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Confronting an Extractive Racialised Genre System: Black Lives Matter, Royalty Recovery and Musical Reparations

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I. Introduction

The political-economic practices of commercial music production may be plausibly analogised to a relation of plunder and redistribution, clothed in and (legally) legitimated by recording and publishing contracts. For African Americans, this was particularly true during the pre-Civil Rights era. During that time, entrepreneurs and companies that offered recording, song writing and publishing contracts to African Americans were able to take advantage of social-structural contexts of considerable societal racial exploitation and violence targeted at African Americans. Further, for all artists prior to (and even during) the digital era, the realities of the commercial recording industry have left open few alternative paths to a recording career other than those largely determined by recording companies. For many artists, this lack of alternatives meant that taking a bad deal was generally preferable to no deal at all.

The US commercial recorded music industry has long been a socially extractive industry with racial characteristics. Here, varied experts, including recording scouts, industry executives and other intermediaries, have frequently operated as seekers after and discoverers of rich seams of unrefined music: they secure rights of exploitation through contracts; and they extract, refine and market uncountable varieties, seizing on and pumping as much value as possible out of the most productive and marketable sources. In a 2004 interview, Marshall Chess, son of Chess Records founder Leonard Chess, recalled his experience of the Chess Records headquarters when a new Chess record became a hit: 'The excitement of a hit was the closest thing I've seen to looking at those old movies where they get the oil gushers.'[1]

> That's how it used to be when you got a hit. It was just amazing; it would be going like a wave going across the country. Records would break, and the phones would start ringing. We'd yell up and down the hall, like 'Detroit 13,000!' I mean, you'd be running and running trying to get the pressings, and it would just roll across the country.[2]

[1] J Broven, *Record Makers and Breakers: Voices of the Independent Rock'n'roll Pioneers* (University of Illinois Press, 2005) 123.

[2] ibid 123.

Chess Records was one of several independent music labels that exploited a vacuum left by major recording companies. Between 1945 and 1955, these indie labels specialised in commercial music made by African Americans, with marketing targeted at African American communities.[3] The development of this 'race' record market segment led such companies to record African American artists in varied genres, including blues, R&B and rock 'n' roll, with a focus on recording artists performing genres categorised as 'black'.

Marshall Chess's 'oil gusher' metaphor highlights the prospecting/extraction dynamic that can be seen at work in several phases of the commercialisation of African American music. In this chapter, we focus on the controversies that can erupt when a creator or bearer of valuable music – a performer or composer – questions the legitimacy of an extracting agent – a record company owner or music publisher – or resists their terms. For example, Little Richard recalled confronting Don Robey about his treatment as an artist contracted to Robey's Peacock Records: 'He jumped on me, knocked me down, and kicked me in the stomach. It gave me a hernia that was painful for years. I had to have an operation. Right there in the office he beat me up.'[4] Years later, according to James Salem, Robey's partner Evelyn Johnson called Little Richard's allegations '"flat, bald-faced lies", but she does remember Robey slapping him once'.[5] In 1985, a television news reporter doing a story on royalties asked singer Hank Ballard (writer of 'The Twist' and other hit songs, long under contract to King Records) 'What happened to your publishing rights?' Ballard responded 'publishing rights? At that time, they didn't allow blacks to have publishing. If you went to a record company and even mentioned publishing, out the door you'd go.'[6]

Many African American artists have pursued restitution by contracting with 'royalty recovery' experts. Yet this tactic has often had perverse results: these experts work for a piece of the action, typically 30–50 per cent, in some cases not just of royalties recovered but of all royalties owed the artist after the royalty recovery contract was signed. For many of these experts' clients, this relation exchanged one extractor for another. Further, much royalty recovery litigation has been between royalty recovery experts and their clients. We contextualise this form of redress to contribute to a historical account of previous restitutive efforts on behalf of African American artists, as well as to highlight potential booby traps in contemporary plans for reform.

II. Black Lives Matter, the Black Music Action Coalition and the Move for Musical Reparations

The dynamics of music industry extraction and configurations of industry intermediaries are perhaps changing during the digital era.[7] However, recent events and the emergence of the Black Lives Matter (BLM) social movement have highlighted the continuing racialised nature of industry institutional configurations and dynamics. The BLM social movement emerged as a Twitter hashtag in July 2013 following the acquittal of George Zimmerman for the 2012 shooting death of African American teenager Trayvon Martin.[8] BLM received significant additional visibility

[3] J Karp, 'Blacks, Jews, and the Business of Race Music, 1945–1955' in R Kobrin (ed), *Chosen Capital: The Jewish Encounter with American Capitalism* (Rutgers University Press, 2012) 141.

[4] C White, *The Life and Times of Little Richard, the Quasar of Rock* (Da Capo Press, 1994) 37.

[5] J Salem, *The Late Great Johnny Ace and the Transition from R&B to Rock 'n' Roll* (University of Illinois Press, 2001) 70.

[6] 'West 57th, September' (television series episode) produced by Martyn Burke (CBS News, 1985).

[7] OB Arewa, 'YouTube, UGC, and Digital Music: Competing Business and Cultural Models in the Internet Age' (2010) 104 *Northwestern University Law Review* 431.

[8] AB Tillery, 'What Kind of Movement is Black Lives Matter? The View from Twitter' (2019) 4 *Journal of Race, Ethnicity and Politics* 297.

following the 25 May 2020 murder of George Floyd, one of numerous African Americans killed in the USA in recent years during encounters with law enforcement.[9] Facilitated by digital age technologies, BLM has been described as an 'Internet-driven civil rights movement'.[10]

In 2020, attendance at BLM protests in the USA made BLM the largest social movement in US history.[11] BLM has had a broad impact in the USA and globally, extending to areas far beyond events that led to its emergence. BLM is a decentralised social movement for which Twitter has been indispensable.[12] BLM has drawn attention to systemic racism with a goal 'to eliminate the racial injustice which permeates and surrounds a wide variety of places in society'.[13] For African American performers and music professionals, linking this impetus to long-standing concerns with the recording industry was a short step.

African American musical forms have long been a key source of musical innovation, and a succession of African American musical genres, from ragtime to rap, have 'stamped themselves indelibly on the lives of generation after generation … [as] the most important tributary flowing into today's music', which is a function of 'the exceptional vitality, creativity, and power of musicians working within these idioms'.[14] Yet 'tributary' also names the relationship of a subject population obliged to pay regular tributes to a conquering ruler. From the dawn of the recording industry, African American innovators in music have been exploited in myriad ways in line with a dominant gold rush impetus in the recording industry in which varied intermediaries sought to harvest value from African American culture within broader approaches built upon an ethos of extraction. Past and present exploitative practices have affected a broad range of musicians, not just African American ones. However, the fundamental role of African American musical genres in musical innovation, pervasive exploitative borrowings from African American music and musicians, societal status of many African Americans and contexts of official white supremacy in which the US recording industry took form have led to exploitation having an outsized impact within African American communities.

