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Accounting for Injustice: AFTRA, Work & Singers' Royalties

Matt Stahl

Olufunmilayo B. Arewa

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Matt Stahl
University of Western Ontario
Faculty of Information & Media Studies

Olufunmilayo B. Arewa
Temple University Beasley School of Law
Fellow, Käte Hamburger Center "Recht als Kulture"
Universität Bonn (May-July 2019)

Introduction

This chapter focuses on contractual royalties in the U.S. recording industry. Developing Arewa's (2019) research on entertainment industry contract accounting and Stahl's (2015) research on record industry royalty reform, we aim to shed light on contractual accounting practices in the record industry and the structural asymmetries of power that characterize them. Central to our analysis is the crucial but until now unstudied role played by the Health and Retirement Funds ("AFTRA H&R Funds" or "H&R Funds") of the American Federation of Television and Radio Artists ("AFTRA") in the economic lives of U.S. recording singers. The activities of this benefits system include monitoring and auditing of singers' compensation and royalty accounts. Archival and other sorts of evidence documenting these activities provide a new and unique window into otherwise obscure accounting and business practices. In part I, we discuss the life and death of Mary Wells, a highly visible and successful recording artist in the early years of Motown. We discuss how the Mary Wells case exemplifies key aspects of the relationships among record companies, unions, and performing artists. In part II, we discuss contractual accounting in light of the historical development of the cultural industries. In part III, we outline AFTRA's relationship with its recording singer members, how singers' recording contracts articulated individual and collective bargaining, and how singers' healthcare and pension accounts expressed the asymmetries of record company royalty accounting. In part IV, we discuss the standard form and terms of recording contracts of the 1950s and 1960s and some of the manipulative accounting practices brought to light in the 1980s by "royalty reform" activists that were (and may still be) central to business practice. In part V, we briefly examine the *Moore* case, a major 1993-2002 lawsuit by aging singers against the H&R Funds, drawing on archival evidence as well as contemporaneous trade journal coverage. We conclude by returning to issues related to contractual accounting in the cultural industries. This chapter makes use of unique sources and types of data that have not been utilized in relevant scholarly literature and provides the first comprehensive examination of singers as union members.

I. Mary Wells, AFTRA, and Recording Contracts

Mary Wells was the first Motown solo superstar and helped define the Motown sound. Her enduring hit song "My Guy" made her popular worldwide. Mary Wells was also an important representative of a broader social phenomenon in the late 1950s and

early 1960s: her songs crossed a racial color line that had long been in place in the United States. Because she was able to cross the recording industry racial color line, Mary Wells "reached huge white and black audiences in America and England consistently and repeatedly . . . she achieved an impressive career total of 20 top 100 hits. She was the first artist on the Motown label to have a Billboard Top 10 and number 1 single, and she was the first to record an album for that label."[1]

Born in Detroit in 1943, Mary Wells died of cancer in Los Angeles in 1992. Despite her notable successes, Mary Wells died in poverty. She did not have health insurance, although she should have been entitled to receive coverage through AFTRA. This lack of insurance no doubt contributed to her suffering as she fought against the laryngeal cancer that ultimately contributed to her death. Following her diagnosis of advanced cancer of the larynx in 1990, her initial medical expenses are conservatively estimated to have been $140,000.[2] After deciding to forgo the removal of her larynx recommended by her doctors, Mary Wells underwent intensive radiation and was no longer able to perform. Because her illness prevented her from performing, she did not have income to pay her expenses; she was evicted from her townhouse, her phone was shut off, and her car repossessed.[3] The life and death of Mary Wells reveals critical aspects of music industry institutional structures that have exploited singers and other musicians, particularly but not only African American ones, in varied times and places since at least the dawn of the recording industry.

The poverty and death of Mary Wells tell us about the contractual relationships that pervade the recording industry and entertainment sector more generally. These contractual relationships highlight the tenuous status of many artists by multiple measures. For example, recording industry contracts reflect ambiguities about the work status of performing artists, who receive certain benefits typically associated with being an employee, as compared to an independent contractor. Performing artists, through their union membership, may receive retirement and health insurance benefits, which are often thought of as attributes of employment. Their contracts may refer to an employment term.[4] At the same time recording artists may not be treated as employees by other measures, including at times issues related to control.[5] Performing artists have long exemplified issues related to employment status now widely associated with the digital

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[1] PETER BENJAMINSON, MARY WELLS: THE TUMULTUOUS LIFE OF MOTOWN'S FIRST SUPERSTAR ___ (2012).
[2] *Id*. at 224, 230.
[3] *Id*. at 230.
[4] *See, e.g.*, Exclusive Artist's Recording Contract between MCA Records, Inc. and Olivia Newton-John (April 1, 1975), Los Angeles County Archive; AFM Phonograph Record Contract between Capitol Records and Nellie Lutcher (April 1, 1947) Howell Begle Collection, University of North Carolina, Chapel Hill; as well as agreements between Atlantic Records and Ruth Brown (June 2, 1958), the Drifters (May 10, 1959), the Clovers (December 18, 1952), Joe Turner (February 15, 1954), and the Coasters (March 23, 1959), Howell Begle Collection, University of North Carolina, Chapel Hill.
[5] V.B. Dubal, *Wage Slave or Entrepreneur?: Contesting the Dualism of Legal Worker Identities*, 105 CAL. L. REV. 101, 110-111 (2017) (noting that "the legal definitions and doctrinal tests demarcating the protected employee in federal, state, and municipal work laws are indeterminate" and discussing legal and doctrinal tests under federal, state law, and municipal laws).

era gig economy. The term "gig" comes out of contexts of musical performance as a slang term for a short engagement.[6] Well before the advent of the digital-era gig economy, many performing musicians were living in precarious, catch-as-catch-can conditions, presaging the nature of work and employment arising in today's gig economy.[7]

Recording industry contracts also underscore economic relationships and processes that may contribute to poor economic outcomes for many artists. Performing artists such as Mary Wells are members of unions that ultimately exercise little effective control over the individual terms of the contracts such recording artists sign with record labels. Unions do play a role, however, in creating plans under collective bargaining agreements that provide recording singers and other performers retirement and medical benefits due them. Since 1959, under AFTRA's Code of Fair Practice for Phonograph Recordings (or Phono Code, known today as the Sound Recording Code), recording companies have been required to make contributions to AFTRA's Health and Retirement Funds in proportion to royalties and other compensation paid to artists.[8] In the case of 1960s recording artists, AFTRA did not adequately monitor or enforce recording companies' compliance with payment obligations to the health and retirement funds. Mary Wells's health policy was said to have been cancelled by mistake, and the union eventually paid for much of her medical treatment.[9] In addition to assistance with medical costs, Mary Wells needed money to cover living expenses. She received support from other artists and institutions, including Joyce and Sam Moore, the Rhythm & Blues Foundation, Bruce Springsteen, Anita Baker, the Temptations, Rod Stewart, Diana Ross, Aretha Franklin, Berry Gordy, Bonnie Raitt, Martha Reeves, Phil Collins, Robert De Niro, Frank Sinatra, Smokey Robinson, Stevie Wonder, and Gladys Knight. Friends and fans had raised a total of $150,000 by September 1991.[10]

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[6] James Bau Graves, The Original Gig Economy, Many Futures of Work: Possibilities and Perils 2018 Conference, https://www.futuresofwork.org/s/Graves-Orig-Gig-Econ-II.pdf.

