Little-Known New Jersey-Based Group Is Accusing They Ripped off for Their 2003 Single “Stand Up”*, BILLBOARD MAGAZINE (May 25, 2006), <https://www.eonline.com/news/52428/ludacris-kanye-west-tell-quot-stand-up-quot-story>.

¹¹⁵ See Elias Leigh, *Salt-N-Pepa Teach People to ‘Push It’ in New Geico Commercial*, BILLBOARD MAGAZINE (Nov. 26, 2014), <https://www.billboard.com/articles/news/6327810/salt-n-pepa-push-it-geicocommercial>.

¹¹⁶ Salt N-Pepa has a tortuous history with complex music contracts, resulting in exploitation:

In 1985, Salt-N-Pepa—on the verge of becoming one of hip-hop’s marquee acts—signed a contract with Next Plateau Records that granted their manager Herby Luv Bug half of a \$5 million check for production costs, while the group’s three members split the remainder. Herby was initially receiving 100 percent of the group’s royalties until they renegotiated years later.

John Kennedy, *Confusion over His Record Deal Recalls Raps’s Bad Old Days*, YAHOO/ENTERTAINMENT (May 3, 2017), <https://www.yahoo.com/entertainment/lil->

entitled copyright license fees or royalties from the song's performance in the commercial. As non-composers, they also would not receive performance or mechanical royalties for their platinum albums. Salt and Peppa were shocked at how little they were being compensated at the height of their fame.¹¹⁷

The rap group seems grateful the commercial ad introduced them to a new generation.¹¹⁸ *Push It* was originally released in 1987 and as such, is within the window for copyright termination. However, that right belongs solely to the composer. Hip-hop music is ripe for commercial exploitation in many forms — re-issues, digital streaming, sales of vinyl, synchronization in film and television, advertising, and theatre.

As it stands, the old-school hip-hop music catalogue will create tremendous opportunities for wealth creation going forward. “Where a high-yield legacy recording or song is presumptively [at] issue, the financial stakes are extraordinary. . . . these works function as annuities [and]. . . [t]heir worth, when capitalized using standard accounting and valuation methods, can be tremendous.”¹¹⁹ That wealth, however, is likely to remain in the hands of large corporate interests under the penalizing effects of the copyright termination provisions.

IX. “UNREMUNERATIVE” TRANSFERS AND HIP-HOP MUSIC CONTRACTS

When Congress enacted the copyright termination provisions, the stated purpose was to protect artists from “unremunerative” transfers of copyright made early in their careers and at a time when they had little bargaining leverage. Copyright termination would provide artists “a second bite of the apple.”¹²⁰ Historically, African-American artists could

yachty-apos-confusion-over-191957991.html [https://www.complex.com/music/2017/05/lilyachty-confusion-over-his-record-deal-](https://www.complex.com/music/2017/05/lilyachty-confusion-over-his-record-deal)

¹¹⁷ The rap duo Salt N-Pepa also fought Herby Luv Bug and their record company, Next Plateau, over money. “The production company was paid millions. Herby wrote many of the songs. He gets money every time they are on the radio — they never quite grasped that,” says Eddie O’Loughlin of Next Plateau, an independent label that [represents] other top groups.” Dinita Smith, *How Salt-N-Pepa Turned Rock on Its Head*, INTELLIGENCER (Jan. 14, 1994) (Jan. 17, 1994), <https://nymag.com/intelligencer/1994/01/straight-outta-queens.html>.

¹¹⁸ See Dan Reilly, *Cheryl ‘Salt’ James Talks Salt-N-Pepa Nostalgia and That Geico Commercial*, VULTURE.COM (July 29, 2015), <https://www.vulture.com/2015/07/salt-n-pepa-nostalgia-geico-90s-fest.html>.

¹¹⁹ David Givens, Esq., U.S. Copyright Termination: Remonetization’s Final Frontier, (2014) https://static1.squarespace.com/static/525ed589e4b07b05fff51e46/t/570d1c6f01dbae1ce3e77c1e/14604770_50080/US+Copyright+Termination+-+Remonetization%27s+Final+Frontier+-+MIDEM+2016.pdf.

