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*RCA v. Whiteman: Contested Authorship, Copyright, and the Racial Politics of
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Abstract

Between the Progressive Era and World War II, African American jazz music became the source of big profits for some white entrepreneurs in the United States. The encounter between whites and jazz was both a propertization and a privatization of African American group resources. While new technologies of recording and radio broadcasting were critical factors facilitating these cultural enclosures, the *sine qua non* was the embeddedness of American intellectual property law in the logic of white supremacy. In this paper, I focus on the popular jazz bandleader Paul Whiteman, best known to most contemporary legal scholars as the defendant in the precedent-setting copyright case *RCA v. Whiteman* (1940). I read *RCA v. Whiteman* as a symptomatic text that speaks to the power and purchase of a very real species of property rights for whites only: what we might call, after Cheryl Harris, whiteness as intellectual property. I examine the history of *RCA v. Whiteman* and the discourses in which it was grounded both through traditional archival research and by looking at artistic and popular culture representations of Whiteman's copyright politics, such as Langston Hughes's poem "White Man" (1936), and William Dieterle's film *Syncopation* (1942).

Introduction: Paul Whiteman and African American Popular Music

“So far in their music, the negroes have given their response to the world with an exceptional naiveté, a directness of expression which has interested our minds as well as touched our emotions; they have shown comparatively little evidence of the function of *their* intelligence... Nowhere is the failure of the negro to exploit his gifts more obvious than in the use he has made of the jazz orchestra; for, although nearly every negro jazz band is better than nearly every white band, no negro band has yet come up to the level of the best white ones, and the leader of the best of all, by a little joke, is called Whiteman”

Gilbert Seldes, “Toujours Jazz,” *The Dial*, August 1923, 160.¹

White Man! White Man!
Let Louis Armstrong play it—
And you copyright it
And make the money.
You’re the smart guy, White Man!
You got everything!
But now,
I hear your name ain’t really White Man.
I hear it’s something
Marx wrote down
Fifty years ago—
That rich people don’t like to read.
Is that true, White Man
Is your name in a book
Called the Communist Manifesto?
Is your name spelled
C-A-P-I-T-A-L-I-S-T?

Langston Hughes, “White Man.” *New Masses*, December 16, 1936.²

The differing assessments of Paul Whiteman provided by Gilbert Seldes and Langston Hughes-- both written during the interwar decades, when Whiteman was one of the United States’ most popular bandleaders-- illustrate the controversial nature of Whiteman’s career and persona. Whiteman was born in Denver, Colorado on March 28, 1890. Whiteman’s father, Wilberforce Whiteman, was a music teacher who trained his son as a violist. During the war years, Whiteman began to study the “ragtime” music

¹ Quoted in Michele Hilmes, *Radio Voices: American Broadcasting, 1922-1952* (Minneapolis: University of Minnesota Press, 1997), 77. “Toujours Jazz” is also a chapter in Gilbert Seldes’s celebration of American popular culture, *The 7 Lively Arts* (New York: Sagamore Press, 1957).

² Excerpted from Langston Hughes, “White Man,” reprinted in Faith Berry, ed. *Good Morning Revolution: Uncollected Writings of Langston Hughes* (New York: Citadel Press, 1993, 1972), 4-5.

popular in the dockside taverns of California. In 1920, he recorded a hit single, “Whispering,” for the Victor label, which sold over a million copies and propelled Whiteman into the ranks of “name” bandleaders. In 1924 Whiteman presented a historic “jazz” concert, entitled “An Experiment in Modern Music” at Aeolian Hall in New York.³ At this event, and over the course of the rest of his career, Whiteman showcased a style of jazz called “sweet,” in contradistinction to African American “hot” varieties. While Whiteman made some space for improvisation in his concerts (according to most accounts he could not improvise jazz solos himself), and hired jazz musicians like Bix Beiderbecke to play in his orchestra, his *modus operandi* was to play tightly arranged and “sweetened” versions of African American music.

After the Aeolian Hall concert Whiteman’s earning power ballooned: he seldom earned less than \$400,000 between 1924 and his retirement in 1941.⁴ Towards the end of the 1930s, however, Whiteman’s popularity waned as that of the jazz musicians of the first bebop generation waxed. The slow integration of the bands of younger, “hipper,” and more politically committed Jewish bandleaders Benny Goodman and Artie Shaw made these groups much more appealing to Popular Front-era audiences. There was an increasingly glaring disconnect between Whiteman’s fondness for nostalgic WASP Americana and the “structure of feeling” of the late 1930s. While Whiteman reemerged as a radio host later in the 1940s, and remained a public figure until his death in 1967, he never recaptured the central place he occupied in American musical culture in the 1920s and 1930s.

³ Thomas A. De Long, *Pops: Paul Whiteman, King of Jazz* (New Brunswick, NJ: New Century Publishers, Inc., 1983)

⁴ In 1925 Whiteman’s best year, he played dates in over 300 cities and towns and earned over \$800,000 in expenses De Long, *Pops*, 64, 84.

Gilbert Seldes, a liberal writing for the “little magazine” *The Dial* in the early 1920s, captures Whiteman’s complicated role as cultural mediator. At one and the same time, Whiteman was a champion of African American culture and a prospector who mined the veins of early blues and jazz for big profits. Whiteman made African American jazz safe for whites while legitimating the nasty racial logics that have, from the first, poisoned the encounter between white intellectuals and jazz. For Seldes, African American music revealed a naiveté and propensity for unfiltered expressivity. The difference between white and African American jazz spoke to the gulf between Europe and Africa, intelligence and intuition, high culture and low vernacular, composition and improvisation, individual genius and collective mediocrity.

Seldes writes that African American jazz “interested our minds” (with the possessive “our” clearly indicating a community of educated whites). But there is a catch: African American music might stimulate the imaginations of whites, but it did not provide evidence of the intellectual capacities of its creators. In fact, white listeners were the real artists, transforming raw materials into things of beauty. It was not surprising, then, that the intellectual labors of musicians like Whiteman (in the putatively white domains of managing, arranging, and orchestrating) far surpassed those of all of his African American competitors.

Langston Hughes’s take on Whiteman, on the other hand, captures the alternately pained, ironic, angry, and mocking reaction to the insults—the condescending affirmations of African American humanity at the core of Whiteman and Seldes’s conception of jazz—that compounded the injuries of cultural theft. In “White Man,” written in 1936, Hughes echoes *Chicago Defender* film critic Chappy Gardner’s earlier

critique of Whiteman as a false friend of African American culture. Gardner set down on paper what was obvious to most African American cultural consumers. Whites were “claiming originality in Negro jazz, song, and music,” and without active intervention, “someone might actually believe these bedtime stories.” A “certain white boy,” for example, claimed that he wrote the blues standard “Stormy Weather.”⁵ Whiteman embodied for Gardner the absurdities of white claims to black culture: “Whiteman says he is king of jazz. Maybe he means he plays or imitates our real jazz masters quite well. But until he writes a ‘St. Louis Blues’ like Handy we are laughing at him.”⁶

Three years later, Hughes picked up where Gardner left off. In what is perhaps the most interesting line of the poem, Hughes accuses Whiteman of being a “C-A-P-I-T-A-L-I-S-T.” Hughes zeroes in on *copyright* as the means by which Whiteman exploited jazz musicians. The line “Let Louis Armstrong play it/And you copyright it” highlights the significance of this legal tool of white propertization of African American cultural resources.⁷ Hughes’s critique captures the complexities of conflicts over cultural property at the key moment of the mid-1930s: when new technologies (network radio, innovations in phonograph recording and pressing that made the broadcast of pre-recorded music newly attractive in the 1930s), an expanding capitalist market for musical commodities, and the development of racial ideologies made copyright a symbol of disenfranchisement and dispossession.

Part One

⁵ Chappy Gardner, “Writer Calls White Performers Great ‘Imitators,’” *Chicago Defender*, Sep. 9, 1933, 10.

⁶ Gardner, 10.

⁷ See Cheryl Harris, “Whiteness as Property,” *Harvard Law Review*, June 1993, 106 *Harv. L. Rev.* 1707, 1-75; George Lipsitz, *The Possessive Investment in Whiteness: How White People Profit from Identity Politics* (Philadelphia: Temple University Press, 2006); and David Roediger, *The Wages of Whiteness: Race and the Making of the American Working Class* (London: Verso, 1998 [1991]).

RCA v. Whiteman and Whiteness as Intellectual Property

This essay looks in detail at this historical moment, focusing in particular on a series of copyright lawsuits in which Whiteman was a key player. These lawsuits sought to give new rights to interpretive musicians who recorded their own versions of songs written by others, culminating in the precedent-setting case *RCA v. Whiteman* (1940).⁸ Under other circumstances, these lawsuits might have empowered and provided economic security to African American jazz musicians whose most brilliant and innovative work was often built on the formal compositions of others. Whiteman's legal activism, however, was rooted in the National Association of Performing Artists (NAPA), a whites-only advocacy group, and promised to extend intellectual property rights mostly to white performers.⁹

The exclusion of African American musicians by the NAPA suggests that the group's concern with intellectual property rights was interwoven with fears that white jazz musicians were losing cultural authority in the age of the phonograph and broadcast

⁸ *RCA Mfg. Co. v. Whiteman et al*, No. 357, United States Court of Appeal for the Second Circuit, July 25, 1940. Judge Learned Hand, of the Second Circuit Court of Appeals, declared that any property rights that bandleaders had in recordings expired at the point of sale in June of 1939. In 1940, the Supreme Court declined to hear the case on appeal, which in effect affirmed Hand's decision as the law of the land for the next several decades. This was a common pattern: the Second Circuit covered New York City, where the majority of music, theater, and publishing industry copyright conflicts of the first half of the century emerged. Hand developed expertise in intellectual property matters unparalleled by any member of the Supreme Court, and the Court therefore regularly deferred to his decisions rather than hear appeals. See Gerald Gunther, *Learned Hand: The Man and the Judge*. (New York: Knopf, 1994).

⁹ The NAPA aimed to "curb promiscuous broadcasting" of commercial recordings. While this goal had a solid labor rights dimension, it also threatened to diminish the affective resources of poor and working-class people. The drastic reduction in the radio broadcasting of commercial music would deny many poor people and minority communities of an important source of emotional sustenance and community solidarity. To make matters worse, because African American musicians were frequently barred from playing live in radio studios or in radio orchestras, the NAPA's quest for a "curb on promiscuous broadcasting of commercial recordings" represented an assault on the one means by which radio listeners in the 1930s could hear African American music. Russell Sanjek, *Pennies From Heaven: The American Popular Music Business in the Twentieth Century*, rev. ed., updated by David Sanjek, (Da Capo: New York, 1996 [1988]), 130.

radio. NAPA members could no longer count on enjoying the advantages of segregation to profit off of their adaptations of African American music. While NAPA lawyers argued—and some judges agreed—that the broadcast of recordings by bands like Whiteman’s Orchestra forced musicians to compete against themselves, the competition that the NAPA most wanted to circumvent was between white bands and their African American counterparts. Why would a disc jockey not prefer to play Duke Ellington rather than Paul Whiteman if the choice came down only to which plastic platter was to be put on the turntable?