[7] Elka Torpey and Andrew Hogan, Working in a Gig Economy, U.S. Bureau of Labor Statistics, May 2016, https://www.bls.gov/careeroutlook/2016/article/pdf/what-is-the-gig-economy.pdf. Social histories of music-making stress the everyday vulnerability of medieval performers in terms likely familiar to workers in today's Uberizing economy: "To be a *Spielmann*," a medieval singer not affiliated with a court or employed by a town, "meant to lead a restless existence. [A]s the weaker one [in any social relation], he had to surrender himself to a fate without being able to plan his life rationally. He had to forego striving for a solid existence." WALTER SALMEN, "THE SOCIAL STATUS OF THE MUSICIAN IN THE MIDDLE AGES" at 26, in THE SOCIAL STATUS OF THE PROFESSIONAL MUSICIAN FROM THE MIDDLE AGES TO THE 19TH CENTURY.

[8] Section 30 of the 1959 Code, the first to cover recording singers under the Health and Retirement Funds, mandates that each company annually makes to the Funds "a payment equal to 5% of the gross compensation actually paid to an artist by the company in respect of services (including rehearsal) rendered by him"; "gross compensation" is subsequently defined as "including salaries, earnings, royalties, fees, advances, guarantees, deferred compensation, proceeds, bonuses, profit-participation, shares of stock, bonds, options and property of any kind or nature whatsoever paid to the artist directly or indirectly or to any other person, firm, entity or corporation on his behalf, and/or whether paid during the term of this Code or the artist's individual agreement with the Company regardless of the continued existence of this or successor Code."

[9] BENJAMINSON *supra* note 1, at 231.

[10] *Id*. at 233.

Performing artists such as Mary Wells sign agreements with record labels that typically entitle the artists to royalties based on unit sales and, often, other income streams, at rates set out in the contract. The record labels calculate the amounts due to performing artists under such contracts but are far from neutral parties in this process. As will be discussed in this paper, royalty calculations can often be complex, nontransparent and amenable to flexible interpretations of contractual accounting. Further, record labels have incentives that may ultimately work against performing and other artists. Notably, record companies benefit when they are able to use techniques of contractual accounting for royalties that shift money due to artists to the record companies themselves.

The work status and contractual relations of performing artists have long been issues of contestation. Arguments over record royalties have been common events in the recording industry since the earliest days of the commercial recording industry.[11] Recording industry firms have historically exploited rural artists and have used exploitative tactics with multiple generations of African American artists.[12]

Recording artists regularly assert that record companies underpay them; if a company sees continuing profitability in the artist, the assertion might lead to a renegotiation of certain contractual terms. An artist might be able to hire an auditor—if she or he is wealthy enough—individual artist audits are expensive, time-consuming and severely limited by company policy to only certain forms of documentation. One thing is certain: decades' worth of assertions and audits have not notably altered opaque royalty accounting practices that continue to be the norm in the recording industry. Recording industry firms typically pay no penalty for underpayment of contractual royalties; the most a company can be compelled to do is to pay what can be showed as owing, and even then the typical result is settlement of less than one hundred cents on the dollar.[13]

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[11] Exploitation of musicians and disputes about royalties had emerged by the early blues era. In the case *Gee v. CBS, Inc.*, 471 F. Supp. 6110, 611 (1979), the heirs of the late Bessie Smith, one of the luminaries of the early blues era, sued Columbia Records, Inc. and its parent corporation, CBS, Inc., alleging that all recording contracts and copyright agreements entered into by Smith and Columbia between 1924 and 1933 "are invalid because of their unconscionability and Columbia's overreaching . . . and were the product of race discrimination." In the mid-1930s, folk/blues singer-songwriter Huddie Ledbetter (also known as Lead Belly) threatened to sue folklorist John Lomax for nonpayment of royalties under a management contract Ledbetter signed with Lomax. Ledbetter and Lomax settled their dispute. Brian Lukasavitz, *Blues Law: Lead Belly vs. Lomax*, American Blues Scene, Jan. 13, 2014, https://www.americanbluesscene.com/blues-law-lead-belly-vs-lomax/; NOLAN PORTERFIELD, THE LAST CAVALIER: THE LIFE AND TIMES OF JOHN A. LOMAX 365-366 (1996); *see also* Robert Springer, *Folklore, Commercialism and Exploitation: Copyright in the Blues*, 26 POPULAR MUSIC 33, 39 (2007) ("The socio-economic position of African-Americans in the South, their frequent illiteracy and the fact that they were novices in the world of commercial music, made them easy prey who could be exploited without contract or persuaded to sign away their rights.") (citations omitted); Amy Absher, *Traveling Jazz Musicians and Debt Peonage*, 37 AM. MUSIC 172, 176 (2019) (discussing an instance in the 1930s of debt peonage, a form of enslavement in which traveling jazz musicians "were offered the opportunity to work or face the alternative to labor: starvation, imprisonment, and violence.").

[12] Springer, *supra* note 11; Stephen Calt, *The Anatomy of a "Race" Music Label: Mayo Williams and Paramount Records*, *in* RHYTHM AND BUSINESS: THE POLITICAL ECONOMY OF BLACK MUSIC 86 (Norman Kelley ed., 2002).

[13] KEVIN MURRAY ARTICLE

The union status of singers has varied over time. Since 1951, recording singers have been covered by the American Federation of Television and Radio Artists (or AFTRA, which merged with the Screen Actors Guild in 2012 to form SAG-AFTRA) under the Phono Code. Unions such as SAG-AFTRA negotiate and enforce collective bargaining agreements. These collective bargaining agreements guarantee minimum (never maximum) salaries, set standards for safe working conditions, and set health and retirement benefits.[14] The negotiating power of recording artists and economic terms of such contracts vary significantly but are within the guarantees established by AFTRA if they meet the Phono Code's requirements. However, although AFTRA contracts include procedures for binding arbitration, AFTRA does not resolve disputes between recording singers and record companies. As a result, the essential economic terms of the relationship between the recording singer and recording company are largely unregulated by AFTRA.

The AFTRA Health and Retirement Funds are a system of employee benefits tied directly to individually- and collectively-bargained forms of wage and non-wage compensation related to work in a group covered by AFTRA. Recording singers are just one of several groups covered by AFTRA; other groups include performers in radio, television, and advertising. To claim healthcare and pension benefits, union members must meet and/or maintain certain earnings thresholds by working for signatory companies.[15] Signatory companies fund individual healthcare and pension accounts through annual contributions equal to a percentage of each performer's earnings for that year.[16] AFTRA H&R Funds monitor and enforce company contributions and administer collectively-funded healthcare and retirement plans. This system was established in the 1950s for each of AFTRA's employee groups through collective bargaining.[17]

AFTRA H&R Funds are an entirely employer-funded "multi-employer pension plan," the first of its kind in the cultural industries.[18] More significantly, by including record royalties along with wages and residuals as the basis for determining eligibility and amounts of health and retirement benefits available to performers, the union and signatory companies created a *private* enforcement system for the royalty terms in individually-bargained agreements between performing singers and recording companies. The AFTRA H&R Funds' structure created an entity that was legally separate from both the signatory companies and the union, governed by a board of trustees with A) much

[14] American Federation of Television and Radio Artists, The People Who Entertain and Inform, https://web.archive.org/web/20120306194259/http://www.aftra.org/8B5287F230CD40458B2B226EAECFFD5C.htm.
[15] These thresholds are among the many terms covered in rounds of bargaining between the union and employer groups in each sector and were regularly published in AFTRA's "Your Benefits" pamphlets distributed to members (**citation**).
[16] These rates too are among the many terms covered in rounds of bargaining between the union and employer groups in each sector and were regularly published in AFTRA's "Your Benefits" pamphlets distributed to members (**citation**).
[17] Rita Morley Harvey offers perhaps the only published account of this decade-long, multi-sector project. See her *Those Wonderful, Terrible Years: George Heller and the American Federation of Television and Radio Artists*, Carbondale, Illinois: Southern Illinois University Press (1996).
[18] *Id*.

greater power than individual singers, and B) a fiduciary obligation to enforce timely royalty accounting and accurate payment by signatory companies.

