

Goodbye Copyright? The Rise of Trademark and Rights of Publicity in the Hip-Hop Music Industry

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INTRODUCTION

1986 was a seminal year in the “golden age” of hip-hop.¹ That year, the iconic rap group Run-DMC inked a million-dollar contract with Adidas.² Adidas’s affiliation with hip-hop built Adidas into one of largest sneaker companies in the world.³ The Run-DMC and Adidas partnership signaled both a seismic shift in marketing and the rise of the ancillary rights of trademark and publicity rights.⁴ The Run-DMC/Adidas deal is part of the lore of hip hop, and like lore, the story of how the deal occurred is sketchy.⁵ If Run is to be believed, an oral deal for the record-breaking deal was cut right on stage at a Run-DMC performance.⁶ In any event, a written contract was inked, and history was made.⁷

Hip-hop music dominates popular culture and fuels the global entertainment industry, from music to dance, film, advertising, television, social media, and the internet.⁸ Hip-hop music, also known as rap, is an art form created by African American artists, but largely controlled through distribution and intellectual property (“IP”) transfers by majority white-led corporations.⁹ From its inception, hip-hop presented a challenge to prevailing theories and doctrines of intellectual property, especially copyright law. Today, the gauntlet of rules regarding who is an IP owner, what is and is not protected, and the law’s bias toward the sophisticated continues to burden hip-hop artists.

Hip-hop arose in the 1970’s from Black artists and performers in the South Bronx:

¹ See Robin Mellery-Pratt, *Run-D.M.C.’s ‘My Adidas’ and the Birth of Hip Hop Sneaker Culture*, THE BUS. OF FASHION (July 18, 2014), <https://www.businessoffashion.com/videos/news-analysis/run-d-m-c-s-adidas-birth-hip-hop-sneaker-culture> [https://www.perma.cc/JUN3-ZXF6] (“Angelo Anastasio, a senior Adidas employee, was attending a 1986 Madison Square Garden performance of the Raising Hell tour when he was struck by the sight of tens of thousands of fans lifting their Adidas sneakers into the air, answering the call of those on stage. Inspired, Anastasio reportedly ran back to the Adidas New York headquarters and within days, Run-D.M.C. became the first hip hop group to receive a million-dollar endorsement deal.”).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ See André Douglas Pond Cummings, *Thug Life: Hip-Hop’s Curious Relationship with Criminal Justice*, 50 SANTA CLARA L. REV. 516, 518–19 (2010) (noting that “[h]ip-hop music and culture have ‘conquered’ the world”).

⁹ Lewis Weaver, *Corporate Exploitation of Hip Hop*, ITAZRAP (May 15, 2013), <https://itazarap.wordpress.com/2013/05/15/corporate-exploitation-of-hip-hop/> [https://perma.cc/H8YC-L9M4] (concluding that the hip hop genre is being “exploited” by “mostly large white owned corporations”).

In the summer of 1973 there was a back-to-school party in the basement of a south Bronx apartment building which changed the world. It was there at Highbridge's 1520 Sedgwick Avenue that an 18-year-old Jamaican immigrant by the name of Clive "DJ Kool Herc" Campbell invented a new genre of music when he looped the break of James Brown's "Give It Up or Turnit Loose" inside of the packed rec-room.¹⁰

Hip-hop is a cultural cluster of music, dance, fashion, and art.¹¹ Hip-hop rose to cultural prominence against both a racialized cultural battleground and a hostile legal environment for the Black artists and performers who create it. Early hip-hop contracts were typically exploitative and often there were no contracts at all.¹² Digital sound sampling is essential to hip-hop art forms, and the very legality of that sampling is therefore essential to rap itself.

IP and contract disputes in the hip-hop music context abound today as in the past. At the courthouse, an overwhelmingly white judiciary referees cases and hip-hop disputes.¹³ The most famous

¹⁰ Alex Mitchell, *A History of Hip Hop in the Boogie Down Bronx*, BRONX TIMES (Feb. 25, 2021), <https://www.bxtimes.com/a-history-of-hip-hop-in-the-boogie-down-bronx> [https://www.perma.cc/6HEA-A435].

¹¹ See Alvin Benjamin Carter III, *Statutorily Stifling: The Legal Burden Copyright Places on the Hip-hop Community*, NE. UNIV. L. REV. EXTRA LEGAL (Feb. 10, 2018), <https://nulawreview.org/extralegalrecent/2018/2/10/statutorily-stifling> [https://perma.cc/EH9X-KYBB] ("Hip-hop is a culture comprised of various elements. There are many schools of thought as to how many elements there are, but four are generally accepted as the main elements of the culture. Those elements are DJing, emceeing (rapping), dancing, and graffiti. (There is also the fifth element of knowledge which is also widely recognized.)").

¹² For instance, Sugar Hill Records, who produced the first commercially successful hip-hop record, "Rapper's Delight," was known as being exploitative. See Francesca D'Amico, *You Can't Stop the Truth: The Story of the Original Founding Members of the Sugarhill Gang*, ACTIVE HISTORY (Feb. 21, 2012), <https://activehistory.ca/blog/2012/02/21/you-cant-stop-the-truth-the-story-of-the-original-founding-members-of-the-sugarhill-gang/> [https://perma.cc/L76J-JLJK] (noting that Sugar Hill Gang members "Wright and O'Brien's label not only removed their writing credits from recordings and stole their profits and publishing rights, but trademarked the group's name and Wright and O'Brien's stage names, making it virtually impossible for the emcees to perform their original material when they attempted a comeback in 2005."). Members of the group have alleged they received only "token payouts, often in the form of cars and clothes, . . . [and] few royalty cheques or concert earnings." *Id.* Ice Cube, who wrote and performed on the groundbreaking NWA album "Straight Outta Compton," only "received \$32,700 in album royalties" on the multi-platinum album. See Ben Westhoff, *Did Jerry Heller Actually Cheat N.W.A.?*, FORBES (Sept. 7, 2016, 9:43 AM), <https://www.forbes.com/sites/benwesthoff/2016/09/07/jerry-heller-nwa/?sh=610595895176> [https://perma.cc/3CNZ-JPFC].

¹³ See Rakim Brooks, *A Quarter of Federal Courts Have Only Ever Had White Judges*, DEMOCRACY DOCKET (Nov. 6, 2013), <https://www.democracymocket.com/opinion/a-quarter-of-federal-courts-have-only-ever-had-white-judges/> [https://perma.cc/DKV5-WSL5] (noting that most judges have come from legal careers at large corporate law firms or prosecutors' offices, while other legal backgrounds — like legal aid offices that serve the common good

early sampling case showed tremendous judicial hostility to hip-hop. The late Judge Kevin Duffy in the Biz Markie case denounced digital sound sampling and the rappers who engaged in it as thieves deserving criminal prosecution.¹⁴

In the intervening decades, hip-hop has become an indispensable pillar of the music industry. The legal system, however, still struggles to reconcile hip-hop production with copyright law. Copyright, a creature of white cultural dominance, is generally hostile to notions of “remix,” including sampling. Remix involves copying, and copying without permission is generally actionable as copyright infringement.¹⁵

Similarly, no legally cognizable cause of action exists for “cultural appropriation.”¹⁶ Copyright law does not protect ideas.¹⁷ This includes styles of performance, which copyright considers an unprotectable idea.¹⁸ Much of the cultural past is in the public domain, a space that treated Black artists brutally under the era of copyright formalities. And after that, the doctrine of fair use disposes of any copyright claim for cultural appropriation.

My scholarship posits that copyright doctrine, music industry standards, and practices and adjudication in the courts have acted as a fulcrum of wealth-extraction out of the creative Black community. Legal doctrines and industry practices serve to divert the bulk of the value of works by Black artists into the coffers of

and are more often populated by people of color — were not seen as viable paths to a judicial nomination. This approach privileged not only white lawyers, who had greater access to the traditional career paths, but also more men (three district courts in the country have *never* had a female trial judge).”). *See also* Clay Halton, *Racial Diversity in the U.S. Judicial System*, INVESTOPEDIA (Feb. 15, 2024) (“The judicial system in the United States has historically been dominated by a virtually all-white judiciary. Having judges who represent the diversity of the nation is important for justice, but it still has largely not been achieved Minority group members make up just 20% of all [judges].”).

¹⁴ *Id.* at 185 (granting plaintiff’s application for a preliminary injunction and recommending that the United States Attorney consider “prosecution of these defendants under 17 U.S.C. § 506(a) and 18 U.S.C. § 2319”).

¹⁵ *See, e.g.*, 17 U.S.C. § 501(b) (providing cause of action against anyone who “violates any of the exclusive rights of the copyright owner”).

¹⁶ Brigitte Vézina, *Cultural Appropriation Keeps Happening Because Clear Laws Simply Don’t Exist*, TORONTO STAR (Dec. 22, 2019), https://www.thestar.com/opinion/contributors/cultural-appropriation-keeps-happening-because-clear-laws-simply-don-t-exist/article_1da10d3f-593d-5bff-b03d-f70d23deeb88.html [<https://www.perma.cc/523A-GFZL>] (noting that there is no legal definition of the term cultural appropriation, which has been so overused that “it’s hard for anyone to say for sure if something is culturally appropriated or not”).

¹⁷ 17 U.S.C. § 102(b) (“In no case does copyright protection for an original work of authorship extend to any idea . . .”).

¹⁸ *See, e.g.*, *McDonald v. West*, 138 F. Supp. 3d 448, 455 (S.D.N.Y.) (2015) (noting that “copyright does not protect styles, but only particular expressions of those styles”).

non-creators and corporate conglomerates. I have written elsewhere that copyright law, in particular, routinely treated works created by African Americans as if dedicated to the public domain that is freely appropriable by anyone.¹⁹

While rap music sits at the top of music charts and generates billions in revenues through other areas of the entertainment industry such as Tik-Tok, fashion, and memes originating in the Black community, the copyright revenues available to artists in the age of digital streaming have actually declined steeply from the days of the vinyl record business.²⁰ Streaming revenues are led by hip-hop music and generate billions in song plays and ad revenues, but pay out fractions of pennies to artists, meaning that many millions or even billions of streams are necessary to generate wealth.²¹

The paucity of revenues generated from copyright sources has diminished the importance of copyright revenues for hip-hop artists and elevated ancillary revenue sources from branding (the domain of trademarks) and endorsements (the domain of publicity rights).²² Because musical artists typically own rights to their trademarks and to their name and likeness, this development constitutes progress on its face.

The U.S. entertainment industry is built on a model that requires artists to give up copyrights in exchange for distribution

¹⁹ See K.J. Greene, *Copyright, Culture & Black Music: A Legacy of Unequal Protection*, 21 HASTINGS COMM'NS & ENT. L.J. 339, 368 (1999).

²⁰ See Suzanne Kessler, *The Non-Recording, Non-Artist "Recording Artist": Expanding the Recording Artist's Brand into Non-Music Arenas*, 20 VAND. J. ENT. & TECH. L. 515, 515 (2017) ("[A]s digital delivery, especially streaming, now supplants physical records as the primary music consumption manner, the money that labels and artists realize from music sales has significantly decreased. In particular, artists earn fractions of pennies per track streamed. Labels, too, are dissatisfied with their returns on digital sales, which are insubstantial compared to the returns on physical product.").

²¹ See DeJuan Wright, *Hip-Hop Remains a Branding Behemoth*, BUSINESS2COMMUNITY, <https://www.business2community.com/branding/hip-hop-remains-a-branding-behemoth-02430398> (last updated Sept. 12, 2021) ("According to Nielsen Music/MRC Data, six out of ten of the most streamed artists of the last decade were hip-hop artists . . . and the other four artists (Taylor Swift, Ariana Grande, Rihanna, and Ed Sheeran) have featured hip-hop artists on at least one of their singles.").

²² See Christopher R. Chase, *How the Band Protects its Brand: The Use of Trademarks to Protect and Promote the Musical Artist*, INTELL. PROP. TODAY (Apr. 2007), https://fkks.com/uploads/news/Band_Protects_Brand_Complete.pdf [<https://perma.cc/AA3D-7Z6V>] ("The landscape of the music industry has changed, however, in recent years. As artists in the music industry become more reliant upon ancillary streams of revenue rather than record sales alone, they must seek out other opportunities for income and can use their names and logos to do so.").

of music and motion pictures.²³ Some might categorize this exchange as a “devil’s bargain.”²⁴ However, this article contends that the rise of trademark and publicity rights portends three insights.

