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# Tactical destabilization for economic justice: The first phase of the 1984-2004 rhythm & blues royalty reform movement.

Matt Stahl, University of Western Ontario

*'[E]ven if I should speak, no one would believe me. And they would not believe me precisely because they would know that what I said was true.'*

James Baldwin<sup>1</sup>

*'We have paid a price to sing this music.'*

Ruth Brown<sup>2</sup>

## 1. Introduction

In the late 1980s and early 1990s, something unusual happened in the US recording industry: a group of major record companies—including Warner, MCA, and Capitol/EMI—wiped out the production debts of dozens of retirement-age black R&B and soul singers, enabling those artists to collect royalties on recordings that were still selling, decades after their initial release. In many cases, these companies doubled or tripled the royalty rates specified in the artists' original 1950s contracts. Some artists were able to claim as much as 20 years' worth of unpaid royalties, gaining payouts of thousands of dollars. Many of these performers had never received a royalty payment until then.

The actions of these conglomerates were not the result of an attorney general's investigation, nor were they spontaneous acts of magnanimity. They were propelled by a 'royalty reform' movement made up of sexagenarian performers, pro-bono lawyers, sympathetic lawmakers, stars of popular music, and other supporters. Together, these actors destabilized a longstanding subsystem of exploitation characteristic of what Mahon calls the 'racialized political economy' of the recording industry, wherein black performers 'occupy a subordinate position' even as their creative work serves as a 'central creative resource' in the industry as well as in mainstream (often white-dominated) musical cultures of the United States.<sup>3</sup> This episode culminated in companies and executives acknowledging the existence of this subsystem, reforming their royalty accounting for many affected artists, and committing funds to the creation and support of a non-profit Rhythm & Blues Foundation to provide financial assistance to, and foster the public recognition of, the many aging R&B performers on whose behalf the movement had fought. Strikingly, these events transpired in the context of the record industry's consolidation into a handful of ever more powerful multinational corporations.

Contests involving the rights of recording artists with respect to recording and music industry organizations are an important theme in scholarly, journalistic, and

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<sup>1</sup> Quoted in C Mills, *The Racial Contract* (Cornell, New York NY 1997) at 97.

<sup>2</sup> Quoted in P Perrone, 2006. 'The "Original Queen of Rhythm'n'Blues" Who Made a Surprise Comeback and Campaigned for Royalty Reform', *The Independent* (London, November 20, 2006) at 36.

<sup>3</sup> M Mahon, *Right to Rock: The Black Rock Coalition and the Cultural Politics of Race* (Duke, Durham NC 2004) at 146.

popular analyses of US popular music.<sup>4</sup> Yet aside from the odd passing mention,<sup>5</sup> no scholarly attention has been paid to this movement. Drawing on trade journal and major newspaper coverage, archival and autobiographical sources, and popular and scholarly histories, this essay outlines this contractual regime and explains how royalty reformers destabilized it to the advantage of the performers. As the first product of a broader research project, the paper proposes an account of R&B royalty accounting practices and their reform that will begin to fill in gaps in the history of talent contracting and the control of creative labor and property in the recording industry.<sup>6</sup>

This essay contextualizes and recounts the royalty reform movement's first phase. It focuses primarily on the contest led by R&B singer Ruth Brown and attorney Howell Begle against Atlantic Records, then sketches in less detail the ensuing Atlantic-funded establishment of the Rhythm & Blues Foundation and the subsequent participation of other major record companies in royalty reform.<sup>7</sup> This first phase of royalty reform differs from the run of artist-company contests, most of which resolve along more or less predictable lines reflecting established power relations in the field: artist complaints about contractual and/or accounting problems are typically quieted by renegotiation, and rarely culminate in public or courtroom resolution.<sup>8</sup> While the initial efforts of Brown and

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<sup>4</sup> E.g., J All, 'Again from the Top! The Continuing Pursuit of a General Public Performance Right in Sound Recordings' (2012) 22 *Albany Law Journal of Science and Technology*, 1-48; N Kelley (ed.) *Rhythm and Business: The Political Economy of Black Music* (Akashic, New York NY 2002); Mahon, *Right to Rock*, supra (n 3); I Monson, *Freedom Sounds: Civil Rights Call out to Jazz and Africa* (Oxford, Oxford UK 2007); M Stahl, *Unfree Masters: Recording Artists and the Politics of Work* (Duke, Durham, NC 2013); S Greenfield and G Osborn, *Contract and Control in the Entertainment Industry: Dancing on the Edge of Heaven* (Ashgate, Brookfield, VT 1998); S Soocher, *They Fought the Law: Rock Music Goes to Court* (Schirmer, New York NY 1999). Also important are those contests involving rank and file performers who work under American Federation of Musicians-governed contracts. See e.g., J Kraft, *Stage to Studio: Musicians and the Sound Revolution, 1880-1950* (Johns Hopkins, Baltimore 1996); R Gorman, 'The Recording Musician and Union Power: A Case Study of the American Federation of Musicians' (1983) 37 *Southwestern Law Journal*, 697; M Roberts, *Tell Tchaikovsky the News: The Problem of Rock and Roll and the Rise and Fall of the American Musicians' Union 1940-1970* (Unpublished doctoral dissertation, City University, New York NY 2005); J Burlingame, *For the Record: The Struggle and Ultimate Rise of American Recording Musicians Within Their Labor Movement* (Recording Musicians Association, Hollywood, CA 1997); L Miller, 'Racial Segregation and the San Francisco Musicians' Union, 1923- 1960' (2007) 1 *Journal of the Society for American Music*, 161, which I do not touch on here.

<sup>5</sup> E.g. B Ward, *Just My Soul Responding: Rhythm and Blues, Black Consciousness, and Race Relations* (University of California, Berkeley CA 1998), at 48, 461 (mistakenly crediting the Rhythm and Blues Foundation with 'courtroom victories'); G Altschuler, *All Shook Up: How Rock 'n' Roll Changed America* (Oxford, New York: University Press 2003) at 54 (misnaming one of the main actors).

<sup>6</sup> Greenfield and Osborn, *Contract and Control*, supra (n 4); Stahl, *Unfree Masters*, supra (n 4).

<sup>7</sup> Future research and publications will bring more sustained attention to the Rhythm & Blues Foundation and the actions of other companies, and will examine later phases, which include major class-action lawsuits and the passage of royalty-accounting legislation in California in 2004.

<sup>8</sup> For example, rock singer Courtney Love pursued a lawsuit against her company that she promised would expose abusive if not corrupt record company contracting practices. Yet this suit, like many others before and since, ended not with a bang but with a whimper: a renegotiation of her contract that most likely included a non-disclosure clause—little was heard from her on the topic after the out-of-court resolution. See J Leeds, 'Courtney Love Settles Suit Against Vivendi Universal Music' *Los Angeles Times* October 1, 2002.

Begle *did* benefit from their ability to threaten Atlantic legally, they did *not* turn to that familiar tool of music industry negotiation, the lawsuit. Instead, through Brown's 1980s 'comeback' and ensuing capture of media attention—including lauded film and stage roles in addition to news media coverage—and Begle's behind-the-scenes research, the two claimants produced a 'counterstory'<sup>9</sup> that helped to destabilize and delegitimize both the contracting and accounting regime that directed earnings away from R&B artists and the dominant narratives that justified it. Remarkably, the royalty reformers' development and circulation of a sympathetic narrative of unjust exploitation, coupled with the building of formidable evidence against Atlantic, pushed other major companies to undertake reforms without being themselves subjected to direct or even indirect legal threats.

Section 2 of this essay introduces complementary positions on 'narrative' as a form and component of arguments such as those examined here, proposing an analytical framework for an analysis of royalty reform that draws on legal and social science scholarship. Section 3 offers a brief account of the royalty contracting system that formalized and organized the relations between most of the independent (or 'indie')<sup>10</sup> R&B record companies of the 1940s, 50s, and 60s and their black recording artists, and argues that this regime should be understood as *private*, *exploitative*, and *racialized*. In four subsections, Section 4 recounts the activities of Ruth Brown and Howell Begle (and their allies) and some of the principal outcomes of those activities. Section 5 offers a concluding summary of the account and poses questions that will guide planned future research.