There is a curious silence in the legal literature regarding the racial dimension of these campaigns, and of cases like *RCA v. Whiteman*. While copyright lawyers and legal scholars find a lot of things interesting about *RCA v. Whiteman*, they rarely note its most bizarre aspect: Whiteman sued to have courts recognize *his* moral rights as the author of compositions like “Whiteman Stomp,” written by Fats Waller and arranged by Don Redman.¹⁰ Whiteman arrogated rights to himself both as an employer vis-à-vis his employees, and as a white “author” vis-à-vis African American sources of “raw material.”

In this essay, I focus on the deep connection between Whiteman’s racial politics and his intellectual property politics.¹¹ What were the ruling ideologies, internalized

¹⁰ One of the confusing aspects of this campaign is that the traditional pro-worker/anti-corporate framework that usually serves as a good guide to labor history is far too crude in this case. Thus, although musicians were often at the forefront of battles to reshape public policy to tilt property rights (and the revenues they generated) in the direction of cultural workers and away from corporations, they were mostly concerned with transferring corporate authorship from the company that paid for the production of the work to some one single artist/director/manager who oversaw the execution of the work. In either version, rank-and-file cultural workers were never taken seriously as co-authors.

¹¹ This emphasis is intended to shift attention away from unproductive debates about Whiteman’s guilt or innocence, talent or lack thereof. Defending Whiteman’s legacy has become something of an industry for white revisionist jazz historians. This is often a vehicle for advocating a very old-fashioned historical/musicological positivism and indulging in some thinly-veiled racism. Don Rayno writes, for

values, epistemic structures, received ideas, and legal doctrine that came together to situate African American cultural practices as not-property (or not-yet-property) that Whiteman was free to use as he pleased? How was it that Whiteman could straightforwardly plead with a court that he had moral rights as author of “Whiteman Stomp?”

I think that Hughes gives us the answer to these questions. Whiteman was a “White Man.” In this paper, I read *RCA v. Whiteman* as an example of the way that whiteness has functioned as a kind of *intellectual property*: a license wielded by white artists enabling them to claim privileges of authorship and ownership of material derived from the African American cultural commons. Whiteness provided the crucial rationalizations for the copyright-driven enclosure of African American expressive resources: a practice best exemplified, perhaps, in the anecdote about the white music publisher Irving Mills flying into a rage when the jazz musician Cootie Williams tried to

example, that jazz historians typically invoke Whiteman’s name to denigrate him: “for some decades, it has been quite in fashion for music critics and writers to knock Whiteman, or, at best dismiss him as a mere footnote in the history of popular music.” He warns readers that his biography of Whiteman contains “few critiques and sociological judgments made from the hindsight and perspective of today” because “there have been more than enough of these proffered already” by previous jazz historians. Don Rayno, *Paul Whiteman: Pioneer in American Music, Volume I: 1890-1930* (Lanham, MD: The Scarecrow Press, 2003), xxiii-xxiv. Norman P. Gentieu complains that the “opinionated dilettantes” and “purblind ideologues” who dominate jazz criticism have trashed “musical and historical verities” in their character assassination of Whiteman, whose only sin was “being proclaimed by the public as the King of Jazz.” The “gurus of jazzology,” charges Gentieu, “rankling with envy of Whiteman’s brilliant career, have resorted to mean-spirited disinformation.” Instead of seeking an understanding of Whiteman’s success, they have demeaned themselves with “knee-jerk ad hominem attacks, junk aesthetics, and snide opinions, all gussied up in politically correct pieties.” Rayno, *Paul Whiteman*, ix. William H. Youngren argues that jazz critics have “failed to use their ears” when writing about Whiteman. They have “not bothered to investigate Whiteman’s actual dealings with jazz musicians in the 1920s, and their attitudes toward him.” In Rayno, *Paul Whiteman*, xi. Joshua Berrett’s double biography of Whiteman and Louis Armstrong also seeks to reverse the tide of anti-Whiteman criticism. Berrett notes that Whiteman has “been condemned in jazz history as a usurper or else expunged from the record altogether.” Like Rayno, Gentieu, and Youngren, Berrett is also short on evidence. None of these authors provide examples of anti-Whiteman prose from contemporary works of jazz history and criticism. Most focus on the sin of omission that has deprived Whiteman of a prominent place in jazz history. The most incendiary piece of Whiteman bashing that Berrett can dig up is a *New Yorker* article from the 1990s by Henrik Hertzberg and Henry Louis Gates, Jr.—neither an especially significant historian of jazz—that accused Whiteman of being “syncopationally challenged.” Joshua Berrett, *Louis Armstrong & Paul Whiteman: Two Kings of Jazz* (New Haven: Yale University Press, 2004) xii-xiii.

sell him the rights to a new blues song, screaming at Williams: “I own *all* the blues!”¹² Structural barriers imposed and maintained by the law, public policy, and institutional racism prevented African American musicians from claiming authorship of musical works they created. Whiteman’s ability to call himself an “author” depended on these structural inequalities. Throughout the essay, I draw contrasts between the experiences of Whiteman and those of African American jazz composer and bandleader Duke Ellington, a year Whiteman’s senior, to illuminate the legal and structural dimensions of white supremacy in pre-World War II jazz.

Drawing on Carole Pateman’s recent work on the “settler contract” I try to situate Whiteman’s cultural prospecting and work of cultural “improvement” within a popular imperialist logic that predicated cultural innovation on the denial of history to the subaltern people who are the objects of these practices. The “settler contract” helps to explain why Whiteman consistently tried to package his “borrowing” from African American culture as expressions of interracial friendship.¹³ I frame this discussion with a comparison of two cinematic representations of Whiteman, *King of Jazz* (1930) and

¹² Mills bought blues compositions from African American musicians, who would sell him “lead sheets” (notated melodies) for fifteen to twenty dollars. At the time the New York music publishing world was still in the throes of a “blues fever” that began in 1920 with Mamie Smith’s recordings for Okeh. This blues boom generated interest on the part of white companies in African American songwriters and recording artists. Duke Ellington described his colleagues as active and canny agents in this propertization of the blues: they relished selling “ordinary” blues compositions to Mills, who presumably could not tell a generic from a remarkable tune, and Ellington once joked that some of them probably “sold the same blues turned around” multiple times. Mark Tucker, *Ellington: The Early Years* (Urbana: University of Illinois Press, 1991), 94. Edward Kennedy Ellington, *Music is my Mistress* (Garden City, NJ: Da Capo, 1973), 72-73.

¹³In the late 1920s, Whiteman famously told the African American bandleader Fletcher Henderson, whose music he admired greatly (and who was sometimes mockingly called the “Paul Whiteman of the Race”): “if you were white, you would make a million dollars.” Whiteman may well have been genuine in his sympathy for Henderson and other African American musicians. As Jon Cruz has shown, “sympathy” for African Americans on the part of white cultural prospectors has a long history, stretching back to antebellum abolitionism. Often this sympathy is offered in the place of real work for social justice, to placate guilt rather than to build a different kind of society, and to mask the rewards that whites have gained from selling the cultural resources of African American communities. See Jon Cruz, *Culture on the Margins: the Black Spiritual and the Rise of American Cultural Interpretation* (Princeton: Princeton University Press, 1999),

Syncopation (1942). Both of these films use images of the “jungle” and of the white engagement with jazz as a kind of Victorian hunting expedition. There are important differences, however, separating the earlier film from the later one. In particular, in the aftermath of *RCA v. Whiteman*, the Depression-era articulation of whiteness as intellectual property was no longer tenable. African American cultural resources could not be propertized by any wily white prospector. Instead, they belonged to the United States as a whole. This maneuver continued the dispossession of African American cultural resources, but under the aegis of cultural nationalism and discourses of heritage and patrimony. Copyright remained the tool by which whites “used black music to get wealthy,” to paraphrase the rap artist Eminem, but the justification changed from liberal property rights to enrichment of American prestige or protection of vulnerable “natural resources.”¹⁴

Welcome to the Jungle? The “Settler Contract” and Whiteness as Intellectual
Property

King of Jazz, a feature length revue starring Whiteman and his band from 1930 is not a very good film, but it is quite illuminating.¹⁵ After the opening credits and some introductory business, we see a short animated cartoon of Whiteman in the African jungle, goofing around with primitives and anthropomorphized animals, embodying the

¹⁴ This articulation remains potent today, guiding, for example, Ken Burns’s interpretation of jazz in the PBS series *Jazz*. See George Lipsitz, *Footsteps in the Dark: The Hidden Histories of Popular Music* (Minneapolis: University of Minnesota Press, 2007).

¹⁵ *King of Jazz*, directed by John Murray Anderson, Universal Pictures, 1930.

spirit of the Victorian hunter/adventurer/researcher. This segment ends with the African menagerie crowning Whiteman the “King of Jazz.”

The inclusion of this bit of imperial kitsch points to the deep significance of “the jungle” in white intellectual property rationalizations of cultural prospecting: “the jungle” is a place where whites are free to propertize natural resources—including cultural expression and its artifacts—so long as, following Lockean logic, they “improve” them. In the Western musical imaginary, “improvement” is implicit in almost all of the things a white musician might think to do with “primitive” materials: standardization, notation, adaptation to orchestral instruments, regularization of rhythms, smoothing out of timbre, and incorporation into narrative forms.

