

Discriminatory Impacts of Facially Neutral Copyright Laws

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Robert Brauneis, *Copyright, Music, and Race: The Case of Mirror Cover Recordings*, available at [SSRN](#).

Several scholars have shown that while copyright law may appear facially race-neutral, in its application many of its provisions perpetuate systemic discrimination, particularly against African American creators. K.J. Greene, Funmi Arewa, and Candace Hines have each argued that seemingly harmless features of copyright law can interact with industry practices to operate to the disadvantage of African American authors. The pre-1978 copyright statutes, for example, required authors to navigate a series of formalities in order to vest their exclusive rights. Greene has shown that these provisions tended to deprive copyrights disproportionately to African American authors, who were less likely to have access to legal information and advice necessary to navigate the requisite technicalities.

[Bob Brauneis'](#) article, *Copyright, Music, and Race: The Case of Mirror Cover Recordings*, builds on this work by providing a detailed case study of one particular instance in which apparently race-neutral copyright law combined with entertainment law norms to discriminate against African American creators: the so-called "mirror" cover recording, a practice where white performers would create nearly identical versions of sound recordings by African-American artists. Brauneis' work consciously styles itself as an effort at historical recovery, which is valuable because it revivifies a time in the history of the music industry that has been largely forgotten.

Early in the twentieth century, recordings supplanted sheet music as the primary way that Americans consumed popular music. Recordings were marketed not only to different genre tastes (e.g., classical versus dance hits), but also to different social and racial groups. In response to this segregated marketing, record companies would often create a new and closely imitative recording of the same musical composition, one performed by white artists and aimed at a white audience, and the other performed by African American artists and aimed at an African American audience. This usually meant that if a label released a recording by African American creators that met with success, another record label would make a nearly identical (hence "mirror") version of that recording and market it to a white audience.

The second recording often reaped much greater economic returns without providing any compensation to the label whose record it replicated. This success was not due solely to the appeal of the underlying musical composition on which each recording was based. Brauneis' case study, for example, focuses on the hit track "A Little Bird Told Me." The original recording performed by African-American artists and released by Supreme Records sold a couple hundred thousand copies. Soon after, two recording companies, Decca Records and Capitol Records, made mirror covers of "A Little Bird Told Me" that sold millions of copies. The mirror recording by white record labels did not merely also perform the same musical composition as the African-American performers who preceded them. They copied the distinctive arrangement and performance elements of the initial sound recording, making a version that was identical in all respects save for the race of the people who executed it.

This is not just a story about consumer demand and marketing, it is also a story about copyright law. If anything, it seems counter to copyright's aim of protecting creators' exclusive rights to allow competing record labels to make mirror cover recordings without any recompense to the owner of the initial

recording. A 1909 statutory compromise defined recorded versions of musical works as copies subject to infringement liability. But while this statutory provision obliged creators of sound recordings to pay a statutory license to the owner of the underlying musical work they were performing, it created no exclusive rights in sound recordings themselves. Record labels thus remained largely free to copy one another's tracks, and increasingly did so.

The dispute about "A Little Bird Told Me" culminated in a little known but highly consequential federal district court case, *Supreme Records v. Decca Records*. Supreme sued Decca in federal court, though on a theory of unfair competition rather than copyright. Here, too, copyright's formalities got in the way of vindicating the interests of the creators of "A Little Bird." The recording itself enjoyed no federal copyright protection. And while the Supreme team had re-arranged the original composition, including written notations, before recording their version, those notations were neither published with proper copyright notice nor federally registered as an unpublished work, so did not comprise separately protected expression. Supreme's failure to check all the numerous boxes required to assert federal copyright thus limited the legal theories they could assert against Decca's piracy.

The decision in *Supreme Records* dealt a blow to record companies seeking any legal bulwark against mirror cover recordings. Aping copyright doctrine even in the context of an unfair competition suit, the court's decision was read to mean that arrangements of original music could never be copyrighted. *Supreme Records* may not be the best-known copyright decision, but as Brauneis shows, it was highly impactful. It removed any concern record companies had about whether they were liable to other record companies for copying their sound recordings, including but not limited to mirror covers. This paved the way for countless white artists who made their careers by making virtually identical versions of tracks performed by African American artists without having to pay those performers a dime. Yet the most immediate impact of *Supreme Records* may also be the most tragic: Burdened by costs associated with the litigation and deprived of any judgment from it, Supreme Records was rendered insolvent and ceased to exist.

Brauneis' case study exposes a particular kind of social injustice: One that tends to evade detection because it is caught up in the weeds of dry, obscure transactional and legal details. The racial inequity exemplified by *Supreme Records* is not the product of a highly visible event or rule to which we all share moral revulsion, but to a series of copyright's notoriously technical legal rules—mechanical licenses, fixation, pre-1976 Act registration—that taken together created a system in which white artists regularly profited off the work of African American artists free of charge. Copyright's formalities are not, by any means, the only context in which neutrally phrased rules interact with intractable social racism to create racial disparities. In fact, this interaction is likely the case with much if not most regulation. Still, Brauneis' case study, as well as the scholarship of Greene and others, serves as a useful reminder to be mindful of this risk in the context of copyright, where consciousness of discrimination remains limited.

Brauneis concludes on a somewhat optimistic note, observing that doctrinal developments and statutory reforms—along with changing social preferences—have diminished the popularity and the problems of mirror covers. Yet this still leaves us with the concern that other features of copyright law may unwittingly contribute to racial injustice. How then to assure that copyright does not replicate the mirror covers problem that Brauneis chronicles? This is a hard question to answer because, as is so often the case with systemic bias, the blame is widely distributed. The disproportionate harm to African American authors Brauneis locates in the case of mirror covers, and that Greene and others have exposed in other parts of copyright law, is not the work of a single mastermind, but of a series of unfortunate events: Congress's creation of weak rights in sound recordings, majority consumer preferences for music performed by white artists, recording companies uncritically responsive to those preferences, and African American artists who tended to lack the information and resources to navigate the various pitfalls of the Copyright Act. That this outcome is the result of distributed, often unreflective, acts makes

reform all the more challenging.

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