

2008

Intellectual Property at the Intersection of Race and Gender: Lady Sings the Blues

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Recommended Citation

Greene, K.J. "Intellectual Property at the Intersection of Race and Gender: Lady Sings the Blues." *American University Journal of Gender, Social Policy & the Law*. 16, no. 3 (2008): 365-385.

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INTELLECTUAL PROPERTY AT THE INTERSECTION OF RACE AND GENDER: LADY SINGS THE BLUES

K.J. GREENE*

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The history of the production of cultural property in the United States follows the same pattern as the history of the racial divide that inaugurated the founding of the Republic. The original U.S. Constitution excluded both black women and men from the blessings of liberty. Meanwhile, that same Constitution granted rights to authors and inventors in what is known as the Patent/Copyright Clause of Article I, Section 8.¹ This clause laid the foundation for intellectual property (“IP”) rights that have become an economic juggernaut not only in the United States, but globally.² IP rights are inextricably tied to cultural and scientific production, which influences all aspects of society. Thus, before the passage of the major civil rights amendments and acts, the provisions of Article I, Section 8 were unavailable to protect the cultural rights of early black Americans.

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1. U.S. CONST. art. I, § 8 (announcing that Congress has the power to promote the progress of science and the arts by securing, for a limited time, the rights to artistic works and discoveries as the property of the artist).

2. See, e.g., Keith Aoki, *Balancing Act: Reflections on Justice O’Connor’s Intellectual Property Jurisprudence*, 44 HOUST. L. REV. 965, 975 (2007) (noting that the expansion of intellectual property in the United States has helped to “underwrite U.S. dominance in the intellectual property sector of the global economy”).

Congress enacted laws mandating racial equality and effectively protecting the intellectual property rights of blacks in the arts and sciences only within the past few decades.³

This Article briefly explores how women artists, particularly black women, have been impacted by the IP system, and compares how both blacks and women have a shared commonality of treatment with indigenous peoples and their creative works. The treatment of blacks, women, and indigenous peoples in the IP system reflects the unfortunate narrative of exploitation, devaluation, and promotion of derogatory stereotypes that helped fuel oppression in the United States, and in the case of indigenous peoples, both here and abroad. The treatment of women blues artists in the IP system illustrates the racial and gendered nature of IP rights, and that IP has been central to racial subordination from both an economic and cultural standpoint. However, examining inequality in the IP context is not merely a backwards-looking narrative. Racial and gender dynamics offer unique insights that can guide reforms to the IP system with a view toward benefiting, in Derrick Bell's words, the least-advantaged "faces at the bottom" of our society.⁴

Traditionally, IP scholarship and jurisprudence has not focused on race and gender inequality. However, these issues are receiving renewed attention in feminist scholarship and in critiques of existing power structures by those concerned with the treatment of people of color, women, and indigenous peoples in the international arena. Analytical inquiries that explore the rights of minorities, women, and indigenous peoples enhance the debate about IP reforms. Further, a focus on the least advantaged segments of society, such as blues women, shifts the debate to focus on the empowerment of artists who create, and not on empowerment of large conglomerates that control IP in the United States and abroad.

Part I of this Article, briefly discusses the tenets of critical race theory to show that it can be useful in explaining how IP law has disadvantaged African-American artists and fostered their subordination. Part II explores how feminist critiques of IP benefit from examining the treatment of black women, using blues women of the 1920s as a focal point. Part III examines how the treatment of indigenous peoples parallels IP deprivations of blacks and women.

3. See, e.g., Drew S. Days, III, "Feedback Loop": *The Civil Rights Act of 1964 and Its Progeny*, 49 ST. LOUIS U. L.J. 981, 981-82 (2005) (outlining the major civil rights statutes passed by Congress throughout the mid- to late 1960s in the aftermath of the Civil Rights Act of 1964, including laws bringing racial equality to public accommodations, employment discrimination, and housing discrimination).

4. DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 3 (Basic Books 1992) (arguing that black Americans remain a disadvantaged class, and any advances made in the 1960s and 1970s have been reversed in all basic measures of poverty, unemployment, and income).

I. THE EMERGENCE OF RACE IN LEGAL ANALYSIS

Many legal scholars increasingly recognize that the examination of race in legal discourse serves to illuminate the merits and values of the law.⁵ In contrast, before the 1980s, legal scholarship “virtually ignored legal theorizing based on the perspectives of people of color.”⁶ The invisibility of race in legal discourse changed with the advent of critical race theory (“CRT”) in the late 1980s, following the development of feminist legal theory in the prior decade.

Critical race theory is not a unified construct, but it does set forth four core tenets.⁷ First, it posits that “race and racism are endemic to the American normative order.”⁸ Second, it posits that legal structures are “part of the social fabric . . . [which] constructs and produces race and race relations . . . [in support of] white supremacy.”⁹ Third, it contends that the construct of “colorblindness” in legal jurisprudence “ignores and cements the racial caste system constructed in part by law,” and thus perpetuates inequality for subordinated groups.¹⁰ Finally, CRT proponents advocate that “[legal scholars should be] working toward a norm of ‘racial equality’ where different groups will not continue to suffer the oppression and subordination they have suffered.”¹¹

CRT can also be defined via its opposition to

at least three entrenched, mainstream beliefs about racial justice . . . [one,] that blindness to race will eliminate racism . . . [two,] that racism is a matter of individuals, not systems . . . [and three,] that one can fight racism without . . . attention to sexism, homophobia, economic exploitation, and other forms of injustice and oppression.¹²

5. See, e.g., Kim Forde-Marzrui, *Learning Law Through the Lens of Race*, 2 J.L. & POL’Y 1, 4 (2005) (arguing that law should be integrated into all courses of a legal curriculum because of the integral role that race had in the development, administration, and consequences of the law).

6. Cynthia Grant Bowman et al., *Race and Gender in the Law Review*, 100 NW. U. L. REV. 27, 56 (2006).

7. Athena D. Mutua, *The Rise, Development and Future Directions of Critical Race Theory and Related Scholarship*, 84 DENV. U. L. REV. 329, 333-34 (2006).

8. *Id.* at 333.

9. *Id.* at 334.

10. *Id.*; see also Neil A. Gotanda, *A Critique of ‘Our Constitution is Color-Blind,’* in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 257 (1995) (theorizing, in a seminal work on CRT, that the “colorblind” paradigm of constitutional law “fosters white racial domination” by maintaining the privileges held by whites).

11. Rebecca Tsosie, *Engaging the Spirit of Racial Healing Within Critical Race Theory: An Exercise in Transformative Thought*, 11 MICH. J. RACE & L. 21, 25 (2005).

12. See Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 YALE L.J. 1757, 1766-67 (2003); Francisco Valdes et al., *Battles Waged, Won, and Lost: Critical Race Theory at the Turn of the Millennium*, in CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY (Francisco Valdes et

Further, CRT advocates reject the use of “neutral” accounts of legal decision-making and focus on the perspectives of subordinated peoples, i.e., “voices from the bottom” of society.¹³ Finally, CRT embraces the use of story-telling “to expose discrimination and illuminate how the law often fails to account for the voices of outsiders.”¹⁴

CRT analysis has been applied to many diverse areas of law, including antidiscrimination law, law and economics, and taxation.¹⁵ CRT has spawned numerous theories of subordination within the law, including Latina and Latino Critical Theory, Asian-American critical legal theory, and Critical Race Feminism.¹⁶ Not surprisingly, CRT and its analogs have come under harsh attack from conservatives in the legal academy.¹⁷ This is expected since “conservative critics have long denounced feminism, as well as other civil rights movements, for promoting victimization.”¹⁸ Given the breadth of its subject matter, it is unsurprising that divisions over analytical approaches exist in the CRT movement.¹⁹

A. Intellectual Property, Innovation, and African-Americans

CRT analysis has “provided important insights into the ways in which anti-discrimination law has not only failed to address, but [has] further entrenched, ideological and thus material forms of discrimination.”²⁰ An

al. eds., 2002).

