Elena Flauto

Professor Marc Cimino

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Uncovering Exploitation: Examining the Compulsory Mechanical License and the Racist History of Cover Songs

Artists re-recording and releasing songs that have been embodied in previously released recordings—or artists "covering" songs—is a practice that has produced countless hit records. Whitney Houston's iconic rendition of "I Will Always Love You" is a cover of Dolly Parton's original song, Sinead O'Connor's "Nothing Compares 2 U" is originally a Prince song, and Johnny Cash's recording of "Hurt" follows Nine Inch Nails' original recording of the song. Prince notoriously "abhorred" cover songs; he said of the concept: "I don't mind fans singing the songs… My problem is when the industry 'covers' the music. A lot of times, people think that I'm doing Sinead O'Connor's song and Chaka Khan's song when in fact, I wrote those songs" (Abram). Prince specifically took issue with the "unfair and inequitable" compulsory mechanical license, which allows artists to cover other artists' music without requiring the original artist's approval, or, in Prince's words "allows artists, through the record companies, to take your music, at will, without your permission," an allowance Prince noticed "doesn't exist in any other art form" (Abram). The compulsory mechanical license was written into law in 1909. Though many artists recorded and released records of the same compositions—often jazz and Great American Songbook standards—throughout the first half of the 20th century, the popular practice of covering songs and the term itself originated in the 1950s (Jancelewicz). During this time, it was commonplace for white artists to record their own versions of black artists' "race records" and market them to a white audience, capitalizing off of black art without having to receive permission to do so. Considering the compulsory mechanical licensing scheme in the United States in conjunction with the racial tensions surrounding the history of cover songs in America raises some questions about whether such a licensing scheme, unintentionally or not, exploits black artists and composers.

As Prince lamented, if someone wishes to record and release a song that has already been recorded and released by another artist, they indeed may do so without receiving permission from the original artist or songwriter. More formally, Section 115 of the Copyright Act allows for those wishing to engage in "the reproduction and distribution of nondramatic musical compositions" already recorded and distributed by other artists to do so by obtaining a compulsory license and paying mechanical royalties out to the appropriate rightsholders of the

composition according to the statutory mechanical royalty rate set by the Copyright Royalty Board (U.S. Copyright Office). Mechanical royalties pertain to earnings generated by mechanical reproductions—digital and physical—of songs, whereas performance royalties are generated by the public performance of a composition, such as a live performance, a play on the radio, and the song being played over the loud speaker in public spaces (Passman 229). Mechanical royalties are generated today by record sales, digital downloads, and streams. The concepts of both mechanical royalties and the compulsory mechanical license originate from the era of piano rolls—in the early 20th century, the advent of the player piano and piano rolls meant that consumers could listen to compositions from their home for the first time by using these devices. As piano roll manufacturers encoded compositions into piano rolls without any license to do so, exploiting the ambiguity in the law regarding "the extent of the copyright owner's right to control the making of a copy of its work," and selling them to consumers eager to play them on their player pianos, legal disputes arose in which copyright holders demanded for the exclusive right to make copies of their compositions (Jacobson). Instead of fulfilling this demand, lawmakers decided to create a compulsory license in Section 1(e) of the 1909 Act which would allow any person to make "similar use" of the musical work upon payment of a royalty of two cents for "each such part manufactured," the logic behind this decision being that granting copyright owners the exclusive right to make mechanical reproductions of musical works could have resulted in "the right to make mechanical reproductions of musical works becom[ing] a monopoly controlled by a single company" ("Statement of Marybeth Peters"). Therefore, this license writes into law a limitation to the monopoly on one's own creative work granted to authors of works by U.S. copyright law: as stated in the U.S. Constitution, a monopoly that is granted to copyright owners "To promote the Progress of Science and useful Arts, by securing for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discovers" (U.S. Const. art. I, § 8, cl. 8).

The changes in what the compulsory mechanical license created in 1909 applies to today—not piano rolls, but cover songs—in addition to the power dynamics at play when artists cover other artists' songs (as opposed to piano roll manufacturers creating piano rolls of compositions) beg the question of whether the compulsory mechanical licensing scheme in effect is appropriate when considering the way cover songs are, made, released, and consumed today. As technology has developed, revisions to the 1909 Copyright Act in 1976 and 1995 have accounted for some of these technological updates, maintaining the original logic behind the 1909 law's compulsory license, but applying it to digital recordings and clarifying that the license only applies when the original

phonorecord has already been distributed, among other clarifications (Jacobson). While provisions in the law also require the person recording and releasing the cover song to pay out royalties to the composition rights holders at an amount that has increased over the years, now at 12.4 cents per download or sale, these provisions have not always been strong enough to encourage an appropriate split or allocation of revenue when artists with a great amount of leverage and special contract terms are the ones making the covers, which we will discuss in greater detail when analyzing the publishing contracts artists like Elvis Presley were able to acquire and the lack of royalties black creators received for their work in these cases. Because past iterations of the same compulsory license in effect today existed during this time when Presley rose to fame, it is worth critically examining whether the same issues with enforcing the law that were present in the mid 20th century still exist today.

