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# Check Your Bank Account First: Examining Copyright Formalities and Remedies Through a Race Conscious Lens

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# Check Your Bank Account First: Examining Copyright Formalities and Remedies Through a Race Conscious Lens

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*Abstract*

*This Note examines copyright formalities through a race conscious lens and concludes that further change is necessary given the legacy of economic inequality that communities of color experience. It examines the history of copyright formalities in the United States and the disenfranchisement of Black musical creators through the theft of their intellectual property. In exploring the relationship between race, wealth, and musical copyright protection this Note explains why considering the economic inequality is relevant to ensure copyright protection for Black creators. This Note proposes abolishing the registration timeline for certain remedies and altering the filing fee structure of the copyright office to remove barriers to entry into the copyright system which may disproportionately impact creators of color.*

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*"IP scholars are increasingly recognizing that the legal regimes of intellectual property are inextricably linked to systems of social and economic inequality."*[1]

## *I. Introduction*

The copyright registration system is one of the many ways which creators can protect their creations and intellectual property in the United States legal system.[2] Copyright protection arises as soon as "an author fixes the work in a tangible form of expression" and currently lasts for the life of the author plus another seventy years after death.[3] Copyright owners have exclusive rights to reproduce their works, perform the work publicly, and to distribute copies via sale, just to name a few.[4] This system of copyright, however, has not always been a tool that is accessible to all creators. For much of the history of copyright in the United States certain mandatory steps, copyright formalities, had to be followed in order to gain access to the protection and benefits of copyright ownership.[5] Failure to comply with these formalities either terminated the copyright or prevented the protections from arising in the first place.[6]

These formalistic copyright requirements existed alongside explicit systems of slavery and racial discrimination which intentionally stripped Black Americans of capital, education, and land.[7] These strict formal requirements existed "within social structures that historically did not serve the interests of black

1. K.J. Greene, *"Copynorms," Black Cultural Production, and the Debate Over African-American Reparations,* 25 CARDOZO ARTS & ENT L. J. 1179, 1182 (2008).

2. *See What is Copyright?*, COPYRIGHT.GOV (explaining the basics of copyright law) [https://perma.cc/YJ8G-TXUR].

3. *See id.* (detailing how fixation works and how long a copyright lasts).

4. *See id.* (discussing the "exclusive rights" provided under copyright law).

5. *See* Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485, 492–94 (2004) (describing formalities in "early U.S. copyright laws" from 1790 to 1976).

6. *See id.* at 487 (explaining the consequences of failure to comply).

7. *See* Greene, *supra* note 1, at 1183 ("Racial discrimination has produced unequal access to capital, education, land and other entitlements under slavery and Jim Crow segregation.").

cultural production."[8] Copyright formalities became another tool to steal from and oppress Black creators.[9] While copyright has shifted away from the rigid *per se* registration requirements, timely registration of a copyright still provides significant benefit in the form monetary damages and attorney's fees.[10]

This Note examines the history of copyright formalities, how the history of formalities intersects with systemic racial oppression, and whether the historical concerns surrounding these procedural mechanisms have been adequately addressed by the reduction in formalistic requirements. Part II provides an overview of the origins of the copyright system in the United States and how formalities fit within that system.[11] Part III examines how the copyright system has historically failed to provide adequate protection for artists of color.[12] Part IV addresses the issues of modernization that are currently confronting copyright law and how formalization does or does not adequately address them.[13] Part V examines how recent legislation has failed in modernizing musical copyright and in addressing the concerns of creators of color and explores the persistent economic inequality that BIPOC are still facing as a result of generations of discrimination.[14] Part VI argues for the abolition of the limitations on remedies for failure to register within three month of creation.[15] Part VII advocates for two potential alternative fee structures which could be adopted to make registration less of a financial hardship for creators.[16] These proposed changes would be small but significant changes to the

8. *Id.*

9. *See id.* at 1202 (suggesting that copyright formalities are "just another form of white domination given the state of Black education and legal representation in the 1920s").

10. *See What is Copyright?, supra* note 2, (explaining why it is important to register a work despite it not being mandatory).

11. *See infra* Part II.

12. *See infra* Part III (providing historical patterns of inadequate protection for BIPOC artists related to music copyright).

13. *See infra* Part IV (explaining the state of copyright formalities in the digital age).

14. *See infra* Part V (illustrating the state of the Music Modernization Act and wealth disparity related to race).

15. *See infra* Part VI (detailing why the registration requirement and limitation on remedies should be abolished).

16. *See infra* Part VII (arguing for alternative fee structures).

copyright system which would be a step towards addressing the historic and ongoing challenges that creators of color face.

### *II. Foundations of Copyright Law in Music*

The history of copyright for music in the United States has many twists and turns. The United States only recently extended copyright protection to sound recordings. Until 1972 copyright protection for music in America applied only to sheet music and musical compositions.[17]

Discussing the current state of copyright formalities and persistent challenges first requires building basic understanding of the origins of American copyright system. Two of the core pieces of legislation in the copyright system are the 1909 and 1976 Copyright Acts which have shaped the vast majority of the copyright system.[18] Understanding copyright law in the United States next requires understanding the impact of the U.S.'s late entry to the Berne Convention and how that corresponded to the level of formalism in the copyright system.[19] The Berne Convention set international minimum standards for copyright and one of these basic principles was the elimination of formalities.[20] Next, understanding the lingering preference for registration is essential to examining the copyright system through a racial equity and social justice lens.[21] The current copyright system still prioritizes registration by limiting certain remedies for failure to register. Beginning to examine the current state of the United States copyright system requires first turning to British copyright law.

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17. *See* Bruce D. Epperson, *From the Statute of Anne to Z.Z.Top: The Strange World of American Sound Recordings, How it Came About, and Why it Will Never Go Away*, 15 J. MARSHALL REV. INTELL. PROP. L. 1, 2 (2015) (describing American copyright protections).

18. *See infra* Part II.B (illustrating two pivotal pieces of legislation, the 1909 and 1976 Copyright Acts).

19. *See infra* Part II.C (discussing formalization generally); *see also* Part II.D (analyzing changes to formalism in the United States based on Berne Convention compliance).

20. *See infra* Part II.D (discussing the Berne Convention).

21. *See infra* Part II.E (explaining the lurking registration requirement of section 412).

### *A. Origins of the American Copyright System*

The origins of copyright law stem from the Statute of Anne passed by the British Parliament in 1710.[22] This limited copyright protection was the early model for modern copyright law as it created a state-sanctioned monopoly for creators (of written works in this case), rather than just publishers or owners.[23] Copyright law is an extension of the concepts of traditional property law to a creator's products to encourage and incentivize creation by legislatively protecting a creator.[24] The United States was one of the first nations to adopt these concepts of copyright, even including a copyright clause in the Constitution.[25] The "Progress Clause" of the Constitution was quickly put into effect and Congress began legislating copyright laws.[26] These new laws had a variety of requirements for 'formalization' to secure the copyright.[27] The applicant had to deposit a copy of the printed work, register the title, and place a newspaper notice prior to publication all within a certain timeframe to qualify for the protections provided.[28] Subsequent litigation established that once a government statutory copyright system exists, that is the only copyright law that exists and any common-law copyright is

22. *See* Jimmy J. Zhuang, *The Rite of Copyright: The Comparative Procedural Emphasis of American Copyright Law*, 80 ALB. L. REV. 1, 5 (2017) (describing the Statute of Anne's limited copyright protection).

23. *See id.* at 5–6 (detailing how the Statute of Anne was the "model legislation for all modern copyright law" due to its "revolutionary nature" and the changes described).

24. *See id.* ("This innovative copyright revolution therefore developed a system that incentivized authors to produce works . . . .").

25. *See id.* at 6 (providing that the United States drew upon the Statute of Anne, and principal notions of copyright protection, in the formation of the U.S. Constitution).

26. *See* U.S. CONST. art. I, § 8, cl. 8 ("To promote the [progress] of [s]cience and useful [a]rts, by securing for limited [t]imes to [a]uthors and [i]nventors the exclusive [r]ight to their respective [w]ritings and [d]iscoveries."); *see also* THE FEDERALIST NO. 23 (James Madison) (explaining that the 'Progress Clause' distinguished American copyright laws from England because the right guaranteed by the Constitution refers to both the copyright of authors and the right to useful inventions).

27. *See* Epperson, *supra* note 17, at 6 (discussing the new requirements for copyright enacted by Congress in 1790).

28. *See id.* (providing that applicants for copyright protections had to satisfy each requirement within six months).

terminated.[29] As various technical innovations increased Americans' ability to consume music on their own, it became clear that musical copyright did not fit simply into the established doctrines and legislation around copyrights for machines and literary works.[30] Both the Register of Copyrights and President Theodore Roosevelt implored Congress to revise the copyright laws, and Congress began the process of updating copyright in 1906.[31] How to address mechanically reproduced music was one of the primary sticking points which complicated matters and delayed the copyright act by several years.[32]

### *B. 1909 and 1976 Copyright Acts*

Despite a three year Congressional struggle to reach a compromise, the Copyright Act of 1909 did not adequately address mechanical sound reproduction and failed to coordinate with the Berne Convention.[33] Sound recordings were not well addressed by the 1909 Act and it was unclear whether a recording was eligible for federal copyright protection.[34] It was not clear whether song records fell under the Progress Clause as 'writings' or whether they were writings, but Congress intended to exclude them from protection.[35] The Copyright Act of 1909 further failed to address whether selling a recorded song (regardless of the copyright status)

29. *See id.* at 5–7 (stating that copyright statutes override common law copyright) (citing Wheaton v. Peters, 33 U.S. 591 (1834)).

30. *See id.* at 6–10 (discussing how organette and phonograph technology made music more accessible and how greater accessibility created questions about the scope of copyrighted sheet music).

31. *See id.* at 10 ("Our copyright laws urgently need revision . . . they are difficult for the courts to interpret; and impossible for the Copyright Office to administer with satisfaction to the public.") (citing *Copyright Law Revision: Studies Prepared Pursuant to S. Res. 53,* 86th Cong., 1–2 (1960)).

32. *See id.* (discussing how categorizing mechanically reproduced music was "one of the main sticking points" is enacting revised legislation).

33. *See id.* at 14 (describing the two "glaring errors and omissions" of the 1909 Copyright Act).

34. *See id.* (explaining the ambiguity around sound recordings when they were a new technology).

35. *See id.* (explaining how the gap around the coverage of sound recordings was significant to copyright law).

would release the sound or composition into the public domain.[36] Early jurisprudence interpreting this issue extended an extremely limited protection to sound recordings on the basis that the Copyright Act gave composers control over how their compositions were used.[37]

The limited protection extended to a specific sound recording protecting the recording from reproduction does not automatically convey a right to reproduce the sound recording.[38] The failure to adequately address sound recordings led to decades of confusing, contradictory and uncertain protection of sound recordings under federal copyright law.[39] The Copyright Act of 1909 had convoluted and complex formalization requirements of notice and publication.[40] Under the 1909 Act, an artist had to register, notify via publishing proof publicly, notify on the copyrighted piece, and renew their copyright.[41] An artist who was unfamiliar with the copyright process and complex rules regarding formalization sometimes, if not often, inadvertently allowed their works into the public domain, which ends any economic rights to copyright protection.[42] A call by the Register of Copyrights in the late 1960s to include recorded performances as 'writings' in the constitutional sense kicked off another wave of reform.[43]

"Before 1972, music legally existed, as far as the federal government was concerned, only in the form of musical

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36. *See id.* (discussing the challenges of recorded songs).

