



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

(Session: Copyright Formalities as the Bane of African-American Artists from Blues to Hip-Hop)

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Of all the features of copyright law, registration stands is a magical talisman, the basis of ownership claims in the two-trillion-dollar copyright industries.¹ Technically copyright registration is distinct from copyright ownership under U.S. copyright law. Practically, copyright registration is synonymous copyright ownership and protection. Copyright registration is the crown jewel in copyright transactions. In copyright industry transactions, whether movie, sound recording or videogame deals, registration is all important required as part of chain of title. In litigation, following recent Supreme Court precedent, registration is the key to the courthouse, and without it, no infringement or ownership claim can be pursued. In infringement lawsuits, federal judges reverence copyright registrations bordering on the realm of fetish.

Copyright registration is the sine non qua of the U.S. Copyright Office, which sits in Washington D.C., as both the strong fortress of copyright and the temple of copyright protection.² Professor Litman note that “[an] accurate and complete registry of copyrighted works carries important public benefits, and the Copyright Office makes registration records publicly available.”³ Yet, the Copyright Office and the registration system is in a sense an unguarded fortress. Behind the all-mighty copyright registration certificate little oversight of the copyright registration process exists. Given the lack of oversight and scrutiny of registrations, assurance that the records of the Copyright Office are indeed “accurate and complete” is illusory. Most registration applications will “graduate” to certificates as long as the work falls within the subject matter of copyright.⁴

¹ See, Stephen E. Siwek, *Copyright Industries in the U.S. Economy: The 2018 Report* (2018), noting that in “2017, the value added by the total copyright industries to U.S. GDP exceeded \$2.2 trillion), accounting for 11.59% of the U.S. economy.”, <https://iipa.org/files/uploads/2018/12/2018CpyrtRptFull.pdf>.

² See Lauren N. Ross, "The Implications of *Fourth Estate v. Wall-Street.com* on Copyright Registration" 52 *Conn. L.aw Rev.* 439 (2020), noting that “The Copyright Office is entrusted with the important responsibility of registering copyright claims. In 2018, the Copyright Office received over 600,000 claims. In 2017, the Office received 539,662 claims and issued 452,122 certificates of registration.”

³ See Jessica Litman, *Argument preview: When has registration of a copyright claim “been made”?*, SCOTUS Blog, Jan 3, 2019, <https://www.scotusblog.com/2019/01/argument-preview-when-has-registration-of-a-copyright-claim-been-made/>.

⁴ Historically, the U.S. Copyright Offices has an extremely low rate of registration refusals or denials. The Copyright Office lists the following grounds for refusal of registrations: “The applicant failed to submit a complete application, complete filing fee, and/or complete deposit copy(ies).

- The work is not fixed in a tangible medium of expression.
- The work lacks human authorship.
- The applicant asserts a claim to copyright in a work that is not covered by U.S. copyright law. See 17 U.S.C. §§ 102, 103.

The U.S. Copyright Office (hereinafter “Copyright Office”) expressly avows that it does not verify authorship in the works it stamps its seal upon: “[w]hen, after examination, the Register of Copyrights determines that . . . the material deposited constitutes copyrightable subject matter & that the other legal and formal requirements of this title have been met, the Register shall register the claim and issue to the applicant a certificate of registration under the seal of the Copyright Office.” The Copyright Act states that copyright registration is “not a condition of copyright protection.”⁵ However, this view is completely out of touch with the realities of the American copyright industries, where registration is an absolute prerequisite to copyright protection.

The United States Supreme Court recently resolved a circuit split about when copyright registration becomes effective in the Fourth Estate case.⁶ The ruling provides that registration of copyright only becomes effective when the Copyright Office issues a completed registration. As a result, artists who have not been granted a completed registration are deprived of a forum to prosecute copyright infringement or copyright ownership claims. The fallout from the Fourth Estate decision has already impacted artists of color in profoundly negative ways. Hip-hop artists seeking to sue for copyright infringement were denied a federal forum when they failed to register the composition in a song called “Walk It.”⁷ Similarly, the rapper 2 Milly had to withdraw his lawsuit the maker of the Fortnite videogame series after the Fourth Estate ruling.⁸ The Fourth Estate decision will wreak havoc on communities of color.

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- The work was not independently created.
 - The work lacks the minimum level of creative authorship to support a copyright claim.
 - The work is in the public domain.
 - The work is a sound recording that was fixed before February 15, 1972 (i.e., the date on which sound recordings became eligible for federal copyright protection).” See U.S. Copyright Office Compendium 1702, <https://www.copyright.gov/comp3/chap1700/ch1700-administrative-appeals.pdf>.