Since 1959, under the Phono Code, recording contracts between singers and signatory companies have obligated those companies to report individual singers' earnings to AFTRA's Health and Retirement funds, and to make annual payments to the funds on behalf of each singer. H&R Funds contributions are subject to AFTRA oversight and monitoring. Further, in 1974, the U.S. Congress passed the Employee Retirement Income Security Act (ERISA),[19] which expanded federal government regulatory oversight over private-sector retirement plans.[20] Little government regulation of private pension plans existed prior to the passage of ERISA.[21] ERISA establishes fiduciary standards that require that employee benefit plans such as private pension funds be handled prudently and in the best interests of plan participants; more specifically, ERISA fiduciaries have duties, including the duty of loyalty, duty of care, and duty to act in accordance with plan documents.[22] The AFTRA Health and Retirement Funds Trust is an ERISA fiduciary.[23] The Health and Retirement Funds Trustees have significant power to make determinations about benefits to be paid to AFTRA singers and are authorized to make compromises, settlements, and releases of claims, and construe the provisions of the Trust Agreement.[24] Constructions of the Trust Agreement rendered in good faith are "binding" on AFTRA and the record companies.[25] AFTRA, as a fiduciary, has a legal obligation meet the requirements of the duty of care toward members.

Determination of the amounts due to recording singers and such singers' eligibility for AFTRA benefits require understanding of the payment terms in contracts between such artists and record companies. Issues emerging from such contracts are at the core of myriad industry disputes today. Their legal status empowers the Funds to examine record companies' books. Insofar as it documents the H&R Funds' monitoring and enforcement activity, the AFTRA archive concentrates a great deal of relevant evidence concerning the routine practices of major and minor record companies, offering

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[19] 29 U.S.C. §§ 1001-1461 (2012).
[20] Rebecca J. Miller, Robert A. Lavenberg & Ian A. Mackay, *ERISA: 40 Years Later*, J. ACCOUNTANCY, Sept. 1, 2014, https://www.journalofaccountancy.com/issues/2014/sep/erisa-20149881.html.
[21] James G. McMillan, III, *Misclassification and Employer Discretion under ERISA*, U. PA. J. LAB. & EMP. L. 837, 841 (2000).
[22] Patrick Purcell & Jennifer Staman, *Summary of the Employee Retirement Income Security Act (ERISA)*, (RS34443) CRS 1, 27-33 (2008). Washington, DC: Congressional Research Service, http://digitalcommons.ilr.cornell.edu/key_workplace/ 505/.
[23] The AFTRA health and retirement funds were established pursuant to an Agreement and Declaration of Trust between AFTRA, the record companies, and other entities. This agreement created two funds, a health fund and a retirement fund, and twenty trusteeships, the Funds Trustees, which positions are held by 10 individuals chosen by record companies and 10 individuals chosen by AFTRA. *Moore v. AFTRA*, *supra* note ___, at 3; *see also* AFTRA Retirement Plan, Form 5500, Annual Return/Report of Employee Benefit Plan for Plan Year End Nov. 30, 2017 (2016); AFTRA Health Plan, Form 5500, Annual Return/Report of Employee Benefit Plan for Plan Year End Jan. 1, 2017 (2016).
[24] *Moore v. AFTRA*, *supra* note ___, at 3.
[25] *Id*.

an extraordinary window onto the otherwise carefully-guarded contractual accounting practices of the U.S. recording industry of the 1960s, 1970s, and 1980s.

II. Contractual Accounting and the Rise of the Cultural Industries

The contractual accounting practices at issue in the *Moore* case are just one type of measurement used by recording firms and are important for understanding outcomes for performing artists. Firms employ accounting measurements for various purposes within the firm, including to account for firm activities as a whole. Contractual accounting practices are best understood within the context of firm accounting practices generally.[26]

Entertainment industry firms effectively keep two sets of books,[27] one related to financial accounting at the firm level and the other based on industry contracts (contractual accounting).[28] Financial accounting is reflected in public presentations of industry financial statements and is typically subject to various oversight mechanisms, including audits and, in some instances, mandatory securities law disclosure requirements. Contractual accounting reflects special accounting treatments created within an industry that are used to account for contractual payments owed to industry participants. In the cultural industries, the contracts upon which contractual accounting is based reflect industry power hierarchies and are used by cultural industry firms to, among other things, make determinations about how to apply costs to a particular contract and whether royalties should be payable to a particular artist.

Contrasts between financial statement accounting at the firm level and contractual accounting for individual contracts highlight ways in which accounting practices, which rarely are closely examined in other than a highly technical manner, are at the heart of the modern business enterprise. Financial statements, which have become a common language of business and basis for myriad business practices, are widely used by multiple audiences. For example, those within companies use financial statements for varied purposes, including for planning, monitoring, and compliance purposes, while regulators and investors use company financial statements for varied purposes.

Financial statement accounting became increasingly standardized in the context of nineteenth and twentieth century industrial enterprises.[29] However, industrial enterprises were not the only businesses to flourish during the nineteenth century. The development mass media, led by the publishing industry, accelerated in connection with a growing

[26] [Olufunmilayo B. Arewa & Matt Stahl, Accounting, Accountability, and Singers' Royalties, Working Draft, July 2019].
[27] Companies also typically keep a separate set of books for tax purposes. Tax accounting will not be discussed in this chapter. *See* Celia Whitaker, *How to Build a Bridge: Eliminating the Book-Tax Accounting Gap*, 59 TAX LAWYER 981, 982-985 (2006).
[28] Reed Abelson, *The Shell Game of Hollywood 'Net Profits': DreamWorks May Be Shaking Up Some Time-Honored Accounting Habits*, N.Y. TIMES, March 4, 1996, www.nytimes. com/1996/03/04/business/shell-game-hollywood-net-profits-dreamworks-may-be-shaking-up-some- time-honored.html.
[29] Arewa & Stahl, *supra* note 26.

body of copyright law,[30] under which a mass market for books quickly arose.[31] In this context the relationships between authors and publishers grew increasingly complex as financial stakes mounted. During the early development of the commercial book publishing industry, contracts with authors were based on varying criteria. Publishing on commission, which required that authors take the financial risk of their books, flourished.[32] In Britain, subscription became a popular publication method (after patronage) in the late 1600s.[33] In the eighteenth and nineteenth centuries, the half-profits system was a risk sharing approach to publishing in which authors shared risk and agreed to receive 50 percent of book sale revenues minus costs.[34] The half-profit system was abused by publishers who, "through misleading accounting and inflation of distribution and production costs, could emerge with more profit at the expense of the author."[35] Publishers also bought author copyrights outright at a fixed price. In the late nineteenth century, publishing contracts based on half-profits were giving way to what one author has characterized as an "American" style royalty basis.[36]