## 2. Narrative

This essay's account is structured narratively, as an antagonism between two groups of actors, in which the first (the black R&B performers) have been deprived of their rightful earnings by the second (the R&B record companies and their latter-day corporate owners). While archival documents and journalistic accounts do feature prominently in this analysis, the following account is to a large extent built on verbal reports by this first group, in the manner of the narrative approach developed by exponents of critical race theory or CRT.<sup>11</sup> CRT has emerged out of the research of 'activists and scholars interested in studying and transforming the relationship among race, racism, and power'.<sup>12</sup> Central to this project are arguments that social structure in the United States has been and remains *white supremacist*, and that US law, developed in

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<sup>9</sup> R Delgado, 'Storytelling for Oppositionists and Others: A Plea for Narrative' (1989) 87 Michigan Law Review, 2411.

<sup>10</sup> In the context of the 20<sup>th</sup> century US record industry, "independent" (or "indie") typically refers to a record company that lacked its own distribution system, and therefore had to rely on bigger companies, independent distributors, or other systems for getting their records to market. See T Dowd, 'Structural Power and the Construction of Markets: The Case of Rhythm and Blues' (2003) 21 *Comparative Studies of Culture and Power*, 147-201.

<sup>11</sup> See G Martinez 'Philosophical Considerations and the Use of Narrative in Law' (1999) 30 Rutgers Law Journal, 683.

<sup>12</sup> R Delgado and J Stefancic, *Critical Race Theory: An Introduction* (2<sup>nd</sup> edn, New York University, New York NY 2012), at 3.

this context, often unjustly denies voice and standing to members of subordinated groups. In response, CRT scholars have argued for the usefulness and validity of narrative as a ‘language for minorities to communicate harms’ that are not recognized by law, because minorities ‘did not formulate our legal practices or modes of argument’<sup>13</sup>—including, for example, the legal time limits that prevented civil claims on previous decades’ royalties. Minority narrative of the kind developed by CRT scholars, offered in accounts and contexts of legal contest, ‘is a tool to change [the] mind set’<sup>14</sup> of legal decision-makers, who typically belong to the dominant racial group and take the fairness and legitimacy of existing law more or less for granted. Martinez argues that CRT’s arguments about the affordances of narrative ‘is especially true for counter narratives which provide alternative perspectives through narrative—i.e., perspectives that run counter to the dominant perspective’.<sup>15</sup> Royalty reform’s counter narratives of routine artist mistreatment at the hands of Atlantic Records (and other companies) began gaining wider circulation at the same time that Ahmet Ertegun, Atlantic’s founder and president, was himself articulating a celebratory public display of the dominant perspective on his own and his company’s contributions to US culture—a 40<sup>th</sup> anniversary concert at New York’s Madison Square Garden. Brown’s counter narrative, bolstered by Begle’s research, aimed to ‘unmask the gentility’<sup>16</sup> of Ertegun and Atlantic Records at the very moment that the executive and the company were working to affirm the dominant perspective and consecrate themselves publicly.

The counter-narrative tactic identified and fostered by CRT resonates with the analysis of ‘offstage’ discourse that contrasts the ‘public’ and ‘hidden’ ‘transcripts’ of dominant and subordinate actors in relations of power. Scott writes that ‘virtually all ordinarily observed relations between dominant and subordinate [actors] represent the encounter of the *public* transcript of the dominant with the *public* transcript of the subordinate’.<sup>17</sup> This knowledge ‘hardly exhausts what we might wish to know about power’<sup>18</sup> because it can only really encompass the (often legitimating) masks worn by the powerful in the public exercise of power and the (often deferential) masks worn by the weak when in view and/or hearing of the powerful. What matter to Scott are the *hidden* transcripts shared within dominant groups (behind closed doors), and among subordinated groups (in distinct social sites carved out by them), that illuminate systems and subjective experiences of domination. The present essay considers the possibility that

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<sup>13</sup> Martinez, ‘Philosophical Considerations’, supra (n 11), at 686, 698.

<sup>14</sup> Ibid. at 700.

<sup>15</sup> Ibid. at 700.

<sup>16</sup> R Delgado and J Stefancic, *Critical Race Theory*, supra (n 12) at 44. It is important to point out that Atlantic and the many other labels that recorded, released, and promoted black R&B played a significant role in enabling black people in the US to gain voice and articulate new narratives of race during what Omi and Winant call the ‘great transformation’ of race relations in post-World War II US society. See M Omi and H Winant, *Racial Formation in the United States*, (3<sup>rd</sup> edn, Routledge, New York NY 2015). This social fact provides the hook on which the dominant narrative hangs; the present study is concerned primarily with the counter narrative.

<sup>17</sup> J Scott, *Domination and the Arts of Resistance: Hidden Transcripts* (Yale, New Haven CT 1990), at 13.

<sup>18</sup> Ibid. at 14.

the passage of decades following the termination of the employment relations between the independent record companies and the R&B performers—and the advances of the Civil Rights and Black Power movements during that time—created the conditions in which performers could begin to give voice to previously hidden transcripts. Nearing retirement age, and having all but given up on their royalty rights, Ruth Brown and her colleagues had little to lose (and much to gain), and while their counterstories contradicted the official stories of Atlantic Records and other companies, a growing general perception of the 1950s as a period of routine racial exploitation underwrote their credibility. Moreover, the sudden appearance of elements of Atlantic Records' own hidden transcript—internal memoranda indicating royalty fraud—helped create the conditions in which the dominant perspective—the public transcript—could be challenged and undermined.

Scott's further insights about the relationship of appropriation and indignity are particularly salient. The 'process of appropriation', he writes, 'unavoidably entails systematic social relations of subordination that impose indignities of one kind or another on the weak. These indignities are the seedbed of anger, frustration, and swallowed bile that nurture the hidden transcript' of the subordinates.<sup>19</sup> Anger, frustration, and bile do appear in some of the R&B performers' accounts of their experiences of recording for independent labels in the 1950s and 60s. The narrative and hidden transcript perspectives provide a useful framework for the study of royalty reform that takes the participants' stories seriously while being sensitive to their possible ritualization, and that perceives the broader symbolic and social stakes to be quite high, even where the dollar amounts might not seem commensurate.

Nevertheless, despite the workings of narrative logic, the account does not lead to an evaluation of the final outcome of the case as naturally or necessarily a positive one. The royalty-reform driven formation of the Rhythm & Blues Foundation as a charitable organization, responsible for distributing funds to needy musicians, does not represent a 'fundamental'<sup>20</sup> critique of or challenge to the sociopolitical order that produces poverty for R&B performers as the flip-side of owners' and executives' wealth. Indeed, the industry-governed structure of the Foundation appears to have hobbled it from the beginning. Rock critic Dave Marsh—one of the Foundation's founding board members—asserted in 2002 that the organization's 'main mission appears to be covering up the felonies committed against veteran soul / R&B artists'.<sup>21</sup>

Additionally, the essay does not endorse a normative approach according to which intellectual property rights (contractual or statutory) should be a substitute for a malfunctioning pension and social security system in the United States, or a categorically legitimate means for the accumulation of wealth. Following Hesmondhalgh's analysis of digital sampling and cultural inequality,<sup>22</sup> the essay perceives the pursuit and enforcement

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<sup>19</sup> Ibid. at 111.

<sup>20</sup> J Calmore 'Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World' (1992) 65 Southern California Law Review, 2129.

<sup>21</sup> D Marsh, 'Stones in Our Passway' (March 2002) *Rock & Rap Confidential*, at 2.