Exploitation has also occurred in contexts, particularly in the pre-Civil Rights era, in which entertainment was one of the few socially sanctioned avenues of work for many African Americans other than servitude:

> Long after slavery had ended, African Americans could not escape servitude, having few if any other alternatives for employment … There are many reasons for this dearth of options, but prominent among them is the assumption of the utilitarian nature of black people based on the conviction of black inferiority, and an accompanying resistance to reconceptualizing the potential for anything else for blacks.[15]

Music critics and historians have often noted parallels in the regimes of sharecropping and the recording industry.[16]

[9] DM Clayton, 'Black Lives Matter and the Civil Rights Movement: A Comparative Analysis of Two Social Movements in the United States' (2018) 49 *Journal of Black Studies* 448.

[10] J Eligon, 'One Slogan, Many Methods: Black Lives Matter Enters Politics' *New York Times* (18 November 2015) www.nytimes.com/2015/11/19/us/one-slogan-many-methods-black-lives-matter-enters-politics.html.

[11] L Buchanan, Q Bui and P Jugal, 'Black Lives Matter May Be the Largest Movement in US History' *New York Times* 3 July 2020) www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html.

[12] Tillery (n 8).

[13] Clayton (n 9).

[14] S McClary, 'Rap, Minimalism, and Structures of Time in Late Twentieth-Century Culture' in C Cox and D Warner (eds), *Audio Culture: Readings in Modern Music* (Continuum, 2004) 289.

[15] MI Jordan, *African American Servitude and Historical Imaginings: Retrospective Fiction and Representation* (Palgrave Macmillan, 2004) xiv.

[16] N Carr, *Utopia is Creepy and Other Provocations* (WW Norton, 2016) 30–31. See also F Tharpe, 'Steve Stoute on Disrupting the Culture, the Grammys, and the Coming "Revolution in Music"' (*Complex*, 20 December 2018) www.complex.com/life/2018/12/steve-stoute-disruptor-interview.

In recent years, particularly since the 2020 murder of George Floyd, a BLM epistemology has proliferated across many sectors of American life, returning public attention to forms of institutionalised racism. Inspired by concerns raised by BLM about racial injustice, the non-profit Black Music Action Coalition (BMAC) was founded in June 2020 to 'ensure that the music business – which is arguably kept afloat by black music and black creators – continues to combat systemic racism beyond a fleeting moment of uproar and activism'.[17] The inequities that are the focus of the BMAC include the terms of industry contracts and the composition of industry senior management, executives and board members.

A 2021 report from the University of Southern California Annenberg Institute Inclusion Initiative highlights the broad lack of inclusion across all segments of the music industry:

> In conclusion, the findings in the report show that a lack of inclusion in the music industry is not the problem of one company or one sector. It involves the entire community of artists, executives, agents, managers, publicists, distributors, and even the audience. Thus, creating a more inclusive industry requires the insight, input, and effort of all.[18]

The BMAC embodies BLM in its 2020 challenges to music industry institutions to get right with African American performers, composers, industry professionals and audiences. In January 2021, in response to public demands for accountability on the part of music corporations, Berlin-based BMG announced results of an internal audit of its artist contracts.[19] Although BMG seemingly acknowledged and owned up to racialised contracting practices, the data released by BMG gave little insight into underlying biases and their impact. BMG also promised further, as yet unidentified, action.

Industry approaches to systemic racism have been neither sustained nor comprehensive. As the 2021 BMAC *Music Industry Action Report Card* notes: 'The music business has been confronted about practices which marginalize Black artists and executives before, and those confrontations usually lead to some organizational or financial changes, but those changes don't last.'[20] BLM has reinvigorated debate about reparations across sectors of the economy; BMAC has been at the forefront of calls for reparations in the music industry. BMAC was also part of a coalition of groups that formed part of the Why We Can't Wait Coalition, which issued a statement in 2021 urging the US Congress to immediately act on the Federal Slavery Reparations Bill.[21] Others, including Jeff Tweedy, singer and guitarist for the American alternative rock band Wilco, have also called for reparations in the music industry.[22]

[17] S Hissong, 'Meet the Music Industry's New Black Music Action Coalition' *Rolling Stone* (22 June 2020) www.rollingstone.com/pro/news/black-music-action-coalition-record-industry-1018726/.

[18] SL Smith, C Lee, M Choueiti et al, 'Inclusion in the Music Business: Gender & Race/Ethnicity Across Executives, Artists & Talent Teams' (USC Annenberg Inclusion Initiative, June 2021) https://assets.uscannenberg.org/docs/aii-inclusion-music-industry-2021-06-14.pdf.

[19] BMG refers to BMG Rights Management GmbH, also known as the 'new' BMG. This 'new' BMG, founded in 2008, is a music publisher, record label and subsidiary of the private multinational media conglomerate Bertelsmann. 'The Success Story of the New BMG' (24 March 2021) www.bertelsmann.com/media/news-und-media/downloads/bmg-milestones.pdf.

[20] Black Music Action Coalition 2021. Music Industry Action Report Card, 4, https://www.bmacoalition.org/musicindustryreports.

[21] 'Why We Can't Wait Coalition Statement Urges Immediate Congressional Actions on HR 40/S.40, the Federal Slavery Reparations Bill' (30 July 2020) www.hrw.org/sites/default/files/media_2021/11/Coalition%20Letter%20-%20Why%20We%20Cant%20Wait%20-%20US%20Congress%20Should%20Pass%20Reparations%20Bill%20HR%2040.pdf.

[22] J Bernstein, 'Why Jeff Tweedy Is Calling for Reparations in the Music Industry' *Rolling Stone* (20 July 2020) www.rollingstone.com/music/music-features/jeff-tweedy-reparations-royalties-racism-interview-1024524/.

III. Blues and R&B (and Country) as Racialised Music Genres

The music industry has long been criticised for racialised music genre categories that have placed African American artists in categories reserved for music classified as 'black'. Contemporary genre categories in music reflect a historical legacy of racial classifications. Racial classifications, which have been used in the USA since the early days of its formation,[23] have long been an integral part of the marketing of recorded music. Music genres are constructed categories that may be taken for granted or assumed to be natural ones. The recording industry has shaped not only genres, but also the types of music different musicians could record. We draw attention to two interlocked, mutually reinforcing problems associated with racial genre classification: the naturalisation of 'black' and 'white' musical forms and ways this antinomy has licensed and justified racialised exploitation. African American artists appear to be 'black' before they are 'artists'.

In the early days of the commercial recording industry, industry participants had to create new markets for new recording technologies. Music soon emerged as a key application of recording technologies. Early acoustic technologies limited what could be recorded due to the limited range of early recording technology.[24] These limitations contributed to a search for things to record that led to engagement with an emerging body of African American popular music.

Blues is a distinctively American musical form and one of the most important of such forms. It arose in the early twentieth century and became a crucial sector of the recording industry in the 1920s, comprising an important element in other musical forms, including jazz, country music, R&B and rock 'n' roll. Blues is a 'definable body of musical elements or traits inherited from both African and European traditions, that forms the foundational language of much twentieth-century American musical style'.[25] Blues music has roots in African music, African American folk and work songs, and European musical traditions.[26] It is typically identified by a characteristic 4/4 syncopated or offbeat phrasing rhythmic structure, a musical mode that may incorporate flatted thirds and sevenths, and lyrics in a three-line stanza in which the second line repeats the first (AAB).[27]

As is the case with other African American-influenced musical genres, blues music has traditionally reflected an aesthetic based on borrowing and other types of copying, 'which has significantly contributed to the dynamism and widespread reach of blues as a musical form', highlighting 'the inability of current dominant copyright perceptions of music to encompass musical practice in blues and other living musical traditions that reflect borrowing and improvisatory practices'.[28] Since the early twentieth century, blues has been a key source for much of popular music, including R&B and rock 'n' roll.

