

Copyright, Music and Race: The Case of Mirror Cover Recordings

A Teaching Module

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I. Introduction

Is copyright law racist, or has it ever been? Has copyright law aided discrimination on the basis of race, or exploitation of racial minorities? Presumably you would be concerned if it had, because you believe that discrimination and exploitation on the basis of race is morally abhorrent. However, you may suspect – and it turns out, rightly so – that copyright legislation in the United States has never explicitly incorporated racial categories. No federal or state copyright statute has ever withheld copyright protection from authors of a particular race, or imposed different fees on authors or owners of different races, or otherwise explicitly used racial categories.

You also know, or rightly suspect, that minority authors and performers have often ended up much worse off than white authors and performers. That can be traced, in part, to the diminished access to resources and knowledge that general racial subordination and isolation begets. For example, Reebee Garofalo has noted that because black musicians “seldom had access to good advice about record contracts, royalty payments, marketing, promotion, or career development . . . , they were routinely swindled out of their publishing rights and underpaid for record sales.”¹ There are countless examples of such uncompensated or undercompensated appropriation.² But of course, minority authors and performers have also faced more direct discrimination. The copyright industries – those industries that focus on producing works protected by copyright, such as the music industry, the motion picture industry, the publishing industry, and so on – have all had their own histories of racial discrimination, and consumers of or audiences for works protected by copyright have also often harbored and acted upon racial prejudices. When authors and performers face racism from society at large, from those with whom they have to work, including employers, agents, publishers, and fellow authors and performers, and from the public that consumes or rejects their works, they are often ill-served even by laws that are on their face general and neutral. In such a society, even the enforcement of general laws of property, contract, and copyright can aid racial discrimination and exploitation, because that enforcement can give legal backing to the racist decisions made by employers, consumers, and others upon whom authors and performers depend to earn a living from their creativity.

If that is the only way in which copyright law might aid racism, however, there would not seem to be much to discuss that is specific to copyright. Discussion would likely migrate to examination of each of the types of relationships that authors and other economic actors may find themselves in, and to whether and how those relationships should be regulated. And, of course, there has been plenty of discussion of those relationships, and in some cases that discussion has been followed by legislation. Discrimination on the basis of race in areas such as employment³ and the operation of public accommodations⁴ has been prohibited, and in some of those areas there is some legal scrutiny, not only of practices that are intentionally discriminatory, but of practices that have a disparate impact on racial minorities.⁵ However, there is nothing copyright-specific about those discussions and laws: employment for purposes of creating a song or a movie is not treated differently than employment for purposes of

producing milk or napkins. Racial discrimination in private consumption choices, on the other hand, is generally not regulated. Even if an author could prove that someone had refrained from buying his book solely because he was a member of a racial minority group – proof that is usually hard to come by – the law would afford him no remedy.

What if, however, there were particular features or doctrines of copyright law that did not explicitly incorporate racial categories, but that arguably facilitated racial exploitation in a more focused

Have other facially neutral doctrines of copyright law disadvantaged minority groups?

- **Fixation and Author Identification.** K.J. Greene and Candace Hines have argued that copyright law's requirement of fixation, and particularly its former requirement of written notation for music, denies protection to African American oral culture, and that its requirement of locating an individual author clashes with African American traditions of communal creation.⁶
- **Formalities.** Greene has also argued that the formalities that with which authors have historically had to comply to receive copyright protection, including registration and publication with proper copyright notice, had a particularly disadvantageous impact on African American authors, who were less likely to have access to legal information, and thus were more likely to forfeit copyright by failing to comply with required formalities.⁷
- **The Idea-Expression Doctrine.** Similarly, Greene has argued that copyright law's idea-expression doctrine has "penalized the most innovative artists in blues, jazz and rock, essentially denying protection of their signature styles and denying compensation for the creation of genres."⁸

manner? This module will explore three related copyright doctrines that potentially fit that description, in the context of the music industry and the potential exploitation of African American composers and recording artists. Since an understanding of these doctrines and their relationship goes a long way towards understanding how copyright in music works, this module also provides a good basic introduction to copyright in music.

The first of the three doctrines is the so-called "mechanical statutory license," which allows recording artists to record performances of musical compositions and sell those recordings by paying the composer a legislatively determined license fee. The second doctrine is a provision that denies copyright in a derivative work when permission has not been obtained to use the underlying work. The third began its life as a refusal to protect musical arrangements for which federal copyright protection had not been obtained, and has become a limitation on the scope of protection of sound recordings. The second and third provisions have typically worked together to deny performers and arrangers any copyright protection for what they might add to a song when they record it, either as a derivative musical work or as a sound recording.

We will ask whether these doctrines enabled white recording artists to make and sell "cover recordings" of songs composed and/or previously recorded by African-Americans, without obtaining the permission of those composers or previous performers, and without providing them adequate compensation (or any compensation at all) for their creative contributions. Part II provides an historical introduction to the mechanical compulsory license, and to the racial categories that were used in the marketing of sound recordings ("records") for

many decades of the twentieth century. Part III introduces the phenomenon of white cover recordings of songs originally recorded by African Americans. Part IV presents excerpts from a seminal 1950 judicial decision that facilitated the making of cover recordings by denying the copyright claims of an African-American recording artist and her record company. Part V explores the facts, law, and impact of that decision, and invites discussion about the policy issues raised by the legal doctrines that sanctioned

white cover recordings.

II. The Historical Context: Sheet Music, Recordings, the Mechanical Compulsory License and the Racial Segregation of Music Markets.

In the nineteenth century, music publishers made money from songs by selling sheet music. Recordings of songs were not widely commercially distributed until the early years of the twentieth century. Following decisions in several lower courts, the Supreme Court held in 1908 that the Copyright Act only regulated the making of copies of a song, and that a record was not a copy of a song, since it was just part of a machine that could render an audible performance of the song.⁹ Thus, under that decision, the owner of copyright in a song had no control over the making of records of that song, and received no compensation from the sale of those records.

When Congress passed a new copyright act in 1909, it extended copyright regulation to “mechanical” renderings of musical works, a category that included phonographs, player pianos, music boxes, and their interchangeable parts – including phonograph records. Rather than giving owners of copyright in musical works complete control over licensing recordings of those works, however, Congress created the first “compulsory license” in copyright law. Under that arrangement, which persists to this day, the owner of copyright in a musical work had control over the first recording of that work. The copyright owner could agree to license the first recording for a negotiated fee, or could refuse to license recording at all. Once the first recording was licensed and distributed, however, the compulsory license in the statute applied. Anyone else who wanted to could make another recording of that musical work, upon payment of a fee that was determined by the statute itself. That fee, 2 cents for every record sold, astoundingly remained unchanged from July 1, 1909 to January 1, 1978. Because the value of the dollar in 1978 was roughly only 15% of what it was in 1909, the compulsory license rate had by that time dwindled to about 1/3 of one cent in 1909 dollars.¹⁰

The standard explanation of why Congress created the mechanical compulsory license is that it was concerned about the lack of competition in the player piano roll market after one manufacturer, the Aeolian Company, had seemingly cornered the market by entering into exclusive licenses with every major music publisher. When it came to records, however, music publishers were already used to licensing many different recording companies to create different recordings of a song. It wasn’t too long before that only a limited number of copies could be made of any one recording, so that even a single recording company had to record a song numerous times when a song started selling well. And consumers, who were purchasing a tinny, scratchy, “low-fi” novelty, were usually not that concerned about which recorded version of a song they purchased:

[I]n the early decades of the twentieth century records still played a relatively minor role in popular music, and people thought of them very differently than we do today. . . . Some bands and artists had devoted fans, but most customers were apparently still shopping for songs rather than specific performances: they would hear [a performance of a song], go to a music store, and ask for a record of it. [Bandleader Paul] Whiteman’s name was regarded as a guarantee of quality, but if the Victors were out of stock, most people were happy to go home with an alternate version on Brunswick, Okeh, or Columbia.¹¹

When record companies began to sell records to the public in the early 1900s, they “courted the total, undifferentiated American public.”¹² Their catalogues arranged records by genre – “Dance Hits,” “Marches,” “Novelty,” “Classical,” and so on – but they assumed that any consumer might be interested in any or all of these genres. By the 1920s, however, record companies began to segment markets along racial and social lines.¹³ In particular, “race” records, contemplated as being made by and for African-Americans, and “hillbilly” or “old-time” records, contemplated as being made by and for white, rural Southern Americans, were marketed differently from “popular” records, the main, residual category made by and for whites generally. Frank Walker, an executive with Columbia Records in the 1920s (and later with RCA Victor and MGM Records) may have put it most tellingly: the category of “race records,” he said, was created “in order to have a differentiation between that and normal phonograph records.”¹⁴ As Karl Hagstrom Miller writes,

Separate catalogues suggested a correspondence between consumer identity and musical taste, one that was both holistic and exclusive. They implied that unique segments of the population were satisfied by particular kinds of records and yet uninterested in others. . . . The significant variety of musical sounds and styles that stuffed race record catalogues were held together and advertised as a cohesive whole by the fact that they were created by African American musicians. Companies, however, often refused to allow black artists to record selections the musicians held dear – from pop songs and arias to hillbilly breakdowns – but did not fit within corporate conceptions of black music.¹⁵

