

**INTELLECTUAL PROPERTY AT THE INTERSECTION OF RACE AND GENDER: OR LADY SINGS THE BLUES BY K.J. GREENE<sup>1</sup>**

The history of cultural production in the United States tracks 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. Congress enacted formal laws mandating racial equality only scant decades ago, although it may seem long ago to today's generation. Interestingly, the same Constitution that validated slavery and excluded women from voting also granted rights to authors and inventors in what is known as the Patent/Copyright clause of Article I, section 8. Those rights have become the cornerstone of economic value not only in the U.S but globally, and are inextricably tied to cultural production that influences all aspects of society. My scholarship seeks to show how both the structure of copyright law, and the phenomena of racial segregation and discrimination impacted the cultural production of African-Americans and how the racially neutral construct of IP has in fact historically adversely impacted African-American artists.<sup>2</sup>

It is only in recent years that scholarship exploring intellectual property has examined IP in the context of social and historical inequality. This piece will explore briefly how women artists and particularly black women have been impacted in the IP system, and to compare how both blacks and women have shared commonality of treatment with indigenous peoples and their creative works. The treatment of blacks, women and indigenous peoples in the IP system reflects an unfortunate narrative of exploitation, devaluation and the promotion of derogatory stereotypes that helped fuel oppression in the United States and in the case of indigenous peoples, aboard. It is however, not merely a backwards-looking narrative, but can help in reforming the IP system to the benefit of the in Derrick Bell's words, "faces at the bottom" of our society.

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<sup>1</sup> Associate Professor, Thomas Jefferson School of Law, San Diego CA, J.D. Yale Law School.

<sup>2</sup> See K.J. Greene, Copyright, Culture and Black Music: A Legacy of Unequal Protection, HASTINGS COMM. & ENT. L.J. 339 (1999), see also 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).

A focus on race and gender inequality has been sorely lacking in IP scholarship and jurisprudence, but is now taking on renewed attention in feminist scholarship and critiques of existing power structures by those concerned with the treatment of people of color and indigenous peoples in the international arena. Hopefully, these three areas of inquiry: the rights of minorities, the rights of women and the rights of indigenous peoples can bring about reforms to IP that truly empower artists who create, and not merely benefit the large conglomerates that control IP in the United States and abroad. In part one of this article, I will briefly discuss how IP law has disadvantaged African-American artists, in part two I will explore how feminist critiques of IP can benefit from examining the treatment of black women. In part three, I will examine how the treatment of indigenous peoples parallels IP deprivations of blacks and women, and part four will provide some prescriptions for reform.

#### **THE EMERGENCE OF RACE IN LEGAL ANALYSIS**

Scholars increasingly recognize that the examination of race in legal discourse serves to illuminate the merits and values of the law.<sup>3</sup> In contrast, before the 1980's, legal scholarship "virtually ignored legal theorizing based on the perspectives of people of color."<sup>4</sup> The invisibility of race in legal discourse changed with the advent of the critical race theory ("CRT") in the late 1980's, following on the development of feminist legal theory in the prior decade.

Critical race theory is not a unified construct, but has set forth four core tenets. First, it posits that "race and racism are endemic to the American normative order."<sup>5</sup> 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."<sup>6</sup> Third, it contends that the construct of "colorblindness" in legal jurisprudence "ignores and

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<sup>3</sup> See Kim Forde-Marzuri, Learning Law Through the Lens of Race, 2 J.L. &POL'Y 1 (2005).

<sup>4</sup> See e.g. Cynthia Grant Bowman, Dorothy Roberts and Leonard Rubinowitz, Race and Gender in the Law Review, 100 Nw. U. L. REV. 27, 56 (2006).

<sup>5</sup> See Athena D. Muttua, The Rise, Development and Future Directions of Critical Race Theory and Related Scholarship 84 DENV. U. L. REV. 329, 333-34 (2006) (providing a comprehensive description of the tenets of CRT).