Dominant recorded music business practices, as they developed during the early roots music recording era, of which the blues was a key aspect, have continued long after the peak of blues music popularity. Music industry institutional structures continue to be based in practices

[23] K Prewitt, 'Racial Classification in America: Where Do We Go from Here?' (2005) 134(1) *Daedelus* 5.
[24] M Chanan, *Repeated Takes: A Short History of Recording and Its Effects on Music* (Verso, 2005) 50.
[25] RJ Ripani, *The New Blue Music: Changes in Rhythm & Blues, 1950–1999* (University of Mississippi Press, 2006) 16.
[26] ibid 4–9.
[27] P Oliver, *Songsters and Saints: Vocal Traditions on Race Records* (Cambridge University Press, 1984) 1–9; GP Ramsey, *Race Music: Black Cultures from Bebop to Hip-Hop* (University of California Press, 2004) 113; Ripani (n 25) 16–61; E Southern, *The Music of the Black Americans: A History*, 3rd edn (WW Norton, 1997) 334–36.
[28] OB Arewa, 'Blues Lives: Promise and Perils of Musical Copyright' (2010a) 27 *Cardozo Arts & Entertainment Law Journal* 602.

rooted in earlier eras that reflect models based to a significant degree on exploitation rather than partnership.[29] Early blues was initially distributed largely through sound recordings of African American musicians for African American audiences manufactured and sold by white-owned companies. Although blues sound recordings were based on a continuing live blues performance tradition, the types of recordings that were distributed by companies marketing so-called 'race' records (of which blues formed an important segment) were significantly influenced by cultural assumptions and hierarchies of race. African American artists have often faced double exploitation. Within existing forms of exploitative business and legal norms, African American artists have suffered forms of racial exploitation that have both deprived them of ownership of their creative works and subjected them to business and legal norms that continue to the present day to be organised around an ethos of segregation and exclusion based on race.

The term 'race records' had been used since Mamie Smith's 1920 bestselling Okeh recording of 'Crazy Blues'. In 1949, the recording industry changed the 'race' music category to rhythm and blues, or R&B: 'The term *Rhythm and Blues* came into use in the late '40s after *Billboard* magazine substituted it for *race*'.[30] Terms such as 'race' music, R&B and, more recently, 'urban' music are marketing terms that have been applied to a broad range of music whose most significant commonality – as far as marketers were concerned – was the race of its performers and targeted market.[31] For example, at its emergence, R&B was not a pristine or unitary phenomenon, but a 'conglomerate of many different musical styles', including blues shouting, jump blues, blues ballads, country blues, vocal groups and gospel music.[32]

Racialised genre categories and recording industry marketing and business practices are important background factors in considering copyright treatment and contractual practices involving the blues and R&B genres. The continuing impact of racialised music genre categories remains a pressing issue, not least because their naturalisation justifies racially disparate treatment past and present. Ironically, responding to pressures about racial injustice following the murder of George Floyd, in June 2020 the Grammy Awards decided to rename the 'Best Urban Contemporary Album' as the 'Best Progressive R&B Album'.[33] The term 'urban', however, remains in the Latin music space.[34] This seeming change just repeats racialised categories of the past and highlights participants' widespread difficulty in attempting to confront racialised industry categories and other forms of exclusion and discrimination.

The recording industry's race-based genre categorisation system has a significant and continuing impact on African American musicians. African American musicians in the popular music arena are usually assigned to record chart categories considered to be 'black'.[35] In contrast, white performers typically start out on the pop charts.[36] In the past, construction of charts themselves reflected subjective assumptions about race that could diminish how charts accounted for the success of artists in 'black' genres.[37] This was evident when *Billboard* began using Nielsen

[29] M Stahl and O Arewa, 'Accounting for Injustice: AFTRA, Work and Singers' Royalties' in SM O'Connor (ed), *Oxford Handbook of Music Law and Policy* (Oxford University Press, 2021) 202.

[30] A Shaw, *Honkers and Shouters: The Golden Years of Rhythm & Blues* (Macmillan, 1978) xv.

[31] Ripani (n 25) 6.

[32] ibid 6.

[33] G Suarez, 'The Grammy's Still Don't Get It' (*Vulture*, 20 June 2020) www.vulture.com/2020/06/grammys-urban-category-essay.html.

[34] ibid.

[35] R Garofalo, 'Industrializing African American Popular Music' in PK Maultsby and MV Burnim (eds), *Issues in African American Music: Power, Gender, Race, Representation* (Routledge, 2016) 81.

[36] ibid 81.

[37] TJ Dowd and M Blyler, 'Charting Race: The Success of Black Performers in the Mainstream Recording Market, 1940 to 1990' (2002) 30 *Poetics* 87.

SoundScan data in 1991. The staggered implementation of SoundScan data led to inconsistencies between different *Billboard* charts. The SoundScan data also revealed that hip-hop had a far larger market share than was apparent under the old subjective reporting system, in which *Billboard* contacted certain record stores to determine song popularity for the purpose of constructing industry charts.[38]

Early recording industry business and marketing executives focused their efforts on what they considered to be 'authentic' black music, which for them meant blues, not string band music. Black string bands were thus excluded from 'race' music catalogues because they played 'hillbilly' music and from 'hillbilly' music catalogues because they were not white.[39] A few black 'hillbilly' musicians made careers within country music, notably harmonica player DeFord Bailey, the first African American country music star.[40] However, most black string bands were not able to get recorded, leading the black string band tradition to come 'close to disappearing'.[41]

The segregation of most African American musicians to music genres categorised as 'black' affects the shape and reception of music that might be created or recorded by African American artists. In the 1980s and 1990s, African American performers of rock music formed an activist organisation, the Black Rock Coalition, to contest this deep-seated divide. In Maureen Mahon's analysis, these musicians faced a catch-22: they were 'at once too black to be real rockers' and 'not black enough because they rock'.[42]

Race-based genre distinctions pervade the music industry and influence choices about marketing, booking and other aspects of the industry. Racialised categories have a significant impact on creators and other music industry participants and shape creative spaces in critical ways. Musicians still face pressure to fall within race-based industry silos. African American country star Mickey Guyton, for example,

> found that many people would attempt to silo her, calling her an R&B artist rather than acknowledge her legitimacy as a country musician … 'With Black women, we're supposed to be just R&B', she [Guyton] said. 'That is where everybody's comfortable putting us in'. In 2018, Guyton sang 'Caught Up in Your Storm' for the film 'Forever My Girl'. She distinctly remembers a group of white men loudly yelling during her performance, 'That's R&B! That's R&B!' She had to start over. 'There's a video of me singing it, and that was the day that it happened', Guyton said. 'Because I was a girl and because I was Black, they felt that they could do that, say that, and they were very, very rude about it. But I don't care. I'm here. Sorry, not sorry'.[43]

In late 2018, African American rapper, singer and songwriter Lil Nas X released the country rap hit single 'Old Town Road'. 'Old Town Road' became a viral meme on the video-sharing social networking service TikTok. The song went on to be number one on the US *Billboard* Hot 100 record chart for 19 weeks, which at the time was longer than any song since the chart originated in 1958. In addition to appearing on the *Billboard* Hot 100, 'Old Town Road' appeared on the Hot R&B/Hip Hop chart, a chart typically for music categorised as 'black', and the Hot Country Songs chart. In March 2019, *Billboard* announced that 'Old Town Road' was to be removed from the Hot Country chart.[44] Thus, even today, African American musicians who cross into genres

[38] SC Watkins, *Hip Hop Matters* (Beacon Press, 2006) 35–37.