¹²⁰ Dana Halber., *Copyright Termination Rights: Giving Artists Their Second Bite at the Apple*, PACE INTELL. PROP., SPORTS, & ENT. L. F. (April 21, 2013), <https://>

serve as the poster child and “exhibit A” for “unremunerative” assignments of copyright. Artists such as Scott Joplin, Jelly Roll Morton, Bessie Smith, Little Richard and Richard Berry signed away their works for little or no compensation. Richard Berry, for example, conveyed all his rights in the composition *Louie, Louie*, a foundational rock song, for \$750 in the 1950’s.¹²¹ Little Richard reportedly conveyed his rights in the iconic song Tutti Frutti to a music publisher for \$50.¹²²

Perhaps the granddaddy of all “unremunerative” transfers was the infamous Jimi Hendrix PPX contract. In 1965, Hendrix assigned his rights in all works created between 1965 and 1969 to PPX for the princely sum of one dollar and one percent royalty rate.¹²³ The Hendrix PPX contract ended up litigated for many years after the rock icon’s death.¹²⁴ It is true that egregious recording contracts impacted black and white artists alike — the

pipsself.blogs.pace.edu/2013/04/21/copyright-termination-rights-giving-artists-their-second-bite-at-the-apple/ (“When Congress enacted the 1976 Act, which went into effect on January 1, 1978, the intent of Section 203 was to give authors and artists a “second bite at the apple,” as it’s commonly heard throughout the industry . . .”).

¹²¹ See Jon Pareles, “Richard Berry, Songwriter of ‘Louie Louie,’ Dies at 61,” *NEW YORK TIMES* (Jan 25, 1997), <https://www.nytimes.com/1997/01/25/arts/richard-berry-songwriter-of-louie-louie-dies-at-61.html>, (“In 1959, [Berry] needed money to get married, and he sold the publishing rights to “Louie Louie” to Max Feirtag, the owner of Flip [Records].”, for \$750. . . [p]ublishing royalties for the ever-increasing number of versions of “Louie Louie” went to Max Feirtag until 1986, when Mr. Berry finally recovered three-quarters of the publishing rights to his song, although he did not receive back royalties.”).

¹²² See Gerri Hirshey, *From Sin to Salvation: Little Richard Tells All*, *ROLLING STONE MAG.* (May 9, 2020), <https://www.rollingstone.com/music/music-features/little-richard-gay-preacher-biography-996737>. (In his own words, Little Richard revealed that he “had signed a very bad deal with Specialty. If you wanted to record, you signed on their terms or you didn’t record. I got half a cent for every record sold. Who ever heard of cutting a penny in half! It didn’t matter how many records you sold if you were black. The publishing rights were sold to the record label before the record was released. “Tutti-Frutti” was sold to Specialty for 50 dollars.”).

¹²³ “On October 15, 1965, [Hendrix and producer Ed Chalpin] inked a notorious three-year recording contract—for \$1.00 and a 1% royalty — with Jimi (then “Jimmy”) Hendrix and Curtis Knight & The Squires that would prove endlessly problematic, once the guitarist hit big with his own group, the Jimi Hendrix Experience, in 1967.” *Experience Hendrix and Legacy Recordings Acquire Rights To 88 Recordings by Curtis Knight & The Squires Featuring Jimi Hendrix*, *JIMI HENDRIX EXPERIENCE* (July 17, 2014), <https://www.jimihendrix.com/news/experience-hendrix-legacy-recordings-rights-88-recordings-curtis-knight-squires-jimi-hendrix>.

¹²⁴ See *Experience Hendrix, LLC v. Chalpin*, No. 06 Civ.9926(LAK), (S.D.N.Y. Nov. 6, 2006) (noting that PPX “agreement led to lengthy legal battles between Chalpin and Enterprises, on the one hand, and Hendrix and his estate (the “Hendrix Estate”), on the other.”).

Beatles early recording contracts, for example, were very unfair.¹²⁵ I have contended elsewhere that the very structure of the American music industry was shaped — and tainted — by racism, and this impacted the fortunes of all artists. Segregated “race record” music label practices became the norm for the entire industry.