<sup>6</sup> *Id.*

cements the racial caste system constructed in part by law”, and thus perpetuates inequality for subordinated groups.<sup>7</sup> In contrast, CRT proponents advocate that “we ought to be working toward a norm of ‘racial equality’ where different groups will not continue to suffer the oppression and subordination they have suffered.”<sup>8</sup>

CRT can also be defined via its opposition to “at least three entrenched, mainstream beliefs about racial justice....[first] that blindness to race will eliminate racism...[second] that racism is matter of individuals, not system....[and third] that one can fight racism without...attention to sexism, homophobia, economic exploitation, and other forms of injustice and oppression”.<sup>9</sup> Further, CRT advocates reject the use of “neutral” accounts of legal decision-making, and focus on the perspectives of subordinated peoples, i.e., “faces at the bottom” of society.<sup>10</sup> Finally, CRT embraces the use of story-telling—i.e., narrative—“to expose discrimination and illuminate how the law often fails to account for the voices of outsiders.”<sup>11</sup>

CRT analysis has been applied to many diverse areas of law, including antidiscrimination law, law and economics, and taxation<sup>12</sup>. CRT has spawned numerous other theories of subordination within the law, including Latina and Latino Critical Theory (LaCrit), Asian American critical legal theory, and Critical Race Feminism.<sup>13</sup> Not surprisingly, CRT and its analogs have come under harsh attack from conservatives in the

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<sup>7</sup> *Id.*

<sup>8</sup> See 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).

<sup>9</sup> See Devon W. Carbado and Mitu Gulati, The Law and Economics of Critical Race Theory, 112 YALE L.J. 1757, 1766-67 (2003), citing CROSSROADS, DIRECTIONS AND A NEW CRITICAL RACE THEORY (FRANCISCO VALDES ET AL. EDS 2002).

<sup>10</sup> Race and Gender in the Law Review, *supra*, note \_\_\_, 100 NW. U. L. REV. at 60-61.

<sup>11</sup> See Mario L. Barnes, Black Women’s Stories and the Criminal Law: Restating the Power of Narrative, 29 U.C. DAVIS L. REV. 941, 953-54 (2006).

<sup>12</sup> See Dorothy A. Brown, Race, Class and Gender Essentialism in Tax Literature: The Joint Tax Return, 54 WASH. & LEE L. REV. 1469 (1997).

<sup>13</sup> See 84 DENV. U. L. REV., *supra*, note \_\_\_ at 337-38.

legal academy.<sup>14</sup> It has similarly been noted that “conservative critics have long denounced feminism (and other civil rights movements) for promoting victimization.”<sup>15</sup>

### **INTELLECTUAL PROPERTY, INNOVATION AND AFRICAN-AMERICANS**

The three core protections of intellectual property at the federal level are copyright, patent and trademark law.<sup>16</sup> 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. Until very recent times, few legal scholars examined either race or gender in the context of IP. The long omission of an analysis of blacks within IP is glaring, given the 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, IP in the form of appropriated and distorted works (a copyright problem) and trade symbols and imagery (a trademark problem) has promoted derogatory racial stereotypes that facilitated racial subordination.

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<sup>14</sup> For a sampling of some of the legal ruling establishments critique of CRT/critical race feminist methodology, *see* RICHARD A. POSNER, *OVERCOMING LAW* 382-384 (1995) (highlighting the “pathologies” of black anti-Semitism and black criminality that critical race scholars purportedly gloss over).

<sup>15</sup> *See* Martha T. McCluskey, *Fear of Feminism: Media Stories of Feminist Victims and Victims of Feminism on College Campuses* in MARTHA A. FINEMAN & MARTAH A. MCCLUSKEY, *FEMINISIM, MEDIA & THE LAW* 57 (1997).

<sup>16</sup> Some forms of intellectual property-type doctrine are protected at the state level, including state trademark law, the right of publicity and idea-submission protection.

## BLACKS AND COPYRIGHT LAW

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<sup>17</sup>, as well as blues, ragtime, rock and roll and today’s hip-hop music. However, the history of blacks within the U.S. intellectual property law has been one of appropriation, degradation and devaluation over a long period, beginning with the founding of the nation and up until the 1950’s and 60’s . There is a compelling assumption that similar divestment of patent protection impacted black inventors. <sup>18</sup> Time after time, foundational artists who developed ragtime, blues and jazz found their copyrights divested, and through inequitable contracts their earnings pilfered.<sup>19</sup> I have argued elsewhere that for a long period of U.S. history, the work of black blues artists was essentially dedicated to the public domain.<sup>20</sup> The public domain “can most broadly be 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.’”<sup>21</sup>