The Whiteman cartoon is one variant of a central “type scene” of the white engagement with jazz: travel to the “jungle” (literal or metaphorical) that leads to an epiphany of discovery, a sublime encounter with the music of the Other.¹⁶ The power of this “type scene” points to the extraordinarily long reach of a spatial politics that, as David W. Noble has argued, formed the basis of both Enlightenment nationalism (predicated, of course, on imperialism and colonialism) and its peculiar American variant, “exceptionalism.” Noble stresses that imaginary wilderness spaces like the “jungle” are often imagined as a “timeless.” To take a cultural artifact from jungle to city, then, is not only to bring it across geographic boundaries, but also to bring it out of timelessness and

¹⁶ This scene is frequently used as a narrative device in films about songwriters. In Michael Curtiz’s *Night and Day* (1946), a Cole Porter biopic, Porter first hears the melody of “Begin the Beguine”—a “native song” played by dark-skinned musicians in fezzes—while in the trenches of World War I, quickly notating the melody on stave paper. Later, we see the song featured in a key sequence, part of a tropical exotica spectacle that demonstrates Porter’s artistic maturity. In *Your Cheatin’ Heart* (1964), a Hank Williams biopic, George Hamilton IV’s Williams experiences similar epiphanies in an African American bar.

into historical time. This labor is central to the claims of ownership and authorship (as well as authority and stewardship) that cultural prospectors like Whiteman claimed.¹⁷

Carole Pateman's discussion of the legal doctrine of *terra nullius* and the "settler contract," helps us to understand the conceptualization of the "jungle" in the minds of Whiteman and his peers.¹⁸ Pateman suggests that beginning in the early modern era, jungle fantasies have been grounded in the doctrine of *terra nullius*: the idea that if a land was "empty," it could rightfully be occupied by a European power. Roman law established that an "empty thing" (*res nullius*) was common to all until it was put to use; the person who put a thing to use became its owner.¹⁹ Enlightenment thinkers understood *terra nullius* in two ways: first, the claim that the lands were *terra nullius* as "uncultivated wilderness," and were therefore open to appropriation by virtue of the "right of husbandry" (variations on the idea that Europeans were justified in seizing land if natives were not using it properly—which included "failing" to partition it into private property, "failing" to have developed a division of labor, and "failing" to have developed currency and money); and second, that colonized lands were *terra nullius* because the inhabitants had no recognizable form of sovereign government.

Pateman uses *terra nullius* doctrine to answer one of the fundamental mysteries of the history of modernity: how could liberal philosophers, committed to the idea of sovereignty deriving from the free consent of political subjects in a social contract, possibly justify colonialism?²⁰ Without the justifications of divine right or religious authority and with the desire to vindicate the new social contract-based moral and

¹⁷ David W. Noble, *Death of a Nation: American Culture and the End of Exceptionalism* (Minneapolis: University of Minnesota Press, 2002).

¹⁸ Carole Pateman and Charles W. Mills, *The Contract and Domination* (Malden, MA: Polity, 2007).

¹⁹ Pateman, 36.

²⁰ Pateman, 35.

political philosophy, thinkers like John Locke turned to *terra nullius* to rationalize colonial experiments in the Americas. If the colonized land was *terra nullius*, then a founding contract could be made even without the consent of the colonized people. Colonizers (including Locke himself in the Carolinas) drew on and refined preexisting racial discourses, exaggerating the non-humanity of the colonized in order to render them incapable of consenting to a contract.²¹

Reading Locke against the grain, Pateman suggests that Locke in fact relied on a special (tacit) variety of the social contract—the “settler contract”—to cover colonial cases. The “settler contract” created a special subcategory of the “state of nature”: the fictional “state of nature” that was simultaneously the site of an actually existing non-Western society. Within the context of “settler contracts,” the colonized could be incorporated into the new societies as consenting parties even in the face of overwhelming evidence of non-consent.²²

One does not have to search very hard to find musical corollaries to Pateman’s discussion of *terra nullius* and the “settler contract.” Over the course of several centuries, and through a variety of encounters with the music of African, Asian and diasporic performers—in literary reports, transcriptions, and drawings, at Victorian exhibitions and world fairs, in the fieldwork and mobile audio recording efforts of anthropologists, ethnomusicologists, and song-collectors, in nightclubs, hotel lobbies, and amusement parks—Europeans and European-Americans have sought to travel to the figurative jungle

²¹ Pateman, 60.

²² Pateman, 38.

for musical pleasures inaccessible in the equal-tempered, metronomic, and through-notated art music traditions of the West.²³

In the late 1920s and early 1930s, audiences would have understood Whiteman's choreographed acts of cultural transportation in terms of these imperial logics of improvement and ownership. It is worth recalling that *King of Jazz* is an artifact of the same cultural moment in which Duke Ellington performed "jungle" music for wealthy whites at Harlem venues where African Americans could not be seated as patrons.²⁴ Whiteman recreated the "jungle/bourgeois metropolis" distinction many times throughout his career, separating the jungle of Harlem from the city of the uptown concert hall, the jungle of the jazz jam session from the city of the jazz orchestral performance, the jungle of spontaneous black expressivity from the city of European-American self-mastery and authorial genius.

The clearest example is Whiteman's famous Aeolian Hall concert of 1924, which choreographed a transition from wild to domestic for the edification of the audience. The promotional materials and program notes for the Aeolian Hall concert hinged on distinctions between "smooth" and "rough" and "civilized" and "wild." Whiteman's orchestra began with a performance of "Livery Stable Blues," adapted from a 1917 recording by the Original Dixieland Jazz Band, considered by many the first jazz recording.²⁵ Like the ODJB, Whiteman's performance featured a variety of raucous

²³ See Cruz, *Culture on the Margins*; Michael Taussig, *Mimesis and Alterity: A Particular History of the Senses* (New York: Routledge, 1993); Timothy D. Taylor and Charles McGovern, *Beyond Exoticism: Western Music and the World* (Durham: Duke University Press, 2007); and Benjamin Filene, *Romancing the Folk: Public Memory and American Roots Music* (Chapel Hill: University of North Carolina Press, 2000).

²⁴ See, especially, footage of "jungle music" performances in *A Duke Named Ellington*, directed by Terry Carter, Center for Positive Images, Inc., 1992.

²⁵ In a telling irony of history, the ODJB was a white group led by clarinetist Nick LaRocca, who later assumed the mantle of jazz's inventor, and insisted that jazz was an entirely white creation.

imitations of barnyard sounds—suggesting that “blackness” and “animality” were deeply linked, thereby justifying white property claims.

Whiteman chose “Livery Stable Blues” as the concert opener in order to display the subsequent ‘improvements’ in jazz scoring that had been developed as certain aspects of jazz were repackaged to fit with the white popular music of the time. Later, Whiteman performed the popular song, ‘Whispering’ in two versions—“legitimate scoring vs. jazzing”—so as to display a “melodic, harmonious, modern theme jazzed into a hideous nightmare.” The entire evening was structured to validate white claims to having improved jazz, and thus like John Locke’s agrarian capitalist claiming ownership of “turf his horse had cut,” to assert legal ownership of the music.²⁶ Jazz writer Leslie Leiber wrote that after the Aeolian Hall concert, “jazz was proclaimed respectable.”²⁷

Looking at the evidence from *King of Jazz* and the Aeolian Hall concert in light of Pateman’s discussion of the “settler contract” helps us gain some precision in the elaboration of whiteness as intellectual property. As the work of Cheryl Harris and George Lipsitz amply demonstrates, whiteness-as-property has taken in shape in a number of recurring forms: as a state-protected “right to exclude,” as a bundle of expectations regarding the continuity of entitlements (“affirmative action for whites”), and as a mechanism of trans-generational wealth accumulation.²⁸ Whiteness as intellectual property encompasses aspects of all three of these dimensions of whiteness as property, but adds the racially exclusive right to make a “settler contract.” Although

²⁶ See Robert Walser, ed. *Keeping Time: Readings in Jazz History* (New York: Oxford University Press, 1999), 39. For discussion of the “turfs” passage, see Ellen Meiksins Wood, *Democracy Against Capitalism*, and Neal Wood, *John Locke and Agrarian Capitalism*.

²⁷ Whiteman, 15.

²⁸ See Cheryl Harris, “Whiteness as Property,” George Lipsitz, *The Possessive Investment in Whiteness*, and Ira Katznelson, *When Affirmative Action was White: an Untold History of Racial Inequality in America* (New York: Norton, 2006).

there are no guarantees that they will be successful, whites are formally entitled to make “settler contracts,” while African Americans and other members of aggrieved communities are formally barred from making these contracts.

The historical record provides ample evidence. We recall, for example, that it was only with difficulty that Duke Ellington could claim property rights in his own music. On the other hand, by virtue of being white, Paul Whiteman was free to set the terms of his propertization of African American resources as he pleased. Whiteman regularly went to see the Ellington Orchestra play in Harlem in the 1920s and 1930s, motivated by the desire to pilfer musical materials.²⁹ Whiteman urged his composer collaborator Ferde Grofé to transcribe the music of the Ellington orchestra.³⁰ Whiteman did not hide these activities, but on the contrary publicized them. Just as Locke needed to situate the colonial experiment in America within the liberal theory of the state, and therefore build the consent of indigenous people to colonization into the social contract, so Whiteman needed to construct his engagement with African American resources as an act of interracial friendship.³¹ However genuine this self-conception, the fact remains that Whiteman enjoyed state-sanctioned, legal protection of whiteness as intellectual property.

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²⁹ Sonny Greer interview in Stanley Dance, *The World of Duke Ellington*, 65.

³⁰ De Long, *Pops*, 101.

³¹ See Nathan Huggins, *Harlem Renaissance*, Paul Allen Anderson, *Deep River: Music and Memory in Harlem Renaissance Thought* (Durham: Duke University Press, 2001), 164-65, and Eric Porter, *What is this Thing Called Jazz? African American Musicians as Artists, Critics, and Activists* (Berkeley: University of California Press, 2002), 9-12.

³² If Whiteman’s cultural prospecting was *constitutive* of a certain kind of 1930s-era racial liberalism, no one took the practice more seriously than Whiteman’s colleague and friend George Gershwin, who traveled to the southeastern states to collect musical materials from African Americans. Kembrew McLeod writes that when preparing for writing the music for *Porgy and Bess* Gershwin made numerous trips to South Carolina. Gershwin treated these trips as an “inexhaustible source of folk material.” Gershwin lore has it that he “responded to the stimulus of his surroundings with an exuberant, creative outflow.” The musical ideas he absorbed during his travels “poured forth quickly and steadily at the piano as if from a

As Langston Hughes observed, the differential power that Whiteman enjoyed as a “White Man” enabled his capacity to amass fortunes off of African American music as a capitalist. Two decades after Hughes exposed the perversity of whiteness as intellectual property in “White Man,” he wrote: “It is nothing new for American whites to take American Negro songs, words, and styles, and appropriate them for their own.” Tracing this process back one hundred years, Hughes noted that “almost as fast as the Negro originates something new in the world of music, the whites take it and go, sometimes even claiming it as their own creation.” Shortly after the ODJB claimed to have invented jazz, Hughes reminded his readers, Paul Whiteman took unto himself the title of “The King of Jazz.”

For Hughes, the scandal of Whiteman’s arrogance was not the lie of white ownership of jazz. Rather, it was the way that this lie created and sustained material disparities. “Some of the poor guys who created jazz and are still living,” Hughes noted, “are on relief.”³³ At that same time, Whiteman was a millionaire, enjoying a career as an executive in the television industry. Whiteness, intellectual property, and racial liberalism contributed to the very different fates of Whiteman and the “poor guys who created jazz.”