13. See Bowman et al., *supra* note 6, at 60-61.

14. See Mario L. Barnes, *Race, Sex, and Working Identities: Black Women's Stories and the Criminal Law: Restating the Power of Narrative*, 29 U.C. DAVIS L. REV. 941, 953-54 (2006) (arguing that many CRT theorists believe that a narrative is an important form in which to construct analysis because traditional legal scholarship uses the same narrative form to perpetuate racist norms); see also Pedro A. Malavet, *Literature and the Arts as Antisubordination Praxis: A Latcrit Theory and Cultural Production: The Confessions of an Accidental Crit*, 33 U.C. DAVIS L. REV. 1293, 1301-02 (2000) (examining the use of narrative to combat an essentialism that threatens to exclude minority viewpoints).

15. See Dorothy A. Brown, *Race, Class and Gender Essentialism in Tax Literature: The Joint Tax Return*, 54 WASH. & LEE L. REV. 1469, 1489-90 (1997) (discussing the need to examine tax law from a race as well as a gender perspective). See generally Dorothy A. Brown, *Fighting Racism in the Twenty-First Century*, 61 WASH. & LEE L. REV. 1485 (2004) (examining the outgrowth of CRT into business related areas of law such as tax, corporate law, and bankruptcy).

16. See Mutua, *supra* note 7, at 337-38.

17. See RICHARD A. POSNER, *OVERCOMING LAW* 382-84 (3d ed. 1996) (1995) (engaging in a scathing critique of critical race and feminist methodology, and highlighting the “pathologies” of black anti-Semitism and black criminality that critical race scholars purportedly gloss over).

18. Martha T. McCluskey, *Fear of Feminism: Media Stories of Feminist Victims and Victims of Feminism on College Campuses*, in FEMINISM, MEDIA & THE LAW 57 (Martha A. Fineman & Martha T. McCluskey eds., 1997).

19. See generally Kevin R. Johnson, *Roll Over Beethoven: “A Critical Examination of Recent Writing About Race,”* 82 TEX. L. REV. 717 (2004).

20. Emily M.S. Houh, *Critical Race Realism: Re-Claiming the Antidiscrimination*

insight that CRT offers to IP law is that its use in society and legal scholarship, like antidiscrimination law, also may have served to entrench material forms of discrimination. While individual black artists without question have benefited from the IP system, the economic effects of IP deprivation on the black community have been devastating. Intellectual property today is perhaps the preeminent business asset.²¹ Analysts recognize that blacks and other minorities in a market economy “cannot participate as equals unless they too can deploy the private power generated by ownership and control substantial business assets.”²²

The three core protections of intellectual property at the federal level are copyright, patent, and trademark law.²³ Copyright law protects creative output of authors, such as music composers, writers, and choreographers, by granting limited property rights in their creations. Patent law provides legal protection to inventors of useful inventions. Trademark law prohibits the use of a valid trademark by third parties where the unauthorized use is likely to cause consumer confusion in the marketplace.

In the past, few legal scholars examined race or gender in the context of IP. It is only in recent years that scholarship exploring IP has examined it in the context of social and historical inequality. Only recently have scholars, such as Professor Sunder, recognized that IP serves not merely as a legal doctrine allocating rights, but “as a legal vehicle for facilitating (or thwarting) recognition of diverse contributors to social discourse.”²⁴ IP scholars such as Keith Aoki and Shubha Ghosh are now validating the phenomena of the similar divestment of patent protection for black inventors.²⁵ My scholarship was among the first to show how the structure of copyright law, and the phenomena of racial segregation and discrimination, impacted the cultural production of African-Americans, and

Principle Through the Doctrine of Good Faith in Contract Law, 66 U. PITT. L. REV. 455, 464 (2005).

21. See, e.g., David Kohler, Symposium, *Foreword to Sony v. Universal: The Betamax Decision Twenty Years Hence*, 34 SW. U. L. REV. 151, 151 (2004) (remarking that “technology and entertainment represent two of this country’s premier growth industries,” and that these industries are founded on control over intellectual property).

22. See Robert E. Suggs, *Poisoning the Well: Law & Economics and Racial Inequality*, 57 HASTINGS L.J. 255, 283 (2005) (contending that the wealth deriving from “a thriving private sector and business class . . . would ameliorate many of the persistent economic disparities” facing blacks).

23. See, e.g., Peter S. Menell, *Bankruptcy Treatment of Intellectual Property Assets: An Economic Analysis*, 22 BERK. TECH. L.J. 733, 735 (2007).

24. See Madhavi Sunder, *IP3*, 59 STAN. L. REV. 257, 269 (2006).

25. See Keith Aoki, *Distributive Justice and Intellectual Property: Distributive and Syncretic Motives in Intellectual Property Law (with Special Reference to Coercion, Agency, and Development)*, 40 U.C. DAVIS L. REV. 717, 738-47 (2007) (noting that slave owners often took credit for inventions by slaves). See generally Shubha Ghosh, *Globalization, Patents, and Traditional Knowledge*, 17 COLUM. J. ASIAN L. 73 (2004).

how the racially neutral construct of IP has adversely impacted African-American artists.²⁶

The long omission of an analysis of race in the IP context is glaring given the tremendous innovative contributions of black authors and inventors to society, and the salience of race “branding” in trademark law. The treatment of blacks in the IP system has been characterized by two dynamics that have import for racial and distributive justice. First, black authors and inventors have found their works routinely appropriated and divested. Second, appropriated and distorted creative works protected by copyright, and trade symbols and imagery protected by trademark, have promoted derogatory racial stereotypes that facilitate racial subordination.

B. Blacks and Copyright Law

At its core, IP in America “is understood almost exclusively as being about incentives.”²⁷ The history of blacks in the arts is one of unparalleled innovation and creativity, especially in the realm of music and dance. There has always been “an overwhelming prevalence of black innovators in jazz,”²⁸ as well as blues, ragtime, rock-and-roll, and today’s hip-hop music. The history of black artists within U.S. IP law, however, has been one of appropriation, degradation, and devaluation beginning with the creation of the nation until the 1950s and ’60s. In the arena of music, there is no need to assume mass appropriation and disparate treatment of black composers and performers. Time after time, foundational artists who developed ragtime, blues, and jazz found their copyrights divested, and through inequitable contracts, their earnings pilfered.²⁹ I argued elsewhere that for a long period of U.S. history, the work of black blues artists was essentially dedicated to the public domain.³⁰ The public domain “can most broadly be

26. See generally K.J. Greene, *Copyright, Culture and Black Music: A Legacy of Unequal Protection*, 21 HASTINGS COMM. & ENT. L.J. 339 (1999) [hereinafter Greene, *Copyright*]; K.J. Greene, *What the Treatment of Black Artists Can Teach About Copyright Law*, in PETER K. YU, *INTELLECTUAL PROPERTY AND INFORMATION WEALTH ISSUES AND PRACTICES IN THE DIGITAL AGE* 385 (2007).

27. See Sunder, *supra* note 24, at 257; see also ROBERT P. MERGES ET AL., *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 12 (2d ed. 2000) (noting the primacy of incentive theory as underlying the basis of IP protections).