[39] E Wald, *Escaping the Delta: Robert Johnson and the Invention of the Blues* (Amistad/HarperCollins, 2004) 47.

[40] RK Oermann, *Behind the Grand Ole Opry Curtain: Tales of Romance and Tragedy* (Center Street, 2008) 242–50.

[41] CK Wolfe, 'Hillbilly Fever, The Lost Tradition of Black String Bands' [May/June 2002] *No Depression* 112, www.nodepression.com/the-lost-tradition-of-black-string-bands/.

[42] M Mahon, *Right to Rock: The Black Rock Coalition and the Cultural Politics of Race* (Duke University Press, 2004) 162.

[43] RE Samuel, 'Mickey Guyton Is Carving a Path for Black Women in Country Music' (*Huffpost*, updated 11 November 2021) www.huffpost.com/entry/mickey-guyton-black-women-country-music_n_618ab716e4b055e47d80c592.

[44] E Leight, 'Lil Nas X's "Old Town Road" Was a Country Hit. Then Country Changed Its Mind' *Rolling Stone* (26 March 2019) www.rollingstone.com/music/music-features/lil-nas-x-old-town-road-810844/.

considered to be white may be guided to categories largely reserved for music considered to be 'black' and that typically derive from the original 'race' music category: 'This problem is not exclusive to country. In the music industry, rock and pop are also still thought of as music by, and for, white people.'[45]

The experiences of Mickey Guyton and Lil Nas X in the country music space reveal the degree to which the apparently natural 'whiteness' or 'blackness' of a musical genre is actively (re)produced.[46] Country music has long presented itself as a white music genre,[47] notwithstanding its evolution from racially mixed musics and African American musical influences.[48] Relaxation of such racial genre policing could undermine the legitimacy of what Maureen Mahon calls popular music's 'racialized political economy'.[49]

IV. Music, Race and Exploitation

Racial ecosystems of exploitation are reflected in at least two major problems evident in terms received from and practices connected to economic arrangements. First, African American artists in varied circumstances have received lower compensation and stated royalty rates. In addition, many African American artists have not been and are still not being paid the compensation to which they are contractually entitled. In this section, we outline key elements of these two problems.

A. Lower Stated Royalty Rates

The 2020 BMG audit revealed that African American musicians have often received lower stated record royalty rates (royalties associated with sales and licences of sound recordings). In December 2020, BMG announced the results of its audit of historical labels that it had acquired. The BMG audit was inspired by BLM, racial justice protests after the murder of George Floyd, and the activities of the BMAC. Audits such as the one undertaken by BMG are certainly a step in the right direction. However, the results of the audit, as reported in media sources, suggests that we have a long way to go in terms of audits that are transparent and that reveal the magnitude of exploitation that African American artists have experienced.

The full BMG study does not appear to have been widely released. The findings as reported in the news media were: 'BMG has found that four of the 33 labels in its historic acquired catalogues show "statistically significant differences between the royalties paid to Black and non-Black artists".'[50] Notably, however, this reporting is not sufficiently transparent. It appears to suggest

[45] ibid.

[46] J Hamilton, *Just Around Midnight: Rock and Roll and the Racial Imagination* (Harvard University Press, 2016); K Hagstrom Miller, *Segregating Sound: Inventing Folk and Pop Music in the Age of Jim Crow* (Duke University Press, 2010).

[47] R Thomas, 'There's a Whole Lot O'Color in the "White Man's Blues": Country Music's Selective Memory and the Challenge of Identity' (1996) 38 *Midwest Quarterly* 81.

[48] JR Neal, *The Songs of Jimmie Rodgers: A Legacy in Country Music* (Indiana University Press, 2009) xiii; D Peckhold (ed), *Hidden in the Mix: The African American Presence in Country Music* (Duke University Press, 2013); A Randall, 'Lil Hardin to Lil Nas X: The Genius of Black Country' in *Rivers of Rhythm: African Americans and the Making of American Music* (National Museum of African American Music, 2020) 131–51.

[49] Mahon (n 42) 106.

[50] M Stassen, 'BMG Publishes Results of Historic Royalties Review, Pledges Action and Invites Other Labels to Probe for Evidence of Racial Disadvantage' (MusicBusinessWorldwide, 18 December 2020) www.musicbusinessworldwide.com/bmg-pledges-action-on-results-of-historic-royalties-review/.

that the magnitude of the royalty differences between black and non-black artists relates to small numbers (only four out of 33 or some 12 per cent of labels had such lower compensation). The public revelations, however, give little or no indication as to the actual magnitude of these royalty differences for the artists involved. Most importantly, the revelations do not reveal the key information that one would need to know to assess the impact of reduced royalties paid to black artists: what total number and percentage of black artists across all labels received lower royalties regardless of the number of labels involved or whether the labels were segregated or had black and non-black artists.[51]

BMG's acquired historical recorded catalogues include recordings on 33 labels by 3163 total artists, with 1010 black artists (31.9 per cent).[52] Fifteen of the 33 labels include both black and non-black artists, which suggests that the other 18 labels may perhaps be segregated,[53] although it is difficult to determine exact breakdowns, given the publicly reported numbers. Of the 15 labels that had both black and non-black artists, a quarter had statistically significant lower royalty rates for black artists: 'in the case of four labels there was a statistically significant negative correlation between being black and receiving lower recorded royalty rates, a difference ranging from 1.1 to 3.4 percentage points'.[54]

The BMG study is an important starting point for identifying lower stated royalties for African American artists, but may be incomplete in important ways. The reported data from the study highlight the importance of greater transparency, but also raise questions. For example, what is the racial composition of the 18 labels that did not include both black and non-black artists and that may perhaps be segregated? If these labels are segregated in that some may have all black artists and some all non-black artists, what are the royalty rates among the different labels? The data released by BMG also lacks other demographic data, including information about royalties and gender, which may reflect a doubly negative impact on artists who are black and female. It would also be helpful to understand the magnitude of the impact of the royalty differential. For example, how many of the 1010 black artists in the BMG-acquired catalogues were in the four labels with the discrepancies or in labels with statistically significant lower royalty rates?

In addition, other provisions may be important in determining artists' contractual rights other than those related to stated royalty rates. Reports about the BMG disclosures do not give a sufficiently comprehensive overview of the legal and economic terms of contracts with the 1010 African American artists who signed contracts with BMG historic labels. The disclosures also do not give sufficient information about how these provisions compare with those of other contracted artists.