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

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<sup>17</sup> See FRANK KOFSKY, *BLACK NATIONALISM AND THE REVOLUTION IN MUSIC* 19 (1970). Kofsky contended 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.” *Id.*

<sup>18</sup> Scholars are only now beginning to examine the treatment of blacks within the patent system, which protects useful technological inventions. One of the few legal scholars to examine blacks within the patent system is Keith Aoki. See Keith Aoki, *Distributive and Syncretic Motives in Intellectual Property Law (With Special Reference to Coercion, Agency and Development)*, 40 U.C. DAVIS L. REV. 717, 738-747 (2007) (noting that slave owners often took credit for inventions by slaves).

<sup>19</sup> 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 e.g. TERRY WALDO, *THIS IS RAGTIME* (1976), CHARLES WOLFE AND KIP LORNELL, *THE LIFE AND LEGEND OF LEADBELLY* (1992), HOWARD REICH AND WILLIAM GAINES, *JELLY’S BLUES: THE LIFE, MUSIC AND REDEMPTION OF JELLY ROLL MORTON* (2003).

<sup>20</sup> See K.J. Greene, *Copyright, Culture and Black Music: A Legacy of Unequal Protection*, 21 HAST. COMM. & ENT. L. J. \_\_\_\_ (1999).

<sup>21</sup> See e.g. Michael A. Carrier, *Cabining Intellectual Property Through a Property Paradigm*, 54 DUKE L.J. 1, 49 (2004).

[including women and minorities].”<sup>22</sup> Indeed, my previous work demonstrated that five copyright structures disadvantaged black cultural production.

First, the idea/expression dichotomy of copyright law prohibits copyright protection for raw ideas, and only protects 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 unprotectable. Second, copyright’s fixation standard provides that copyright protection extends only to a work that is “fixed” in a tangible medium of expression. However, a key component of black cultural production is improvisation out of an oral culture that does “fix” creation deeply disadvantaged African-American modes of cultural production, which derived from an oral tradition and communal standards.<sup>23</sup>

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 the reach of the illiterate or semi-literate creators of the blues. Finally, the general absence of moral rights protection, which protects against harms to authorial dignity. That blacks continued to create and innovate even in the face of diminished economic incentives poses a challenge to copyright policy, which dictates that “rewards to individuals under copyright law are central to effectuating copyright law’s major objective of enhancing societal progress, because an absence of monetary protection might well result in diminished creativity.”<sup>24</sup>surely gives weight to the notion that economic incentives alone are not sole motivator of creative output.

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<sup>22</sup> See K.J. Greene, Copyright, Culture and Black Music: A Legacy of Unequal Protection, 21 HAST. COMM. & ENT. L. J. 339, 356 (1999).

<sup>23</sup> *Id.* This is a core argument in my article, later picked up on by Kembrew McLeod (My article, Copyright, Culture and Black Music, was the first legal article to explore how the structure of copyright law and particularly the fixation requirement imposed disadvantages on black cultural production. Greene, 21 HAST. COMM. & ENT. L.J. 378-379. In McLeod’s chapter entitled “Copyright, Authorship and American Culture”, he contends 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].” See KEMBREW MCLEOD, OWNING CULTURE: AUTHORSHIP, OWNERSHIP AND INTELLECTUAL PROPERTY LAW 72 (2001).

<sup>24</sup> See ROCHELLE COOPER DREYFUS & ROBERTA ROSENTHAL KWALL, INTELLECTUAL PROPERTY: CASES & MATERIALS 213 (2004).

Larry Lessig, a leading intellectual property scholar, has asserted that the “record industry was born of...piracy...”, contending that the “law governing recordings gives artists less...by giving artists a weaker right than it otherwise gives creative authors.”<sup>25</sup> The early music industry was built on the back of black cultural production from 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.<sup>26</sup> Minstrelsy defamed not only blacks, but other minorities in stereotypical and derogatory ways.<sup>27</sup> Then came the ragtime and blues, which single-handedly carried the recording from the 1920’s till 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.<sup>28</sup> 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 extensively plagiarized and appropriated.<sup>29</sup>

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, reduced it to a “simplified formula...and reduced it to the kind of compressed, rigid format that could appeal to a mass audience.”<sup>30</sup> This cultural appropriation of black art set a long-standing

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<sup>25</sup> See LARRY LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY*, 55-57 (2004).