The history of cover songs in the U.S. has significant racial tensions and ties to racist practices in the music and entertainment industries throughout the 20th century. While artists had been singing the same compositions for decades by recording and releasing their own renditions of "standards," these recordings don't always stem from one recording deemed the "original." Cover songs as we understand the term today—an artist recording and releasing a composition embodied in an original recording by another artist, with this version being considered the "original" by music listeners—largely emerged in the 1950s when record labels exploited racism in the US by having the white artistson their roster re-record "race records," later called R&B by a journalist, originally recorded by black artists and promoting them to a white audience. This formula notably launched Pat Boone's career after he covered Little Richard's "Tutti Frutti." Boone's own website boasts of how Dot Records' Randy Wood "wanted Boone to record cover versions of R&B pioneers"—a strategy he believed would "turn Boone into a major star and lead to Hollywood movies and his own TV shows" ("Biography"). The discussion of whether such covers benefited black artists, whose music might not have ever generated that same amount of revenue or reached the same audiences at the time due to widespread racism in the country, or whether such covers ultimately took away from black creators, from both a monetary and credit standpoint, are contentious. Pat Boone is of the belief that his cover songs helped give black artists the opportunies they deserved and contributed to the development of rock and roll. He said of his cover songs,

> My versions of their songs became big hits and opened the doors for [the original artists] to become the stars they so richly deserved to become. I like to say I was the midwife at the birth of rock and roll. In fact,

> there was no such thing as rock and roll. It was called "race music" and the artists were limited to their own stations and charts. (Gaydos)

It seems that Little Richard is in agreement with Boone, at least on his first point. Richard has said of Boone, "He opened a lot of doors for me. He's a beautiful person," and he cited the moment he heard Pat Boone's cover of his song as "the moment he knew his time had come" (Gaydos). Fats Domino seems to share Richard's sentiment, as he told the entire audience at one of his shows in New Orleans: he "brought [Pat Boone] on stage with him … pointed to the most expensive diamond ring on his finger, and said, 'Pat Boone bought me this ring,'" speaking to the generous amount of royalties he earned from Boone's recording of "Ain't That a Shame" (Gaydos). Though it is heartening to hear Richard and Domino's gratitude and admiration for Boone, as there does not appear to be any malice between them and it reflects positively on Boone's character, it is still important to recognize that Boone's take does not seem to consider the systemic exploitation and repression of black creators and their contributions in the music industry in the U.S.—an element of the issue on which Richard and Domino choose not to comment. Boone calling himself a "catalyst who helped R&B become rock 'n roll," though perhaps technically the truth, diminishes the fact that the underlying work that made him famous was that of black creators, and that he benefited off of a racist system that limited them to make "race music" and prevented them from "get[ting] played on 90 percent of the radio stations in America" in the first place ("Biography"). Of course, Domino and Richard are grateful for the exposure and royalties they earned from Boone's cover, and the burden of racism in America does not fall squarely on Boone's back, but Boone's recognition that his career, ultimately, would have been nonexistent without black creators and black art, is glaringly missing, regardless of the way he believes he has been able to give back to those black creators by giving them "recognition in their own field and potentially crossover to a vastly larger audience" ("Biography").

Far from a rarity, Pat Boone is just one of countless white artists who have catapulted to fame after covering black artists' music—and subsequently profited greatly off of these records and the many more they were able to create with their newly launched careers. Elvis Presley, the "King of Rock & Roll" himself, is a prime example of an artist who used black artists' music as a platform for his own rise to fame. Presley, who "had never written a song in [his] life" notably received one third of each songwriter's mechanical royalties for those who wrote on the songs he recorded, as well as negotiating half of the publisher's share for himself (Robinson). Elvis himself seemed to be aware of the ridiculous—or at the very least, illogical—nature of this royalty split: "'It's all a big

hoax,' Elvis Presley once insisted to an interviewer. 'I get one third of the [writing] credit just for recording [a song]. It makes me look smarter than I am!'" (Robinson). This practice—nicknamed "The Elvis Tax"—undermines the law's attempt to fairly compensate writers and speaks to Presley's lack of care for giving credit to the original creators of work. In 2021, a group of top songwriters in the industry calling themselves The Pact signed a letter citing these same issues of artists demanding publishing credit for compositions to which they did not meaningfully contribute; The Pact called for an end to these practices, which artists like Dua Lipa, Justin Bieber, Selena Gomez, Ariana Grande, the Jonas Brothers, Britney Spears, and many others have been revealed to partake in (Aswad). The existence of groups like The Pact today indicate that practices similar to "The Elvis Tax" continue to exist, giving merit to the notion that power imbalances between artists and writers introduce unfair compensation issues that the current iteration of the law is not equipped to address. Though The Elvis Tax and these issues raised by The Pact do not specifically pertain to cover songs, but rather, general power imbalances between the writers of songs and the artists recording them, these ideas are still relevant to the conversation of whether the compulsory mechanical license for cover songs is exploitative of the songs' original writers, because they show that artists have had and continue to have leverage over songwriters and are often willing to exploit that leverage to their benefit. The question becomes whether U.S. copyright law adequately compensates and protects the original writers from artists unfairly using and capitalizing off of their work.

