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CRITICAL RACE IP[♦]

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^{**}Professor of Law at Ohio Northern University, Claude W. Pettit College of Law. We would like to thank the many people who generously provided their input on this this essay, including Maggie Chon, Lisa Ikemoto, Minh-Ha T. Pham, Rich Schur, and Darrel Wanzer-Serrano. We are grateful to research assistants, Brittney Ciarlo (ONU Law 2018) and Garrett Robinson (ONU Law 2019) for all of the help they provided and to Shelly Shockency for administrative assistance. The name Critical Race IP came out of a conversation that the authors and Laura Foster had at a writing retreat at Indiana University in the spring of 2014. The conference came to fruition after several attempts at funding, with multiple sets of colleagues. While we have worked with a number of individuals, this Article represents only the views of the authors. We do not speak for any of the individuals with whom we have collaborated. Any errors or omissions are our own. We are grateful for the community of extraordinary scholars that has expressed interest in and support for Critical Race IP as an intellectual project and subject of a conference for sharing their compelling and important ideas.

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ABSTRACT

In this Article, written on the heels of *Race + IP 2017*, a conference we co-organized with Amit Basole¹ and Jessica Silbey,² we propose and articulate a theoretical framework for an interdisciplinary movement that we call Critical Race Intellectual Property (Critical Race IP).³ Specifically, we argue that given trends toward maximalist intellectual property policy, it is now more important than ever to study the racial investments and implications of the laws of copyright, trademark, patent, right of publicity, trade secret, and unfair competition in a manner that draws upon Critical Race Theory (CRT). Situating our argument in a historical context, we articulate the provisional boundaries and core ideological commitments that define Critical Race IP, particularly in contrast with Critical Intellectual Property. After exploring the landscape of this developing area of study through its central themes, we draw upon scholarship on public feelings to demonstrate the importance of community building and intimacy-making practices in the growth of Critical Race IP. Public feelings are an implicit and often under-theorized aspect of intellectual property law that comes to the forefront in engagements with race and colonialism. We conclude with a discussion of Critical Race IP as decolonizing praxis that can aid in anti-racist and anti-colonial struggles.

Race enters writing and the making of art, as a structure of feeling, as something that structures feelings, that lays down tracks of affection and repulsion, rage and hurt, desire and ache. These tracks don't only occur in the making of art; they also occur (sometimes viciously, sometimes hazily) in the reception of creative work. Here we are again: we've made this thing and we've sent it out into the world for recognition—and because what we've made is in essence a field of human experience created for other humans, the field and its maker and its readers are thus subject all over again to race and its

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³ Anjali Vats, Deidré Keller, Amit Basole & Jessica Silbey, *RACE + IP*, <http://raceipconference.org/> (last visited Aug. 13, 2017); *see also infra* Introduction.

infiltrations. In that moment arise all sorts of possible hearings and mis-hearings, all kinds of address and redress.⁴

[I]ntimacy . . . involves an aspiration for a narrative about something shared, a story about both oneself and others that will turn out in a particular way. Usually, this story is set within zones of familiarity and comfort . . . animated by expressive and emancipating kinds of love. Yet the inwardness of the intimate is met by a corresponding publicness. People consent to trust their desire for ‘a life’ to institutions of intimacy; and it is hoped that the relations formed within those frames will turn out beautifully, lasting over the duration, perhaps across generations.⁵

INTRODUCTION

In April 2017, Boston College hosted the inaugural Race + IP conference.⁶ The collaborative work of an organizing committee consisting of the authors of this Article, Amit Basole, and Jessica Silbey,⁷ Race + IP 2017 brought together scholars from around the world and across disciplines for what the organizers intended to be generative discussions of issues and questions at the intersections of race, colonialism, and intellectual property.⁸ This is the first of what we hope will be many pieces prompted and informed by those discussions. In this piece, we explore and articulate the interdisciplinary movement of Critical Race Intellectual Property (Critical Race IP).⁹

Race + IP 2017 was the outcome of many years of thought, research, and discussion on the part of the authors, often in collaboration with other scholars—such as Laura Foster,¹⁰ Rayvon Fouché¹¹ and Lateef Mtima¹²—who work at the intersections of race

⁴ Claudia Rankine & Beth Loffreda, *On Whiteness and the Racial Imaginary*, LITERARY HUB (April 9, 2015), <https://lithub.com/on-whiteness-and-the-racial-imaginary>.

⁵ Lauren Berlant, *Intimacy: A Special Issue*, 24 CRITICAL INQUIRY 281 (1998).

⁶ Vats et al., *supra* note 3.

⁷ *Id.*

⁸ Anjali Vats, Deidre Keller, Amit Basole & Jessica Silbey, *Schedule*, RACE + IP, <http://raceipconference.org/conference-schedule/> (last visited Aug. 13, 2017).

⁹ Here, we take a page from Cultural Studies, which has been termed an “interdisciplinary movement” and a “network.” See Richard Johnson, *What Is Cultural Studies Anyway?*, 16 SOC. TEXT 38 (1986). Unlike many Cultural Studies scholars, we argue for “academic codification” in this Article. See Tony Bennett, *Cultural Studies: A Reluctant Discipline*, 12 CULTURAL STUD. 528, 533 (citing Johnson and noting, “The concerns that inform [Johnson] . . . and there are many [similar concerns expressed] in the literature—are clear enough. Cultural studies, having accused other humanities disciplines of ‘fixing’ knowledge into particular intellectual and institutional frameworks, must fight shy of both institutionalization and codification if it is not simply to become just another discipline of the kind it had earlier pitched itself against.”).

¹⁰ *Laura Foster*, IND. U. BLOOMINGTON, <https://genderstudies.indiana.edu/about/faculty/foster-laura.html> (last visited Oct. 9, 2017).

¹¹ *Rayvon Fouché*, PURDUE U.,

and intellectual property. We introduce Race + IP 2017 here to offer context for the conversations that are occurring in Critical Race IP. As in Critical Race Theory (CRT), histories of the interdisciplinary study of race, particularly those that center on scholars of color, are an important part of the intellectual project. Our work, therefore, both tells a story of a developing field of study and highlights the work of scholars in the area.¹³ Our aim is to examine the intersections and divergences among CRT, Critical Intellectual Property, and Critical Race IP. We begin, as we must, given that CRT is foundational to our enterprise, with a brief foray into that area.

Devon Carbado recently wrote an article entitled “Critical What What?” in which he traced one version of the genesis story, histories, boundaries, and future of CRT.¹⁴ He recounts:

When my colleagues and I proposed the establishment of a Critical Race Studies specialization at UCLA School of Law more than a decade ago, the only push back we got was over the name. Why Critical Race Studies? Why not Civil Rights? Race and the Law? Anti-Discrimination Studies? . . . [T]he episode suggested that there was something in and about the name. By any other name, our faculty meeting on the matter would have been considerably shorter. . . . This should not lead one to conclude that the ‘Critical what what?’ question is only about the name. The query is about the whatness (or, less charitably, the ‘there there’) of CRT as well. What is the genesis of CRT? What are the core ideas? What are its goals and aspirations? What intellectual work does the theory perform outside of legal discourse? What are the limitations of the theory? What is its future trajectory?¹⁵

As many scholars before us have argued, CRT is a rich, diverse, and nuanced interdisciplinary movement, bound together by shared tenets and goals related to the racial non-neutrality of law.¹⁶ Broadly speaking, CRT evolved as a response to Critical Legal Studies (CLS),¹⁷

https://cla.purdue.edu/academic/sis/directory/index.aspx?p=Rayvon_Fouch%C3%A9 (last visited Oct. 9, 2017).