First, the primacy of branding and endorsements in hip-hop has led to abusive trademark litigation by rappers seeking to stake claims. Abusive claims, even where trivial or absurd, must be defended, and can cast a chill on free expression and the dissemination of expressive works.²⁵

Second, and perhaps even more troubling, the gold rush in branding and endorsements has exposed inequities in the trademark ownership process, where unsophisticated and unrepresented artists have lost out on trademark rights. The U.S. Trademark Office, like the U.S. Copyright Office, does not verify claims of trademark ownership, and registration occurs against a backdrop of murky legal standards regarding who is the trademark owner of a musical group.²⁶

Third, vis-à-vis copyright law and trademark law, the right of publicity emerges as a kind of safe space for artists. There is no plethora of expropriation of artist publicity rights, but rapacious contract provisions regarding name and likeness rights could pose potential problems.

As trademark and right of publicity valuations continue to soar above what artists can generate in the streaming era, these problems are likely to expand, suggesting that tighter penalties should exist for abusive trademark assertions, and that the trademark ownership process needs reform to prevent

²³ See *The Song Goes on Forever; Can the Copyright End?*, KELLY IP (Apr. 2, 2020), <https://www.kelly-ip.com/copyright/the-song-goes-on-forever-can-the-copyright-end/> [<https://perma.cc/9B22-FTVX>].

²⁴ *Id.* (noting that music artists are forced into a “devil’s bargain . . . to get their first recording contract. . . . [f]or most emerging singer/songwriters, the quid pro quo for getting a record deal was this: the record company demanded that the artist assign her copyrights to the label. And that demand came in the form of an offer the artists couldn’t refuse—either assign the copyrights or no deal—a classic case of one party to a deal holding all the cards and having all the leverage.”).

²⁵ For a discussion of the way trademark law can chill free speech, see generally Lisa P. Ramsey, *Free Speech Challenges to Trademark Law after Matal v. Tam*, 56 HOUS. L. REV. 401 (2018).

²⁶ The U.S. Copyright Office notes that “[a]s a general rule, the U.S. Copyright Office accepts the facts stated in the registration materials, unless they are contradicted by information provided in the registration or materials or in the Office’s records.” U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES 18 (3d ed. 2021). However, the U.S. Copyright Office itself “does not conduct investigations or make findings of fact to confirm the truth of any statement made in an application, such as whether a work has been published or not.” *Id.*

expropriation against unsophisticated parties. The complexities of the trademark ownership process have facilitated lost rights for unsophisticated and unrepresented artists.

I. THE DARK HISTORY OF TRADEMARK/PUBLICITY RIGHTS AND RACIAL DOMINATION

I have spent over two decades mapping out the ways in which IP, particularly copyright and trademark law, have adversely impacted African American creators in the music space. Under copyright law, Black creators experienced a lack of protection for their works so vast and pervasive that I have labeled it “copyright scandal.”²⁷ The gap between what Black innovators in music created and what multinational corporations have been enriched by is enormous. IP rights in musical works are particularly vital, because music, out of all the subject matter of copyright, powers all sectors of the entertainment industry from film and video games to live theatre and television.

My scholarship in the copyright arena explored how the trifecta of a copyright regime structurally hostile to African American modes of creation, a minefield of copyright formalities and rapacious industry practices, customs and contractual norms divested protection for some the greatest African American artists.²⁸ The ascendancy of minstrel or “coon” music cemented notions of black inferiority as America consumed a steady diet of racist stereotypes right through the old Victrola.²⁹

Trademark law, like minstrel music, presented a similar assault on African American people. Right through the middle of the twentieth century, a plethora of racially stereotypical trademarks proliferated the American marketplace.³⁰ The commercial marketplace of trademarks communicated a pernicious message in the marketplace of ideas—that blacks and other people of color are different and inferior.³¹ I have contended that trademark law in fact served as a primary source of promoting white supremacy and Black inferiority in American society.³² Unfortunately, the problem of racist trademarks is not a thing of

²⁷ See K.J. Greene, *Thieves in the Temple: The Scandal of Copyright Registration and African- American Artists*, 49 PEPP. L. REV. 615 (2022).

²⁸ *Id.*; see also K.J. Greene, Trademark Law and Racial Subordination: From Marketing of Stereotypes to Norms of Authorship, 58 SYRACUSE L. REV. 431 (2008).

²⁹ See sources cited *supra* note 27 and *infra* note 32.

³⁰ See sources cited *supra* note 27 and *infra* note 32.

³¹ See sources cited *supra* note 27 and *infra* note 32.

³² See Greene, *supra* note 28.

the past, and a recent U.S. Supreme court case has opened the door to the specter of a new rash of racist trademark registrations.³³

The right of publicity and trademark law too have their own dark history vis-à-vis Black folk. The history is steeped in the appropriation of the likenesses of African Americans. Companies built brands around these images, creating brands that generated millions of dollars, but as with copyright law, there is scant evidence that the models received commiserate remuneration.³⁴ In turn, these images promoted not just brands but a consistent message of black inferiority and servility.

In the early twentieth century, America awoke in the morning with pancakes from Aunt Jemima (modeled after a real person, Nancy Green). Alternatively, Americans could have breakfast with “Rasta,” the Cream of Wheat chef, modeled from a photo of Frank White, an African American chef.³⁵ During the day, men chawed on “N*****hair” chewing tobacco, and some on the sly scanned the pages of “Black Tail” magazine.³⁶ In the evening, dinner out could be at “Sambo’s” restaurant or perhaps at home with a side of “Uncle Ben’s” rice.³⁷ All of these brands used images of African Americans, which fall under the right of publicity, but also functioned as source-indicators, the purview of trademark law. In

³³ The case is *Matal v. Tam*, 582 U.S. 218 (2017). Analysts posit that in the wake of *Tam*, “[r]acist words and images can now be registered as trademarks in the United States of America.” Vicki Huang, *Trademarks, Race and Slur-appropriation: An Interdisciplinary and Empirical Study*, 2021 UNIV. ILL. L. REV. 1605 (2021).

³⁴ See Sam Roberts, *Overlooked No More: Nancy Green, the ‘Real Aunt Jemima’*, THE N.Y. TIMES (last updated Aug. 28, 2020), <https://www.nytimes.com/2020/07/17/obituaries/nancy-green-aunt-jemima-overlooked.html> [https://perma.cc/R3A9-N6T5] (noting that the original model for the Aunt Jemima brand, Nancy Green “was said to have received a lifetime contract and made a fortune, but it’s more likely that she simply worked for the company (she described herself in the 1910 census as a ‘housekeeper’) while serving as a missionary for the historic Olivet Baptist Church in Chicago.”).

³⁵ It cannot be definitively confirmed that Frank White is the model for Cream of Wheat Cereal, however “[t]he chef was photographed about 1900 while working in a Chicago restaurant. His name was not recorded. White was a chef, traveled a lot, was about the right age and told neighbors that he was the Cream of Wheat model . . .” *Final Tribute For Cream Of Wheat Man*, CBS NEWS (June 15, 2007, 4:10 AM), <https://www.cbsnews.com/news/final-tribute-for-cream-of-wheat-man/> [https://perma.cc/7E2T-5X3Q] (noting that Frank White, essential to the success of the Cream of Wheat Brand, “died in 1938, and until [2007], his grave in Woodlawn Cemetery bore only a tiny concrete marker with no name”).

³⁶ See David J. Dent, *In Search of Black America: Discovering the African-American Dream*, NEW YORK TIMES BOOKS, <https://archive.nytimes.com/www.nytimes.com/books/first/d/dent-search.html> [https://perma.cc/N3BQ-TVSV] (last visited Mar. 27, 2024); *In re Mavety Media Group Ltd.*, 33 F.3d 1367, 1368–69 (D.C. Cir. 1994).

³⁷ See *Denny’s and Sambo’s*, JIM CROW MUSEUM (2018), <https://jimcrowmuseum.feris.edu/question/2018/august.htm> [https://perma.cc/277U-CBAV]; *Our History*, BEN’S ORIGINAL, <https://www.bensoriginal.com/our-history> [https://perma.cc/GNJ6-S62L] (last visited Mar. 27, 2024).

the wake of the murder of George Floyd in 2020, a kind of brand reckoning occurred. General Mills, the owner of the “Aunt Jemima” mark decided to abandon it.³⁸

II. A REMARKABLE TRANSFORMATION OF ANCILLARY RIGHTS IN THE HIP-HOP AGE

Today’s right of publicity and trademark doctrines reflect a remarkable transformation from the copyright model, which facilitated widespread exploitation of Black music artists. Indeed, the ancillary rights of trademark and publicity rights stand at the forefront of wealth creation for rappers and other creative artists. In a recent law review article, Professors Robert Merges and Justin Hughes posit that copyright law has been on balance a financial boon for African Americans.³⁹ The article’s primary evidence for their assertion was a listing from *Forbes* magazine of the fifty wealthiest African Americans.⁴⁰

Black music stars, including Beyoncé, Diddy, and Jay-Z, are indeed stunningly rich. However, the bulk of their wealth is not derived from their music copyright royalties but from branding and endorsements.⁴¹ This is the zone of the right of publicity and trademark revenues, not copyright revenues. Today’s music artists create wealth by building brands in everything from fashion and fragrances to headphones.⁴² The rapper Megan Thee Stallion is a poster child for the primacy of ancillary rights. In addition to netting millions for a Super Bowl ad, “[s]he has

³⁸ See Audra L. Savage, *Aunt Jemima’s Resignation Letter*, 121 COLUM. L. REV. F. 186, 216 (2022) (“Aunt Jemima’s resignation marks the beginning of corporations issuing statements, pledging money, and retiring racist brands in the wake of George Floyd’s murder.”).

³⁹ See Justin Hughes & Robert Merges, *Distributive Copyright Justice*, 92 NOTRE DAME L. REV. 513, 549–55 (2016).

⁴⁰ *Id.*

⁴¹ See Barclay Palmer, *What Are the Brands and Businesses of Beyoncé?*, INVESTOPEDIA (Dec. 17, 2022), <https://www.investopedia.com/articles/insights/062516/brand-and-business-beyonc-knowles-pep-twx.asp#toc-beyonc-and-jay-z-net-worth> [<https://perma.cc/F7CN-E6UC>]; *Combs Global: A New Era of Excellence*, COMBS GLOBAL, <https://combsglobal.com/> [<https://perma.cc/U9LY-2QY8>] (last visited Mar. 27, 2024); Autumn Hawkins, *Jay-Z: The Businesses That Made His Billion-Dollar Empire*, JAMMIN’ 105.7, <https://jammin1057.com/listicle/jay-z-the-businesses-that-made-his-billion-dollar-empire/> [<https://perma.cc/X3KK-722U>] (last visited Mar. 27, 2024).

⁴² See Travis Lyles, *The \$3 Billion Deal for Dr. Dre’s ‘Beats’ Almost Never Happened*, BUS. INSIDER (Aug. 19, 2015, 1:02 PM), <https://www.businessinsider.com/beats-by-dre-almost-never-happened-2015-8> [<https://perma.cc/9ZBP-DU6J>] (“After selling his gold-mine headphone company Beats by Dre last year to Apple for \$3.2 billion, rap mogul Dr. Dre’s net worth spiked to an estimated \$700 million.”).

recently signed endorsement deals with Nike, Revlon, Cash App and Popeyes.”⁴³

III. THE RIGHT OF PUBLICITY AS “THE LEAST DANGEROUS BRANCH”

Copyright law has and continues to cause distributive problems for Black artists. Trademark law, on balance, has been far less negative for Black artists, but there are areas where trademark law has disadvantaged artists. In contrast, the right of publicity as it exists today is, metaphorically, the “least dangerous branch” of IP for Black artists.⁴⁴ My work in the right of publicity arena started in 2008 when Chapman Law School asked me to speak at a right of publicity conference in Orange County. I was not too interested. It seemed to me that the right of publicity was overdone, with too many scholars writing about it. What do I have to add?