28. See FRANK KOFKY, *BLACK NATIONALISM AND THE REVOLUTION IN MUSIC* 19 (1970) (contending that there have been more black innovators in the history of jazz on any two instruments “than there have been whites on all instruments put together”).

29. The list of such artists is too long to constitute mere “anecdotal” evidence, and includes artists from Scott Joplin to Huddie Ledbetter to Jelly Roll Morton. See TERRY WALDO, *THIS IS RAGTIME* (1976); CHARLES WOLFE & KIP LORNELL, *THE LIFE AND LEGEND OF LEADBELLY* (1992); HOWARD REICH & WILLIAM GAINES, *JELLY’S BLUES: THE LIFE, MUSIC AND REDEMPTION OF JELLY ROLL MORTON* (2003). See generally K.J. Greene, “Copynorms,” *Black Cultural Production and the Debate Over African-American Reparations*, 25 CARDOZO ARTS & ENT. L.J. 1179 (2008).

30. See Greene, *Copyright*, *supra* note 26, at 356 (arguing that blacks received less

defined as ‘material that is unprotected by intellectual property rights, either as a whole or in a particular context, and is thus “free” for all to use.’”³¹

Similarly, it has been argued that with respect to black artists “copyright law . . . was created without deference to the interests of large segments of society,” including women and minorities.³² Indeed, my previous work demonstrates that five copyright structures disadvantaged black cultural production.

First, the idea/expression dichotomy of copyright law prohibits copyright protection for raw ideas, and protects only expression of ideas. I contend that this standard provided less protection to innovative black composers, whose ground-breaking work was imitated so widely that it became the “idea” and thus impossible to protect.

Second, copyright’s fixation standard provides that copyright protection extends only to a work that is “fixed” in a tangible medium of expression.³³ However, a key component of black cultural production is improvisation. As a result, fixation deeply disadvantages African-American modes of cultural production, which are derived from an oral tradition and communal standards.³⁴

Third, copyright law sets forth a minimal standard of originality, which does not protect innovation, and in fact encourages imitation. Fourth, copyright formalities, until 1976, put copyright protection out of reach of the illiterate or semi-literate creators of the blues.³⁵ Finally, there is a

protections over IP rights due to “inequalities of bargaining power, the clash between the structural elements of copyright law and the oral predicate of black culture, and broad and pervasive social discrimination).

31. See, e.g., Michael A. Carrier, *Cabining Intellectual Property Through a Property Paradigm*, 54 DUKE L.J. 1, 49 (2004).

32. See Greene, *Copyright*, *supra* note 26, at 356.

33. 17 U.S.C. § 102(a) (2007) (stating the categories of works that qualify for copyright protection, including literary works, musical works, and accompanying words, sound recordings, etc.).

34. See *id.* (articulating that copyright protection does not extend to ideas or other types of intangible innovations, regardless of the form in which they are described, explained, illustrated, or embodied in a work); see also KEMBREW MCLEOD, *OWNING CULTURE: AUTHORSHIP, OWNERSHIP AND INTELLECTUAL PROPERTY LAW* 71 (2001) (contending that “African-American culture comes out of a primarily oral culture . . . [and] intertextual practices that characterize many aspects of African-American cultural production conflict” with intellectual property law); SIVA VYADNATHAN, *COPYRIGHT AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY* (2001) (arguing that, although ownership in the blues tradition differs significantly from the European model, there is a real and significant claim to originality in the performance-oriented world of the blues).

35. See, e.g., Sara K. Stadler, *Incentive and Expectation in Copyright*, 58 HASTINGS L.J. 433, 471 (2007) (explaining that, prior to the 1976 Copyright Act, failure to comply with copyright formalities of registration, affixation of notice of copyright, and deposit resulted in forfeiture of copyright).

general absence of moral rights protection, which protects against harms to authorial dignity. The fact that black artists continued to create and innovate, even in the face of diminished economic incentives, poses a challenge to copyright policy, which dictates that copyright “is fundamentally about providing a balance of incentives for authors.”³⁶ This phenomenon surely gives weight to the notion that economic incentives alone are not the sole motivator of creative output.

Larry Lessig, a leading IP scholar, asserted that the “record industry was born of . . . piracy.”³⁷ Lessig contends that the “law governing recordings gives artists less . . . by giving artists a weaker right than it otherwise gives creative authors.”³⁸ Lessig was referring to the compulsory license provision of the 1909 Copyright Act, which permits anyone to re-record a composition that has been released to the public via sound recording.³⁹

However, beneath Professor Lessig’s analysis lies a much more insidious form of piracy. The early music industry was built on the back of black cultural production from the era of slave songs and spirituals to the period of black-face minstrelsy—America’s most popular and profitable form of entertainment from 1800 to the end of the last century.⁴⁰ Minstrelsy “was the first truly American contribution to the history of stage entertainment, and it owed its very existence to the Negro [sic].”⁴¹ Minstrelsy defamed blacks, and other minorities, in stereotypical and derogatory ways.⁴²

Then came ragtime and blues, which single-handedly carried the

36. See Timothy Wu, *Copyright’s Communications Policy*, 103 MICH. L. REV. 228 (2004).

37. See LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 55 (2004) (contending that even the advent of the first recording technology presented new problems in law surrounding composers’ rights to their creations, and the music industry’s right to reproduce them).

38. See *id.* at 57 (asserting that Congress’s motivation for giving writers and other artists more control over their creations than any musician over their songs is the fear of stifling creativity and the desire to give the public access to a wider range of music).

39. See *id.* at 57-58 (noting that, while the public and the recording companies benefit from limitations on musical rights, the musicians themselves lose).

40. See WALDO, *supra* note 29, at 12 (noting that stereotypical images of the “happy-go-lucky, wide-grinnin’, chicken-stealin’, razor-toting dorky” became deeply embedded in the social conscience of white America during the minstrel period). The minstrel show was central to American culture from the 1830s to the 1870s, so much so that it is “difficult for us now to realize how all-pervasive and influential the minstrel show was.” *Id.*

41. See JAMES HASKINS, *BLACK MUSIC IN AMERICA: A HISTORY THROUGH ITS PEOPLE* 21 (1987).

42. See Keith Aoki, “Foreign-ness” and Asian American Identities: *Yellowface, World War II Propaganda, and Bifurcated Racial Stereotypes*, 4 UCLA ASIAN PAC. AM. L.J. 1, 21-22 (1996) (analyzing how minstrelsy defamed Asian Americans and noting that the prevalence of white actors in *Yellowface* helped to reinforce the segregation of Chinese immigrants).

recording industry from the 1920s until the Great Depression. Although ragtime music was innovated by black composers such as Scott Joplin, and served as “the most popular ‘pop’ style [for twenty years],” it was white composers such as Irving Berlin who reaped the greatest financial rewards.⁴³ The line between permissible “borrowing” and impermissible appropriation may be dim at times, but there is strong evidence that the works of black artists were plagiarized and appropriated extensively.⁴⁴ Furthermore, the routine stereotyping that occurred concurrently with copyright appropriation negatively impacted black artists’ personality rights. It has been said that the creative process “implicates the honor, dignity, and artistic spirit of the author in a fundamentally personal way.”⁴⁵ From this perspective, black artists also were subject to deprivation of the moral rights of integrity and attribution.