¹² *Lateef Mtima*, HOW. U., <http://law.howard.edu/faculty-staff/lateef-mtima> (last visited Oct. 9, 2017).

¹³ As part of the Conference, we have been building a Critical Race IP reading list to offer an in-depth look at those works which define and inform the subfield. A copy of that list will be available at: *Critical Race IP Reading List*, www.raceipconference.org/readinglist (forthcoming 2018).

¹⁴ Devon W. Carbado, *Critical What What?*, 43 CONN. L. REV. 1593 (2011).

¹⁵ *Id.* at 1595.

¹⁶ See, e.g., Tara J. Yosso et al., *Critical Race Theory, Racial Microaggressions, and Campus Racial Climate for Latina/o Undergraduates*, 79 HARVARD EDUC. REV. 659 (2009).

¹⁷ See, e.g., Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas, *Introduction to CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* xxii (Kimberlé Crenshaw et al. eds., 1995); see also RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* (2d ed. 2012); Athena D. Mutua, *The Rise, Development and Future*

and it functions as a move to center questions of race and racialization, in intersectional ways, while CLS had focused primarily on class and power.¹⁸ At the same time, CRT aims to make progressive interventions in the existing law and scholarship of antidiscrimination, particularly while centering the voices of people of color.¹⁹

Over the last twenty-five years, CRT has grown from the project of a small group of scholars in legal academia to a transdisciplinary project for conceptualizing the many ways that state and cultural apparatuses protect the privileges of whiteness at the expense of people of color.²⁰ While always retaining its core identity as a critique of law in theory and practice, its intersectional, race-centered analysis informs the work of scholars across disciplines and defines the vocabulary of popular cultural social justice discussions.²¹ As Carbado stresses, it is imperative that “we conceptualize CRT as a verb,”²² as in the practice of critical race theorizing, reading it as a dynamic area of study with evolving meanings, boundaries, and scope. Just as CRT has evolved temporally, as we have moved from the post-Civil Rights era into the purported post-racial era,²³ it has also evolved in its content. As Francisco Valdes, Jerome McCristal Culp, and Angela P. Harris write about CRT at the turn of the century: “For a small band of scholars whose ideas are set out in multisyllabic words and who travel with armies of footnotes,

Directions of Critical Race Theory and Related Scholarship, 84 DENV. U. L. REV. 329, 356 (2006).

¹⁸ See, e.g., Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 STAN. L. REV. 1241 (1991).

¹⁹ *Id.*

²⁰ See, e.g., Arild Buanes & Svein Jentoft, *Building bridges: Institutional perspectives on interdisciplinarity*, 41 FUTURES 446 (2009); Imani Perry, *Cultural Studies, Critical Race Theory and Some Reflections on Methods*, 50 VILL. L. REV. 915 (2005). On transdisciplinarity generally, see Marilyn Stember, *Advancing the social sciences through the interdisciplinary enterprise*, 28 SOC. SCI. J. 1 (1991).

²¹ See, e.g., Christine Emba, *Intersectionality*, WASH. POST (Sept. 21, 2015), https://www.washingtonpost.com/news/in-theory/wp/2015/09/21/intersectionality-a-primer/?utm_term=.36cdd414474f (last visited Oct. 7, 2017) (“Over the past several years ‘intersectionality’ has become a feminist buzzword, deployed in discussions of pop culture, political action and academic debate. Considering its recent prominence, it’s surprising to realize that the term has been around only since 1989—it was coined by legal scholar and critical theorist Kimberlé Crenshaw, in a paper illustrating how black women were often marginalized by both feminist and anti-racist movements because their concerns did not fit comfortably within either group.”); see also Clare Foran, *Hillary Clinton’s Intersectional Politics*, ATLANTIC (Mar. 9, 2016), <https://www.theatlantic.com/politics/archive/2016/03/hillary-clinton-intersectionality/472872> (“Clinton’s invocation of intersectionality may also broaden popular understanding of the concept. In popular culture, it has been variously deployed. Intersectionality has been denounced by conservatives as a form of identity politics. Progressives, meanwhile, have used the term both to conceptualize identity and as a framework to broadly explain how different structural barriers operate simultaneously. Clinton is using the concept to denote an integrated approach to dealing with deeply-intertwined environmental, economic, and social problems.”).

²² Carbado, *supra* note 14, at 1602.

²³ See, e.g., Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589 (2009).

CRT has had, as noted at the outset, an extraordinary impact on popular as well as on legal discourse.”²⁴

We invoke Carbado’s work specifically to introduce another “Critical What What”—namely Critical Race IP.²⁵ Critical Race IP, as we define it, refers to the interdisciplinary movement of scholars connected by their focus on the racial and colonial non-neutrality of the laws of copyright, patent, trademark, right of publicity, trade secret, and unfair competition using principles informed by CRT.²⁶ The groundbreaking work of legal scholars such as Keith Aoki,²⁷ Rosemary Coombe,²⁸ Margaret Chon,²⁹ Kevin J. Greene,³⁰ Madhavi Sunder,³¹ Anupam Chander,³² Olufunmilayo Arewa,³³ Ruth Okediji,³⁴ and others³⁵ tackles questions regarding the racial and neo-colonial inequality that intellectual property law produces in contexts such as trade and development, music, film, and traditional knowledge (TK). We articulate a framework that reads these works together, as a body of scholarship with shared tenets about the racialized hierarchies inherent in IP law and its attendant ordering of knowledge. We do not mean to suggest that these scholars employ the same methods or make the same critiques, only that they are tied together by a set of assumptions about intellectual property law, including that it operates to protect the power

²⁴ Francisco Valdes, Jerome McCristal Culp & Angela P. Harris, *Introduction to CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 1* (Francisco Valdes et al. eds., 2002).

²⁵ We shy away from the perhaps obvious acronym “CrIP” because of the use of the term “crip” in the context of disability studies to reclaim the power of the differently-abled body. See, e.g., ROBERT MCRUER, *CRIP THEORY: CULTURAL SIGNS OF QUEERNESS AND DISABILITY* (2006).

²⁶ Anjali Vats, Deidré Keller, Amit Basole & Jessica Silbey, *CFP, RACE + IP*, <http://raceipconference.org/call-for-papers/> (last visited Aug. 13, 2017) (“Broadly considered, critical race IP brings together two strands of scholarship: critical race theory and IP. Scholarship in critical race IP, which engages a variety of topics and texts, focuses on questions which thematically examine the relationship between race and racial formation and the study of copyrights, trademarks, patents, rights of publicity and trade secrets. Issues such as the trademarking of #BlackLivesMatter, the creation of race-based patents, the deployment of rhetorics of piracy demonstrate that race and IP intersect in important and complex ways.”).

²⁷ See, e.g., Keith Aoki, *(Intellectual) Property and Sovereignty: Notes Toward a Cultural Geography of Authorship*, 48 STAN. L. REV. 1293 (1996).

²⁸ See, e.g., ROSEMARY J. COOMBE, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW* (1998).

²⁹ See, e.g., Margaret Chon, *Intellectual Property and the Development Divide*, 27 CARDOZO L. REV. 2821 (2006).

³⁰ See, e.g., K.J. Greene, “Copynorms,” *Black Cultural Production, and the Debate Over African-American Reparations*, 25 CARDOZO ARTS & ENT. L.J. 1179 (2008).

³¹ See, e.g., Madhavi Sunder, *IP³*, 59 STAN. L. REV. 257 (2006).