Chapman said they would pay me money to speak. My interest piqued, and I mused, “All I have to do is drive up the 5 Freeway to lovely Orange County and run my mouth a little?” Or as Brando’s character, the washed-up ex-boxer in the classic movie “On the Waterfront,” said, “I get all that dough for not doing nothing?”⁴⁵

Then the organizers at Chapman said, “And by the way, Professor Greene, if you agree to write an article too for the symposium, we will pay you x dollars more.” And I said, “I’ll do it. Orange County, here we come!”

As agreed, I gave a talk at Chapman and wrote an article entitled, “Intellectual Property Expansion: The Good, the Bad and the Right of Publicity.”⁴⁶ The piece garnered honors as one of the top IP articles of the year by Thompson-Reuters. It was the first of many articles on publicity rights. Still, my distaste for publicity rights and their expansion did not abate.

The right of publicity continued to interest me, mainly for its intersection with IP and critical race and feminist theory. The

⁴³ Jabari Young, *Megan Thee Millions: Rapper Reaps Record Riches*, FORBES (Nov. 28, 2022), <https://www.forbes.com/sites/jabariyoung/2022/11/28/megan-thee-millions-rapper-reaps-record-riches/?sh=2bc0972c7696> [<https://perma.cc/5WXM-N8H9>].

⁴⁴ The analogy springs from the work of Professor Bickel, who in a famous book characterized the federal judiciary as the “least dangerous branch” in our separation of powers scheme. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (Yale Univ. Press ed., 2d ed. 1962).

⁴⁵ *ON THE WATERFRONT* (Columbia Pictures 1954).

⁴⁶ K.J. Greene, *Intellectual Property Expansion: The Good, the Bad, and the Right of Publicity*, 11 CHAP. L. REV. 521 (2008).

ancillary rights of publicity and trademark law fueled the dynamic of African American cultural appropriation. My article “Intellectual Property at the Intersection of Race and Gender: Lady Sings the Blues” was among the first to analyze publicity rights through a critical race/feminist lens.⁴⁷

Still, the right of publicity at a theoretical level continued to cause existential angst. I was all in on writing about the right of publicity’s (and trademark law’s) role in perpetuating Black stereotypes, giving us Uncle Ben, distorting Black culture, and ripping off Nancy Green, the original Aunt Jemima. I have written that Black music is irresistible in American culture, but so is the Black body in marketing and branding.⁴⁸ That is right of publicity territory. Publicity rights and trademark played a central role in the promulgation of white superiority.⁴⁹

Right of publicity theory left me torn. Early in my academic career, I faced considerable flak from academics who saw no connection between racial inequality and intellectual property. Some even left the room when I stood up to deliver a presentation on an aspect of race and IP. I considered the risks, but ultimately concluded the work of unmasking how the IP system promotes inequality was more important than my standing in the academy. Today, a bevy of scholars in IP explore issues of domination and disinvestment that undergird the seemingly race-neutral façade of copyrights, trademarks and rights of publicity.

As for the right of publicity, I was never sold that the law needs to grant economic incentives and monopolies to push people to become famous. Isn’t the money from a sports, film or record deal, the adoration of fans, the groupies, and the freebies enough? One would have to believe that Madonna or Michael Jackson would not have done what they did *unless* they could control all aspects of their likeness and be paid on endorsement deals.

The hip-hop music industry, however, offers more credible theories and validation based in real events about the usefulness of rights of publicity theories. The theory of allocative efficiency,

⁴⁷ K.J. Greene, *Intellectual Property at the Intersection of Race and Gender: Lady Sings the Blues*, 16 AM. U. J. OF GENDER, SOC. POL’Y & THE L. (2008).

⁴⁸ See Eunice Kim, *The Marketing of Black Women’s Body in Hip-Hop*, THE GUARDIAN (March 7, 2021), <https://ucsdguardian.org/2021/03/07/the-marketing-of-black-womens-body-in-hip-hop/> [<https://perma.cc/RJ67-FMU9>] (noting that the stereotypical images portraying African American women that are “accepted in hip hop [are] the Diva, the Gold Digger, the Freak, the Dyke, Gangster, Sister Savior, Earth Mother, and Baby Mama”).

⁴⁹ See Greene, *supra* note 28.

or said more simply, oversaturation, is an alternative to the economic incentive theory. The analog to this theory is trademark dilution in the trademark context.

Trademark dilution posits that famous marks may lose their cache and prestige if overexposed by free-riding trademark bandits.⁵⁰ Exhibit A of the problem of overexposure in the right of publicity context is illustrated by the rapper MC Hammer. Those who were not alive when MC Hammer ruled the early 1990's cannot imagine the scene he caused. He was instrumental in taking hip-hop all the way mainstream, further maybe then even Run-DMC. The baggy parachute pants, the catchy lyrics, and oh, the exquisite funky dance moves. He really was “too legit”—except as a rapper he lacked any visible “street cred,” despite his upbringing on the mean streets of Oakland.

That didn't stop Hammer from using his brand in a flurry of commercials and other projects. Hammer did TV commercials for Taco Bell, floating on the roof of Taco Bell in those puffy pants, and busting a move.⁵¹ Hammer also did TV commercials for Pepsi and Kentucky Fried Chicken (KFC). The KFC ad made a list of the worst rapper commercials.⁵² He had a kids cartoon show too.⁵³

And then came the backlash. Hammer was pilloried as anything but a “legit” rapper, despite his hit song “2 Legit to Quit.” He was mocked on the hit show “In Living Color,” the hippest show of the 90's.⁵⁴ The show featured dancers known as the Fly Girls, trained by Jennifer Lopez, famously known as “J Lo.” And just like

⁵⁰ See *Trademark Dilution*, INT'L TRADEMARK ASS'N, <https://www.inta.org/fact-sheets/trademark-dilution-intended-for-a-non-legal-audience/> [https://perma.cc/P4NG-N6AH] (last updated Nov. 9, 2020).

⁵¹ See Chris Woodyard, *Marketing: M.C. Hammer to Rap in Praise of Taco Bell in Grammy TV Spots*, L.A. TIMES, (Feb. 16, 1991), <https://www.latimes.com/archives/la-xpm-1991-02-16-fi-1170-story.html> [https://perma.cc/4RRZ-L7VJ] (“In the [1991 commercial], M.C. Hammer is seen hanging out with buddies. One suggests buying some hamburgers. Hammer, of course, gets the idea of going to Taco Bell. In a subsequent chase scene, he inflates his baggy pants and drifts to a Taco Bell.”).

⁵² See Jessica McKinney et al., *The Worst Rapper Commercials*, COMPLEX (Jan. 5, 2021), <https://www.complex.com/music/2021/01/worst-rapper-commercials/> [https://perma.cc/3XH9-9PUY].

⁵³ See MURRAY FORMAN, *THE 'HOOD COMES FIRST: RACE, SPACE, & PLACE IN RAP AND HIP-HOP* 305 (1997) (noting that the questionable status of MC Hammer and Vanilla Ice within hip-hop culture became even more pronounced as their images flooded teen magazines and, in Hammer's case, took the form of a plastic action figure and a Saturday morning cartoon).

⁵⁴ The television show “In Living Color” parodied Hammer's song “You Can't Touch This.” See Trish Broome, *Top 10 in Living Color Music Parodies*, THOUGHT CATALOG (Sept. 30, 2012), <https://thoughtcatalog.com/trish-broome/2012/09/top-10-in-living-color-music-parodies/> [https://perma.cc/2RTS-R9DC].

that, it was gone. The next thing you know, old Hammer's not a millionaire. Oversaturation (and massive overspending) had done him in.

The ancillary rights of trademark and publicity have, from the outset of hip-hop, been vital to the genre. Rock artists often scorned commercial ventures, clinging to the role of true "artiste." Bette Midler and Tom Waites, for example, both refused to license music for use in commercials and sued corporations that used imitations of their voices in commercial ads.⁵⁵

In contrast, early hip-hop artists were unabashedly commercial from the beginning, reflecting the "hustling" ethos of the inner-city that spawned the music. Many analysts have noted:

[Hip-Hop] artists developed a sense of entrepreneurship because they had to. Hardly anyone wanted to do business with hip hop. The first rap records were released into the most hostile environment for black music since the 1950s. In the midst of the early 1980s backlash against disco, big music companies viewed rap as an even less palatable offshoot.⁵⁶

Run-DMC, for example, immediately capitalized on their association with Adidas sneakers, becoming the face of the brand and enriching themselves greatly in the process.⁵⁷ Today, artists such as Jay-Z, Snoop Dog, and Rihanna generate revenues from branding that swamp music industry revenues.⁵⁸ The rise of ancillary rights as the path to hip-hop riches is driven by music industry economics. The prevalence of music consumption by streaming has devastated available music royalties to artists.⁵⁹ Today's artists understand they are not in the business of music, but of branding.

⁵⁵ See *Waits v. Frito-Lay*, 978 F.2d 1093 (9th Cir. 1992), *cert. denied*, 113 S.Ct. 1047 (1993); see also *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988).

⁵⁶ Dan Charnas, *A History of Hustling Gives Hip Hop its Entrepreneurial Edge*, FIN. TIMES (Feb. 3, 2015), <https://www.ft.com/content/4282afc8-ab9f-11e4-b05a-00144feab7de> [<https://perma.cc/6BM4-K34F>].

⁵⁷ See Gary Warnett, *How Run-DMC Earned Their Adidas Stripes*, MR PORTER (May 27, 2016), <https://www.mrporter.com/en-us/journal/lifestyle/how-run-dmc-earned-their-adidas-stripes-826882> [<https://perma.cc/E42N-FPMD>].

⁵⁸ See Madeline Berg, *Fenty's Fortune: Rihanna is Now Officially a Billionaire*, FORBES (Aug. 4, 2021, 6:30 AM), <https://www.forbes.com/sites/maddieberg/2021/08/04/fentys-fortune-rihanna-is-now-officially-a-billionaire/?sh=4f6e6b737c96> [<https://perma.cc/B7MG-HEUC>].

⁵⁹ See Ben Sisario, *As Music Streaming Grows, Royalties Slow to a Trickle*, THE NY TIMES (Jan. 28, 2013), <https://www.nytimes.com/2013/01/29/business/media/streaming-shakes-up-music-industrys-model-for-royalties.html> [<https://perma.cc/HUB3-SU3L>].

IV. TRADEMARK LAW—FROM SOURCE IDENTIFICATION TO BRAND VALUE

Trademark law's crown jewel, the Lanham Act, is designed to prevent unfair competition and to police the marketplace of misleading trademark uses.⁶⁰ The Act also protects famous trademarks against trademark dilution. Built into the Lanham Act are pro-trademark ownership benefits and enforcement tools. These benefits always depend on registration, a formality of great import. The Lanham Act's embrace of a formalistic and cultishly complex regime is a legal wonder—a great cathedral. But it harbors potential pitfalls, like IP formalities that would tend to reward the wealthy and connected, and to disadvantage marginalized communities. Under copyright law, formalities have been the bane of Black artists from the inception of the music industry. To truly harness the system, money and resources are needed. The knowledge of how to use the system is available only at a cost not available to communities at the bottom.

Trademark law protects the senior users' interests of a trademark and exists to prevent consumer confusion in the marketplace. Trademark law in its origins was less about protecting trademark owners, and more about combatting uses of trademarks that would confuse consumers as to the source identification of the product or service.⁶¹

Today, the source-identifying function of trademark law is still echoed by the courts, but it is clear from a dollars-and-cents perspective that the trademark ownership function is by far more salient. Trademark rights constitute the biggest asset of giant corporations like Coca-Cola and Google, outstripping the value of buildings, product inventory, and other holdings.⁶² Google's brand value, for example, has been valued at a staggering \$458 billion in 2021.⁶³ Of that, the value of the trademark alone is \$44.3 billion.⁶⁴ Trademarks are also a profit center for corporations, generating

⁶⁰ Lanham Act, 15 U.S.C. §§ 1015–1141n (2022).

⁶¹ See Robert G. Bone, *Hunting Goodwill: A History of the Concept of Goodwill in Trademark Law*, 86 B.U. L. REV. 547, 555 (2006) (“The primary focus of trademark law has always been protecting the source identification and information transmission functions of marks.”).

⁶² See Eric Goldman, *Google Defends Its Most Valuable Asset in Court*, FORBES (Sept. 15, 2014, 12:11 PM), <https://www.forbes.com/sites/ericgoldman/2014/09/15/google-successfully-defends-its-most-valuable-asset-in-court/?sh=7542521e21e1> [<https://perma.cc/VMC8-PKPB>].