William Howland Kenney adds: “From the time of Mamie Smith’s 1920 blues recording, white record entrepreneurs wanted African Americans to sing the blues. They insisted on that genre to the nearly total exclusion of the popular songs that appealed to large numbers of whites and at least some Blacks.”¹⁶

When Billboard magazine started publishing charts of best-selling records in the 1940s, it used the same categories, charting sales of “popular” records separately from “race” records and “folk” records. Many “race” records were produced by smaller, independent labels, particularly during and after World War II, when shellac shortages caused major labels to concentrate on their core white audiences.¹⁷ When major recording companies marketed records by and for African Americans, they usually did so through separate subsidiaries or labels, or using separately marketed series. Columbia used its subsidiary “Okeh”; Mercury used its subsidiary “Wing”; RCA used its subsidiaries “Groove” and “Bluebird”;¹⁸ MGM had its “Ebony Series”;¹⁹ Decca and Capitol released “Sepia” records.²⁰ Although Billboard decided in 1949 to change the name of the “race” category to “rhythm and blues” – “R&B” for short – everyone understood that the new term was still “a code word for black music,”²¹ music by and marketed to African Americans. As Brian Ward has put it,

The marginalization and oppression of peoples of African descent in America has always been more than a purely legal, political, economic, and social phenomenon. It has involved an integrated system of thought, categorization and action which constitutes the fundamental grammar of American racism. As part of that system, the recording and broadcasting industries did not merely reflect the prevailing racial assumptions of the 1950s, they internalized them, functioned according to their dictates, and, in so doing, helped to perpetuate them. Racial conventions permeated the organization and structure of the music industry at every level. The

very existence of separate “Race,” and from 17 June 1949, “Rhythm and Blues” charts for black popular music, symbolized the routine segregation of blacks in American society as much as the segregated schools and separate drinking fountains of the south, or the restrictive housing covenants and discriminatory hiring practices of the North.²²

III. Cover Versions and Race.

As noted above, from very early in the history of sound recordings, it was common for many singers to record and release versions of the same song – a phenomenon that was encouraged by Congress’s provision of a compulsory license in the 1909 Act. In racially divided markets, however, a very particular form of the phenomenon of multiple recordings developed. James M. Salem provides one description of this phenomenon:

An original performance by a black R&B artist was released by a small, independent (sometimes black-owned) record company. Then it was covered by a white performer’s version of the song, released by a large, white-owned major record company with the capability for national distribution and promotion. The white version was not so much a cover as a *copy*, an attempted *duplication* of not only the melody of the song but the musical voicings and rhythmic quality of the arrangement, plus the singer’s distinctive vocal style as well in many cases.²³

In some cases, the white version did make some changes to the original R&B release. It often aimed for a somewhat “smoother,” “less raw” musical sound, or it substituted somewhat more innocuous lyrics for lyrics that were considered too racy.²⁴ Even when a cover version made changes, however, it still copied many features that were not present in the notated song but had been introduced by black recording artists.

Why were white recording artists copying performances by black recording artists? Because it paid, for reasons that can be traced more or less directly back to race. As James M. Salem noted above, one reason it paid was that many of the record companies that released records by black recording artists were small, local companies that did not have developed national distribution channels. Major companies could record another version of a promising song and distribute that version nationwide. Yet that is an incomplete account, because it does not explain why the major companies decided that they needed to produce recordings featuring white artists. That was likely due to a confluence of many factors, all of which manifested racial prejudice in one way or another. Most directly, many members of the record-buying public would not buy recordings by African Americans. In fact, the prejudices ran so deep that record companies who marketed to whites would often decide not to produce any records featuring blacks, or at least, as noted above, to brand those records differently. As Perry Bradford, an African American composer, musician and producer active beginning in the 1910s, put it, “‘Victor [Talking Machine Company] just couldn’t afford to lower their prestige’ by issuing records by Black artists.”²⁵ Those prejudices might be further heightened when the recording artists were visible, as they might be on the covers of sheet music, or later, on television.

In addition, the sale of records was promoted chiefly through play on radio stations, and many radio stations did not play recordings by black artists. In part, that was due to the racial prejudices of their managers or employees, or because they were catering to audiences that they believed harbored

those prejudices. In part, it was because the American Society of Composers, Authors, and Publishers (ASCAP) put pressure on radio stations to play only songs that it licensed;²⁶ because ASCAP had excluded all but a few black composers from membership, those songs were more likely to have been composed, and performed, by whites.²⁷

Could white recording artists make cover versions of R&B recordings without the permission of the recording artists or the companies that produced those recordings? Some were likely refraining from making such covers until that question could be answered. The answer was provided by a Federal District Court opinion excerpted in the next section.

IV. The *Supreme Records* Decision

SUPREME RECORDS, Inc., et al.

v.

DECCA RECORDS, Inc., et al.

90 F.Supp. 904 (S.D. Cal. 1950)

. . . Supreme Records, Incorporated,—to be referred to as “Supreme”—[is a] California corporation[n]. Decca Records, Inc.,—to be referred to as “Decca”;—is a New York corporation. Supreme is the owner of a master recording entitled, “A Little Bird Told Me”, which is an orchestration by Paula Watson . . . 100,000 [copies of the Watson recording] have been sold and distributed as the result of large expenditures of money for promotion and exploitation.

The complaint, after reciting the facts just summarized, stated that Decca, without the permission or consent of the plaintiffs, had appropriated to its own use the Supreme musical arrangement and caused it to be reproduced on records produced by it, which, since October 25, 1948, they have sold to distributors and to the general public.

The musical arrangement contained in the Decca record is asserted to be similar to, and an imitation of, the arrangement of the plaintiff, made with the object of misleading, confusing and deceiving phonograph record dealers and the public into the belief that the product of the plaintiffs was being sold. This . . . [is] averred to be violative of the property rights of the plaintiff in the arrangement.

An accounting and general damages in the sum of \$200,000 and punitive damages in a like sum are asked against Decca.

Decca’s answer denied the violation of any rights of the plaintiff, asserted that their record of the musical composition, made with the consent of the composer, Harvey O. Brown, was the result of the efforts of their own musical arrangers, technicians, artists and musicians, and that the successful sale of the record is the result of Decca’s own ingenuity, skill, business experience and capital.

At the trial, both recordings were played several times in the courtroom. In addition to this, plaintiff had a vocalist, accompanied by a violinist, sing the original score of the song as written by the composer. One of the plaintiff’s

witnesses made a comparison of the similarities and dissimilarities between the two recordings.

The defendants produced as a witness an expert musician, arranger and composer, who made a like analysis. The defendants also produced and caused to be played a record of the music as written without any arrangements. . . .

Opinion

YANKWICH, District Judge (after stating the facts above).

I. The Plaintiff Has No Property Rights

. . . The complaint, which seeks damages, an accounting and injunctive relief, does not indicate clearly the theory upon which it was grounded. But, upon the hearing of the motion to dismiss, and at the commencement of this trial, it was stated that the sole ground on which recovery is sought is unfair competition.

The unfair competition is alleged to consist of appropriating the musical arrangement of the song ‘A Little Bird Told Me’, as embodied in the recording made by Supreme of that song. Supreme does not own the copyright of that song, and does not claim any common law rights in it. They are still owned by the composer, who is not a party to this action

Ordinarily, the composer or the owner of a copyrighted song asserts rights to the arrangement, 17 U.S.C.A. 1. The Copyright Office recognizes this. For in the new Rules and Regulations, adopted November 29, 1949, 17 U.S.C.A. following section 207, it has provided (Sec. 201.4(b)(5): ‘Adaptations and arrangements of musical compositions or musical compositions republished with new matter, including editing, when such new matter is the writing of an author, may be registered as new works under the provisions of section 7 of the Copyright Act.’

The first problem which confronts us is legal: Does the record disclose the existence in the plaintiff of a property interest which it is the duty of a court of equity to protect? The right to the product of one’s intelligence, imagination or skill, whether in the realm of literature, music or art, was recognized by courts long before recognition was given to these rights by statute. Even today, when the right to full ownership of the product of one’s literary or musical skill is infringed by others, through imitation or unauthorized appropriation, courts of equity will protect

the creator, although he may not have secured for himself the added protection of statutes which provide for registration of such works. 18 C.J.S., Copyright and Literary Property, 4-16. Once the creator has availed himself of the right provided by the statute, the common law right ceases to exist. The two cannot co-exist.

In this case, it has been conceded by the plaintiff that the right asserted is not a statutory right to the song, itself, or a common-law right to it. Such right could not very well be asserted, because the composer of the song has not transferred any of his rights to the plaintiff. The plaintiff merely holds a limited right to record,- a right which the composer did not intend to be exclusive, because the record shows that he or his agent approached the defendant, and that the recording by Decca was made in pursuance to an agreement whereby they pay royalties and compensation for the privilege of recording the song. The right which the plaintiff asserts is the right to the particular arrangement of the song, the special manner in which they recorded it. It is their claim that this is a property right which they may assert against the defendant as their competitor, even though the arrangement itself did not give rise to any rights which they might assert against the public.