This thesis is borne out by what happened when an African-American assumed the roles of music moguls in the 1960’s. The company of course was Motown, founded by the legendary Berry Gordy. Motown represented a quintessential American rags-to-riches success story. A young Black man borrows \$500 to start a record label, creates a billion-dollar company from humble beginnings and changes the music business forever. There is a sinister backstory to Motown forever. Motown created great success, and in some cases, great wealth for Black artists. However, Motown has also faced accusations of exploiting artists.¹²⁶

When the Jackson Five signed to Motown in 1968, the group must have been ecstatic. Their father, Joe Jackson, who was a steel worker with no music industry experience, negotiated the deal with Gordy. How bad was that initial deal? So bad that when the Jackson Five left Motown in 1975, after numerous number one hits for the label, Motown demanded \$500,000 for “unrecouped” expenses, and for the group to declaim any rights to the Jackson Five trademark, which Motown retained.¹²⁷ Motown’s experience demonstrated that just because a Black person ran a record label did not mean more equity for artists.

X. HIP-HOP RECORD LABEL AND EGREGIOUS CONTRACTS

In the early days of the hip-hop industry, many independent labels that sprung up as hip-hop had not gained widespread acceptance and major labels were leery of the genre. One of the first hip-hop labels was Sugar Hill Records, the label that launched the first main-stream hip-hop

¹²⁵ See Stan Soocher, *Did Litigation Kill the Beatles?*, ABA JOURNAL (May 1, 2016), https://www.abajournal.com/magazine/article/did_litigation_kill_the_beatles (noting that the Beatles entered into a “lopsided and ill-advised” merchandising deal that conveyed 99% of profits from the sale of Beatles’ goods).

¹²⁶ “One significant difference [between Motown and the major labels] was that Motown charged back to the artists the costs of recording, such as studio time and musicians, while [the majors] paid all such fees. Moreover, for developing and managing Little Stevie Wonder’s career, Berry Gordy Jr. Enterprises took twenty-five per cent of total earnings, the same commission rate charged by Brian Epstein’s NEMS Enterprises in his five-year management contract with the Beatles.” Adam White, *Motown, Stevie Wonder and the First ‘360 Deal’*, CUEPOINT (Oct. 3, 2016), <https://medium.com/cuepoint/stevie-wonder-motown-andthe-first-360-deal-d3db0ff86a39>.

¹²⁷ CITE

record, *Rapper's Delight* in 1979. In doing so, Sugar Hill Records became the face of hip-hop.

Sylvia Robinson was an African American music producer who scored a hit with the song "Love is Strange" in 1960.¹²⁸ However, this paled with the massive success Robinson soared to in launching the hip-hop music industry. Lore has it that Robinson thought of doing what became the first hit rap record after "hearing a DJ rapping over records in a Harlem club." Robinson then "set her son Joey to the task of finding someone who could do the same thing on tape. Joey recruited his friend Big Bank Hank from an Englewood, New Jersey, pizzeria, and Master Gee and Wonder Mike from the surrounding neighborhood. This was on a Friday. Sylvia named the newly formed trio after the Sugar Hill section of Harlem, chose Chic's disco smash "Good Times" as a backing track and scheduled studio time for the following Monday."¹²⁹

In doing so, Robinson went on to become "arguably one of the most consequential producers and label owners of all time. Her business opened the doors for all the independents that followed from Def Jam to Top Dawg, and her music pioneered distinct concepts that set the template for hip-hop's entire creative arc. From party rocking, to the DJ as musician, to social consciousness, Sugar Hill made everything possible for today's hip-hop stars."¹³⁰ The Sugar Hill label scored a slew of hits from other artists in the stable, including Grandmaster Flash and the Furious Five, whose song *The Message* politicized rap music and sold millions of copies in one month.¹³¹

¹²⁸ "In the 1950's, Sylvia earned her own place in music history as one-half of the duo Mickey & Sylvia, who topped the R&B charts in 1957 and made the Top 20 on Billboard's Hot 100 with their song, "Love Is Strange." It is believed the song was penned by Bo Diddley, but this has been hotly contested over the years as are many songs of that time written by African Americans. The song has been covered by Diddley, Buddy Holley, Peaches & Herb, Kenny Rogers & Dolly Parton (yes, a country version), and Paul & Linda McCartney. The song was featured prominently in the 1987 film, *Dirty Dancing*. B.o.B. sampled the song in "My Sweet Baby," featured on B.o.B. Vs. Bobby Ray: *The Mixtape*, released in 2009."

¹²⁹ History.com Editors, *The Sugar Hill Gang's "Rapper's Delight" Becomes Hip-Hop's First Top 40 Hit*, HISTORY (June 1, 2021), <https://www.history.com/this-day-in-history/the-sugarhill-gangs-rappers-delight-becomes-hip-hops-firsttop-40-hit>.