<sup>22</sup> D Hesmondhalgh, 'Digital Sampling and Cultural Inequality' (2006) 15 *Social and Legal Studies*, 53.



of public and private intellectual property rights as a practical tactic for fostering African Americans' cultural recognition, economic security, and social mobility.<sup>23</sup> Such rights are not, ultimately, as desirable as a non-white-supremacist, non-exploitative United States would be. But even where such rights might in fact have undesirable corollaries,<sup>24</sup> the position is that companies' failure to fulfill the original contractual obligations that corresponded to performers' royalty rights amounted at least to a missed opportunity to narrow the social and economic gaps between black and white people in the United States.<sup>25</sup>

### 3. Background – Indie Contracting & Accounting Regime

#### 3.1 Common Practices

The postwar emergence of rhythm and blues music constituted a transformative contribution to US popular music, 'credited with and criticized for promoting integration and economic opportunity for blacks while bringing to 'mainstream' culture black styles and values'.<sup>26</sup> The establishment in the late 1940s and early 1950s of hundreds of small R&B-oriented record companies across the United States (colloquially known as the 'rise of the independents') opened up opportunities for black musicians, songwriters, arrangers, producers, and even some enterprisers, in addition to singers like Ruth Brown and groups like the Clovers. These local and regional 'indies' could compete because the major companies of the day had largely refused to produce for what was then called the 'race market', even in the face of 'evidence of [that market's] ample supply and demand',<sup>27</sup> and because using inexpensive new audio tape technology and paying songwriters and singers very little enabled them to 'break even with sales of only 1,500 units'.<sup>28</sup> Art Rupe, founder of Specialty Records, famously said, 'I looked for an area neglected by the majors and in essence took the crumbs off the table of the record industry'.<sup>29</sup> With few exceptions, the entrepreneurs who founded these companies were experienced music industry veterans whose professional and entrepreneurial experiences enabled them to perceive the market openings left by the major companies' neglect of black America. It was as insiders that these entrepreneurs institutionalized the contracting and accounting practices that would be laid bare in the unfolding of the royalty reform movement.

Documentary evidence of these companies' practices—royalty statements, contracts, memoranda, audits—is scarce, but a general picture emerges from scattered

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<sup>23</sup> See also K J Greene, "'Copynorms,'" Black Cultural Production, and the Debate over African-American Reparations' (2008) 25 *Cardozo Arts and Entertainment Law Journal*, 1179.

<sup>24</sup> M Stahl, 'Public, Private, Popular: Pop Performers, Liberalism, and the Limits of Rights (2014) 40 *MUSICultures*, 93.

<sup>25</sup> M Oliver and T Shapiro, *Black Wealth/White Wealth: A New Perspective on Racial Inequality* (10th ann. edn, Routledge, New York 2006).

<sup>26</sup> Altschuler, *All Shook Up*, supra (n 5), at 35.

<sup>27</sup> Dowd, 'Structural Power', supra (n 10) at 152.

<sup>28</sup> Altschuler, *All Shook Up*, supra (n 5), at 15.

<sup>29</sup> Quoted in Ward, *Just My Soul*, supra (n 5), at 22.

sources. The order of business generally went one of two ways: either the artist recorded each ‘side’ (each song of a two-sided, two-song 78 or 45 rpm record) for a flat fee and that was that, or the artist recorded for a flat fee and a (contractual) promise of royalties. In the latter case, the custom was (and still is, although the numbers and complexity are far greater today) that expenses associated with making the recording were understood to be ‘advanced’ to the artist and were to be ‘recouped’ out of artist royalties. Standard royalty rates for R&B performers were usually 1% - 2% of each sale of a record that cost around 89 cents, with some reputedly artist-friendly companies like Atlantic offering as much as 5%. In the contracts of the 1940s and 50s, the usual practice was to charge three kinds of costs back to artist royalty accounts: payments made to the artist for the session, payments made to side musicians for the session, and the costs of musical arrangements. The funds advanced by the company to cover these costs functioned as loans that were to be repaid out of artists’ anticipated royalties, before they could receive any payments themselves (see Figure 1). According to this model, if the company spent \$300 on side musicians and an arrangement, and the artist was paid \$50, then the company would claim the first \$350 of the artist’s royalty income (their 1%-5% of sales revenue) as repayment.<sup>30</sup>

**10. For each acceptable side recorded by you hereunder, we shall pay you as a non-returnable advance payment against your royalties hereunder, the sum of \$ 50.00 (or, in the event you are a musician, union scale, whichever is greater) and such advance per acceptable side shall include any payments of union scale to you, required by the union to be paid to you through the union instead of to you directly; and we shall pay union scale to the musicians used in conjunction with your services upon such records; and we shall advance the necessary cost of musical arrangements. All such payments shall be as non-returnable advances to you against the artists’ royalties payable to you hereunder and shall be deducted from your royalties when earned.**

Fig. 1. Royalty advance and recoupment clause from the Drifters’ 1959 contract with Atlantic Records.

But the picture painted by the contract often bore little resemblance to the subsequent artist-company relation, which was typically defined by the former’s escalating rather than diminishing debts to the latter. In theory, the artist would receive biannual accounting statements as long as the records were selling, and once those advances were recouped out of artist royalties the artist’s royalty account would swell, and he or she would and royalty checks along with the statements. Yet this is rarely how things turned out. The royalty reformers’ research suggests very strongly that few R&B performers *ever* recouped.<sup>31</sup> Because of the way that advances and recording costs were accounted, artists were typically already in debt from the moment they concluded their very first recording session. Those debts persisted and often even grew, such that many black artists parted from their labels with debts—known as ‘negative royalty account

<sup>30</sup> This 1%-5% royalty rate was actually paid on 90% of sales; 10% was routinely deducted from sales figures to account for “breakage”—the records of the time were very fragile. However, that 10% deduction for breakage persisted as boilerplate long after fragile shellac records were replaced by much tougher vinyl records.

<sup>31</sup> The careers of Ray Charles (on Atlantic and then Paramount Records) and Chuck Berry (on Chess Records) as comparatively savvy and autonomous stand out as so exceptional as to prove the rule. See R Charles and D Ritz, *Brother Ray: Ray Charles’ Own Story* (Dial, New York NY 1978) and B Pegg, *Brown Eyed Handsome Man: The Life and Hard Times of Chuck Berry* (Routledge, New York 2002). With respect to the role of race as variable, planned research will seek to specify if, how, and to what degree the practices of the record companies producing niche music (e.g. hillbilly) for white audiences differed from those R&B companies.



balances’—in the thousands or tens of thousands of dollars. Muddy Waters’ 1986 royalty account balance was nearly \$60,000 in the red even though he had earned nearly \$25,000 in royalties in that year alone (he received no royalty payments because earnings had been swallowed by this negative balance).<sup>32</sup> Carla Thomas’ negative balance was \$80,000.<sup>33</sup> How can such levels of debt be explained? Some is attributable to periodic cash advances requested by the artists themselves, in addition to their recording fees—their live performance incomes were uneven and companies would often dispense small sums to keep an artist happy. According to Jerry Wexler of Atlantic Records, that ‘money went on the record. It was a charge against royalties’.<sup>34</sup> But, as I will explain in Section V, additional direct payments to artists like these appear to account for only a small part of these debts.

### 3.2 A Private, Exploitative, and Racialized IP System

At issue in royalty reform were *record royalties* (as opposed to composition royalties), the most important form of recording-related compensation available to performers who do not (or only rarely) write or co-write the songs they perform. Royalty reform underscored the importance of record royalties for singers getting too old to tour extensively, for whom union pensions and social security income could barely keep body and soul together.

Another important factor in the situations of these artists has to do with the copyright status of their recorded performances. Ruth Brown, the Clovers, Joe Turner and the rest of the anticipated beneficiaries of royalty reform did the bulk of their most significant and commercially successful recording in the 1950s and 60s. Yet sound recordings were not protected by copyright until 1972, and the intended beneficiaries of that protection were not performers but companies seeking a more powerful weapon against the counterfeiting of records.<sup>35</sup> Until that copyright revision, master recordings (the audio tapes holding the music that would be pressed into records) were controlled by being literally locked away in record company premises (thus the importance of ‘masters’ and ‘vaults’ in recording industry discourse). This absence of copyright protection had implications for the status of the performers of sound recordings: roughly speaking, without copyright protection there is no legal author. Thus, unlike composers—and unlike the creators of post-1972 sound recordings—neither the performers featured on

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<sup>32</sup> R Harrington, ‘MCA to Pay Royalties to R&B Greats’ *Washington Post* (December 7, 1989) at E1.