³² See, e.g., Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 CAL. L. REV. 1331 (2004).

³³ See, e.g., Olufunmilayo B. Arewa, *Copyright on Catfish Row: Musical Borrowing, Porgy and Bess, and Unfair Use*, 37 RUTGERS L.J. 277 (2006).

³⁴ See, e.g., Ruth L. Okediji, *Africa and the Global Intellectual Property System: Beyond the Agency Model*, 12 AFR. Y.B. INT’L L. 207 (2004).

³⁵ This list is not exhaustive, only exemplary. We have selected these works as representative of the type of race and intellectual property scholarship that confronts the hegemony of the law and economics framework and pushes for critiques of its assumptions and implications.

of whiteness and the Global North. We proceed by asking a series of questions about Critical Race IP, particularly related to its necessity, purpose, investments, scope, relationships to anti-racist and anti-colonial activism, and possible future directions.

What is Critical Race IP? Why is it necessary? Whose work does it build upon and whose work does it describe? How and where is it emerging? What are its central themes? Where are its boundaries? How might it inform the work of anti-racist and anti-colonialist activists? In asking these questions, we do not profess to assign scholars labels or dictate who may identify as a “Race IP Crit.”³⁶ Rather, our hope is to engage in a conversation about the area, its relationship to CRT and Critical IP, as well as its potential futures. We believe it is imperative to continue to consider the relationship between post-Fordism, the economic system marked by “flexible accumulation”³⁷ rather than standardized industrial mass production as a panacea for economic growth, and a means of reconstructing racial and neo-colonial hierarchies in the evolving contexts of intellectual property law.³⁸ We also believe, as Sunder argues in her scathing critique of the law and economics approach to intellectual property law, “law must facilitate the ability of all citizens, rich or poor, brown or white, man or woman, straight or gay, to participate in making knowledge of our world and to benefit materially from their cultural production.”³⁹

This article proceeds in four parts. In Part I, “Why Critical Race IP?”, we identify some historical contexts and motivating impulses behind Critical Race IP. We trace the sociopolitical and economic

³⁶ We use the term Race IP Crit to both invoke the notion of the Race Crit, i.e. a scholar who identifies as part of the CRT community, and highlight our addition of an intellectual property element to that critical race posture. For an example of the invocation of the term Race Crit, see Valdes et al., *supra* note 24 at 33.

³⁷ See Martha Macdonald, *Post-Fordism and the Flexibility Debate*, 36 *STUD. POL. ECON.* 177, 177 (1991) (“Essentially, the debate surrounding post-fordism/flexibility has to do with the way firms, industries and indeed national economies and world capitalism are restructuring in this era of technological change, heightened international competition and rapidly changing markets. Whereas the post-war period is characterized as one of mass production/consumption, planning, control and stability, the current age, it is argued, requires flexibility and rapid response to change by capital, and hence by labour.”); see also Bob Jessop, *Post-Fordism and the State*, in *COMPARATIVE WELFARE SYSTEMS: THE SCANDINAVIAN MODEL IN A PERIOD OF CHANGE* 165 (Bent Greve ed., 1996); E Schoenberger, *From Fordism to Flexible Accumulation: Technology, Competitive Strategies, and International Location*, 6 *ENV'T & PLAN. D: SOC'Y & SPACE* 245 (1988); see generally DAVID HARVEY, *THE CONDITION OF POSTMODERNITY: AN ENQUIRY INTO THE ORIGINS OF CULTURAL CHANGE* (1989) (discussion of postmodernism and the transition to post-Fordism); MICHEL AGLIETTA, *A THEORY OF CAPITALIST REGULATION: THE US EXPERIENCE* 122–30 (2000).

³⁸ See generally *POST-FORDISM: A READER* (Ash Amin ed., 200); Keith Aoki, *Considering Multiple and Overlapping Sovereignities: Liberalism, Libertarianism, National Sovereignty, “Global” Intellectual Property, and the Internet*, 5 *IND. J. GLOBAL LEGAL STUD.* 443, 457 (1998).

³⁹ See MADHAVI SUNDER, *FROM GOODS TO A GOOD LIFE: INTELLECTUAL PROPERTY AND GLOBAL JUSTICE* 23 (2012).

conditions that gave rise to the scholarship focusing on race, social justice, and intellectual property, as well as the reasons that articulating a Critical Race IP is increasingly important. A central focus of this section is exploring the relationship between CRT, Critical Race IP, and Critical IP, a field of study that John Tehranian defines as concerned with intellectual property law and power.⁴⁰ In parsing the relationships among those three areas, we turn to the debates which preceded and resulted in the emergence of CRT after the development of CLS in the 1970s and 1980s for context. Part II, “The What What of Critical Race IP,” explores some important themes in Critical Race IP, examining how scholars across disciplines read intellectual property’s lack of race neutrality and the tenets that inform their analyses. In particular, we explore how the “race” in Critical Race IP is both consonant with and diverges from the “race” in CRT. We also define “intellectual property,” the body of laws that Critical Race IP engages. Conversations at Race + IP 2017 come to the fore in this section as we locate some provisional boundaries of Critical Race IP as well as the its ideological commitments, which include reading across categories such as race, ethnicity, national identity, and neo-coloniality in intersectional ways in order to reveal intellectual property law’s racial investments in whiteness and continuing implications for racial (in)equality.

In Part III, “All We Have is Each Other: Community Building and Public Feelings in Critical Race IP,” we explore the role of community building in the development of the study of race and intellectual property. We draw upon CRT’s formative workshops and commitment to engagement with public feelings to consider the centrality of relationships in building new professional and public sensibilities around Critical Race IP. In short, we posit that a Critical Race IP lens can help create greater anti-racist and social justice consciousness, thus informing the work of scholars, practitioners, and activists.

Finally, Part IV, “Critical Race IP as Decolonizing Praxis,” investigates why and how the study of Critical Race IP can offer insights not only into addressing the racial bias of intellectual property law which informs systems of ownership, circulation, and distribution of knowledge, but also highlights new avenues for anti-racist and anti-colonial struggle.⁴¹ Crystallizing a set of tenets which define and

⁴⁰ See John Tehranian, *Towards a Critical IP Theory: Copyright, Consecration, and Control*, 2012 BYU L. REV. 1233, 1243–44 (2012) (“I refer to this body of work as ‘critical IP theory,’ which I loosely define as the deconstruction of trademark, copyright, and patent laws and norms in light of existing power relationships to better understand the role of intellectual property in both maintaining and perpetuating social hierarchy and subordination.”).

⁴¹ See, e.g., Bonita Lawrence & Enakshi Dua, *Decolonizing Anti-Racism*, 32 SOC. JUS. 120 (2005); see also Nandita Sharma & Cynthia Wright, *Decolonizing Resistance, Challenging Colonial States*, 35 SOC. JUS. 120 (2009). We are aware of the tensions between anti-racist and anti-colonial discourse. We do not intend to elide those tensions but do recognize that a full

animate Critical Race IP helps us to understand how some scholars approach the study of the complex connections between race and knowledge production, and how we might undo those racially inequitable connections. We close with a discussion of decolonizing Critical Race IP, asserting that theories and practices of decolonization are productive for thinking about new approaches to addressing issues of race and social justice in intellectual property.