<sup>26</sup> The minstrel show was central to American culture from the 1830’s to the 1870’s, so much so that it is “difficult for us now to realize how all-pervasive and influential the minstrel show was.” See TERRY WALDO, *THIS IS RAGTIME* 12 (1976) (noting that stereotypical images of the “happy-go-lucky, wide-grinnin’, chicken-stealin’, razor-toting darky became rigidly embedded in the psyche of white America” during the minstrel period).

<sup>27</sup> For an analysis of how minstrelsy defamed Asian-Americans, see Keith Aoki, “Foreign-ness” and Asian American Identities: Yellowface, World War II Propaganda, and Bifurcated Racial Stereotypes, 4 *ASIAN PAC. AM. L.J.* 1, 21-22 (1996) (noting that the prevalence of “white actors in Yellowface also served to reinforce the segregation of Chinese immigrants from the whites”).

<sup>28</sup> See e.g. NELSON GEORGE, *THE DEATH OF RHYTHM AND BLUES* 8 (1988).

<sup>29</sup> For an exploration of the lines between borrowing and appropriation, see Olfumilayo B. Arewa, Copyright on Catfish Row: Musical Borrowing, Porgy and Bess, and Unfair Use, 37 *RUTGERS L.J.* 277, 305-309 (2006) (noting that famed composer George Gershwin “borrowed” heavily from African-American cultural expression).

pattern wherein “large financial gains were made by white musicians playing black music to essentially white audiences.”<sup>31</sup>

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 a white rappers such as Vanilla Ice and more recently Eminem, gross top sales.<sup>32</sup> While it may be true that the “exploitation of the author is coded deep within the copyright system”<sup>33</sup>, the treatment of Black artists vis-à-vis white artists is striking in its one-way direction of appropriation, and the inculcation of vicious dignitary harm to blacks as a group in the form of stereotyping. CRT analysis has “provided important insights into the ways in which anti-discrimination law has not only failed to address, but [to] have further entrenched, ideological and thus material forms of discrimination.”<sup>34</sup> IP law, like antidiscrimination law, may have also served to entrench material forms of discrimination. The economic effects of IP deprivation on the black community have been devastating. Intellectual property today is the preeminent business asset, and 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.”<sup>35</sup>

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<sup>30</sup> See GUNTHER SCHULLER, *EARLY JAZZ: ITS ROOTS AND MUSICAL DEVELOPMENT*, 179-180 (1968).

<sup>31</sup> See BEN SIDRAN, *BLACK TALK* 50-51 (1971). Sidran noted that the Original Dixieland Band “made the first recordings of out-and-out jazz that sold by the millions....” *Id.*

<sup>32</sup> For analysis of the role of race in the production of rock ‘n’ roll, see CHARLES GILLET, *THE SOUND OF THE CITY: THE RISE OF ROCK AND ROLL* 189 (1996) (noting that by 1958, “more than half the rhythm and blues hits were by white singers”).

<sup>33</sup> See Dan Hunter, *Culture War*, 83 *TEX. L. REV.* 1105, 1125 (2005).

<sup>34</sup> See Emily M.S. Hough, *Critical Race Realism: Re-Claiming the Antidiscrimination Principle Through The Doctrine of Good Faith in Contract Law*, 66 *U. PITT. L. REV.* 455, 464 (2005).

<sup>35</sup> See Robert E. Suggs, *Poisoning the Well: Law & Economics and Racial Inequality*, 57 *HAST. 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). *Id.*



## **BLACKS AND TRADEMARK LAW**

Trademark law provides protection to trademark owners against use of their marks that is likely to lead to consumer confusion. 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.”<sup>36</sup> 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.”<sup>37</sup> Trademark law is inextricably tied to advertising and marketing, and as Desiree Kennedy has pointed out, advertising “is an important means of public discourse... [and]...is instrumental in affecting viewer’s perceptions of their world and their interactions with others.”<sup>38</sup>

Trademarks used in advertising can impact not just commercial transactions, because media images “are frequently the predominant source of information many have about people of color.”<sup>39</sup> In the same way that “coon” music in early America reflected derogatory anti-black stereotypes, so did trade symbols used to sell products. It has been said that “twentieth century white identity was forged in the crucible of Jim Crow iconography, from Aunt Jemima to Uncle Ben to blackface minstrels...”<sup>40</sup> These idyllic southern stereotypes of the smiling, happy black domestic servant could be as “myths [which] masked the ugly violence of lynching, disenfranchisement and segregation.”<sup>41</sup>

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<sup>36</sup> See Alex M. Johnson, Jr., *Destabilizing Racial Classifications Based on Insights Gleaned from Trademark Law*, 84 CAL. L. REV. 887, 906 (1996).