Part Two

RCA v. Whiteman in Historical Context

As noted in the introduction, Langston Hughes wrote “White Man” just as Whiteman and his confederates were gearing up for an ill-fated series of court cases

limitless subterranean well.” Kembrew McLeod, *Owning Culture: Authorship, Ownership, and Intellectual Property Law* (New York: Peter Lang, 2001), 61.

³³ Langston Hughes, “Highway Robbery Across the Color Line in Rhythm and Blues,” *Chicago Defender*, July 2, 1955, 9.

seeking legal recognition of a new set of authorial property rights for interpretive musicians, culminating in *RCA v. Whiteman* (1939-40).

While something of a footnote in the history of popular music, *RCA v. Whiteman* was a key early intellectual property decision, setting a precedent that guided music copyright cases for decades. In this section, I look closely a variety of evidence surrounding *RCA v. Whiteman* and the cases that led up to it, evidence that illuminates the cultural logics that encouraged Whiteman to go prospecting in the jungle in the first place.

The road to *RCA v. Whiteman* began with Fred Waring's 1936 lawsuit against Philadelphia radio station WDAS. Waring claimed that the station's policy of broadcasting his recordings violated his property rights.³⁴ Waring worked with Maurice Speiser, a Philadelphia attorney with connections in the artistic and literary worlds and a pioneering copyright advocate. After reading and translating French lawyer Robert Homburg's *Legal Rights of Performing Artists*, Speiser was drawn to the idea of launching test cases that would induce American courts to recognize "a legal interest for the performer in the recorded performance." Speiser hoped to introduce to the United States the legal protections that European states—in sharp contrast to England and the United States-- have for centuries afforded to authors and artists. These protections cover

³⁴The *Waring v. WDAS* trial was something of an event. The *New York Times* reported that theatrical producers, composers and publishers, song-writers, orchestra conductors, musicians, and restaurant managers flocked to the witness stand to give testimony. Waring called on corporate allies to testify on his behalf, including executives from Paramount Pictures, as well as representatives from songwriters and the musicians' unions. The *Times* emphasized that this testimony was mainly used to establish the great commercial value of Waring's orchestral renditions. Film producers, for example, testified that Waring's asking price for scoring a motion picture was a whopping \$250,000. Waring's lawyers argues that this value was negatively affected by broadcasting from records, and that "the use of records by broadcasting stations interferes greatly with the obtaining of exclusive contracts by orchestra leaders." "Musicians Rally to Aid Waring Suit: Testify that Value of his Recordings were Damaged by Record Broadcasting," *New York Times*, Dec. 13. 1935, 31.

“moral rights,” including the right of attribution, the right to contest false attribution, the right to withdraw work from public view, and the right to contest disfigurement of works after purchase.³⁵ Fired up by the unique potential for expanding the scope of authorial rights in the New Deal moment, Speiser formed the NAPA in 1935 with Waring and Whiteman (as well as dozens of other white popular musicians like Guy Lombardo, Rudy Vallee, and Connie Boswell). The NAPA focused on efforts to impose limits on the uses to which recordings could be put, articulating at the same time a new vision of recorded music as a distinct species of intellectual property.

Speiser explained to *Los Angeles Times* writer Carol Nye in 1936 that the NAPA campaign was meant to combat the steadily increasing “evils” of radio competition with live music.³⁶ The situation for bandleaders, Speiser asserted, had become “intolerable,”

³⁵ Vern Countryman, “The Organized Musicians II” (*The University of Chicago Law Review*, 1949), 128. Homburg’s book was originally published in France in 1930 as *Le droit d’interprétation des acteurs et des artistes exécutants* (Paris: Recueil Sirey, 1930). Speiser’s translation was published as *Legal Rights of Performing Artists* shortly before the NAPA campaign began (New York: Baker, Voorhis & company, 1934). See also Martin A. Roeder, “The Doctrine of Moral Right: A Study of the Law of Artists, Authors, and Creators,” *Harvard Law Review*, Vol. 53, No. 4 (Feb., 1940), 554-55. Roeder distinguishes between copyright law, which protects the economic interests of the creator, and the doctrine of moral right, which follows from the notion that when an artist creates, “he does more than bring into the world a unique object having only exploitive possibilities; he projects into the world part of his personality and subjects it to the ravages of public use.” Accepting such a premise means that there are “possibilities of injury to the creator other than merely economic ones.”

³⁶ The radio broadcast market was divided between major networks, which controlled 20 percent of the market, and independents, which accounted for the remaining 80 percent. While major networks made deals with the American Federation of Musicians and bandleaders to hire live musicians to supply all of its music needs, the approximately 600 independent radio stations sought alternatives to high-priced live music. Independent stations were under enormous pressure as the entertainment industry experienced a wave of consolidations. Dozens of record labels were reduced to a handful, and a multiplicity of independent radio stations came under the domination of the two national networks, NBC and CBS. Frequently, independent stations used local musicians, who played for free in exchange for exposure, or electrical transcription services. Broadcasters also began to broadcast commercial recordings to fill up airtime: according to supporting materials in the *Waring v. WDAS* case, as many as 400 of the 700 stations in operation relied on recorded music. This trend alarmed the American Federation of Musicians, who supported the NAPA campaigns vigorously. New York Local 802 took an especially active role in support of Waring, with Local 802 representative Sam Tabak testifying on Waring’s behalf. In the late 1930s, Chicago AFM head James C. Petrillo pursued a parallel strategy of preserving employment for live musicians by requiring radio stations to hire musicians to sit idly by when discs were broadcast over the air. Stowe, *Swing Changes: Big Band Jazz in New Deal America* (Cambridge: Harvard University Press, 1994), 99. Sanjek and Sanjek, 128.

forcing them to compete against themselves. The NAPA did not wish to eliminate commercial recordings, but to regulate their use. “The purpose is to control the commercial use of records which were made for home consumption and not for commercial exploitation,” Speiser said, “thus creating an opportunity for further employment of musicians and relieving unemployment in that profession.”³⁷

Anxiety in the face of new threats to musical labor from new technologies was central to the NAPA quest for property rights in recordings. These were indeed new threats: until the early-to-mid-1930s, the vast majority of music heard over the radio was performed live in a studio by professional musicians. But change came quickly. By 1937, AFM president Joseph Weber lamented that only 10 percent of the United States’ commercial radio stations employed musicians, representing fewer than eight hundred full-time jobs.³⁸ In closed-door sessions at the 1937 AFM convention in Louisville, Weber and the AFM executive board developed a plan to threaten strikes against the radio networks and record companies in order to gain guarantees of additional jobs.³⁹

The NAPA was thus well positioned to take advantage of growing discontent among the top tier of musical entertainers to launch an aggressive legal campaign. The group needed to find a test case, however, centering on an injury more specific than the mere fact that a radio station had elected to broadcast a bandleader’s music. There was, after all, no law against that. Speiser seized on the fact that beginning in January of 1933,

³⁷ Carol Nye, “Radio and Its Personalities: Artists Open Fight against Recordings,” *Los Angeles Times*, Jul. 19, 1936, C10.

³⁸ Kraft, 107.

³⁹ Kraft, 107-110. While the network radio business grew, the phonograph industry was in the midst of a long crisis of profitability. Peaking in 1921 with revenues of \$106 million, record sales fell steadily over the course of the 1920s. By 1925, sales were half what they had been four years earlier. In 1931, record companies only sold \$16.9 million worth of records, a 60 percent decline from 1930. In June 16, 1931, RCA issued an official order eliminating multiple takes in their recording studios, cutting recording down to a single wax take per selection. As soon as contracts expired, record labels dropped their most expensive artists. Sanjek and Sanjek, 122.

phonograph record manufacturers RCA-Victor, Columbia, and Brunswick had begun to print “Not Licensed for Radio Broadcast” on every disc they issued. This gave Speiser the legal pretext he needed to go forward with litigation: Waring sued WDAS not simply for broadcasting his music, but for broadcasting the songs “You’re Getting to be a Habit with Me” and “I’m Young and Healthy,” recorded by Waring in 1932, on July 2, 1935, in defiance of the “Not Licensed for Radio Broadcast” labels.⁴⁰

Waring v. WDAS was first tried in the Common Pleas Court of Philadelphia in early 1936. In a 37-page decision, Judge Harry S. McDevitt ruled in Waring’s favor, declaring illegal “indiscriminate exploitation of music recordings by radio broadcasting stations” and affirming the property rights of musicians to their “recorded talents.” The American Federation of Musicians journal *International Musician* voiced enthusiasm for McDevitt’s ruling, pointing out that “unrestricted use of music records made expressly for home consumption” was, to a large extent, responsible for “the vast unemployment problem in the music profession.” Especially egregious was the use of announcements by disc jockeys to create the false impression that the concert was being rendered, in real time, “personally by the recording artist.” The musicians union celebrated the fact that McDevitt saw the broadcast of recorded music as forcing musicians to compete against themselves (or the snapshot of themselves captured on a particular musical recording). Recording artists in Pennsylvania could rest easy in the knowledge that “the pirating of music records by radio stations, restaurants, hotels, cabarets, dance halls, and other places of entertainment where musicians have been denied employment” would now be

⁴⁰ “Court Enjoins Radio Station: No More Broadcasting of Leader’s Recordings—Legislation Sought to Make Ruling Universal.” *International Musician* (March 1936), 18.

forbidden.⁴¹ McDevitt affirmed that “the creator of a unique and personal interpretation of a musical or literary composition” possessed a common law property right in the same, and thus had the “right to control and limit its use.”

With Paul Whiteman presiding as toastmaster, The NAPA and Local 802 sponsored a celebratory toast in Waring’s honor after McDevitt’s issued his ruling. All 37 pages of the ruling were read aloud. WDAS immediately appealed the decision, and *Waring v. WDAS* came to trial again in New York District Court in July of 1937.

In the *Waring v. WDAS* decision Justice Horace Stern attempts to balance new issues surrounding musical arrangement and interpretation in the age of recorded sound against the aesthetic standards of nineteenth century European art music. Stern notes that the law did not require “that the entire ultimate product should be the work of a single creator” in order to establish “property rights in intellectual or artistic productions” and that “such rights may be acquired by one who perfects the original work or substantially adds to it in some manner.”⁴² In light of the discussion of the “law of the jungle” above, Stern’s words here are especially resonant. If this is a copyright law expansion “for whites only,” then what appears to be a pragmatic open-mindedness regarding authorship in the age of mass reproduction might instead be the legal authorization for white propertization (“perfection” or “substantial addition to”) of African American expressive resources.

The *Waring* decision shook up the radio and recording industries. For many years, radio stations in Pennsylvania refrained from broadcasting recorded music. In the rest of

⁴¹ “Court Enjoins,” 18.