I. WHY CRITICAL RACE IP

Neither infringement nor Copyright Wars are new phenomena. Their repeated themes stretch back hundreds of years.⁴² William Patry argues that the most recent Copyright Wars occurred in 1998, “when copyright owners obtained from Congress unprecedented rights to control access to and use of their works.”⁴³ With the radical changes brought by Betamax, VHS, the Internet, and Napster between the 1970s and 1990s, big content owners found themselves in deeply unfamiliar and rapidly shifting territory that impacted their core business models.⁴⁴ These technological developments which made copying, transforming, and remixing copyrighted and trademarked works easy for the average consumer fundamentally threatened the profits of entertainment industries that had previously held near monopolies on production and distribution in their respective markets.⁴⁵ Similarly, technological changes ushered in by the era of biotechnology demanded legal and cultural responses.⁴⁶ Negotiating the Agreement on Trade-Related Aspects of Intellectual Property Rights in 1994 (TRIPS Agreement)

engagement with those tensions is beyond the scope of this piece. Instead, we are intentionally seeking to articulate Critical Race IP as a space in which racialized and colonized persons can capitalize upon opportunities for solidarity. See discussion *infra* Part II.A, Part IV. On the potential for such solidarity in other contexts, see, e.g., Rubén A. Gaztambide-Fernández, *Decolonization and the pedagogies of solidarity*, 1 DECOLONIZATION: INDIGENEITY, EDUC. & SOC’Y 41 (2012).

⁴² See WILLIAM PATRY, *MORAL PANICS AND THE COPYRIGHT WARS* (2009); see also ADRIAN JOHNS, *PIRACY: THE INTELLECTUAL PROPERTY WARS FROM GUTENBERG TO GATES* (2010); PETER BALDWIN, *THE COPYRIGHT WARS: THREE CENTURIES OF TRANS-ATLANTIC BATTLE* (2014).

⁴³ See PATRY, *supra* note 42, at xix.

⁴⁴ See, e.g., *id.* at 8–9 (“Due to their push mentality, the copyright industries view the entirety of copyright as unidirectional: the public is a passive participant, whose role is simply to pay copyright owners, or stop using copyrighted works. As we shall now see, the record industry’s fanatical attachment to push marketing led them to miss and early and perhaps their best chance to take advantage of Internet pull marketing and to eliminate in the process a great deal of unauthorized file-sharing.”).

⁴⁵ See generally Mary L. Mills, *New Technology and the Limitations of Copyright Law: An Argument for Finding Alternatives to Copyright Legislation in an Era of Rapid Technological Change*, 65 CHI.-KENT. L. REV. 307 (1989); Ben Depoorter, *Technology and Uncertainty: The Shaping Effect on Copyright Law*, 157 U. PA. L. REV. 1831 (2009).

⁴⁶ See generally Robert Cook-Deegan & Christopher Heaney, *Patents in Genomics and Human Genetics*, 11 ANN. REV. GENOMICS & HUM. GENETICS 383 (2010).

created an unprecedented global intellectual property regime,⁴⁷ compliance with which was encouraged, through more and less coercive means.⁴⁸ Mark Getty of Getty Images,⁴⁹ proclaimed that intellectual property is “the oil of the twenty-first century.”⁵⁰ Though the accuracy of this statement is debatable,⁵¹ the argument for protecting that “oil” gathered (maximalist) steam.⁵² The global public response to these expansions of intellectual property rights was considerable. Pressure for free and open culture,⁵³ critiques of biopiracy,⁵⁴ adusting and culture jamming campaigns,⁵⁵ and large scale protests⁵⁶ were some of the ways people pushed back against the rise of intellectual property maximalism.

The economic conditions ushered in by the rise of the post-Fordist economy not only transformed intellectual property into an increasingly “precious commodit[y],”⁵⁷—one which legal scholars almost exclusively theorized through the lens of law and economics⁵⁸—they

⁴⁷ See, e.g., Donald P. Harris, *TRIPS' Rebound: An Historical Analysis of How the TRIPS Agreement Can Ricochet Back Against the United States*, 25 NW. J. INT'L L. & BUS. 99, 104 (2004) (citation omitted) (“TRIPS has been hailed as ‘the most far reaching and comprehensive legal regime ever concluded at the multinational level in the area of intellectual property rights.’”); Charles R. McManis, *Intellectual Property and International Mergers and Acquisitions*, 66 U. CIN. L. REV. 1283 (1998); Martin J. Adelman & Sonia Baldia, *Prospects and Limits of the Patent Provision in the TRIPS Agreement: The Case of India*, 29 VAND. J. TRANSNAT'L L. 507 (1996).

⁴⁸ Ruth L. Okediji, *Legal Innovation in International Intellectual Property Relations: Revisiting Twenty-One Years of the TRIPS Agreement*, 36 U. PA. J. INT'L L. 191, 191–92 (citations omitted) (“Built on the cornerstone of the ‘Great Conventions’ the World Trade Organization’s (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) profoundly altered the nature, scope, and economic consequences of international intellectual property regulation.”).

⁴⁹ *About Us*, GETTY IMAGES, <http://press.gettyimages.com/about-us/> (last visited Oct. 9, 2017) (describing Getty Images as “among the world’s leading creators and distributors of award-winning still imagery, video, music and multimedia products.”).

⁵⁰ See *Blood and oil*, ECONOMIST (Mar. 2, 2000), <http://www.economist.com/node/288515#print>.

⁵¹ See Bruce Sterling, *The Oil of the 21st Century Is, Uh, Oil*, WIRED (Oct. 31, 2007, 7:19 AM), <https://www.wired.com/2007/10/the-oil-of-the/>.

⁵² See, e.g., Susan K. Sell, *TRIPS Was Never Enough: Vertical Forum Shifting, FTAS, ACTA, and TTP*, 18 J. INTELL. PROP. L. 447 (2011).

⁵³ LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* (2004).

⁵⁴ VANDANA SHIVA, *BIOPIRACY: THE PLUNDER OF NATURE AND KNOWLEDGE* (1997); Olufunmilayo B. Arewa, *Piracy, Biopiracy and Borrowing: Culture, Cultural Heritage and the Globalization of Intellectual Property*, (Case Research Paper Series in Legal Studies, Working Paper No. 04-19, 2006), <http://ssrn.com/abstract=596921>.

⁵⁵ See NAOMI KLEIN, *NO LOGO: TAKING AIM AT THE BRAND BULLIES* (Picador 2000); see also CHRISTINE HAROLD, *OURSPACE: RESISTING THE CORPORATE CONTROL OF CULTURE* (2007).

⁵⁶ *WTO History Project*, <https://depts.washington.edu/wtohist/> (last visited Aug. 13, 2017).

⁵⁷ Michael Mukasey, Attorney Gen., Remarks Prepared for Delivery by Attorney General Michael B. Mukasey at the Tech. Museum of Innovation (Mar. 28, 2008), https://www.justice.gov/archive/ag/speeches/2008/ag_speech_080328.html.

⁵⁸ See, e.g., William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J. L. & ECON. 265 (1987); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL. STUD. 325 (1989); Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 1084 (1997); Peter S. Menell, *Intellectual Property: General Theories*, in *ENCYCLOPEDIA OF LAW & ECONOMICS*

also marked an evolution in the racialized approaches to handling knowledge produced by people of color. We therefore situate the rise of intellectual property maximalism and “information feudalism”⁵⁹ through the lenses of racial capitalism and neoliberalism, both of which are helpful in making race visible in a legal regime which purports to regulate knowledge production in race neutral ways. In invoking the term racial capitalism,⁶⁰ we refer to the work of Cedric Robinson to understand how intellectual property’s economic structure is “always already” raced.⁶¹ As Robinson writes, “The historical development of world capitalism was influenced in a most fundamental way by the particularistic forces of racism and nationalism.”⁶² He continues:

Racialism . . . ran deep in the bowels of Western culture, negating its varying social relations of production and distorting their inherent contradictions. The comprehension of the particular configuration of racist ideology and Western culture has to be pursued historically through successive eras of violent domination and social extraction that directly involved European peoples during the better part of two millennia. Racialism insinuated not only medieval, feudal, and capitalist social structures, forms of property, and modes of production, but as well the very values and traditions of consciousness through which the peoples of these ages came to understand their worlds and their experiences.⁶³

In essence, capitalism—an enterprise racialized at its core and inception⁶⁴—progressed in ways which magnified and exacerbated the

1600 129 (Boudewijn Bouckaert & Gerrit De Geest, eds. 2000).