<sup>33</sup> H Begle, ‘Pioneer R&B Artists Deserve Back Royalties’ *Billboard* (December 24, 1994), at 9.

<sup>34</sup> Quoted in R Greenfield, *The Last Sultan: The Life and Times of Ahmet Ertegun* (Simon and Schuster New York 2011), at 303. This kind of paternalism figures prominently in mass media representations of 1950s R&B. For example, a 2008 feature film about R&B indie Chess Records suggests that artists referred to the company as “Cadillac Records” because they were more likely to receive Cadillacs than royalty statements and payments from the head of the company. See D Martin *Cadillac Records* [feature film] (Sony Pictures 2008). For contrasting perspectives on the same phenomenon, see N Cohodas, *Spinning Blues into Gold: The Chess Brothers and the Legendary Chess Records* (St. Martin’s, New York 2000); W Dixon with D Snowden, *I Am the Blues: The Willie Dixon Story* (Da Capo, New York 1989); E James and D Ritz, *Rage to Survive: The Etta James Story* (Da Capo, New York 1995).

<sup>35</sup> J Mason, ‘Performers’ Rights and Copyright: The Protection of Sound Recordings from Modern Pirates’ (1971), 59 *California Law Review*, 548.

pre-1972 sound recordings nor their heirs have extra-contractual, *statutory* intellectual property claims on their recordings. Pre-1972 record royalties, then, are individually-bargained private intellectual property rights,<sup>36</sup> grounded in the contracts that created them, whose exercise or enforcement was impracticable for most artists prior to the royalty reform movement's collective action.

The subsystem of exploitation that royalty reform set out to transform was an intellectual property (IP) regime in which independent record companies recorded, packaged, and sold thousands of R&B performances in the 1940s, 50s, and 60s, and then repackaged and resold those recordings. This system produced income for the owners of those recordings—not only the original companies but also the conglomerates who later came to own those companies and/or their catalogues. This was a *private* IP regime because pre-1972 sound recordings were not covered by federal copyright; royalties were assigned by contract, not by statute. What made it *exploitive* (in the pejorative as well as the technical sense) is that most of the performers of these recordings received no royalty income from these sales, despite having recorded under contracts specifying companies' obligation to make royalty payments as long as those records were selling, and despite the original recording costs having long ago been recouped by the companies. It was a *racialized* regime (at least in part) because almost all of the entrepreneurs who established it were white (or, at least, not black, and enjoying meaningful degrees of white advantage), and they built their companies almost entirely by selling black music to black people (and later to larger mixed audiences), taking advantage of the major companies' general refusal to cater to black consumers and 'continuing a pattern of exploitation of blacks that spanned the century after "emancipation"'.<sup>37</sup> Royalty reform aimed to expose and destabilize this regime, and to secure royalty revenue for performers and aid in their late-career recognition (as 'pioneers', as the Rhythm & Blues Foundation award program would later characterize them).

Significantly, if only in a piecemeal fashion, royalty reform had the potential to chip away at enduring structures of racial stratification in the US. Over the last several centuries, racially differentiated pathways for the accumulation of wealth have produced a United States in which the average black family holds less than one tenth the wealth of the average white family.<sup>38</sup> Moreover, an abiding, tacit, even unconscious agreement among many (if not most) white people that 'the moral and juridical rules normally regulating the behavior of whites in their dealings with one another either do not apply at all in dealings with nonwhites or apply only in a qualified form'<sup>39</sup> has defined race relations throughout US history. Putting aside (for now) concerns with specific evidence of racist treatment, and simply keeping in mind that R&B contracting and royalty practices developed in a social context in which 'white supremacy was a generally

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<sup>36</sup> C Fisk, 'The Role of Private Intellectual Property Rights in Markets for Labor and Ideas: Screen Credit and the Writers Guild of America, 1938-2000' (2011) 32 Berkeley Journal of Employment & Labor Law, 215.

<sup>37</sup> Altschuler, *All Shook Up*, supra (n 5), at 66.

<sup>38</sup> Oliver and Shapiro, *Black Wealth, White Wealth*, supra (n 25), at 100.

<sup>39</sup> Mills, *Racial Contract*, supra (n 1), at 11.

assumed and accepted state of affairs',<sup>40</sup> a counterfactual presents itself: The timely payment of royalties would have made a proportionately greater improvement in the fortunes of black performers and their families than it might have for white performers and their families, and would have aided in reducing the 'large racial wealth gap'<sup>41</sup> by enabling the cultivation of record-royalty-based annuities and income-generating heritable rights.

#### 4. Royalty Reform, 1985-1995

##### 4.1 Ruth Brown and Howell Begle's Dual Approach

In the 1960s and 70s, a series of lawyers had contacted Atlantic on Ruth Brown's behalf, only to be rebuffed by Atlantic's repeated assertion that the singer was actually in debt to the company to the tune of more than \$25,000. But Brown's pursuit of unpaid royalties changed direction when, in 1983, she was introduced by a mutual friend to Howell Begle, a corporate mergers-and-acquisitions attorney who had long been a fan of Brown's. Begle's passion for R&B—and especially for Ruth Brown's music—prompted him to take the singer on as a client, and directly he began pressuring Atlantic Records for access to their paperwork and explanations for Brown's debt. As he met other Atlantic performers Joe Turner and the Clovers through Brown, and recovered royalties for them (their accounts were simpler to address than Brown's), he and Brown became determined to seek a collective solution to what was beginning to seem like a systemic problem. However, they soon determined *not* to pursue a lawsuit, but they did not reveal this decision to Atlantic or the press. Pursuing a lawsuit, they believed, would have the disadvantage of enabling deep-pocketed Atlantic to drain the reformers' resources by interminably drawing out the discovery process.<sup>42</sup> Moreover, as Begle later told the *Washington Post*, the growing list of Atlantic artists he was representing 'had claims for very substantial sums of money' but because these artists were in such 'tough financial straits', he was concerned that the company could derail a lawsuit by making settlement offers to them of pennies on the dollar.<sup>43</sup> According to Begle, a broader collective effort 'was a matter of principle with Ruth', and she was 'rock solid' in her determination to effect systemic change.<sup>44</sup>

Publicly narrating the problem as a systemic one, Brown and Begle developed a dual approach to the problem of Atlantic's unpaid royalties, cultivating positive public perceptions of the value and significance of the artists and their bodies of work, and of their treatment by the companies that had benefited from their exploitation, and doing the

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<sup>40</sup> Mills, *Racial Contract*, supra (n 1), at 22.

<sup>41</sup> Oliver and Shapiro, *Black Wealth, White Wealth*, supra (n 25), at 103.

<sup>42</sup> Greenfield, *Last Sultan*, supra (n 34), at 297

<sup>43</sup> By the end of 1986, Begle's pro bono clients included Brook Benton, Solomon Burke, The Chords, The Coasters, The Drifters, Clyde McPhatter, Sam & Dave, Chuck Willis, Ivory Joe Hunter, Rufus Thomas, Carla Thomas, Booker T. & the MG's, Eddie Floyd, Chris Kenner, Willis Jackson, The Mar-keys, Eddie Floyd, William Bell, and Doris Troy.