⁶³ *Google Brand Value From 2006 to 2023*, STATISTA (July 2023), <https://www.statista.com/statistics/326046/google-brand-value/> [<https://perma.cc/D782-9DZA>].

⁶⁴ *Top Ten Trademarks: Everything You Need to Know*, UPCOUNSEL, <https://www.upcounsel.com/top-ten-trademarks> [<https://perma.cc/8K5B-QVWF>].

revenue through ancillary merchandise and licensing deals where the brand is central.⁶⁵

This is the basis of the franchise industry, which makes its profits from licensing trademarks. With such money at stake, whether a corporate distributor like Disney,⁶⁶ a toy company like Mattel,⁶⁷ or a hip-hop artist like Dr. Dre,⁶⁸ it is not to be wondered that trademark law is the situs of abusive trademark disputes.

At the center of trademark protection is trademark registration. The Lanham Trademark Act offers a modicum of protection to unregistered trademarks used in interstate commerce under section 43(a).⁶⁹ However, unregistered trademarks are treated in practice as the pauper, while registered trademarks play the role of the prince. Trademark law conveys many benefits to trademark owners, not the least of which is privileged treatment in trademark litigation.

Trademark registration “offer[s] several key advantages... [including] the rebuttable presumption that the owner listed on the registration is the actual owner of the mark.”⁷⁰ Trademark registration also provides protection against “other individuals who subsequently attempt to use the mark.”⁷¹ Additionally, in the music industry, “for an established artist, trademark registrations protect rights in his/her brand, help guard revenue streams, and provide him/her with additional control over the brand when embarking on new business ventures, while for the record label

⁶⁵ A good example is the branding power of Harry Potter. J.K. Rowling conveyed rights to the Potter mark to Warner Brothers, but “Rowling and Warner Bros jointly own US trademark rights for ‘J.K. Rowling’s Wizarding World,’ a fictional world with movies, a website, and related goods and services.” *J.K. Rowling Trademarks*, GERBEN IP: GERBEN TRADEMARK LIBR., <https://www.gerbenlaw.com/trademarks/celebrities/j-k-rowling/> [<https://perma.cc/XR52-L7CE>].

⁶⁶ See *Disney Trademark Infringement: Everything You Need to Know*, UPCOUNSEL (last updated Jan. 1, 2024), <https://www.upcounsel.com/disney-trademark-infringement> [<https://perma.cc/Y2UA-K6WZ>].

⁶⁷ See Jenna Greene, *Don’t Mess With Barbie*, REUTERS (Updated Aug. 17, 2022, 10:56 AM), <https://www.reuters.com/legal/litigation/dont-mess-with-barbie-2022-08-17/> [<https://perma.cc/W9DW-YNF3>].

⁶⁸ See Mark Savage, *Dr. Dre Loses Trademark Battle With a Gynaecologist Called Dr. Drai*, BBC (May 8, 2018), <https://www.bbc.com/news/entertainment-arts-44043205> [<https://perma.cc/TAD6-Y7RR>].

⁶⁹ 15 U.S.C. § 1125 (2012).

⁷⁰ See April Xiaoyi Xu, *They Belong with Taylor Swift™: Applying Trademark Law and Textual Analysis to the Branding of Love Song Lyrics*, 2020 U. ILL. L. REV. ONLINE 139, 144–45 (2020).

⁷¹ *Id.* at 145.

involved, trademarking also benefits the label by offering additional security.”⁷²

V. HIP-HOP: BRANDING TO DIE FOR?

Today’s hip-hop artists have taken branding and endorsements miles ahead of rock artists like The Beatles, who early in their career signed a horrible branding deal that haunted the super group for years.⁷³ The Beatles were and are a marketing behemoth and branding rights remain sought after to this day.⁷⁴ Their name and likeness rights were litigated for unauthorized use by the “producers of the ‘Beatlemania’ stage show.”⁷⁵ However, their initial merchandising deal allocated ten percent of revenues to the group and ninety percent to the company handling the merchandising.⁷⁶ The Beatles should have been able to negotiate at least a thirty percent rate on merchandise.⁷⁷ This error by their manager, Brian Epstein, ultimately cost “[T]he Beatles more money than they ended up making from their record sales.”⁷⁸

Contemporary rappers have also gone far beyond Run-DMC’s 1986 Adidas sneaker deal. Under the auspices of trademark publicity rights law, rappers turn hit songs like “WAP” by Cardi B and “Hot Girl Summer” by Megan Thee Stallion into branding gold.⁷⁹ Perhaps “Exhibit A” for hip-hop branding is the rapper

⁷² *Id.*

⁷³ See John Greathouse, *This Rookie Mistake Cost the Beatles \$100,000,000*, FORBES (July 25, 2015, 1:16 PM), <https://www.forbes.com/sites/johngreathouse/2015/07/25/this-rookie-mistake-cost-the-beatles-100000000/?sh=86966ec8b279> [<https://perma.cc/7E2Y-QVYM>].

⁷⁴ See Thania Garcia, *Music Industry Moves: UMG’s Bravado Acquires the Beatles’ North American Merch Rights*, VARIETY (Sept. 1, 2022, 3:20 PM), <https://variety.com/2022/music/news/cbs-news-anthony-mason-summerstage-icon-1235354514/> [<https://perma.cc/ZT9K-JC87>].

⁷⁵ The Beatles prevailed, winning a \$10 million judgment in California state court for misappropriation of likeness. See Richard Harrington, *\$10 Million to Beatles*, WASH. POST (June 4, 1986, 8:00 PM), <https://www.washingtonpost.com/archive/lifestyle/1986/06/05/10-million-to-beatles/0ce022ae-1237-42db-9deb-6e7e020c2132/> [<https://perma.cc/35ZU-5HE9>].

⁷⁶ See John P. Gelinas, *Merchandising the Beatles*, MIND SMOKE RECORDS (Mar. 20, 2024), <https://msmokemusic.com/blogs/mind-smoke-blog/posts/6485331/merchandising-the-beatles-updated> [<https://perma.cc/7FC9-N8L6>] (noting that the hysteria for Beatles merchandise was so “crazy” that the group even received offers to market their bathwater).

⁷⁷ See Greathouse, *supra* note 73.

⁷⁸ *Id.*

⁷⁹ See Sajaë Elder, *Megan Thee Stallion Says She Has Officially Trademarked “Hot Girl Summer”*, FADER (Sept. 21, 2019), <https://www.thefader.com/2019/09/21/megan-thee-stallion-trademark-hot-girl-summer> [<https://perma.cc/GUV2-X4A>]; see also Chelsea Ritschel, *Cardi B Reportedly Files Trademarks for New WAP Merchandise Including Liquor and Purses*, INDEPENDENT (Sept. 29, 2020, 7:46 PM), <https://www.independent.co.uk/life-style/cardi-b-wap-merchandise-trademark-application-megan-thee-stallion-b698576.html> [<https://perma.cc/65A2-4J96>].

Travis Scott. Scott has nabbed endorsements and done branding collaborations from fashion house Dior to McDonald's, with stops at Nike, Epic Games, and General Mills.⁸⁰ Widely acclaimed as a marketing genius, Scott acquired trademark rights to *Astroworld*, his hit album, which was an abandoned trademark for a Houston amusement park.⁸¹

In November 2021, ten people died at Scott's concert amid allegations that he failed to stop the show.⁸² Some have alleged that jammed lines to purchase merchandise at the show were a contributing factor.⁸³ If so, people literally died to obtain the rapper's merchandise.

In the wake of the Astroworld tragedy, brand collaborators backed off or completely dropped Scott as an endorsement partner. Beer giant Anheuser-Busch discontinued Scott's ballyhooed hard

⁸⁰ See Abram Brown, *How Hip-Hop Superstar Travis Scott Has Become Corporate America's Brand Whisperer*, FORBES (Nov. 30, 2020, 6:30 AM), <https://www.forbes.com/sites/abrambrown/2020/11/30/how-hip-hop-superstar-travis-scott-has-become-corporate-americas-brand-whisperer/?sh=6f8d8f4974e7> [https://perma.cc/6SE5-NQGX]; Mike Destefano & Lei Takanashi, *A Timeline of Travis Scott's Brand Collaborations*, COMPLEX (Sept. 8, 2020), <https://www.complex.com/style/a/mike-destefano/travis-scott-brand-collaboration-timeline> [https://perma.cc/6RAH-SZ6N].

⁸¹ See *Astroworld - Trademark Details*, JUSTIA TRADEMARKS, <https://trademarks.justia.com/879/31/astroworld-87931909.html> [https://perma.cc/PJ6A-HURK] (last visited Feb. 24, 2024); Craig Hlavaty, *This Week in 2005 Houston's Playground AstroWorld Closed Its Gates for Good*, HOUS. CHRON. (Oct. 30, 2018, 4:45 AM), <https://www.houstonchronicle.com/news/houston-texas/houston/article/This-week-in-2005-AstroWorld-closed-its-gates-10307466.php> [https://perma.cc/QB23-HFQL].

[Scott's Astroworld mark] covers everything from the concerts and promotions themselves to fan merchandise like shirts and hoodies, household items, pet clothes, and more. He has also filed trademark applications for his name and several logos for similar purposes. He protected the phrase, "Look Mom I Can Fly" with a trademark in 2019, and the name of his Netflix documentary, for clothing such as shirts, hats and pants.

Travis Scott Trademarks, GERBEN TRADEMARK LIBR. (Feb. 2, 2024), <https://www.gerbenlaw.com/trademarks/musicians/travis-scott/> [https://perma.cc/N9GQ-XG3P].

⁸² See Gary McWilliams & Erwin Seba, *Deaths at Travis Scott Concert Due to Accidental Suffocation, Medical Examiner Says*, REUTERS (Dec. 16, 2021, 4:36 PM), <https://www.reuters.com/world/us/houston-medical-examiner-rules-deaths-travis-scott-concert-were-accidental-2021-12-16/> [https://perma.cc/5Q2W-JG66].

⁸³ See Lei Takanashi, *The Hype for Travis Scott Merch Helped Fuel the Chaos at Astroworld*, COMPLEX (Nov. 12, 2021), <https://www.complex.com/style/a/lei-takanashi/travis-scott-astroworld-festival-tragedy-merch-chaos> [https://perma.cc/QE4B-VQFS] (alteration in original) ("[Around 10:30 a.m.] the crowd was storming the merch tent that was placed right in front of the main entrance. It got really packed and people were jumping over metal gates trying to be first . . . There wasn't anyone guiding us in the line, so it just became a huge mess . . . We had no space, and all our bodies were so compressed onto one another. People were trying to get out and were screaming to give them space.").

seltzer drink, Cacti.⁸⁴ The fashion house Dior indefinitely postponed its collaboration with Scott.⁸⁵ One can only speculate whether Travis Scott branding will be viable going forward.

VI. ABUSIVE TRADEMARK LITIGATION AND HIP-HOP

In 2004, I wrote the first law review article exploring the phenomena of abusive trademark litigation.⁸⁶ My article defined abusive trademark litigation as “the overreaching assertion of trademark rights, typically by a large corporate entity against a smaller entity . . . where the claim involves neither a likelihood of [consumer] confusion . . . nor free-riding or . . . unfair competition.”⁸⁷ Trademark litigation is abusive when it aims to shield corporate image from unflattering attention and making examples of purported infringers by filing spurious claims. In such instances, the brand owner’s goal is not about any likelihood of consumer confusion. Building on my work in this area, Professor Leah Chan Grinvald defines trademark bullying “as the enforcement of an unreasonable interpretation by a large corporation of its trademark rights against a small business or individual through the use of intimidation tactics.”⁸⁸

Many corporations engage in abusive tactics. The iconic fashion brand Louis Vuitton hilariously threatened a law conference on IP and fashion with a cease-and-desist letter for using artwork consisting of the brand’s transformed logo on the conference flyer.⁸⁹

⁸⁴ See Thomas Kika, *Travis Scott Loses Cacti Beverage Brand as Astroworld Taints ‘Marketing Genius’ Reputation*, NEWSWEEK, <https://www.newsweek.com/travis-scott-loses-cacti-beverage-brand-astroworld-taints-marketing-genius-reputation-1658505> [<https://perma.cc/X4F5-TJP6>] (Dec. 12, 2021, 4:49 PM).