¹³⁰ Dan Chamas, *The Rise and Fall of Hip-Hop's First Godmother: Sugar Hill Records' Sylvia Robinson*, BILLBOARD MAGAZINE (Oct.17, 2019), <https://assets.billboard.com/articles/columns/hip-hop/8533108/sugar-hill-records-sylvia-robinson-hip-hop-godmother>.

¹³¹ See Steven Daly, *Hip-Hop Happens: Released in 1979, the Single "Rapper's Delight" Launched HipHop as a Multi-Billion-Dollar Phenomenon. The Opportunistic 15-minute Track Also Revived the Career of its Producer, a Canny R&B Veteran — but It Left the True Pioneers of Rap Fuming*, VANITY FAIR (Oct. 10, 2006), <https://www.vanityfair.com/culture/2005/11/hiphop200511>.

So much about *Rapper's Delight* foreshadowed the controversies — and lawsuits—to come in the hip-hop industry. The sampling by Sugar Hill Gang of Chic's *Good Times* presaged the massive problem of digital sampling in hip-hop.¹³² The tangled ownership issues, illustrated by fact that the lyricist for *Rapper's Delight*, Grandmaster Caz, never received copyright credit for his lyrics. And the sordid accounting practices and royalty disputes that became a hallmark of hip-record labels.¹³³

Lawsuits between Sugar Hill Records and its publishing companies and artists over unpaid royalties raged on for three decades and some continue to this date. Artists like the groundbreaking girl rap group, The Sequence, signed to Sugar Hill had publishing rights to their song *Funk You Up* locked up for thirty years.¹³⁴ Similarly, D.J. Wonder Mike of Sugar Hill Gang stated in interviews that neither he nor his co-artists received royalties from their songs for use in films like the *Wedding Singer* and “Kangaroo Jack”, and for use in other songs by artists such as Missy Elliot.¹³⁵ And as is so often the case, the Black-owned Sugar Hill label ended up being acquired by a major record label — Universal Music.¹³⁶

Artists seeking terminations from the period of old-school hip-hop will face challenges. Labels like Death Row Records kept very poor

¹³² Reportedly, upon hearing *Rapper's Delight* in a Manhattan disco, an “enraged” Nile Rodgers, leader of the band Chic, “immediately sought legal action and attempted to sue the Sugar Hill Gang for using his band’s instrumental in their single. The lawsuit was settled out of court and appropriate credit was given to Chic in their part of the song.” Kiah Fields, *Today in Hip Hop History Sugar Hill Gang Releases ‘Rapper’s Delight’ 37 Years Ago*, THE SOURCE (Sept. 16, 2016), <https://thesource.com/2016/09/16/today-in-hip-hop-history-sugar-hill-gang-releases-rappers-delight-37-years-ago>.

¹³³ See Geoff Edgers, *They Took Grandmaster Caz’s Rhymes Without Giving Him Credit. Now, He’s Getting Revenge*, WASHINGTON POST (Sept. 29, 2016), https://www.washingtonpost.com/entertainment/music/theytook-grandmaster-cazs-rhymes-without-giving-him-credit-now-hes-getting-revenge/2016/09/29/f519c35a7f3e-11e6-8d0c-fb6c00c90481_story.html.

¹³⁴ See Christopher R. Weingarten, *The Sequence: The Funked-Up Legacy of Hip-Hop’s First Ladies: They Were Rap’s First Southerners, its First Hit-Making Women and Possibly the Inspiration for “Uptown Funk” – So Why Can’t They Get Their Props?*, ROLLING STONE (May 24, 2017), <https://www.rollingstone.com/music/music-features/the-sequence-the-funked-up-legacy-of-hip-hops-firstladies-118369>.

¹³⁵ *Wonder Mike Interview with Jayquan*, THE FOUNDATION (2006) <http://www.thafoundation.com/wonmike.htm> (“There was a chipmunk that came out called Fat Daddy Mack from 3 years ago. He says my rap and my name and I see nothing from it. Missy Elliot has a song right now where she uses Apache. Not something where there is a question of whether its Apache, but the whole record. We see nothing. Lil Kim has used my words . . . however, anyone has used our stuff EVER we have NEVER seen a dime.”).