⁴² Leibell cites *Waring v. WDAS* in HN2, *RCA Mfg. Co., Inc., v. Whiteman et al.* District Court. S.D. New York 28 F. Supp. 787, July 24, 1939. See also Justice Horace Stern decision, *Waring v. WDAS Broadcasting Station, Inc.*, Appellant No. 116 Supreme Court of Pennsylvania 327 Pa. 433 October 8, 1937.

the nation, however, the broadcasting of recorded music became increasingly common. The NAPA therefore needed a new test case that could set national policy. This was a dangerous process: although the *Waring* precedent bolstered bandleaders' expectations of legal recognition of authorship, each new lawsuit raised the prospect that a judge would reject wholesale the legitimacy of bandleaders-as-authors.

Despite the fragility of the *Waring* victory, RCA and NBC lawyers and executives took the threat posed by the NAPA seriously. Media executives likely understood the NAPA campaign as a reflection of the accelerating spirit of class struggle in the late 1930s. The quest for property rights in recordings was one more assault on the business elite's conception of private property as sacrosanct.⁴³ For years, New Deal policymakers, trade union militants, and activist consumers had been challenging corporate prerogatives vis-à-vis property: in new forms of taxation, in the recognition of collective bargaining rights, in price controls, and in attacks on monopoly power. Sit-down strikes in the auto factories of Michigan and against "Little Steel" in Illinois were only the most dramatic examples of this militant spirit. Parallel to these developments, a unionized "cultural apparatus" emerged in Hollywood, New York, Chicago and other centers of cultural production.⁴⁴ Cultural workers began to amass legal victories in the

⁴³ The literature of the New Deal era is replete with evidence of the insecure status of private property in the 1930s. For example, in 1937 legal realist Thurman Arnold, soon to assume the position of head of the Antitrust Division of the Department of Justice, wrote: "It is obvious that private property has disappeared." This view stretched back to Progressive era concerns about the increasingly socialized nature of production in the shift from proprietary to corporate capitalism. In their classic work *The Modern Corporation and Private Property*, Adolf Berle and Gardiner Means presented a similar argument: "The surrender of control over their wealth by investors has effectively broken the old property relationships and has raised the problem of defining these relationships anew." The "quasi-public corporation," they wrote, created a revolution: destroying the "unity that we commonly call property" by dividing ownership into nominal ownership and managerial power." Thurman Arnold, *The Folklore of Capitalism*. Adolf A. Berle and Gardiner C. Means, *The Modern Corporation and Private Property* (New Brunswick, NJ: Transaction Publishers, 1991 (1932), 4, 7.

⁴⁴ See C. Wright Mills, "The Cultural Apparatus," in Irving Louis Horowitz, ed., *Power, Politics, and People: The Collected Essays of C. Wright Mills* (New York: Ballantine Books, 1963), 405; and Michael

wake of the Supreme Court's upholding of the Wagner Act. Both John Howard Lawson's Screen Writers' Guild and Heywood Broun's Newspaper Guild made significant gains in the years during which the NAPA was active.⁴⁵ Combined with the growing self-confidence of other white-collar unions, corporate America was increasingly worried about groups like the NAPA.⁴⁶

In January of 1938, RCA lawyers began to sketch out a strategy regarding NAPA litigation. They described the NAPA, "an organization of the artists themselves whereby they, withholding their 'rights and property in and to their unique, original performances and interpretations' would expect to exploit commercial reproductions of records they made, much like ASCAP now exploits copyrighted music." RCA's policy regarding copyright was that the recording artist had no claim to copyright. RCA, however, also lacked official copyright in recordings, even if it did usually receive by written contract

Denning, *The Cultural Front: Laboring of American Culture in the Twentieth Century* (London: Verso, 1997), 38-39.

⁴⁵ See Larry Ceplair and Steve Englund, *The Inquisition in Hollywood: Politics in the Film Community, 1930-60* (Urbana: University of Illinois Press, 2003); Gerald Horne, *The Class Struggle in Hollywood, 1930-1950* (Austin: University of Texas Press, 2001), and *The Final Victim of the Blacklist: John Howard Lawson, Dean of the Hollywood Ten* (Berkeley: University of California Press, 2006); "Interview with John Howard Lawson" (from 1973 with Dave Davis and Neal Goldberg) from *Art/Politics/Cinema: The Cineaste Interviews* edited by Dan Georgakas and Lenny Rubenstein (London: Pluto Press, 1984), 192. Daniel Leab, *A Union of Individuals*, (New York: Columbia University Press, 1978). Richard O'Connor, *Heywood Broun: A Biography* (New York: G.P. Putnam's Sons, 1975).

⁴⁶ Writing in 1941, Murray Ross introduced his study of labor in Hollywood with the observation that the rapid extension of unionism among the "professional and white-collar classes" had been one of the most interesting and surprising developments of the previous decade. Many "highly paid professional groups as well as many supervisory and white-collar employees," Ross noted, "who have traditionally identified their interests with management and therefore were considered immune from the leveling effects of unionism, have recently organized their own unions." Murray Ross, *Stars and Strikes* (New York: Columbia University Press, 1941), vii. On the managerial revolt, see CLR James, *American Civilization*, ed. Anna Grimshaw and Keith Hart (Cambridge, MA: Blackwell, 1993), 231; and Howell John Harris, *The Right to Manage: Industrial Relations Policies of American Business in the 1940s* (Madison: University of Wisconsin Press, 1982), 8

from its recording artists full rights to “commercial, home, and every other use” of the records it produced.⁴⁷

RCA worried that the NAPA would unleash a deluge of cases seeking to “establish rights in artists to control commercial exploitation of phonograph records” and to assert property rights in “unique and original performances and interpretations.” But the NAPA’s previous suits had been against “small and inconspicuous broadcasters and comparatively powerless owners of coin-operated phonograph machines.” The result of such cases against more or less helpless defendants was that by “default, consent or otherwise,” there had been a number of judicial decisions holding that recording artists did have “reserved rights in their records.” Through this litigation, the NAPA was building up an “apparent common law right” which previously had no existence. In most of these cases, no evidence was taken, no fight was made, the judgments were by consent and the record manufacturers were not parties. The accumulation of NAPA victories, in RCA’s view, had the worrisome “tendency to establish in the minds of judges, lawyers, and others,” the existence of “moral rights” in recordings.

RCA believed very strongly that it had to fight to “establish its rights as against the asserted rights of recording artists.” The ideal situation would be the initiation of a policy of making “clear, written contracts with artists” stating the extent and scope of RCA’s right to use the records it issued. In addition to revising contracts, RCA lawyers proposed that the company intervene in NAPA court cases if they brought actions involving the Victor label (which it owned) to establish that the artists had “no property right in their

⁴⁷ Colonel Manton David to David Sarnoff, January 28, 1937, re: ASRA and NAPA litigation. Box 55, Folder 52, NBC Collection, Wisconsin Historical Society, Madison, Wisconsin (hereafter NBC/WHS). Correspondence regarding the NAPA often refers also to the ASRA (the American Society of Recording Artists), a West Coast group with similar aims that merged with the NAPA in 1939.

interpretations,” had “conveyed all their rights in such recordings” to RCA and had retained “no right to prevent or control their use” after sale.⁴⁸

Within this atmosphere of rising militancy, and in light of the NAPA’s “serious threat to the very existence of the phonograph record business” NBC-RCA proceeded with its own plan to assert “moral rights” in recordings.⁴⁹ Executives began to float the idea of a test case of its own against a broadcaster to enjoin the use of phonograph records over the air.⁵⁰

In April of 1937, RCA intervened in several California suits brought by recording artists Wayne King and Jan Garber against Warner Bros. Broadcasting Corporation to restrain the broadcasting of phonograph records.⁵¹ The purpose of the intervention was to establish that artists did not have property rights in records, that if they ever had any such property rights they had been transferred to RCA, that RCA had a special property right of its own in its records, “sufficient to enjoin any unfair use thereof by others,” and that the “use of phonograph records for broadcast purposes infringes this property right and

⁴⁸ Letter from David Mackay to Colonel Manton Davis, February 19, 1937, Box 55, Folder 52, NBC/WHS. In addition to the NAPA actions, RCA and NBC were closely monitoring the increasingly tense standoff between the Chicago Musicians’ Union and the radio and the recording industry. NBC lawyers notes that Chicago Local 10, headed by James C. Petrillo, had ruled that it would not permit its members to make any records “except on conditions to be laid down by it.” Although the much more important New York AFM Local 802 had given NBC assurances that they were not going to adopt the Chicago ruling, they also refused to interfere in Chicago. NBC lawyers connected the need to resolve the legal indeterminacy at the heart of the NAPA conflict with its general strategy regarding the musicians’ union. The threatened recording ban by Chicago’s Local 10 came to fruition in January of 1939. New York Local 802 stated to record manufacturers that “because of the ‘gross negligence’ of the record companies in failing to stop the broadcasting of records,” it was “heartily in sympathy with the action of the Chicago Local” and would use its best efforts at the National Convention of the AFM “to have a nation-wide ban placed against the making of recordings by union musicians.”

⁴⁹ Letter from David Mackay on Position of RCAM re: its Phonograph Records, January 20, 1937, Box 55, Folder 52, NBC/WHS.

⁵⁰ Letter from A.L. Ashby to David Sarnoff, February 24, 1937. Letter from Lenox Lohr to Frank E. Mason, Lloyd Egner, and Mark Woods, Box 55, Folder 52, NBC/WHS.

⁵¹ Letter from A.L. Ashby to Mason, Egner, and Woods, re: NAPA, April 1, 1937, Box, 55, Folder 52, NBC/WHS.

constitutes unfair competition...and should be enjoined.”⁵² These cases were inconclusive and local. RCA therefore hurried to intervene in Whiteman’s lawsuit against WNEW in 1939, a suit more or less tailor-made to its purposes.⁵³

RCA’s lawyers would likely have been more sanguine in 1937 and 1938 had they properly understood the weakness of the NAPA. The group’s fortunes began to falter almost immediately after the initial victory of *Waring v. WDAS*. Two other court cases launched by the NAPA in its first year, involving Frank Crumit and Ray Noble, had failed. An ostensible victory by Waring in North Carolina, seeking to enjoin the broadcast of electrical transcriptions of the Ford Motor Company broadcast was stymied by lobbying on the part of broadcasters, who convinced the North Carolina legislature to adopt a statute cancelling the decision in the Waring case. Broadcasters also succeeded in getting South Carolina and Florida lawmakers to issue similar statutes.⁵⁴

Launching a case with Paul Whiteman as lead plaintiff in an NAPA test case was the group’s best bet for a Supreme Court affirmation of the *Waring* precedent. *RCA v. Whiteman* began as a suit similar to Waring’s. Whiteman sought an injunction against New York radio station WNEW (and its corporate sponsors, W.B.O. Broadcasting Corporation and Ellin, Inc., a refrigerator manufacturer) for broadcasting nine of Whiteman’s recordings made for the Victor and RCA labels.⁵⁵ RCA then intervened in the case. As the record label that produced these recordings, RCA argued that if any

⁵² Memorandum from Frank Wozencraft to David Sarnoff, re: Control of Commercial Reproduction of Records, April 21, 1937, Box, 55, Folder 52, NBC/WHS.