With some irony, one of the most successful white bands of the early twentieth century, the Original Dixieland Jazz Band, took New Orleans Negro music and reduced it to a “simplified formula . . . the kind of compressed, rigid format that could appeal to a mass audience.”⁴⁶ This cultural appropriation of black art set a long-standing pattern wherein “large financial gains were made by white musicians playing black music to essentially white audiences.”⁴⁷

Similar patterns of innovation by blacks, followed by imitation by whites, preceded rock-and-roll, a derivation of the blues, and on to today’s hip-hop, where white rappers such as Vanilla Ice and more recently Eminem gross top sales.⁴⁸ It has been said that the “exploitation of the

43. See NELSON GEORGE, *THE DEATH OF RHYTHM AND BLUES* 8 (1988).

44. See Olufunmilayo B. Arewa, *Copyright on Catfish Row: Musical Borrowing, Porgy and Bess, and Unfair Use*, 37 RUTGERS L.J. 277, 305-09 (2006) (exploring the lines between borrowing and appropriation, for example, by noting that famed composer George Gershwin “borrowed” heavily from African-American cultural expression, and was even accused of stealing the piece “I Got Rhythm” from the classically trained African-American composer William Grant Still).

45. See Roberta Rosenthal Kwall, *The Attribution Right in the United States: Caught in the Crossfire Between Copyright and Section 43(A)*, 77 WASH. L. REV. 985, 986 (2002) (arguing that the framework for moral rights in a creation draws out of the artist or author’s infusion of the self into their work).

46. See GUNTHER SCHULLER, *EARLY JAZZ: ITS ROOTS AND MUSICAL DEVELOPMENT* 179-80 (1968) (articulating that by substituting an unobtrusive, rhythmic drive for the expressive power and improvisation notable of the best African-American bands of the time, the Original Dixieland Jazz Band found the formula for mass appeal).

47. See BEN SIDRAN, *BLACK TALK: HOW THE MUSIC OF BLACK AMERICA CREATED A RADICAL ALTERNATIVE TO THE VALUES OF WESTERN LITERARY TRADITION* 50-51 (1971) (noting that the Original Dixieland Band “made the first jazz recordings that sold millions of copies”).

48. See CHARLES GILLET, *THE SOUND OF THE CITY: THE RISE OF ROCK AND ROLL* 189 (Outerbridge & Dienstfrey ed., 1970) (1996) (analyzing the role of race in the production of rock-and-roll, and explaining that rhythm and blues hits were increasingly recorded by white singers by the late 1950s, losing much of their style and substance along the way).

author is coded deep within the copyright system.”⁴⁹ By any measurement, the treatment of black artists vis-à-vis white artists is striking in the non-reciprocal nature of the appropriation, and the imposition of vicious dignitary harm to blacks as a group through negative cultural stereotyping.

C. Blacks and Trademark Law

At first blush, as Alex Johnson, Jr. has remarked, “the law of trademarks would seem to have little to do with issues of race and racial identification.”⁵⁰ Trademark law provides protection to trademark owners against unauthorized use of their own or a similar mark, when it is likely to lead to consumer confusion.⁵¹ On closer examination, however, Johnson demonstrated that “the principles of trademark law provide surprising insight into the formation of dichotomous racial classifications in the United States.”⁵² Trademark law is inextricably tied to advertising and marketing. As Desiree Kennedy pointed out, advertising “is an important means of public discourse . . . [and] . . . is instrumental in affecting viewers’ perceptions of their world and their interactions with others.”⁵³ Further, Lew Gibbons noted, modern trademarks play a large role in shaping “individual and group social identity.”⁵⁴ The history of advertising, and the role of trademarks therein, is one rife with stereotypical images.⁵⁵

49. See Dan Hunter, *Culture War*, 83 TEX. L. REV. 1105, 1125 (2005) (asserting that artists and creators have been dependant upon sheer generosity for much of recorded history).

50. See Alex M. Johnson, Jr., *Destabilizing Racial Classifications Based on Insights Gleaned from Trademark Law*, 84 CAL. L. REV. 887, 906 (1996) (asserting that by providing uniform quality and economizing on consumer search costs, trademark law makes implicit assumptions about the identity of the unknown consumer).

51. See, e.g., K.J. Greene, *Abusive Trademark Litigation and the Incredible Shrinking Confusion Doctrine*, 27 HARV. J.L. & PUB. POL’Y 609, 620 (2004) (explaining that trademark law prohibits the use of marks similar or identical to registered trademarks only when they are used by a potential competitor or producer of similar goods or services).

52. See Johnson, *supra* note 50, at 906 (asserting that the principals of trademark law, though having seemingly little to do with race, operate in a fashion similar to racial identification).

53. See Deseriee A. Kennedy, *Marketing Goods, Marketing Images: The Impact of Advertising on Race*, 32 ARIZ. ST. L.J. 615, 615-17 (2000) (asserting that advertising is highly important in shaping common perceptions of societal norms, roles, and hierarchies).

54. See Llewellyn Joseph Gibbons, *Semiotics of the Scandalous and Immoral and the Disparaging: Section 2(A) Trademark Law After Lawrence v. Texas*, 9 MARQ. INTELL. PROP. L. REV. 187, 196 (2005) (rejecting a law and economics approach to “queer” marks and re-appropriation of negatively stereotyping trademarks by outsider groups such as gays and minorities).

55. See Ross D. Petty et al., *Regulating Target Marketing and Other Race-based Advertising Practices*, 8 MICH. J. RACE & L. 335, 347-49 (2003) (listing various examples of overtly racist advertisements, such as those that stated they would only be

Trademarks used in advertising can impact more than just commercial transactions; media images “are frequently the predominant source of information many have about people of color.”⁵⁶ In the same way that “coon” music in early America reflected derogatory anti-black stereotypes, so did trade symbols used to sell products. Historically, trademarks and symbols almost perfectly replicated cultural stereotypes about black men and women. From Sambo and Ratus, the grinning chef on the box of Cream of Wheat cereal, to Uncle Ben and Aunt Jemima, trademark law essentially legalized and promoted the use of stereotypical representations of blacks and other minorities. Additionally, it has been said that “twentieth century white identity was forged in the crucible of Jim Crow iconography, including Aunt Jemima, Uncle Ben, and blackface minstrels.”⁵⁷ These idyllic southern stereotypes of the smiling, happy black domestic servant could be seen as “myths [that] masked the ugly violence of lynching, disenfranchisement and segregation.”⁵⁸

In the case of black men, history shows the durability of three stock prototypes: the “Tom” character, the “Coon” character, and the “Buck” character.⁵⁹ “The Tom caricature portrays Black men as faithful, happy, submissive servants.”⁶⁰ An example of this in trademark law is Uncle Ben, the elderly black man used to sell rice. He is comforting, non-threatening, de-sexualized, and there to serve whites.

The Coon character, in contrast, is lazy, shiftless, and unintelligent, yet cunning in obtaining vices he enjoys.⁶¹ Amos ‘n’ Andy, examples of Coon characters, were characters created for a radio show in 1928 that went on to “become one the country’s most popular radio programs.”⁶² The characters were black, but initially played by whites—the show’s creators—on the

sold to whites, to advertisements based on racial stereotypes, such as Crazy Horse Malt Liquor).

56. *See id.*

57. *See* Arela Gross, *Beyond Black and White: Cultural Approaches to Race and Slavery*, 101 COLUM. L. REV. 640, 675 (2001) (asserting that these stereotypes were born in part out of whites’ efforts to keep newly freed slaves “in their place”).

58. *See id.* (noting, in addition, that the increasing violence of male white supremacists was compounded by the growing assertiveness of white women).

59. *See generally* DONALD BOGLE, TOMS, COONS, MULATTOES, MAMMIES & BUCKS: AN INTERPRETIVE HISTORY OF BLACKS IN AMERICAN FILMS (Viking Press 1973).