⁸⁵ See Jon Dec. Blistein, *Dior Axes Travis Scott Collaboration After Astroworld Tragedy*, ROLLINGSTONE AUSTRALIA (Dec. 29, 2021, 9:03 AM), <https://au.rollingstone.com/music/music-news/travis-scott-dior-collaboration-postpone-35681/> [<https://perma.cc/NB9F-DD68>].

⁸⁶ See K.J. Greene, *Abusive Trademark Litigation and the Incredible Shrinking Confusion Doctrine—Trademark Abuse in the Context of Entertainment Media and Cyberspace*, 27 HARV. J.L. & PUB. POL’Y 609 (2004).

⁸⁷ *Id.* at 632.

⁸⁸ Leah Chan Grinvald, *Shaming Trademark Bullies*, 2011 WIS. L. REV. 625, 642 (2011).

⁸⁹ Jenevieve Maerker, *Trademark Parody Dispute Puts Fashion Law in the Spotlight*, JD SUPRA (Mar. 22, 2012), <https://www.jdsupra.com/legalnews/trademark-parody-dispute-puts-fashion-la-21523/> [<https://perma.cc/WU9K-J8HZ>] (noting that in-house counsel at Louis Vuitton “called the poster ‘a serious willful infringement,’ asserted that the law school group should have ‘known better,’ and demanded that [the group] stop using it”). The law school cited trademark fair use and the First Amendment, and the fashion company ultimately backed down. *See id.*

Mattel Corporation has also behaved aggressively in connection with its Barbie trademark.⁹⁰ Furthermore, Monster Energy sued Disney for the 2013 film “Monsters University” and an author for a book entitled “Albert and the Amazing Pillow Monsters.”⁹¹ The author, Justin Drazin, is quoted thusly: “I had to bow to [Monster Energy’s] demands . . . I had written a second and third book . . . but they were never published because of the Monster debacle.”⁹²

What drives these “disputes” is not any concern over consumer confusion, but rather “turf”-marking and sending signals, not to real infringers, but to those the mark owner simply wishes to suppress.

VII. REGULATORS, MOUNT UP: DR. DRE, JAY-Z, AND THE TRADEMARK ART OF WAR

As trademark and right of publicity revenues have soared, rappers have taken increasingly aggressive steps in the enforcement arena. The rapper RZA of Wu-Tang Clan, for example, has launched trademark infringement actions “against multiple e-commerce sites for selling bootleg products with the Wu-Tang Clan logo.”⁹³ The hip-hop space is not immune to overaggressive trademark and right of publicity legal tactics. In virtually every case where a celebrity is involved in an alleged trademark violation, misappropriation of likeness under the right of publicity will also be alleged.⁹⁴ The drama of trademark claims and disputes ticks on like clockwork in the rap music industry.

⁹⁰ See, e.g., Greene, *supra* note 67.

⁹¹ Andrew L. Yarrow, *A D.C. Root Beer Company, an Energy Drink Behemoth and an Ugly Trademark Fight*, WASH. POST (Oct. 21 2019, 9:00 AM), https://www.washingtonpost.com/lifestyle/magazine/a-dc-root-beer-company-an-energy-drink-behemoth-and-an-ugly-trademark-fight/2019/10/21/5f2b190c-e156-11e9-8dc8-498eabc129a0_story.html [<https://perma.cc/E5ZK-48GW>].

⁹² *Id.*

⁹³ Tara Mahadevan, *RZA Files \$2 Million Lawsuit Against Wu-Tang Clan Bootleggers for Trademark Infringement*, COMPLEX (Jan. 25, 2022), <https://www.complex.com/music/a/cmplxtara-mahadevan/rza-files-2-million-lawsuit-wu-tang-bootleggers-trademark-infringement> [<https://perma.cc/9NDU-ZB8Y>].

⁹⁴ See generally Daniel A. Rozansky et al., *Protecting Image and Likeness Through Trademark Law*, NAT’L L. REV. (Oct. 19, 2021), <https://www.natlawreview.com/article/protecting-image-and-likeness-through-trademark-law> [<https://perma.cc/M6QL-6RX3>] (describing potential overlap between right of publicity and trademark claims).

There are fights over titles to cable television shows as in the fight over the mark “Empire.”⁹⁵ An independent hip-hop music label named Empire Distribution challenged Fox Television (Fox) by sending a letter alleging the title of Fox’s hit show “Empire” constituted unauthorized use of the music label’s trademark.⁹⁶ Apparently, Empire Distribution tried to negotiate a settlement wherein Fox would pay Empire \$8 million to continue using the “Empire” title.⁹⁷ Fox’s (entirely predictable) response was to bring a declaratory judgment action, and the music label counterclaimed for trademark infringement.⁹⁸

The District Court ruled in favor of Fox, and the Ninth Circuit affirmed Fox’s victory. The artistic relevance test from *Rogers v. Grimaldi* disposed of the music label’s counterclaim.⁹⁹ The main takeaway, however, is this: do not send letters to Fox Television or any Fox entity threatening legal action.¹⁰⁰ A declaratory judgment action, as here, is likely to follow.

Perhaps the poster child for abusive hip-hop trademark litigation is a recent lawsuit by the rapper Dr. Dre of NWA fame. Dr. Dre sued a real doctor, a gynecologist named Draion M. Burch from Pennsylvania.¹⁰¹ Dr. Draion Burch filed a federal trademark registration application for “Dr. Draï” for speaking services at

⁹⁵ See Steve Brachmann, *Twentieth Century Fox Television Wins Trademark Case, ‘Empire’ Does Not Infringe*, IP WATCHDOG (Nov. 22, 2017, 6:15 AM), <https://ipwatchdog.com/2017/11/22/twentieth-century-fox-wins-trademark-case-empire/id=90366/> [<https://perma.cc/7G6H-VLUQ>].

⁹⁶ See *id.*

⁹⁷ See *id.*

⁹⁸ See *Twentieth Century Fox Television v. Empire Distrib., Inc.*, 875 F.3d 1192, 1195 (9th Cir. 2017).

⁹⁹ See *id.* at 1197–99. The seminal case of *Rogers v. Grimaldi* established the test for artistic uses of trademarks to further First Amendment concerns. *Rogers v. Grimaldi*, 875 F.2d 994, 999 (2d Cir. 1989).

Under the *Rogers* test, the use of a trademark in the title of an expressive work does not violate the Lanham Act unless such use (1) “has no artistic relevance to the underlying work whatsoever,” or (2) if it has artistic relevance, “explicitly misleads as to the source or content of the work.” The *Rogers* test traditionally applies to the use of a mark in the *title* of an expressive work, but some courts, including the Ninth Circuit, have expanded its application to use of a mark within the *body* of an expressive work as well.

See *The Ninth Circuit Affirms Significant Legal Victory for Fox*, CDAS (Jan. 3, 2018), <https://cdas.com/allowing-tv-series-empire-continue-producing-show-merchandise-record-label-empire-distributions-objections/> [<https://perma.cc/SJF8-9ABG>] (quoting *Rogers*, 875 F.2d at 999).

¹⁰⁰ See *Twentieth Century Fox*, 875 F.3d at 1195.

¹⁰¹ *Young v. Burch*, 2018 TTAB LEXIS 154 (T.T.A.B. 2018). See Ben Beaumont-Thomas, *Dr. Dre Loses Trademark Battle with Gynaecologist Dr. Draï*, *The Guardian* (May 10, 2018, 8:33 AM), <https://www.theguardian.com/music/2018/may/10/dr-dre-loses-copy-right-battle-with-gynaecologist-dr-drai> [<https://perma.cc/4HDM-PL8E>].

seminars and for audiobooks.¹⁰² Dr. Dre, in response, filed an opposition action with the United States Trademark Office.¹⁰³ The opposition was denied, meaning Dr. Dre's mark could be registered.¹⁰⁴ The rapper then challenged the denial to the Trademark Trial and Appeal Board, which soundly rejected Dr. Dre's contentions.¹⁰⁵

Here, it would seem that the rapper's lawyers—who, given Dr. Dre's immense fortune, must be fine lawyers—forgot about a basic rule every law student who has taken a basic trademark law class knows: the “Aunt Jemima doctrine.”¹⁰⁶ While the Aunt Jemima brand is defunct,¹⁰⁷ the “Aunt Jemima doctrine” remains locked in as a pillar of trademark law.¹⁰⁸ It says that a trademark infringement claim requires that the marks in question be used in the same or related line of business.¹⁰⁹ Dr. Dre, the real doctor, writes books about anatomy and does podcasts and talks.¹¹⁰ Dr. Dre raps and sells headphones.¹¹¹ Consumers are unlikely to be confused.

Perhaps more than any hip-hop artist, Jay-Z has taken branding to its greatest zenith. Recently Jay-Z was pronounced a billionaire, and branding and endorsement are a massive part of his fortune.¹¹² Jay-Z also defends his brands (and all his IP) in the legal arena as aggressively as any Fortune 500 company. In copyright litigation over his hit song of 2004, “Izzo,” Jay-Z showed

¹⁰² Young, 2018 TTAB LEXIS at 154.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* See David Williams, *Rapper Dr. Dre Loses a Trademark Dispute with Ob/gyn Dr. Dre*, CNN (May 9, 2018, 4:09 PM), <https://www.cnn.com/2018/05/09/entertainment/dr-dre-trademark-ruling-trnd/index.html> [<https://perma.cc/BN45-J8PC>].

¹⁰⁶ Aunt Jemima the brand is no more: done in, some would say, by a “woke” mob.

¹⁰⁷ Dee-Ann Durbin, *Aunt Jemima Brand Gets a New Name: Pearl Milling Company*, PBS (Feb. 9, 2021), <https://www.pbs.org/newshour/arts/aunt-jemima-brand-gets-a-new-name-pearl-milling-company> [<https://perma.cc/J2C6-FZYH>].

¹⁰⁸ See Kenneth L. Port, *Learned Hand's Trademark Jurisprudence: Legal Positivism and the Myth of the Prophet*, 27 PAC. L.J. 221, 244–45 (1996); Matt Soniak, *How Aunt Jemima Changed U.S. Trademark Law*, MENTAL FLOSS (Jun. 15, 2021), <https://www.mentalfloss.com/article/30933/how-aunt-jemima-changed-us-trademark-law> [<https://perma.cc/AW4L-EJF4>].

¹⁰⁹ *Aunt Jemima Mills Co. v. Rigney & Co.*, 257 F. 407, 409–10 (2d Cir. 1917) (“[W]e think that goods, though different, may be so related as to fall within the mischief which equity should prevent.”).

¹¹⁰ See Young v. Burch, 2018 TTAB LEXIS 154 at 2 (T.T.A.B. 2018).

¹¹¹ *People Aren't Hearing All the Music*, BEATS BY DRE, <https://www.beatsbydre.com/company/aboutus> [<https://perma.cc/GW6N-K77T>] (last visited Mar. 5, 2024).

¹¹² See Zack O'Malley Greenburg, *Artist, Icon, Billionaire: How Jay-Z Created His \$1 Billion Fortune*, FORBES (Jun. 3, 2019), <https://www.forbes.com/sites/zackomalleygreenburg/2019/06/03/jay-z-billionaire-worth/?sh=35ffe4173a5f> [<https://perma.cc/699Y-7DQ6>].

that he simply will not settle claims.¹¹³ In that copyright case, an unknown singer named Demme Ulloa sued Jay-Z for using her voice on the “Izzo” song without giving her credit.¹¹⁴ Almost for certain, this matter could have been settled for a modest sum. Instead, the case went to the district court, which denied Jay-Z’s motion for summary judgment on two of Ulloa’s claims.¹¹⁵ Jay-Z filed a motion for reconsideration, but it was denied,¹¹⁶ and was appealed to the Second Circuit. In the end, the legal fees were likely well above six figures.