⁵ 9 17 U.S.C. § 408(a) (2012).

⁶ Fourth Estate Pub. Ben. Corp. v. Wall-Street.com, LLC - 139 S. Ct. 881, 892 (2019), holding “that ‘registration . . . has been made’ within the meaning of 17 U.S.C. § 411(a) not when an application for registration is filed, but when the Register has registered a copyright after examining a properly filed application.”

⁷ See Pickett v. Migos Touring, Inc., 420 F. Supp. 3d 197 (S.D.N.Y. 2019). The District Court noted that “[u]nfortunately, [plaintiff] only registered the copyright in the sound recording and not the musical composition—the ‘music and lyrics he contends were infringed. Because he failed to satisfy the registration precondition announced in Fourth Estate, his lawsuit is doomed to dismissal.”

⁸ See Sam Desatoff, “Rapper 2 Milly drops lawsuit against Epic after Supreme Court ruling”, Yahoo Finance, Mar. 8, 2019, <https://finance.yahoo.com/news/rapper-2-milly-drops-lawsuit-211100446.html>.

In this article, building upon my work about African-American artists and copyright law, I examine how, from a historical perspective, copyright registration, like other copyright formalities, left Black artists at a distinct disadvantage and facilitated the fleeing and expropriation of Black musical works. The treatment of Black artists, as a subordinated group, is illustrative of the need for broad reform of the copyright system.

Registration is complex. It is intimidating artists, and also expensive for multiple registrations. And the myth that registration is not needed in artist community is pervasive. Registration is also punitive. Failing to register leads to harsh consequences. Loss of statutory damages and attorneys' fees, no presumption of ownership, copyright termination headaches. The U.S. supposedly got rid of harsh formalities. Yet such is not the case. Furthermore, given the importance of registration, standards are shockingly loose. The Copyright Office does NOT verify ownership or authorship issue All these dynamic create a perfect storm for further marginalization of Black artists.

A Snapshot of My Work on Race and IP

Over twenty years ago, I began writing about the impact of race in the IP space. At that time, no scholarship existed on this topic. The genesis of my work was the Black barber shop of my childhood in New York. The Black barbershop is a locus of culture and politics, and I often heard stories of Black artists who had been pilfered by the music industry. This planted the seed for my future work in this area, and for a cavalcade of scholars who have followed furthered and enriched scholarship in this area, including Lateef Mtima, Mahadvi Sunder, Olufunmilayo Area, David Trout, Keith Aoki, Deidre Keller, Anjali Vats, Bob Bruneis and others, making the study of race and IP one of the most fertile and fascinating fields of inquiry in IP scholarship.⁹

My work over the years mapped out how African-American artists, while dominating artistic creation of music in the United States from its inception ended up receiving so little of the fruits of their authorship. Examining copyright doctrine, I identified the

⁹ See, Keith Aoki, *Distributive and Syncretic Motives in Intellectual Property Law (with Special Reference to Coercion, Agency, and Development)*, 40 U.C. Davis L. Rev. 717 (2007), Shubha Ghosh, *Race-Specific Patents, Commercialization, and Intellectual Property Policy*, 56 Buff. L. Rev. 409 (2008), .David Dante Troutt, *I Own Therefore I Am: Copyright, Personality, and Soul Music in the Digital Commons*, 20 Fordham Intell. Prop. Media & Ent. L.J. 373 (2009), OLUFUNMILAYO B. AREW, *BLUES LIVES: PROMISE AND PERILS OF MUSICAL COPYRIGHT*, 27 CARDOZO ARTS & ENTERTAINMENT L.J. 573, (2010), andré douglas pond cummings, *A Furious Kinship: Critical Race Theory and the Hip Hop Nation*, 48 U. Louisville L. Rev. 499 (2010), Lateef Mtima, *IP SOCIAL JUSTICE THEORY: ACCESS, INCLUSION, AND EMPOWERMENT*, 53 GONZAGA LAW REVIEW 401, (2012). Robert Brauneis, *Copyright, Music, and Race: The Case of Mirror Cover Recordings*, GW Law School Public Law and Legal Theory Paper No. 2020-56 (2020), ANJALI VATS & DEIDRÉ A. KELLER, *CRITICAL RACE IP*, 36 CARDOZO ARTS & ENTERTAINMENT 735 (2018)

chasm between how Black artists create music, and what copyright law requires to secure and maintain protection of creative works¹⁰. This all occurs a backdrop of race neutrality in the Copyright Act itself. However, it is manifest that while an Act or a law may be race-neutral on its face, that law can still have a disparate impact on marginalized group.¹¹ My scholarship has examined how copyright doctrine in operation has disparately impacted African-American music artists, through the lens of what I call the “seven deadly sins of copyright”, as explored below.