60. David Pilgrim, *The Caricatures - Golliwoggz!*, Dec. 2000, <http://golliwogg.wordpress.com/the-caricatures> (explaining that the Tom caricature endeared himself to whites by being dependable, selfless, and psychologically dependent on whites for approval).

61. *See id.* (noting that the Coon character was the most insulting of the anti-black caricatures, portraying blacks as lazy, stupid, childish, and morally wanting).

62. *See* *Silverman v. CBS Inc.*, 870 F.2d 40, 42 (2d Cir. 1989) (analyzing whether, after over twenty years of disuse, CBS effectively had abandoned copyright ownership of the Amos ‘n’ Andy characters and series).

radio, who posed in blackface for publicity photos. When the show went to television in 1951, black actors took over in the lead roles. Amos 'n' Andy was protected by both copyright and trademark. In the 1980s trademark litigation ensued over whether CBS, which had discontinued the show in the 1960s after protests by civil rights advocates, abandoned and therefore lost legal rights in the Amos 'n' Andy mark.⁶³

Similarly, Sambo's Restaurants used the symbol of a smiling Coon-type character to sell food products for over sixty years. "Little Black Sambo" was a literary character that "has long been a part of the American culture," dating back to a 1781 play "where the black male Sambo character, played by a white actor in blackface, 'danced, sang, spoke nonsense, and acted the buffoon.'"⁶⁴ After numerous complaints from civil rights activists and lawsuits by municipalities seeking to prevent expansion, Sambo's Restaurants changed its name to "Sam's" in 1989.⁶⁵

The Buck character is a brute, and could represent the worst fears of early white America—that of the hyper-sexual black male intent on getting access to white women's sexuality.⁶⁶ The Buck character surfaces in political marketing, a fairly recent incarnation, being the "infamous television spot from the 1988 presidential campaign" of George Bush, Sr., featuring released criminal Willie Horton.⁶⁷

Stereotypes with roots in trademarks have stigmatized African-American women. It has been noted that "American history is replete with 'slave-rooted' images of African-American womanhood."⁶⁸ Three negative stereotypes exist regarding black women: the "Aunt Jemima" type, a domestic servant; the "Mammy" type, a typically domineering, matriarchal

63. See *id.* at 51 (finding that CBS still held rights to the post-1948 radio scripts, but that those prior were in the public domain).

64. See Ronald Turner, "Little Black Sambo," *Images and Perceptions: Professor Cohen's Critique of Professor Lawrence*, 12 HARV. BLACKLETTER L.J. 131, 140 (1995).

65. See, e.g., *Sambo's Restaurants Inc. v. City of Ann Arbor*, 663 F.2d 686, 695 (6th Cir. 1981) (holding that the name "Sambo," while offensive to blacks, was commercial speech protected under the First Amendment).

66. See, e.g., Jon Hanson & Kathleen Hanson, *The Blame Frame: Justifying (Racial) Injustice in America*, 41 HARV. C.R.-C.L. L. REV. 413, 437-38 (2006) (noting that the brute caricature served to legitimize slavery and Jim Crow by providing a compelling case for segregation and the suppression of black men to protect white women).

67. See, e.g., Terry Smith, *Race and Money in Politics*, 79 N.C. L. REV. 1469, 1487 (2001) (asserting that Republicans' motivations in choosing Horton were influenced by the fact that his crime was particularly frightening to many of their constituency—that of a black male raping a white woman).

68. See, e.g., Lori A. Tribbett-Williams, *Saying Nothing, Talking Loud: Lil' Kim and Foxy Brown, Caricatures of African-American Womanhood*, 10 S. CAL. REV. L. & WOMEN'S STUD. 167, 169-70 (2000).

figure; and the “Jezebel” type, a highly amoral, sexualized representation.⁶⁹

Trademark law derives its authority at the federal level from the Lanham Act of 1946. The Lanham Act prohibits the trademarked use of racially derogatory images, but limits the trademark registration of such images under Section Two, part of which prohibits the registration of a mark that consists of or comprises “scandalous” or “immoral” matter.⁷⁰ Further, trademark law prohibits the registration of trademarks that may disparage—i.e., bring into contempt or disrepute—living or dead persons, institutions, beliefs, or national symbols.⁷¹ In recent years, groups including Native Americans and African-Americans used Section Two of the Lanham Act to cancel the registration of racially offensive trademarks.

In today’s marketplace, scholars note that “explicit racial discrimination is rare in commercial advertising,” but subtle forms of stereotyping still persist.⁷² Professor Rosemary Coombe has noted that stereotypes of Native Americans in advertising are particularly entrenched.⁷³ African-American trademarks, however, such as Uncle Ben and Aunt Jemima have received makeovers in recent years to remove stereotypical associations. Despite commercial changes, racist groups on the internet still use stereotypical commentary to link blacks to consumption of Kentucky Fried Chicken. Some blacks have even attempted to trademark derogatory terms such as “nigga.”⁷⁴

One of the ironies of minstrelsy, which inculcated stereotypes that persist to this day, was that it provided the first opportunities for black artists and performers, especially black women.⁷⁵ Black women from slavery until well into the twentieth century were characterized in popular culture and

69. See *id.* (describing the fourth stereotype, the “tragic mulatto,” as being of two races and accepted by neither); see also PATRICIA MORTON, *DISFIGURED IMAGES: THE HISTORICAL ASSAULT ON AFRO-AMERICAN WOMEN* xi, xiv (1991).

70. See 15 U.S.C. § 1052(a) (2000); Stephen R. Baird, *Moral Intervention in the Trademark Arena: Banning the Registration of Scandalous or Immoral Trademarks*, 83 TRADEMARK REP. 661, 663 (1993).

71. 15 U.S.C. § 1052(a) (2000); Baird, *supra* note 70, at 730-31.

72. See Petty et al., *supra* note 55, at 348 (noting that “implied and inferential racial messages” persist).

73. See Rosemary Coombe, *Marking Difference in American Commerce: Trademarks and Alertity at Century’s End*, 19 POL. & LEGAL ANTHROPOLOGY REV. 105, 111 (1996) (remarking on the persistence of negative stereotyping in advertising of such brands as RED MAN tobacco, BRAVES, and REDSKINS for sports teams, among others).

74. See Brenda Porter, ‘N’ Word Means Divide and Conquer, BLACK ENTERPRISE, May 1, 2007 (recounting the failed attempt by comedian Damon Wayans to patent the word “nigga” for a clothing line and remarking that the website “niggaspace.com” is an online social website for African-Americans).

75. See ROSALYN M. SCOTT, *AND SO I SING: AFRICAN-AMERICAN DIVAS OF OPERA AND CONCERT* 14-15 (1990) (noting that African-Americans gained theatrical experience and financial advantages through minstrelsy).

literature “by the stereotypical images of [either] the ham-fisted matriarch [or] the amoral, instinctual slut.”⁷⁶ The “unifying theme underlying [stereotypes of black women] is one of deviance and worthlessness”⁷⁷ Media defined black women as Mammies, Jezebels, Aunt Jemimas, Sapphires, and welfare queens.⁷⁸

II. THE EMERGING FEMINIST CRITIQUE OF INTELLECTUAL PROPERTY

The impact of both gender and race in IP has been under-explored until recent years. IP scholars such as Dan Burk have noted the rarity of “[f]ocused critical examination of pervasive biases of the intellectual property system”⁷⁹ The feminist critique of IP is still in its early stages, but it provides a good foundation for the analysis of the ways that a seemingly “gender-neutral” regime, such as IP, can in fact reinforce social domination. IP, in the form of film, theatre, music, and literature provides the raw material for popular culture, and feminist scholars such as Susan Bisom-Rap have noted that “[p]opular culture is a fertile analytical site for feminist legal theory.”⁸⁰

A great strength of feminist legal theory is its focus on uncovering subordination hidden in “neutral” legal regulations.⁸¹ Professor Coombe, for example, has recognized that “[i]ntellectual property law does not function simply in a rule-like fashion, nor is it merely a regime of rights and obligations.”⁸² Rather, it exists in a cultural battleground of hegemony, social dominance, and resistance. A feminist critique recognizes that rights governing cultural production did not arise in a social or cultural vacuum, but in a crucible of gender and racial subordination, the embers of which

76. See Sherey Anne Williams, *Foreword to ZORA NEALE HURSTON, THEIR EYES WERE WATCHING GOD*, at vii (Univ. of Ill. Press 1978) (1937).