<sup>37</sup> *Id.*

<sup>38</sup> See Desiree A. Kennedy, *Marketing Goods, Marketing Images: The Impact of Advertising on Race*, 32 ARIZ. ST. L.J. 615, 616 (2000).

<sup>39</sup> *Id.*

<sup>40</sup> See Arela Gross, *Beyond Black and White; Cultural Approaches to Race and Slavery*, 101 COLUM. L. REV. 640, 675 (2001).

<sup>41</sup> *Id.*

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 black and other minorities. In the case of black men, history shows the durability of three stock prototypes: the “Tom” character, the “Coon” character, and the “Buck” character.<sup>42</sup>

The “Tom” caricature “portrays Black men as “faithful, happy, submissive servants.”<sup>43</sup> 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, unintelligent yet cunning in obtaining vices he enjoys.

An example of this type is the Amos and Andy characters. Amos ‘n’ Andy was created as characters for a radio show in 1928, and went on to “become one the country’s most popular radio programs.”<sup>44</sup> The characters were black, but initially played by whites (the creators) on the 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, and in the 1980’s trademark litigation ensued over whether CBS, which had discontinued the show in the 1960’s after protest by civil rights advocates, had abandoned and therefore lost legal rights in the Amos ‘n’ Andy trademark.

Similarly, Sambo’s Restaurants used the symbol of a smiling coon-type, Sambo 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.’”<sup>45</sup> After numerous complaints from civil rights

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<sup>42</sup> Cite BOGGLE, COONS, TOMS, BUCKS & MAMMIES: BLACKS IN AMERICAN CINEMA.

<sup>43</sup> David Pilgrim, Golliwoggz!: The Caricatures, <http://golliwogg.wordpress.com/the-caricatures>.

<sup>44</sup> See *Silverman v. CBS Inc.*, 870 F.2d 40 (2<sup>nd</sup> Cir. 1989).

<sup>45</sup> See Ronald Turner, “Little Black Sambo”, *Images and Perceptions: Professor Cohen’s Critique of Professor Lawrence*, 12 HARV. BLACKLETER L.J. 131, 140 (1995).

activists and lawsuits by municipalities seeking to prevent expansion, “Sambo’s Restaurants” changed its name to “Sam’s” in 1989.<sup>46</sup> The “Buck” character is a brute, and could be said to represent the worst fears of early white America, that of the hyper-sexual black male intent on getting access to white women’s sexuality. The “Buck” character surfaces in political marketing, the last incarnation being the criminal Willie Horton, used by great effect in the presidential campaign of Ronald Reagan

African-American women have been stigmatized by stereotypes that have their roots in trademarks. It has been noted that “American history is replete with ‘slave-rooted’ images of African-American womanhood.”<sup>47</sup> It has been said that four negative stereotypes exist regarding black women: Aunt Jemima type, a domestic servant the mammy type, typically a domineering, matriarchal figure, and the Jezebel type, a highly amoral, sexualized representation.<sup>48</sup>

Trademark law derives its authority at the federal level from the Lanham Act of 1946. The Lanham Act does prohibit the trademarked use of a racially derogatory image, but does limit the trademark registration of such images under Section 2. Section 2 of the Lanham Act prohibits the registration of a mark that consists or comprises “scandalous” or “immoral” matter.<sup>49</sup> 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.<sup>50</sup> In recent years, Section 2 of the Lanham Act has been used by various groups, including Native Americans and African-Americans to cancel the registration of racially offensive trademarks.

## **THE EMERGING FEMINIST CRITIQUE OF INTELLECTUAL PROPERTY**

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<sup>46</sup> See e.g. *Sambo’s Restaurants Inc. v. City of Ann Arbor*, 663 F.2d 686 (6<sup>th</sup> Cir. 1981) (holding that the name “Sambo’s” while offensive to blacks was commercial speech protected under the First Amendment).