¹³⁶ See Jake Paine, *Sugar Hill Records Signs Deal with Universal Music Publishing*, HIP HOP DX (Apr. 8, 2013), <https://hiphopdx.com/news/id.23502/title.sugar-hill-records-signs-deal-with-universal-music-publishing#>.

records, and many of the early rap labels like Rap-a Lot and Cold Chillin' Records were known for taking advantage of artists. The earliest hip-hop artists, legends such as Cool Herc, DJ Red Alert, and others created a business worth billions of dollars. But unlike the innovative founders of companies like Apple and Microsoft, these pioneering hip-hop artists are mostly forgotten, and often destitute. Not all this misfortune can be laid at the feet of profligate spending by artists.

Copyright formalities like registration and copyright termination play a key role in the fortunes of old-school hip hop artists. Roxanne Shante was a teenager when she was asked to rap on what became the iconic hip-hop record, *Roxanne's Revenge*. Roxanne claims the label cheated her out of royalties.¹³⁷ The termination provisions, if they functioned as intended, would have given Shante the opportunity to terminate the original grant in her record deal. However, the label attorney who negotiated the 1984 deal stated in a sworn declaration filed in federal court that the company's copy was destroyed in a flood . . .¹³⁸

XI. RE-FORMALIZING COPYRIGHT: A DAGGER TO AFRICAN-AMERICAN ARTISTS

In recent years, prominent scholars in the IP legal academy have contemplated, and in some cases advocated, for bringing back many of the copyright formalities that dominated American copyright law before the 1976 Copyright Act and the 1986 Berne Convention Amendments. Berkeley Law School put on a conference in 2013 entitled "Reformalizing Copyright." The conference attracted "130 participants provided a comprehensive overview of the past, present, and future of formalities and explored an internationally acceptable framework for the reintroduction of copyright formalities."¹³⁹ Professor Samuelson noted that "[t]o respond to the overly expansive copyright regime now in place, there emerged a strong interest within the CPP group for "reformalizing" copyright

¹³⁷ See Alex Frank, *Rap Pioneer Roxanne Shanté Finally Gets Her Moment*, PITCHFORK (Mar. 19, 2018), <https://pitchfork.com/thepitch/rap-pioneer-roxanne-shante-finally-gets-her-moment> (noting that while "'Roxanne's Revenge' went on to sell 250,000 copies and made Shanté a trailblazer for women in rap . . .", Shante claims she has never received a royalty check for the song).

¹³⁸ Ben Sheffner, *Roxanne's Nonexistent Revenge*, SLATE (Sept. 2, 2009), <https://slate.com/newsand-politics/2009/09/heard-about-how-rap-legend-roxanne-shante-forced-her-label-to-pay-for-her-cornellph-d-it-never>.

¹³⁹ Comments of Pamela Samuelson in Response to the Department of Commerce Internet Policy Task Force's Green Paper, Copyright Policy, Creativity, and Innovation in the Digital Economy on Incentives for Copyright Registration & Recordation 4, (Jan. 17, 2014). https://www.uspto.gov/sites/default/files/documents/samuelson_post-meeting_comments.pdf.

law.”¹⁴⁰ The conference participants recognized that in past times, copyright formalities constituted a “trap for the unwary,” but that with technological improvements, new formalities can be deployed without disadvantaging artists. The participants apparently did not consider the experience of African-American artists and formalities. Indeed, it is not apparent that any perspectives from the Black community were present at the conference.

The Berkeley conference on formalities Professor Carroll explained “[the] theme of reform(aliz)ing copyright means that current public policy must reclaim an increased role in establishing, administering, or regulating new and existing systems of copyright formalities.”¹⁴¹

XII. “WE FINALLY GOT A PIECE OF THE PIE?”¹⁴²
 COPYRIGHT TERMINATIONS — DISTRIBUTIVE
 JUSTICE OR REVERSE REDISTRIBUTION?

Copyright is a form of government entitlement. Much like other socially constructed entitlements, copyright reflect policy choices. Those policy choices favor those in power. If copyright policy paid as much attention to inequitable distributive effects as it has to say, international copyright piracy, perhaps the treatment of Black artists would look very different.

Copyright operates within a market structure, and “markets are notorious for producing inequality. . . . [I]n fact, the unequal distribution of resources is an inevitable feature of free markets.”¹⁴³ The question is whether copyright, and particularly copyright formalities like copyright terminations conform to notions of distributive justice. “In the United States, as elsewhere, issues of distributive justice are connected to concerns about systemic poverty and racism, and questions about the fairness of affirmative action — policies that grant preferential treatment to particular racial or gender groups.”¹⁴⁴

¹⁴⁰ *Id.*

¹⁴¹ Michael W. Carroll, *A Realist Approach to Copyright Law’s Formalities*, 28 BERKELEY TECH. L.J. 1551 (2004).