<sup>44</sup> (R Harrington, 'Rhythm, Blues & the Battle Royalty: Ruth Brown & Her Lawyer, Recording a Win' *Washington Post* (May 22, 1988) at F1.

research to back up a formal petition to the company. Ruth Brown took every opportunity to speak out about her experiences and those of her colleagues, repeatedly stressing the importance of their contributions to US popular music. She also redoubled her effort to rebuild her show business career after years of close-to-the-bone single parenthood (detailed in her 1996 autobiography *Miss Rhythm*, which I quote in the following pages). ‘While Howell was chipping away at Atlantic’, she wrote, ‘I found work back in New York wherever I could ... hosting a radio program for National Public Radio, *Harlem Hit Parade*, [accepting] whatever gigs came my way...anything to keep my profile high’ (Brown 1996: 206). Her job, as Begle later told me, was to make people care about her situation and those of her R&B contemporaries. Howell Begle had significant material and social resources at his command that Brown’s previous lawyers lacked. His regular professional practice involved negotiating contracts for network television programs (including the telecast of Ronald Reagan’s 1985 inaugural gala) and multi-million dollar newspaper mergers.<sup>45</sup> This placed him near the top of the US media food chain, with (sometimes happenstance) access to powerful figures in influential adjacent fields, including other media sectors, labor organizations, and the government.

#### 4.2 Atlantic’s Hidden Transcript and the RICO Prospect

The first significant crack in the system opened in early 1984, when Begle was visiting the Atlantic office looking for evidence of accounting that would explain Ruth Brown’s negative royalty balance. In his words, he was ‘screaming at them all the time, “Don’t you have royalty statements? Don’t you have copies of anything?”’<sup>46</sup> An Atlantic employee finally directed him to a box of old documents containing, among other things, a run of accounting statements covering both royalty income and charges against Brown’s royalty account for from 1955 until her 1961 dismissal, royalty statements for one record (1957’s ‘Lucky Lips’), and a handful of revealing internal memoranda.

The details in these documents are fascinating; space considerations allow me only to summarize Begle’s findings: First, Atlantic’s accounting for the years 1955-60 indicated that Brown’s total cash receipts from the label (the \$4,000-\$5,000 per year the company said they paid her in session fees and other payments) were double what the label claimed were her *actual* earnings of only around \$2,000/year. Those \$2,000-\$3,000 overpayments, they argued, accounted for the negative royalty balance of \$25,000 that her account showed when she left the company in 1963. Next, the ‘Lucky Lips’ royalty statements showed approximately 200,000 records sold (mostly in 1957), resulting in royalty earnings of around \$10,000 (none of which she would actually have received as it would have been posted against and swallowed up by her outstanding debt). Yet this record was one of three Ruth Brown records that Atlantic reported to the trade press as million-sellers, on which she should (by that count) have earned much more. (‘They’re either lying to the trades and the public, or they’re lying to the artists’, Begle told *Legal*

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<sup>45</sup> J Hall, Jennifer ‘A Fan Helps Blues Artists Recoup’ (1987) 9 *Legal Times: Law and Lobbying in the Nation’s Capital*, 1, 6-7.

<sup>46</sup> Quoted in Greenfield, *Last Sultan*, supra (n 34), at 296; Begle’s findings summarized in H Begle, ‘Royalties Summary Statement for Ruth Brown’ (1995) (document on file with author).

*Times*<sup>47</sup>). Finally, the memoranda in this box included one that read ‘We did not pick up royalties earned from 4/1/60 to 9/30/71’.<sup>48</sup> In his summary memo, in Begle’s words, the company was admitting

that when all these artists finished their careers in the 1960s and they all had these large debit balances, the company decided there was no way in hell these people were ever going to work their way out so let’s don’t even bother to go through the exercise of even posting what they earned. All of Atlantic’s [subsequent] royalty statements were fraudulent because they knew they were missing eleven years’ worth of data in those that had debit balances.<sup>49</sup>

In other words, ‘offstage’, Atlantic assumed early on that their R&B artists would *never* recoup, and so stopped posting royalty earnings to their accounts, treating those earnings as undifferentiated company income for eleven years.

This final ‘smoking gun’ memorandum gave Brown and Begle critical insights into, and evidence of, Atlantic Records’ hidden transcript. ‘[D]ominant groups’, Scott writes, ‘often have much to conceal, and typically they also have the wherewithal to conceal what they wish’.<sup>50</sup> This material had been concealed from Brown, and the attorneys she’d retained over the years, for two decades. Had this employee known that dusty box contained damning evidence of Atlantic’s hidden transcript, he or she might have been more circumspect in the face of Begle’s demands, and its concealment might have remained undisturbed.

This hidden transcript showed that Atlantic was engaging in ‘mail fraud’— knowingly using the United States mail to send out fraudulent royalty statements. Evidence of this practice made Atlantic susceptible to a suit under the banner of the Racketeer Influenced and Corrupt Organizations (RICO) Act of 1970, which provides federal criminal penalties for those who ‘use proceeds derived from a “pattern of racketeering activity” to operate...an enterprise’; this pattern is found in the ‘commission of at least two “predicate acts” [such as murder, extortion, mail fraud] within ten years of each other’.<sup>51</sup> This law was passed in order to criminalize and make vulnerable to civil charges the leaders and not just the hirelings of organizations that depend on or participate in criminal activities, like motorcycle gangs or Mafia crime families. More to the point, the RICO law is not constrained by the statutes of limitations that would have barred a standard civil lawsuit over unpaid royalties from previous decades, and it enables plaintiffs to compel the unsuccessful defendant not only to pay the plaintiff’s legal fees but also to pay triple damages. Thus, the invocation of RICO put executives on notice that they could be held perilously accountable for misdeeds carried out by their

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<sup>47</sup> Hall, ‘A Fan’, *supra* (n 49), at 6.

<sup>48</sup> Atlantic Records, ‘Memo from Fran Wakshal’ (1983) (document on file with author).

<sup>49</sup> Quoted in Greenfield, *Last Sultan*, *supra* (n 34), 297.

<sup>50</sup> Quoted in Greenfield, *Last Sultan*, *supra* (n 34), at 297.

<sup>51</sup> 18 US Code Chapter 96 (Racketeer Influenced and Corrupt Organizations); ‘RICO Reform’, Hearing convened by House of Representatives, Subcommittee on Criminal Justice, Committee on the Judiciary. Washington, DC, July 31 1986, at 1323.



subordinates, so long ago that the regular law would not have applied. In Begle's words, 'Every statement they had sent out after [the date of the memo] was just another nail in their coffin under RICO'—evidence of the commission of another 'predicate act'.<sup>52</sup> I've suggested that lawsuits are a standard tool of negotiation in the US recording industry; more often than not they culminate in out-of-court settlements and contract renegotiations rather than awards of damages or injunctions. The credible threat of criminal prosecution and civil liability under RICO is well outside that field's realm of legitimate bargaining tactics. In Ruth Brown's words, 'these memos were manna from heaven',<sup>53</sup> constituting a crucial part of the foundation for the royalty reform successes that were to follow. Moreover, as Begle and others observed at the time, RICO's attorney fees and enhanced damages provisions meant that establishing RICO as a viable new tactic in royalty recovery would attract attorneys and encourage them to take on clients they otherwise might pass over.<sup>54</sup>

As Begle's research was progressing behind the scenes, a number of public opinion-related developments were unfolding as a result of, and adding to, the increasing circulation and credibility of royalty reform's counterstory. In September of 1985, thanks in part to Begle's media connections, the CBS television network devoted a ten-minute segment of its newsmagazine *West 57<sup>th</sup>* to the problem posed by unpaid royalties to performers Bo Diddley, Brooke Benton, and Hank Ballard, in addition to highlighting Begle and Brown's efforts.<sup>55</sup> In November of that year, Atlantic released the 14-volume retrospective collection *Atlantic Rhythm and Blues 1947-1974*.<sup>56</sup> 'Ironically', wrote the *Washington Post*'s Richard Harrington, the collection 'served as a checklist of potential [royalty] plaintiffs'.<sup>57</sup> Singer Joe Turner died that same month; he had been a major Atlantic star whose dire situation the television program had discussed. In March of 1986, because he was now representing numerous veteran Atlantic R&B performers, Begle received the first royalty statements reporting earnings on the *Rhythm and Blues* collection. These statements brought into sharp relief the company's persistent habit of charging expenses to artists' royalty accounts that were not allowed under their contracts. As a Harrington put it,

Atlantic's corporate bookkeepers tried to bill both [Ruth] Brown and [Joe] Turner—who was undergoing dialysis treatments at the time and depending on benefit concerts to pay his medical expenses—for the mastering, editing, and mixing done for that collection though they hadn't recorded for the label in 25 years. Begle protested, and when [Ahmet] Ertegun heard about it, he immediately

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<sup>52</sup> Greenfield, *Last Sultan*, supra (n 34), at 297.