<sup>47</sup> 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 (2000).

<sup>48</sup> *Id.*, citing PATRICA MORTON, *DISFIGURED IMAGES: THE HISTORICAL ASSAULT ON AFRO-AMERICAN WOMEN* xi, xiv (1991).

<sup>49</sup> See Stephen R. Baird, *Moral Intervention in the Trademark Arena: Banning the Registration of Scandalous or Immoral Trademarks*, 83 TRADEMARK REP. 661, 662 (1993).

<sup>50</sup> *Id.* at 730-31.

The impact of both gender and race in IP has been under-explored until recent years. IP scholars such as Dan Burke have noted the rarity of “[f]ocused critical examination of pervasive biases of the intellectual property system...”<sup>51</sup> 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 in fact can 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.”<sup>52</sup>

A great strength of feminist legal theory is its focus on uncovering subordination hidden in “neutral” legal regulations. Rosemary Coombs, for example, has recognized that intellectual property law “does not function simply in a rule-like fashion, nor is it merely a regime of rights and obligations”, but rather exist in a cultural battleground of hegemony, social dominance and resistance.<sup>53</sup> A feminist critique recognizes that rights governing cultural production did not arise in a social or cultural vacuum, but in a foundry of gender and racial subordination, the embers of which still burn today.

Some analytical commonalities exist between feminist critiques of intellectual property and those that seek to expose racial subordination in the IP context. My work seeks to illustrate that there is an invisible (in an Ellisonian sense) dynamic of subordination that underlies the “race-neutral” regime of intellectual property. In 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”<sup>54</sup>. Similarly, feminist scholars have recognized that intellectual property scholarship, in the words of Sonia

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<sup>51</sup> See Dan L. Burke, *Feminism and Dualism in Intellectual Property*, 15 AM. U. J. GENDER & SOC. POL’Y & L. 186 (2007) (noting that patterns of subordination in women’s work “appear to hold true in our system for rewarding innovation and creativity”). *Id.* at 192-193.

<sup>52</sup> See Susan Bisom-Rap, Introduction, in MARTHA A. FINEMAN & MARTAH A. MCCLUSKEY, *FEMINISM, MEDIA & THE LAW* 87 (1997) (noting that a central question to feminists is how can they “gain greater influence over the messages deployed in popular culture...”) *Id.* at 89.

<sup>53</sup> See Rosemary J. Coombe, *Critical Cultural Studies*, 10 YALE J.L. & HUMAN. 463, 479-481 (1998).

<sup>54</sup> See Dan L. Burk, *Copyright and Feminism in Digital Media*, 14 AM. U.J. GENDER SOC. POL’Y & L. 519, 521 (2006).

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.”<sup>55</sup>

Gender perspectives on IP can help inform issues of race and reform in IP, 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.”<sup>56</sup> 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...whether 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.”<sup>57</sup> 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...”<sup>58</sup>

## **AFRICAN-AMERICAN WOMEN AND IP**

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<sup>55</sup> See Sonia K. Katyal, Performance, Property and the Slashing of Gender in Fan Fiction, 14 AM. U. J. GENDER SOC. POL’Y & L. 461 (2006).

<sup>56</sup> See Debora Halbert, Feminist Interpretations of Intellectual Property, 14 AMER. U.J. GENDER SOC. POL’Y & L. 431, 432 (2006).

<sup>57</sup> See Ann Bartow, Fair Use and the Fairer Sex: Gender, Feminism and Copyright Law, 14 AMER. U.J. GENDER SOC. POL’Y & L. 551, 557 (2006).

<sup>58</sup> See Rebecca Tushnet, My Fair Ladies: Sex, Gender and Fair Use in Copyright, 15 AM. U. J. GENDER & SOC. POL’Y & L. 273 303-305 (2007).