The plaintiff seeks to apply to the situation confronting us in this case the principles declared by the Supreme Court in the case of *International News Service v. Associated Press*, 1918, 248 U.S. 215, 39 S.Ct. 68, 63 L.Ed. 211, 2 A.L.R. 293. In that case, the court states the general principle that the right of property may exist under certain circumstances, despite the non-existence of any common-law or statutory right. They held that the misappropriation of news gathered by another agency was the subject of protection by a court of equity. . . .

Subsequent cases relating to news have emphasized the fact that it is the discovery, and especially the manner of presentation of a news item, which is the essence of the right which the courts will protect. . . .

[I]t is my view that before a musical arrangement may be protected as a right against a competitor, it must have a distinctive characteristic, aside from the composition itself, of such character that any person hearing it played would become aware of the distinctiveness of the arrangement. . I do not believe that the Supreme Court intended the decision in *International News Service v. Associated Press*, supra, to apply to appropriations of a different character. The limitation which other courts have placed upon the case, confining it to news-gathering only, accords with my own interpretation. See, *Cheney Bros. v.*

Doris Silk Corporation, 2 Cir., 1929, 35 F.2d 279; *R.C.A. Mfg. Co., Inc., v. Whiteman*, 2 Cir., 1940, 114 F.2d 86.

* * * *

. . . I do not think that a mere recording of an arrangement of a musical composition by one who is not the author of the composition is a property right which should be given recognition in equity. . . . [I]t is evident from a study of the copyright law . . . that the Congress did not intend to give recognition to the right of arrangement, dissociated from the work itself, to which the author claims the right. Otherwise, a right could be segmented and portions of it could be asserted by persons who do not claim direct ownership of a musical composition, but merely certain subsidiary rights. To recognize such right would not aid the owner. For the owner would be confronted with the situation of having given to a person a limited right,- the right to reproduce a musical composition,- would find himself confronted with persons who claim derivative rights from the concern to which he gave the right to reproduce this in a recording, asserting rights against others to whom he has given similar rights.

There is a line of cases which holds that what we may call generically by the French word *representation*,- which means to perform, act, impersonate, characterize, and is broader than the corresponding English word,- is not copyrightable or subject to any right recognized under the law of unfair competition. So the choice of a distinct locale for a play or story is not the subject of appropriation. Nor are mechanical devices used in production, gestures or motions of actors, or the movement of a dance or a spectacle. . . .

If recognition were given to the right of ownership in a musical arrangement, we would have to disregard all these cases. We would have to hold that Mr. Charles Laughton, for instance, could claim the right to forbid anyone else from imitating his creative mannerisms in his famous characterization of Henry VIII, or Sir Laurence Olivier could prohibit anyone else from adopting some of the innovations which he brought to the performance of Hamlet.

II. Uniqueness and Tendency to Confound

However, even if we grant, for the sake of argument, that such a right may exist, it must,- to be recognizable in equity,- satisfy the requirements which the courts have laid down in the cases referred to as to dramatic compositions or characterizations,- namely, it must consist of unique elements which combine to produce a finished product which has a being or distinctive

existence of its own. Unless the product has such character, it does not create any property right which a court of equity is bound to protect. Otherwise put, the creation must be of such character as would satisfy the law of unfair competition when applied to trade names of secondary meaning. This principle is summed up in one sentence in *Kellogg Co. v. National Biscuit Co.*, 1938, 305 U.S. 111, 118, 59 S.Ct. 109, 113, 83 L.Ed. 73: 'It must show that the primary significance of the term in the minds of the consuming public is not the product but the producer.'

The best statement of law as applied today is found in Restatement of Torts, Sec. 728: Comment at 'The ultimate test of whether or not there is a confusing similarity between a designation and a trade-mark or trade name which it is alleged to infringe is the effect in the market in which they are used.

* * * *

Except for the testimony of one interested witness, (Leroy White), offered by the plaintiff, there is no evidence in the record that any confusion of source resulted from the two recordings. The Decca record is distinctly labelled under their own label with the name of a different artist, Evelyn Knight. All the Decca advertisements in trade papers, trade sheets and other advertising media sent by Decca to distributors for display, are distinctly their own. One examining them can find no trace of copying or imitation. And they are the chief materials, other than the contents of the recordings themselves, from which the likelihood of confusion would arise, if any were possible. And they show a complete absence of any of the indicia of deception. To the contrary, they indicate a most meticulous observance of all rules of decent merchandising.

III. The Decca Recording Is Distinctive

We come now to the recorded arrangements themselves, which, in the last analysis, must spell unfair appropriation, if any exists.

* * * *

. . . We must bear in mind at all times that, of necessity, similarity stems from the fact that we are dealing with two recordings of the same song. This was made very plain when there was played to the Court, on two occasions, a recording of the music as written, without any arrangement. Any attempt to discern similarities and dissimilarities must take this into consideration. The only similarities claimed are an introduction, overlaps and handclapping, choral responses, a certain verbal deviation

from the wording of the song, and the introduction of those bars of music at about the middle of the song (a fill-in, as it is called), of a type which would occur to any arranger, a kind of *musique a faire*. They accentuate the beat and rhythm of the song as a background to the vocal rendition of the lyrics by the singer. The use of every one of these elements is well known in the art. No claim of originality can be based on their use, singly or in combination. The introduction of additional bars of music, additional notes in the recording of a song, as a part of its interpretation, is a practice to which probably every known singer resorts. It gives individuality to the particular interpretation of the song.

It is also quite evident in any recording against an orchestral background that an introduction would be in order. And there is testimony in the record showing that very few recordings begin with the mere singing of the song. There is also evidence in the record that handclapping and responses are commonly resorted to in the recording.

The method has been resorted to repeatedly in interpreting popular songs, - especially in the last few years. There is testimony in the record designating compositions by well-known signers and artists in which all these elements were present. There are also present certain expressions which have been referred to as jive expressions, such as *yeah, dog, solid* and the like, which are not called for in the song as written.

Ultimately, the Judge, rather than attempting to resolve the different interpretations by musically trained listeners, must determine the question by placing himself in the position of the average person who would listen to the two records and determine whether such person, listening to one, would confound it with the other, or, to put it the other way, whether, in the mind of such person, there would be such confusion. It is more difficult to analyze two songs and compare them than two pieces of literature. But it is not impossible. However, it can be done. In the first place, the entire impression of the two recordings is different. The melody is the same. But the plaintiff has no rights to the melody. And the impression one gets from the recorded melodies is entirely different. The effect of the plaintiff's recording is thick, mechanical, lacking inspiration, containing just the usual accompaniments and the usual intonations which one would find in any common recording. The impression one receives from the Decca recording is entirely different. It is rich, against a musically colorful background. It sounds full, meaty, polished. The difference derives from the different quality of the voices of the artists, the more precise, complex and

better organized orchestral background, the fuller harmonization of the responses, the clearer intonation and expression, and the more musical entrances in the Decca record.

There is also a difference in the manner in which the records end. The Supreme record ends upon a male voice saying in half humorous ton, 'Love that little bird.' This is an anti-climax. The ending of the Decca recording is upon notes in keeping with the harmony, and not upon a prosaic statement of that type. So that even if we disregard entirely the statement of defendant's expert that the recording of the two is different in style, that the Supreme record is clearly identified as 'a race or blues and rhythm' recording, while the Decca record is 'popular', the result,- regardless of the method used,- the impression to the ear is entirely different. I doubt that anyone is likely to say, upon hearing the Decca record, 'That is the Supreme recording'. For it has so many incidences, so many qualities which are absent from the other recording that even the most untrained ear would conclude that the only similarity discernible is that which comes from the identity of the melody.

To conclude, therefore: Assuming that a common-law property right may be asserted to the arrangement in a recorded song, distinct from the right to the song itself, in order that a particular arrangement be given recognition as such, the elements which the recorder has introduced must involve creative ability of a distinct kind.⁴ Adding certain incidents, such as emphasis upon accent, which is all that the clapping does, does nothing to the essence of musical creation. Musical creation consists in the grouping of notes, similarity of bars, harmony or melody. See, *Hirsch v. Paramount Pictures*, D.C. Cal. 1937, 17 F.Supp. 816, 818. Accent is important. But accent alone does not rise to the dignity of creation.

I am also convinced from the evidence in this case that the facts in the case do not show any actual confusion or any confusion likely to arise from the two recordings.

Judgment will, therefore, be for the defendants.

⁴ If we apply to the problem the rule of patent law, i.e., that in order that a combination of old elements amount to invention, it must achieve a better or different result, see, *Pointer v. Six-Wheel Corporation*, 9 Cir., 1949, 177 F.2d 153, the conclusion is inevitable that the combination of these elements did not produce any distinct result in this case. . . .