37. *See id.* at 16 (discussing the cases decided under the 1909 Copyright Act) (citing Aeolian Co. v. Royal Music Roll Co., 196 F. 926 (W.D.N.Y. 1912)).

38. *See id.* ("[A] license to use a composition does not, in itself, convey a right to its "production," the means to manufacture or reproduce it.").

39. *See id.* at 16–32 (describing attempts to interpret how the Copyright Act of 1909 applies to sound recordings).

40. *See* K.J. Greene, *Copyright, Culture & Black Music: A Legacy of Unequal Protection*, 21 HASTINGS COMM. & ENT. L.J. 339, 354 (1998) ("The 1909 Act also contained convoluted and complex requirements of notice and publication.").

41. *See* Sprigman, *supra* note 5, at 492–94 (explaining that the 1909 Act involved a notice requirement to "publish proof of registration in a newspaper" as well as to mark on the work).

42. *See* Greene, *supra* note 40, at 354 (describing how allowing work into the public domain results "in the loss of their economic rights to copyright protection").

43. *See* Epperson, *supra* note 17, at 35 (explaining how reforms followed the Register of Copyrights' statements that recorded performances are "fully creative and worthy of copyright protection" as other writings).

compositions written on paper."[44] The Copyright Act of 1976 eliminated much of the rigid formalism of the 1909 Act and reduced the number of works which would inadvertently enter the public domain.[45] Prior to the 1976 Act many works inadvertently became part of the public domain if they were published without the correct formalities and were therefore deprived of copyright protection.[46] Works in the public domain are not copyrightable and publishing without complying with formalities divests works into the public domain.[47] The Act of 1976 was a substantial shift in copyright law as the Act ended the "conditional" copyright system, where the existence and continuation of one's copyright was dependent on complying with formalities.[48] The reduced set of formalities established in 1976, played a less significant role in the existence of one's copyright.[49] Failure to comply with the formal conditions for registration meant a "copyright either did not arise or was unenforceable."[50] The Copyright Act of 1976 somewhat addressed how sound recordings fit into the legal framework: a musician could send in sheet music to register as a printed composition or send in a cassette tape to protect the song only as performed.[51] This system was an improvement, but it quickly became subjected to abuse by producers and managers.[52] Further, the changes did very little to clarify the existing problems and did

44. *Id.* at 35.

45. *See* Greene, *supra* note 40, at 354 ("The 1976 Act effectively eliminated the traditional rigid formalities imposed under the 1909 Act as a condition of copyright.").

46. *See* Epperson, *supra* note 17, at 7 ("But if the score was published without securing federal copyright, it was released into the public domain. This was known as divestiture.").

47. *See id.* (discussing what divests works into the public domain and the impact of divestiture).

48. *See* Sprigman, *supra* note 5, at 488 (explaining the shift away from copyright formalities).

49. *See id.* (describing the "reduced set of voluntary formalities" after the Copyright Act of 1976).

50. *See id.* at 502 ("Until the 1976 Act, the registration and notice requirements served as initial conditions for which noncompliance meant copyright either did not arise or was unenforceable.").

51. *See* Epperson, *supra* note 17, at 37 (describing copyright changes to recorded songs from the 1976 Copyright Act).

52. *See id.* (explaining the system was "widely abused").

not provide any retroactive changes.[53] The 1976 Act did not end any state-law copyright protections, which had become an arena for copyright protection while federal copyright protection was lacking.[54]

The Copyright Act of 1976 did not provide sufficient detail on when a sound recording was considered formally published.[55] 'Publication' in copyright has the potential to release a work into the public domain (divest a work) if the correct copyrighting formalities are not correctly followed.[56] In *La Cienega Music v. ZZ Top*,[57] the court addressed what constitutes publication: when a song is issued to the public (via a recording of some sort) or when the registration is secured.[58] Publication, without complying with copyright formalities, releases a work into the public domain, where it is not protected under a copyright scheme.[59] However, publication does not necessarily divest an owner of their copyright—if the owner has complied with the necessary formal steps then their work will be protected despite being published.[60] If a sound recording, lacking the adequate formalities, constitutes 'publication' then issuing records would release the songs immediately into the public domain.[61] Alternatively, the publishing date could be determined by the date the registration was secured.[62] The court determined that issuing phonorecords does publish the underlying composition which would place the

53. *See id.* (stating that the changes "did little to rectify the pre-existing problems" which surrounded sound recordings).

54. *See id.* at 38–44 (discussing how state law copyright law continues to govern pre-1972 works).

55. *See id.* at 47 (explaining how publishing has a dramatic impact on a copyright owners' rights).

56. *See id.* at 7 ("But if the score was published without securing federal copyright, it was released into the public domain. This was known as divestiture.").

57. 53 F.3d 950 (9th Cir. 1995).

58. *See* Epperson, *supra* note 17, at 47 (explaining the impact of publication date in *La Cienga Music v. ZZ Top*).

59. *See id.* at 7 (describing publication).

60. *See id.* at 48 (explaining that one "may secure copyright for [their] work by publication thereof with the notice of copyright required by this Act") (citing 56 Fed. Reg. 6021 (Aug. 21, 1956)).

61. *See id.* (explaining pre-1972 sound recording publication challenges).

62. *See id.* (discussing different registration interpretations).

work into the public domain if the publication did not have the adequate formal notations.[63]

At the time the songs at issue were recorded, a circle-C or circle-p symbol was a required formal notice to protect a published work.[64] The *La Cienega Music* court remanded as there was not sufficient information in the record to support a determination as to the presence or absence of the required formalities.[65] *La Cienga Music*, as well as related cases, inspired Congress to retroactively address what constitutes publication.[66] In the late 1990s Congress amended Section 303 of the Copyright Act to clarify that distributing phonorecords prior to 1978 would not constitute publication for copyright purposes.[67] Despite this modification, the issue of publication of sound recordings has "proved to be an issue that simply refused to die."[68] Even famous and well-known artists run afoul of Section 303.

The Rolling Stones had recorded versions of songs which originally dated to a composition and recording by bluesman Robert Johnson in the 1930s.[69] Johnson's estate filed a suit against ABKCO (the owner of the Rolling Stone's version of the songs) while the House of Representatives was still considering the language modifications to Section 303.[70] ABKCO argued that the new language of Section 303 could not be applied in this case as the lawsuit had begun and was not yet concluded so the legislature

63. *See id.* at 47–48 (describing the *ZZ Top* holding related to formal signals of copyright).

64. *See id.* (discussing formalities related to publication which created problems for artists).

65. *See id.* at 48 ("The court did not have this information.").

66. *See* Epperson, *supra* note 17, at 50 (describing that "Congress finally had enough" and addressed publication of sound recordings); *see generally* Mayhew v. Gusto Records, 960 F. Supp. 1302 (M.D. Tenn., 1997) (finding that issuing records to the public did not publish the sound recording).

67. *See* Epperson, *supra* note 17, at 50 (explaining the new subpart (b) of Section 303).

68. *See id.* at 51.

69. *See id.* (discussing the dispute over "Love in Vain" and "Stop Breakin' Down").

70. *See id.* (explaining the dispute in ABKCO Music, Inc. v. Laverne, 217 F.3d 684 (9th Cir. 2000)).

could not change a law to affect pending legislation.[71] However, a law which simply clarifies existing policy, as the court held the Section 303 change was, is acceptable.[72] The central theme within the American copyright system discussed so far is what degree of formal procedures must be complied with in order to secure a copyright, let us now turn to what exactly formalization is and how it persists in current copyright law.[73]

### *C. Formalization*

Copyright is considered to arise when a work is created, but the formal processes of registering a copyright are important in the American copyright system.[74] Registering a copyright is necessary before an infringement suit may be filed, provides protection against the importation of infringing copies, and is necessary to claim the statutorily provided damages and attorney's fees against infringers.[75] The procedural requirements of registration can be outcome determinative, especially for inexperienced or uninformed copyright owners who struggle to navigate the complex system.[76] The American common law system, in concert with necessary registration requirements, creates barriers to entry within copyright law.[77]

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71. *See id.* ("In this case, the lawsuit had begun, but had not yet concluded, when the change in legislation was approved.").

72. *See id.* (establishing the 1997 amendment simply clarifies the meaning of the 1909 act).

73. *See infra* Part II.C (explaining formalization).

74. *See* Zhuang, *supra* note 22, at 45 (stating that "copyright is secured automatically when the work is created: and that the American copyright regime "makes registration an essential additional requirement for copyright ownership . . . .).

75. *See id.* at 45–46 (explaining why registering a copyright is necessary in America).

76. *See id.* at 46–47 (explaining that the formalization requirements are "stealthily outcome determinative" for an "unsophisticated, unregistered copyright owner . . . .").

77. *See id.* at 48 (stating that American law makers are "not attempting (as much as their European counterparts) to make the copyright laws accessible to the general public").

However, the role that formalities play in copyright law is somewhat analogous to the formal structures in real property.[78] Transferring and recording of property title with real property is an important formal step to demonstrate ownership via a regulatory structure.[79] The copyright formalities are considered play a similar role and to consolidate information and record ownership for forms of property—indicating ownership and title to those who care to look.[80] Formalities can serve as an important signal of ownership, especially given that intellectual property rights, unlike real property, will eventually terminate.[81] Ownership can also serve to help copyright owners profit from their works through licensing arrangements, and having a formal register can help to make licensing simpler and less expensive.[82] Understanding the state of formalization in the United States requires looking to the international law governing formalization: the Berne Convention.[83]

### *D. The Berne Convention Limits on Formalization*

In 1886, the Berne Convention first established international minimum standard for copyright laws.[84] However, the United States refused to sign onto the Berne Convention for close to 100 years, perhaps due to the United States' status as an importer of copyrighted materials.[85] As the United States shifted to an

78. *See* Sprigman, *supra* note 5, at 500 (discussing how copyright formalities function similarly to formal structure in real property).

79. *See id.* (explaining the significance of title transfer).

80. *See id.* ("Formalities played an analogous role of recording ownership for the intangible form of property in literary and artistic works that we refer to as copyright.").

81. *See id.* at 501 (discussing how signaling ownership is especially important given the temporary nature of intellectual property).

82. *See id.* 501–02 ("[H]istorically, copyright formalities helped to lower the transaction costs of licensing.").

83. *See infra* Part II.D (discussing the Berne convention).

84. *See* Zhuang, *supra* note 22, at 9 (discussing the origins of the Berne Convention and how it established minimum standards for copyright law).