Throughout U.S. history, black women have borne the unique burden of being subordinated based on both race and gender. Critical race feminists “have highlighted the failure of mainstream civil rights and feminists paradigms alike to see the intersection of racism and sexism in hierarchies of power and in the experiences of women of color.”<sup>59</sup> Scholars examining race through a critical race feminist lens contend that “Black women experience a special kind of oppression...because of their dual racial and gender identity and their limited access to economic resources.”<sup>60</sup> An examination of black women involved in the criminal justice system in late eighteenth and 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.”<sup>61</sup> 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.”<sup>62</sup>

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.<sup>63</sup> Black women from slavery until well into the twentieth century were characterized in popular culture and literature “by stereotypical images of [either] the ham-fisted matriarch...[or] the amoral, instinctual slut.”<sup>64</sup> It is said that the

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<sup>59</sup> 100 Nw. U. L. REV., *supra*, note \_\_\_ at 65-66.

<sup>60</sup> See Jewel Amoah, Narrative: The Road to Black Feminist Theory, 12 BERK. WOMEN’S L.J. 84, 99 (1997) citing BEVERLY GUY-SHEFTALL, INTRODUCTION TO WORKS OF FIRE: AN ANTHOLOGY OF AFRICAN-AMERICAN FEMINIST THOUGHT 2 (1995).

<sup>61</sup> See e.g. Anne M. Butler, Still in Chains: Black Women in Western Prisons, 1865-1910 in MONROE LEE BILLINGTON AND ROGER D. HARDAWAY, AFRICAN-AMERICANS ON THE WESTERN FRONTIER 191-192 (1998) (noting that throughout the western frontier “burdened both by race and gender, juggled an uneasy relationship with western society”),

<sup>62</sup> See 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 BOST. COLL. THIRD WORLD L.J. 67, 71 (2002).

<sup>63</sup> See ROSALYN M. SCOTT, AND SO I SING: AFRICAN-AMERICAN DIVAS OF OPERA AND CONCERT 14-15 (1990).

<sup>64</sup> See Shereley Anne Williams, Foreword, THEIR EYES WERE WATCHING GOD, vii (1978).

“unifying theme underlying [stereotypes of black women] is one of deviance and worthlessness...”<sup>65</sup> Scholars have noted that the “great classic blues singers were women.”<sup>66</sup> It is said that over three-quarters of blues songs in earlier 1920’s were “written from a woman’s point of view.”<sup>67</sup> Thus it was women blues singers and their lyrics “who first brought blues into general notice in the United States.”<sup>68</sup>

### **TRADITIONAL KNOWLEDGE/INDIGENOUS PEOPLE’S AND INTELLECTUAL PROPERTY**

Similarly the debate over traditional knowledge, indigenous peoples and IP appropriation can provide insight into the dynamic of African-American cultural appropriation.<sup>69</sup> In the area of traditional knowledge (“TK”), asymmetries of power between the developed and the colonial or developing world in the ninetieth 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.”<sup>70</sup> 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.<sup>71</sup>

### **Conclusion**

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<sup>65</sup> See Margaret M. Russell, *Law as Legal Reelism: Black Women as Celluloid “Legal” Heroines in* MARTHA A. FINEMAN & MARTHA T. MCCLUSKEY, *FEMINISM, MEDIA AND THE LAW* 136 (1997).

<sup>66</sup> See LEROI JONES, *BLUES PEOPLE: THE NEGRO EXPERIENCE IN WHITE AMERICA AND THE MUSIC THAT DEVELOPED FROM IT*, 91-92 (1963).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> See e.g. Bryan Bachner, *Facing the Music: Traditional Knowledge and Copyright*, 12 No. 3 *Hum. Rts. Brief* 9 (2005) (noting that “‘traditional knowledge’ refers to indigenous and local community knowledge, innovations, and practices...often collectively owned and transmitted orally from generation to generation”).

<sup>70</sup> See e.g. 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).

<sup>71</sup> See Angela R. Riley, “Straight Stealing”: Towards an Indigenous System of Intellectual Property Protection, 80 *WASH. L. REV.* 69, 78 (2005).

Taken to together, critical race, feminist and internationalist critiques of IP have the potential to transform the way we think of IP protection in “democratic civil society”.

<sup>72</sup> 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 artist at the bottom of society, rather than multi-national conglomerates concentrated across IP industries.

The critical project to IP examination can also help us think about ways to achieve racial and gender equality, rather than reinforcing those social constructs through the dynamics of IP protection. IP is a social construct, just as race and gender are socially constructed, and IP is an entitlement, not a right that can 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.

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<sup>72</sup> CITE