B. Non- and Under-payment of Contractual Record Royalties

In addition to lower stated royalty rates, African American (and other) artists have experienced persistent difficulties in getting royalties paid to them. Difficulties in getting paid often relate to

[51] The terms 'black' and 'white' are not capitalised in this chapter. As Kwame Anthony Appiah has noted, both black and white are categories that reflect 'historically created racial identities'. KA Appiah, 'The Case for Capitalizing the B in Black' *The Atlantic* (18 June 2020) www.theatlantic.com/ideas/archive/2020/06/time-to-capitalize-blackand-white/613159/.

[52] Stassen (n 50).

[53] C Cooke, 'BMG Calls on Industry to Follow Its Lead to Tackle Discrimination in Old Record Contracts' (*Complete Music Update*, 21 December 2020) completemusicupdate.com/article/bmg-calls-on-industry-to-follow-its-lead-to-tackle-discrimination-in-old-record-contracts/.

[54] ibid.

problems with royalty accounting and recording firms' manipulation of royalty accounting.[55] In the 1980s and 1990s, Howell Begle, a pro-bono attorney working on behalf of Ruth Brown, Joe Turner, the Clovers and many other 1950s R&B acts, found evidence that Atlantic Records had larded performers' royalty accounts with debits in the form of packaging and other charges not allowed by their contracts, and neglected to monitor, account for or pay Ruth Brown's (and possibly other artists') foreign record royalties for over 10 years.[56] When Ruth Brown stopped recording for Atlantic Records in 1963, the company declared that she owed them tens of thousands of dollars in unrecouped cash advances and other monies the company paid on her behalf. Until Begle made his discoveries public, Atlantic denied that their own accounting practices contributed to Brown's negative royalty account balance, her 'debt' to the company.

In a recent case involving the late soul artist Johnnie Taylor, Sony was said to be writing off that singer's debt (or negative royalty account balance) so that Taylor's family could receive royalty payments.[57] Howell Begle's research threw into question the bromide that R&B recording artists' negative royalty account balances (like Johnnie Taylor's supposed 'debt') were due to performers' poor financial discipline.[58] Ruth Brown and Howell Begle's 'royalty reform' activism gathered steam in the mid-1980s and culminated about 10 years later with several major and minor record companies acknowledging historical and continuing injustices, zeroing out negative royalty account balances, updating their accounting practices and in some cases raising royalty rates from the one to five per cent standard of the 1950s to the 10 per cent standard of the 1980s.[59]

The patterns of institutional behaviour that are suggested in the recent BMG study, brought to light in Ruth Brown and Howell Begle's royalty reform work and recently evinced in news accounts of Johnnie Taylor's persisting negative royalty account balance with Sony, all hinge on historical problems associated with *record royalties*, royalties to be paid to artists on retail sales of recordings to the record-buying (or cassette- or CD-buying) public. When journalistic coverage of a recording artist speaks of a *royalty rate*, reference is being made to the formula by which a record company determines how much it will credit a recording artist per unit sold. For most artists addressed by Brown and Begle, a typical royalty rate would have been around one to five per cent; this is likely the case with most of the artists covered in the BMG study whose contracts predate 1965. Problems of record royalties relate to distinct patterns of unequal treatment, evident, for example, in artists in some genres being offered lower rates than artists in other genres, as well various ways companies have avoided paying even those lower rates.

V. Dispossessive Music Publishing Practices in Blues and R&B

Problems with record-royalty accounting are also associated with a distinct but closely related system of extraction, one where race and genre also play very significant roles: music publishing

[55] Stahl and Arewa (n 29).

[56] M Stahl, 'Tactical Destabilization for Economic Justice: The First Phase of the 1984–2004 Rhythm & Blues Royalty Reform Movement' (2015) 5 *Queen Mary Journal of Intellectual Property* 344.

[57] J Bernstein, 'He Scored the First Platinum Hit. 45 Years Later, His Family Is Fighting for Every Penny' *Rolling Stone* (2 November 2021) www.rollingstone.com/music/music-features/johnnie-taylor-fonda-bryant-sony-royalties-1241773/; D Brown, 'Late Soul Singer's Family Fights with Sony to Get Rid of His Debt' (WSOC-TV 9, 10 November 2021) www.wsoctv.com/news/local/late-soul-singers-family-fights-with-sony-get-rid-his-debt/6IFBCCFOGFFTNLNUNK4AUXHUKU/.

[58] Stahl (n 56).

[59] ibid.

in the recorded music industry. A pattern of publishing practices emerged in the early 1920s with the development of relations between record companies, African American singers and instrumentalists, African American record buyers and a new cohort of intermediating figures: the talent scouts/music publishers now generally known as 'A&R' (artist and repertoire) people.[60] People in this role, frequently lauded as risk-taking pioneers, continue to fascinate historians of the recording industry.

A. The Mechanical Right

The booming recording industry of the 1920s took advantage of 1909 Copyright Act provisions that allowed companies to make a mechanical reproduction (phonorecord) of a musical composition 'without the consent of the copyright owner provided that the person adhered to the provisions of the license'.[61] The compulsory mechanical licence provisions had stringent requirements, including statutory minimum royalty rates. These requirements meant that compulsory mechanical licences under the 1909 Act were not widely used.[62] Mechanical licences were often privately negotiated, with the statutory minimum royalty rates typically being a ceiling for them.[63] Statutory minimum rates were two cents per copy from 1909 until the 1976 Copyright Act came into force on 1 January 1978.[64]

By the late nineteenth century, US copyright law gave copyright owners exclusive rights to reproduce and distribute their copyrighted works,[65] including in the case of music through sale of sheet music, to translate and dramatise such works[66] and to publicly perform them.[67] Those seeking to make reproductions, distribute copyrighted works or undertake public performance of musical compositions thus required the permission of the copyright owner, which typically required receiving permission (or a licence) from the copyright owner for the use of the musical composition. Such licences usually entailed payment of royalties to the copyright owner.

The 1909 Act created additional rights for copyright owners of musical compositions for *mechanical reproductions* of such compositions, including through piano rolls and recorded cylinders and discs. These rights were, however, made subject to a compulsory licence framework due to concern about the monopolisation of these mechanical rights by a single company.[68] To prevent such monopolisation and foster competition among manufacturers,[69]

[60] To avoid anachronism and glorification, we use the less-loaded term 'intermediary' hereinafter.

[61] Statement of Marybeth Peters, The Register of Copyrights before the Subcommittee on Courts, The Internet and Intellectual Property of the House Committee on the Judiciary, United States House of Representatives, 108th Congress, 2nd Session, 11 March 2004, www.copyright.gov/docs/regstat031104.html.

[62] ibid.

[63] ibid.

[64] ibid.

[65] In 1831, the first general revision of the US Copyright Act extended copyright protection to musical compositions: Copyright Act, Washington DC (1831). L Bently and M Kretschmer (eds), *Primary Sources on Copyright (1450–1900)* www.copyrighthistory.org.

[66] In 1870, Congress extended the Copyright Act of 1831 to translations and dramatisations of musical compositions: Copyright Act, Washington DC (1870). ibid.