<sup>53</sup> R Brown with A Yule, *Miss Rhythm: The Autobiography of Ruth Brown, Rhythm and Blues Legend* (Donald I. Fine, New York NY) at 217.

<sup>54</sup> A Groer, 'Star of the Past Fires a Blast at Rock'n'Roll Royalty Ripoff' *Orlando Sentinel* (August 4, 1986), at A1.

<sup>55</sup> *West 57<sup>th</sup>*, September [Television series episode] produced by Martyn Burke (CBS News 1985).

<sup>56</sup> *Atlantic Rhythm and Blues 1947-1974: Highlights of the First 27 Years of Atlantic Black Music* [Sound recording] (Atlantic Records, New York 1991)

<sup>57</sup> Harrington, 'Rhythm, Blues', supra (n 47).

put an end to such practices; when Turner died soon afterward, Ertegun paid for his funeral and paid off the mortgage on his widow's home.<sup>58</sup>

Ahmet Ertegun, founder of Atlantic Records, had remained in a position of paternalistic authority even after he and producer/partner Jerry Wexler had sold the company to Warner Communications Inc. (WCI) for \$17 million in 1967. He was understood by many observers to bear some direct responsibility for the company's practices, and his concern with the company's reputation (and his own) made him more vulnerable than other record company executives to credible charges of artist maltreatment.

#### 4.3 Brown and Begle Recruit Advocates and Challenge the Dominant Perspective

Brown and Begle's efforts began to synchronize and synergize with related contests pressed by ongoing Civil Rights activism and unfolding in the federal government. In April of 1986, Begle met Congressman Mickey Leland, a Democrat from Texas and chair of the Congressional Black Caucus (a group of black members of Congress established in 1971 around shared commitments to continuing the black Civil Rights movement from within the US federal government), at a Women's Political Campaign Fund dinner. Ruth Brown writes that Leland was a 'diehard music fan, particularly [of] our brand'.<sup>59</sup> Leland told Begle and Brown that noted Civil Rights activist and 1984 presidential candidate Jesse Jackson was preparing to attack WCI for 'their almost complete lack of African-Americans in senior positions at the company, as well as their continuing trade with South Africa'.<sup>60</sup> Jackson, Begle, and Leland would soon yoke together their related struggles to press WCI executives on their minority hiring and royalty accounting practices. Around the same time, Begle was introduced to Congressman John Conyers, a Democrat from Michigan, by Bill Harris of the Clovers, who was Conyers' bass guitar instructor. Informing Conyers about his work with Brown and her colleagues, Begle urged the progressive congressman to oppose a pending attempt by congressional conservatives to gut the RICO law, which he presented as the only available legal remedy for Ruth Brown and her fellow Atlantic artists. That July, Conyers held a hearing on RICO reform at which Ruth Brown testified movingly about Atlantic's refusal to consider her pleas and about the many other artists who had tried and failed or who were still trying to recover royalties.<sup>61</sup> Her testimony in this very public and political venue, and its coverage in a major story by the *Orlando Sentinel's* Washington correspondent Anne Groer,<sup>62</sup> widened the crack in Atlantic's institutional and symbolic position that had been opened by the documentary revelations of the previous year.

Had Ruth Brown been seeking redress from almost any other of the 1950s R&B independents it is likely that things would have turned out very differently. Atlantic was uniquely susceptible to pressure from a well-placed attorney and a singer whose comeback was flowering. The company's success in transitioning from R&B to rock

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<sup>58</sup> Harrington, 'Rhythm, Blues', supra (n 47).

<sup>59</sup> Brown *Miss Rhythm*, supra (n 57), at 226.

<sup>60</sup> Brown *Miss Rhythm*, supra (n 57), at 226.

<sup>61</sup> 'RICO Reform', supra (n 54), at 1328.

<sup>62</sup> Groer, *Star of the Past*, supra (n 58).

music (signing what turned out to be mega-acts like Led Zeppelin, Genesis, and Crosby, Stills & Nash) had been overseen by Ahmet Ertegun, who remained the company's head. On the one hand, this continuity meant that even though the company had lost a good deal of paperwork over the years, the business records it did manage to preserve amounted to much more than was available to artists signed to companies that had not remained intact for nearly 40 years. On the other hand, Ertegun's interest in his and his company's legacy supported his strong concern with the appearance of legitimacy. Indeed, in addition to Atlantic's ambitious program of reissues of its classic R&B recordings, the 1980s saw Ertegun participating actively in the foundation of the Rock and Roll Hall of Fame<sup>63</sup> and the production of a 12-hour concert at Madison Square Garden commemorating Atlantic's 40<sup>th</sup> anniversary, headlined by an eagerly-anticipated Led Zeppelin reunion performance. These high-profile heritage projects framed Ertegun as a cultured philanthropist and Atlantic as a venerable cultural institution. Begle and Brown's unrelenting exposure not only of Atlantic Records' racialized political economy—how 'for years Atlantic benefited from the lower royalties it paid' to the black artists whose music and its sales put the company on the map<sup>64</sup>—but also of evidence of habitual royalty fraud proposed a narrative about the company that contradicted and threatened to undermine the official story that Ertegun was at pains to promulgate as he approached his eighth decade.

#### 4.4 The Reform Effort's First Major Settlement and the Rhythm and Blues Foundation

By early 1987, Begle was convinced that Ruth Brown's negative royalty balance was *not* the result of additional cash payments made by the company to the artist. With the help of gathering public opprobrium, Begle pushed the company to perform a 'test audit' on the accounts of eight Atlantic artists, requesting accounting for specific types of ongoing unauthorized charges about which he had confidentially been informed by a former Atlantic accountant. One of these was a 'packaging' charge typically included in contracts signed in the 1970s and later, but absent from the 1950s contracts; the audit turned up unauthorized packaging charges against each of the eight artist accounts ranging from \$1400 to \$106,500.<sup>65</sup> The audit revealed that the eight artists were overcharged a total of \$250,000 with respect to the type of charges Begle specified in his audit request; given the size of these artists' negative royalty balances, it was virtually certain that the test audit indicated only a fraction of the total unauthorized charges. Later in 1987, when the company finally produced sales figures for Brown's records covering the years since her 1963 departure, Atlantic's

accounting for the worldwide sale of [Brown's] recordings was so slipshod that [her \$26,000] negative balance was only shrunk by \$6,000. (It was still \$19,000 in February 1987.) This means that [her] royalty earnings, as calculated by Atlantic, for the entire 24 year period, averaged less than \$300 per year.<sup>66</sup>

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<sup>63</sup> Greenfield, *Last Sultan*, supra (n 34).

<sup>64</sup> Harrington, 'MCA to Pay', supra (n 32).

<sup>65</sup> Atlantic Records, 'Internal Audit' (1987) (document on file with author).

<sup>66</sup> Begle, 'Royalties Summary', supra (n 49) at 2.

Music journalist Dave Marsh pointed out on the television news magazine *Nightline* in 1995 that these figures defied belief; ‘it wouldn’t have been cost-effective’ for Atlantic—‘the General Sherman of its own back catalogue’—to keep records in print that sold in such small quantities.<sup>67</sup> Between the test audit’s results and Atlantic’s statement of Brown’s 1963-1987 royalties, the company’s position was steadily undermined.