77. See Margaret M. Russell, *Law and Racial Legal Realism: Black Women as Celluloid “Legal” Heroines*, in MARTHA A. FINEMAN & MARTHA T. MCCLUSKEY, *FEMINISM, MEDIA AND THE LAW* 136 (1997).

78. See, e.g., Linda L. Ammons, *Mules, Madonnas, Babies, Bathwater, Racial Imagery and Stereotypes: The African-American Woman and the Battered Woman Syndrome*, 1995 WIS. L. REV. 1003, 1049-50 (describing the effect of these caricatures as marginalizing African-American women).

79. See Dan L. Burk, *Feminism and Dualism in Intellectual Property*, 15 AM. U. J. GENDER SOC. POL’Y & L. 183, 186 (2007) (noting that patterns of subordination in women’s work “appear to hold true in our system for rewarding innovation and creativity”).

80. See Susan Bisom-Rap, *Introduction to MARTHA A. FINEMAN & MARTHA T. MCCLUSKEY, FEMINISM, MEDIA AND THE LAW* 87, 89 (1997) (noting that feminists seek to gain greater influence over the gender messages deployed in popular culture).

81. See NANCY LEVIT & ROBERT R.M. VERCHICK, *FEMINIST LEGAL THEORY: A PRIMER* 45-56 (2006) (noting that legal feminist methodology focuses on uncovering “male biases hidden beneath supposedly ‘neutral’ laws”).

82. Rosemary J. Coombe, *Critical Cultural Studies*, 10 YALE J.L. & HUMAN. 463, 481 (1998).

still burn today. Authorship, after all “is the foundation of copyright,”⁸³ and authorship, like race and gender, is socially constructed.

Some analytical commonalities exist between feminist critiques of IP and those that seek to expose racial subordination in the IP context. This Article seeks to illustrate that there is an invisible—in an Ellisonian sense—dynamic of subordination that underlies the “race-neutral” regime of IP. In a similar vein, IP scholars using a feminist paradigm have noted that “intellectual property appears to have been largely overlooked in feminist critiques of the law”⁸⁴ Similarly, feminist scholars have recognized that IP scholarship, in the words of Sonia Katyal, has traditionally “failed to consider how intellectual property, as it is owned, constituted, created, and enforced, both benefits and disadvantages segments of the population in divergent ways.”⁸⁵

Gender perspectives on IP can help inform issues of race and reform, and vice versa. Racial critiques of IP, like feminist critiques, can provide “insight into the power, social structures, and theory that would otherwise be missing . . . [and can] give[] us a different way of looking at the world.”⁸⁶ Feminist IP scholars have noted that copyright laws from their inception

were written by men to embody a male vision of the ways in which creativity and commerce should intersect . . . [w]hether this model of copyright serves women as well as men has not been a primary consideration of policy makers, if it has even been contemplated at all.⁸⁷

Similarly, scholars such as Rebecca Tushnet, examining IP through the lens of gender, have noted that “when we compare fields that get intellectual property protection (software, sculpture) with fields that do not (fashion, cooking, sewing) it becomes uncomfortably obvious that our cultural policy has expected women’s endeavors to generate surplus creativity but has assumed that men’s endeavors require compensation”⁸⁸

83. Carys J. Craig, *Reconstructing the Author-Self: Some Feminist Lessons for Copyright Law*, 15 AM. U. J. GENDER SOC. POL’Y & L. 207, 209 (2007).

84. Dan L. Burk, *Copyright and Feminism in Digital Media*, 14 AM. U. J. GENDER SOC. POL’Y & L. 519, 521 (2006).

85. Sonia K. Katyal, *Performance, Property and the Slashing of Gender in Fan Fiction*, 14 AM. U. J. GENDER SOC. POL’Y & L. 461, 462 (2006).

86. See Debora Halbert, *Feminist Interpretations of Intellectual Property*, 14 AM. U. J. GENDER SOC. POL’Y & L. 431, 432 (2006) (“[T]he issue of copyright has not been considered a feminist issue . . .”).

87. Ann Bartow, *Fair Use and the Fairer Sex: Gender, Feminism, and Copyright Law*, 14 AM. U. J. GENDER SOC. POL’Y & L. 551, 557 (2006).

88. Rebecca Tushnet, *My Fair Ladies: Sex, Gender and Fair Use in Copyright*, 15 AM. U. J. GENDER SOC. POL’Y & L. 273, 303-04 (2007).

A. African-American Women and IP

Throughout U.S. history, black women have borne the unique burden of being subordinated based on both race and gender.⁸⁹ Intersectionality theory, an off-shoot of critical race feminism, posits that “black women are subordinated in ways not predicted by the lowest common denominator experiences of just blacks or just women.”⁹⁰ Critical race feminists “have highlighted the failure of mainstream civil rights and feminist paradigms alike to see the intersection of racism and sexism in hierarchies of power and in the experiences of women of color.”⁹¹ Scholars examining race through a critical race feminist lens contend that “[b]lack women experience a special kind of oppression . . . because of their dual racial and gender identity and their limited access to economic resources”⁹² For example, an examination of black women involved in the criminal justice system in late eighteenth through the early twentieth centuries shows that black women had higher arrest rates, received longer sentences, and were “less likely to be pardoned, paroled or put on probation than were [white] females.”⁹³ However, black feminist scholars also note that African-American women and other women of color are multi-dimensional and have “some race issues in common with men of color, some gender issues in common with white females, and some separate issues and identities.”⁹⁴

Catherine MacKinnon, a leading feminist scholar, contended that “women have a history [and] . . . create culture”⁹⁵ In the case of black women, the contributions to art and culture have been titanic. African-

89. Cf. Sumi K. Cho, *Converging Stereotypes in Racialized Sexual Harassment: Where the Model Minority Meets Suzie Wong*, 1 J. GENDER RACE & JUST. 177, 181 (1997) (remarking on the dual subordination faced by other women of color such as Asian women and positing a theory of “racialized (hetero)sexual harassment” regarding Asian women).

90. See Frank Rudy Cooper, *Against Bipolar Black Masculinity: Intersectionality, Assimilation, Identity Performance, and Hierarchy*, 39 U.C. DAVIS L. REV. 853, 856, 861 (2006) (postulating that women of color are “denigrated within more than one major system of oppression”).

91. Cynthia Grant Bowman et al., *supra* note 6, at 65.

92. Jewel Amoah, *Narrative: The Road to Black Feminist Theory*, 12 BERKELEY WOMEN’S L.J. 84, 99 (1997); see BEVERLY GUY-SHEFTALL, INTRODUCTION TO WORDS OF FIRE: AN ANTHOLOGY OF AFRICAN-AMERICAN FEMINIST THOUGHT 2 (Beverly Guy-Sheftall ed., 1995).