⁵³ R.P. Myers to Mark Woods, December 2, 1938, re: Whiteman v. WNEW, Box 65, Folder 47, NBC/WHS.

⁵⁴ Ibid.

⁵⁵ The songs at issue were: “San,” “O So Blue,” “Whiteman Stomp,” “By the Sycamore Tree,” “You Excite Me,” “Cuban Love Song,” “There’s Nothing Else to Do,” “Singing a Happy Song,” and “A Waltz was Born in Vienna.”

rights were violated when WNEW disc jockeys broadcast Whiteman's music, *RCA* was the injured party, not Whiteman.⁵⁶

RCA v. Whiteman was first argued before Judge Vincent L. Leibel in the District Court for the Southern District of New York in 1939.⁵⁷ *RCA*'s lawyers argued that the "use of [*RCA*'s] records by others for profit" constituted a "wrongful exploitation of its property rights," reducing demand for its records, depriving it of "the services of artists who will not record unless they can be protected against injudicious and excessive repetitions over the radio of their recorded performances" and causing "a species of unfair competition" by destroying the saleability of records through "constant repetition." In the case of records like Whiteman's that bore labels proscribing radio broadcast, *RCA* alleged that radio station WNEW was guilty of "breach of contract resulting from violation of a restrictive covenant."

Directing its attention to Whiteman, *RCA* claimed that the bandleader's attempts to license records for broadcasting and public performances, along with "representations to the effect that [Whiteman] alone" was "entitled to grant such license" interfered with the company's "exclusive right to control the use of its records." This affront damaged its "reputation, goodwill and business" and constituted unfair competition in that Whiteman was attempting "to exploit, as his own, property rights belonging to [*RCA*]."

Like Stern's decision in *Waring v. WDAS*, Judge Leibel's prose in *RCA v. Whiteman* rewards close analysis. Leibel notes: "until recent years the problem of a common law right in musical interpretations and renditions had never been

⁵⁶ R.P. Myers to Mark Woods, December 2, 1938, re: *Whiteman v. WNEW*, Box 65, Folder 47, NBC/WHS.

⁵⁷ *Ibid*, 790.

adjudicated.⁵⁸” The technological innovation of the phonograph changed the playing field of copyright law. Before the phonograph, a “particular rendition” of a song was lost forever after it was played. Because of the immediate disappearance of this “intangible” rendition, the property rights of interpretive musicians were in no danger of being violated. Leibell concludes that Whiteman “contributed something in addition to that which was already the subject of a copyright, the musical composition itself,” and that he was therefore fully entitled to “protect what is his property, over and above existing property rights of the composer.”⁵⁹

Against the view that intellectual property rights are held only by solitary authors who create original works in isolation, Leibell underlines Stern’s assertion in *Waring v. WDAS* that the law “has never considered it necessary for the establishment of property rights in intellectual or artistic productions that the entire ultimate product should be the work of a single creator” and that “such rights may be acquired by one who perfects the original work or substantially adds to it in some manner.”⁶⁰ Whiteman, in Leibell’s view, had acquired rights in the compositions of others by virtue of perfecting or adding to them.

These property rights were inherent in the recordings, which clearly had only one intended use: “to reproduce [their] contents through the use of a phonograph.” This did not extend to “the right to broadcast the contents of the record over the radio.” The “Not Licensed for Broadcast” labels were therefore superfluous. Labels or not, the purchaser of a record had no right to broadcast it on the air, because such an action would constitute

⁵⁸ Ibid, HN1.

⁵⁹ Ibid, HN1 and HN2.

⁶⁰ Ibid, HN2 and HN3.

unfair competition with the Whiteman Orchestra. If radio stations wished to “give their public Whiteman’s orchestra” they were able to do so “by hiring the orchestra at a proper price, as some of them do.” Leibell warns that if radio stations were allowed unfettered access to recordings for broadcast, “the principal beneficiaries of this judicial bounty” would be “those who in broadcasting such record seek to ‘harvest the fruits of another’s labor’ at practically no cost to themselves.”

The Leibell decision affirmed that radio broadcast of recording constituted unfair competition with recording artists, and enjoined radio stations from playing Whiteman’s recordings over the radio. Because of Leibell’s focus on unfair competition, it was unclear if this was the kind of intellectual property victory dreamed of by Speiser. The “moral rights” of musicians remained murky.

RCA v. Whiteman was then appealed to the United States Court of Appeals for the Second Circuit, coming to trial in June of 1940. Learned Hand heard the appeal, and took a dim view of the legal arguments at the heart of the NAPA campaign. Hand’s decision rejects Leibell’s generous understanding of intellectual property rights in recordings. Up until the moment his recordings were issued, Hand argues, Whiteman did indeed point possess property rights in them. These were abandoned, however, at the point of sale. Once a recording was offered for sale, its contents were “dedicated” to the public. For Hand, *RCA v. Whiteman* constituted an attempt to privatize public property. Furthermore, the “Not Licensed for Radio Broadcast” labels were illegitimate: a form of what Hand’s colleague Zechariah Chaffee called “unequitable servitude on chattels”--

restrictions that could not be imposed on commodities for sale on the market without violating the property rights of consumers.⁶¹

For Hand, Whiteman's property rights in his recordings protected only against unauthorized *republication* of the Whiteman Orchestra's music, not against its broadcast. Only a deliberate act of "bootlegging"—recording a broadcast off the radio and selling this homemade recording—would therefore constitute a violation of recording musicians' rights.⁶² Listening to and enjoying recorded music broadcast over the radio (or providing that opportunity to listeners) was not illegitimate or illegal. Radio broadcasters had not violated Whiteman's rights, Hand argues, because they had not "copied his performances at all." Instead, they had merely used copies which Whiteman and RCA made and distributed to retailers.⁶³

Hand concludes with a disquisition on the nature of recorded music as intellectual property. He notes that much of what constitutes the arts and sciences has historically fallen outside the realm of property. Drawing a famous distinction between "ideas" and "expression," Hand insists that ideas cannot be owned. While the law protects some

⁶¹ At the heart of Hand's decision are questions regarding the legal notion of "abandonment": when is a work of art or innovation "abandoned" to the public, after which the creator can no longer try to regain a monopoly over its use or reproduction? Legal precedent suggested that the performance of a play or delivery of lecture did not constitute "abandonment" or "dedication to the public." Similarly, Hand reasoned, the work of a conductor directing a musical performance that is broadcast over the radio was not an "abandonment." In Hand's view, "it would be unlawful without his consent to record it as it was received from a receiving set and to use the record."⁶¹ This distinction appears to have been aimed at bootlegging and illicit radio transcriptions; in the case of recordings aimed for sale to the public, in contrast, Hand ruled that the "common-law property" in these performances "ended with the sale of the records." The NAPA's written proscriptions against unauthorized use did not "save" this "common-law property" and that even if they did, the records themselves could not be clogged with "a servitude."⁶¹ Hand stressed that since copyright is at root an artificial means of creating a monopoly: "it consists only in the power to prevent others from reproducing the copyrighted work." In this light, Hand felt that W.B.O. Broadcasting Corporation never "invaded any such right of Whiteman" because they had not "copied his performances at all; they have merely used those copies which he and the RCA Manufacturing Company, Inc., made and distributed." *RCA v. Whiteman*, 8-9.

⁶² *RCA v. Whiteman*, 7.

⁶³ *RCA v. Whiteman*, 8-9.

forms of expression, this protection reflects public policy considerations, not the “natural rights” of authors.⁶⁴

Hand’s ruling is worded as a kind of “pox on both your houses.” Neither Whiteman nor RCA could seek to enlarge their property rights in recordings. In reality, the ruling favored RCA. The company continued to enjoy expansive control over recordings, and its employees had been put in their place. RCA regarded Hand’s verdict as a “complete victory for the broadcasting industry as opposed to the recording companies and NAPA.”⁶⁵

Back to the Jungle

Hand’s ruling—along with a host of other historical forces—also caused a shift in the logic of whiteness as intellectual property. Had the NAPA prevailed in *RCA v. Whiteman*, it is likely that white musicians would have gained significant control of the recording industry. While it is interesting to ponder what the possible impact of such an arrangement would have been on African American musicians, such musing is the stuff of conjecture and counterfactual history.⁶⁶ With the decline of the NAPA, a new regime

⁶⁴ *RCA v. Whiteman*, 13-14.

⁶⁵ A.L. Ashby to Niles Trammell, July 29, 1940, re: RCAM v. Whiteman, Box 81, Folder 25, Correspondence: Paul Whiteman, 1940, NBC/WHS.

⁶⁶ Most likely, had the NAPA been victorious they would have set up an apparatus similar to that of the songwriting publishing group ASCAP (the American Society of Composers and Publishers), as RCA’s lawyers feared. ASCAP was notoriously racist. Beginning in the late nineteen teens, ASCAP began a long reign as the most important cog in the machine collecting licensing fees and distributing money to musicians in the United States. ASCAP used a ranking system that ostensibly rewarded the most popular musicians with the most money, and the least popular with the least. The precise nature of this ranking system, however, was not disclosed to members. ASCAP was the preserve of music publishing firms, many of which were owned by the same New York-based corporations and banks that controlled the Hollywood studios, and white composers. The Association seems to have systematically excluded African American and working-class musicians from the southern states. Of the 170 composers and 22 publishers who were charter members, only one musician and one lyric writer was African American. During the next twelve years, only eight other African American composers became members. Prominent African American musicians were excluded for appallingly long stretches of time. Louis Armstrong did not become a member until 1939, Cab Calloway until 1942, and Fletcher Henderson until 1948, even though by 1939 Henderson was a staff arranger for Benny Goodman. Ragtime innovator Scott Joplin never became a member. John Ryan, *The Production of Culture in the Music Industry: The ASCAP-BMI Controversy* (Lanham, MD:

governing the political economy of music emerged, which, at least in the short term, was at least as insidious and economically exploitative as that which preceded it. In this final section of the essay, I look at William Dieterle's 1942 film *Syncopation* as a symptomatic text that provides evidence of the contours of this regime change. *Syncopation* reveals the emergence of a new racial logic, a Popular Front consensus organized discursively around principles of egalitarianism and inclusion that nevertheless stopped short of any meaningful progress in restoring full citizenship rights to African Americans.⁶⁷

Syncopation and the Wartime Popular Front Revision of the "Settler Contract"

Released only a short while after the resolution of *RCA v. Whiteman*, *Syncopation* provides a fictional portrayal of Paul Whiteman (composer Leith Stevens in an uncredited cameo as the character Ted Browning), who functions as a villain within a story that tracks both the evolution of jazz and of the birth of the new Popular Front social order in the World War II-era.⁶⁸ Whiteman's changing role in the popular understanding of jazz—from hero to bête noir in a few short years—attests to the potency of contextualization in the politics of culture. Whiteman stood still while politics shifted around him, situating him as a heroic "King of Jazz" in the late 1920s and early 1930s and as a tyrannical enemy of jazz in the early 1940s.