V. Sorting through the *Supreme Records* Decision: Facts, Law, Impact, and Policies

A. Sorting through the Facts.

The opinion in *Supreme Records* says very little about how the Supreme recording, featuring Paula Watson, was created, but depositions in the case and other references provide more detail. The composer of “A Little Bird Told Me,” Harvey Oliver Brooks, was a successful African-American composer and pianist. Brooks was born in 1899, and toured and recorded with blues singer Mamie Smith in the 1920s.²⁸ He then settled in Los Angeles, and became the first black American to write a complete score for a major motion picture, namely, “I’m No Angel,” the most popular movie of 1933, starring Mae West and Cary Grant.²⁹ On October 27, 1947, Brooks registered “A Little Bird Told Me” with the Copyright Office as an unpublished work.³⁰ The version of the song that was protected by federal copyright was therefore the version that Brooks had deposited with his registration application. We don’t have the actual copy that was deposited, but apparently it was the same as the manuscript that Judge Yankwich accepted as representing the song during the litigation. That manuscript is reprinted below in Appendix A.

PAULA WATSON
(Supreme 1507)

Pretty Papa Blues

Opening shows good blues feeling, but atmosphere isn't sustained. Miss Watson has the race manner, tho, and may be heard from.

A Little Bird Told Me
Staccato rhythm novelty cleverly written and performed, but too pop-flavored for the race lists.

The reviews of the Supreme recordings of “Pretty Papa Blues” and “A Little Bird Told Me” on page 112 of the October 16, 1948 issue of *Billboard* magazine. Do they make use of any racial or gender stereotypes?

In 1947, Albert Patrick founded Supreme Records, a small, independent record label based in Los Angeles.³¹ He and Leroy Whyte, a bandleader, arranger, and trumpeter,³² recruited Paula Watson, a singer and pianist, to record for Supreme, and they began to search for suitable songs for her. In the early summer of 1948, Patrick, Whyte and Watson went to visit Brooks at his house in Los Angeles.³³ Brooks played “A Little Bird Told Me” for them, and Watson tried playing and singing it. They decided that it would be a good song for Watson to record. Whyte, Patrick, and Watson spent some time at Patrick’s house working out how they would arrange the song for the recording. The arrangement that Whyte wrote included new lyrics and melody for a male chorus to sing in response to the Brooks-composed lyrics that Watson would sing.³⁴ The left side of Table 1, on the next page, shows the words that are in the Brooks manuscript; the right side shows the additional words added by Whyte that appear in both the Supreme (Watson) recording and the Decca (Knight) recording. The Whyte arrangement also added an introduction hummed by the male chorus; a distinctive repeating two-bar bass line on the first and third beats that alternated with hand claps on the second and fourth beats; and four added bars of music.³⁵ Whyte notated all of those elements on scores that he distributed

to the musicians who recorded the song for Supreme.³⁶

On the Supreme recording, which was made sometime in July of 1948, Paula Watson played the piano and sang. The band that backed her up included Jesse Sailes on drums, Chuck Hamilton on bass, Tiny Webb on guitar, and Maxwell Davis and Pete Peterson on saxophones; the backup musicians also

sang as the male chorus.³⁷ Supreme Records released the recording in August 1948, as the B-side of a 78-rpm record that included “Pretty Papa Blues” on the A-side.

**A LITTLE BIRD TOLD ME
BRUSH THOSE TEARS FROM YOUR EYES** Evelyn Knight With the Stardusters and Rhythm Decca 24514

Evelyn Knight, a highly talented chirp who has never quite made the grade on wax, may finally emerge via this pairing. Both tunes fit into the current light rhythm novelty vogue with “Brush” being the “You Call Everybody Darlin’” successor and “Little Bird” being a sort of spiritual blues initially brought to attention via a Supreme waxing with Paula Watson. The thrush injects her personality to bolster sizably the rhythmic vocal and instrumental support. Dinking may prove to be a juke bonanza.

The reviews of the Decca recordings of “A Little Bird Told Me” and “Brush Those Tears from Your Eyes” on page 37 of the October 23, 1948 issue of Billboard magazine.

In October 1948, Decca made and released its recording of “A Little Bird Told Me,” featuring Evelyn Knight as the principal vocalist, and a vocal group called the Stardusters performing the backup vocals.³⁸ There is no question that those who worked on the Decca recording knew of the Supreme recording and copied from it; Decca had tried to buy the rights to the Supreme recording, presumably for its “Sepia” series targeted at the African American market.³⁹ Both of the recordings climbed the Billboard bestseller charts. The Supreme recording featuring Paula Watson sold well – probably about 250,000 copies⁴⁰ – but the Decca recording featuring Evelyn Knight’s sold much better, about two million copies.⁴¹

February 12, 1949 The Bil

The Billboard MUSIC POPULARITY CHARTS

Race Records PART VI

Based on reports received last three days of Week Ending February 4

BEST-SELLING RETAIL RACE RECORDS

Records listed are race records that sold best in stores according to The Billboard's special weekly survey among a selected group of retail stores, the majority of whose customers purchase race records.

POSITION	Weeks Last	This	Artist	Label
Weeks	Week	Week		
12	1	1	CHICKEN SHACK BOOGIE... A. Milburn	Alad-
			<i>It Took a Long, Long Time</i> ... din 3014-Monogram 105—ASCAP	
12	2	2	BEWILDERED R. Miller Trio	.....Bullet 295—ASCAP
10	3	3	BEWILDERED A. Milburn	Alad-
			<i>A & M Blues</i> din 3018-Monogram 105—ASCAP	
13	13	4	A LITTLE BIRD TOLD ME... P. Watson	.....Supreme S-1507—ASCAP
			<i>Pretty Papa Blues</i> L. Jordan and His Tympany Five	
6	15	5	PETTIN' AND POKIN' L. Jordan and His Tympany Five	.....Decca 24257—ASCAP
			<i>Why'd You Do It, Baby?</i> Hal Singer Sextette	
20	5	6	CORN BREAD Hal Singer Sextette	.....Savoy 671—BMI
			<i>Plug for Cliff</i> Big Jay McNeely	.....Savoy 685
3	5	6	DEACON'S HOP Big Jay McNeely	.....Savoy 685
			<i>Artie's Jump</i> R. Brown	.....De Luxe 3198
2	—	8	FORE DAY IN THE MORNING R. Brown	.....De Luxe 3198
			<i>Rainy Weather Blues</i> R. Brown	.....De Luxe 3198

February 12, 1949 billboard

The Billboard MUSIC POPULARITY CHARTS

Retail Record Sales PART IV

Based on reports received last three days of Week Ending February 4

BEST-SELLING POPULAR RETAIL RECORDS

Records listed are those selling best in the nation's retail record stores (dealers). List is based on The Billboard's weekly survey among 4,970 dealers in all sections of the country. Records are listed numerically according to greatest sales. (F) indicates tune is in a film; (M) indicates tune is in a legit musical. The B side of each record is listed in italic.

POSITION	Weeks Last	This	Artist	Label
Weeks	Week	Week		
13	1	1	A LITTLE BIRD TOLD ME... E. Knight-The Stardusters	.....Decca 24514—ASCAP
			<i>Brush Those Tears From Your Eyes</i> Decca 24514—ASCAP	
6	3	2	FAR AWAY PLACES B. Crosby-K. Darby Choir	.....Decca 24532—ASCAP
			<i>Tara Talara Tala</i> M. Whiting and The Crew Chiefs	
7	6	3	FAR AWAY PLACES M. Whiting and The Crew Chiefs	.....Capitol 15278—ASCAP
			<i>My Own True Love</i> E. Knight-The Stardusters	
7	4	4	POWDER YOUR FACE WITH SUNSHINE E. Knight-The Stardusters	.....Decca 24530—ASCAP
			<i>One Sunday Afternoon</i> Dinah Shore	
21	2	5	BUTTONS AND BOWS Dinah Shore	.....Columbia 38284—ASCAP
			<i>Daddy-O</i> S. Kaye Ork	
10	7	6	LAVENDER BLUE S. Kaye Ork	.....Victor 20-3100—ASCAP
			<i>Down Among the Shelter</i> Victor 20-3100—ASCAP	

These images, of the “Race” and “Popular” charts in the February 12, 1949 issue of Billboard magazine, show the positions of the two recordings at issue in *Supreme Records, Inc. v. Decca Recordings, Inc.* The original recording of “A Little Bird Told Me,” by Paula Watson, is in fourth position on the “Race” chart, on the left side. The cover, by Evelyn Knight, is in first position in the “Popular” chart, on the right side.

What did the Evelyn Knight (Decca) recording copy from the Paula Watson (Supreme) recording? Judge Yankwich provides the following list of elements that Supreme claimed Decca copied: “an introduction, overlaps and handclapping, choral responses, a certain verbal deviation from the wording of the song, and the introduction of [several] bars of music at about the middle of the song.” You can perform your own research into what Decca copied from Supreme by looking at the copyrighted score composed by Harvey Brooks while listening to the Supreme recording, and then the Decca recording. If an element does not appear in the score, but does appear in the Supreme recording, and then appears in the Decca recording, then it is likely that it was copied from the Supreme recording by Decca. As of this writing, the Paula Watson recording is [available on YouTube here](#); the Evelyn Knight recording is [available on YouTube here](#).