⁵⁹ PETER DRAHOS WITH JOHN BRAITHWAITE, INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY? (2007).

⁶⁰ CEDRIC J. ROBINSON, BLACK MARXISM: THE MAKING OF THE BLACK RADICAL TRADITION 9 (2000). While we are aware of Nancy Leong’s article, *Racial Capitalism*, 126 Harv. L. Rev. 2151 (2013), we choose here to return to Robinson, whose work predates Leong’s and began a long conversation about the relationship between radical Blackness and Marxism. His groundbreaking work is being taken up in contemporary contexts today in ways we believe should be centered in thinking about intellectual property in particular.

⁶¹ Here, we call upon Louis Althusser’s discussion of interpellation of subjects, to argue that intellectual property law does not simply hail subjects but *racial subjects* under its racialized understandings of knowledge production, protection, and circulation. See LOUIS ALTHUSSER, LENIN AND PHILOSOPHY AND OTHER ESSAYS (2001); see also, RACE, LAW AND SOCIETY (Ian Haney López ed., 2007) (invoking Althusser in explaining the hailing of racial subjects).

⁶² For a discussion of neoliberalism, see DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM (2007). In a recent interview in the *Jacobin*, Harvey explains: “I’ve always treated neoliberalism as a political project carried out by the corporate capitalist class as they felt intensely threatened both politically and economically towards the end of the 1960s into the 1970s. They desperately wanted to launch a political project that would curb the power of labor.” Bjarke Skaerlund Risager, *Neoliberalism is a Political Project: An Interview with David Harvey*, THE JACOBIN (July 23, 2016), <https://www.jacobinmag.com/2016/07/david-harvey-neoliberalism-capitalism-labor-crisis-resistance/>.

⁶³ ROBINSON, *supra* note 60, at 66.

⁶⁴ See, e.g., EDWARD E. BAPTIST, THE HALF HAS NEVER BEEN TOLD: SLAVERY AND THE REMAKING OF AMERICAN CAPITALISM (2014).

racialization of intellectual property economies. The connection between race and intellectual property is certainly not new, but it has evolved with the coincident ascendance of the technology economy and intellectual property maximalism. We are not attempting to articulate the master narrative of race and intellectual property. Nor do we intend a comprehensive history of the decades before Critical Race IP scholarship began to take root. Rather, we wish to narrate, in broad strokes, an unfolding of events in which race, capitalism, and intellectual property set the stage for Critical Race IP, whose name and characteristic themes we elaborate upon in Part II of this article.

A. *The Rise of the Intellectual Property Economy*

Ash Amin writes that “there is an emerging consensus in the social sciences that the period since the mid-1970s represents a transition from one distinct phase of capitalist development to a new phase.”⁶⁵ Whether described as “post-Fordism,” “post-industrialism,” “post-modernism,” or any number of other terms, the new phase of capitalism,⁶⁶ with its neoliberal characteristics, ideological rejection of industrial production as the primary engine for the US economy, embrace of flexible labor, and trade in knowledge is one that encourages the creation, protection, and valuation of intellectual properties.⁶⁷ In the post-Fordist world,

⁶⁵ Ash Amin, *Introduction*, in POST-FORDISM: A READER, *supra* note 38, at 1.

⁶⁶ *Id.*

⁶⁷ See, e.g., W. Ron Gard & Elizabeth Townsend Gard, *The Present (User-Generated Crisis) Is the Past (1909 Copyright Act): An Essay Theorizing the “Traditional Contours of Copyright” Language*, 28 CARDOZO ARTS & ENT. L.J. 455, 481–82 (2011) (emphasis added) (footnotes omitted) (citations omitted):

The fissures that appeared in the system in these postwar decades by the early 1970s became full ruptures, and quite quickly the modernist economic configuration of Fordism gave way. Since that time a new configuration has been emergent, a postmodernist, post-Fordist configuration some have termed ‘flexible accumulation’ but is more commonly recognized by the general term ‘globalization.’ In this period, production and consumption of goods has continued to expand even as they have become ever more adaptable, drawing more and more parts of the world into the market system, while the major bases of manufacturing have been relocated to cheaper labor markets around the globe. Labor in the United States in particular, but also in other fully-developed industrialized nations, increasingly has become *information and service sector based*, while the cultural experience in these countries increasingly has become one of consumption. The manufacture of goods occurs almost invisibly and the appearance of those goods infinitely arrayed on store shelves seems to happen almost magically. . . . [T]he cultural experience of dematerialization presently felt in some locations is the result of the global system’s spatial configuration and distribution of production and consumption. There is no question that more material goods than ever before are being produced. While clear distinctions between Fordist and post-Fordist economic configurations can be drawn, *both recognizably are spatio-temporal formations organized to manage mass production*, and, as such, can be traced back to the transformations at the end of the nineteenth century when these activities were initiated. There is little doubt that the individual experience of cultural change occurring at the end of the nineteenth century must have been profound. The spatial redistribution of cultural activities coupled with the sudden and growing pervasiveness

America became a net *exporter* of information for the first time in its existence, as it shifted from a manufacturing-based to an information-based economy.⁶⁸

Accelerating pushes for privatization and deregulation in the 1980s implicated intellectual property as well as its theoretical opposite, the public domain. As the desire to own information increased, so too did conflicts over the scope and contents of the public domain. In their 2002 book, *Information Feudalism: Who Owns the Knowledge Economy?*, Peter Drahos and John Braithwaite articulate the competing considerations as represented by distinct constituencies: “visionaries and entrepreneurs who . . . want ever stronger and more rigorously policed international standards of intellectual property” and those who recognize that “[c]opying and imitation are central to our processes of learning and the acquisition of skills. . . . The creator of innovation is also always the borrower of ideas and information from others.”⁶⁹ They further argue that the move towards more and stronger intellectual property protection has resulted in a “transfer of knowledge assets from the intellectual commons into private hands.”⁷⁰ In essence, we have entered the era of the mass privatization of knowledge, an era in which information is increasingly treated as an excludable good with the characteristics of real property and all too often managed by unregulated markets.

Part of what motivated and continues to inspire the insistence upon increasingly more IP protection is technological development. As Jessica Litman and Jane Ginsburg note in the copyright context, this assertion of the need for expanded IP protection in light of technological advancement is not new.⁷¹ In fact, that assertion continues apace with

of material goods must have naturally led to a manifestation of value that was intricately bound up with material qualities. However, as subsequent historical spatial configurations through the twentieth century and up to the present show, what ultimately proves more fundamental than the material state of culture, even as material elements remain significant and influential, is a society’s exchange practices, or its manner of circulation.

See Aoki, *supra* note 27.

⁶⁸ See David Nimmer, *The Impact of Berne on United States Copyright Law*, 8 CARDOZO ARTS & ENT. L.J. 27 (1989).