[67] In 1870, Congress also extended the Copyright Act of 1831 to public performances of dramatic works. ibid. In 1897, Congress extended the Copyright Act of 1831 to public performances of musical compositions: US Copyright Amendment Act of 1897, Copyright Act (Public Performance of Musical Compositions), Washington DC (1897). ibid.

[68] Peters (n 61).

[69] House of Representatives Report No 60-2222, 6 (1909).

the 1909 Act provided that 'whenever the owner of a musical copyright has used or permitted or knowingly acquiesced in the use of the copyrighted work upon the parts of instruments serving to reproduce mechanically the musical work, any other person may make similar use of the copyright work' by following procedures laid out in the 1909 Act,[70] or by negotiating privately with the owner of the copyright. A House of Representatives Report for the 1909 Act identifies varied types of mechanical reproduction, including discs, plates, cylinders, strips, perforated rolls and phonographs. This report notes that:

> It is not the intention of the committee to extend the right of copyright to the mechanical reproductions themselves, but only to give the composer or copyright proprietor the control, in accordance with the provisions of the bill, of the manufacture and use of such devices.[71]

As of 1965, somewhat late in the period surveyed here, 'no legitimate record company ha[d] ever [exercised] the compulsory license provisions of the Act. In every instance the record company obtain[ed] an agreement with the publisher because of certain benefits derived irrespective of the Act'.[72] These benefits included, for example, the possibility that a star artist would record a new version of a previously recorded song (cover song) and, by selling hundreds of thousands or millions of records, generate revenue through mechanical and performance royalties from uses of the musical composition. Such cover songs could also increase interest in the song and thus improve the likelihood that the song would be recorded and released in new versions by other companies in the future. The potential benefits of cover songs could also induce rights holders to accept reduced mechanical royalties or even create agreements where the record company would pay no mechanical royalties until a certain record sales threshold was reached. Agreements like these enabled record companies to structure agreements to avoid or minimise having to deal with mechanical licences.

The 1909 Copyright Act's compulsory licence provisions created a framework for two related developments that are important to our story of genre-related business practices in the US recording industry. The first was the emergence in the 1920s of a new kind of entrepreneurial publisher, an intermediating figure who brokered relations between African American music performers and composers and the companies who demanded new recordings to market to African American music consumers. According to Ward and Huber, these intermediaries 'often earned most of their income in the recording industry from controlling copyrights'.[73] The second development was the merging of record manufacturing and music publishing in the development of record companies' 'in-house' (or affiliated or subsidiary) publishing companies. According to Arnold Shaw, himself a publishing professional in blues and R&B during the postwar period, recording company executives developed business techniques 'to reduce royalties paid to songwriters and publishers'.[74] Each of these phenomena became systematised around the extraction of copyrights and/or claims of copyright ownership by recording company-owned publishing companies, whether through transfers of publishing rights from composers or through executives' full or partial claims of authorship.

[70] 1909 Copyright Act, Pub L No 60-349, 35 Stat 075 (4 March 1909), §1(e).

[71] House Report (n 69) 9.

[72] W Whiting, 'Compromise to Correct Result: Retention and Modification of the Compulsory License in Proposed Copyright Law Revision' (1965) 53 *California Law Review* 1528.

[73] B Ward and P Huber, *A&R Pioneers: Architects of American Roots Music on Record* (Country Music Foundation Press, 2018) 90.

[74] Shaw (n 30) 200.

B. Race Records Producing and Publishing in the 1920s

By the 1920s, thanks in part to the popular 1910s compositions of WC Handy and the staggering sales of Mamie Smith's 1920 record 'Crazy Blues', a 'blues and jazz bonanza' was underway.[75] From that time until the early 1930s, the business of 'race' records was quite profitable.[76] Companies such as Paramount, Okeh, Vocalion and Brunswick Records manufactured and sold recordings by rural and city-dwelling African American performers. According to William Barlow, 'there were close to 15,000 race records released by the industry [during this period]; approximately 10,000 blues titles, 1,750 gospel titles, and 3,250 jazz titles'.[77] These were white-owned companies that soon came to depend on intermediaries who could recruit and record African American performers whose recordings they could market to African American audiences.

At the same time, it is not at all clear that these companies prioritised copyright acquisition or exploitation; some seem to have understood their business solely as manufacture and sale of tangible wares, not proprietorship of intellectual property rights. The conditions existed, therefore, for the emergence of intermediaries who could (i) locate and recruit vocalists and instrumentalists to provide recordings needed by record manufacturers, and (ii) register the copyright to any copyrightable works not already protected by copyright (or secure rights to registered works) that such performers recorded. Ward and Huber emphasise the centrality of this mode of extraction to the establishment of the recording industry: 'these practices constituted the vital financial lifeblood – as well as the dark heart – of the interwar roots music recording business'.[78]

J Mayo 'Ink' Williams, Perry 'Mule' Bradford, Clarence Williams, Ralph Peer, Polk Brockman, HC Speir and other entrepreneurs, seeing an emerging mass market in sound recordings, positioned themselves to siphon off royalties flowing from rights in copyrighted musical compositions. They recruited performers to make recordings that Paramount, Okeh, Vocalion, Brunswick and other companies could manufacture and sell. These music producers prioritised securing copyrights to musical compositions – sometimes on behalf of the companies, but often for themselves alone – by buying the composition from the performer on the spot, by licensing it for shared revenue or by simply claiming it without explaining or disclosing anything.

The workings of the mechanical royalty set early record producers 'on a feverish search, not just for new talent to record but also, more specifically, for new talent with original material that might be copyrighted'.[79] These miners in a cultural gold rush operated on a piece-of-the-action basis. In 1923, Polk Brockman started copyrighting and publishing the blues songs of performers whose recording he supervised, later branching out into 'hillbilly' music; 'My sole interest', he said, 'was in the mechanicals and recordings'.[80] In 1965, William Whiting observed that 'a significant part of the income of the music industry is derived from mechanical reproduction'.[81] Recent research into the practices of intermediaries like those discussed here sheds new light on how this principle played out in racialised terms.

Ralph Peer is best known for his recruitment and recording of 'hillbilly' performer-composers like the Carter Family and Jimmie Rodgers. However, Peer had witnessed the blues windfall of Okeh Records while working for that company in 1920, when they released Mamie Smith's

[75] W Barlow, 'Cashing In: 1900–1939' in JL Dates and W Barlow (eds), *Split Image: African Americans in the Mass Media*, 2nd edn (Howard University Press, 1990) 33.
[76] Ward and Huber (n 74) 90.
[77] Barlow (n 76) 33.
[78] Ward and Huber (n 74) 91.
[79] ibid 93.
[80] ibid 100.
[81] Whiting (n 73).

blockbuster 'Crazy Blues'. Moving to Victor Records in 1926, Peer made a deal to recruit and record race and hillbilly acts in exchange for a piece of the action. Victor Records seems to have been unconcerned with music publishing, and Peer claimed publishing rights on virtually all the material he recorded. According to David Suisman, 'Peer understood that every record that came out had in it a lucrative "mechanical right" to exploit',