As had been the case with books and the relation of author to publisher, the rise of the printing press contributed to the transformation of old systems in music based on patronage.[37] Under the older patronal system, musicians were often attached to upper class households.[38] The marketization of music—exemplified by the 1760-1800 career of Haydn, which spanned this transition—has been referred to as "emancipation" of musicians from household service.[39] As popular composers became market actors, lawmakers became susceptible to demands for the extension of copyright.[40] The nineteenth century movement to a mass music market, at first for sheet music, was likewise closely connected to the development of copyright law.[41] One study of the royalty ledgers of a British publishing company in the late nineteenth and early twentieth centuries found five types of royalty arrangements with authors, many of which remain evident today: (1) outright purchase by publisher of the author's copyright; (2) publisher payment of a royalty; (3) publisher payment of a royalty with an advance; (4) publisher

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[30] Mark Rose, *Nine-Tenths of the Law: The English Copyright Debates and the Rhetoric of the Public Domain*, 66 LAW & CONTEMP. PROBS. 75, 75 (2003) (discussing early copyright debates and the origins of conceptions of literary property, which is often seen as reflecting the settlement and enclosure of the literary world).

[31] ALEXIS WEEDON, VINCENT NEWEY & JOANNE SHATTOCK, VICTORIAN PUBLISHING: THE ECONOMICS OF BOOK PRODUCTION FOR A MASS MARKET 1836-1916 at 31 (2016).

[32] Leslie Howsam, *Forgotten Victorians: Contracts with Authors in the Publication Books of Henry S. King and Kegan Paul, Trench 1871-89*, 34 PUBLISHING HIST. 51, 51 (1993).

[33] FINKELSTEIN & MCCLEERY, *supra* note ___, at 76.

[34] *Id*.

[35] *Id*.

[36] Howsam, *supra* note 32, at 51.

[37] William Weber, *Mass Culture and the Reshaping of European Musical Taste, 1770–1870*, 25 INT'L REV. AESTHETICS & SOC. MUSIC 175, 186 (1994).

[38] *Id*. at 177-78.

[39] See e.g. Salmen – social obligations of the emancipated musician; Petzoldt – economic conditions of 18th c musicians; Carlton – changes in status and role-play: the musician at the end of the eighteenth century.

[40] Kretschmer and kawohl

[41] *Id*. at 177-78; Jane A. Bernstein, *Printing and Patronage in Sixteenth-Century Italy*, 16 REVISTA DE MUSICOLOGÍA 2603 (1993); Weber, *supra* note 37, at 182 (citations omitted).

payment of a royalty after a contribution from author for expenses; and (5) publisher would publish at author's expenses.[42] Recording artists today would find these nineteenth and early twentieth century compensation models familiar.

Copyright law and the effective control of content have provided key existential conditions for media businesses, at least prior to the digital era. Compensation models in music and other cultural industry firms have reflected sector-specific particularities of the application of copyright. In the United States, recorded music typically involves two distinct copyrights, one attaching to the musical composition, which includes musical notation and any lyrics,[43] the other to the sound recording.[44] These two copyrights are handled through two distinct systems. In typical music publishing agreements, songwriters and composers assign all or a portion of the copyright in their musical compositions to a music publisher; under most exclusive recording contracts, recording artists assign their copyright in sound recordings containing their performances to a record company. Assignments by songwriters/composers and recording artists are typically made in exchange for promised payments of future royalties. Music publishers exploit musical compositions and share income with composers according to copyright-conforming individual contracts and depend on copyright law for the protection and enforcement of their rights. Royalties payable to composers and songwriters from public performances of their musical compositions are collected and distributed by performing rights organizations (PROs), which are a form of Collective Management Organization (CMO). PROs collect payment from venues where music is performed, and typically directly pay songwriters and composers their share of proceeds from public performances.[45] These organizations originated out of lobbying and self-protective efforts by mid-nineteenth century composers; ASCAP, BMI, and SESAC are the primary PROs in the United States.

By contrast, the intellectual property and compensation relations between recording artists and record companies in the United States work differently and reveal different assumptions. Prior to 1972, sound recordings were not protected by federal copyright law and performers, even after enactment of copyright protection for sound recording, did not receive performance rights similar to those of composers. Singers (or the holders of the sound recording rights they assign) cannot control the uses of sound recordings the ways that composers can scores. As a result, no royalty rights-based interest groups have arisen in the United States to collect payments for singers, other

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[42] John R. Turner, *J.W. Arrowsmith's Royalty Ledger*, 48 PUBLISHING HIST. 85, 86 (2000).

[43] Shapiro, Bernstein & Co. v. Jerry Vogel Music Co., 161 F.2d 406, 409 (2d Cir. 1946).

[44] Sound Recording Act of 1971, Pub. L. No. 92–140, 85 Stat. 391 (1971) (amending the Copyright Act to provide for the creation of a limited copyright in sound recordings for various purposes, including protecting against unauthorized duplication and piracy of sound recordings).

[45] This means that unlike recording singers, songwriters and composers have a stream of revenue that may not be subject to recoupment by the music publisher. Industry practice may, however, be changing, and music publishers may be increasingly seeking to have payments due songwriters on account of public performances pass through the music publisher to enable the publisher to recoup advances. *See* The Music Publisher and Songwriter Relationship, RoyaltyExchange.com, January 4, 2018, https://www.royaltyexchange.com/blog/the-songwriter-and-music-publisher-relationship-pt-4#sthash.CaILamye.dpbs.

musicians, or other participants in the creation of sound recordings, such as producers.[46] Further, performers' rights that might otherwise be received through copyright or related rights have in the United States have typically been incorporated in industry collective bargaining arrangements.[47]

The enactment of the sound recording copyright and development of related rights for performers reflect conceptions of musical authorship that see performers as non-authors who make marginal contributions to works authored by others by virtue of their interpretation of such works.[48] Copyright and related rights in connection with sound recordings reflect underlying assumptions about musical authorship that is inconsistent with how music is actually created, particularly today.[49]

Although copyright is an important background factor in the relative allocation of payments within the music industry generally, payments due recording artists are to a significant degree defined by collective bargaining arrangements and the terms of individual contracts such artists enter into with recording industry firms. Most artists typically have little negotiating leverage in entering into contracts with recording companies. Recording industry firms are also typically given contractual authority to make determinations about payments to artists. The combination of disadvantageous contractual terms, minimal negotiating power for most recording artists, and recording industry companies' ability to make determinations about payments to artists have contributed to what can only be characterized by pervasive shortfalls for many recording artists in both royalty payments and health and retirement benefits contributions. This pattern is in part due to recoupment practices discussed below and inappropriate allocation of costs to individual artist accounts in contractual accounting for royalty

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[46] In contrast, some jurisdictions have created related rights or neighboring rights to copyright, which provide for a right of remuneration payable to performers or producers of records or both when commercial sound recordings are communicated to the public or used for broadcasting. These rights are typically seen as not related to the authorship of musical works. In such jurisdictions, neighboring rights collection societies and other CMOs that manage collection of payments due to performers and producers have arisen. International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, adopted in Rome, October 26, 1961, https://www.wipo.int/treaties/en/text.jsp?file_id=289757; World Intellectual Property Organization (WIPO), WIPO Performances and Phonograms Treaty (WPPT), adopted in Geneva, December 20, 1996, https://www.wipo.int/treaties/en/text.jsp?file_id=295578; WIPO, Collective Management of Copyright and Related Rights, https://www.wipo.int/copyright/en/management/.