⁶⁹ DRAHOS WITH BRAITHWAITE, *supra* note 59, at 2. Note that Drahos and Braithwaite are conflating authors with copyright owners. While they are in great company in doing so, this conflation is often quite problematic. See Deidré A. Keller, *Copyright to the Rescue: Should Copyright Protect Privacy?*, 20 UCLA J.L. & TECH. 1 (2016).

⁷⁰ DRAHOS WITH BRAITHWAITE, *supra* note 59, at 2–3.

⁷¹ Jane C. Ginsburg, *How Copyright Got a Bad Name For Itself*, 26 COLUM. J. L. & ARTS 61, 65–66 (2002) (reviewing JESSICA LITMAN, *DIGITAL COPYRIGHT* (2001)); *id.* (footnotes omitted) (“The self-destructive dance between copyright owners and technology entrepreneurs is hardly new, as developments from piano rolls to videotape recorders attest. Nor is today’s invective significantly more strident, as even a glance at the legislative history of the 1909 Act mechanical license, or recollection of the furor over the Betamax, demonstrate.”).

technological advancement.⁷² In the 1980s, this phenomenon of demanding intellectual property protection in response to a technological advancement was front and center in *Sony Corp. of America v. Universal City Studios, Inc.*⁷³ As such, James Lardner, the journalist who wrote the definitive book on the history of *Sony*,⁷⁴ dubbed the legal wrangling over the legality of Betamax the “VCR Wars.”⁷⁵ In the thirty years since the VCR Wars, much legal scholarship has been written about *Sony*, both on its specific deficiencies and the larger extent to which the law ought to change in response to specific technological advancements.⁷⁶ These critiques notwithstanding, the law

⁷² *Id.* at 66.

I think that recent years’ evolution, from the unfortunate lawsuit seeking to bar sales of the ‘Rio’ portable MP3 player, to the misguided Hollings bill that would mandate anticopying technology for consumer electronics, offers more of the same. It suggests that some copyright owners, if not paranoid, are Pavlovian in their response to new means of making copies or communicating works. I don’t mean to say that no copyright-owning dog can learn new tricks, but neither do many copyright owners, particularly the larger ones, appear to be leaping to unleash these technologies’ potential. In this debate, appearance counts a lot; and, whatever their conduct in fact, many copyright owners appear—or are portrayed by some vigorous detractors in the academy and in the popular press—as hell-bent on stomping out both new technology and the scientists and entrepreneurs behind it.

Id. See also Robert P. Merges, *One Hundred Years of Solicitude: Intellectual Property Law, 1900-2000*, 88 CAL. L. REV. 2187, 2189–90 (2000) (“Each successive wave of new technology was, we were told, so different, so challenging, so fundamentally new, that this body of law had better adapt, and quick, or become obsolete.”).

⁷³ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

⁷⁴ Jessica Litman, *The Sony Paradox*, 55 CASE W. RES. L. REV. 917, 922 (2005).

⁷⁵ See JAMES LARDNER, *FAST FORWARD: HOLLYWOOD, THE JAPANESE AND THE VCR WARS* (1987); see also PETER DECHERNEY, *HOLLYWOOD’S COPYRIGHT WARS: FROM EDISON TO THE INTERNET* (2012).

⁷⁶ As to the former, see, e.g., Peter S. Menell & David Nimmer, *Unwinding Sony*, 95 CAL. L. REV. 941, 943–44 (2007) (emphasis omitted) (footnotes omitted) (citations omitted).

Although *Sony* was the first Supreme Court decision to interpret the 1976 Copyright Act, it cited neither the statute nor legislative history to delineate the scope of contributory liability. Rather, on the basis of what it asserted as a ‘historic kinship between the patent and copyright law,’ the Court engrafted an express provision from the Patent Act of 1952 onto the Copyright Act of 1976. The provision, section 271(e) of the Patent Act, provides that ‘whoever offers to sell or sells within the United States . . . a material part of the [patented] invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use, shall be liable as a contributory infringer.’ Given that the comprehensive reform of the Copyright Act of 1976 was the result of nearly two decades of deliberation, it seems astonishing for the ‘Magna Carta for the technology age’ to be rooted not in that voluminous history but instead handed down in a contemporaneous judicial decision. When Congress adopted the Copyright Act, it could have easily turned to the 1952 Patent Act, where ‘both the concept of infringement and the concept of contributory infringement are expressly defined by statute.’ Instead, the legislative history of the Copyright Act reveals that Congress rooted its considerations regarding contributory infringement elsewhere. This Article reveals why the Court chose that unconventional path and thereby places the *Sony* precedent in its proper legislative and jurisprudential perspective.

Id. Regarding the latter, see, e.g., Merges, *supra* note 72, at 2190 (“Detailed, technology-specific amendments thus thwart, to some extent, the quasi-common-law process by which IP law is

has indeed changed quite a bit to accommodate changes in technology over those thirty years.⁷⁷ Sheila Jasanoff's theorization of "interactional coproduction"⁷⁸ is useful in conceptualizing the mutually constitutive relationship between technology and intellectual property law. Writing in the context of Science and Technology Studies, Jasanoff proposes that epistemological approaches to technology emerge through an interactional relationship with institutional and cultural knowledge.⁷⁹ She argues, "scientific ideas and beliefs, and (often) associated technological artifacts, evolve together with the *representations, identities, discourses, and institutions* that give practical effect and meaning to ideas and objects."⁸⁰ We can read Jasanoff's framework more broadly to understand how intellectual property law, technology, and race coproduce one another and facilitate the development of new forms of biopolitics.⁸¹ In other words, intellectual property law's orientation to technology shapes and is shaped by structures of race and capitalism in a way that informs state management over life and bodies.

Perhaps the most striking change to copyright law since the Supreme Court's decision in *Sony* is the Digital Millennium Copyright Act of 1998 ("DMCA"), which David Nimmer goes so far as to call "nonsense on stilts."⁸² It may also be fairly characterized as the most immediate and consequential change to copyright law in the United States to be specifically spurred by a particular technological advancement—the Internet.⁸³ In the nearly two decades since the passage of the DMCA, many IP scholars have criticized it.⁸⁴ The primary critique of the DMCA has been that it curtails fair use and thereby infringes upon the First Amendment rights of users.⁸⁵ Though

elaborated. The recent erosion of what might be termed 'legislative slack' is hardly surprising. Much more money is at stake in IP legislation than in the past. With higher stakes comes greater desire to nail down the details of protection—and greater reluctance to leave important issues to the courts. Economic theory and common sense both predict as much: more specific, highly elaborated property rights are worth lobbying for when the assets they cover are more valuable."

⁷⁷ See generally David Nimmer, *Codifying Copyright Comprehensibly*, 51 UCLA L. REV. 1233, 1242 (2004) for a discussion of those technological changes.

⁷⁸ Sheila Jasanoff, *Ordering Knowledge, ordering society*, in STATES OF KNOWLEDGE 13 (Sheila Jasanoff ed. 2004).

⁷⁹ *Id.*

⁸⁰ *Co-Production*, SHEILA JASANOFF, <http://sheilajasanoff.org/research/co-production> (last visited Oct. 9, 2017)(emphasis in original).

⁸¹ See, generally, MICHEL FOUCAULT, THE BIRTH OF BIOPOLITICS: LECTURES AT THE COLLEGE DE FRANCE 1978-79 (ed. Michel Senellart, et. al. 2004).

⁸² Nimmer, *supra* note 77, at 1342 (citation omitted). New dot coms like Google, Amazon, and Facebook also changed the face of American capitalism. However, given the historical period we are highlighting here, i.e., the 1970s through the 1990s, we have left the intellectual property issues that their business models raise for another day.