In the trademark realm, Jay-Z and his affiliated companies have seen numerous trademark battles. Jay-Z’s \$200 million sale of his Rocawear fashion line to Iconix Brands led to a lawsuit by Iconix, in which it alleged trademark rights in the “Rocawear” mark were part of the transaction.¹¹⁷ Iconix filed an arbitration claim against Roc Nation and Jay-Z when Jay-Z’s companies sold Roc Nation baseball caps, which Iconix contended violated the parties’ licensing agreement.¹¹⁸ Jay-Z fought valiantly, even disputing the validity of the arbitration on the matter due to the lack of African American arbitrators on the panel.¹¹⁹ Ultimately, the parties settled, with Jay-Z reputedly paying \$15 million to Iconix.¹²⁰

Jay-Z’s signature “diamond cutter” hand gesture has also led to trademark litigation. At concerts and public forums, Jay-Z routinely does a hand gesture where he brings his hands together

¹¹³ See *Ulloa v. Universal Music & Video Distrib. Corp.*, 303 F. Supp. 2d 409, 411 (S.D.N.Y. 2004).

¹¹⁴ See *id.*

¹¹⁵ See *id.*

¹¹⁶ *Ulloa v. Universal Music & Video Distrib. Corp.*, 2004 U.S. Dist. LEXIS 6755 at *1 (S.D.N.Y. Apr. 19, 2004).

¹¹⁷ See Cedric “Big Ced” Thornton, *Jay-Z Buys Back Intellectual Property for Rocawear for \$15 Million*, BLACK ENTER. (Nov. 23, 2019), <https://www.blackenterprise.com/jay-z-buys-back-intellectual-property-for-rocawear-for-15-million/> [<https://perma.cc/2Q5X-34VL>]; see also First Amended Complaint at 2–3, *Iconix Brand Grp., Inc. v. Roc Nation Apparel Grp., LLC*, No. 17-CV-3096 (AJN), 2019 WL 5203256 (S.D.N.Y. Sept. 26, 2019).

¹¹⁸ See *Rocawear, Iconix Put Years-Long Web of Trademark, Fraud Fights to Bed in New Settlement*, TFL (Nov. 14, 2019), <https://www.thefashionlaw.com/rocawear-iconix-put-years-long-web-of-trademark-fraud-fights-to-bed-in-new-settlement/> [<https://perma.cc/S5HK-EF8F>]; see also Eriq Gardner, *Jay Z’s Roc Nation Accused of Undermining \$204 Million Licensing Deal*, HOLLYWOOD REP. (May 2, 2017, 7:44 AM), <https://www.hollywoodreporter.com/business/business-news/jay-zs-roc-nation-accused-undermining-204-million-licensing-deal-999514/> [<https://perma.cc/JZF7-VDDE>].

¹¹⁹ *Id.*

¹²⁰ See Kori Hale, *Jay-Z’s Roc Nation Gets Iconix Lawsuit Dismissed for \$15 Million*, FORBES (Nov. 24, 2019, 8:00 AM), <https://www.forbes.com/sites/korihale/2019/11/24/jay-zs-roc-nation-gets-iconix-lawsuit-dismissed-for-15m/?sh=4acefa736e29> [<https://perma.cc/7RD8-4XZH>].

like a pyramid.¹²¹ Jay-Z reportedly attempted to register the hand gesture—unsuccessfully—eight times with the U.S. Trademark Office.¹²² Jay-Z was sued by a wrestler named “Diamond” Dallas Page in 2005 for trademark infringement for use of the hand gesture.¹²³ The case apparently settled favorably for Dallas Page.¹²⁴ Jay-Z renewed his attempt to register the gesture in the Trademark Office in 2018.¹²⁵

One cannot help but think that, while great for individuals, these trademark and right of publicity conflicts are not beneficial to society.

VIII. INEQUITABLE TRADEMARK DISTRIBUTIONS

Finally, the music industry has always been plagued by trademark inequities which penalize the legally unsophisticated and unrepresented. This dynamic plagued the Blues artists at the inception of the music industry and continues to afflict urban hip-hop artists of today.¹²⁶ There is a tremendous economic and informational gap between the “haves” of IP, such as multimillionaire and billionaire rappers and major record labels, and the “have-nots”: the creative African American artists. There is copyright law for the one percent, and copyright and IP law for everyone else. Black creators are the cultural shock troops that drive everything entertainment-related. Black street slang turns into corporate-owned advertising.¹²⁷ Social media and the internet “thrive[] on content from Black people.”¹²⁸ Black teenagers’

¹²¹ See *Jay-Z Goes Hands-On for Trademarks*, PROTOPOPESCU & PARTNERS: INTELL. PROP., <https://protopopescu.eu/blog/2019/10/21/jay-z-goes-hands-on-for-trademarks/> [https://perma.cc/ZF3P-MSSS] (last visited Mar. 19, 2024); Quibian Salazar-Moreno, *Jay-Z Loses Lawsuit over Roc-A-Fella “Diamond” Hand Sign*, HIPHOP, <https://www.ihiphop.com/jay-z-loses-lawsuit-over-roc-a-fella-%E2%80%9Cdiamond%E2%80%9D-hand-sign/> [https://perma.cc/TN7B-XKJT] (last visited Feb. 24, 2024).

¹²² See *Jay-Z Goes Hands-On for Trademarks*, *supra* note 121.

¹²³ See Salazar-Moreno, *supra* note 121; see also Complaint, *Diamond Dallas Page v. Shawn Carter et al.*, No. 05-08475 DSF (JWJx), 2005 WL 3775933 (C.D. Cal. Dec. 2, 2005).

¹²⁴ See Salazar-Moreno, *supra* note 121.

¹²⁵ See Timothy D. Sitzmann, *Hands off Jay-Z’s Hand Gesture Trademark*, WINTHROP & WEINSTINE (Feb. 8, 2018), <https://winthrop.com/bold-perspectives/hands-off-jay-zs-hand-gesture-trademark/> [https://perma.cc/NQJ7-WHR4].

¹²⁶ See Greene, *supra* note 19, at 343, 356 n.82.

¹²⁷ See Lei Danielle Escobal, *Without Black Leaders, Companies Shouldn’t Profit from AAVE*, DIAMONDBACK (Oct. 6, 2021), <https://dbknews.com/2021/10/06/corporations-aaave-profit-performative/> [https://perma.cc/LH7L-9PUR].

¹²⁸ DeAsia Paige, *Black Memes Matter: How Black People Drive Social Media Culture*, UNIV. DAILY KANSAN: CHALK (Feb. 27, 2020), https://www.kansan.com/chalkmagazine/black-memes-matter-how-black-people-drive-social-media-culture/article_b572c262-5995-11ea-b61d-2b1231ea3e81.html [https://perma.cc/XS9S-PR6F] (“[O]ut of the five . . . most-viewed GIFs of 2019, four of them were based on the reactions from Black people, according to GIPHY.”).

internet memes go viral, but these creators often lack the wherewithal to turn phrases into protectable IP.¹²⁹ Created by Black youth but trademarked by others, TikTok dances that are performed by videogame avatars online—and the music itself—often end up in the hands of non-creators.

The U.S. Trademark Office investigates whether confusingly similar trademarks exist in the trademark registration process.¹³⁰ The Trademark Office, however, does not investigate whether the mark applicant and claimant is indeed the person or entity entitled to trademark ownership. The Trademark Office's website has a section devoted to trademark registrations for musical artists and bands.¹³¹ The website has a subsection on trademark ownership in the registration process.¹³²

However, the guidance is sparse regarding the critical issue of who is entitled to claim trademark ownership, with the website providing only that “[i]f there are joint owners, [meaning] more than one person owns the trademark but [they] haven't formed a legal partnership,” then “[i]nclude each person's name in the application.”¹³³ The Trademark Office further notes that “all band members co-own the trademark as individuals,” and the claimant must “complete owner information for each member by identifying each member as an individual and specifying each member's national citizenship.”¹³⁴ This is useful information, but far from setting forth standards of trademark ownership in the musical group context.

This begs the question: what if one member of a band decides to register the band name on their own, unbeknownst to the other members? This dynamic occurs frequently when there is a musical group that has not contractually defined issues of trademark ownership in a partnership agreement or otherwise.¹³⁵

¹²⁹ See Emma Grey Ellis, *Want to Profit off Your Meme? Good Luck if You Aren't White*, WIRED (Mar. 1, 2017, 11:00 AM), <https://www.wired.com/2017/03/on-fleek-meme-monetization-gap/> [<https://perma.cc/4XZR-KPJ7>].

¹³⁰ See *Likelihood of Confusion*, U.S. PAT. & TRADEMARK OFF., <https://www.uspto.gov/trademarks/search/likelihood-confusion> [<https://perma.cc/BCA2-K7LD>] (last visited Mar. 19, 2024).

¹³¹ *Rockin' Your Trademark*, U.S. PAT. & TRADEMARK OFF., <https://www.uspto.gov/trademarks/laws/rockin-trademark> [<https://perma.cc/E4GK-4C3Y>] (last visited Feb. 24, 2024).

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ Even where a written partnership agreement exists, things can go horribly awry, as seen in the band Journey's epic trademark ownership disputes. See Chad Childers,

This is precisely what happened in a case involving a band, known as Wonderbread 5.¹³⁶ The Bay Area band consisted of five members who performed together for over ten years. One member described Wonderbread 5 as “a bunch of Caucasian boys playing Jackson 5 songs.”¹³⁷ As is common among musical groups, the band did not have a formal partnership agreement setting forth trademark ownership, and never filed a trademark registration.¹³⁸ One member of the band, Gilles, was expelled from the group, and litigation over the termination ensued in a California state court.¹³⁹

Gilles subsequently filed a federal trademark registration, listing himself as the author.¹⁴⁰ The other band members, as petitioners, filed a trademark cancellation action to cancel the mark on the grounds of fraud.¹⁴¹

The Trademark Trial and Appeal Board looked at the evidence and ruled that Gilles’s registration should be cancelled since Gilles was not the trademark owner of the Wonderbread 5 mark.¹⁴² In doing so, the Board looked to a test for band ownership formulated by Professor McCarthy in the McCarthy on Trademarks and Unfair Competition treatise.¹⁴³

In his treatise, McCarthy sets forth a test for band ownership.¹⁴⁴ McCarthy posits that in cases involving a band, it must first be determined whether the group name is personal to the individual members or not.¹⁴⁵ If not, a second question then must be determined: for what quality or characteristic is the musical group known and who controls that quality?¹⁴⁶ The

Journey Reach Settlement with Ex-Rhythm Section over Alleged ‘Coup’, LOUDWIRE (Apr. 1, 2021), <https://loudwire.com/journey-reach-settlement-ross-valory-steve-smith-alleged-coup/> [<https://perma.cc/T3W2-Y44P>] (“[Journey] guitarist Neal Schon and keyboardist Jonathan Cain accused Valory and Smith of attempting to pull a corporate “coup d’état” trying to gain control of the band’s name and trademark without consulting them. Schon and Cain had a 1998 written agreement with former vocalist Steve Perry that granted them the rights to the group’s name and trademark.”).

¹³⁶ *Wonderbread 5 v. Patrick Gilles a/k/a Wonderbread 5 and/or Wonderbread Five*, 115 U.S.P.Q.2d (BNA) 1296 (T.T.A.B. 2015).

¹³⁷ *Id.* (quoting Rickard Dep. 8:24-9:7 (32 TTABVUE 210)).

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION §16.45 (Thomson West, 5th ed. 2017).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

answer should identify the person or entity that owns the group name as a mark.¹⁴⁷

Ultimately, the Board held that “the WONDERBREAD 5 mark was not ‘personal’ to Respondent Gilles or any other of the band members.¹⁴⁸ The mark signified the ‘style and quality’ of the group: a Jackson 5 tribute band, not a ‘particular performer combination.’”¹⁴⁹

The hip-hop arena has also witnessed disputes over band trademark ownership. An example is the rap group Run-DMC. The group started in 1981 with three members—Joseph “Rev. Run” Simmons, Darryl “D.M.C.” McDaniels and Jason “Jam Master Jay” Mizell, who passed away in 2002.¹⁵⁰ In 1986, Run-DMC entered into a landmark deal with Adidas and, in essence, not only became the face of the sneaker giant, but arguably built the company into what it is today.¹⁵¹

Yet amazingly, the trademark for Run-DMC was not filed as a trademark until 2004.¹⁵² Moreover, one member of the band, McDaniels, registered the mark exclusively.¹⁵³

Similarly, the iconic hip-hop group Wu-Tang Clan formed in the early 1990’s and consisted initially of Robert Diggs, known as RZA, and Russell Jones, known as Ol’ Dirty Bastard. The band’s famous bat-wing logo was designed by band member D.J. Mathematics. According to band member U-God, “each member of the group made an investment”—he estimates \$40,000—“to get Wu-Wear off the ground in the mid-’90s.”¹⁵⁴ Later, a music producer signed the group to a recording deal. “RZA also convinced [the producer] to allow each individual in the group to become, in essence, a free agent. They could sign a solo deal with any other

¹⁴⁷ *Id.*

¹⁴⁸ *Wonderbread 5 v. Patrick Gilles a/k/a Wonderbread 5 and/or Wonderbread Five*, 115 U.S.P.Q.2d (BNA) 1296 (T.T.A.B. 2015).