[47] Robert A. Gorman, *The Recording Industry and Union Power: A Case Study of the American Federation of Musicians*, 37 SOUTHWESTERN L.J. 697, 698 (1983) (noting that in the absence of copyright protection, "[l]abor organizations representing performers—instrumental musicians, singers and actors—have therefore attempted to secure such performers' rights through the private mechanism of collective bargaining.")

[48] U.S. Congress, House, Committee on the Judiciary, Performance Rights in Sound Recordings: Report Mandated by Pub. L. 94-553, 95 Cong., 2 sess., Sept. 22, 1971, pp. 3-4, https://www.copyright.gov/reports/performance-rights-sound-recordings.pdf (noting that sound recordings typically reflect three separate contributions: the contributions of authors of the musical or literary works, the contributions of performers, whose performances reflect some type of interpretation of the underlying musical work, the and the contributions of record producers, who capture, edit, and mix sounds reproduced on the record).

[49] Olufunmilayo B. Arewa, *A Musical Work is a Set of Instructions*, 52 HOUSTON LAW REVIEW 467 (2014).

payments, which means that the effective royalty rate that an artist receives may be well below the royalty rates identified in the contract.[50]

III. Unionized Recording Singers, Compensation, and Benefits

Individual recording contracts between performing artists and record companies typically delineate the business relationship between the artist and the record company. Such contracts typically entitle performing artists to varied types of payments, including artist advances, privately-bargained royalty rights, hourly wages for recording sessions, and other payments. As noted above, payments due to recording and other artists have long been a subject of dispute. The *Moore* case, filed in October 1993 against AFTRA, a number of signatory record companies, and the AFTRA H&R Funds, offers an important window through which to evaluate issues related to recording artist compensation that have long been contested.[51]

Evidence presented in this lawsuit and other settings strongly suggest that recording industry firms have engaged in a systematic and longstanding pattern of under-reporting and under-paying royalty payments to singers and that such firms also failed to make required contributions to the AFTRA H&R Funds.[52] These recording industry firm practices appear to have been facilitated by inadequate monitoring and enforcement by the H&R Funds. Moreover, evidence from AFTRA's archive[53] shows that H&R Funds employees were aware of the problems addressed by the *Moore* lawsuit at least two years before the singers brought AFTRA and the H&R Funds to court.

The status of singers within AFTRA and the music institutional landscape is relevant to this legal case. AFTRA's executive officers and bargaining teams established the H&R Funds and made their health and pension plans available to qualifying performers in all AFTRA sectors over the course of many rounds of bargaining between 1950 and 1960.[54] Recording singers were the last group to be included in the H&R Funds; the H&R Funds first appeared in the 1959-1962 Phono Code, negotiated in 1958. Recording singers were also the smallest occupational group covered by AFTRA, and it was not until the 1990s, after Sam Moore and his co-plaintiffs filed suit, that the H&R Funds Board of Trustees included a single member with record-industry experience. In the perspective of one director of the Funds, singers' marginal status in AFTRA central to their experience of royalty and benefits shortfalls.

Records companies' annual contributions to AFTRA singers' H&R accounts are only one of several forms of extra-wage compensation characteristic of entertainment unions' collective bargaining agreements. Although such non-wage payments take different forms for members in AFTRA's different employee groups (and for members of other Hollywood unions), they have in common the principle that certain (re)users of existing recorded performances must make additional payments to the original

[50] Stahl 2015 on Begle's 'test audit'
[51] *Moore v. AFTRA*, *supra* note ___.
[52] Fred Williams, "Rockers Sing Pension Blues: Musicians Sue Recording Industry over Lack of Benefits" *Pensions and Investments* March 7, 1994.
[53] Located at the Tamiment Library, New York University.
[54] Harvey, *supra* note 22.

performers. For example, when a television station or network rebroadcasts (or "reruns") old television programs that include AFTRA-covered performances, additional payments, calculated as a percentage of their original performance fees/wages, must be made to those AFTRA members who performed in the original video-recorded performances. This is sometimes explained as compensation for the effects of reuses on the market for new performances: when air-time can be filled by recordings, fewer new performances are needed.[55]

Unlike singers' royalties, residuals for television and radio performers are negotiated and overseen by AFTRA (though AFTRA singers performing on TV or radio do so under the TV and Radio Codes and are entitled to residual payments on the occasions that those recordings are rebroadcast).[56] Like royalties, residuals count as "covered earnings" under the Phono Codes of the 1960s, meaning that they are part of a performers' annual gross compensation as defined by the Codes, the basis on which companies' contributions to benefits plans are calculated. The formulas for calculating payments owing to original performers are core features of collective bargaining agreements throughout the entertainment industry, and controversy over the scope and rates of residual compensation have led to the majority of Hollywood performer labor actions.[57] Since their establishment in the Hollywood unions, these modes of compensation have become central to the political economy of the U.S. entertainment industry.[58]

Like residuals, AFTRA singers' royalties reflect the continuing market value of original performances, but unlike residuals, record company royalty obligations and rates are established through *individual* negotiations between performers and record companies. Royalties are *not* mandated collectively, and they can vary extremely—across categories of singers at any given time, across singers' careers, over years or decades, and across other institutional lines. For the last two or three decades, royalty rates for promising and established acts have been around 10-20%; Michael Jackson's reported (and possibly apocryphal) early 1980s rate of 42% has probably never been equaled, let alone exceeded, by another artist signed to a major company.[59] When Sam Moore and his early 1960s R&B colleagues were signed, royalty rates typically ranged from 1-5%.[60] The highly individualized and contingent nature of royalty agreements already suggests that a benefit plan funded primarily (or even partly) through performers' royalty income will have a wide range of outcomes, even if reporting, contribution, monitoring, and enforcement are relatively accurate and effective.

By 1959, each of AFTRA's sector-specific collective bargaining agreements (the various Codes of Fair Practice) required signatory companies to report, and to contribute

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[55] *Id.*
[56] Future of Music Coalition, Artist Revenue Streams Case Study: Background Vocalist, March 2014, at 8, 10, http://money.futureofmusic.org/wordpress/wp-content/uploads/2014/03/ARScasestudyAY.pdf.
[57] See Jan Wilson "When Hollywood Strikes" *Labor Law Journal* Oct. 1, 1991, 693-707.
[58] Paul and Kleingartner supra note 73.
[59] See Jonathan Blaufarb "The Seven-Year Itch: California Labor Code Section 2855" *Hastings Communication and Entertainment Law Journal* 6(3) 653-693 (1984).
[60] Many contracts stipulated royalty rates, accounting, and payment obligations without any executive intention of payment. See Richard Carlin *Godfather of the Music Business: Morris Levy* University Press of Mississippi (2016).

annually a sum equivalent to a percentage of, each employee's "covered earnings" each year, to the AFTRA funds under the employee's name. For recording artists, this amount was initially set at 5%, all of which was payable by recording companies, with nothing withheld or paid out of employees' wages or other earnings. In the 1970s, the contribution amount rose to around 10% and remained close to that level through the early 1990s.

For most of AFTRA's members—those working in broadcast and advertising—this system appears to have worked pretty well. The reporting and monitoring of earnings and the contribution and enforcement of payments were comparatively simpler when they concerned regular, salaried employees, such as radio announcers or television actors, whose earnings were easily tracked, or even calculable in advance. Moreover, residuals payment rates were clearly set out in collective bargaining agreements, and the licensing of an existing program or series was a complex but routine affair involving participants from separate organizations in a regulated industry whose output could be comparatively easily monitored.