85. *See id.* at 9–10 ("The United States in the late eighteenth century, nineteenth century, and early twentieth century was a net importer of copyrighted materials . . . .").

exporter of copyrighted materials, the economic loss due to copyright piracy created an incentive to become a signatory to the Berne Convention.[86] The Berne Convention requires that copyright protection be granted to works within "literary, scientific and artistic domains . . . ." and protects key rights such as reproduction, performance, adaptation, etc. for a copyright term of the author's life and at least an additional fifty years.[87]

One of the basic principles of the Berne convention was the "abolition of formalities as a prerequisite for copyright protection."[88] However, the nations which joined could require formalization under their own domestic legislation.[89] The Berne Convention's philosophical stance against formalization kept the United States from joining.[90] The "only major obstacle" keeping the United States from joining the Berne Convention was the U.S.'s attachment to the formalization provisions.[91] Formalization has long been a prerequisite to copyright in the United States and introduces procedural steps to secure one's copyright.[92] These "philosophical differences" prevented the United States from being in line with the standard of international law.[93] The United States failure to join the Berne Convention placed the United States out

86. *See id.* at 10 (describing the copyright export of Hollywood films and software which resulted in "losing as much as $63 billion per a year to copyright piracy abroad . . . .").

87. *See id.* (citing Peter Burger, *The Berne Convention: Its History and Its Key Role in the Future*, 3 J.L. & TECH. 1, 15–16 (1988)) (stating the Berne Convention protections).

88. *See* Peter Burger, *The Berne Convention: Its History and Its Key Role in the Future*, 3 J.L. & TECH. 1, 12 (1988) (highlighting one of three principles underlying the berne convention that aimed at determining the minimum protections for countries).

89. *See id.* ("[E]ach contracting state could require formalities under their own domestic copyright legislation.").

90. *See id.* at 69 ("[The] philosophical differences between the U.S. copyright system and the systems of the Berne Union members had caused the United States to withhold its accession for over one hundred years.").

91. *See id.* at 69 n.461 ("[T]he only major obstacle to U.S. accession are the U.S. formality provisions.").

92. *See id.* (discussing obstacles to U.S. accession).

93. *See id.* at 68 ("The Berne Union has always encouraged the United States to accede to the Convention, but philosophical differences between the U.S. copyright system and the systems of the Berne Union members had caused the United States to withhold its accession for over one hundred years.").

of step with international law—meaning that the United States was providing less protection to creators than the minimum standards observed by the rest of the world.[94]

In 1988 President Ronald Reagan brought the United States into the Berne Convention and signed into law the Berne Convention Implementation Act (BCIA).[95] The BCIA, however, depends upon domestic legislation and the United States has "thus far fallen short of total compliance."[96] Berne Convention compliance is complicated by the United States preference for formalities.[97] Under the BCIA a copyright owner must register their works prior to filing a claim of infringement.[98] The BCIA also fails to eliminate a "questionable" provision under Title 17 which limits remedies of statutory damages and attorney's fees for failure to register.[99] The United States is the only major country which requires registration to obtain relief from copyright infringement.[100] Despite the lessening of formalities upon the United States entry into the Berne Convention, compliance with the formality of registration is still necessary to "enjoy the full weight of copyright protections offered by the American system."[101]

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94. *See id.* at 16 (explaining that the Berne Convention established "minimum standards" with the goal of "increasing the protection of authors' rights").

95. *See* William Belanger, *U.S. Compliance with the Berne Convention*, 3 GEO. MASON IND. L. REV. 373, 374 (1995) (discussing the Berne Convention Implementation Act).

96. *See id.* at 390 (explaining that the failure to comply with the BCIA lies within domestic legislation in the United States).

97. *See id.* at 395 ("Strictly speaking, certain formalities still remain after the 1988 Implementation Act.").

98. *See id.* (explaining that the failure to register no longer leads to forfeiture of copyright, but that owners must still register to bring a suit).

99. *See id.* at 394–95 (explaining how the BCIA approaches limitations on remedies); *see also infra* Part II.E (explaining this lingering registration requirement).

100. *See* David R. Carducci, *Copyright Registration: Why the U.S. Should Berne the Registration Requirement*, 36 GA. ST. U. L. REV. 873, 901 (2020) ("As a result, the United States is the only major country that requires any form of registration to obtain relief for copyright infringement.").

101. *See id.* at 902 ("However, certain formalities are still required to enjoy the full weight of the copyright protections offered by the American system. The issue of registration exemplifies this contrasting view of formalities between the American and Berne Convention.").

### *E. A Lurking Registration Requirement*

Despite the abolition of copyright formalities upon the United States entry to the Berne Convention, a vestige of the registration requirement still lurks in the United States Copyright Code.[102] Section 412 of Title 17 bars certain remedies unless a creator has registered their copyright within a certain time frame.[103] Section 412 states:

> In any action under this title, other than an action brought for a violation of the rights of the author under section 106A(a), an action for infringement of the copyright of a work that has been preregistered under section 408(f) before the commencement of the infringement and that has an effective date of registration not later than the earlier of 3 months after the first publication of the work or 1 month after the copyright owner has learned of the infringement, or an action instituted under section 411(c), no award of statutory damages or of attorney's fees, as provided by sections 504 and 505, shall be made for–
>
> 1. Any infringement of copyright in an unpublished work commenced before the effective date of its registration; or
>
> 2. Any infringement of copyright commenced after first publication of the work and before the effective date of its registration, unless such registration is made within three months after the first publication of the work.[104]

This registration requirement limits creators access to remedies of statutory damages or the possibility of attorney's fees, creating a lurking formal registration requirement.[105]

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102. *See supra* Part II.D and accompanying text (explaining the impact of the Berne Convention on copyright formalities).

103. *See* 17 U.S.C. § 412 (2018) ("Registration as a prerequisite to certain remedies for infringement. . . .").

104. 17 U.S.C. § 412 (2018) (emphasis added) (internal citations omitted).

105. *See id.* (barring certain remedies under 17 U.S.C. § 504 (2018) and 17 U.S.C. § 505 (2018) unless the work has been registered within a certain time frame).

## *III. Historical Patterns of Inadequate Protection for BIPOC Artists*

The copyright formalities discussed above have a history of disenfranchising artists of color, specifically Black artists.[106] Despite the enormous cultural contribution that Black artists have made to American society, the copyright system has not protected these artists.[107] Confronting and understanding the impact that copyright formalities can have requires learning and addressing the complicated history of exploiting artists of color within the American copyright system.[108] Even in an industry which has "generally exploited artists as a matter of course," Black artists have "borne an even greater level of exploitation and appropriation."[109] Copyright is assumed to be race-neutral, but creators exist within our race-stratified culture and the impact of that societal mooring bleeds into the copyright realm.[110]

This section first discusses unique aspects of Black music traditions.[111] The distinct aspects of musical traditions within Black communities do not fit well within the formalistic dependent U.S. copyright system.[112] Next, this section will discuss how copyright structures have been used to strip Black creators of their intellectual property.[113] This is followed by a brief discussion of cultural appropriation.[114] Cultural appropriation is included to

106. *See* Greene*, supra* note 40, at 340 ("African-American music artists, as a group, were routinely deprived of legal protection for creative works under the copyright regime.").

107. *See id.* (stating that Black artists have not been protected under the copyright regime).

108. *See id.* ("But the future for Black artists—and indeed artists of all races—will be brighter if we understand the pitfalls of the past.").

109. *See id*. at 341 (stating that Black artists have difficulty claiming ownership of their music due to the music industry taking it for its own use).

110. *See id.* at 343 ("An underlying assumption of race-neutrality pervades copyright scholarship. However, not all creators of intellectual property are similarly situated in a race-stratified society and culture.").

111. *See infra* Part III.A (discussing unique musical aspects of historically Black musical styles).

112. *See infra* Part III.A (explaining how revision and improvisation are at odds with fixation and formalization).

113. *See infra* Part III.B (discussing theft of IP from Black creators).

114. *See infra* Part III.C (examining cultural appropriation).

highlight that creative theft from Black authors is not solely relegated to formal IP structures. This section concludes with a discussion of how formalistic requirements were particularly harmful to Black creators and how many lost their copyright as a result of strict formalism.[115]

### *A. Black Musical Tradition's Distinct Style and History*

Black musical tradition is distinct in many ways, but the tradition of community composition and improvisation are particularly relevant to the copyright system.[116] A system of group oral creation conflicts with the values of American copyright law: individual creation and registration.[117] The conflict between the copyright system's values and the tradition of oral group creation in the Black community created challenges for Black artists seeking to protect their works.[118]

The communal aspect of Black musical tradition is rooted in both African oral tradition as well as a necessity of community oral tradition, rather than written, as a result of prohibitions on literacy of enslaved people.[119] Because of literacy prohibitions, oral tradition played an extremely important role in Black musical culture and music was "learned, composed, and transmitted" via performance.[120] In a culture of oral tradition, individual authorship is not necessary for performance.[121] Each creator in

115. *See infra* Part III.D (explaining divestment and loss of copyright by Black creators).

116. *See* Candace G. Hines, *Black Musical Traditions and Copyright Law: Historical Tensions*, 10 MICH. J. RACE & L. 463, 469 (2005) (describing the unifying characteristics of Black music).

117. *See id.* at 470 ("Born of culture and circumstance, the lack of emphasis on written forms in Black culture directly conflicts with the American copyright regime, since copyright is based on the written tradition of musical notation.").

118. *See id.* (describing that the copyright systems emphasis on individual "[w]ritten musical notation" hindered Black artist's "success in the copyright regime").

119. *See id.* at 469–70 (discussing the origins of Black musical tradition as being the African oral tradition and the legacy of slavery).

120. *See id.* (explaining that Black musicians relied on oral traditions to keep their music culture ongoing).

121. *See id.* (citing TRICIA ROSE, BLACK NOISE: RAP MUSIC AND BLACK CULTURE IN CONTEMPORARY AMERICA 64 (1994)) (explaining how the communal style of

oral tradition can put their own spin on a story or song with new materials to make a new result.[122] The emphasis of the American copyright system on written music as a prerequisite for copyright protection is at odds with this system of group oral creation.[123]

Further, Black musical tradition is heavily influenced by "the African tradition of improvisation to create music . . . ."[124] Musical improvisation occurs when performers or creators build upon prior performances or works to create a new composition.[125] Improvisation is at odds with two central tenants of American copyright law: the fixation requirement and the strict originality standard.[126] Copyright law requires that works be fixed and non-changing in a tangible medium and the "constant state of revision" of improvisation does not allow for a fixation which truly captures the work.[127] Improvisation's structure of building on other works pushes improvisational works into the category of derivative works.[128] Only the original work's author or creator can make derivative works, or the original author must consent.[129] Group creation and improvisation both trace their roots to slavery in the United States.[130] But the importance of community and revision in Black musical tradition still persists in music by Black creators in genres such as rap, R&B, and countless others.[131] These stylistic

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music produced by Black musicians does not fit cleanly within American copyright principles).

122. *See id.* (describing oral tradition in Black communities).

123. *See id.* (explaining the conflict between the U.S. copyright system and systems of oral tradition and improvisational song).

124. *See id.* at 472 (noting that Black music originates from African music, making improvisation an important aspect in the creation of Black music).

125. *See id.* (describing improvisation as occurring "[v]ia innovative performers who built upon what they heard before").

126. *See id.* (explaining that "constant state of revision" inherent within improvisational music is in conflict with copyright law).

127. *See id.* (explaining that improvisation "frustrates" fixation).

128. *See id.* (citing 17 U.S.C. § 101, 103 (2000) (defining a derivative work as "[b]ased upon one or more preexisting works . . . [which have been] recast, transformed, or adapted.")).

129. *See id.* at 472 n. 58 (explaining derivative works).