Table 1: "A Little Bird Told Me": Original and Added Lyrics

Original lyrics as written by Harvey O. Brooks	Lyrics added by Paula Watson / Supreme Records and also used by Evelyn Knight / Decca Records
<p>A little bird told me that you love me</p> <p>And I believe that you do This little bird told me I was fallin'</p> <p>Fallin' for no one but you There's no use denying I might as well confess Of all the boys I know, dear I'm sure I love you best A little bird told me we'd be happy</p> <p>And I believe that it's true A little bird told me we'd be married</p> <p>And I believe that it's true This little bird told me when we marry</p> <p>We'll have a pretty cottage Not too far</p> <p>All fenced in like a movie star</p> <p>We'll have a great dane pup We'll call him Ace</p> <p>Lying there by the fireplace</p> <p>A goldfish pond and a wishing well</p> <p>Everything is gonna turn out swell</p> <p>A little bird told me we'd be happy And I believe that it's true</p> <p>And now I know that it's true Come June it's sure to be true</p>	<p>That you love me</p> <p>Really fallin'</p> <p>Oh so happy</p> <p>Gonna get married</p> <p>When we get married</p> <p>Yeah</p> <p>Solid</p> <p>Cool</p> <p>[Real] gone</p> <p>A little bird told us she'd be married (yew de do do do) And we believe that it's true This little bird said she'd have a family (do do de do do do) Now tell us what she's going to do</p> <p>She believes that it's true</p>



When “A Little Bird Told Me” was published as sheet music in late 1948, Paula Watson, who first recorded the song, was nowhere to be seen; the sheet music cover featured Evelyn Knight.

The Original....

“A LITTLE BIRD TOLD ME”

featuring
Little Bird
Paula Watson
SUPREME RECORD #1507
**Imitated—
But Never Equalled**

**Order TODAY
from your nearest
B. & W. Distributor**

HOME OFFICES:
HOLLYWOOD 27, CALIF. NEW YORK CITY
4910 Santa Monica Blvd. 728 Tenth Avenue
Phone: NOrmandie 2-8151 Phone: Circle 6-6271

An ad for Supreme’s recording of “A Little Bird Told Me” on page 39 of the November 13, 1949 issue of Billboard, noting that in contrast to the Decca cover, it was “The Original” and “Imitated –But Never Equalled.”

B. Sorting through the Law.

As Judge Yankwich’s opinion mentions, Supreme Records represented during the litigation that its claim for relief was based solely on a theory of unfair competition, and not on statutory (federal) copyright. The concession as to federal copyright made sense; since Supreme had neither published any arrangement in written form, nor registered any such arrangement, it could not have obtained federal copyright protection. Thus, Judge Yankwich had to determine the contours of an unfair competition right that Supreme could assert against Decca, and to conclude whether Decca had violated any such right. The opinion arguably rambles through several different approaches to these issues. Below are four quotes from the opinion that could be seen as representing four different holdings. In some instances these quotes also incorporate factual findings. Can you state the legal standard that the court is formulating in each quote, separating it from the court’s application of the standard to the facts of the case? Do you find the court’s applications of the standards convincing? In the case of the third quote, we have also included, for purposes of comparison, two quotes on the originality standard in copyright law, one from a Supreme Court opinion and one from a Second Circuit opinion. How do the standards stated in those opinions compare to the standard stated in the *Supreme Records* opinion?

1. “Ultimately, the Judge . . . must determine the question by placing himself in the position of the average person who would listen to the two records and determine whether such person, listening to one, would confound it with the other. . . . [T]he impression one gets from the recorded melodies is entirely different. The effect of the plaintiff’s recording is thick, mechanical, lacking inspiration, containing just the usual accompaniments and the usual intonations which one would find in any common recording. The impression one receives from the Decca recording is entirely different. It is rich, against a musically colorful background. It sounds full, meaty, polished. The difference derives from the different quality of the voices of the artists, the more precise, complex and better organized orchestral background, the fuller harmonization of the responses, the clearer intonation and expression, and the more musical entrances in the Decca record.”
2. “I do not think that a mere recording of an arrangement of a musical composition by one who is not the author of the composition is a property right which should be given recognition in equity.”
3. “The only similarities claimed are an introduction, overlaps and handclapping, choral responses, a certain verbal deviation from the wording of the song, and the introduction of those bars of music at about the middle of the song (a fill-in, as it is called), of a type which would occur to any arranger, a kind of *musique a faire*. . . . The use of every one of these elements is well known in the art. No claim of originality can be based on their use, singly or in combination. If we apply to the problem the rule of patent law, i.e., that in order that a combination of old elements amount to invention, it must achieve a better or different result . . . the conclusion is inevitable that the combination of these elements did not produce any distinct result in this case.”
 - Compare *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340. 345 (1991): “Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity. . . . To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, ‘no matter how crude, humble or obvious’ it might be.”
 - Compare *Alfred Bell & Co. v. Catalda Fine Arts*, 191 F.2d 88, 102 (2d Cir. 1951): “In *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 [(1903)], the Supreme Court cited with approval *Henderson v. Tompkins*, C.C., 60 F. 758 [(1894)], where it was said, 60 F.at page 764: ‘There is a very broad distinction between what is implied in the word ‘author,’ found in the constitution, and the word ‘inventor.’ The latter carries an implication which excludes the results of only ordinary skill, while nothing of this is necessarily involved in the former. . . . [A] multitude of books rest safely under copyright, which show only ordinary skill and diligence in their preparation. . . . [T]he courts have not undertaken to assume the functions of critics, or to measure carefully the degree of originality, or literary skill or training involved.’”
4. “The melody is the same. But the plaintiff has no rights to the melody. . . [The Decca recording] has so many incidences, so many qualities which are absent from the [Supreme] recording that even the most untrained ear would conclude that the only similarity discernible is that which comes from the

identity of the melody.”

C. The Decision’s Reception and Impact.

Having lost its lawsuit, Supreme Records became insolvent and ceased operations; Decca Records bought Paula Watson’s recording contract from Supreme.⁴² Judge Yankwich’s opinion is not a model of either factual or legal clarity, and it could conceivably have remained an obscure, one-off decision. In fact, however, the decision had an impact that was both immediate and lasting. The case was commonly understood in the music industry to hold that anything added to a song by performers and arrangers while making a recording was not protected against copying. A *Billboard* magazine article published days after the release of the Yankwich opinion summarized its principal holding in these two sentences: “Judge [Yankwich] ruled that only a copyright owner holds [property] rights for original music, but that other arrangements are not considered as property. Moreover, after hearing both platters in court, Judge Yankwich ruled that there was nothing original in Supreme’s arrangement which could be made the subject of property ownership.”⁴³ The *Billboard* article also mentions that the parties (and perhaps the industry more generally) saw from the beginning the litigation’s potential “importance as a precedent-setting suit,”⁴⁴ a view we will see echoed in a description of the suit five years later as a “test case.” And some of the impact of the suit may have been due to the perception that Judge Yankwich was a copyright expert, and that his resolution of the case would therefore likely receive deference from other judges.⁴⁵

As Larry Starr and Christopher Waterman put it, the *Supreme Records* decision “opened the floodgates for cover versions during the 50s.”⁴⁶ From the current perspective of well into the twenty-first century, it may be difficult to imagine a musical culture like that of the 1950s and early 1960s, when white covers of black recordings became ubiquitous. Some readers may recall that Elvis Presley, Bill Haley, the Beatles, the Rolling Stones, and Eric Clapton all made hits by covering R&B recordings. However, other recording artists who are less known now but were extremely popular in their heyday, including Pat Boone, Georgia Gibbs, the McGuire Sisters, and the Crew Cuts,⁴⁷ built their careers on such covers. At least one entire record company, Dot Records, focused much of its energies on making



LANGSTON Hughes

Highway Robbery Across The Color Line In Rhythm And Blues

It is nothing new for American whites to take American Negro songs, words, tunes, and styles, and appropriate them for their own. This began more than a hundred years ago.

Sigmund Spaeth in his book, "A History of Popular Music in America"—at practically the very beginning of the book—says that in 1842 a popular Negro song was going about called "Take Your Time, Miss Lucy", but a little later a man named Allen put new words to it, changed Miss Lucy into a white lady, and with it, he went to town.

From the 1840's to the early 1900's for more than 60 years, the most popular form of entertainment in the United States was the minstrels, performed by white men in black face, and using almost entirely the melodies and often the words of Negro plantation songs.

Negro styles of singing, banjo playing, and dancing were taken over verbatim into the minstrels, as well as all the plantation jokes the white performers could appropriate.

This material was exaggerated for the sake of comedy, faces were made blacker, eyes whiter, and lips redder than those ever possessed by a real Negro.

Millions of dollars were made by white actors, singers, and managers from this borrowed and caricature form of "Negro" entertainment.

Young people nowadays seem to think that all the white popular singers who have copied the singing styles of Billie Holiday, Sara Vaughan, Dinah Washington, Ethel Waters, Billie Daniels, King Cole, La Vern Baker, and Mahalia Jackson are doing something new. Not true at all! White singers have been copying Negro singing styles for over 100 years.