The Seven Deadly Sins of Copyright Law Vis-à-vis Black Artistic Production.

The seven deadly sins are a metaphor for the experience of Black artists under copyright law. I have identified the core aspects of copyright law that have resulted in under protection and sometimes expropriation of the works of Black artists. The seven deadly sins are as follows:

1. Originality;
2. Fixation
3. The idea-expression dichotomy;
4. Copyright formalities;
5. Under-protection of performance;
6. Hostile judicial doctrines
7. Lack of mora rights protections.

In the interest of brevity, I explore below three of the “sins”, originality, fixation and copyright formalities below.

Originality:

Originality is a core requirement for copyright ownership and protection. The originality requirement is constitutionally ordained, and codified in the 1976 and prior Copyright Acts. In the seminal case on originality, the U.S. Supreme Court stated that the originality

¹⁰ K. J. Greene, Copyright, Culture & Black Music: A Legacy of Unequal Protection, 21 Hastings Comm. & Ent. L.J. 339 (1998).

¹¹ The principle that a law that is race-neutral on its face can still violate Constitutional norms if applied in a discriminatory fashion is an old one. See *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S. Ct. 1064 (1886).

is a low standard, requiring only independent creation and a “modicum” of creativity.¹² I have written how this low standard of creativity has, in conjunction with the idea-expression dichotomy, resulted in under protection for innovative Black artists. Copyright law does not prohibit imitation, and the examples of artists outside of the Black community imitating works of Black authors are legion.

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

Fixation:

The Copyright Act requires that “a work of authorship must be “fixed in any tangible medium of expression, now known or later developed, from which [it] can be perceived, reproduced, or otherwise communicated, either directly or indirectly with the aid of a machine or device.”¹³ Although “race-neutral”, the fixation requirement has not served the ways Black artists create: “a key component of black cultural production is improvisation.” As a result, fixation deeply disadvantages African-American modes of cultural production, which are derived from an oral tradition and communal standards.”¹⁴

Historically, the fixation requirement did serious harm to Black artists.¹⁵ Blues artists tended not to reduce their works to a writing, partly due to the oral and improvisational nature of Black creativity, partly due to illiteracy. This left these artist vulnerable to unsavory characters who would listen to the works and simply fix and register those works.¹⁶

¹² Feist Publications, Inc. v. Rural Telephone Service Co., Inc. - 499 U.S. 340, 111 S. Ct. 1282 (1991).

¹³ 17 U.S.C. 102.

¹⁴ K.J. Greene, Intellectual Property at the Intersection of Race and Gender: Lady Sings the Blues, 16 American U. J. Gender, Social Policy & the Law.363, 371 (2008).

¹⁵ See Larisa Mann, If It Ain't Broke . . . Copyright's Fixation Requirement and Cultural Citizenship, 34 Colum. J.L. & Arts, 201, Copyright law and institutions have undeniably rejected black artists and their traditions, both explicitly, as with ASCAP not allowing black members, or implicitly in the contours of copyright that leave out many aspects of musical traditions mainly dominated by people of African descent.”

¹⁶ See Gregory S. Donat, Fixing Fixation: A Copyright with Teeth for Improvisational Performers, 97 Colum. L. Rev. 1363 (1997).

Copyright Formalities:

Under the 1909 Copyright Act formalities like recordation, notice, renewal and publication were essential for perfecting a creator's rights. The 1909 Copyright Act is still an enormously important law, as any works after 1926 are still under its shadow.¹⁷ Under the 1909 Act, only those works that were published and affixed with an official notice of copyright qualified for copyright protection.¹⁸ Historically, "registration prior to publication was a prerequisite for protection."¹⁹ The impact of copyright formalities such as notice, deposit, renewal and registration "served to limit the number of works receiving copyright protection, such that many works immediately entered the public domain upon publication."²⁰

The 1976 Copyright Act set creation, not publication as the marker for copyright owners. Then in the 1986, the U.S. decided to join the Berne Convention, and modified U.S. copyright law accordingly.²¹ The Berne compliance amendments purportedly loosened the restrictive formalities around registration.²² However, copyright formalities,

¹⁷ "In 2021, works published in 1925 - originally set to enter the public domain in 2001 - will finally go into our public domain." Duke Law Center for the Public Domain, <https://web.law.duke.edu/cspd/>. Some of the works which entered the public domain in 2021 include *The Great Gatsby*, the works of W.C. Handy, composer of the "Saint Louis Blues", and the works of blues legend Ma Rainey. Id.