93. See, e.g., Anne M. Butler, *Still in Chains: Black Women in Western Prisons, 1865-1910*, in MONROE LEE BILLINGTON & ROGER D. HARDAWAY, AFRICAN-AMERICANS ON THE WESTERN FRONTIER 191-92 (1998).

94. Angela Mae Kupenda, *For White Women: Your Blues Ain’t Like Mine, but We All Hide Our Faces and Cry—Literary Illumination for White and Black Sister/Friends*, 22 B.C. THIRD WORLD L.J. 67, 71 (2002).

95. CATHERINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 39 (1987) (positing that women “not only have been excluded from making what has been considered art; our artifacts have been excluded from setting the standards by which art is art”).

American women in essence launched the modern recording industry with the advent of blues. A singer named Mamie Smith recorded a song in 1920 that sold 75,000 copies in one month and one million copies within one year.⁹⁶ Music historians recognize that “the early 1920’s was the golden era of the black female blues singer.”⁹⁷

Scholars note that “the great classic blues singers were women.”⁹⁸ More than three-quarters of formal blues were “written from a woman’s point of view.”⁹⁹ Thus it was women blues singers and their lyrics “who first brought blues into general notice in the United States.”¹⁰⁰ History shows that the great blues singers, such as Bessie Smith and Ma Rainey, were swindled out of copyrights to compositions and subject to disparate treatment in segregated “race record” divisions of major record companies.¹⁰¹ Bessie Smith, recognized as the greatest of blues singers, sold close to ten million records over the course of her career, but was duped of copyrights in compositions and royalties for record sales by record industry executives and managers.¹⁰² Similarly, Ma Rainey, who composed most of the songs she recorded, “like most black musicians . . . was paid a flat fee for recording sessions, and she never received royalties” for copyrighted compositions.¹⁰³ Yet after the great blues singers of the early 1920s, black women virtually disappeared from sight in the emergence of ragtime and jazz, genres dominated by men, to such an extreme that books on the history of jazz overlook women artists, save perhaps references to Billy Holiday and Ella Fitzgerald.¹⁰⁴

96. See TED GIOIA, *THE HISTORY OF JAZZ* 17 (1997) (noting that “[i]n 1926 alone, more than three hundred blues and gospel recordings were released . . . most of them featuring black female vocalists”).

97. EILEEN SOUTHERN, *THE MUSIC OF BLACK AMERICANS: A HISTORY* 371 (3d ed. 1997).

98. LEROI JONES, *BLUES PEOPLE: THE NEGRO EXPERIENCE IN WHITE AMERICA AND THE MUSIC THAT DEVELOPED FROM IT* 91 (1963).

99. *Id.*

100. See *id.* (noting that the majority of country blues singers were almost all men).

101. See Greene, *supra* note 29 (explaining that in 1979, Bessie Smith’s heirs unsuccessfully filed suit against Columbia records alleging that Columbia paid Smith a flat-fee per song basis with no record royalties, and registered Smith’s compositions in the record company’s name, thus denying Smith her copyright royalties).

102. See, e.g., *AFRICAN-AMERICAN LIVES* 779 (Henry Louis Gates & Evelyn Brooks Higginbotham eds., 2004) (commenting that in 1931 Columbia Records dropped Bessie Smith as an artist and her record sales dramatically declined).

103. See *BLACK WOMEN IN AMERICA: A HISTORICAL ENCYCLOPEDIA* 959-60 (Darlene Clark ed., 1993).

104. See, e.g., ROY CARR, *A CENTURY OF JAZZ: FROM BLUES TO BOB, SWING, AND HIP-HOP* (1997).

III. TRADITIONAL KNOWLEDGE/INDIGENOUS PEOPLES AND INTELLECTUAL PROPERTY

“Critical” perspectives in the context of international IP law are now emerging.¹⁰⁵ Taking up the challenge to apply the lens of critical race and other “critical theories,”¹⁰⁶ scholars such as Margaret Chon contend that globalization and the gap between rich and developing nations of the former colonial period in conjunction with IP have “injected human rights and social justice debate into a field dominated by commercial instrumentalism and economic rationales”¹⁰⁷ The debate over traditional knowledge reflects tensions between the developed world and the Third World over culture and control of resources.¹⁰⁸ Scholars such as Peter Yu explore the connection between IP and human rights.¹⁰⁹ Angela Riley urges making distinctions between IP rights that further the interest of a mere few but dominant entities, for example the Walt Disney Corporation, “and those that are designed to put indigenous peoples on equal footing with other actors in the global market.”¹¹⁰

The debate over traditional knowledge, indigenous peoples and IP appropriation can provide insight into the dynamic of African-American cultural appropriation. While African-Americans are not an “indigenous” people to North America, many commonalities exist between the treatment of early blues artists and native peoples.¹¹¹ In the area of traditional

105. See, e.g., William J. Aceves, *Critical Jurisprudence and International Legal Scholarship: A Study of Equitable Distribution*, 39 COLUM. J. TRANSNAT'L L. 299, 392 (2001) (examining the international legal regime through the lens of critical jurisprudence and arguing that facets of international norms and rules marginalize and subordinate countless groups of people).

106. See Penelope E. Andrews, *Making Room for Critical Race Theory in International Law: Some Practical Pointers*, 45 VILL. L. REV. 855, 872-75 (2000) (arguing that two dominant features of critical race theory are the narratives of individuals and its lack of programs).

107. See Margaret Chon, *Intellectual Property and the Development Divide*, 27 CARDOZO L. REV. 2821, 2825 (2006) (indicating that analysis of the intersection of intellectual property and development is absent larger guiding principles that address the central concerns of development).

108. See Ghosh, *supra* note 25, at 76 (highlighting the difference between the traditional knowledge debate and debates over the expansion of intellectual property in the areas of academic culture and the internet).

109. See Peter K. Yu, *International Rights Approaches to Intellectual Property: Reconceptualizing Intellectual Property Interests In a Human Rights Framework*, 40 U.C. DAVIS L. REV. 1039 (2007) (proposing that protecting human rights obligations is more important than the non-human rights aspects of intellectual property protections).

110. See Angela R. Riley, *Indigenous Peoples and Emerging Protections for Traditional Knowledge*, in 4 INTELLECTUAL PROPERTY AND INFORMATION WEALTH: ISSUES AND PRACTICES IN THE DIGITAL AGE 373, 383 (Peter K. Yu ed., 2007) (indicating that balanced and fair protection of TK will not provide indigenous groups with additional rights, but instead put them on the same level as other creators).

111. See David E. Wilkins, *African Americans and Aboriginal Peoples: Similarities and Differences in Historical Experiences*, 90 CORNELL L. REV. 515, 530 (2005)

knowledge (“TK”), asymmetries of power between the developed and the colonial or developing world in the nineteenth century “led to certain types of knowledge that were concentrated in the Third World as essentially being deemed public domain resources that were freely appropriable.”¹¹² Although no single definition of TK exists, it has been described as “indigenous and local community knowledge, innovations, and practices . . . often collectively owned and transmitted orally from generation to generation.”¹¹³ As Paul Kuruk has noted, the group-focused, collective nature of TK makes it difficult to protect under traditional IP law norms.¹¹⁴

Christine Haight Farley was one of the first scholars to analyze the disadvantages IP imposed on traditional knowledge and indigenous peoples.¹¹⁵ Professor Farley noted that indigenous people in recent decades have attempted to use IP law “to protect their cultural heritage from external poaching.”¹¹⁶ Traditional knowledge of indigenous peoples, like the works of early black blues artists, has presented challenges to IP protection, and often for the same reasons.