Almost as fast as the Negro originates something new in the world of music, the whites take it and go, sometimes even claiming it as their own creation.

A white band in Chicago in the early 1920's claimed to be the creators of jazz since they beat King Oliver and Louis Armstrong to the North by a few months.

In New York a bit later Paul Whiteman took unto himself the title of "The King of Jazz", and gave the first jazz concert in Aeolian Hall. George Gershwin wrote the first jazz concerto, also the first blues opera—and made himself not only famous, but rich. Some of the poor guys who originated jazz and are still living, are on relief.

It is the same with dancing. Back in 1830 the first of the white minstrels, Dan Rice, copied the jig of a Negro stable boy in Louisville, called it Jump Jim Crow, and made himself famous.

When the Charleston first came to fame in Harlem in the 1920's some whites quickly and jerkily learned it, and claimed—unsuccessfully for once—to have originated it. A bit later Gilda Gray had claimed the shimmy.

And I would not be surprised to read any day now where some white singer originated the blues. Some have just that much nerve.

That hundreds of white performers are today copying note for note and slur for slur the rhythms and blues styles of Negro performers is a compliment to Negro artists—artistically, if not commercially.

"Imitation is the sincerest form of flattery," so the saying goes. What the Negro artists are saying is, "It's nice to have white performers imitate us—but cut us in on the jobs and the dough, too."

But it just happens that the white performers can carry their copies of Negro material into the best night clubs, the biggest theatres, and onto the movie screens of Hollywood where poor Negroes hardly ever get a look in—not to seek of the fields of radio and television where colored performers with regular jobs are few and very, very far between.

In other words, in commercial entertainment, "the white man is still in the lead." He makes the money. We make the basic music. What to do about it? Who knows? From coast to coast, and uptown to down, Broadway to Central Ave., Vine St. to W. 125th st. where stands the Hotel Theresa, the colored performer is yowling to high heaven, "They got me and gone!"

A column by Langston Hughes on page 9 of the July 2, 1955 issue of the Chicago Defender (national edition)

and selling white covers of R&B hits.⁴⁸

In 1955, black singer LaVern Baker became particularly angry when Georgia Gibbs, made a recording of a song called “Tweedle Dee” that copied the arrangement in Baker’s earlier recording “note for note” and became much more successful than Baker’s recording. (Gibbs made covers of a number of LaVern Baker’s recordings, as well as recordings by black singer Etta James; in a bit of critical humor, Baker once took out a life insurance policy on herself with Gibbs as beneficiary and sent it to Gibbs with a note stating “Georgia, you need this more than I do because if anything happens to me, you’re out of business.”⁴⁹)

Here are the original and cover versions of three classic songs from the 1950s:

“Tweedle Dee”

- [Original recording by LaVern Baker](#)
- [Cover by Georgia Gibbs](#)

“Sh-Boom”

- [Original recording by The Chords](#)
- [Cover by the Crew Cuts](#)

“Tutti Frutti”

- [Original recording by Little Richard](#)
- [Cover by Pat Boone](#)

When Baker wrote a letter to Representative Charles Diggs of Michigan calling for an amendment to the Copyright Act to protect singers from “modern-day pirates,” she cited the *Supreme Records* case as evidence that current law would not protect them:

To illustrate the practice [of duplication of successful disks], the letter mentioned the case of Paula A. Watson, who recorded “A Little Bird Told Me” on Supreme in 1948 – a disk which was “copied in its entirety by Evelyn Knight on Decca.” In the ensuing test case, the court held that the Copyright Act protected a song – but not an arrangement. . . . “Since there is no court to uphold my right [,” Miss Baker writes, “[]maybe my plea for protection will merit some attention from you.”⁵⁰

When the Copyright Office and Congress began to consider copyright reform legislation in the 1960s, the *Supreme Records* case was mentioned in hearings as the “mirror recording” case⁵¹ – the case supposedly holding that making a recording which duplicated the features of another recording violated no rights of the first recording artist. As we will see, it was influential in that guise in formulating a rule that persists today in the Copyright Act of 1976.

D. The *Supreme Records* Issue under Current Law.

Copyright law has changed a great deal since the *Supreme Records* case was decided in 1950. How would the case be decided under current law and practice? In 1971, Congress passed a law granting federal copyright protection to sound recordings. However, one limitation on that protection, derived directly from the *Supreme Records* decision, is stated in what is now §114(b) of the Copyright Act.

The exclusive rights of the owner of copyright in a sound recording under clauses (1) and (2) of section 106 do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording.⁵²

Thus under current law, as long as Decca “independently fixed” its sound recording, which it did, it could imitate any feature in the Supreme recording without violating the copyright in that recording.

That does not exhaust analysis under current law, however, because at least some of the features added to “A Little Bird Told Me” in the Supreme recording could count as a derivative musical work, not just a sound recording. Since 1978, musical works can gain federal copyright protection even if they are only fixed only in a phonorecord, and not as musical notation: “copyright subsists . . . in original works of authorship fixed in any tangible medium of expression.”⁵³ Thus, for example, the new words and melody that are sung by the male chorus in the Supreme recording should count as a derivative musical work that could be protected separate from the original song.⁵⁴ You will recall that one of the passages in the *Supreme Records* opinion suggests that the technique of adding responses was “well known in the art,” and that therefore the male chorus additions were not “original.” That, however, is not the established standard of originality under copyright law. Under the established standard, requiring only “independent creation” and “a modicum of creativity,”⁵⁵ the added words and melody would qualify as an original derivative work.

However, both the Copyright Act of 1909 and the Copyright Act of 1976 have provisions denying copyright to a derivative work that uses an underlying copyrighted work without permission of the owner. The 1976 act provision states that “protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.”⁵⁶ Under that rule, as long as the song “A Little Bird Told Me” is under copyright, an arrangement of the song would typically be denied copyright protection if the authors of the arrangement did not get permission to use the song. We say “typically” because use without permission would not be unlawful if it fell within one of the Copyright Act’s exceptions to the exclusive rights, such as the “fair use” exception. But the arrangement made of “A Little Bird Told Me” for the Supreme recording would almost certainly be the typical case, as it is unlikely that it would qualify for any exception.

Did Harvey O. Brooks give permission to Supreme Records to create an arrangement of “A Little Bird Told Me?” In one sense, the answer would certainly be “yes”; he knew that Supreme would arrange the song for purposes of recording it, and he gave permission for the recording, so he at least impliedly gave permission to create the arrangement. It would be unimaginable that Brooks could sue Supreme for having created the arrangement, so shouldn’t we say that he sanctioned its creation? Under the Copyright Act of 1909, which was in effect when the recording was made, at least part of the answer would have been that Brooks did not give permission to publish or register notated copies of the arrangement, and that therefore Supreme could not have gained federal copyright protection for the arrangement.

Under the 1976 Act, denying federal copyright protection to Supreme would require a more complicated theory, because Brooks did permit Supreme to make the recording, and making the recording would sufficiently fix the arrangement as a musical work to gain federal copyright protection for it. Interestingly, § 115 of the Copyright Act, which currently codifies the compulsory mechanical license, contains a specific provision regarding copyright in a musical arrangement created in connection with a recording made under that compulsory license. Such an arrangement, states § 115(a)(2), “shall not be subject to protection as a derivative work under this title, except with the express consent of the copyright owner.”⁵⁷ Thus, if Supreme had made the recording of “A Little Bird Told Me” under a 1976 Act compulsory license, it would only have had copyright protection for its arrangement if Harvey O. Brooks had expressly consented to it. However, Supreme did not make the recording under compulsory

license at all. It was making the first recording of the song, which is not subject to compulsory licensing, and it obtained a voluntary license from Brooks, which would not have carried the presumption of lack of copyright stated in § 115(a)(2). Nonetheless, a voluntary license could presumably be formulated to reach the same result as § 115(a)(2). It could require, as a condition of the permission to record, that copyright in any derivative musical work created with the recording be abandoned, or in other words, dedicated to the public. Thus, under the current Copyright Act, the owner of copyright in a song could ensure that recordings made of that song did not result in the creation of any derivative musical works protected by copyright.

D. Sorting Out the Policy.

The combination of three copyright law doctrines – the compulsory mechanical license, the invalidation of copyright in derivative works created without permission of the owner of copyright in the underlying work, and the *Supreme Records* holding that arrangements can be freely imitated – meant that no one could stop record companies and recording artists from making white cover versions of African-American rhythm and blues recordings. Composers such as Harvey O. Brooks had no control, because the compulsory mechanical license allowed anyone to record a song once it had been recorded and publicly distributed for the first time. The mechanical license did provide for compensation to composers, but as mentioned above, the rate had been set at 2 cents per copy in 1909 and never changed; by 1948, the real value of that compensation was dwindling.⁵⁸ After *Supreme Records*, performers, arrangers and others who contributed elements to an original rhythm and blues recording could not prevent white cover recordings from being made either. Unlike the owner of copyright in the song, they would not even be compensated for the elements they added. They got nothing.