¹⁸ See U.S. Copyright Office, noting that the "1909 act granted protection to works published with a valid copyright notice affixed on copies. Accordingly, unpublished works were protected by state copyright law, but published works without proper notice fell into the public domain." https://www.copyright.gov/timeline/timeline_1900-1950.html#:~:text=The%201909%20act%20granted%20protection,fell%20into%20the%20public%20domain.

¹⁹ Dotan Oliar, Nathaniel Pattison & K. Ross Powell, Copyright Registrations: Who, What, When, Where, and Why, 92 *Texas L. Rev.* 2212, 2215 (2014).

²⁰ Daniel Gervais & Dashiell Renaud, THE FUTURE OF UNITED STATES COPYRIGHT FORMALITIES: WHY WE SHOULD PRIORITIZE RECORDATION, AND HOW TO DO IT, 1460 *BERKELEY TECHNOLOGY LAW JOURNAL* Vol. 28:1459.

²¹ See Peter S. Menell, ECONOMIC ANALYSIS OF COPYRIGHT NOTICE: TRACING AND SCOPE IN THE DIGITAL AGE, 96 *BOSTON UNIVERSITY LAW REVIEW* 967, 991 (2016), noting that "[n]otwithstanding the long-standing differences between U.S. and Berne Union positions on copyright requirements and national policy autonomy, the U.S. government, aided by its State Department's domestic diplomacy, ultimately agreed to take the steps necessary to align its copyright law with Berne's precepts. The Berne Convention Implementation Act ("BCIA"), passed in 1988, effected many of the changes required to bring U.S. copyright law into compliance with the Berne Convention."

²² As Professor Pamela Samuelson notes, "[i]n the late 1980s, these industries persuaded one of their own President Ronald Reagan that the U.S. needed to join the Berne Convention in order to exercise influence on international copyright policy. And so in 1989, under Reagan's leadership, the U.S. joined the Berne Convention and abandoned the notice-on-copies and registration requirements that had served the nation well since its founding." Pamela Samuelson, Too Many Copyrights?, 54 *Communications of the ACM*, 29-31 (2011), <https://cacm.acm.org/magazines/2011/7/109884-too-many-copyrights/fulltext>.

including those around copyright registration, are still very much alive under the 1976 Copyright Act.

The impact of copyright formalities like registration, publication, notice and copyright terminations on artists of color has been devastating. These formalities are complex, so complex that even major corporations have missed renewal deadlines and screwed up registration forms. Scholars have recognized that “formalities predicate to the existence or enforcement of copyright can serve to shield large copyright owners who routinely comply with formalities from the infringement claims of smaller copyright owners, particularly individual authors, who may lack the information or resources systematically to register and deposit their works.”²³ For the Black artistic community, formalities have stood as a nearly insurmountable obstacle.

Copyright registration provides significant, indeed, extraordinary benefits to authors. A copyright registration is prima facie evidence of ownership. Courts—and industry players—view the certificate of registration as strong evidence of copyright ownership. In copyright litigation, “[p]roving the first element of an infringement claim—ownership of a valid copyright—is often done, at least initially, by introducing into evidence a certificate of copyright registration.”²⁴

In actuality, federal courts worship registrations. A stark example of this is illustrated in case involving musical artist George Clinton, also known as the “King of Funk.” Clinton was embroiled in a lawsuit against his former law firm regarding legal fees. The law firm had sued Clinton to recover its fee of \$1.5 million. Clinton did not have the funds to pay the fees, and the law firm took the position that it could levy four iconic sound recordings owned by Clinton.

The District Court held that Clinton was not a copyright owner by virtue of his assignment through his loan-out corporation to Warner Brothers, which registered the sound recordings as works made for hire. The District Court, and the Ninth Circuit on appeal, upheld the sale of Clinton’s sound recordings to the law firm, refusing to examine whether the initial transfer to Warner Brothers was really a work made for hire, and stressing that Clinton did not own anything since he had transferred his rights in the sound recordings to a loan-out corporation. The Ninth Circuit on this point stressed that

²³ See Jane C. Ginsburg, *The US Experience with Copyright Formalities: A Love/Hate Relationship*, 33 *Colum. J.L. & Arts* 311 (2010).

²⁴ See Lydia Pallas Loren & R. Anthony Reese, *Proving Infringement: Burdens of Proof in Copyright Infringement Litigation*, 23 *Lewis & Clark L. Rev.* 621, 631 (2019).