⁸³ *Id.* at 1375 ("With such sorry results, it is useful to reflect on the exigency that compelled Congress to adopt the Digital Millennium Copyright Act. The Internet was then very much on Congress' mind.")

⁸⁴ See, e.g., *id.*

⁸⁵ See generally Marc J. Randazza, *Lenz v. Universal: A Call to Reform Section 512(f) of the*

there have been some instances in which courts refused to recognize new or broader IP rights,⁸⁶ the trend has definitely been towards more expansive IP protection.⁸⁷

Similar trends are evident in other areas of intellectual property law. As copyright protection was expanding through legislation such as the DMCA, trademarks were becoming increasingly important in the negotiation of identity. Rosemary Coombe notes the role of trademarks in identity formation as well as national identity formation. She writes, referring to Michael Warner's work on public spheres, "we have brand names all over us.' Trademarks, [Warner] suggests, are constitutive parts of a public sphere—constructing a common discourse to bind the subject to the nation and to its markets."⁸⁸ With the acceleration of globalization and the rise of free trade, brands became increasingly valuable commodities separate from the products that they marked. Benjamin Barber's concept of "McWorld" describes globalization's tendency to produce interconnected markets, notably markets in which trademarked products can circulate. As he notes, companies such as Nike, Microsoft, Apple, and Genentech, all of which grew considerably in the 1970s and 1980s, "represent a new form of economic power."⁸⁹ The structural changes associated with neoliberal capitalism, including President Ronald Reagan's moves toward deregulation, criminalization, and stronger trademark and copyright laws, ushered in, as Naomi Klein contends, a new era of "trademark harassment."⁹⁰ The "cultural and linguistic privatization"⁹¹ of the moment fueled the move to a contemporary age in which brands are valuable commodities even apart from the products to which they are attached. Notably, Reagan signed the Trademark Counterfeiting Act of 1984 which was an early, though relatively narrow, step toward criminalizing intellectual property violations.⁹² One 1984 law review article proclaimed: "Commercial trademark counterfeiting in the United States is a problem which threatens to go out of control."⁹³ Claims such as this one fueled maximalist trademark and unfair competition policy by asserting that

DMCA and to Strengthen Fair Use, 18 VAND. J. ENT. & TECH. L. 743 (2016).

⁸⁶ See, e.g., *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519 (2013).

⁸⁷ DEBORA J. HALBERT, *THE STATE OF COPYRIGHT: THE COMPLEX RELATIONSHIPS OF CULTURAL CREATION IN A GLOBALIZED WORLD* (2014).

⁸⁸ Rosemary J. Coombe, *Marking Difference in American Commerce: Trademarks and Alterity at Century's End*, 19 POL. & LEGAL ANTHROPOLOGY REV. 105, 105 (1996) (In an early commentary on the connections between trademark and race, Coombe notes that "[s]uch legal forms always invite encounters with alterity.").

⁸⁹ BENJAMIN R. BARBER, *JIHAD VS. MCWORLD* 54 (2001).

⁹⁰ Klein, *supra* note 55, at 177.

⁹¹ *Id.*

⁹² Trademark Counterfeiting Act of 1984, 18 U.S.C. § 2320 (2012).

⁹³ Robert J. Abalos, *Commercial Trademark Counterfeiting in the United States, the Third World and Beyond: American and International Attempts to Stem the Tide*, 5 B.C. THIRD WORLD L.J. 151, 151 (1985) (footnotes omitted).

the status quo constituted under-protection.⁹⁴

In the context of patent law, new scientific discoveries and globalization, especially after the negotiation of TRIPS in the mid-1990s, drove the extraction of potentially valuable biological resources for the development of new drugs, often from the developing world, and experimentation with gene therapies.⁹⁵ Cases such as *Diamond v. Chakrabarty*⁹⁶ and *Moore v. Regents of the University of California*⁹⁷ paved the way for the private ownership of biological materials.⁹⁸ As biotechnology flourished, courts applying *Chakrabarty* found and continue to find plants, genetically modified mammals, and certain types of genetic material to be patentable subject matter.⁹⁹ The pushback against the monetization of such materials was and remains tremendous. Critiques of biopiracy¹⁰⁰ and the exploitation of individuals' biological material for monetary gain have continued to gain traction even today.¹⁰¹

The push for more protection and related critiques extended to other areas of intellectual property law, such as rights of publicity and trade secrets, as well.¹⁰² The move toward intellectual property maximalism across bodies of law prompted urgent questions about the

⁹⁴ *Id.* For a general discussion of maximalist trademark policy, see, e.g., Coombe, *supra* note 88; Klein, *supra* note 55.

⁹⁵ See, e.g., CARLOS M. CORREA, INTELLECTUAL PROPERTY RIGHTS, THE WTO AND DEVELOPING COUNTRIES: THE TRIPS AGREEMENT AND POLICY OPTIONS (2000).

⁹⁶ *Diamond v. Chakrabarty*, 447 U.S. 303 (1980).

⁹⁷ *Moore v. Regents of Univ. of Cal.*, 793 P.2d 479 (Cal. 1990).

⁹⁸ For a brief discussion of ownership in biological and genetic materials, see, e.g., Osagie K. Obasogie, *Your Body, Their Property*, BOS. REV. (Sept. 30, 2013), <http://bostonreview.net/us/obasogie-gene-patent-myriad-moore>.

⁹⁹ For a general overview of these developments, see Jane M. Marcinişzyn, *What Has Happened Since Chakrabarty?*, 2 J.L. & HEALTH 141 (1988). For the patentability of plants and animals, see Ryan M.T. Iwasaka, Note, *From Chakrabarty to Chimeras: The Growing Need for Evolutionary Biology in Patent Law*, 109 YALE L.J. 1505 (2000); see also *Ass'n for Molecular Pathology v. Myriad Genetics, Inc.*, 569 U.S. 576 (2013) (Supreme Court faced the question of whether human genes are patentable and held that isolated DNA is not patentable subject matter while synthetically-created DNA is patent eligible.).

¹⁰⁰ Shiva, *supra* note 54.

¹⁰¹ Joseph M. Healy, Jr. & Kara L. Dowling, *Controlling Conflicts of Interest in the Doctor-Patient Relationship: Lessons from Moore v. Regents of the University of California*, 42 MERCER L. REV. 989, 990 (1991) (observing that "it is impossible to overlook the extent to which medicine, once viewed respectfully as an artful science, has assumed the characteristics of a business and, as a consequence, finds itself increasingly under the critical scrutiny of its customers and its regulators.").

¹⁰² Vanna White sued Samsung claiming their commercial depicting a robot wearing a wig and a dress and posed beside a Wheel of Fortune board infringed upon her right of publicity. The Ninth Circuit's decision denying Samsung summary judgment has been read as expanding the scope of intellectual property law considerably, through protection of property rights in evoking a particular celebrity. *White v. Samsung Elecs. Am.*, 989 F.2d 1512 (9th Cir. 1993); see, e.g., Arlen W. Langvardt, *The Troubling Implications of a Right of Publicity "Wheel" Spun Out of Control*, 45 KAN. L. REV. 329 (1997); see also Rosemary J. Coombe, *The Celebrity Image and Cultural Identity: Publicity Rights and the Subaltern Politics of Gender*, 14 DISCOURSE 59 (1992), for a discussion of celebrity and property rights.

relationship between intellectual properties, race, and inequality, including the extent to which copyright, trademark, patent, right of publicity, trade secret, and unfair competition law shape racial categories and operate as potential sites for renegotiating racial power relations. If Drahos and Brathwaite are right in arguing that we are steadily moving toward a situation in which relatively few global conglomerates are in possession of the vast majority of the intellectual property resources,¹⁰³ then there is no question that we are also moving toward the further marginalization of those who are currently situated at the edges of the intellectual property system. Scholars considering the power hierarchies inherent in intellectual property regimes formed the core of Critical IP literature. In the next section, we contextualize those scholars within the larger Critical Legal Studies movement.