(exploring similarities between indigenous peoples, such as Native Americans and African-Americans, and noting that both Native Americans and blacks historically have endured a similar lack of rights, even though the law has treated each group quite differently); see also Howard J. Vogel, *Reframing Rights from the Ground Up: The Contribution of the New U.N. Law of Self-Determination to Recovering the Principle of Sociability on the Way to a Relational Theory of International Human Rights*, 20 TEMP. INT’L & COMP. L.J. 443, 459 (2006) (contending that African-Americans may qualify as a “minority people” under international human rights law).

112. See, e.g., ROSEMARY J. COOMBE, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION AND THE LAW* 209 (1998) (noting that western categories of intellectual property “divide peoples and things according to the same colonizing discourses of possessive individualism that historically disintegrated and disenfranchised Native peoples in North America”); Olufunmilayo B. Arewa, *TRIPS and Traditional Knowledge: Local Communities, Local Knowledge, and Global Intellectual Property Frameworks*, 10 MARQ. INTELL. PROP. L. REV. 155, 163 (2006) (explaining that the global intellectual property system that developed at the end of the nineteenth century was based on existing national intellectual property systems and bilateral agreements between countries).

113. See, e.g., Bryan Bachner, *Facing the Music: Traditional Knowledge and Copyright*, 12 HUM. RTS. BRIEF 9, 9 (2005) (noting that TK can include forms of stories, songs, folklore, proverbs, cultural values, rituals, local languages, agricultural practices, and medical resources).

114. See Paul Kuruk, *The Role of Customary Law Under Sui Generis Frameworks of Intellectual Property Rights in Traditional and Indigenous Knowledge*, 17 IND. INT’L & COMP. L. REV. 67, 72 (2007) (stating that another problem with IP laws and indigenous knowledge is IP laws only offer protection for fixed periods of time and not an indeterminate period necessary to protect indigenous knowledge).

115. See Christine Haight Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?*, 30 CONN. L. REV. 1, 1 (1997) (concluding that the current IP system is well-suited for those who want to disseminate their art, but not for those who want to prevent outside use of their art).

116. See *id.* at 13 (claiming that indigenous groups want control over their art so that they can use mass media imagery to communicate their cultural identity to the outside world).

As Professor Farley noted, the fixation requirement of copyright, for example, can constitute a barrier to protection because folklore and traditional knowledge “may never be recorded in any tangible form.”¹¹⁷ Traditional knowledge, such as folklore, has existed “beyond the reach of conventional IP models of ownership and moral rights.”¹¹⁸ Daniel Gervais has provided three main areas in which IP has been incompatible with TK protection.¹¹⁹ One, TK has been under-protected because it is too old and therefore in the public domain.¹²⁰ Two, TK does not qualify for IP protection because the author of the material cannot be identified.¹²¹ Three, TK is often created by large, diffused groups, whereas western IP paradigms are based on creation by individuals.¹²² In contrast, aboriginal or indigenous cultures seek to protect cultural resources “in the name of the relevant community.”¹²³

Analysts in the TK arena assert that the cultural appropriation of indigenous people’s works “causes cultural devastation” and reinforces systems of subordination used to oppress native groups.¹²⁴ The harm of appropriation in the TK context is exacerbated “because of the spiritual or sacred element in much indigenous, creative material.”¹²⁵

Just as blues men and women found their musical works routinely appropriated, a similar dynamic impacted native peoples. The most famous example is the song “The Lion Sleeps Tonight,” derived from the composition of a Zulu tribesman, who sold the rights for a pittance.¹²⁶ The

117. See *id.* at 28-29 (explaining that film-makers and researchers who fix an indigenous work in a tangible medium are not the authors of that work and therefore not the original copyright owners).

118. See Johanna Gibson, *Intellectual Property Systems, Traditional Knowledge, and the Legal Authority of Community*, 26 EUR. INTELL. PROP. REV. 280, 287 (2004).

119. See Daniel J. Gervais, *Internationalization of Intellectual Property: New Challenges From the Very Old and Very New*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 929, 957-58 (2002).

120. See *id.* (arguing that traditionally intellectual property rights are awarded for a limited period before they return to the public domain for others to use).

121. See *id.*

122. See *id.* (explaining that the works such as textile patterns, musical rhythms, and dances may have several versions or incarnations).

123. See Gibson, *supra* note 118, at 287.

124. See Angela R. Riley, “*Straight Stealing*”: *Towards an Indigenous System of Intellectual Property Protection*, 80 WASH. L. REV. 69, 78 (2005) (indicating that the destruction of the rain forest in Brazil has destroyed indigenous inhabitants’ language, religion, and cultural existence).

125. See Nancy Kremers, *Speaking with Forked Tongue in the Global Debate on Traditional Knowledge and Genetic Resources: Are U.S. Intellectual Property Law and Policy Really Aimed at Meaningful Protection for Native American Cultures?*, 15 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1, 108 n.619 (2004) (noting that subtle linguistic and conceptual distinctions could help indicate whether Western laws are suitable for protecting traditional knowledge).

126. See, e.g., Sunder, *supra* note 24, at 263 (noting that the author of the song,

song went on to become a massive hit, subsequently used in the Disney movie “The Lion King.”¹²⁷ Similarly, a Taiwanese tribal people known as the Ami found their traditional folk songs recorded without compensation and used by the artist Enigma.¹²⁸ As in the case of blues artists, it is “abundantly clear that intellectual property regimes fail to adequately capture all of the cultural and economic significance” of the works of indigenous peoples.¹²⁹

IV. CONCLUSION

Taken together, critical race, feminist, and internationalist critiques of IP have the potential to transform the way we think of IP rights and protection. IP itself is in a period of analytical and practical turbulence, and a focus on critical perspectives can be invaluable to re-imagining an IP system that actually provides real incentives to artists at the bottom of society, rather than multi-national conglomerates concentrated across IP industries.

The critical project of IP examination can provide ways to achieve racial and gender equality, rather than reinforcing unequal social constructs through the dynamics of IP protection. Critical perspectives locate IP in a social construct, just as race and gender are socially constructed.¹³⁰ Therefore, IP can be re-engineered to bring about results of distributive justice and to foster norms of racial and gender equality. These results would be in keeping with the constitutional mandate of IP protection, which is designed to insure a robust marketplace of ideas, and to compensate those who add intellectual, scientific, and artistic value to society. Further, a critical examination of IP rights is consistent with a human rights perspective of IP being developed by scholars using international norms to inform IP entitlements.

Solomon Linda, died in 1962 “with less than \$25.00 to his name”).

127. *See id.* (indicating that Linda assigned the rights to the publisher during the apartheid-era for less than two dollars).

128. *See* Angela R. Riley, *Indigenous Peoples and the Promise of Globalization: An Essay on Rights and Responsibilities*, 14 KAN. J.L. & PUB. POL’Y 155, 158-59 (2004) (claiming that the Lifvon and other Ami tribal members performed their aboriginal music across Europe in the mid-1990s and were recorded and published without their knowledge).

129. *See id.* at 159 (claiming that international law will not come any closer to protecting indigenous work than already exists because the Western model of intellectual property is becoming dominant).

130. *See* Francisco Valdes, *Outsider Jurisprudence, Critical Pedagogy and Social Justice Activism: Marking the Stirrings of Critical Legal Education*, 10 ASIAN L.J. 65, 67 (2003) (believing that critical education reminds members of social groups that “law and society are a constructed, not given, inheritance”).