“Warner Bros. registered the Masters as ‘works made for hire’ within five years of publication, listing ‘Warner Bros. Records Inc.’ as the ‘author’ on the registration form.”²⁵

Significantly, the Ninth Circuit refused to do any examination of whether Clinton was the owner of the sound recordings at issue, citing section 410(c) of the Copyright Act, which provides that a certificate of registration is prima facie evidence of copyright owner.²⁶ The Ninth Circuit noted that the language of 410(c) “persuasively supports H & L’s argument that, on this ground alone, the district court could reasonably conclude that Warner Bros. was the initial author and owner of the Masters...”

Copyright Registration Basics:

1. An application for copyright registration must meet three essential requirements:
2. a completed application form;
3. a nonrefundable filing fee; and
4. 3) a nonreturnable deposit containing a copy or copies of the work.²⁷

Registration is effective “[w]hen the Copyright Office issues a registration certificate” and the relevant date of the application is when the Office receives all the necessary elements “regardless of how long it took to process the application and mail the certificate of registration.”²⁸

Supplementary Registrations:

Despite the importance of registration as an indicia of copyright ownership, there are severe limits on correcting an already filed registration. One such limit is competing registrations for the same work. The Copyright Office will only grant one registration per

²⁵ The case is *Hendricks & Lewis PLCC v. George Clinton*, No. 13–35010 (9th Cir. 2014).

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

²⁷ U.S. Copyright Office, *Registering a Copyright with the U.S. Copyright Office*, <https://www.copyright.gov/fls/sl35.pdf>.

²⁸ *Id.*

work and will reject an application when a competing second basic registration is submitted for the same version of the work.

Supplementary registration is the only legal mode permitting authors and claimants to correct or amplify the information on a basic registration. Per the Copyright Office, “[s]upplementary registration does not cancel or replace the original registration or the registration number. Nor does it change or remove the information contained in the original registration.”²⁹

Supplementary registrations are designed to correct errors in the original registration, such as spelling errors in the basic registration, name or address changes and changes in a title to work. More ominously, a supplemental registration can add a missing author or co-claimant and to clarify the claim to copyright in the work.³⁰ Supplementary registrations cannot be used to reflect changes in the ownership of a work or to challenge the validity of a basic registration. Indeed, there is no established mechanism to challenge a false registration through the U.S. Copyright Office.

Criminal Penalties for False Copyright Registrations: 18 U.S.C. sect. 506(e)

In filing a copyright registration application, applicants must make a “declaration . . . that the information provided within the application is correct to the best of [the applicant’s] knowledge.”³¹ Generally, the Office “accepts the facts stated in the application.”³² If a party lies on a copyright registration, two possible avenues exist to remedy it. The first is a criminal copyright statute, 18 U.S.C. sect. 506(e). The purpose of this statute is to ensure the accuracy of . . . copyright applications.”³³

To establish a violation of §506(e), the government must prove that: (1) that a false representation; (2) of a material fact; (3) was knowingly made; (4) in a copyright application or any written statement filed in connection with an application.”³⁴ However,

²⁹ Copyright Office Circular 8 Supplementary Registration, <https://www.copyright.gov/circs/circ08.pdf>.

³⁰ The Copyright Office notes that “[i]f two or more authors created the work and some of the authors of were not named in the basic registration, the names of the missing authors may be added to the registration record with a supplementary registration.” Compendium, Chapter 1800 Post-Registration Procedures, <https://www.copyright.gov/comp3/chap1800/ch1800-post-registration.pdf>.

³¹ 37 C.F.R. § 202.3(c) (3) (iii) (2019).

³² Id.

³³ <https://www.justice.gov/archives/jm/criminal-resource-manual-1856-copyrights-false-representations-17-usc-506e>.

506e has two deficiencies. First, as a criminal statute, 506e has no private right of action, only the government can bring a case under the statute.

Secondly, the penalties under the statute are ridiculously low: “[v]iolations are punishable by a fine of up to \$2,500.”³⁵ The amount of the penalty cannot possibly serve as a deterrent to an unscrupulous registrant. The statute is also rarely, if ever enforced. There is, from what the author can tell, no evidence that the federal government has brought a claim against anyone, ever, under 506e.

Fraud on the Copyright Office: 17 U.S.C. 411

The criminal route to fighting back against copyright registration fraud is, as explained above, essentially closed. No one is getting prosecuted for false copyright filings. The penalties on the criminal side are minimal. As noted previously, the Copyright Office does not verify claims of copyright ownership. Further, the Copyright Office “accepts the facts stated in the registration materials, unless they are contradicted by information provided elsewhere in the registration materials or in the Office’s records.”

Even more radically, “the Office does not conduct investigations or make findings of fact to confirm the truth of any statement made in an application.”³⁶ In essence, the shocking lack of oversight around copyright registrations adds up to a recipe for fraud. The problem historically is even more salient, given the long influence of organized crime in the American music industry.