130. *See id.* at 472 (citing Slave Codes of the State of Georgia, 1848 Art. III, § VI, No. 59) ("[T]he first Black musical genre in the United States emerged from slavery, despite the prevalence of slave codes . . . .").

131. *See id.* at 464 (citing DAVID BRACKETT, INTERPRETING POPULAR MUSIC 127–56 (2000) (quoting Black studies scholar Henry Louis Gates)) ("The Black

challenges are only one part of the story of Black creators in the copyright system—Black creators also had their rights to their creations intentionally stolen and were denied the benefits of their creativity.[132]

### *B. Disenfranchisement via Copyright*

Black creators have long been denied or had their proprietary rights taken—there is a history of denying Black creators their "credit, copyright royalties and fair compensation."[133] Black artists have not reaped the benefits of copyright protections and their work has been appropriated on an industrial scale.[134] American systems of racial discrimination, including formal systems such as Jim Crow and enslavement, have produced unequal access to "capital, education, [and] land."[135] The structural inequality of the American legal system, and American society, impact the copyright system in a way that has failed to serve the interests of Black creators.[136] Despite their invaluable cultural contributions, "Black artists did not share rewards commiserate with their enormous creativity."[137] As a result of existing within a system of racial discrimination, the economic and societal benefits of IP ownership eluded, or were taken from, Black artists for much of American history.[138]

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musical tradition works in a 'trope of revision,' that is, it is a highly creative tradition that builds and improves upon the music within its community.").

132. *See* discussion *infra* Part III.B (explaining how the copyright system often disenfranchised Black creators).

133. Greene, *supra* note 1, at 1181 (describing the ways in which Black artists have been denied or stripped of their proprietary rights).

134. *See id.* ("The mass appropriation of the work of black artists and inventors reflects the systemic subordination based on race that characterized most of U.S. history.").

135. *Id.* at 1183.

136. *See id.* ("Copyright law exists within social structures that historically did not serve the interests of black cultural production.").

137. *Id.* at 1183–84.

138. *See id.* at 1189 ("For much of American history, the valuable rights of IP (including compensation, credit and control) eluded Black artists operating in a social system of racial discrimination.").

The intersection of contract law and IP law, specifically copyright, facilitated widespread disenfranchisement of Black artists' rights to profit from their creations.[139] During the era of ragtime, the early twentieth century, Black artists were frequently deprived of royalties from their music due to exploitation by white publishers.[140] Ragtime was a musical phenomenon that emerged during the 1890's and quickly became incredibly popular—these swinging piano tunes were specifically composed for dancing.[141] The notion of freedom to contract facilitated unfair deals by taking advantage of the intense racial stratification and "rendered contract protection illusory to a large class of Black creators."[142] The impact of the illusory freedom of contract extended to creators' rights to their IP, which could easily be contracted away.[143] Given the systemic oppression of Black communities, the negotiations occurred "against a background of immense inequality," which extended into copyright transactions as well.[144] Black creators experienced "disadvantage in IP transactions" which courts rationalized under freedom to contract doctrines, which were used by courts to justify slavery and further discrimination.[145]

Scott Joplin, the originator of ragtime, did not receive an advance for the "seminal composition Maple Leaf Rag" and

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139. *See id.* at 1194 ("[C]ontract law, in conjunction with IP law, facilitated the widespread fleecing of Black Artists long after the Civil Rights Act of 1876.").

140. *See id.* at n.89 ("[I]t was not common to publish works by [B]lack composers . . . . White publishers could purchase a tune or a song for ten dollars and reap a considerable profit.") (citing JAMES HASKINS, SCOTT JOPLIN: THE MAN WHO MADE RAGTIME 74 (1978)).

141. *See History of Ragtime*, LIBRARY OF CONGRESS (describing the history and success of ragtime) [https://perma.cc/65V8-FSC4].

142. *See* Greene, *supra* note 1, at 1194–95 (pointing out that the freedom to contract is not free from the pressures of society).

143. *See id.* at 1195–96 (arguing that maldistributed contract law is "directly implicated" in the IP context).

144. *See id.* at 1196 (noting that "[a]fter emancipation of slaves, 'negotiations between [B]lack laborers and [W]hite landowners still occurred against a background of immense inequality'") (citing Aziz Z. Huq, *Peonage and Contractual Liberty*, 101 COLUM. L. REV. 351, 359 (2001)).

145. *See id.* at 1197 & n.105 (stating that "contractarian arguments were employed by Antebellum courts to justify slavery and political exclusion") (citing Anita L. Allen, *Social Contract Theory in American Case Law*, 51 FLA. L. REV. 1, 16 (1999)).

received a royalty of only one cent per copy sold.[146] Big Bill Crudup, the musical force behind Elvis and known "father of rock 'n' roll," did not receive the royalties he was due and died destitute.[147] Contract law enabled a system in which Black creators were easily separated from their credit and their royalties.[148]

### *C. Cultural Appropriation*

One early pattern of appropriation of Black expression was the minstrel tradition.[149] In the minstrel tradition, white actors would dress in blackface and perform the "music and comedy of black slaves" as entertainment.[150] Minstrel shows were appropriations of Black creativity and the financial control and windfall was retained by whites.[151] The minstrel tradition is a crude roadmap of the cultural appropriation which has plagued Black creators in countless genres "from blues to ragtime, jazz, R&B and rap."[152] Jelly Roll Morton, one of the creators who claimed to invent jazz, died "unnoticed and unsung except by a tiny group of musicians and jazz fans" as a result of having his music appropriated by

146. *See id.* at 1197–98 & n.112 (asserting that Scott Joplin agreed to the terms because he was so intent on having his work published that he would agree to almost any terms or conditions) (citing JAMES HASKINS, SCOTT JOPLIN: THE MAN WHO MADE RAGTIME 101 (1978)).

147. *See id.* at 1198 (providing an example of a Black artist who was deprived of royalties) (citing Arnold Shaw, HONKERS AND SHOUTERS: THE GOLDEN YEARS OF RHYTHM AND BLUES xix (1978)).

148. *See id.* at 1198 (citing William F. Patry, *The Copyright Term Extension Act of 1995: Or How Publishers Managed to Steal the Bread From Authors*, 14 CARDOZO ARTS & ENT. L. J. 661, 665 (1996)) (outlining how contracts often exploited Black creators).

149. *See id.* at 1190 (describing the problematic origins of minstrel shows).

150. *See id.* at 1191 (suggesting that in order to create the minstrel tradition, White actors deliberately appropriated the music and culture of Black slaves) (citing MARTHA BAYLES, HOLE IN YOUR SOUL: THE LOSS OF BEAUTY AND MEANING IN AMERICAN POPULAR CULTURE 27 (1994)).

151. *See id.* (discussing how minstrel shows appropriated and distorted Black tradition).

152. *See id.* at 1191 (describing Black cultural appropriation across multiple genres).

white performers.[153] Formalism also played a role in the mechanisms of how Black creators were stripped of the profit and prestige of their creativity.[154]

### *D. Formalism & Disenfranchisement*

Until the 1976 Copyright Act, an artistic work had to be fixed in a tangible form such as sheet music to be protected.[155] As noted previously, music styles which Black artists have dominated are not well suited to fixation due to the ever-evolving nature of the music.[156] Many early Black creators were deprived of an education and lacked the ability to read or write to fix their work as sheet music and qualify for protection.[157] Under the 1909 Act, federal copyright protection arose only when a work was properly published or registered.[158] Even if a work was registered, the 1909 Act allowed a non-creator to register a work and this had a "particularly disadvantageous impact on Black artists" who frequently had their works registered by others and lost their copyright.[159] Due to the strict formal requirement of the 1909 Act, "artists unfamiliar with legal requirements could easily find their works injected into the public domain" and lose the economic

153. *See id.* at 1198 (noting that Jelly Roll Morton died destitute) (citing JAMES LINCOLN COLLIER, THE MAKING OF JAZZ: A COMPREHENSIVE HISTORY 106 (1978)).

154. *See* discussion *infra* Part III.D (explaining how copyright formalism was used to disenfranchise Black creators).

155. *See* Greene, *supra* note 1, at 1201 & n.140 (noting that while sheet music was required prior to the 1976 Act, a recording now suffices to satisfy the fixation requirements) (citing 17 U.S.C. § 102(a) (2007)). *See also supra* Part II.B (discussing the 1909 Copyright Act).

156. *See id.* (highlighting the "impossibility of noting jazz rhythm accurately using ordinary Western musical notation") (citing PETER TOWNSEND, JAZZ IN AMERICAN CULTURE 21 (2001)).

157. *See id.* ("[A]s a result of educational deprivation, many Black artists . . . could not functionally read or write.") (citing Greene, *supra* note 40, at 353–54).

158. *See* discussion *supra* Part II.B (discussing the 1909 Copyright Act).

159. *See* Greene, *supra* note 40, at 353–54 (pointing out that there were no federal copyright protections until the work was either published with proper notice or registered, making it so that "initial copyright registration for a work could list a claimant other than the author as the copyright owner").

benefits of their creative works.[160] The most egregious exploitation of Black artists occurred under the 1909 Act.[161] The 1976 Act eliminated many of the formalistic structures which prevent Black artists from benefiting economically from their creative endeavors.[162] The formal structures of copyright have historically kept Black artists from protecting their music.[163] This loss of copyright has deprived Black artists of millions.[164]

## *IV. Formalities in the Digital Age*

The necessity of complying with copyright formalities has become less important in the American copyright system and formalities have been completely abolished in some countries.[165] The Berne Convention was an important driver of this shift in formal requirements and the United States was a latecomer to abandoning formalities.[166] The digital technology revolution has shifted the way that nearly all copyrighted content is both produced and consumed, which has increased the need for "legal certainty concerning the claim of copyright" as information freely flows through digital channels.[167] Copyright arises automatically upon creation and is protected from that point in the absence of

160. *Id.*

161. *See id.* ("Much of the inequality to African-American artists detailed in this article occurred under the 1909 Act.").

162. *See id.* at 354 (noting that the 1976 Act "effectively eliminated" the traditional formal copyright requirements). *See also supra* Part II.B (discussing the overall impact of the 1976 Act).

163. *See generally id.* (explaining the historical patterns of inadequate protections for Black creators in the music copyright system).

164. *See id.* at 357 ("Social status and copyright law replicated inequality, and deprived the African-American community of untold millions in royalties and other revenues.").

165. *See* Stef van Gompel, *Formalities in the Digital Era: An Obstacle or Opportunity?*, GLOBAL COPYRIGHT: THREE HUNDRED YEARS SINCE THE STATUTE OF ANNE, FROM 1709 TO CYBERSPACE 395, 395–96 (Lionel Bently, Uma Suthersanen, & Paul Torremans eds., 2010) (portraying the softening of copyright formalities globally and Germany's complete abolition of copyright formalities).

166. *See id.* at 395 (stating that formalities shifted in the early twentieth century); *see also supra* Part II.C (highlighting the process of formalization); *supra* Part II.D (discussing the provisions of the Berne Convention).