Recording singers, working irregularly under AFTRA contracts, likely making much more of their income through live performances, lacked such institutional "grids" by which earnings and contributions could be as clearly rationalized, predicted, inspected, or regulated. For reports and payments on royalty earnings the Funds depended *entirely* on record companies' accounting. As noted above, in the United States, no performing rights organizations-like institutions arose to act as independent monitors or enforcers with respect to the circulation and performance of sound recordings. Standard recording contracts now provide for artist audits of amounts paid under contracts. But, then and now, individual singers without the money to hire an auditor and/or attorney had little or no effective means to check the timeliness or accuracy of company royalty accounting. They had even less ability to verify the sufficiency or accuracy of recording company contributions to the H&R Funds. The H&R Funds alone had the effective authority to enforce companies' contribution obligations, and therefore the authority to audit artist royalty accounts and other artist earnings to assess the accuracy of H&R Fund contributions. The 1993 *Moore* suit argued that, as a fiduciary, the AFTRA H&R Funds should have exercised that power.

Signatory record companies were required to file earnings reports and make Funds contributions within temporal windows set out in the Phono Code. Timeliness was crucial: if the H&R Funds did not receive the required payment within a certain period, then the earnings would not be credited to that period, and the performer might lose healthcare coverage or pension credits or might be delayed in establishing eligibility for benefits. (Funds trustees did have the authority to change or make more flexible that policy, but, with the exception of a brief period to be discussed in future work, they did not.) Affidavits filed in the *Moore* case by a former director and a former royalty expert of the H&R Funds,—as well as internal memoranda and auditing documents—indicate that record company contributions were usually late, and that companies would often pay little or nothing until the H&R Funds audited or threatened to audit them.[61] The difficulties Mary Wells faced in obtaining health insurance benefits when she had

[61] Located in the David Hinckley papers at the Rock and Roll Hall of Fame and Museum Archive and in the AFTRA collection at the Tamiment Library, NYU, respectively.

advanced cancer and her death stood as an example of what many African American R&B and soul singers could face should they be deemed ineligible for H&R coverage, as Mary Wells had been.

IV. Recoupment and Recording Company Practices

For singers, the gaps between the AFTRA H&R Funds' commitment to monitor earnings and enforce payments (as established in the Phono Codes from 1959 on) and the laxity of actual monitoring and enforcement (as later demonstrated by the Funds' continual dependence on after-the-fact auditing) was only part of the problem. Perhaps even more significantly, the H&R Funds' accounting and enforcement system as it concerned recording singers was shaped by and around the record industry contract practices of the time. These practices, embedded in the wording and interpretation of standard form contracts, favored record companies, often to absurd degrees. Recording contracts of the 1950s (when the H&R Funds were instituted) and the 1960s (drafted in context of record companies' new plan obligations) were typically no more than three pages long and had only a few basic features. Most contracts of that era are standard form printed contracts with blank spots for artists names and room for only a few individually-negotiated terms such as royalty rates, renewal options, and number of finished recordings per unit time (quarter, year).[62]

This contractual form was built around one structure: *recoupment*, a core feature of recording contracts. Standard form contracts and industry practice bound the company to collect royalties in individual artist royalty accounts. When the amount collected equaled the amount advanced by the company, the artist was "recouped" and could then begin to receive royalties. Recoupment means that the company, the hiring party, is entitled to be reimbursed—by the artist, out of her royalty income—for certain costs associated with making a record (including her own wages), *before* the artist is entitled to receive any royalties. The company adds the recoupable costs associated with each recording by the singer to the singer's royalty account such that no royalties will be paid out until *all* recoupable costs associated with *all* the singer's records have been recouped. At the point the singer's royalty account balance thus shifts from "negative" to "positive," the record company must pay accruing royalties, typically in the form of checks issued along with biannual royalty account statements.

Recording companies typically advance amounts needed to cover recording costs, including the singer's guaranteed minimum wages, as well as costs incurred by the record company for arranger/producer fees and employment of side musicians for recording sessions. These costs are later recouped out of royalties due to an artist, which means that an artist would not receive any royalties until the record company advance is recouped.[63] In the 1950s, total costs for a small R&B label to record a "side" (a song—one side of a

[62] G&O book
[63] Matt Stahl "Tactical Destabilization for Economic Justice: The First Phase of the 1984-2004 Rhythm & Blues Royalty Reform Movement" *Queen Mary Journal of Intellectual Property* 5(3) 344-363 (2015)

two-song, two-sided 45 or 78 rpm disc) could be as low as a few hundred dollars.[64] The advance, then, is effectively a loan to the artist (the artist's liability, the company's asset) – which must be repaid *out of royalty income* before the artist herself is entitled to receive any royalties. Contract language suggests that companies were obliged to account for royalties due to the artist as long as her material was selling (and, later, as long as it was selling or being licensed), and to pay royalties once she was finally "recouped."[65]

From the 1960s on, processes of determining how much artists were due became based on formulas that grew increasingly Byzantine and obscure.[66] With the 1959 Phono Code, AFTRA's Health and Retirement Funds began to include singers. The problems faced by aging AFTRA singers in the 1990s were likely foreseeable from the outset. The H&R Funds grafted its processes of establishing and maintaining members' benefits accounts, and monitoring and enforcing employer contributions, onto a system of advances, recoupment and royalty accounting that was already complex, nontransparent, and engineered in the companies' interest in the 1950s.

The emergence of R&B from a few urban centers, as dozens of small independent record companies made records for racialized market segments ignored by the "majors" of the 1940s and 1950s has been well studied.[67] Many participants (entrepreneurs, performers, and others) seem to have approached the R&B business as a potentially profitable fad, ephemeral, without expectations of the kind of long-term popularity, sales, and revenues now associated with pop music of that era. Yet artist royalty accounts, concealed within corporate black boxes, seem to have been readily adaptable to business needs and conditions. In the *Moore* case and other instances, recording companies appear to have manipulated artist royalty accounts, using them as a means for hiding artists' royalty incomes rather than as a mechanism for tracking or for ensuring timely and accurate payments to artists. The degree to which these practices enabled the companies to survive, compete, and, in some cases (e.g., Atlantic Records) become dominant firms, has not yet been examined.

Routine manipulation of artist royalty accounts was perhaps first revealed in the 1980s, when aging R&B singers and their advocates publicly began pressuring companies to account for irregular individual royalty statements and spotty or non-existent payments. In some cases, singers had not received contractually-mandated biannual royalty account statements from their companies for years (some had never received any such statements).[68] Companies' failure to issue royalty statements, and their aggressive resistance to performers' royalty accounting-related inquiries, rang increasingly false in light of the gathering popularity of nostalgic film soundtracks like

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[64] See John Broven *Record Makers and Breakers: Voices of the Independent Rock'n'Roll Pioneers* Urbana: University of Illinois Press, 2009, and Rick Kennedy and Randy McNutt *Little Labels—Big Sound: Small Record Companies and the Rise of American Music* Bloomington: Indiana University Press (1999).
[65] However, it is important to note that, under the Phono Code's definition of "gross compensation," companies were obligated to make contributions on singers' royalties whether or not they are "recouped."
[66] This and other transformations can readily be tracked by comparing successive editions of industry guides like Sidney Shemel and M. William Krasilovsky's *This Business of Music* (ten editions published by Billboard Publications between 1977 and 2007).
[67] See Charlie Gillett *The Sound of the City: The Rise of Rock and Roll* Da Capo Press (1996)
[68] Stahl *supra* note ___.