However, in section 411 of the Copyright Act, Congress provided a remedy for false copyright filings. Section 411(b) (1) states that a “certificate of registration satisfies the requirements of section 411(a) and section 412 even if it contains inaccurate information, unless ‘the inaccurate information was included on the application for copyright registration with knowledge that it was inaccurate;’ and ‘the inaccuracy of the information, if known, would have caused the Register of Copyrights to refuse registration.”^{37 38}

³⁴ Id.

³⁵ Id.

³⁶ U.S. Copyright Office, Compendium of U.S. Copyright Office Practices § 602.4(C) (3d ed. 2017)

³⁷ See ABC TV 2020 Report, Dec. 1988, <https://www.youtube.com/watch?v=hjYObelFiWE>.

³⁸ FASHION AVENUE SWEATER KNITS, LLC vs. POOF APPAREL CORP., ET AL., CASE NO.: 2:19-CV-06302-CJC-JEM (C.D. Cal. 2021), RESPONSE OF THE REGISTER OF COPYRIGHTS TO REQUEST PURSUANT TO 17 U.S.C. § 411(b) (2), <https://www.copyright.gov/rulings-filings/411/fashion-avenue-sweater-knits-llc-v-poof-apparel-corp.pdf>.

Invalidating a Registration under Section 411(b) (1)

A possible sanction for knowingly false copyright registration is a declaration of invalidity by the courts. The relevant authority is 17 U.S.C. 411 (b). Courts that have construed section 411(b) have not been consistent. The Eleventh Circuit has held that to invalidate a registration, a claimant must demonstrate actual fraud. In a case involving the hip-hop song “Hustlin”, the District Court, sua sponte, found fault with the plaintiff’s copyright registrations.³⁹

Plaintiff held three registrations issued for the “Hustlin” song. The first copyright registration incorrectly stated that the work was unpublished. The second registration provided an incorrect date of creation, specifying the creation date was 2006 when it was actually 2005, and “did not disclose that there was a prior registration.”⁴⁰ The third copyright registration contained the same errors as the first two, botching the date of creation and not disclosing the two prior registrations. After chastising the District Court for bringing up these issues on its own, the Eleventh Circuit set forth three elements required to prove copyright registration fraud:

- “(1) the application must contain inaccuracies,
- (2) the inaccuracies must be material, and
- (3) the applicant must have the required scienter of intentional or purposeful concealment.”

In contrast, in the Ninth Circuit, a party seeking to invalidate a copyright registration does not have to show intent to defraud. Rather, the party seeking to invalidate the registration must show that “the inaccuracy of the information, if known, would have caused the Register of Copyrights to refuse registration.”⁴¹ In *Gold Value*, the inaccurate information on the application was about publication of the work. The test in the Ninth Circuit is:

1. a plaintiff’s certificate of registration contains inaccurate information;

³⁹ The case is *Roberts v. Gordy*, 877 F.3d 1024 (11th Cir. 2017). “Specifically at issue in the litigation was the beat drop “every day I’m shuffling,” which defendants argued was a parody protected by the fair use doctrine.” See Tal Dickstein and Ava Badiie, *IP/ENTERTAINMENT CASE LAW UPDATES* *Roberts v. Gordy*, Loeb & Loeb, Dec. 15, 2017, <https://www.loeb.com/en/insights/publications/2018/01/roberts-v-gordy>.

⁴⁰ *Id.*

⁴¹ See *Gold Value Int’l Textile v. Sanctuary Clothing, LLC, et al.*, Case No. 17-55818 (9th Cir. June 4, 2019).

2. “the inaccurate information was included on the application for copyright registration” and;
3. the inaccurate information was included on the application “with knowledge that it was inaccurate.”

Under Ninth Circuit precedent, a District Court is required to submit a request to the Register of Copyrights “to advise the court whether the inaccurate information, if known, would have caused [it] to refuse registration.”⁴² In *Gold Value*, the Copyright Office upon review opined that it would not have registered the work if it had known of the representation of publication.

The Ninth Circuit in *Unicolors* “flatly rejected the district court’s requirement that H&M demonstrate that Unicolors intended to defraud the Copyright Office at the time of its application filing, and pointed to the Ninth Circuit’s 2019 ruling in *Gold Value Int’l Textile, Inc. v. Sanctuary Clothing, LLC*, where it clarified that there is no such intent-to-defraud requirement for copyright registration invalidation (and in doing so, rejected a series of Ninth Circuit cases that imply an opposite conclusion).”⁴³

Dark History of African-American Artists and Copyright Registration

Black artists innovated virtually every genre of popular music in the United States, going back to the ragtime era of the late 1800’s to hip-hop music today. The influence of Black artists is vast that “[d]escribing the African-American influence on American music in all of its glory and variety is an intimidating—if not impossible—task. African-American influences are so fundamental to American music that there would be no American music without them.”⁴⁴

Because the creators of these works were legally unsophisticated and often illiterate, copyright formalities such as registration put them at a severe disadvantage. Grafted onto the legal requirements of copyright law were predatory music industry practices that required sharing of copyright ownership and credit.