¹⁴⁹ John L. Welch, *Precedential No. 21: TTAB Sides with Band in “WONDERBREAD 5” Ownership Dispute*, THE TTABLOG: KEEPING TABS ON THE TTAB (July 20, 2015), <https://thettablog.blogspot.com/2015/07/precedential-no-21-ttab-sides-with-band.html> [<https://perma.cc/BM54-LXBW>].

¹⁵⁰ See McKenzie Jean-Phillippe, *Why Run-D.M.C. are the Undisputed Kings of Hip-Hop*, OPRAH DAILY (Jan. 24, 2020, 10:15 AM), <https://www.oprahdaily.com/entertainment/a30644382/run-dmc-facts/> [<https://perma.cc/CD96-MY2L>].

¹⁵¹ See Mellery-Pratt, *supra* note 1.

¹⁵² See RUN--DMC, Registration No. 3310249.

¹⁵³ *Id.*

¹⁵⁴ Bandini, *U-God Airs Wu-Tang’s Dirty Laundry. It Was Far From Simple Back Then*, AMBROSIA FOR HEADS (Mar. 20, 2018), <https://ambrosiaforheads.com/2018/03/ugod-calls-out-rza-wu-tang-clan-management-book/> [<https://perma.cc/P2T2-2KC3>] (citation omitted).

company, and take the Wu-Tang name with them”¹⁵⁵ However, as member U-God claims:

DJ Mathematics drew that logo on the back of a napkin back in the day. RZA quickly trademarked it, and to this very day his brother beefs when any of the original members attempt to use it. That to me is crazy — I mean, I understand if someone was using it without the group’s permission, but the members of the group itself? Wow, that’s just crazy.¹⁵⁶

In this sense, trademark law has traded one set of problems for artists for another. In the 1960s and 1970s, some record labels and producers demanded ownership of a band’s trademark. Motown Records was one such label, and Motown seized the rights to the trademark of Motown’s greatest band in terms of commercial sales—the Jackson 5.¹⁵⁷

That is why when the Jackson 5 left Motown in the late 1970s, the group had to change its name to “The Jacksons.”¹⁵⁸ The great singer Tina Turner faced the same fate when she left Ike Turner and his record label.¹⁵⁹ Similarly, the 1980s group, New Edition, had to sue to wrest back their trademark in the band’s name from their producer, Maurice Starr.¹⁶⁰ Starr was the impresario behind the group, and no doubt whipped them into shape to achieve hit records in the 1980s.¹⁶¹ The “New Edition” name was first used in 1978 by Bobby Brown and four childhood friends, and was later resurrected in 1981.¹⁶²

IX. OLD-SCHOOL HIP-HOP TRADEMARK AND OWNERSHIP ISSUES

No scholarship exists on the legal history of old-school hip-hop trademarks. The issue is germane to this exploration of the rise of trademark and branding in the hip-hop arena. What emerges is the notion that early hip-hop artists, despite their affinity for marketing

¹⁵⁵ Frannie Kelly, *The Wu-Tang Clan’s 20-Year Plan*, NPR (Apr. 8, 2013, 6:00 AM), <https://www.npr.org/sections/therecord/2013/04/08/176519640/the-wu-tang-clans-20-year-plan> [<https://perma.cc/EP6R-HM7M>].

¹⁵⁶ Bandini, *supra* note 154.

¹⁵⁷ UMG Recordings, Inc. v. Siggys Music, Inc., 2018 WL 3529479, at *5 (T.T.A.B. 2018).

¹⁵⁸ As part of a 1980 settlement agreement, the members of the Jackson 5 gave up all rights to the Jackson 5 mark, which was owned by Motown. *See id.* at *6 (noting that the 1980 settlement agreement “does not provide that the Jackson brothers collectively or individually own or have the right to use the trademark J5 or any other marks”).

¹⁵⁹ Ike Turner chose and trademarked the name “Tina Turner” so he could, if the need ever arose, replace one “Tina Turner” with another. *IKE TURNER WITH NIGEL CAWTHORNE, TAKIN’ BACK MY NAME: THE CONFESSIONS OF IKE TURNER* 74–75 (1999).

¹⁶⁰ *See Bell v. Streetwise Recs., Ltd.*, 640 F. Supp. 575, 579 (D. Mass. 1986).

¹⁶¹ *See* Peter Watrous, *White Singers + Black Style = Pop Bonanza*, N.Y. TIMES, Mar. 11, 1990 (§ 2), at 1.

¹⁶² *See Bell*, 640 F. Supp. at 577 n.5.

and commercial ventures existed in a kind of Wild West. The Run-DMC trademark is illustrative of some of these problems.¹⁶³

The group's members, McDaniels, Simmons, and Mizell, were three talented young men from the streets of Hollis, Queens, New York City,¹⁶⁴ and not educated in legal matters. Records indicate that the Run-DMC trademark was first used in commerce in 1983 but was not registered until 2004.¹⁶⁵ The original registrant of the mark was McDaniels.¹⁶⁶ The mark was subsequently transferred to Run DMC Holdings, Inc., and again to Run-DMC Brand, LLC.¹⁶⁷

The fact that the Run-DMC mark remained unregistered for over twenty years is in itself rather astonishing. After all, this is the band that pioneered modern endorsement deals in hip-hop music and has sold over 230 million records worldwide.¹⁶⁸ There are few safeguards in preventing unscrupulous parties from registering band trademarks and stage names. A band member could hypothetically file an opposition to a trademark application that omits the band member. This presumes that an artist would be aware that such chicanery was afoot. The opposition period is short for trademark registrations.¹⁶⁹ The next step would be a cancellation proceeding, which are notoriously expensive proceedings and have a very low success rate.¹⁷⁰ Once a mark has

¹⁶³ See *supra* notes 150–153 and accompanying text; *Run-DMC Co-Founder Darryl McDaniels Inks Wide Ranging Licensing Deal*, THE LICENSING LETTER (Nov. 3, 2021), <https://www.thelicensingletter.com/run-dmc-co-founder-darryl-mcdaniels-inks-wide-ranging-licensing-deal/> [https://perma.cc/72HH-PRAM].

¹⁶⁴ Maurice DuBois, *Run-DMC's Darryl McDaniels Reflects on His Hollis, Queens, Roots*, CBS NEWS (Aug. 11, 2023, 7:10 PM), <https://www.cbsnews.com/newyork/news/run-dmc-darryl-mcdaniels-hollis-queens/> [https://perma.cc/K68R-APCZ].

¹⁶⁵ RUN--DMC, Registration No. 3,310,249. See also U.S. Trademark Application Serial No. 73/712,624 (filed Feb. 22, 1988).

¹⁶⁶ *Run-DMC Co-Founder Darryl McDaniels Inks Wide Ranging Licensing Deal*, *supra* note 163.

¹⁶⁷ *Id.*

¹⁶⁸ McKenzie Jean-Philippe, *Why Run-D.M.C. Are the Undisputed Kings of Hip-Hop*, OPRAH DAILY (Jan. 24, 2020, 10:15 AM), <https://www.oprahdaily.com/entertainment/a30644382/run-dmc-facts/> [https://perma.cc/WV22-UVF5].

¹⁶⁹ See 37 C.F.R. § 2.101(c) (2023) (“The opposition must be filed within thirty days after publication . . . of the application being opposed or within an extension of time . . .”).

¹⁷⁰ Barton Beebe & Jeanne C. Fromer, *Fake Trademark Specimens: An Empirical Analysis*, 120 COLUM. L. REV. F. 217, 246–47 (2020) (“[T]he[] biggest limitation [of trademark cancellation proceedings] is their high cost, which can be burdensome to smaller businesses. One study . . . estimates the median cost of a U.S. opposition or cancellation proceeding to be \$95,000.” (citing AM. INTEL. PROP. L. ASS'N, 2015 REPORT OF THE ECONOMIC SURVEY 39 (2015), <http://files.ctctcdn.com/e79ee274201/b6ced6c3-d1ee-4ee7-9873-352dbe08d8fd.pdf> [https://perma.cc/S7FW-J72D])).

been in use continuously, it becomes close to impossible to obtain cancellation due to the doctrine of incontestability.¹⁷¹

X. STANDARDS FOR FRAUDULENT TRADEMARK REGISTRATIONS

False representations on trademark applications are unlawful. The Lanham Trademark Act provides that “[a]ny person who shall procure registration in the Patent and Trademark Office of a mark by a false or fraudulent declaration or representation, oral or in writing, or by any false means, shall be liable in a civil action by any person injured thereby for any damages sustained in consequence thereof.”¹⁷²

Traditionally, courts interpreted section 1120 to show that “[a] trademark applicant commits fraud in procuring a registration when it makes material representations of fact in its declaration which it knows or should know to be false or misleading.”¹⁷³ That changed with the Federal Circuit’s decision in *In re Bose Corporation*.¹⁷⁴

In *Bose Corporation*, the Federal Circuit significantly lowered the high bar of proving fraud shown in the *Medinol* line of cases.¹⁷⁵

In *In re Bose Corporation*. . . the CAFC ruled that the TTAB’s standard for determining whether fraud existed was too low. “[B]y equating ‘should have known’ with a subjective intent,” the Board “erroneously lowered the fraud standard to a simple negligence standard.” . . . The CAFC found no substantial evidence that Bose intended to deceive the PTO in the renewal process, and it therefore reversed. The CAFC made it clear that proof of intent to deceive is required to establish fraud: “Thus, we hold that a trademark is obtained fraudulently under the Lanham Act only if the applicant or registrant knowingly makes a false, material representation with the intent to deceive the PTO.”¹⁷⁶

¹⁷¹ See *Wilhelm Pudenz, GmbH v. Littlefuse, Inc.*, 177 F.3d 1204, 1208 (11th Cir. 1999) (“Once a registration has achieved incontestable status, it is treated as conclusive evidence of the registrant’s right to use the trademark, subject to certain enumerated defenses. Thus, incontestability narrows, but does not eliminate, the grounds upon which the trademark’s validity may be called into question by a defendant.” (citation omitted)).

¹⁷² Lanham Act § 38, 15 U.S.C. § 1120 (1975).

¹⁷³ *Medinol Ltd. v. Neuro Vasx, Inc.*, 67 U.S.P.Q. 2d 1205 (T.T.A.B. 2003).

¹⁷⁴ 580 F.3d 1240 (Fed. Cir. 2009).

¹⁷⁵ Richard E. Petershack, *The Bose Decision: Proving Fraud on the USPTO Made Harder*, AXLEY ATTYS (Dec. 8, 2009), https://www.axley.com/publication_article/the-bose-decision-proving-fraud-on-the-uspto-made-harder/ [<https://perma.cc/Z3MB-L2E5>].

¹⁷⁶ *Id.*

Under the *Bose Corporation* standard, a person alleging fraud on the Trademark Office must do so by presenting clear and convincing evidence of actual fraud.¹⁷⁷

XI. GOODBYE COPYRIGHT? COPYRIGHT'S HIP-HOP PROBLEM

Trademark and publicity rights have emerged as a much more attractive alternative to the traditional music industry source of copyright revenues. The reasons for this are three-fold. First, in the era of digital streaming, payouts to artists are nowhere near the revenues of the old vinyl and later CD hard copy sales.¹⁷⁸ Top-line artists such as Taylor Swift have bemoaned the inequitable payouts from digital streaming services. “Swift has advocated for change in the music-streaming industry since 2014 when she published an essay for The Wall Street Journal arguing that ‘music should not be free.’ The same year, Swift pulled her ‘1989’ album from Spotify.”¹⁷⁹ In response, the architect of Spotify’s platform flatly stated that the platform was not built to pay artists. There is a global movement afoot to bring more equity for artists to the streaming space, but it faces long odds.¹⁸⁰

Hip-hop’s relationship with copyright law has been tenuous and combative from the outset. The first major hit record hip-hop song, “Rapper’s Delight,” was based on pilfered lyrics from an unfortunate rapper, D.J. Caz, who missed the studio session for

¹⁷⁷ See Adrienne Baker, *In Re Bose Corp.: CAFC Requires a Clear and Convincing Intent to Deceive*, JOLT DIGEST (Sept. 14, 2009), <https://jolt.law.harvard.edu/digest/in-re-bose-corp> [<https://perma.cc/Z468-EM54>].