American Graffiti, and the multiplying reissues of old material and newly-issued compilation albums of "oldies," often heavily advertised on television.[69] Million-selling soundtracks and popular reissues and "oldies" compilations offered aging singers evidence of the continuing cultural value of their old recordings and news of their continuing revenue-generating circulation, giving impetus to demands for accountability, and increasing the reputational vulnerability of companies profiting in these markets.

From the late 1960s to the late 1980s, when artists and their advocates, seeking unpaid royalties, contacted their record companies (or the companies that had purchased them), company lawyers often told them that the singers had it all wrong. In one case after another, it seems, the artists were in debt to the companies, and not the other way around. For example, Atlantic Records warned Ruth Brown in 1969 that she owed them $26,000, giving her the impression that if she didn't stop pestering them, they would sue her for the money.[70] Such debts were typically in the tens of thousands of dollars—Muddy Waters owed MCA (owner of Chess Records) $56,000 in 1986; Howlin' Wolf owed MCA/Chess nearly $44,000; and Carla Thomas owed Stax Records $80,000. Company executives routinely asserted that such accounts reflected their forebears' willingness continually to advance sums of cash to supposedly spendthrift singers.[71] In the early 1980s, against the backdrop of a booming nostalgia market, investigations by artist advocates began to challenge official explanations of these startling debts.[72]

The efforts of Howell Begle, a prominent mergers and acquisitions attorney with government and mass-media connections, working pro-bono on behalf of Ruth Brown and many of her R&B colleagues beginning in the 1980s, were particularly effective. Begle's research demonstrated that whatever *other* purposes artist royalty accounts served, they also served as sponges that could soak up company liabilities for costs that were actually non-recoupable (i.e., costs that could not to be charged to artists according to contract terms, such as promotion and packaging with respect to 1950s contracts), that were nonetheless being passed on to artists.[73] This shifting of costs transformed them from *liabilities* (money owed or spent by the company on promotion, packaging, and other non-recoupable costs, not to mention royalties owed to artists) to *assets* (money purportedly owed to the company by the artist). Taking advantage of political support, celebrity power, and Atlantic Records' concern for its own reputation, Begle obtained internal documents from Atlantic showing that the industry practice of larding royalty accounts with unrecoupable business costs was routine in contractual royalty accounting for 1950s R&B artists.[74]

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[69] Ruth Brown with Andrew Yule *Miss Rhythm: The Autobiography of Ruth Brown, Rhythm and Blues Legend* New York: Donald I. Fine (1996), p. 213.
[70] *Id* 314; Artist Statements of Royalties (MCA Records) Howell Begle Collection, University of North Carolina; Howell Begle "Pioneer R&B Artists Deserve Back Royalties" *Billboard* December 24, 1994.
[71] Stahl 2015 Wexler quotation
[72] Stahl *supra* note ___.
[73] Stahl *supra* note ___; in aggregate, Howell Begle's documents of his own Atlantic Records research (in his eponymous UNC collection) suggest this hypothesis quite strongly.
[74] Stahl *supra* note 114; Begle's documents included an internal memo acknowledging Atlantic's failure to collect any foreign royalties for one of their biggest R&B stars for a ten-year period: "Memo from Fran Wakschal 'R.E. Ruth Brown' 6/8/83" Howell Begle Collection.

Howell Begle, Ruth Brown, and their allies in government and the entertainment industries were able to compel some of the record companies they targeted to make some public and apparently substantial changes.[75] Among other things, several major companies wiped out the suspect "production debts" discussed above, and some doubled or even tripled royalty rates specified in 1950s contracts, getting them closer to 1980s averages.[76] These "royalty reform" efforts mainly concerned performers whose contracts pre-dated the 1959 inclusion of recording singers into AFTRA's H&R Funds, and thus could only address the behaviors of recording companies in accounting for royalty payments to individual recording artists and not the behaviors of the Funds, for whom fiduciary responsibility was definitional. From the perspective of the singers and their allies (if only in retrospect), the binding of signatory companies to Funds' reporting and contribution system added a potentially significant layer of accountability to their employment relations, as well as a potentially significant source of social security to their lives.

V. The *Moore* Case, Royalty Accounting Manipulation, and Audits

In June 1993, at the age of 57, after thirty years in the profession and numerous hit records, Sam Moore learned from the AFTRA H&R Funds that his pension would amount to a single lump-sum payment of $2,285.19 (payable when he reached age 65), and monthly payments of less than $70, guaranteed for up to five years.[77] This was magnitudes less than what he could have expected given his career's milestones and longevity. Shortly thereafter, Moore and several other AFTRA singers filed a class-action suit against AFTRA (the union), a number of record companies, and the AFTRA H&R Funds. Even sober observers noted at the time that a plaintiff class in this case could include 10,000 AFTRA singers who had contracted with signatory companies since 1959, and that such a suit could concern unpaid contributions totaling in the hundreds of millions of dollars.[78] The case against the union and the companies were dismissed, and the case against the H&R Funds, though denied class certification, was settled in 2002 for $8.4 million.[79] Plaintiffs' lawyers received about one third of that amount, and the remaining named plaintiffs (Curtis Mayfield had died, and white singer Brian Hyland dropped out without public explanation) received payments of $25,000 each. The balance of funds was to be dedicated to creating a system within the AFTRA H&R Funds whereby singers' claims and appeals would be handled more expeditiously and in light of the patterns of non- and under-payment disclosed during the suit.[80] This case reflects

[75] Allies included Jesse Jackson, John Conyers, Dennis Kucinich, Bonnie Raitt, and others.
[76] Capitol/EMI CEO Jim Fifield's response was exemplary in this regard. Stahl *supra* note 114, p. 360.
[77] June 11, 1993 letter from AFTRA H&R Funds, reprinted in Sam Moore's written testimony for "Joint Hearing of the California State Senate Committee on the Judiciary and State Senate Select Committee on the Entertainment Industry: Record Company Accounting Practices" July 23, 2002, npn.
[78] Marilyn A. Gillen "60s Artists Sue Unions, Labels for Health Benefits" *Billboard* November 13, 1993 p. 14; David Hinckley "Lawyer in Benefits Battle for Pioneers" *New York Daily News* November 18, 1993.
[79] Bill Holland "Artists, AFTRA Settle Benefits Suit" *Billboard* November 2, 2002 p. 8.
[80] Accounts of the settlement meetings are located in the David Hinckley papers at the Rock and Roll Hall of Fame and Museum Archive. The coverage of AFTRA archive at NYU's Tamiment Library ends in 1993; we have not yet discovered data as to the implementation and effectiveness of planned measures.

persistent power asymmetries in royalty and contract accounting practices in the cultural industries.

One key factor in the *Moore* case was the Funds' 1989 hiring of a new director, Frederick Wilhelms III. Wilhelms was the first Funds director to have previous experience in multi-employer pension plans and the first to join the Funds from outside the entertainment industry. Almost immediately upon his arrival Wilhelms discovered major problems, determining that since their inception the Funds had "lacked any mechanism, procedure, or other means to determine what plan participants worked under the Phono Code for what employers and for what compensation except for the audits themselves."[81] Audits were irregularly undertaken, seem always to have discovered amounts owing (from the thousands to the millions of dollars per company per audit) and seem only to have ended (and many were never concluded) with settlements for pennies on the dollar; they were "a terribly inefficient collection device."[82] Audits in fact were the Funds' primary, in many cases the only, source of information about members' covered earnings, which suggests that the companies were not reporting or making payments as required and that the Funds were not undertaking their duty to monitor earnings reports and payments made by recording companies on behalf of recording artists.