¹⁴² Theme song for *The Jefferson’s*, a 1970s tv show: “Well, we’re moving on up to the East side to a deluxe apartment in the sky, moving on up to the East side, We finally got a piece of the pie . . .” The lyrics to the song were written by the late Ja’net Dubois, an actress on the show. As an employee of CBS, her composition would be considered a work-made-for-hire and not subject to copyright termination.

¹⁴³ JEREMY DE BEER, MAKING COPYRIGHT MARKETS WORK FOR CREATORS, CONSUMERS AND THE PUBLIC INTEREST 141, 151 (2000), <http://press-files.anu.edu.au/downloads/press/n2190/pdf/ch05.pdf>.

¹⁴⁴ Michelle Maiese, *Distributive Justice*, BEYOND INTRACTABILITY (July 2020), https://www.beyondintractability.org/essay/distributive_justice.

Has copyright law on balance provided distributive justice to African-American creators? In a 2016 law review article, Professor Merges and Hughes tackled this question, and analyzed the fortunes of African-American authors under a Rawlsian lens. These esteemed professors, icons in the legal academy, came to an astonishing conclusion: based Rawlsian principles of distributive justice, copyright law represents the greatest of all of wealth accumulation tool for African-Americans.¹⁴⁵ In other words, “we finally got a piece of the pie.”¹⁴⁶

Professors Hughes and Merges deserve commendation for raising the issue of distributive justice in the context of Black creativity and copyright law. Their article is a brilliant exposition of the work of John Rawls in a context not explored before — copyright law. And the fact these professors spent a considerable chunk of the piece to tie in the elephant in the room — Black creatives — is real progress in a non-diverse IP academy which has historically and completely ignored the problem of Black artists and copyright expropriation.

At the outset, it must be acknowledged that any Rawlsian conception of race comes with problems. As Professor Charles Mills has famously noted, Rawls dodged the issue of race almost totally in his paradigm, an issue that should have been at its center.¹⁴⁷ More significantly, Hughes and Merges grapple with the issue of the treatment of Black creatives in the copyright context, but ignore the central critique of “critical race” scholars, who locate that treatment in the broader backdrop of race-neutrality and color-blindness as a key lever in the subordination of Blacks under the color of law.

Hughes and Merges look to the success of some prominent and wealthy Black creatives, and see hope for copyright law as a vehicle for distributive justice. There are two dynamics, however, that they fail to address. The first is practical in nature. Many of the Black entertainers Hughes and Merges identify as copyright distributive justice exemplars in fact do not garner the bulk of their revenues from copyright. Jay Z, for

¹⁴⁵ Justin Hughes & Robert P. Merges, *Copyright and Distributive Justice*, 92 NOTRE DAME L. REV. 513 (2016).

¹⁴⁶ *Good Times* theme song, *supra* note 144.

¹⁴⁷ Professor Mills notes that “[w]e face a paradox: Rawls, the celebrated American philosopher of justice, had next to nothing to say in his work about what has arguably historically been the most blatant American variety of injustice, racial oppression. The postwar struggle for racial justice in practice and in theory and the Rawlsian corpus on justice are almost completely separate and nonintersecting universes. The remediation of the legacy of white supremacy is apparently not of the slightest interest or concern for Rawls and most of his commentators and critics, as manifested in the marginality of this subject in his own work, and its virtual nonappearance in the secondary literature.” Charles W. Mills, *Rawls on Race/Race in Rawls*, 9 S. J. PHIL. 47 (2009).

example, generates far more income from his branding, merchandising and investment vehicles than from traditional copyright income such as music royalties.¹⁴⁸ Branding and endorsements, the domain of trademark law and publicity rights law actually provide more robust streams for the richest entertainers than copyright law does.¹⁴⁹ More importantly, Hughes and Merge's rosy approach to copyright and distribution of the pie does not grapple with wealth-redistributive aspects and impacts of copyright law. This can be found, as outlined in my other scholarship in copyright doctrine, such as the idea-expression dichotomy, which left innovative African-American styles unprotected, and the requirements of fixation and originality, which exposed African-American improvisation and short musical phrases to expropriation.¹⁵⁰