> and in 1926, when he went to work for Victor as a producer, he negotiated for the company to sign over to him all the copyrights of the recordings whose sessions he organized, in lieu of receiving any salary. Victor, believing Peer foolish to negotiate such a deal, gladly agreed, but Peer knew what he was doing. In the second quarter of 1928 alone, he earned close to $250,000. Concerned that Victor would get wise to the amount of money he was taking in, he then set up several publishing companies for cover, which by the 1930s and '40s had expanded into a multimillion-dollar international publishing empire.[82]

One of the publishing companies Peer developed in this context is now known as Peermusic. It remains family-run and maintains a catalogue of over 250,000 pop music compositions.[83]

J Mayo Williams was another influential intermediary and contemporary of Peer. Williams worked for Paramount, Brunswick and Decca Records during the late 1920s and early 1930s, typically without a salary and without an official position, recruiting performers and recording new masters for the companies in exchange for rights in compositions. 'I never had no salary contract, nothing like that because I would get mine from the royalties from the songs.'[84] In a 1970s interview, Williams said

> 35% of the artists sold off their composition outright for a flat proposition … Not only did the publishing company receive all the royalties from the compositions they owned outright, but they stood to make a lot if another company made a record using that composition.[85]

According to Robert Springer, Williams's 'name appeared as author or coauthor of about half the compositions registered. From 1928 to 1932, State Street Music [the publishing company Williams had founded] deposited 500 songs in the race series of both labels.'[86] Sara Filzen writes that Williams 'once described himself as being about "fifty percent honest"'.[87] As Ward and Huber write, 'Virtually all the artists Williams signed and recorded for Paramount, Brunswick, and Decca [in Williams' own words] "received a flat fee … I don't know of a single one that was on a royalty basis"'.[88]

Peer and Williams exemplified a novel mode of extraction built around the social process of recording in a racially stratified socio-legal context. According to Kenney,[89] independent recruitment and contracting of artists by Williams, who was African American and one of the most successful producers of his era, enabled the companies to whom he supplied recordings and performers to show that they employed no African Americans in managerial positions. This further permitted white company officers to avoid dealing directly or publicly with the African American artists on whose unique services and copyrightable compositions they depended.

[82] D Suisman, *Selling Sounds: The Commercial Revolution in American Music* (Harvard University Press, 2009) 175.

[83] www.peermusic.com/; A Paine, 'We Are Family: Peermusic's Mary Megan Peer Takes Over as CEO' *MusicWeek* (11 December 2020) www.musicweek.com/publishing/read/we-are-family-peermusic-s-mary-megan-peer-takes-over-as-ceo/082183.

[84] Ward and Huber (n 74) 91.

[85] ibid 103.

[86] R Springer, 'Folklore, Commercialism and Exploitation: Copyright in the Blues' (2006) 26 *Popular Music* 33, 37 (citation omitted).

[87] S Filzen, 'The Rise and Fall of Paramount Records' (Winter 1998–99) 82 *Wisconsin Magazine of History* 114.

[88] Ward and Huber (n 74) 103.

[89] WM Kenney, *Recorded Music in American Life: The Phonograph and Popular Memory, 1890–1945* (Oxford University Press, 1999).

C. In-House Blues and R&B Publishing in the 1950s

The 'rise of the independents' – the scores of little record companies that sprang up in post-war American cities to record African American musicians and market to African American consumers – is a story that has been told many times from many different perspectives.[90] Scholarly and other histories of blues and R&B companies, entrepreneurs, songwriters and performers often highlight music publishing as a major concern in this business ecosystem. The most successful independent companies had their own in-house or affiliated publishing companies, and many of those companies made it a requirement that a new performer signing a recording contract also sign a publishing contract assigning publishing rights to the company's publisher. James Salem writes that 'the independent record companies that survived the transition from r&b to r&r in the 1950s … did so on the strength of their publishing subsidiaries'.[91]

'The traditional publisher–composer relationship,' writes Roger Wallis,[92] 'assumes close ties between creator and [publisher, as creator's] representative, with the publisher being entirely independent of the recording industry.' This idealised model does not adequately describe the operations of the intermediaries discussed in the previous section. It also does not explain publishing activities undertaken by postwar blues and R&B record companies. Many blues and R&B entrepreneurs, having gained music industry experience before starting their own record companies, entered into record manufacturing and music publishing in close succession, as, for example, did Art Rupe with his Specialty Records and Venice Music Publishing and Syd Nathan and his King Records and Lois Music. Publishing subsidiaries were most profitable when major national companies had their mainstream white pop stars record cover recordings of songs whose publishing rights the regional independents held. The independent companies' publishing subsidiaries would receive the mechanical royalties owed by the major companies on each copy of the cover record they sold.

The well-documented practice of covering, as was undertaken in the early 1950s, is widely understood as a racialised extractive process whereby the major record companies re-recorded songs originated (if not written) by African American artists and released these re-recordings within months or even weeks of the original independent release. Cover recordings by mainstream white pop singers were frequently able to capture the upward chart momentum of the original recording, effectively capping the original's sales and geographical spread, as radio DJs and record retailers prioritised relations with richer companies over imprecations from original artists and their advocates. This system very often gave the white performer (Pat Boone, Georgia Gibbs, Elvis Presley, Ernie Ford and so on) a national hit. It was the performers of the original recordings, especially those who could claim no authorship credit, who were most negatively affected here.[93] As Don Snowden writes, the in-house publisher arrangement 'was a situation ripe for exploitation since an artist was completely dependent on the publisher and record company to supply accurate information that would let the performer know what was going on'.[94]

[90] See, eg Shaw (n 30); GC Altschuler, *All Shook Up: How Rock'n'Roll Changed America* (Oxford University Press, 2003).
[91] Salem (n 5).
[92] R Wallis, 'Copyright and the Composer' in S Frith and L Marshall (eds), *Music and Copyright*, 2nd edn (Routledge, 2004) 109.
[93] See the interview with LaVern Baker in C Deffaa, *Blue Rhythms: Six Lives in Rhythm and Blues* (Da Capo Press, 1996) 174–216. Baker was a singer recording for Atlantic Records in the 1950s, whose songs were repeatedly covered by Mercury Records' white pop singer Georgia Gibbs.
[94] W Dixon and D Snowden, *I Am the Blues: The Willie Dixon Story* (Da Capo Press, 1989) 185.

By owning or co-owning in-house publishing companies, record manufacturers such as Chicago's Chess Records could effectively pay themselves all or most of the mechanical royalties. Muddy Waters, Howlin' Wolf, Chuck Berry and dozens of other African American artists were under contract to Chess in the 1950s and 1960s. Chess Records's historian Nadine Cohodas outlines how this worked for Chess and its affiliated publisher Arc Music, formed in 1953:

> The four Arc principals [Leonard and Phil Chess and their partners Gene and Harry Goodman] agreed that Chess would pay the one-penny 'mechanical' fee on the sale of [songs first released on] Chess Records directly to the writer. But Arc would not get the other penny even though it was publisher of the song. That penny would remain at Chess …[95]

In other words, Chess Records would pay to Arc Music no part of the two cents per song per record that they could otherwise have been required to pay an independent publisher. Chess instead kept both cents on the understanding that the record company would pay the writer's share of the mechanicals to the writer 'directly'.[96] Chess would not pay mechanicals to Arc Music even on cover versions released on Chess's labels; it was as if there were no publisher at all in this situation. Arc Music would only receive mechanical royalties when the song at issue was re-recorded and released by another label. Thus, Arc Music played little immediate role in the day-to-day experiences of the many Chess song-writing artists whose songs were not covered by artists recording for non-Chess companies.