There is no question that although these doctrines were racially neutral on their face, in practice in the 1940s, 1950s, and into the 1960s, they operated to deny African-Americans control and compensation of music they created far more frequently than they did whites. Should that have been a good reason for changing one or more of the doctrines, or were they justifiable in spite of their disparate racial impact? Below are some possible perspectives on that question. Do you agree or disagree with each of them, and do you have other thoughts on the issues raised in this module?

- The institution of property, including intellectual property, can provide and has provided important protection for minorities. As N.D.B. Connolly put it, “at the end of the nineteenth century . . . black people’s civil rights and voting rights stood on shifting sand. . . . By contrast, when it came to black people’s legal claims on property, courts and other adjudicating bodies generally proved more responsive, for there is was the integrity of capitalism, not white power, that was at issue.”⁵⁹ The subjection of musical works to a compulsory license, and the refusal to protect the contributions of arrangers and performers at all, left African American creators of music vulnerable to exploitation by whites who could repackage their music with white wrapping and sell it to a prejudiced white audience while paying the creators little or nothing.
- Although copyright rules may have left much of black music unprotected, the results were not necessarily entirely negative; the fact that the music was in the public domain “may have given rise to significant ‘internal’ [within the black community] creative hybridization and cross-fertilization that might not have otherwise occurred.”⁶⁰ More generally, the benefit of leaving works of authorship in the public domain should not be underestimated, because it likely leads to

more follow-on creativity; we shouldn't change the rules just because of one bad episode in one copyright industry.

- The larger power struggle here is between “composers” – those who create musical works that manage to borrow from previous works in ways that do not infringe copyright under prevailing rules – and others – “arrangers,” “musicians,” “performers” – who are also creating new musical works, but in doing so are borrowing from previous works in ways that would infringe copyright without permission. “Composers” and their representatives, such as music publishers and performing rights societies, want to prevent the others from getting any rights, so that they don't have to share licensing payments with anyone else. This much Judge Yankwich had right; if we recognized rights in arrangements embedded in recordings, “the owner [of copyright in the underlying song], having given to a person a limited right,- the right to reproduce a musical composition,- would find himself confronted with persons who claim derivative rights from the concern to which he gave the right to reproduce this in a recording, asserting rights against others to whom he has given similar rights.” It is better for composers if no one else can assert rights connected with their works. The problem with that is that copyright law then plays favorites among creators, recognizing the creativity of “composers” but refusing to recognize the creativity of “arrangers” and “performers.”
- There is nothing inevitable about the rule that creators of derivative works forfeit copyright protection for their own creative additions if they don't get permission of the owner of copyright in the previous work that they are using. That certainly isn't the rule in patent law: it is perfectly possible to get a patent on an improvement to an invention that is itself still under patent. Of course, that doesn't mean that you can freely distribute a device that embodies your improved version of the invention; that would infringe the patent on the original invention. But the same could be true in copyright – you could own copyright in a derivative work, but infringe the underlying work if you attempted to reproduce and distribute the derivative work without permission of the owner of copyright in the underlying work. The forfeiture rule unduly discourages and underrewards follow-on creativity.
- It is mostly a matter of bargaining, but the default rule matters. Supreme Records could have bargained with Harvey O. Brooks to gain copyright in an arrangement that it could then have asserted against Decca. (The bargain would have been a little cumbersome back in 1948, because it would have involved publishing or registering a notated version; it would be less cumbersome now.) It didn't. So it didn't get copyright. Recording artists or record companies can bargain to get copyright in their arrangements now; but most of them don't. It is true, however, that setting the default rule will have some effect, both on the distribution of wealth and on other policy goals. Setting the default rule of no copyright in derivative works without permission should make owners of copyright in the underlying works richer, and those who contribute to derivative works poorer. And it also should reduce the cost of negotiating licenses for the use of the musical works, and result in more licensed uses, since it is easier to negotiate when the rights that are needed to make use of a work are held by one party – in Judge Yankwich's terms, when the rights are not “segmentized.”
- Granting exclusive rights in all creative contributions, including all aspects of arrangement and

performance, is hardly a panacea. There is great value to leaving some creative contributions free for all to imitate, vary, and otherwise use. That is particularly true of the kinds of stylistic techniques used in performance, such as methods of singing notes slightly off rhythm, bending notes, and so on. Whatever you think of the rest of Judge Yankwich’s decision, there is merit in his assertion that it would be problematic “to hold that Mr. Charles Laughton, for instance, could claim the right to forbid anyone else from imitating his creative mannerisms in his famous characterization of Henry VIII, or Sir Laurence Olivier could prohibit anyone else from adopting some of the innovations which he brought to the performance of Hamlet.” Thus, even if we were going to recognize copyright in unlicensed derivative works, we should not recognize copyright in the kind of small elaborations and variations that occur during performance of a work. The performers who introduce those elaborations and variations are usually compensated well enough anyway – they build a reputation, and people will pay to see them, not just an imitator. Other performers who imitate those elaborations and variations may just be the next generation learning their craft by working through established performance styles and techniques, and many of them may develop their own innovations to be added to the common pool, thus “paying forward” their debt to past performers.

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¹ Reebee Garofalo, *Crossing Over: From Black Rhythm & Blues to White Rock ‘n’ Roll*, in *Rhythm and Business: The Political Economy of Black Music* 112, 123 (2002).

² *See, e.g.*, K.J. Greene, *Copyright, Culture & Black Music: A Legacy of Unequal Protection*, 21 *Hastings Comm./Ent. L.J.* 339, 372-373, 376-377 (1999) (hereinafter “*Copyright, Culture & Black Music*”) (discussing the phenomenon generally and the cases of Frankie Lymon, Little Richard, and Chuck Berry in particular); K.J. Greene, *Intellectual Property at the Intersection of Race and Gender: Lady Sings the Blues*, 16 *Am. U. J. Gender Soc. Pol’y & Law* 365, 370 n. 29 (citing sources discussing cases from Scott Joplin to Huddie Ledbetter to Jelly Roll Morton).

³ *See, e.g.*, Title VII of the Civil Rights Act of 1964, codified at 42 U.S.C. § 2000e et seq.

⁴ *See, e.g.*, Title II of the Civil Rights Act of 1964, codified at 42 U.S.C. § 2000a et seq.

⁵ *See, e.g.*, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (holding that an employment policy that has a disparate impact on a protected class will violate Title VII of the Civil Rights Act unless the employer can demonstrate a business necessity for the policy).

⁶ *See* K.J. Greene, *Copyright, Culture & Black Music*, *supra* note 2, at 360, 378-379 (1999); K.J. Greene, “Copynorms,” *Black Cultural Production, and the Debate over African-American Reparations*, 25 *Cardozo Arts & Ent. L. J.* 1179, 1201 (2008) (hereinafter “*Copynorms*”); Candace G. Hines, *Black Musical Traditions and Copyright Law: Historical Tensions*, 10 *Mich. J. Race & L.* 463, 469-470 (2005).

⁷ *See* K.J. Greene, *Copyright, Culture & Black Music*, *supra* note 2, at 353-354, K.J. Greene, *Copynorms*, at 1201-1202.

⁸ K.J. Greene, *Copyright, Culture & Black Music*, *supra* note 2, at 383, K.J. Greene, *Copynorms*, at 1201.

⁹ *See White-Smith Music Pub. Co. v. Apollo Co.*, 209 U.S. 1 (1908).

¹⁰ *See* Bureau of Labor Statistics, *CPI Inflation Calculator*, <http://data.bls.gov/cgi-bin/cpicalc.pl> (that calculator goes back only to 1913, so I used 1913 as a rough proxy for 1909).

¹¹ Elijah Wald, *How the Beatles Destroyed Rock ‘n’ Roll: An Alternative History of American Popular Music* 85 (2011).

¹² Karl Hagstrom Miller, *Segregating Sound* 188 (2010); *see* Olufunmilayo B. Arewa, *Blues Lives: Promise and Perils of Musical Copyright*, 27 *Cardozo Arts & Ent. L.J.* 573 (2010) (discussing the categorization of music along racial lines and the development of the genre of “race music”).