Copyright formalities, such as terminations and registration have acted to shift creative resources out of the Black community and have functioned as barriers to entry. The perspective of copyright law from the streets looks is starkly different from the high towers of the legal academy. In grappling with copyright, ordinary artists confront an unintelligible set of mechanisms, if they are aware of such mechanisms at all. Even a "simple" one page copyright registration form becomes a frightening obstacle to protection. I agree that copyright law could have been a major vehicle to level the *unequal playing field wrought by American apartheid, which continues in different guise* today. However, we are far from that point today, and only with restructuring of copyright requiring fair compensation can the *promise of distributive justice articulated by Hughes and Merges be realized. It would require, in lines with the philosopher Rawls, reimagining a copyright law scaled for the least advantaged.*¹⁵¹

¹⁴⁸ Rapper Sean Carter, better known as Jay Z, has music revenues that generate \$95 million. In contrast, just one of his brands, his champagne company Armand de Brignac, is worth \$250 million. See Madeline Berg, *Billionaire Jay-Z's Net Worth Jumps 40% with Sales of Streaming Service Tidal, Champagne Brand*, FORBES (Mar. 4, 2021), <https://www.forbes.com/sites/maddieberg/2021/03/04/billionaire-rapper-entrepreneur-jay-zs-net-worth-jumps-40-with-sales-of-streaming-service-tidal-champagne-brand/?sh=6484b8c7cc2c>.

¹⁴⁹ *Id.*

¹⁵⁰ See Greene, *Copyright*, *supra* note 5.

¹⁵¹ See PAUL VOICE, *THE CAMBRIDGE RAWLS LEXICON*, 420-21 (2014) (noting that "the least advantaged are those members of society who comprise the "income class with the lowest expectations."), <https://www.cambridge.org/core/books/cambridge-rawls-lexicon/leastadvantaged-position/EF4F56F4ABD5202DF3756D525120B1FD>.

XII. *OUT OF THE MAZE — A WAY FORWARD FOR
COPYRIGHT TERMINATIONS*

Professor Menell has noted that “from its earliest manifestations, copyright law has struggled to deal with the equitable and efficient division of value and control between creators and the enterprises that distribute their works. And for almost as long as copyright has existed, there has been concern about creators getting the short end of the stick in their dealings with distributors.”¹⁵² The racial disparity in this connection is a persistent feature of the American music industry. Little Richard, a foundational rock artist, purportedly signed away his rights to *Tutti Frutti* for \$50 in exchange for a half-cent royalty.¹⁵³ Richard Berry, who composed the iconic rock anthem *Louie, Louie*, signed away his rights for \$750, to buy a wedding ring.¹⁵⁴ This is not just some old problem from the 1950’s. Rapper Cardi B signed an exploitative record contract and management deal before she became a star. Professors Ginsburg and Bentley suggest that the better way to vindicate artist’s rights would be through contract regulation of copyright transfers rather than copyright termination.¹⁵⁵ This approach was tried in South Africa’s copyright law reform. The legislation proposed, in addition to adding fair use requirements also requiring entertainment industry contracts, which are driven by copyright ownership, to provide fair compensation.¹⁵⁶ The response to South Af-

¹⁵² Peter S. Menell & David Nimmer, *Pooh-Poohing Copyright Law’s ‘Inalienable’ Termination Rights*, 57 J. COPYRIGHT SOC’Y 799 (2010).

¹⁵³ Carlie Porterfield, *How Little Richard Was Exploited by a Bad Record Deal and Never Fully Cashed in*, FORBES (May 9, 2020), <https://www.forbes.com/sites/carlieporterfield/2020/05/09/how-littlerichard-was-exploited-by-a-bad-record-deal-and-never-fully-cashed-in/?sh=19a104854d96> (noting that “Little Richard’s “contract was typical for black musicians of the time—while white artists would enjoy a cut of between 3% and 5%—and Little Richard also reportedly received no royalties when his hits were used in movies or covered by white singers, a common practice in the music industry at the time.”).