University Press of America, 1985), 54-65. See also David Suisman, *Selling Sounds: The Commercial Revolution in American Music* (Cambridge: Harvard University Press, 2009).

⁶⁷ *Syncopation*, directed by William Dieterle, RKO, 1942. For a jumbled and badly acted WWII-era melodrama, *Syncopation* is a surprisingly interesting film. It has a fascinating back-story: created and directed by the leftist German émigré filmmaker William Dieterle, who consulted extensively with Freudian-Marxist philosophers Max Horkheimer and Theodor Adorno (perhaps the two best-known members of the Frankfurt School and its key institution, the Institute for Social Research) during the script-writing phase of the project. David Jennemann's research has shown that this collaboration, among other things, represented an attempt by Adorno to make up for the crude analysis of jazz that he famously laid down in his essay "On Jazz" and to incorporate a more sophisticated understanding of the racial politics of jazz into the script. Adorno at first dismissed *Syncopation* as a B-movie, but later he praised "basic idea of advocating jazz in its boldest form." David Jennemann, *Adorno in America* (Minneapolis: University of Minnesota Press, 2007).

⁶⁸ Stevens was the musical director and chief composer for the film. Coincidentally, he later founded an organization, the Composers and Lyricists Guild, with an agenda similar to that of the NAPA.

Syncopation is a convoluted film, with many twists and turns, and lots of incidental business. Because the Paul Whiteman character does not appear until the last third of the film, I will try to confine my analysis to that section. Nevertheless, some discussion of the film's earlier parts is necessary: both to set up the structural and dramatic place of Whiteman within the film, and to highlight thematic concerns that run through the film as a whole.

Syncopation begins with a globe spinning around to reveal the African continent. We see Africans dancing in "traditional" garb in a circle. A well-dressed white man in a suit and bowler hat presents a chief with parasols and hats. Next, we see wooden crates full of shackles and chains being opened by anonymous white hands, followed by a bird's eye view of the hold of a slave ship. The globe turns from Africa to the United States, and the action shifts to the cotton fields of the American South. Finally, we arrive in New Orleans, circa 1906.

The first dramatic scene takes place in an African American music school for children. The camera focuses on Reggie, a young boy playing some jazzed-up trumpet lines, while fellow students and a teacher listen. A music stand looms before Reggie, but it is apparent that he is improvising, not reading music. Reggie's teacher asks: "What am I going to do with you? You're better on that horn of yours than anyone we've ever had, but when it comes to reading..." Reggie replies: "Music on paper don't mean nothing to me!" Reggie's teacher, although sympathetic, expels him from the music school.

Next, we meet Reggie's mother, Ella, played by Jessie Grayson, sweeping the stairs outside of her employer's home. Ella is the maid of widowed white architect George Latimer (Adolph Menjou) and his young daughter Kit, who entertains guests with

enthusiastic renditions of New Orleans blues on the piano. Kit and Reggie, we learn, are close friends: spending her days with Ella and Reggie has given Kit a thorough education in New Orleans jazz.

Because Reggie is the first character we meet, we expect the film to be about him. And indeed, the next scenes are about Reggie. He plays in a black church (a fairly clichéd depiction of ecstatic and emotional worship), gets a job with King Jeffers, a local jazz hero, and leaves his mother for this new surrogate parent. But then *Syncopation* takes an abrupt shift and drops Reggie's story, picking it up again awkwardly later on. These early scenes are fascinating, however. Before she agrees to let Reggie go, Ella accosts King Jeffers outside a smoky nightclub where Jeffers has introduced Reggie to the joys of the bandstand. "I don't want any son of mine playing in a place like that," Ella insists. "I want him to study music like the white folks do." Jeffers replies, "Reggie's got something no teacher can give him" and argues that, properly nurtured, Reggie's gifts might become a "burning fire." Here the film deploys the core oppositions at the heart of jazz mythology: "schooled/white/notated music/respectability" versus "spontaneous/black/improvised/subterranean." *Syncopation* situates Ella's release of Reggie to King Jeffers as perfectly natural, even though Reggie appears to be only about eight or nine years old, and Ella obviously loves him dearly. The jazz apprenticeship naturalizes the separation of Ella from Reggie, which in fact is driven by economic necessity built on racial capitalism, institutional sexism, and white supremacy. The film's logic suggests that Ella "naturally" feels more committed to her role as Kit's surrogate mother than as Reggie's parent.

The next section of the film has Kit, George, and Ella move to Chicago. Kit is now an adult, wrestling with the demands of bourgeois respectability while nurturing a deep connection to New Orleans, its music, and the spiritual sustenance that she seeks in recordings and at the piano. Wandering the streets at night, Kit strikes up a friendship with Jackie Cooper's Johnny Schumacher, a young white trumpet player, who takes her to a rent party hosted by the fast-talking and wise cracking white pianist Smiley Jackson.

There is a fascinating exchange between Kit and Jackson during the party sequence that is particularly interesting in light of the intellectual property issues we have been exploring in this essay. Jackson walks over to Kit and Johnny, whistling a bluesy tune. The audience has heard this tune before, sung by Ella around the house, and played by Kit on the piano. When Kit asks about the melody, Jackson reports that it is a "little thing" he "cooked up" that morning. When Kit protests that this cannot be true, Jackson shrugs: "Now can you beat that! Ain't it criminal the way they steal things these days before you have a chance to get 'em down on paper!" Pressed by Kit, Jackson confesses: "Just between you and me and the lamppost, it's something I picked up on a Mississippi riverboat from a bootblack boy. They play it slow in Memphis, they sing it blue in St. Louis... but up here in the Windy City we bring it back to life with a little bit of that old razzmatazz!" Jackson looks a bit embarrassed that his con game has been disrupted, but there is no sense that he feels any distress about taking musical materials from "bootblack boys." In the Progressive Era, such a person was not deserving of authorial rights. Men like Jackson were free to scavenge the jungle for their songs. Kit—who identifies as an honorary member of the culture from which Jackson poaches—sits down at the piano to prove that the song does not belong to him.

The party scene sets up an improbable subplot that has Kit on trial for playing jazz piano at the party, resolving with Kit's raucous piano performance in the courtroom, leading to her acquittal. While this trial sequence is mostly unrelated to the rest of the plot, it underlines the dichotomies and binary oppositions at the heart of the film: between white aesthetics and values and their African American counterparts. The fact that Kit is on trial adds gender to the mix: Kit's fluency in jazz, taught to her by Ella and Reggie, speaks to the miscegenation anxieties and demands that southern womanhood be protected at the heart of the Jim Crow project (resurgent in the World War I moment that is the setting of the trial sequence).

The film, of course, takes Kit's side, and situates the process of the white bourgeoisie coming to accept jazz as a common baptism in the waters of modernism. Ella, taking the stand to defend jazz as "trouble music," breaks down in tears, unable to articulate a rational defense of the music as something other than the soundtrack to the "low and iniquitous places" that the prosecuting attorney castigates. "Music comes right from the soul," Ella protests, "and there can't be no harm in that." The judge excuses Ella with a kindly and patronizing wave of the hand. The audience gets the message. Ella doesn't "understand" jazz any more than the uptight Presbyterians scandalized by its rhythms and sensuality. *Syncopation* insists that jazz is not African American music. It is "American" music (which necessarily must negate its African American origins). It is not a form of music dangerous to urban capitalist modernity. On the contrary, it is the very embodiment of urban capitalist modernity.

We meet Reggie again as an adult, played by Todd Duncan. The United States has entered World War I, and the police are closing down Basin Street. Reggie is playing hot

trumpet with his band in a smoky and festive African American nightclub tightly packed with dancers. Before the scene concludes, Reggie announces that he and his band will be traveling to Chicago to work for Smiley Jackson—setting up Reggie and Kit’s reunion.

The next section of the film is marked by the “failure” of this dramatically logical reunion to unfold in an emotionally satisfying way. Particularly when Kit happens upon Reggie playing in a nightclub after Kit learns that her fiancé has died overseas, the logic of Popular Front-era melodrama and “women’s films” suggests that Kit and Reggie should fall in love. Because Reggie is African American, however, this is impossible. While affable and smiling, Reggie is more or less unable to communicate except through music. This, of course, is a classic example of overdetermination: as an African American man in a studio-era Hollywood film, Reggie must be incapable of meaningful social participation or coherent expression. That the romantic tradition in music thrives on fantasies of primitive expressive genius and of the subaltern virtuoso as social outcast merely exacerbates the inevitable construction of Reggie as a non-subject.

Even though Reggie is a smiling and inarticulate cliché, he and Kit have far more chemistry than Kit has with the bland and moody Johnny. Racism, of course, makes Kit falling in love with Reggie impossible; the two cannot even have a sincere conversation when they reunite. Reggie offers upbeat platitudes to Kit when she breaks down in grief (she fails to consider that she should offer condolences to Reggie after the death of their shared mother, Ella). The obvious gesture--Reggie comforting Kit with an embrace-- is glaringly absent here. Reggie instead plays the trumpet as a kind of “surrogate embrace.” This reinforces the film’s structural/logical affinities with Whiteman’s cultural prospecting: African American jazz is “intimate labor,” belonging to the realm of affect

and spirit; white “improvement” makes jazz intellectual labor, coordinated with the projects of artistic modernism and cultural nationalism.

Before the film is done with Reggie, it deploys him and his African American comrades to mentor Johnny in the ways of authentic jazz improvisation. Reggie’s band mates freely give of their time and knowledge. Reggie teaches him jazz lick after jazz lick through call and response, repetition and imitation. He tells Johnny “you can’t learn this music with no book,” harkening back to the film’s early scenes. Embodying the ethics of a gift economy, Reggie places no value on his time or intellectual capital. Johnny, on the other hand, will have no problem spinning gold from the “raw materials” prospected in the late-night seminar.