D. Royalty Recovery – Ambivalent Restitution

Varied R&B and blues musicians, including Willie Dixon, Robert Johnson and McKinley Morganfield (Muddy Waters) and their heirs, may have experienced multiple levels of exploitation over time, including through *royalty recovery*.[97] Royalty recovery is a restitutive model that emerged in the 1970s whereby white experts with industry experience and connections, including Scott Cameron and Chuck Rubin, worked to recover copyrights or royalty rights, most often for African American artists, frequently ending up in conflict (if not in litigation) with their clients. In the case of the estate of early blues artist Robert Johnson, for example, Johnson's heirs assigned to Steve LaVere, a music historian, the rights to photographs of Johnson and other memorabilia and copyright to Johnson's works in exchange for 50 per cent of any royalties earned by LaVere for their use.[98] Artists often experienced significant difficulty when they sought to terminate contracts with royalty recovery experts, leading to extensive royalty recovery contract litigation. The Johnnie Taylor case referred to above, the Robert Johnson case and other cases involving estates of artists highlight the intergenerational consequences of exploitative music industry practices, which have likely contributed to the racial wealth gap. Royalty recovery cases and disputes about music industry contracts and accounting underscore the critical need for more extensive analysis of experiences of African American litigants in commercial litigation involving music industry contracts.

One distinguishing feature of royalty recovery practitioners is a persistent, long-term financial interest in the outcome of their royalty recovery activities. Such interests were evident in

[95] N Cohodas, *Spinning Blues into Gold: The Chess Brothers and the Legendary Chess Records* (St Martin's Press, 2012) 80.

[96] Willie Dixon makes it seem like that 'direct' payment system was a means by which Chess could demand kickbacks as a condition of making any payments to Dixon: Dixon and Snowden (n 95) 199–200.

[97] M Stahl and O Arewa, 'Willie Dixon, Muddy Waters, and Commercial Litigation: The Intergenerational Impact of Royalty Recovery Cases' (unpublished manuscript).

[98] *Anderson v LaVere* 895 So 2d 828, 831 (Miss 2004).

Cameron's disputes with the Dixon family, and later the disputes of Cameron's surviving spouse Elizabeth with the family of Muddy Waters.[99] Chuck Rubin and his Artists Rights Enforcement Corporation (AREC) have been parties to numerous lawsuits against their own clients. Royalty recovery practitioners' suits against their clients amount to another extractive system, a *shadow industry* of contracts upon contracts, extractions upon extractions, operating in the asymmetrically racialised gaps and ambiguities that have characterised the music industry of the twentieth century.

VI. Conclusion

Black Lives Matter and the Black Music Action Coalition returned public attention to the 'racialized political economy'[100] of the American recording industry. BMG's 2020 self-audit confirmed BLM and BMAC arguments, albeit in an obscure and insufficiently transparent fashion. In this chapter, we have tried to show some of the core factors at work for a century in the production and reproduction of the recording industry as an extractive system with racial characteristics. There is much still to learn about how the following factors (and others) interacted: the construction of racialised music genres; the formation of copyright law's categories and boundaries with respect to music; and the development of roles, resources and institutions in the twentieth-century recording industry.

Since the early days of the recording industry, widespread use of racial categories and differential compensation based on race have intensified the impact of pervasive exploitative borrowings from African American musicians and culture. Although borrowing is a characteristic aspect of African American-influenced music, these exploitative borrowings underscore the impact of broader sociocultural contexts. A BLM epistemology emphasises that all these factors and relations unfolded in a context of official and thoroughly normalised white supremacy. In the worlds of American popular music, white supremacy contained and supported fascination with African American music and performers, an economic interest in African American consumers' growing purchasing power and a readiness to recruit, classify and exploit African American performers and repertoires to the hilt.

Racialised practices of value extraction by means of appropriation and/or control of copyrights and publishing rights exemplified and undergirded this fluid articulation of laws, norms and practices, particularly as they operated in the margins of early twentieth-century US society and its burgeoning entertainment industries. As Mayo Williams and Ralph Peer did in the 1920s, so the Chess family and other entrepreneurs secured ownership and/or control of copyrights and publishing rights in the margins of the post-war US recording industry. These entrepreneurs secured massive windfalls by licensing their copyright-protected material to major national companies able to market it to mainstream white audiences, while maintaining contractual control of the originating artists and composers signed to their regional, specialised recording and publishing companies.

Almost certainly under multiple pressures, many African American artists were stripped of their copyrights, knowingly or unknowingly, by representatives of white-owned companies in a political-legal regime of white supremacy. Political philosopher Charles Mills quotes a 1969 article from the journal *Foreign Affairs*: as late as the 1940s,

[99] Estate of McKinley Morganfield Deceased, 18th Judicial Circuit Court, DuPage County Illinois.
[100] Mahon (n 42) 146.

> [t]he long-established patterns of white power and nonwhite non-power were still the generally accepted order of things. All the accompanying assumptions and mythologies about race and color were still mostly taken for granted … white supremacy was a generally assumed and accepted state of affairs in the United States as well as in Europe's empires.[101]

Kenney writes that the 'purchase of copyright' – and, as we have suggested, its appropriation through other methods – 'was a widespread procedure in the race record business, and it continues to provide a basic factual reference point for African American accusations of musical exploitation in the United States'.[102] For African American performers and composers in a turbulent, insecure industry, the ready cash offered by a Mayo Williams or Polk Brockman for a recording session and/or property in the song may well have been more appealing than 'hypothetical sums that might come their way in the future',[103] particularly given a social context where continuing exploitation was likely to be an accepted norm. This notion that 'a bad deal is better than no deal' arises in much of the primary and secondary literature.

In the 1970s and 1980s, many of these artists (by this time at retirement age) and/or their heirs sought overdue compensation, often signing contracts with royalty recovery experts like Chuck Rubin, Scott Cameron and Steve LaVere. These second-order intermediaries' whiteness, music industry knowledge and industry contacts enabled them to recover publishing and record sales royalties. Yet these recoveries came at very high prices; in many cses, these experts' contracts with clients including Huey 'Piano' Smith, Carl Gardner, Willie Dixon, Muddy Waters and the heirs of Robert Johnson were even more onerous and extractive than the artists' original recording and publishing contracts. It is not surprising that a large proportion of the lawsuits in which, for example, Chuck Rubin and his successors were parties in suits against AREC's own clients.

Our concern here has been to illustrate how the recording industry's extractive system is historically constituted such that the racialised incentives that attracted and rewarded extractors like Williams, Peer and the Chess brothers and others remain operational. This extractive system provides the basis for royalty recovery as a shadow extractive industry, an industry of contracts on contracts. The American recording industry's stubborn racial-genre segregation and the racialised system of economic incentives persist and, we believe, must be considered in the development of strategy and tactics for reforming the recording industry's racialised practices.

[101] Quoted in C Mills, *The Racial Contract* (Cornell University Press, 1997) 27.
[102] Kenney (n 89) 119.
[103] Springer (n 87) 39.