¹⁵⁴ “*Smashed Song*”, *Louie, Louie*, BBC (Apr. 30, 2015), <https://www.bbc.com/news/magazine-32520921> (noting Berry reacquired his rights to the song in 1980’s). “In 1986, an artists’ rights group helped him recover royalties worth about \$2 million.” See *‘Louie, Louie’ Composer Richard Berry Dies at 61*, WASHINGTON POST (Jan. 25, 1997), <https://www.washingtonpost.com/archive/local/1997/01/25/louie-louie-composer-richard-berry-dies-at-61/3b7b2bba-830c-4dfb-bb86-ca9673d6e787>.

¹⁵⁵ See Lionel Bentley & Jane Ginsburg, *The Sole Right . . . Shall Return to the Authors’ Anglo-American Authors’ Reversion Rights from the Statute of Anne to Contemporary U.S. Copyright Law*, 25 BERKELEY TECH. L.J. 1465, 1586 (2010).

¹⁵⁶ See Sean Flynn, *Making Sense of South Africa’s New Copyright Bill and US Trade Threats*, THE CONVERSATION (Dec. 15, 2020), <https://theconversation.com/making-sense-of-south-africas-new-copyright-bill-and-us-trade-threats-128418>.

(noting that South Africa’s Copyright Amendment Bill “includes rights to royalties, limitations on unfair contracts, and reversion of all copyright assignments to creators after 25 years.”)

rica's proposed legislation, which included expansive fair use provisions met a hostile response from the global entertainment industry and the United States and the European Union. There was "unprecedented pressure, with economic implications, from the U.S. Trade Representative and the EU Commission. The USTR and EU Commission were strongly influenced by lobby groups inside South Africa and abroad, and multi-billion-dollar publishing and creative conglomerates that opposed the Bill."¹⁵⁷ The prospects for fair copyright compensation legislation in the U.S. would be subject to the same line of attack.

First and foremost, reform of the copyright termination provisions would begin with the Copyright Office. The Copyright Office at present provides some data on terminations, but the data is insufficient. It provides the number of terminations in its report, but not the parties. Moreover, the office does provide data on the universe of works that are eligible for termination compared to the number of actual terminations. The Copyright Office could do a great service to underserved artists by providing this information and doing a campaign of public service announcements to educate and inform artists about the termination right.

Next, the role of Congress should be utilized. Congress could, if the political will existed, place the burden on rightsholders to keep track of termination dates and send notices to artists regarding the existence of termination rights and termination procedures such as notice. As suggested by the advocacy group Public Knowledge, could also make copyright termination automatic.¹⁵⁸

Congress could require all contracts where a party transfers copyrights to contain information on copyright termination, including the dates for sending notices and effectuating termination. Congress should also resolve the issue whether sound recordings are subject to termination of sound recordings, rather than leave the issue to the courts, who are by nature less representative of American society.

African-American artists are the engine of the American music business, and past inequities have deprived these creators of untold billions. A radical restructuring of the termination system would indeed constitute a much-fairness for artists presently unable to exercise their rights. Looking

¹⁵⁷ See Denise Nicholson, *South Africa's Copyright Amendment Bill—Five Year's On*, INFOJUSTICE (Aug. 17, 2020), <https://infojustice.org/archives/42570>.

¹⁵⁸ Public Knowledge proposes that Congress should "[r]evise the Copyright Act so that the termination right vests automatically, with an option for artists to delay or opt-out of the automatic reversion to renegotiate more favorable contracts. DYLAN GILBERT, MEREDITH ROSE & ALISA VALENTIN, MAKING SENSE OF THE TERMINATION RIGHT: HOW THE SYSTEM FAILS, ARTISTS AND HOW TO FIX IT (Dec. 2019), <https://www.publicknowledge.org/wp-content/uploads/2019/12/Making-Sense-of-the-Termination-Right1.pdf>. While noble in spirit, the political obstacles to such a proposal would be gargantuan.

forward, an equitable copyright termination regime is consistent with the incentive theory of copyright. As analysts have noted, despite the rhetoric of artist incentives as the basis of copyright protection, “[i]n practice. . . relatively few of copyright’s rewards end up in creators’ pockets. Indeed, such a huge proportion of the benefits of increased protection is captured by others in the cultural production chain that authors are sometimes viewed as “stalking horse[s]” to mask other economic interests.”¹⁵⁹ These measures would help close the knowledge gap and provide economic rewards to those who most deserve them.

¹⁵⁹ Rebecca Giblin, *A New Copyright Bargain? Reclaiming Lost Culture and Getting Authors Paid*, 41 COLUM. J. L.&ARTS 369, 382 (2018).