167. *See* VAN GOMPEL, *supra* note 165, at 395–96 (emphasizing the "digital revolution" and the impact on copyright law).

formalization requirements, but it can be difficult to determine what falls within the scope of protection in a rapidly evolving technological world.[168] The question of how to protect copyright in a digital world raises the question of whether the concerns with formalities are still relevant and whether formal structures may be useful in this new environment.[169]

This section begins by examining the argument in favor of reintroducing formal structures as a way of adapting copyright to the digital age.[170] Some scholars have advanced formalistic structures as a solution to theft and rights clearance in the internet era.[171] Following is a subsection which examines how formalism in the digital age is not an appropriate solution to ongoing copyright concerns.[172] Part IV is essential to understanding the need for a further reduction in formalism despite arguments that formalism is the way to adapt copyright to the twenty-first century.[173]

### *A. The Argument in Favor of Reintroducing Formalities*

Those who argue in favor of the reintroduction of copyright formalities argue that formal structures are well suited to the challenges of the digital environment and that the historical concerns associated with formalization are lessened in a digital age.[174] In the absence of copyright formalities and the "lack of legislative definitional closure" about the scope of copyright-

168. *See id.* at 399 ("Because of the fact that copyright arises automatically upon the creation of an original work of authorship, it is not always easy to establish *ex ante* whether a particular object is protected by copyright.").

169. *See id.* at 396 (articulating that "recent calls for a reintroduction of formalities are surrounded by quite some controversy").

170. *See infra* Part IV.A (putting forth arguments in favor of formalism in the modern digital era).

171. *See infra* Part IV.A and accompany texts (examining the role of copyright formalities as a solution to digital concerns).

172. *See infra* Part IV.B (noting arguments against formalism in the modern digital era).

173. *See supra* Part IV (posing various issues regarding copyright formalities in the modern digital age). *See also infra* Part VI (advancing an argument for the abolition of limitations on remedies) and *infra* Part VII (arguing for shifting fee structures).

174. *See* van Gompel, *supra* note 165, at 396 (explaining that "recent calls for a reintroduction of formalities are surrounded by quite some controversy").

protectable subject matter, it is often difficult to determine whether a work is copyrightable for new or innovative subject matter.[175] Difficulty determining whether a work is protectable and, if time has passed, whether a work is still under protection "could prove a source of legal uncertainty for prospective users."[176]

In a digital environment, finding a work is hardly difficult, but discerning who owns a work with no statement of authorship or ownership creates a challenge for "the clearance of rights."[177] The digital era has vastly increased the challenges associated with licensing works as information is so widely available online.[178] Supporters of a return to formalization also point to the ways in which the internet has changed what is worthy of copyright protection.[179] The proponents observe that "copyright undeniably aims at protecting creators and creative industries against free-riding by others[.]"[180] "[T]he costs of producing and disseminating content have fallen so significantly that it is doubtful whether all works automatically merit the strong and long-term copyright protection that is presently granted."[181] While registration and having a record of ownership are beneficial and desirable, formalities impose barriers to entry into the copyright system which can prevent creators from securing protection.[182]

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175. *See id.* at 399 (highlighting how difficulties arise with copyrighting due to the lack of both formalities and "'legislative definitional closure'") (quoting Kathy Bowrey, *The Outer Limits of Copyright Law: Where Law Meets Philosophy and Culture*, 12 LAW & CRITIQUE 75, 85 (2001)).

176. *Id.* at 400–1 (citing Lucie Guibault, *Wrapping Information in Contract: How Does it Affect the Public Domain, in* THE FUTURE OF THE PUBLIC DOMAN: IDENTIFYING THE COMMONS IN INFORMATION LAW 87, 95 (Lucie Guibault & P. Bernt Hugenholtz eds., 2006)).

177. *See id.* at 401 (pointing out the challenges regarding rights clearance for online content).

178. *See id.* at 401–2 ("Although these licensing difficulties are certainly not new, they clearly have exacerbated in recent times.").

179. *See id.* at 405 ("[I]t is highly questionable whether, in the current digital era, all works should automatically warrant copyright protection.").

180. *See id.* (pointing to social media posts on Facebook and other digital platforms to conclude that content is now largely produced "not for commercial purposes, but for the benefit of social sharing and remixing") (citing James Gibson, *Once and Future Copyright*, 81 NOTRE DAME L. REV. 167, 212 (2005)).

181. *Id.*

182. *See* Jane C. Ginsburg, *The U.S. Experience with Mandatory Copyright Formalities: A Love/Hate Relationship*, 33 COLUM. J. L. & ARTS 311, 342 (2010)

### *B. The Argument Against Formalities*

Successfully copyrighting a work in a formalistic copyright system presents challenges which artists must overcome in order to protect their work: knowledge and money become more important in a formalistic system.[183] Making copyright protection conditional upon complying with formal requirements has the potential to exclude those who "are ignorant of the obligation" and fail to comply from protection.[184] For those who are inexperienced with copyright formalities, this could result in works inadvertently entering the public domain and depriving artists of compensation.[185] Further, the cost of protecting one's work in a formalistic system can quickly become prohibitive, especially for an artist who "creates a large volume of works" and therefore pays a larger number of fees.[186]

The $45 fee for electronic filings and $125 for paper filings can quickly add up for an artist who produces a larger volume of work.[187] It is entirely possible that an artist could not afford to register all their works, as the fee-per-work registration costs pile up.[188] Artists could be placed in the position of choosing which of their works they should seek copyright protection for, gambling their ability to protect their creations by having to correctly predict which ones attract an audience.[189] Filing fees are increased to $760

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(noting that the benefits of formalization can also present drawbacks for "individual creators").

183. *See id.* at 342–43 (arguing that "some are ignorant of the obligation" to comply with formal requirements, while "some may find the fees prohibitive").

184. *See id.* at 342 (providing alternative reasons for why some creators fail to satisfy the requirements for copyright protections, other than lack of care for their works).

185. *See* Greene, *supra* note 40, at 354 (describing how allowing creators' work into the public domain results "in the loss of their economic rights to copyright protection").

186. *See* Ginsburg, *supra* note 182, at 342 (explaining fee structures in copyright registration).

187. *See Fees*, COPYRIGHT.GOV (outlining the fee structures for musical artists) [https://perma.cc/5E36-CBXF].

188. *See* Ginsburg, *supra* note 182, at 342–43 ("The author who cannot afford to register all her works might wait to see which of her works attracts an audience before selecting which to register, but this strategy could prove perilous.").

189. *See id.* at 343 (noting that waiting to register "could prove perilous" for many artists).

for "eve-of-litigation registration"[190] which could be prohibitively expensive to artists in a nation where nearly half of Americans cannot cover a $400 expense without borrowing money or selling something.[191] This financial state of affairs is particularly relevant as "[c]ertain groups—African Americans, Hispanics, lower-income people—have fewer financial resources than others."[192] Many Americans lack knowledge of the fundamentals of finance—"65% of Americans age 25 to 65 were financial illiterates."[193] The increasing complexity of financial systems creates additional challenges that can spark worse "financial insecurity for [their] citizens."[194] Not only are the increased fees a potential challenge for creators, but some forms of damages are only available for works registered within three months of publication or within a month of infringement occurring, whichever is earlier.[195] Statutory damages and attorney's fees are only available when a creator promptly registers.[196] The costs of waiting are potentially disastrous: "the author who waits to see what succeeds . . . . will have lost the opportunity to obtain statutory damages and attorney[']s fees, and therefore might find she cannot afford to bring the suit."[197]

One of the espoused benefits of creating a formal copyright register is to create a centralized location to check ownership and

190. *See id.* (highlighting the increase in registration fees) (citing La Resolana Architects v. Clay Realtors Angel Fire, 416 F.3d 1195 (10th Cir. 2005); Corbis Corp. v. Amazon.com, Inc., 351 F. Supp. 2d 1090 (W.D. Wash. 2004); Strategy Source, Inc. v. Lee, 233 F. Supp. 2d 1 (D.D.C. 2002); Do Denim, LLC v. Fried Denim, Inc., 634 F. Supp. 2d 403 (S.D.N.Y. 2009)).

191. *See* Neal Gabler, *The Secret Shame of Middle-Class Americans*, THE ATLANTIC (May 2016) (conveying the financial state of "middle-class Americans" and the impact of unexpected expenses) [https://perma.cc/Q44S-5273].

192. *Id.*

193. *Id.*

194. *See id.* ("It is ironic that as financial products have become increasingly sophisticated, theoretically giving individuals more options to smooth out the bumps in their lives, something like the opposite seems to have happened, at least for many.").

195. *See* 17 U.S.C. § 412 (2018) (noting the time period in which an action must be brought).

196. *See* Ginsburg, *supra* note 182, at 343 (pointing out that statutory damages and attorney's fees are only available in certain registration contexts).

197. *See id.* (citing 17 U.S.C. § 412 (2006)).

to secure greater copyright compliance.[198] Copyright compliance is not just a legal system, but also rests on a societal framework in which the norms of ownership and creativity impact the viability of protecting one's copyright.[199] Copyright ideals are "rooted in some deeper understanding of society's regard for creativity, property, economic efficiency, or fundamental justice."[200] The internet's ability to perpetuate and facilitate digital piracy is staggering.[201] Copyright owners and creators open themselves up to risk when sharing their creations online and they "have become increasingly frustrated at [the] failure [by the music industry], both through legal or technological means, to halt or even substantially slow the rapid growth of piracy perpetuated by means of peer-to-peer networks."[202] This mass-scale piracy is carried out by consumers and "large numbers of people see file-sharing as permissible."[203] Digital sharing norms indicate that that "[v]ast segments of the potential market for copyright-protected content have the access, ability and inclination to make unauthorized copies of albums, movies, books and video games with little fear of recrimination and feel it is permissible to do so."[204] The notion that a comprehensive register of music copyright would enable quicker and easier copyright checks rests on the notion that individuals are inclined to check at all.[205] Efforts by the

198. *See supra* Part IV.A (putting forward the positive aspects of formalization).

199. *See* Greene, *supra* note 1, at 1227 (citing Jon M. Garon, *Normative Copyright: A Conceptual Framework for Copyright Philosophy and Ethics*, 88 CORNELL. L. REV. 1278, 1283 (2003) (arguing that copyright law relies on certain societal norms in order to foster compliance and provide enforcement)).

200. *See id.* (quoting Jon M. Garon, *Normative Copyright: A Conceptual Framework for Copyright Philosophy and Ethics*, 88 CORNELL L. REV. 1278, 1283 (2003)).

201. *See* Steven A. Hetcher, *The Music Industry's Failed Attempt to Influence File Sharing Norms*, 7 VAND. J. ENT. L. & PRAC. 10 (2004) ("While this technology promises vastly more efficient means of distribution and consumption of content, the industry has also viewed this potential as constrained by the technology's ability to perpetuate digital piracy.").

202. *Id.*

203. *Id.*

204. *Id.* at 10–11.

205. *See id.* (arguing that certain societal norms are "at the heart of the industry's ability to deter mass-scale copyright infringement" and a significant

music industry have largely failed to shift this norm in part because of the "negative public perception of the music industry".[206] Questions of digital norms in the digital age implicate the Berne Convention and spark questions of the value of international unity.