As the story progresses, Johnny begins to play in the style of Reggie, but is frustrated by his inability to play as well as his teacher. Kit comforts him. “You’ve got your own style,” she says. “Reggie is New Orleans, Basin Street... You pick up where Basin Street leaves off!” Progress, in this vision, is not just the movement from African American to white—but geographical, from the South to the urban North, and historical, from the past to the future.

This theme dominates the final section of the film. To be cinematically engaging, however, a new conflict must emerge upon which to pin it. Because, with Kit’s encouragement, Johnny has transcended his insecurity vis-à-vis Reggie and African American music, the film no longer needs Reggie. Johnny’s conflict—through which he will affirm his authenticity and individuality—must necessarily be with the forces of commerce and mass culture. Enter Paul Whiteman.

Immediately following his wedding to Kit, Johnny notices a brightly lit marquee announcing a concert by “Ted Browning’s Symphony of Jazz.” Newly concerned with domestic responsibility and earning potential, Johnny jumps at the chance to join Browning’s group. Venturing into the theater to audition for a job with Browning, Johnny and Kit have their final encounter with Reggie, who is breaking with Jackson and hitting the road with his band. Reggie tells Kit: “There must be some spot around here where they still like it hot, where a man doesn’t have to beat his brains out on set routines of music, where a man can play just what he feels!”

Immediately following Reggie’s soliloquy, Johnny excitedly announces that he has secured a job with the Browning Orchestra. We think, therefore, that the work of resisting discipline and regimentation in jazz has been delegated to African American musicians, whose non-subject status makes them better suited for artistic martyrdom. We will soon find out, however, that Johnny will come to hate the discipline and regimentation of the orchestra musician, the suppression of individuality and subsumption into a corporate body, just as thoroughly as Reggie.

Syncopation takes pains to let the audience know that Browning is Whiteman. Leith Stevens, portly and mustachioed, wears Whiteman’s signature tuxedos and wields a conductor’s baton in a distinctly Whiteman-esque fashion. We see stage spectaculars reminiscent of Whiteman’s preferred brand of camp modernism: angular and cubist sets with Statues of Liberty and White Houses jutting out as backdrops to the Orchestra’s performances of Aaron Copland and Ferde Grofé-style orchestral settings of big American musical themes.

Over the course of Johnny's tenure in the Browning Orchestra, Browning/Whiteman becomes ever more tyrannical as Johnny grows more miserable. Johnny's friends all quit the band ("playing the same notes over and over for six months will put you in the bughouse!"), but Johnny has more thoroughly internalized a bourgeois ethos. "What's wrong with making a lot of money?" he asks Kit, as she begs him to quit Browning's Orchestra. She warns him: "You'll turn into a mechanical toy—a monkey on a stick." Johnny promises her that he will convince Browning to open up more space in his concerts for individual self-expression and input from the group. When Kit keeps arguing, Johnny yells: "The kind of jazz we know is dead! And you can count me out as a pallbearer!"

We next see a montage of scenes of endless travel, depicting Johnny's accelerating frustration. Browning/Whiteman, of course, has no interest in relinquishing managerial control, rebuffing Johnny. The music and images steadily speed up. In a surreal special effects sequence, Johnny finds himself imprisoned in the staves and among the music notes of a grotesquely oversized and bulbous piece of sheet music, wrestling to get out. He drops his trumpet and slump over in his chair.

In the film's final scene, Kit has convinced Smiley Jackson to book Johnny's new jazz group at a nightclub (coincidentally located across the street from the hotel ballroom hosting the Ted Browning Orchestra). Johnny explains that he had drifted for several months after leaving Browning/Whiteman, and rediscovered his faith in music on the road. Recreating the "money jungle" typescene one more time, Johnny is re-baptized in the musical culture of the lumpenproletariat:

I saw guys who were a lot worse off than me, guys who were beat down, coming from no place, going nowhere... yet, somewhere along the line, every night, they

would stop and come to life. They hadn't forgotten how to laugh: they could still sing, music made up by guys in a jam, songs about broken lives and busted dreams... I was like crazy when I heard it! It made me see what brings people together. They want to get rid of their troubles—talk them or sing them or dance them away...

This is not much different than the gloss on jazz as “trouble music” provided by Ella on the stand during the courtroom scene—why is it here the content of a rousing manifesto for culture whereas earlier it was the inarticulate stuff of an exasperated defense of autochthonic expression? The most obvious difference is that Johnny is white, and that in bringing the “trouble music” from its original locations to the urban metropole, and in translating it into expressive content played by groups of white men, the latent potential of “trouble music” could finally be realized.

If this seems far-fetched, consider the film's denouement. A mischievous bellhop opens the doors of the ballroom where Browning/Whiteman is playing, allowing the raucous sounds of Johnny's all-white jazz combo to flood the venue. The well-heeled patrons flee Browning/Whiteman's concert en masse, and rush to the small nightclub at which Johnny is playing. The white jazz singer Connie Boswell, one of Whiteman's confederates in the NAPA, sings the song “Falling Star.” Kit sits at the piano to play her New Orleans blues one last time. Browning/Whiteman looks ruefully from the hotel balcony at the mob scene at the nightclub below, lamenting his decision to fire Johnny.

The scene of bourgeois whites dancing to “authentic” white renditions of jazz moves Kit to soliloquize: “this time, it's here to stay!” The dancers were not just dancing to forget their troubles, but getting something they could carry away. “It comes from the heart: music that's American born!” Before the credits roll, we witness a jazz performance by the “All-American Dance Band,” selected by readers in a *Saturday*

Evening Post poll. The members of this band are all white: Charlie Barnet, Benny Goodman, Harry James, Jack Jenney, Gene Krupa, Alvino Rey, and Joe Venuti. The diversity of this group (encompassing the Jewish Goodman, the Italian-American Venuti, Polish-American Krupa, the southerner James, the Irish-American/faux-Latino Rey, and their WASP colleagues Barnet and Jenney) suggests a typical Popular Front era substitution of ethnic whiteness for blackness.⁶⁹

This finale was a late addition to the film. Earlier in *Syncopation*'s development phase, a different ending was floated. This would have resolved the film with a climactic jazz contest between Johnny's big band and Reggie's jazz combo, with Reggie's "hot jazz style" trumping Johnny's "improvements" and "refinements."⁷⁰ Apparently, in this early version of the script, Johnny's character did not experience a baptism-by-fire slaving for a Whiteman-type character and then rejecting the corporate model of white jazz—he instead evolved into a Whiteman-type character, making a "settler contract" with Reggie and gaining fame and fortune as the respectable face of jazz. The difference between this version and the final form of *Syncopation* tells us a great deal. On the one hand, the idea of Reggie participating in—let alone winning-- the jazz contest was far too radical a notion for a 1942 film. On the other hand, the notion that Johnny as a Whiteman-type bandleader could be a plausible love interest and hero was too

⁶⁹ David Roediger explores this substitution in "The Houses We've Lived in and the Workings of Whiteness," an essay on Frank Sinatra's pro-tolerance short film and song (written by Abel Meeropol and Earl Robinson) of 1945, "The House I Live In." The original version of this song and film included African Americans in its vision of various ethnic and racial groups brought under the umbrella of American multiculturalism, but the line "my neighbors, white and black" was cut out of the final cut in the interest of avoiding undue controversy. This decision was made not by some puritanical censor or cigar-chomping studio executive, but the politically committed and CP-affiliated Albert Maltz and Melvyn LeRoy. In the name of wartime unity, the celebration of ethnic whites as authentic Americans was seen as an effective substitute for the representation of racial equality. David Roediger, *Working Toward Whiteness: How America's Immigrants Became White* (New York: Basic Books, 2005), 235.

⁷⁰ Jenemann, 115-17.

conservative a notion for a 1942 film, as implausible a protagonist as an unrepentant Republican banker or corporate magnate. Instead, Johnny plays the same kind of small-group, improvisation-based music as Reggie, “improving” it not by staging it in ballrooms and theatres suitable for the white glove set, but simply by virtue of the fact of being white himself. Within this logic, the act of interracial reconciliation signified by whites playing and dancing to jazz was predicated on the erasure of African Americans as citizens and subjects. In *Syncopation*, this is represented rather literally, in the exclusion of African American musicians from the “All-American Dance Band” and in the scrapping of the original ending in which Reggie reemerges to win the jazz contest. In contrast, Paul Whiteman continually acknowledged the African American sources of his music: African Americans were a constant presence in his musical vision, and their exploitation and second-class status was a source of contradiction and anxiety. *Syncopation*, and the wartime Popular Front logic it reflects, does away with contradiction and anxiety as it evacuates African American participants from the stage of cultural history.

Conclusion

I have attempted to show that *RCA v. Whiteman* and a series of texts surrounding it reveal a complex transition from one conceptual regime to another, from Whiteman’s cultural prospecting to *Syncopation*’s white substitutionism. In this conclusion, I turn to a nagging question, left unresolved by this research. How can historians situate the grievances surrounding cultural “theft” without naturalizing the propertization of culture in the first place? Are we not in danger of affirming the core logic of the “settler contract,” but merely haggling about the price? On the other hand, if we romanticize the

non-market character of cultural forms like jazz, we recreate the racist depiction of African American musicians as non-subjects and non-citizens, out of time and out of place in the modern world, in need of help from sympathetic whites to preserve an endangered heritage. Furthermore, if we take these questions seriously, we often find ourselves isolated ourselves from the conversation in which we seek to intervene. That fraction of intellectual property scholars who are willing to accept that copyright law can have problems other than “transaction costs,” “free riders,” “externalities,” and “market failure” still see injustice only in the deprivation of the property rights of individuals. While they understand the grievances at the heart of court cases involving blues musicians taking white rock and roll bands to court for “stealing” their songs,” they have a more difficult time with the notion of group grievances.⁷¹

This denial of group grievances hides fundamental dimensions of intellectual property history, naturalizes an acquisitive, possessive individualism foreign to the creative cultures of working-class music, and renders the role of racism in shaping intellectual property law incidental and occasional. The most urgent conflicts at the heart of the *RCA v. Whiteman* texts are not cases of one individual taking something of value from another individual. They have to do with community resources, collective notions of property, and the imposition of an “author-owner” model of proprietary authorship and singular “musical works” on deeply rooted counter-traditions based on co-ownership of open texts and improvisation. Before we can properly appreciate the radical politics of jazz and other African American musical forms, and in order to reckon with the painful legacy of capitalism’s relentless propertization and marketization of the means of creative

⁷¹ See for example, Chapter 4 of Siva Vaidhyanathan’s *Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity* (New York: NYU Press, 2001); and Chapter 2 of McLeod, *Owning Culture*.

expression, we need to strengthen our capacity to articulate and defend other conceptions of the ownership of culture.