In practice, the determination of which AFTRA members had met required earnings thresholds for health coverage and pension credits was up to the record companies. Companies could under-contribute to the H&R accounts of commercially successful artists without threatening those artists' coverage, but under-contribution of even a few percent to the accounts of more marginal and less successful (but still value-generating) performers could have significant consequences. Where performers' marginality is racialized such consequences would only be intensified.[83]

Record companies resist audits. From the standpoint of surplus generation, the companies' logic is unassailable. Outside of settlements, few practical legal or reputational downsides result from recording companies' withholding royalties. Further, primary documentary evidence regarding auditing is scanty—audits are highly secret, rigorously defended against by companies through confidentiality agreements and settlements that prevent claims from ever reaching a courtroom. Individual artist audits performed by professional auditors as well as the record company audits performed periodically by the AFTRA H&R Funds share a distinctive feature: the record companies appear always to under-report artist earnings. Around 2004, Wilhelms wrote:

> After nearly 20 years of involvement with audits on behalf of artists, I have not seen one that showed a cumulative error in favor of the label [meaning the label was found to have overpaid and the audit revealed the artist owed the company money]. I have heard of one from another auditor, but I have no details on it, and

[81] Fred Wilhelms, "Case Overview – 2000" document on file with authors.
[82] *Id.*
[83] See Melvin Oliver and Thomas Shapiro *Black Wealth/White Wealth: A New Perspective on Racial Inequality* New York: Routledge (1995) and Charles Mills *The Racial Contract* Ithaca, NY: Cornell University Press (1997).

> until I actually see them, I consider the rumor to be the Bigfoot sighting of royalty accounting.[84]

Independent auditor Fred Wolinsky's 2002 testimony before a committee of the California State Legislature hits a strikingly similar note:

> I've done over 500 audits. You can count on one hand the number of audits that [resulted] in findings that were paid by the record company that weren't in excess of my fees [typically in the tens of thousands of dollars]. All the rest of them were in excess of my fees and in some cases ten and twenty times.[85]

Both Wilhelms and Wolinsky, from their very different institutional backgrounds and positions, encountered the same situation, and found themselves constrained by the companies' power to resist full accountings and fuller settlements.

A major turning point in the suit occurred in May 2002 when, under the authority of its new National Executive Director, Greg Hessinger, AFTRA (the union) intervened to prevent a proposed settlement that would, among other things, have prohibited all future claims by AFTRA singers of the 1960s, 1970s, and 1980s. Hessinger told Variety that the "proposed settlement is manifestly unfair to artists." "There is no question," he continued,

> that the funds and the named plaintiffs have a right to settle their litigation at a price they deem appropriate. But when that price includes sacrificing the rights of thousands of artists who have never had a voice in this suit, AFTRA has a duty to give those artists a voice.[86]

In June of 2002, Hessinger told a committee of the California State Legislature that the H&R Funds' system for monitoring earnings and enforcing contributions, "as it is structured now, is so ambiguous, is so bereft of any transparency, so subjective on the side of the label, so complex, that…you're always going to have the perception that the artist is getting robbed."[87] AFTRA's intervention was crucial to the structure of the final settlement of the case, which, according to many observers, amounted to an unexpected success.[88]

Conclusion

Although privately negotiated, industry contracts are typically based on standard form contracts that leave all but the most powerful of artists with little ability to make significant contractual changes through negotiation. The terms and typically process by which artists sign record contracts have long been a source of significant protests by

[84] Fred Wilhelms "Some general notes on the subject of royalty audits from the trenches" (n.d.); document on file with author.
[85] California State Senate Hearing: "Record Company Accounting Practices" July 23, 2002, p. 118.
[86] Dave McNary "AFTRA Against Settlement of Suit over Health Funds" *Variety* May 24, 2002 p. 6.
[87] California State Senate Hearing: "Record Company Accounting Practices" July 23, 2002, pp. 138-139.
[88] See e.g., "Recording Artists Win Settlement Against Entertainment Union" *Jet* January 6, 2003 p. 35.

artists over an extended time period. Royalty payment structures today continue to reflect the risk sharing aspects of author payments evident in the early days of book publishing.

Royalty payments in the music industry are often complex and non-transparent. Part of this lack of transparency is a consequence of significant institutional changes within the cultural industries during the last few decades. Publishing companies, sheet music firms, and recording firms were once separate industries that were much smaller in scale than is typically the case today. Many of these firms are now contained within industry vast conglomerates with multiple strands of activity. The range of rights that music and publishing industry firms manage is often far more extensive than would have been the case in an earlier era, resulting in greater revenue streams from varied licensing sources.[89]

Recording contracts and other cultural industry contracts that require profit or risk sharing involve calculations that determine how much artists are paid. These calculations are problematic in a number of important respects. The firms undertaking royalty calculations will typically benefit if they pay out lower amounts of royalties. Paying lower royalties could permit cultural industry firms to retain a larger share relative to each artist bound by an industry contract. This gives industry firms incentive to deprive artists of royalties. Although likely not as egregious as what occurs in Hollywood where even the most successful of movies often fail to make a profit, at least as defined contractually, industry payments of royalties present a problem for many artists. In the recording industry, where entitlement to union healthcare and retirement benefits depend largely on royalty calculations, artists' problems are intensified. Cultural industry firm incentives are further skewed to underpay artists by current industry institutional structures. Cultural industry firms typically combine multiple strands of activities under one firm umbrella. This means that some of the expenses that are charged against artist royalties may be payable to sister firms within the conglomerate structure. This gives firms further incentive to underpay artists because they benefit to the detriment of artists being forced to pay for additional costs. Music industry firms have significant discretion and are often not sufficiently accountable for these types of practices.

Music industry royalty practices, such as those revealed in the archival evidence brought to light in this chapter, highlight potential problems with contractual accounting. Royalty contractual accounting numbers may not be correct or calculated in a transparent or fair way, which results in a situation that leaves significant room for exploitation of a wide range of artists. Even if an artist is aware that royalty figures are not correct, the artist may not have much recourse. In the nineteenth century, the activities of industrial companies highlighted the need for better audits to encourage investment in such enterprises by equity and debt investors. In contrast, audit procedures for contractual accounting are not robust. This may be in part a result of labor conditions within the cultural industries more generally. Although standard form industry contracts typically permit audits to occur, audits are typically at the expense of the artist seeking an audit. Because audits are expensive, audits are not always feasible.

[89] COSER, KADUSHIN & POWELL, *supra* note ___, at 14.

In addition to outlining basic conditions and features of twentieth-century record industry royalty accounting, this chapter has aimed to identify and make use of neglected sources and types of evidence, and to indicate avenues of reform. One avenue for improving the conditions under which artists work in the cultural industries would be to borrow from the development of audit services in from the financial accounting arena. Such models could be used to develop more effective audit practices within cultural industry contractual accounting that would give those calculating royalty payments better incentive to do the correct calculations and fairly compensate those entitled to royalties in accordance with relevant contract terms.