Historically, Presley's career alone clearly answers this question: no, U.S. copyright law has not always prevented artists from exploiting the original creators of songs; though, these examples more so speak to the music industry's unfair exploitation of black creators than direct failings of the law. While Big Mama Thornton, the original artist who recorded and released "Hound Dog," one of the songs that made Presley famous, did not receive compensation for Presley's subsequent hit recording of the song (Desta). However, "Hound Dog" was allegedly written for her by Jerry Leiber and Mike Stoller, and because Thornton did not have a manager like Presley's who would fight for her to have a share of the publishing credit whether or not she made significant contributions to the composition (which remains unclear), she then did not receive mechanical royalties for Presley's rendition. Thornton has publicly shown frustration at Elvis's success after releasing his version of what she considered "her song": Thornton has referred to the song as "the record [she] made Elvis Presley rich on" and "a song [she] got robbed of" (Desta). Regardless of the information available on who had copyright interests in "Hound Dog," Thornton believes she has been deprived of income she is owed for this record, stating "I got one check for $500 and never saw

another" (Desta). In another case, it is clearly documented that Thornton wrote the song "Ball n' Chain," which later became a hit record by Janis Joplin, but Thornton still did not receive publishing credit or any royalties for this song (Jancelewicz). It is possible that, in the case of "Hound Dog," Thornton did not contribute to the publishing and, thus, there is an explanation why she did not receive royalties for Presley's record, but it is worth noting that she has been repeatedly wronged by the industry and truly received opposite treatment to Elvis—who was able to receive credit for songs he did not even write—due to his leverage as an artist and almost certainly his identity as a white male during the time he rose to fame. This discussion of ownership and royalties does not even delve into the issue of credit from a cultural standpoint—the irony of Elvis, especially, being dubbed the "King of Rock & Roll" when it was really the work of black creators that pioneered and defined the genre is palpable. Unfortunately, racism in the United States resulted in rock and roll records by white artists like Elvis—cover songs—being the records with marketing efforts put behind them by labels who weren't willing to put those same resources into "race records" they didn't believe the could successfully market to white audiences.

If the same issues of labels and artists with significant financial leverage or privilege preying upon artists and songwriters in marginalized communities or with less leverage have run rampant in the music industry for decades, is the law truly doing its job to hold the music industry accountable? Does the current compulsory mechanical licensing scheme for cover songs further enable this exploitative behavior in its leniency—that is, is the compulsory nature of this license ultimately more harmful than helpful to songwriters given the power imbalances present and the deeply problematic history of cover songs? It is important to note that the compulsory license also allows anyone—all artists regardless of their popularity, leverage, or any other parameter—to record a rendition of any other artist's previously released records. This is beneficial in that it prevents artists with a great amount of leverage from preventing smaller artists from recording their songs, as well. In this regard, the compulsory mechanical license greatly benefits small artists and even amateur musicians. We have spoken about the capacity of a hit cover song to generate significant income for the original songwriters, as well, if they truly receive their fair share of mechanical royalties and the publishing credit they are owed. Our discussion of the power imbalances between artists and even major songwriters seems to point toward industry-wide issues that cannot be addressed by amending the compulsory element of the license to create and release cover songs, which would likely even cause more harm than good by eliminating smaller artists' access to popular compositions. While the argument could be made that, historically, the compulsory nature of this license was abused by white artists and record labels taking

advantage of black artists and songwriters, which changed the narrative of history and obscured black creators' immense contributions to the development of the rock and roll genre, the power imbalance between writers with little leverage and artists today more often show themselves in unfair contract terms and allocations of credit, practices which could continue even with an alternative noncompulsory alternative to the compulsory mechanical license.

While the compulsory mechanical license is not as directly harmul today as it once was, it is important to acknowledge the effect whitewashed cover songs—which excluded black creators' perspectives and, by nature, their approval, as well as excluded much of their creative contributions from the narrative of history—had on stripping black creators of credit and even earnings for their work. Spreading awareness about this problematic history and the true extent to which black artists contributed to the development of the rock and roll genre is a crucial step forward in shedding light on the systemic exploitation of black creators in the music industry. Providing education on these issues and uncovering how artists without much leverage have been taken advantage of in the industry over the years can also impart cautionary tales to young artists and help them identify their rights, as issues of developing artists and writers—and even well-known, highly successful writers—being shortchanged the credit and earnings they are due continue to pervade the industry today. By supporting initiatives like The Pact and advocating for legislative changes to address the unfair practices in the industry surrounding publishing credits, we can work towards a more just music ecosystem. Ultimately, in increasing awareness about this history of exploitation of underprivileged or unsupported writers and artists, we can foster a culture that empowers artists and writers of all backgrounds to assert their rights to equitable treatment and compensation for their work, honors the important contributions of all creators, and truly reflects the diverse voices that have shaped music.

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