⁴² “Copyright Office, Not Courts, Determines Validity of Registrations Containing Inaccurate Information”, *National Law Rev.* June, 2020, citing *Unicolors, Inc. v. H&M Hennes & Mauritz, L.P.*, (9th Cir. May 29, 2020).

⁴³ *Id.*

⁴⁴ See Steven Lewis, *Musical Crossroads: African American Influence on American Music*, Smithsonian Music, Sept. 2016, <https://music.si.edu/story/musical-crossroads>

For example, Elvis Presley was not a composer.⁴⁵ Many of his greatest hits including “Don’t Be Cruel”, “All Shook Up”, and “Return to Sender” were penned by Otis Blackwell, an African-American composer⁴⁶. “Don’t Be Cruel” was the first of three songs for which Blackwell shared writing credit with Presley.⁴⁷ According to Blackwell, “I was told that I would have to make a deal [to share writing and copyright credit with Presley]...[m]any have argued that Presley’s management virtually stole half of the writer royalties on “Don’t Be Cruel,” all of which should have gone to Blackwell.”⁴⁸ This is copyright fraud, lawyered with thick coat of discrimination, and was part of a pattern and practice in the American music industry.

Little Richard had to share songwriting credit for his seminal hit “Tutti Frutti.” According to Little Richard, “[t]he publishing rights were sold to the record label before the record was even released. ‘Tutti Frutti’ was sold to Specialty for \$50.”⁴⁹

The dynamic of registration fraud is often buried in cases. For example, the case of *Merchant v. Levy* is known for its holding on the copyright statute of limitations.⁵⁰ *Merchant* was one of the “teenagers” in the iconic group of Frankie Lymon and the Teenagers. In 1956, the group scored a hit record with their song “Why Do Fools Fall in Love.” The Second Circuit in *Merchant* noted that “Merchant and Santiago are two of the original members of the singing group “The Teenagers,” which was formed in 1955. Plaintiffs testified that in 1955 they jointly wrote the initial version of the song Fools. Frankie Lymon made a number of changes to the song when he subsequently joined the

⁴⁵“ Elvis recorded more than 600 songs in his music career but did not write a single song (impossible to confirm, but he was given co-writing credit on many songs because his label demanded songwriters give up 50% of the credit before Presley would record it).” 8 Elvis Presley Facts So Crazy You Might Not Believe Them, <https://playback.fm/trivia/crazy-elvis-facts>. See also, <https://www.elvispresleymusic.com.au/ep-music.html#:~:text=RCA%20Records%20owned%20all%20of,label%20for%20issuing%20Elvis%20releases> noting that “Elvis, through his own publishing companies (Elvis Presley Music, Gladys Music, Whitehaven Music and Elvis Music, Inc.) was part owner (typically half or third) of a great many of the songs he recorded and even some songs he did not record.”

⁴⁶ Elvis History Blog, “Otis Blackwell ... His Music Fueled the Elvis Machine in the Fifties”, <http://www.elvis-history-blog.com/otis-blackwell.html>.

⁴⁷ Id.

⁴⁸ Id.

⁴⁹ See Carlie Porterfield, “How Little Richard Was Exploited by a Bad Record Deal and Never Fully Cashed In”, *Forbes Mag.* May 9, 2020, <https://www.forbes.com/sites/carlieporterfield/2020/05/09/how-little-richard-was-exploited-by-a-bad-record-deal-and-never-fully-cashed-in/?sh=4b6ea1cc4d96>.

⁵⁰ *Merchant v. Levy*, 92 F.3d 51 (2d Cir. 1996).

group, which then became known as "Frankie Lymon and The Teenagers." The jury found that Merchant, Santiago, and Lymon were co-authors of Fools.”⁵¹

Goldner, the label owner, wrote to the Copyright Office in 1965, and asserted that Morris Levy, rather than Goldner, had co-authored Fools with Lymon. The Copyright Office then changed the ownership of “Fools” in essence handing the copyright to Levy's company, Big Seven Music.⁵² Both Merchant and fellow Teenager Santiago testified that Morris Levey had threatened to kill them when they inquired about royalties and copyright ownership.⁵³ Levy didn't write music but as was customary in the “race record” music industry, insisted on copyright credit.