Uniformity across boarders via the Berne Convention is relevant to the question of whether an American formalistic system should be reinstated.[207] In order for creators to secure protection in a foreign territory, they must comply with the requirements of the territory.[208] Securing international protection presents challenges and differing standards of formalistic requirements can make it "very difficult to secure international protection, especially at a multinational level."[209] The Berne Convention simplified matters for all the signatory states, including the United States.[210]

Copyright formalization structures are just one of the many areas where the systemic inequality of the American system is visible, where the "[B]lack artistry has created it while white ownership has profited disproportionately from it."[211] Assessing whether re-instituting copyright formalities is appropriate requires considering what challenges would be created by a formalistic structure and whether the same concerns of exploitation and appropriation or theft persist for artists of color.[212]

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part of the digital piracy problem). *Contra* Part IV.B (discussing why formalities may not be a solution to digital concerns).

206. *See* Greene, *supra* note 1, at 1227 (quoting Jennifer Norman, *Staying Alive: Can the Recording Industry Survive Peer-to-Peer?*, 26 COLUM. J. L. & ARTS 371, 405 (2003)); *see generally* Hetcher, *supra* note 201.

207. *See generally* van Gompel, *supra* note 165 (outlining the international implications of certain copyright formalities).

208. *See id.* at 19–20 (highlighting the persistent difficulties creators experienced with securing international copyright protections in the past).

209. *Id.* at 20.

210. *See id.* at 20; *see also supra* Part II.D (explaining the impact of the Berne Convention).

211. Greene, *supra* note 1, at 1227 (quoting Frank Kofsky, *Black Music, White Business: Illuminating the History and Political Economy of Jazz* 84 (1977)).

212. *See* Hines, *supra* note 116, at 476–77 (providing the various ways in which Black creators have had their artistic creations or profits stolen).

## *V. The Present Age: Ongoing Issues*

Despite seemingly being a race and gender-neutral legal structure, IP and copyright have the potential to "reinforce social domination" as "the raw material for popular culture . . . ."[213] In considering reinstituting copyright formalities, it is important to consider whether formal structures are "reinforcing unequal social constructs through the dynamics of IP protection."[214] This section first discusses some of the failures of the Music Modernization Act (MMA).[215] The purpose of briefly discussing the MMA is to highlight the need for further legislation and modernization. This section next turns to the historic and ongoing discrimination against BIPOC in the United States.[216] A foundational understanding of the systemic, persistent economic inequality that communities of color experience is essential to examining the impact of the copyright fee structure and limitations on remedies of Section 412.[217]

### *A. The Music Modernization Act Fails to Adequately Protect Artists*

The Music Modernization Act (MMA) was a 2018 piece of legislation designed to address gaps in royalty payments within the music industry.[218] Major players in the music industry and

213. K.J. Greene, *Intellectual Property at the Intersection of Race and Gender: Lady Sings the Blues*, 16 AM. U. J. GENDER SOC. POL'Y & L. 365, 379 (2008).

214. *See id.* at 385 (discussing the "critical project of IP examination" through the lenses of critical race and gender theory).

215. *See infra* Part V.A (stressing the failures and inadequacies of the Music Modernization Act).

216. *See infra* Part V.B (examining the ongoing economic inequality within communities of color).

217. *See infra* Part V.B (outlining the persistent economic inequality within communities of color); *see also* Cary Martin Shelby, *Profiting From Our Pain: Privileged Access to Social Impact Investing*, 109 CALIF. 102 (2021) (emphasizing the economic realities within communities of color to measure the accessibility and efficacy of race-conscious solutions).

218. *See* Spencer Paveck, *All the Bells and Whistles, but the Same Old Song and Dance: A Detailed Critique of Title I of the Music Modernization Act*, 19 VA. SPORTS & ENT. L.J. 74, 75 (2019) (explaining why the MMA was originally implemented).

major artists embraced the legislation as "a much-needed revamp of music legislation . . . ."[219] However, the MMA "falls short of its goals" to modernize royalty structures and properly compensate creators.[220] One of the goals of the MMA was to address the historical marginalization of creators and artists that were "exacerbated by the systemic manipulation and abuse of the copyright law and music sound recording contracts and licensing agreements."[221] The MMA sought to "close [a] bizarre legal loophole allowing online streaming services not to pay royalties for pre-1972 songs."[222] The MMA solves this problem by establishing "a new rate setting standard to be applied by the Copyright Royalty Judges [of the Copyright Royalty Board]."[223] However, Copyright Royalty Board ("CRB") proceedings and the larger administrative state of musical copyright have been slow to adapt to the digital streaming world.[224]

While the issues related to the failure of royalty structures to adapt to the digital streaming world are beyond the scope of this Note, this shortfall of the MMA is significant insofar as creators suffer the consequences.[225] The MMA also did not go far enough in

219. *Id.* (outlining several major endorsements of the MMA by members of the music industry).

220. *Id.* at 76 ("Although the royalty frameworks established by the MMA represent a necessary modernization of the royalty payment process and provide for increased compensation to songwriters, overall, the MMA—and Title I in particular—falls short of its purported goals.").

221. *Update on the Passage of the Music Modernization Act*, INST. FOR INTELL. PROP. & SOC. JUST. [https://perma.cc/CE5C-H9VF].

222. Steve Knopper, *'Music Creators Should Be Compensated,' Says Copyright Office*, ROLLING STONE (Feb. 6, 2015, 8:38PM) [https://perma.cc/WV7A-GJ3T].

223. *Music Modernization: Frequently Asked Questions*, COPYRIGHT.GOV [https://perma.cc/9GG8-ZB25].

224. *See generally* Jenna Hentoff, *Compulsory Licensing of Musical Works in the Digital Age: Why the Current Process is Ineffective & How Congress is attempting to Fix It*, 8 J. HIGH TECH. L. 113 (2008) (stating the ongoing issues with interactive and non-interactive digital streaming).

225. *See* Mary LaFrance, *Music Modernization and the Labyrinth of Streaming*, 2 BUS., ENTREPRENEURSHIP & TAX L. REV. 310, 322–24 (2018) (weighing the positives and negatives of royalty structures in the MMA).

addressing the pre-1972 loophole that it purports to resolve.[226] Protections provided under the MMA provide "most of the same rights and remedies that apply to copyrighted sound recordings" but "expressly denies that pre-1972 sound recordings are protected by copyright."[227] These owners of exclusive rights are referred to as a "rights owner" rather than the owner of a copyright.[228] Worse still, this protection is "defer[ed] largely to state law. In doing so, it creates significant and unnecessary uncertainty."[229] State law copyright varies wildly and was available as a source of copyright prior to this legislation.[230]

The royalty structure of the MMA, in combination with copyright protection, presents a tremendous risk to unsophisticated creators.[231] In order to receive royalties for streamed compositions, creators must register their compositions with the Copyright Office of the Mechanical Licensing Collective (MLC).[232] This "process disproportionately affects songwriters with limited access to information and resources," and navigating the landscape without legal representation can be challenging.[233] Musical copyright, like countless if not all systems in America, is one where access to money is an asset, and BIPOC have been

226. *See id.* at 325 ("[T]he new law offers significant benefits to record labels and recording artists who own rights in these recordings. However, it also creates ambiguities and potential conflicts with other provisions in federal law.").

227. *Id.* at 327.

228. *See id.* ("For this reason, § 1401 consistently refers to the owner of exclusive right in a pre-1972 sound recording as the 'rights owner' rather than the copyright owner.").

229. *Id.* at 330.

230. *See id.* at 331–32 (explaining that state laws "vary" with respect to what degree of protection is provided, who the owner is, and may even create conflicts of law problems).

231. *See* Payeck, *supra* note 218, at 91 ("MMA Title I requires songwriters to be registered if they wish to receive royalties for their compositions: For songwriters to be entitled to receipt of their royalties, they must be identifiable in the records of the MLC.").

232. *See id.* (citing Holland Gormley, *The Breakdown: What Songwriters Need to Know about the Music Modernization Act and Royalty Payments,* LIBR. OF CONG. (Apr. 13, 2020) [https://perma.cc/KAM5-GZ2A]).

233. *See id.* at 91–92 (explaining the challenges faced by unsophisticated artists).

systemically excluded from systems of generational wealth building that are essential to building capital.[234]

### *B. Historic and Ongoing Exclusion of BIPOC From Wealth Building Tools*

The fundamentally unequal economic landscape of the United States provides the backdrop for analyzing the state and future of copyright formalities with a race conscious lens. Many associate the struggles that Black Americans have faced with slavery and segregation, as visible systems of oppression which suppressed and kept Black Americans from benefiting from the same system they provided the labor for.[235] While these periods are unarguably oppressive and cruel, in recent times the struggles faced by BIPOC have persisted but are less starkly visible than de jure systems of segregation.[236]

Between 1983 and 2013, the average wealth of white families has grown by 84%—three times the rate for the Black population.[237] If that trend continued, "the average wealth of

234. *See* Danyelle Solomon, Connor Maxwell, & Abril Castro, *Systemic Inequality: Displacement, Exclusion, and Segregation*, CTR. FOR AM. PROGRESS (Aug. 7, 2019) (explaining how "historic and ongoing displacement, exclusion, and segregation" prevent BIPOC from obtaining and retaining their own homes, which are "critical tools for wealth building and financial well-being") [https://perma.cc/B4M5-FHLP].

235. *See* PBS, *Ten 'Must Watch' Black History Documentaries* (Oct. 10, 2013) (elaborating that the "[d]ocumentaries offer rich insight into our society and culture, connect us to some of our proudest and most shameful moments in American history, and remind us how far we've come." The vast majority of top ten list are related to the Civil Rights Movement and slavery) [https://perma.cc/Q6LZ-CQ3N]. *See also* MAKSYM CHORNYI, *Best Movies About Slavery and Racism* (Feb. 5, 2018) (listing almost exclusively (6 out of 7) films about slavery and the Civil Rights Movement as the most descriptive of the Black experience) [https://perma.cc/L3TN-ES28].

236. *See* Robert Longley, *What is De Jure Segregation? Definition and Examples*, THOUGHTCO. (last updated Feb. 28, 2021) (explaining that de jure segregation is segregation "according to the law," which includes systems such as "Jim Crow Laws") [https://perma.cc/XF8F-W6VA].

237. *See* DERICK ASANTE-MUHAMMED, CHUCK COLLINS, JOSH HOXIE, & EMANUEL NIEVES, THE EVER-GROWING GAP: WITHOUT CHANGE, AFRICAN-AMERICAN AND LATINO FAMILIES WON'T MATCH WHITE WEALTH FOR CENTURIES, 5 (Inst. for Pol'y Stud. ed., 2016) (highlighting the rate of growth of wealth for white families) [https://perma.cc/V8MJ-SWMT].

White households [would] increase by over $18,000 per year, while Latino and Black households would see their respective wealth increase by about $2,250 and $750 *per year*."[238] At this pace "it would take Black families 228 years to amass the same amount of wealth White families have *today*," just a few years short of the 245 years that slavery was the law of the land.[239] Generations of discrimination and de jure segregation have resulted in "a slew of economic inequalities that exacerbate the social disparities they face."[240] The average White household wealth is $656,000 and the average Black household wealth is $85,000—this wealth inequality "has only served to further compound and exacerbate [the] racial wealth divide."[241] This ever growing wealth disparity is the "natural result of public policies past and present that have either been purposefully or thoughtlessly designed to widen the economic chasm between White households and households of color . . . ."[242] Significant reform is needed to address the wealth divide as overall wealth inequality continues to remain "on track to become even wider in the future."[243]

Black and Latino populations have much higher unemployment rates than their White counterparts—8.6% for Black workers, 5.8% for Latino workers, 4.4% for white workers.[244] Black families have a median household income $20,000 per a year lower than the average White household income, $13,000 for Latino families.[245] There are serious gaps on the ability to handle financial emergencies, as "Black and Latino families face financial

238. *See id.* (emphasis added).