Also in the spring of 1987, Begle, Congressman Leland, and Jesse Jackson had begun a series of meetings with WCI executives, with Ertegun finally participating in the fall of that year. Over the course of this series of meetings Congressman Leland proposed the creation of a foundation to oversee the reparations that Atlantic would inevitably have to make to its aging performers and/or their estates. As Ruth Brown wrote, the idea resonated with Warner Communications’ head Steve Ross because it had two great advantages:

First, it would ensure that money found its way directly into artists’ pockets. The problem with a straightforward back-payment of royalties was the slice liable to be hijacked by ex-managers and agents emerging from the woodwork at the smell of new money. There was nothing in [Leland’s suggested system of foundation grants], for example, for a Chuck Rubin. Sorry, Chuck! Second—Mickey Leland’s point in the first place—was that there did not seem to be any realistic way to expect that whatever money paid out in royalty recalculations would approach the sum actually due. Money dispensed through a ‘Rhythm and Blues’ foundation would at least begin to make up for the lost years. And the grants could be tax-free. Yep, it was a brilliant notion.<sup>68</sup>

Atlantic committed \$1.5 million to fund the Foundation, and a further \$500,000 toward future operating costs. Ahmet Ertegun reserved to himself the right to decide which ‘30 or so artists [were] to be included in royalty recalculation efforts’ that Atlantic would undertake specifically to address the claims of Begle’s Atlantic clients.<sup>69</sup> Just before the 1988 Atlantic 40<sup>th</sup> anniversary concert, Atlantic, Begle, and his clients worked out a compromise. In exchange for wiping out negative royalty balances and setting up the Foundation, the company would be responsible only for paying back royalties to cover the period 1970 to 1988 (rather than including the 1950s and 60s, for which they said they had no paperwork), and integrating those artists’ masters into their computerized royalty tracking system to ensure regular, accurate accounting and payments.<sup>70</sup> Predictably, representatives of WCI maintained that ‘the company [was] responding to artistic merit and financial need, not to the threat of lawsuits’.<sup>71</sup> Bob Morgado, senior vice president at WCI, told the *Washington Post* that ‘[t]here is no obligation on the part of companies to entertain audit challenges that are 20 or 30 years old’, although he did

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<sup>67</sup> ABC News, ‘Rhythm, Royalties, and the Blues’ *Nightline* [Television series episode] (ABC News 1995)

<sup>68</sup> Brown *Miss Rhythm*, supra (n 57), at 274.

<sup>69</sup> H Begle, ‘Chronology of Atlantic Royalty Accounting Efforts and Related Occurrences’ (n.d.) (document on file with author).

<sup>70</sup> Brown *Miss Rhythm*, supra (n 57), at 284.

<sup>71</sup> R Harrington, ‘Atlantic’s Bow to the Blues Heritage: Label is Recalculating Past Royalty Payments’, *Washington Post* May 12, 1988) at D1

concede that Atlantic ‘was founded on black music’ and that ‘[m]any of the artists who had a lot to do with the development of modern pop music, and with the creation of the business for us, never really participated in the economic fortunes of that business’.<sup>72</sup>

Over the next several years, Ruth Brown’s comeback—including her appearance as Motormouth Maybelle in John Waters’ 1988 film *Hairspray*, a Tony-winning performance in the 1989 Broadway musical *Black and Blue*, a 1989 Grammy award, and the beginning of a long-lived association with Bonnie Raitt—enabled her to continue telling her story and to advocate for royalty reform’s extension beyond Atlantic to other major labels profiting from the ongoing resurgence of interest in R&B. The R&B Foundation and its board members and supporters (including Raitt, Blues Brother Dan Ackroyd, music writer Dave Marsh, Mickey Leland, songwriter Doc Pomus, and activist Joyce McRae), aided by sympathetic reporters like Groer, David Hinckley of the *New York Daily News*, and Richard Harrington of the *Washington Post*, exhorted other major companies to join Atlantic in royalty reform. A significant boost came in January of 1989, when the controversial head of the Republican National Party, Lee Atwater, contrived an inaugural ‘Concert for Young Americans’ in honor of George Bush the elder, featuring many of the R&B artists involved in and benefiting from royalty reform.<sup>73</sup> Later that year, MCA not only wiped out negative royalty balances for the artists who had recorded decades before on companies that MCA had purchased, it also wrote new contracts paying royalties at 10%, bringing affected artists ‘into the mainstream of royalty payments’.<sup>74</sup> A few years later, Denon/the Nippon Columbia Co., and Rhino Records followed suit, eliminating out negative balances and raising royalty rates to 10% for artists whose original contracts were with R&B independents now owned by those companies. Capitol/EMI went even further, initiating the same reforms ‘for all pre-1972 artists, regardless of musical genre’.<sup>75</sup> That latter company’s CEO Jim Fifield remarked that embracing royalty reform ‘wasn’t a financial consideration. It was what I felt was the right thing to do for artists whose contracts were signed, say, in the ‘50s or ‘60s, but whose music was being purchased in the 1990s’.<sup>76</sup> This sentiment contradicts the contractarian line otherwise so ruthlessly maintained by record executives.<sup>77</sup>

Yet the Rhythm & Blues Foundation—the flagship of royalty reform’s gains—was not without controversy and its legacy is a contested one. Despite the participation of the above-named artists and advocates, the influence of industry honchos and money complicated the Foundation’s efforts to distribute its funds to needy performers. In late October of 1991, Warner Communications Inc. ‘restructured’ its 1988 promise of \$150,000 per year for operating expenses, instead splitting the next year’s \$150,000 into

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<sup>72</sup> Ibid.

<sup>73</sup> B Sisario, ‘Long-Lost Video of R&B Stars at 1989 Inaugural is to Air’ *New York Times* (February 28 2014).

<sup>74</sup> Harrington, ‘MCA to Pay’, supra (n 32).

<sup>75</sup> Bill Holland, ‘Sony, Rhino Plan Royalty Reforms for Older Artists’ *Billboard* March 4, 1995.

<sup>76</sup> ABC News, ‘Rhythm, Royalties’, supra (n 71).

<sup>77</sup> Stahl, *Unfree Masters*, supra (n 4).



three annual payments of \$50,000. According to the *Washington Post*, ‘the move provoked the immediate resignation of board member Dave Marsh, who dubbed WCI’s restructuring a ‘reneging’. He said the company’s commitment had been unconditional and WCI “had no right to unilaterally impose new conditions”’.<sup>78</sup> ‘Gerald Bursey, who oversaw the foundation’s health insurance task force, resigned in February [1994] after unsuccessfully urging the organization to do more to help artists recoup unpaid royalties from record labels’.<sup>79</sup> And in 1995, Begle himself resigned in frustration over the Foundation’s increasing operating budget and glitzy award ceremonies, and its reluctance to distribute what it now considered its principal—the \$1,000,000 or so that remained from WCI’s initial ‘gift’.<sup>80</sup> As board member Bonnie Raitt told *Rolling Stone* that year, ‘The R&B Foundation isn’t about a dinner party once a year where you get to hear some legendary people perform. The people who built this industry are suffering, and it’s not OK to wait until they’re gone’.<sup>81</sup>

## 5. Conclusion

The US recording industry of the 1980s had integrated the 1950s R&B independents’ recordings, contracts, accounting practices, and orientation toward performers into their operations. Performers’ persisting indebtedness to record companies, decades after they stopped recording, despite the continuing profitable circulation of their records, was widespread. While the dominant perspective suggests that this problem was the result of performers’ profligacy,<sup>82</sup> the analysis here has argued that this phenomenon resulted at least in part from the inability of performers to influence the terms on which they did their work, and the terms on which company’s contractual obligations would be met. Royalty reform recast the R&B artist-company relationship as one of domination, and took aim at it, bringing ethical, legal and political pressure to bear at a moment when the legitimacy of one of the major institutions in the field—Atlantic Records—was of paramount concern and hence open to inflection and challenge.

It was not foreordained that Ruth Brown, Joe Turner, the Clovers, and their colleagues would benefit materially or symbolically from the continuing circulation of their music. Drawing on critical race theory’s understanding of narrative and Scott’s conception of the hidden transcripts of power relations, this essay has argued that a fortuitous constellating of a number of facts made Ruth Brown and Howell Begle’s consequential intervention possible. Atlantic’s continuity of leadership, its inadvertent disclosure of its own hidden transcript, and its founder’s emphasis on prestige made that company, and the dominant perspective that had legitimized it, especially vulnerable to challenge. Ruth Brown’s determination to correct the systemic denial of royalties to the group of veterans to which she belonged, rather than focusing on her own fortune, her

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<sup>78</sup> R Harrington, ‘Blues for R&B Foundation’ *The Washington Post* October 9, 1991 at C7.