¹⁷⁸ Jess Conway, *Progressive Beats: from CDs to Online Streaming*, MEDIUM (Nov. 13, 2020), <https://medium.com/digital-society/progressive-beats-from-cds-to-online-streaming-e8760b22f7ae> [<https://perma.cc/V22Z-J3TW>]. But in an ironic twist, vinyl record sales now exceed those of CD’s. See Sarah Whitten, *Music Fans Pushed Sales of Vinyl Albums Higher, Outpacing CDs, Even as Pandemic Sidelined Stadium Tours*, CNBC (July 13, 2021, 11:23 AM), <https://www.cnbc.com/2021/07/13/music-fans-pushed-sales-of-vinyl-albums-higher-in-first-half-of-2021.html> [<https://perma.cc/TAK8-5P77>].

¹⁷⁹ Hannah Towey, *Taylor Swift Doesn’t Need to Earn Streaming Royalties, According to a Former Spotify Boss Who Said the Company Is a Distribution Platform That Wasn’t Built to Pay Artists*, BUS. INSIDER (July 6, 2021, 1:09 PM), <https://www.businessinsider.com/taylor-swift-doesnt-need-streaming-royalties-former-spotify-boss-said-2021-7> [<https://perma.cc/Y7CN-KYKS>]; see also Taylor Swift, *For Taylor Swift, the Future of Music Is a Love Story*, WALL ST. J. (July 7, 2014, 6:39 PM), https://www.wsj.com/articles/for-taylor-swift-the-future-of-music-is-a-love-story-1404763219?mod=article_inline [<https://perma.cc/Z4PZ-DD4A>].

¹⁸⁰ See Ben Sisario, *Musicians Say Streaming Doesn’t Pay. Can the Industry Change?*, N.Y. TIMES (May 10, 2021), <https://www.nytimes.com/2021/05/07/arts/music/streaming-music-payments.html> [<https://perma.cc/269B-DHHD>] (“Major record labels, after contracting painfully for much of the 2000s, are now posting huge profits. Yet not enough of streaming’s bounty has made its way to musicians, the activists say, and the major platforms’ model tends to over-reward stars at the expense of everybody else.”).

the song. His lyrics were used in the record without authorization, and he has yet to receive writing credit for it.¹⁸¹ The song was also used, again without authorization, in the Chic song “Good Times” and served as its backbone.¹⁸²

XII. HOSTILE JUDICIAL ATTITUDES

Judicial hostility to hip-hop in its early days was palpable. The apex of judicial hostility occurred in the *Grand Upright* case, where the late rapper Biz Markie used an unauthorized sample of the Gilbert O’Sullivan song, “Alone Again Naturally.”¹⁸³ A plethora of copyright infringement claims plagued hip-hop songs from Vanilla Ice’s hit song “Ice, Ice Baby” to the iconic group Tribe Called Quest’s “Can I Kick It,” which sampled Lou Reed’s “Take a Walk on the Wild Side.” The digital sampling which made Public Enemy great became impossible in this hostile judicial environment.¹⁸⁴

¹⁸¹ See Yahoo Travel, *Writing Cred for ‘Rapper’s Delight’ Sparks Grudge*, N.Y. POST (Jan. 26, 2014, 5:21 AM), <https://nypost.com/2014/01/26/writing-cred-for-rappers-delight-sparks-grudge/> [<https://perma.cc/BAS5-BK8W>] (“Pioneering rapper Grandmaster Caz (a.k.a. Curtis Brown) has long claimed that his former manager, future Sugar Hill member Big Bank Hank (nee Henry Jackson), stole the lyrics for the legendary song.”).

¹⁸² See Mosi Reeves, *Sample Snitching: How Online Fan Chatter Can Create Legal Trouble for Rap Producer*, PITCHFORK (Jan. 21, 2021), <https://pitchfork.com/features/article/sample-snitching-how-online-fan-chatter-can-create-legal-trouble-for-rap-producers/> [<https://perma.cc/8Z9S-2DVC>] (“The very first hip-hop hit, Sugarhill Gang’s ‘Rapper’s Delight,’ was the subject of a legal challenge (settled out of court) from the members of Chic, whose ‘Good Times’ bass line the pioneering rap song interpolated.”).

¹⁸³ See Dasha Chestukhin & Joelle Milov, “All Samples Cleared!”: Remembering Biz Markie’s Contributions to Copyright Law, COWAN, LEIBOWITZ & LATMAN (Aug. 17, 2021), <https://www.cll.com/CopyrightDevelopmentsBlog/all-samples-cleared-remembering-biz-markies-contributions> [<https://perma.cc/MQQ9-QW38>] (“The resulting case, *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*, 780 F. Supp. 182 (S.D.N.Y. 1991), was decided in O’Sullivan’s favor, with Judge Kevin Duffy beginning his opinion with the biblical admonition ‘[t]hou shalt not steal’ and noting that defendants had violated ‘not only the Seventh Commandment, but also the copyright laws of this country.’”).

¹⁸⁴ Chuck D, the leader of Public Enemy, noted in an interview that:

Public Enemy’s music was affected more than anybody’s because we were taking thousands of sounds. If you separated the sounds, they wouldn’t have been anything—they were unrecognizable. The sounds were all collaged together to make a sonic wall. Public Enemy was affected because it is too expensive to defend against a claim. So we had to change our whole style, the style of *It Takes a Nation* and *Fear of a Black Planet*, by 1991.

Kembrew McLeod, *How Copyright Law Changed Hip Hop: An Interview with Public Enemy’s Chuck D and Hank Shocklee*, LITTLE VILL. (Oct. 17, 2011), <https://littlevillagemag.com/how-copyright-law-changed-hip-hop-an-interview-with-public-enemys-chuck-d-and-hank-shocklee/> [<https://perma.cc/P5T3-LFDR>].

XIII. FALSE COPYRIGHT REGISTRATIONS AND ROYALTY UNDERCOMPENSATION

Black artists in hip-hop and every genre created by them have been plagued by false copyright registrations, royalty underpayments and non-payments, and inequitable music industry contracts. This is an on-going saga, as illustrated by R&B legend Johnnie Taylor's heir's battle to receive royalties from a major record label.¹⁸⁵ Even when artists, such as Taylor, who scored a number one hit in 1976 with "Disco Lady," achieve commercial success, they somehow end up on the short end of royalty statements.¹⁸⁶

XIV. DOCTRINAL HOSTILITY TO HIP-HOP CULTURAL PRODUCTION

At a more organic level, copyright law's features exhibit considerable hostility to Black artists. For one, copyright law generally rewards composers but not performers who are outside the copyright loop. Only composers are entitled to copyright royalties under U.S. law.¹⁸⁷ Because Black music cultural production is based on performance, not composition, this has been a serious disadvantage to Black artists.

Copyright law is also hostile to short phrases, which are the stock and trade of the genre.¹⁸⁸ It is manifest that "short phrases—perhaps because they're so easily severable from larger works—are commonly the subject of theft. They're often plucked and recycled in other literary, musical or artistic works or on merchandise."¹⁸⁹ The hostility to short musical phrases is detrimental to Black creators. In a lawsuit filed by then little-known rappers against rap mega-star Ludacris for his hit "Stand Up," the court declined

¹⁸⁵ See Johnathan Bernstein, *He Scored the First Platinum Hit. 45 Years Later, His Family Is Fighting for Every Penny*, ROLLING STONE (Nov. 2, 2021), <https://www.rollingstone.com/music/music-features/johnnie-taylor-fonda-bryant-sony-royalties-1241773/> [<https://perma.cc/35N7-2HUV>] ("Since at least 2011 . . . Taylor's heirs weren't receiving any royalty earnings from their father.").

¹⁸⁶ *Id.*

¹⁸⁷ See Mary LaFrance, *Are We Serious About Performer's Rights?*, 5 IP THEORY 81, 81 (2015) ("Historically, the rights of performers have received far less attention than the rights of traditional authors. The law has been reluctant to recognize performers as authors and, to the extent that performers' rights are recognized, they are secondary to, and more limited than, the rights of traditional authors.").

¹⁸⁸ See *What Does Copyright Protect?*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/help/faq/faq-protect.html> [<https://perma.cc/NH2X-9CZV>] (last visited Feb. 21, 2024) ("Copyright does not protect names, titles, slogans, or short phrases.").

¹⁸⁹ Mary Minow, *Copyright Protection for Short Phrases*, STANFORD LIBRS. (Sept. 9, 2003), https://fairuse.stanford.edu/2003/09/09/copyright_protection_for_short/ [<https://perma.cc/W7GS-B26X>].

to find that the infringing phrase “just like that” was insufficiently original to merit copyright protection.¹⁹⁰

XV. COPYRIGHT FORMALITIES AND LITIGATION BARRIERS

Finally, copyright law formalities like registration and copyright termination also have had deleterious impacts on hip-hop and other African American artists. In 2019, the U.S. Supreme Court declared that a completed registration certificate is required to institute copyright infringement or ownership cases.¹⁹¹ I have contended elsewhere that copyright formalities like registration and copyright termination will necessarily disadvantage marginalized communities.¹⁹² As an example, rapper 2 Milly sued the online game company Fortnite for copyright infringement, but in the wake of the *Fourth Estate* case, rescinded his copyright lawsuit for want of a registration certificate.¹⁹³

Copyright enforcement through lawsuits is a rich person’s pursuit, as copyright litigation is frightfully expensive.¹⁹⁴ Additionally, plaintiffs in music copyright infringement cases have an abysmal record of success in pursuing claims.¹⁹⁵

CONCLUSION

For all of these reasons, trademark and the ancillary right of publicity have emerged as the best IP regimes for hip-hop artists in the era of digital streaming. Artists, of course, must achieve some level of visibility in the marketplace to take advantage of trademark branding and celebrity endorsement deals. The road ahead is not

¹⁹⁰ See *BMS Entertainment/Heat Music LLC v. Bridges*, No. 04 Civ. 2584 (PKC), 2005 WL 1593013, at *8 (S.D.N.Y. July 6, 2005) (denying summary judgment to the defendants. Ludacris and producer Kayne West prevailed over the plaintiffs at trial.).

¹⁹¹ See *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881, 890 (2019).

¹⁹² See, e.g., Kevin J. Greene, *The Future is Now: Copyright Terminations and the Looming Threat to the Old School Hip-Hop Song Book*, 68 J. COPYRIGHT SOC’Y 45 (2021) (exploring the devastating impact of the copyright termination provisions on Black artists).

¹⁹³ See Sam Desatoff, *Rapper 2 Milly Drops Lawsuit Against Epic After Supreme Court Ruling*, YAHOO! (Mar. 8, 2019), <https://www.yahoo.com/now/rapper-2-milly-drops-lawsuit-211100446.html> [<https://perma.cc/288S-KT9P>].

¹⁹⁴ Terrica Carrington, *A Small Claims Court Is on the Horizon for Creators*, COPYRIGHT ALL. (Oct. 14, 2017), <https://copyrightalliance.org/small-claims-court-on-the-horizon/> [<https://perma.cc/7WBA-TY9Q>] (noting that the average cost for a copyright infringement case as of 2017 is \$278,000 and that “[f]or far too many creators, the protections afforded by copyright are more theoretical than practical, as they lack the financial resources to bring a suit for infringement in federal court. In a practical sense, the courthouse doors are locked shut for individual creators and small businesses seeking to enforce their rights”).

¹⁹⁵ See Edward Lee, *Fair Use Avoidance in Music Cases*, 59 B.C. L. REV. 1873, 1899 (2018).

totally clear, however, because trademark, like copyright law, has formal procedures and standards that can be manipulated to deprive the unwary artist of property and protection.