239. *See id.* (emphasis added) (explaining the wealth inequality based on race in the US).

240. *See id.* at 6 (advocating for expanding conversations around the problems surrounding racial inequality requires a system wide approach and specifically looking into wealth disparity).

241. *See id.* (discussing "the lingering effects of generations of discriminatory and wealth-stripping practices" which have fueled the fire of inequality).

242. *See id.* (discussing the origins of the racial wealth divide).

243. *See id.* ("In the absence of significant reforms, the racial wealth divide––and overall wealth inequality—are on track to become even wider in the future.").

244. *See id.* at 8 (discussing unemployment variation based on race).

245. *See id.* ("[T]hey face a median household income gap that sees them earning about $13,000 [for Latino households] and $20,000 [for Black households] less per a year, respectively, than the median White household earns ($50,400).").

insecurity at about double the rate of White families."[246] For many families this means turning to less than ideal financial services, such as prepaid cards and non-bank transfers (money orders, etc.), to meet every day financial needs, which have high fees and result in "stripping families of much-needed financial resources."[247] This economic gap is the result of countless generations having "wealth and economic opportunity stripped" and stolen from Black Americans.[248]

This inequality stems from generations of policy which have served to strip Black communities of wealth and financial stability.[249] Black Americans were excluded from programs which paved the path to homeownership and economic opportunity for countless White Americans.[250] Practices of redlining, a policy classifying predominately nonwhite neighborhoods as hazardous and therefore risky investments for banks, kept Black Americans from buying homes and "undermined wealth building in black communities."[251] Home ownership helps families to build and eventually transfer wealth across generations, which in turn provides economic stability and starter capital to the next generation.[252] Currently, college educated Black Americans are less likely to own their home than White Americans who never finished high school.[253] Economic inequality in America is not an

246. *Id.*

247. *See id.* (explaining that Black households that are "relying on alternative financial serves" lose wealth from associated fees and interest).

248. *See id.* at 11 ("For Black and Latino households—who for years have had their wealth and economic opportunity stripped from them—overcoming these inequities seems almost impossible.").

249. *See* Solomon, Maxwell, & Castro, *supra* note 234 (discussing how public policy to combat "urban blight, or bolstering economic development" has resulted in "stripping Black communities of the wealth and financial stability").

250. *See id.* ("[T]he federal government established several programs in the 20th century that were designed to promote homeownership and provide a pathway to the middle class. However, these programs largely benefited white households while excluding Black families.").

251. *See id.* (discussing the process of redlining which resulted in "just 2 percent of the $120 billion in FHA loans distributed between 1934 and 1962 were given to nonwhite families").

252. *See id.* ("Federal home loan programs allowed households—the majority of them white—to build and transfer assets across generations, contributing to flaring racial disparities in homeownership and wealth.").

253. *See id.* (discussing the disparity between Black and white households).

issue of the past and Black Americans are still faced with the legacy of generations of economic and social oppression.[254] This fundamentally unequal economic landscape provides the backdrop for analyzing the state and future of copyright formalities with a race conscious lenses.[255]

### *VI. Abolishing Registration Timeline for Remedies*

Copyright formalities have been lauded as a solution to the challenges of music copyright enforcement in the digital age.[256] However, formalistic copyright structures can become, quite simply, barriers to entry based on one's knowledge of registration requirements and ability to afford the registration fee.[257] The $45 fee for electronic filings and $125 for paper filings can quickly add up for an artist who produces a larger volume of work, such as musical artists who are constantly producing music in the hopes of getting picked up by a major label.[258] It is entirely possible that an artist could not afford to register all their works, as the fee-per-work registration can quickly become a substantial sum.[259]

The United States has a long history of displacing, excluding, and segregating BIPOC in a way that has created long-lasting and persistent economic strains within communities of color.[260] Latino and Black families face severe income gaps when compared to

254. *See id.* ("Across the country, historic and ongoing displacement, exclusion, and segregation prevent people of color from obtaining and retaining homeownerships, as well as accessing safe, affordable housing.").

255. *See generally id.* (discussing the state of economic inequality in America); ASANTE-MUHAMMED, COLLINS, HOXIE, & NIEVES, *supra* note 237 (explaining persisting wealth gaps in America).

256. *See supra* Part IV.A and accompanying text (arguing that more formalistic structures provide a solution to determining ownership and allowing for more efficient licensing).

257. *See* Ginsburg, *supra* note 182, at 342 (discussing fee structures).

258. *See Fees*, U.S. COPYRIGHT OFF. (describing fee structures) [https://perma.cc/5E36-CBXF].

259. *See* Ginsburg, *supra* note 182, at 342 (discussing fee structures).

260. *See* SOLOMON, MAXWELL & CASTRO, *supra* note 234 (discussing the impact of policy decisions on wealth in communities of color as a result of "displacement, exclusion, and segregation"). *See also* ASANTE-MUHAMMED, COLLINS, HOXIE, & NIEVES, *supra* note 237, at 6 (explaining persisting wealth gaps in America and that Latino and Black households own an average of six to seven times less wealth than White households).

White families,[261] double the rates of financial insecurity,[262] and much higher rates of unemployment than their White counterparts.[263] Economic inequality is linked with racial inequality and economic flexibility is essential to security and opportunity.[264] The elements of "economic advantage are structurally intertwined"[265] and could impact the ability of artists of color to take advantage of the copyright system. The $45 fee for electronic filings and $125 for paper filings can quickly add up,[266] and may provide a greater barrier to entry for Black creators who have been subjected to generations of intentional wealth-stripping practices and compounding wealth inequality.[267]

In light of the persistent and ongoing economic inequality faced by creators of color, the registration prerequisite formality which persists in Section 412 of Title 17 could disproportionately disadvantage BIPOC and limit the ability to seek remedies for infringement.[268] Statutory damages and attorney's fees are only

261. *See* ASANTE-MUHAMMED, COLLINS, HOXIE, & NIEVES, *supra* note 237, at 8 (stating that Latino and Black families earn approximately $13,000 and $20,000 less per a year respectively than the median white household).

262. *See id.* ("Black and Latino families face financial insecurity at about double the rate of White families.").

263. *See id.* (citing unemployment rates of 8.6% for Black workers, 5.8% for Latino workers, contrasted with 4.4% for white workers).

264. *See id.* at 6 (explaining that income inequality alone is not an appropriate measure of long-term inequality and "the essential role that wealth plays in achieving financial security and opportunity").

265. *See* Angela Anwuachi–Willig & Amber Fricke, *Class, Classes, and Classic Race–baiting: What's in a Definition?*, 88 U. DENV. L. REV. 807, 815 (2011) (citing Deborah C. Malamud, *Class-Based Affirmative Action: Lessons and Caveats*, 74 TEX. L. REV. 1847, 1870–72 (1996)).

266. *See Fees*, U.S. COPYRIGHT OFF. (describing fee structures) [https://perma.cc/5E36-CBXF].

267. *See* SOLOMON, MAXWELL & CASTRO, *supra* note 234 (discussing "wealth-stripping practices" and the impact of policy decisions on wealth in communities of color as a result of "displacement, exclusion, and segregation"); *see also* ASANTE-MUHAMMED, COLLINS, HOXIE, & NIEVES, *supra* note 237, at 6 (explaining persisting wealth gaps in America and that Latino and Black households own an average of six to seven times less wealth than White households).

268. *See supra* Part V.B and accompanying text (discussing ongoing racial and economic inequality). *See also* 17 U.S.C. § 412 (2018) (creating a registration prerequisite to being awarded statutory damages (17 U.S.C. § 504 (2018)) or attorney's fees (17 U.S.C. § 505 (2018))).

available when a creator promptly registers.[269] The costs of waiting are disastrous: "the author who waits to see what succeeds . . . . will have lost the opportunity to obtain statutory damages and attorney[']s fees, and therefore might find she cannot afford to bring the suit."[270] Despite the abolition of copyright formalities upon the United States' entry to the Berne Convention, a vestige of the registration requirement still lurks in the United States Copyright Code.[271] Section 412 of Title 17 bars the statutory damages as well as attorney's fees remedies unless a creator has registered their copyright within a certain time frame.[272]

This requirement has the potential to be particularly damaging to Black creators not only because of generations of wealth-stripping practices, but also because of the unique aspects of Black musical tradition.[273] Historically, Black musical styles rely heavily on improvisation and the "constant state of revision" of improvisation does not allow for a fixation in a medium which truly captures the work.[274] Each unique variation would require a separate registration—the structure of improvisation "frustrates" the concept of fixing a work as a final and complete product in one moment of time.[275] Styles of group creation and improvisation both trace their roots to slavery in the United States.[276] But the importance of community composition and revision in Black musical tradition still persists in music by Black creators in genres

269. *See* Ginsburg, *supra* note 182, at 343 (citing 17 U.S.C. § 412 (2018) and explaining the perils of waiting).

270. *See id.* (citing 17 U.S.C. § 412 (2006)).

271. *See supra* Part II.D and accompanying text (explaining the impact of the Berne Convention).

272. *See* 17 U.S.C. § 412 (2018) ("Registration as a prerequisite to certain remedies for infringement . . . .").

273. *See supra* Part V.B and accompanying text (discussing ongoing racial and economic inequality); see *supra* Part III.A and accompanying text (discussing unique aspects of Black musical tradition).

274. *See* Hines, *supra* note 116, at 469 (explaining that improvisation "frustrates" fixation).

275. *See id.* 469 (explaining that improvisation "frustrates" fixation requirements).

276. *See id.* at 472 ("[T]he first Black musical genre in the United State emerged from slavery . . . .").

such as rap, R&B, and countless others.[277] Such styles create particular challenges of Section 412: either register every variation of a song or place yourself at risk of losing access to meaningful monetary remedies for your failure to do so.[278]

Creators who are unable to pay to register their works within the three months that Section 412 requires are punished by losing the significant remedies provided in the statute.[279] This choice between registration to protect remedies or failure to register at the expense of one's remedies is one which is unduly punitive to artists of color. Historically, Black musical styles and traditions which do not fit well into fixed, formalized copyright structures.[280] This distinct music style in combination with the prior and persistent economic inequality as a result of exclusion and discrimination[281] creates a perfect storm for artists of color to once again be excluded from the copyright system. "IP scholars are increasingly recognizing that the legal regimes of intellectual property are inextricably linked to systems of social and economic inequality."[282] A small step towards correcting an ongoing system of social and economic inequality is removing the registration requirement from Section 412. The lurking registration requirement of Section 412 ignores the persistent economic inequality which is closely tied to race in the United States and removing this statutory provision removes a potential barrier to copyright protection for artists of color.[283]

"As new technologies continue to cause explosive growth in the value of information, the value of copyrights and intellectual

277. *See id.* at 464 ("The Black musical tradition works in a 'trope of revision,' that is, it is a highly creative tradition that builds and improves upon the music within its community.").