<sup>79</sup> F Goodman, ‘The Big Payback’ *Rolling Stone* May 5, 1994, at 15.

<sup>80</sup> H Begle, letter to board members, Rhythm & Blues Foundation, June 14, 1995 (document on file with author).

<sup>81</sup> J Wiederhorn, ‘The Royalty Scam’, *Rolling Stone* March 9, 1995, at 25.

<sup>82</sup> See, e.g., Cohodas, *Spinning Blues*, supra (n 34).

even-keeled public persona, and her penetrating and concise narrative and observations made her contributions especially credible. Begle's commanding position in an adjacent media sector, his acquaintance with influential political figures, and the support of his employer for thousands of hours of pro bono work over more than a decade gave extraordinary weight to his efforts. In the absence of any of these factors it is likely that Brown would have, at best, received some pennies-on-the-dollar settlement, of which a more run-of-the-mill royalty recovery expert would have taken as much as 50% in perpetuity.<sup>83</sup>

The work of the royalty reformers zeroed in on the ethics and mechanics of companies' royalty accounting practices, constructing a vivid image of a private, exploitive, and racialized IP regime, whose already-low royalty rates were exacerbated by evident fraud. Intellectual property rights (including contractual rights to record royalties) are potentially significant forms and/or sources of wealth, as (for example) struggles among Michael Jackson's and Jimi Hendrix's heirs show.<sup>84</sup> This axiom, as Greene has argued,<sup>85</sup> is especially crucial for black people in the United States, who have been systematically disadvantaged: by white supremacist state housing and labor policies, formal and informal exclusion from various markets, and by sedimented and institutionalized racism.<sup>86</sup> One of Martin Luther King's heirs has opined that 'copyright and intellectual property are the real estate of the future',<sup>87</sup> suggesting that the creation, management, and marketing of valuable IP is an increasingly important means of accumulation. From this perspective, black people in the United States may be able to cultivate income-generating forms of heritable wealth, improving their life chances and social mobility and narrowing the 'large racial wealth gap'<sup>88</sup> produced by centuries and generations of white supremacist state and civil society institutions. This is not to say that copyright and intellectual property are the best way or even a desirable way to achieve economic stability and social mobility. The desirability of a non-white supremacist United States with substantial social security systems and regimes of worker rights should be self-evident. Rather, the perspective is that royalty reform shows how the contracting and accounting systems of the US record industry impeded blacks' progress toward parity with whites, or at least did not support black economic progress to a degree commensurate with material or symbolic value of their contributions. The thrust of royalty reform's main arguments was that economic justice with respect to IP rights can

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<sup>83</sup> See, e.g., *The Cameron Organization, Inc., v. George Guy a/k/a Buddy Guy and GBG Enterprises*, Appellate Court of Illinois, First District, Third Division; 407 Ill. App. 3d 1184; 998 N.E.2d 981; P Span, 'A Jury Agrees These Men Wrote "Why Do Fools Fall in Love?" Now They Stand to Get a Cut. Maybe' *The Washington Post* November 27, 1992 at B1.

<sup>84</sup> (T Arango and B Sisario, 'Jackson's Estate: Piles of Assets, Loads of Debt' *New York Times* (June 27, 2009), 1; N Raafat, 'Purple Hazel! Stepsister Who Made a Fortune from Star's Death' *Sunday Mail* (Queensland, Australia). June 16, 2002, 49.

<sup>85</sup> Greene, "'Copynorms,'" supra (n 23).

<sup>86</sup> Oliver and Shapiro, *Black Wealth, White Wealth*, supra (n 25); Mills, *Racial Contract*, supra (n 1); Omi and Winant, *Racial Formation*, supra (n 14).

<sup>87</sup> Quoted in R Schur, 2009, *Parodies of Ownership: Hip Hop Aesthetics and Intellectual Property Law* (University of Michigan, Ann Arbor MI 2009), at 1.

<sup>88</sup> Oliver and Shapiro, *Black Wealth, White Wealth*, supra (n 25), at 103.

make meaningful (if still sub-optimal) changes to the lives of black performers and, as Greene<sup>89</sup> observes, can provide a forum for the consideration of further measures.

As a first issue of a larger ongoing research project, this paper has sought to lay out some of the salient aspects of this racialized political economy's subsystem of R&B exploitation. Many questions remain the answers to which will help explain and specify the royalty reform movement's 1984-2004 career. First, this paper has not said much about the conceptual frameworks, subjectivities, and narratives of the R&B performers themselves. Scott argues that 'the hidden transcript is specific to a given social site and to a particular set of actors', and that '[e]ach hidden transcript...is actually elaborated among a restricted 'public' that excludes—that is hidden from—certain specified others'.<sup>90</sup> How did these performers—as members of a restricted public—understand and narrate their experiences of appropriation, subordination, indignity when they were 'offstage'? Future work along these lines will also focus more fully on the relationship between principles of 'recognition' (questions of meaning, membership, and identity yet to be addressed systematically in the research) and 'redistribution' (the more material, political-economic questions of the kind explored in this paper) highlighted by Nancy Fraser,<sup>91</sup> with an eye to the racial hierarchies potentially at work in companies owned by first- or second-generation members of white(ning) immigrant groups. This theme will benefit from further engagement with analyses of the property of whiteness<sup>92</sup> and racial disparities in wealth accumulation and social mobility as well as the deep-seated white supremacy that undergirds social relations in the United States.<sup>93</sup>

Second, one major question is to find out what kind of impact royalty reform actually had on the socioeconomic trajectories of the R&B performers and their families. Have their heirs been afforded meaningful economic stability and social mobility as a result of royalty back-payments and new royalty rates? This question would be profitably addressed through interviews with surviving spouses and sons and daughters, in addition to other kinds of legal, primary and secondary source research. Third, political-theoretical questions of rights also merit further consideration. As individually bargained private IP rights not backstopped by federal copyright legislation, pre-1972 rights to record royalties are comparatively ephemeral, and their enforcement is constrained by parties' disparities in social power. Moreover, where subordinated groups seek rights to redress injuries, as Wendy Brown<sup>94</sup> shows, outcomes often involve further injury; to what sorts of perverse outcomes might royalty reform have led? Finally (for now), questions of aging, retirement, and disability in popular music have remained in the background here; these too are worth extended consideration. Future research will aim to address these questions while focusing in more detail on further episodes in the 1984-2004 royalty reform saga,

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<sup>89</sup> Greene, "'Copynorms,'" supra (n 23).

<sup>90</sup> Scott, *Domination*, supra (n 17), at 14.

<sup>91</sup> N Fraser, 'Debate: Redistribution or Recognition? A Critical Reading of Iris Young's *Justice and the Politics of Difference*' (1995) 3 *Journal of Political Philosophy*, 166.

<sup>92</sup> C Harris, 'Whiteness as Property' (1993) 106 *Harvard Law Review*, 1709.

<sup>93</sup> Mills, *Racial Contract*, supra (n 1).

<sup>94</sup> W Brown, *States of Injury: Power and Freedom in Late Modernity* (Princeton, Princeton, NJ 1995).

including the formation and transformation of the Rhythm & Blues Foundation, Sam Moore and Curtis Mayfield's class action suit against the AFTRA Pension and Welfare Funds, Peggy Lee's class action suit against Decca Records and its owner, MCA Records, and California State Senator Kevin Murray's pursuit of an amendment to the state's civil code regarding royalty auditing. This first phase of royalty reform resulted in an unlikely milestone: record company executives acknowledged widespread and systematic exploitation and committed money and organizational resources to redressing those past wrongs. Later phases carried the struggle to new fronts: class-action lawsuits and legislative innovation.

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