In the Merchant case, Levy, when [”c]alled upon in court to explain how he contributed to the epic hit “Why Do Fools Fall in Love” by Frankie Lymon and the Teenagers, a group Levy had met only months after the song had been recorded, Levy outlined his own creative process: “You get together, you get a beat going, you put music and words together. I think I would be misleading you if I said I wrote songs, per se, like Chopin.”⁵⁴ Levy in essence admitted that he was not a songwriter.

Plaintiffs state that defendant Roulette Records, Inc., another company owned by Levy, participated in wrongfully withholding from Plaintiffs their interest in the copyright.

Although “Fools” became a hit and continues to be popular today (Diana Ross has recorded a popular version), Plaintiffs have never received any royalties from their claimed co-authorship of Fools.

However, “record company owner George Goldner told the group that only two names could be listed on the copyright, and credited himself and Lyman as songwriters. In 1964, Goldner signed over the rights to Morris Levy, who had been claiming copyrights for years, collecting royalties on songs he didn't write by Chuck Berry, Tommy James and many others.”⁵⁵

⁵¹ Id.

⁵² Id.

⁵³ Id.

⁵⁴ Jonathan Karp, *The Hit Man*, Jewish Review of Books (2016). Interestingly, Levy was also instrumental in the distribution of the iconic rap hit “Rapper’s Delight” for the Sugar Hill Record Label in the late 1970’s. Id.

⁵⁵ Songfacts, *Why Do Fools Fall in Love*, <https://www.songfacts.com/facts/frankie-lymon-the-teenagers/why-do-fools-fall-in-love>.

Many examples of notorious mobsters at the center of jazz and rock music exist, but perhaps no more so than Nat Tarnopol a record producer who worked with some of soul's greatest artists including Jackie Wilson and the Chi-Lites. Tarnopol was indicted along with other music industry executives for defrauding artist on Tarnopol's Brunswick label. Tarnopol ultimately beat the charges of wire fraud and tax evasion on appeal, but the Third Circuit had no doubt artists on the Brunswick label were routinely defrauded. Tarnopol engaged in clear examples of registration fraud, infamously adding his unborn son's name to music credits on Jackie Wilson's composition "Dogging Around." Jackie Wilson's music still generates royalties today for Sony Music, which acquired the CBS records catalog.

There is no reason to believe that false copyright registrations in the music context are merely a relic of the past. Rapper Lil Wayne sued his co-joint venture partner Birdman and Cash Money Records for missed royalty payments. In the litigation, discovery revealed that although under the Cash Money-Young Money joint venture agreement, the copyrights to Lil Wayne's music were to be registered jointly to both entities. However, the copyrights to Wayne's songs were registered solely in Cash Money's name.⁵⁶

Proposed Reforms

The African-American experience is full of stories of false registrations and non-authors claiming copyright ownership as joint authors. The registration records of the Copyright Office lack any credibility. Only an audit would restore credibility. Copyright registration should be made optional for artists. As Professor Tehranian, has noted, while sophisticated corporate owners take full advantage of registration, "[in] sharp contrast, unsophisticated creators, like individual artists, typically do not timely register their works & are often left with little except moral force and the uncertain threat of injunctive relief to enforce their [IP] rights."⁵⁷ Those who choose not to register should not be

⁵⁶See Zara Golden, Everything You Need To Know about Lil Wayne's Lawsuit Against Cash Money, noting that Lil Wayne alleged that "Cash Money failed to register the copyright of the Young Money Label recordings in both Cash Money and Young Money names", Jan. 29, 2015, <http://www.thefader.com/2015/01/29/everything-you-need-to-know-about-lil-waynes-complaint-against-cash-money>. The complaint is Young Money Ent. LLC. V. Cash Money Inc., 15 C.V. 00614 (S.D.N.Y. 2015).

⁵⁷ John Tehranian, The Emperor Has No Copyright: Registration, Cultural Hierarchy and the Myth of American Copyright Militancy, 24 Berk. Tech. L.J. 1397 (2009), noting that "'Sophisticated, routine creators—generally corporations in content-creation industries—timely register their works and therefore enjoy generous remedies against infringers").

deprived of a federal forum. The U.S. Copyright Office should move to a system closer to trademark law. The Trademark Office reviews every trademark registration, scrutinizing applications to insure that the registrations comply the Lanham Act.

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

Until such time that the Copyright Office verifies ownership claims, there is little reason to have confidence in the registration system, a Wild West where there is no accountability. These undertakings would not be cheap and would be time-consuming. However, certifying the integrity and veracity of the copyright registration system, with its monumental impact on copyright ownership and wealth should be paramount over cost and time spent.