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- ¹³ The use of the term “race” to denote a category of records originated with the label Okeh Records in 1923. See Jonathan Karp, Blacks, Jews, and the Business of Race Music, in *Chosen Capital: The Jewish Encounter with American Capitalism* 141, 144 (Rebecca Korbin, ed., 2012).
- ¹⁴ Quoted in William Howland Kenney, *Recorded Music in American Life: The Phonograph and Popular Memory, 1890-1945* 130 (1999).
- ¹⁵ *Id.* at 188-189.
- ¹⁶ William Howland Kenney, *Recorded Music in American Life*, *supra* note 14, at 132.
- ¹⁷ See Reebee Garofalo, *Crossing Over*, *supra* note **Error! Bookmark not defined.**, at 116-117.
- ¹⁸ See Brian Ward, *Just My Soul Responding: Rhythm and Blues, Black Consciousness, and Race Relations* 27 (1998).
- ¹⁹ See, e.g., *The Billboard*, Oct. 23, 1948, at 26 (advertisement for MGM Records).
- ²⁰ See *id.* at 29 (advertisement for Capitol Records); *id.* at 23 (advertisement for Decca Records).
- ²¹ Reebee Garofalo, *Crossing Over*, *supra* note **Error! Bookmark not defined.**, at 121.
- ²² Brian Ward, *supra* note 18, at 27-28.
- ²³ James M. Salem, *The Late Great Johnny Ace and the Transition from R&B to Rock n’ Roll* 168 (1999). For previous discussions in legal academic literature of white cover recordings, see Candace G. Hines, *supra* note **Error! Bookmark not defined.**, at 484-486; Neela Kartha, *Digital Sampling and Copyright Law in a Social Context: No More Colorblindness!*, 14 *U. Miami Ent. and Sports L. Rev.* 218, 232-234 (1997).
- ²⁴ For example, Pat Boone, a white singer who achieved great success recording cover versions of earlier R&B releases, stated that when covering “Tutti Frutti,” earlier recorded by Little Richard, he changed “Boys you don’t know what she do to me” to “Pretty little Susie is the girl for me” in order to “make it more vanilla.” David O. Szatmary, *Rockin’ in Time: A Social History of Rock-and-Roll* 26 (8th ed. 2014).
- ²⁵ William Howland Kenney, *supra* note 16, at 113 (quoting Perry Bradford . . .
- ²⁶ See, e.g., Charlie Gillett, *The Sound of the City: The Rise of Rock and Roll* 21 (Da Capo 1996).
- ²⁷ See Reebee Garofalo, *Crossing Over: From Black Rhythm & Blues to White Rock ‘n’ Roll*, in *Rhythm and Business: The Political Economy of Black Music* 112, 113 (2002) (“Of [ASCAP’s] 170 charter members, six were black . . . [T]he vast majority of ‘untutored’ black artists were routinely excluded from the society and thereby systematically denied the full benefits of copyright protection.”).
- ²⁸ See Leonard Feather & Ira Gitler, *The Biographical Encyclopedia of Jazz* 69 (2007).
- ²⁹ See Wikipedia, “Harvey Oliver Brooks,” https://en.wikipedia.org/wiki/Harvey_Oliver_Brooks (last visited March 16, 2016).
- ³⁰ See U.S. Copyright Registration No. EU101224 (Oct. 27, 1947).
- ³¹ Deposition of Albert Patrick, February 3, 1950 and February 14, 1950, *Supreme Records, Inc. v. Decca Records, Inc.*, No. 8929-Y, United States District Court, Southern District of California, Central Division, p.10.
- ³² See Peter Vacher, *Swingin’ on Central Avenue: African American Jazz in Los Angeles* 175 (2015).
- ³³ Deposition of Albert Patrick, *supra* note 31, at 7-9.
- ³⁴ Reporter’s Partial Transcript of Proceedings, May 3, 1950, *Supreme Records, Inc. v. Decca Records, Inc.* No. 8929-Y, United States District Court, Southern District of California, Central Division, pp.11-14 (cross-examination testimony of Leroy Whyte).
- ³⁵ *Id.* at 16.
- ³⁶ *Id.* at 11-14.
- ³⁷ Reporter’s Partial Transcript of Proceedings, *supra* note 34, at 21 (cross-examination testimony of Leroy Whyte).
- ³⁸ The Decca recording session was held on October 12, 1948. See Michael Ruppli, *The Decca Labels: the eastern sessions 1943-1958* 218 (1996).
- ³⁹ See *Supreme Records, Inc. v. Decca Records, Inc.*, 90 F.Supp. 904, 913 n.4 (S.D. Cal. 1950).
- ⁴⁰ The estimate of 250,000 was produced by adding the month-by-month sales figures that the President of Supreme Records, Albert Patrick, provided in his deposition. See Deposition of Albert Patrick, *supra* note 31, at 18-23. Other estimates have varied widely. The court in *Supreme Records* provides the figure of 100,000, see *Supreme Records v. Decca Records*, 90 F. Supp. 904, 905 (S.D. Cal. 1950); Albin Zak states that the record eventually sold over a million copies. See Albin J. Zak III, *I Don’t Sound Like Nobody: Remaking Music in 1950s America* 143 (2010).
- ⁴¹ See “Evelyn Knight, 89; versatile singer had two no. 1 hits in 1949,” *Los Angeles Times*, October 31, 2007, available at <http://articles.latimes.com/2007/oct/31/local/me-passings31.s1>.
- ⁴² See Chip Deffaa, *Blue Rhythms: Six Lives in Rhythm and Blues* 152 (1999).

⁴³ Billboard, May 13, 1950, at 12. For other acknowledgement of the impact of the *Supreme Records* decision, see, e.g., Russell Sanjek, *American Popular Music and Its Business: The First Four Hundred Years, Volume III From 1900 to 1984* 325 (1988) (“Any legal barrier to the practice [of producing covers that were “almost exact musical duplications”] was removed by the courts . . . with a decision in the ‘Little Bird Told Me’ case. . . . [The] verdict . . . declared that musical arrangements were not copyrighted property and therefore not subject to the law’s protection.”); Brian Lukasavitz, *Blues Law: A Little Bird Told Me about Cover Versions*, *American Blues Scene Magazine* (2012), available at <http://www.americanbluesscene.com/2013/01/blues-law-a-little-bird-told-me-cover-versions/> (“Finding for Decca records, the [*Supreme Records*] Court paves the way for what would become an endless number of cover version recordings of blues and R&B tunes for the pop music consumers.”).

⁴⁴ *Id.*

⁴⁵ Yankwich had already become famous for creating the copyright doctrine of “scenes à faire” in the case of *Cain v. Universal Pictures Co.*, 47 F. Supp. 1013 (1942). He was also a prolific author of articles in law reviews and legal journals, although most of his articles on copyright law were published in the 1950s, after the decision in *Supreme Records*.

⁴⁶ Larry Starr & Christopher Waterman, *American Popular Music from Minstrelsy to MTV 196-197* (2003).

⁴⁷ For one chart of original black R&B recordings and white covers, see Steve Chapple & Reebee Garofalo, *Rock’n’Roll is Here to Pay: The History and Politics of the Music Industry* 239 (1977). For a book-length account of the phenomenon, see Bob Leszczak, *Who Did it First?: Great Rhythm and Blues Cover Songs and Their Original Artists* (2013).

⁴⁸ See Deena Weinstein, *Rock’n America: A Social and Cultural History* 59 (“Dot Records became a major label by releasing so many covers.”) (2015).

⁴⁹ *The Penguin Encyclopedia of Popular Music* 62 (Donald Clarke, ed.) (2d ed. 1998).

⁵⁰ *The Billboard*, March 5, 1955, at 13.

⁵¹ See Copyright Law Revision Part III, page 196 (comments of Sydney A. Diamond, London Records) (meeting of April 11, 1963); see also *id.* at 75 (referring to “mirror copying”) (comments of Leon Kellman, American Guild of Authors and Composers).

⁵² 17 U.S.C. § 114(b).

⁵³ 17 U.S.C. § 102(a).

⁵⁴ Some courts have held that features of a recording produced by “performance techniques” rather than “composition” are not part of the musical work fixed in the phonorecord, but only part of the sound recording. See *Newton v. Diamond*, 388 F.3d 1189 (9th Cir. 2003); Robert Brauneis, *Musical Work Copyright for the Era of Digital Sound Technology: Looking Beyond Composition and Performance*, 17 *Tul. J. Tech. & Intell. Prop.* 1, 35-43 (2014) (reviewing four different tests for separating musical works from sound recordings in phonorecords, and concluding that none of them work well).

⁵⁵ *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 345 (1991).

⁵⁶ 17 U.S.C. § 103(a). While the 1976 Act version only denies copyright in those parts of a derivative work that use the underlying work unlawfully, the 1909 Act version seems to deny copyright to the entire derivative work: “[C]ompilations or abridgements, dramatizations, translations, or other versions of . . . copyrighted works when produced with the consent of the proprietor of the copyright in such work, . . . shall be regarded as new works subject to copyright under the provisions of this Act.” Act of March 4, 1909, § 6.

⁵⁷ 17 U.S.C. § 115(a)(2).

⁵⁸ See Neela Kartha, *supra* note 23, at 234 (noting that the compulsory mechanical license rate remained the same for decades, and arguing that that eroded copyright protection, particularly for black composers). The mechanical license rate remained at 2 cents per copy until the effective date of the Copyright Act of 1976, January 1, 1978; since then, it has gradually been increased, and as of this writing is 9.1 cents per copy for a song of five minutes or less. For one table of rates, see https://www.harryfox.com/license_music/what_mechanical_royalty_rates.html; see also 37 C.F.R. 255.3.

⁵⁹ N.D.B. Connolly, *A World More Concrete: Real Estate and the Remaking of Jim Crow South Florida* 29 (2014).

⁶⁰ Keith Aoki, *Distributive and Syncretic Motives in Intellectual Property Law*, 40 *U.C. Davis L. Rev.* 717, 760-761 (2007).