278. *See* 17 U.S.C. § 412 (barring certain remedies after non-registration).

279. *See id.* (limiting remedies).

280. *See supra* Part III.A and accompanying text (explaining unique Black musical traditions which rely heavily on group creation and improvisation, both of which don't mesh well with formalistic requirements).

281. *See supra* Part V.B and accompanying text (discussing ongoing racial and economic inequality).

282. *See* Greene, *supra* note 1, at 1182.

283. *See* 17 U.S.C. § 412 (2018) (making registration a prerequisite to certain remedies for infringement).

property will continue to increase sharply."[284] Making sure that the systems of copyright are accessible to creators of color is an important priority in creating a more equal and fair society, and making copyright systems accessible requires looking to the social and economic realities that Black creators face.[285] Copyright systems in the United States have previously been used to deny Black creators their "credit, copyright royalties and fair compensation."[286] Historically, Black artists have not reaped the benefits of copyright protections and their work has been appropriated on an industrial scale.[287]

In the past, the structural inequality of the American legal system, and American society, has impacted the copyright system in a way that has failed to serve the interests of Black creators.[288] Despite their invaluable cultural contributions, "Black artists did not share rewards commiserate with their enormous creativity."[289] The economic and societal benefits of IP ownership eluded, or were taken from, Black artists for much of American history as a result of existing within a system of racial discrimination.[290] It is necessary to consider how Section 412 may perpetuate theft of work or profits from artists of color and continue the sordid legacy of keeping Black creators from engaging with and profiting from the copyright system.[291]

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284. *See* Greene, *supra* note 40, at 341.

285. *See supra* Part V.B (discussing ongoing economic inequality and it aligns with race).

286. Greene, *supra* note 1, at 1181.

287. *See id.* ("The mass appropriation of the work of black artists and inventors reflects the systemic subordination based on race that characterized most of U.S. history.").

288. *See id.* ("Copyright law exists within social structures that historically did not serve the interests of black cultural production.").

289. *Id.* at 1183–84.

290. *See id.* at 1189 ("For much of American history, the valuable rights of IP (including compensation, credit and control) eluded Black artists operating in a social system of racial discrimination."); Black artists were also excluded from artists protection organizations such as the American Society of Composers, Authors, and Publishers (ASCAP) further exacerbating inequality.

291. *See supra* Part III.B, Part III.D (explaining how copyright systems were used to intentionally exclude creators of color).

The remedies which Section 412 limits based on a failure to register are significant remedies for creators. Section 504[292] governs the damages which are available for infringement and Section 505 provides for attorney's fees as a remedy.[293] Section 504 states that an infringer is liable for either actual damages and profit or the statutory damages, with additional damages being awarded in certain severe circumstances.[294] The statutory damages provided by Section 504 range from $750–$30,000 "as the court considers just."[295] These damages are significant because they are available without the creator having to prove actual harm, as is required by actual damages and profit loss.[296]

It can be challenging for creators to prove they have been actually damaged by infringement and is often the most contentious portion of any IP suit.[297] Statutory damages are available without the proof of actual harm suffered as a result of infringement and remove one of the most difficult portions of an infringement suit.[298] These statutory damages are also provided for each work which was infringed upon, so each work essentially is entitled to a set amount of damages regardless of if the creator was 'actually' harmed in the legal sense.[299] Section 504 also allows for increased damages up to $150,000 if the court finds "that infringement was committed willfully[.]"[300] These amounts of damages are significant, but are almost certainly especially

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292. 17 U.S.C. § 504 (2018).

293. *See id.* § 505 (limiting the award to "reasonable" attorney's fees).

294. *See id.* § 504 (specifying that the plaintiff may be entitled to "an additional award of two times the amount of the license fee").

295. *Id.* § 504(c)(1).

296. *See id.* (allowing for collection without proof of actual harm suffered); *but see* § 504(b) (requiring the owner to prove "actual damages suffered by him or her as a result of infringement").

297. *See What Are Statutory Damages and Why Do They Matter?* COPYRIGHT ALL., ("Statutory damages are important because the alternative type of damage award is "actual damages," which must be proven in court and can be very difficult to establish.") [https://perma.cc/NX7L-S686].

298. *See id.* ("Actual damages are often difficult to prove, so statutory damages are beneficial to copyright owners because they remove the difficult of providing evidence of actual damages.").

299. *See id.* (explaining the value of statutory damages); *see also* 17 U.S.C. § 504(c) (2018).

300. 17 U.S.C. § 504(c)(2) (2018).

significant to any creator who struggles financially. Section 505 provides that the plaintiff's costs and attorney's fees are available as a remedy for infringement.[301]

Because of Section 505 the court "in its discretion may allow the recovery of full costs."[302] A specific statutory grant of attorney's fees and costs is a meaningful remedy, especially for a creator who struggles financially. Attorney's fees as a remedy creates an incentive for lawyers to take infringement cases even when the infringement is not willful because "fees are a necessary evil" even for lawyers.[303] Section 412 is particularly harmful because it strips both of these remedies simultaneously. A lawyer will likely not take your case if they have to fight tooth and nail to prove actual harm unless the damages are high enough that it would be worth their while. Thus, a failure to register promptly strips creators of two incredibly significant remedies for infringement, remedies which are the most significant to creators struggling financially. Removing the limitations on remedies in Section 412 treats a symptom of the larger problem and taking steps towards addressing race in copyright requires examining the fee structure as well.

### *VII. Adopting an Alternative Fee Structure*

In addition to abolishing the limitations on remedy of Section 412, the copyright fee structure should be changed to make copyright more accessible to creators. The expense of registering works can quickly become prohibitively expensive for creators and shifting the fee structure of registration would make registration more feasible.[304] This section will propose two potential remedies to the expense of registration: one based on the scaled fee structure in the patent system and another allowing for bulk registration.

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301. *Id.* § 505.

302. *Id.*

303. *See* Richard Stim, *Small Entities and Micro Entities: What's the Difference When Paying Patent Fees?* NOLO (discussing how the USPTO "seeks to help smaller businesses and individual inventor afford the patent process" and that fees are "relative" to size) [https://perma.cc/8B84-39SZ].

304. *See supra* Part III.D (explaining the impact on artists of color); *see also supra* Part IV (discussing how impactful fees can be on artists).

*A. Scaled Fee Structure Analogous to the Patent Fee System*

The United States Patent and Trademark Office (USPTO) fee structure provides an excellent skeleton for one potential scaled fee structure.[305] The USPTO distinguishes between three different categories in determining what fee is paid: micro entities, small entities, and other than a small or micro entity.[306] While the "fees are a necessary evil" the USPTO builds in a fee schedule that seeks to encourage innovation by providing financial break to smaller companies and independent inventors.[307] The difference in fee based on size gives substantial financial to small and micro filers: small entity filers receive a half discount and micro entity filers receive a seventy-five percent discount of the standard fee.[308] The goal of this type of tiered system is to encourage innovation and to help smaller scale inventors by lowering their fees relative to large corporations.[309]

Within this tiered structure the standard $320 filing fee becomes a $160 filing fee for a small entity or a $80 filing fee for a micro entity.[310] Both small and micro entity filing status come with limitations on who can qualify for the benefits of reduced fees.[311] To qualify as a small entity an applicant must certify that they are an individual, a small business with no more than 500 employees, a university, or a qualifying nonprofit.[312] To qualify as a micro entity an applicant must be one of the within one of the categories for qualification as a small entity and certify that in addition they have not filed more than four previous patents, that their income is not greater than three times the median household income for the preceding year, that the inventor is not obligated to convey the

305. *See* 37 C.F.R. § 1.16 (2021) (displaying fee differences based on organization size).

306. *See id.* (listing fee structures based on small, micro, or other status).

307. *See* Stim, *supra* note 303 (noting the necessity of the application fees).

308. *See id.* (explaining the fee structure tier and discount level).

309. *See id.* ("The goal of this multi-tiered system is to provide a break for smaller companies and independent inventors, and to encourage innovation.").

310. *See* 37 C.F.R. § 1.16 (2021) (displaying fee differences based on organization size).

311. *See id.* § 1.29 (explaining limitations on micro entity status); *id.* at § 1.27 (describing limitations on small entity status).

312. *See id.* (illustrating limitations on small entity status).

patent to an entity with an income greater than three times the median household income for the preceding year.[313]

Adopting fee structure similar to the USPTO in the Copyright Office could have a dramatic impact on creators who are working independently or are not affiliated with large record labels. Having a tiered structure will make protecting their works more accessible to creators who have smaller scale financial success or are not very experienced in the industry. The Copyright Office should take a page out of the USPTO's book and adopt a scaled fee structure of small entity, micro entity, and other than small or micro entity.[314] The criteria for small entity could be adopted with no alteration and criteria for micro entity would only have the minor shift from 'patent' to 'works' to fit within the Copyright Office's fee structure.[315] This small shift in fee structure would be incredibly meaningful for creators who are seeking to protect their work and are currently being limited by their financial ability to do so. Adopting the USPTO's fee structure at the Copyright Office is one possible structure which could better serve the interests of smaller creators. Another alternative is a bulk registration system.

### *B. Bulk Registration*

Another potential solution to the prohibitive cost of registering each work individually could be to allow creators to register multiple works in a bundle. This bulk registration system would allow creators to register more than one work per each registration fee for creators who produce a high volume of works. One way to adopted bulk registration could be to allow creators to file all their works produced during a set time period (ex: quarterly, or bi-weekly) to be registered for one fee. A bundle system would have to come with restrictions on who can bundle, or bulk register works. Limiting bulk registration to creators who, like small entities at the USPTO, are registering as individuals, or a small business with no more than 500 employees, or a university, or a

313. *See id.* § 1.29 (defining limitations on micro entity status).

314. *See id.* § 1.16 (displaying fee differences based on an organization's size).

315. *See id.* § 1.29 (explaining limitations on micro entity status); *id.* § 1.27 (clarifying limitations on small entity status).

qualifying nonprofit would provide the needed check on bulk registration.[316]

Allowing creators to get 'more bang for their buck' in terms of registration could alleviate some of the challenges that high-volume creators face in determining whether to register their works.[317] Both bulk registration and a tiered fee structure analogous to the structure of the USPTO are viable alternatives to the current system of one fee, one registration where record labels pay the same flat fee as an individual creator.

## *VIII. Conclusion*

The United States currently experiences tremendous economic inequality which is closely tied to its history of segregation, racism, and exclusion of BIPOC.[318] Section 412 and copyright fee structures may continue to perpetuate this trend given the economic realities that creators of color currently face.[319] Abolishing section 412 and changing the copyright fee structure are two small and easily adopted changes to begin to address the legacy of racism in America.[320] Make no mistake, these changes are limited proposals intended to provide a manageable first step and create meaningful benefits for creators of color immediately, but they are far from a comprehensive solution to persistent racism in America.

316. *See id.* § 1.27 (explaining limitations on small entity status).

317. *See supra* Part III.D (discussing the challenges faced by creators based on expense).

318. *See supra* Part V.B (discussing historic and ongoing economic inequality between Black and white Americans).

319. *See supra* Part V (explaining the ongoing importance of being race-conscious when assessing copyright fee structures).

320. *See supra* Part VI (arguing for the abolition of § 412); *see supra* Part VII (arguing for a change in the fee structure of the copyright office).