B. *From CLS to Critical IP*

In 1982, Margaret Jane Radin, in a landmark piece entitled “Property and Personhood,” made the argument that fully-realized personhood requires access to and control over at least some “personal property.”¹⁰⁴ Her Hegelian argument offers a rights-based justification for ensuring the stability and security of property that is integral to personhood.¹⁰⁵ Radin’s argument is an appropriate place to begin because it engages and informs many of the themes that emerged in the 1970s and 1980s in the areas of CLS, Feminist Jurisprudence, and CRT, including how law might become a more economically and socially just enterprise.¹⁰⁶ Specifically, the interrogation of property as both a *cultural* and *racial* construct formed the backbone of the scholarly innovations that followed years later in the area of Critical Race IP. Revealing possibilities for reinterpreting property paved the way for new and radical claims about rethinking and remaking intellectual property.¹⁰⁷ Around the same time as Radin published her

¹⁰³ DRAHOS WITH BRATHWAITE, *supra* note 59, at 3 (“These hands belong to media conglomerates and integrated life sciences corporations rather than individual scientists and authors. The effect of this, we argue, is to raise levels of private monopolistic power to dangerous global heights, at a time when states, which have been weakened by the forces of globalization, have less capacity to protect their citizens from the consequences of the exercise of this power.”).

¹⁰⁴ Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

¹⁰⁵ *Id.*

¹⁰⁶ Because the categories of CLS, Feminist Jurisprudence, and CRT are often overlapping, we use one footnote here. Radin’s *Property and Personhood* has been cited, according to Google Scholar, 2,018 times as of May 12, 2018 at 11:58 P.M. Some of those landmark pieces which engage her work in order to get at questions of equity, justice, gender, and race in law include: CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (reprt. ed. 1991); CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (9th prt. 1994); Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 323, 400 (1987).

¹⁰⁷ See, e.g., Paul K. Saint-Amour, *Your Right to What’s Mine: On Personal Intellectual*

groundbreaking work, CLS and civil rights scholars were facing considerable critique from a subset of scholars interested specifically in the racial hierarchies embedded in the law and in pushing civil rights discourse in a more progressive direction. These contentions would form the basis of the Critical Race Theory movement.

CRT, according to Kimberlé Crenshaw, Neil Gotanda, Gary Peller, and Kendall Thomas, “embraces a movement of left scholars, most of them scholars of color, situated in law schools, whose work challenges the ways in which race and racial power are constructed and represented in American legal culture and, more generally, in American society as a whole.”¹⁰⁸ CRT emerged from critiques of the Civil Rights Movement and its rights-based approach to equality in the United States.¹⁰⁹ While CLS was making many important interventions in the areas of class and power, many found its analysis of race to be inadequate. Scholars particularly interested in questions of racial hierarchy, who had been attending CLS meetings, began to meet independently of CLS and articulate a progressive legal perspective that centered race as a necessary and important starting point for inquiries into inequality.¹¹⁰ Those early meetings were the beginning of what would become CRT. It did not take long for first generation CRT scholars to turn to questions of intellectual property.¹¹¹

Rosemary Coombe, who had been developing a framework for studying the intersections between culture and intellectual property, often in the context of race, became one of the first scholars to focus attention on the racial and colonial dimensions of copyrights and trademarks.¹¹² Then, in 1996, Keith Aoki authored a piece entitled “(Intellectual) Property and Sovereignty: Notes Toward a Cultural Geography of Authorship.”¹¹³ The article, one of the earliest to expressly invoke CRT in the context of intellectual property law, advances an interdisciplinary critique of attempts to globalize intellectual property rights, particularly copyright, without attending to

Property, 25 LAW & LITERATURE 103 (2013) (arguing from Radin that users may have personal interests in copyrighted works).

¹⁰⁸ Crenshaw et al., *supra* note 17, at xiii.

¹⁰⁹ See Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976) (serving as a starting point for CRT).

¹¹⁰ Crenshaw et al., *supra* note 17, at xviii–xix. We note that, in many ways, this break with CLS signified a symbolic and ideological break with the mainstream white, American liberalism that had failed African Americans.

¹¹¹ See, e.g., Keith Aoki, *The Stakes of Intellectual Property Law*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 259 (David Kairys ed., 3d ed. 1998).

¹¹² Coombe’s early articles, which make up much of her 1998 book, pushed for critical/ cultural legal studies, one which examined racial and colonial politics. See e.g., Rosemary J. Coombe, *The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy*, 6 CAN. J. L. & JURIS. 249 (1993).

¹¹³ Aoki, *supra* note 27.

the politics of local development.¹¹⁴ At the core of Aoki's argument is an observation that the one size fits all model of international intellectual property, animated by the figure of the Romantic Author who is capable of "original" work, speciously justifies maximalist copyright policy based in fictions of universality that are actually grounded in European-ness.¹¹⁵ He writes:

As the discourse of authorship produces a particular type of intellectual property owner (the author), the discourse of globalization produces a very particular and peculiar representation of the globe. At their intersection, the discourses of authorship and globalization privilege at least six dominant . . . norms within Anglo-American legal thought (as Rosemary Coombe delineates): (1) a clear distinction between categories of public and private; (2) a sharp distinction between property and speech; (3) an Enlightenment-derived, linear model of progress; (3) a deeply held commitment to and belief in a marketplace of ideas; (5) a faith (at least up until fairly recently) in the transparency of language; and (6) a foundational belief in the commensurability of all things, that is, that all things may be reduced to a common metric understood by all¹¹⁶

Aoki's essay presages the major themes that progressive intellectual property scholars have been now considering for two decades, including Eurocentrism and inequity, the Enlightenment, and distributive justice. While authorship is only one factor in progressive intellectual property, Aoki's work offers a starting point for contemplating various strands of critique that have developed over the years. We turn to those themes in the next section, focusing on how scholars like Coombe, Aoki, and others laid the groundwork for Critical Race IP.

Aoki's piece was an early example of what Tehranian describes as Critical IP scholarship.¹¹⁷ While Tehranian's consideration of Critical IP as an area of study is important, we believe it equally important to place questions of race, racialization, and racism at the center of considerations of intellectual property. In Tehranian's formulation, race, though a *sufficient* marker of Critical IP, is not a *necessary* axis of analysis.¹¹⁸ We contend here that race is an exceedingly important site

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 1341–42.

¹¹⁷ Tehranian, *supra* note 40. In the interest of articulating the actual provenance of the term, "critical intellectual property," as we understand it, we note that the first use of the term of which we are aware was in an article by Laura A. Foster. See Laura A. Foster, *Situating Feminism, Patent Law, and the Public Domain*, 20 COLUM. J. GENDER & L. 262 (2011).

¹¹⁸ Tehranian, *supra* note 40, at 1244 (broadly defining "'critical IP theory' . . . as the deconstruction of trademark, copyright, and patent laws and norms in light of existing power relationships to better understand the role of intellectual property in both maintaining and

for intellectual property analysis for which existing considerations of power, inequality, or distributive justice simply do not fully account. Because Critical IP proceeds from a rather broad set of values to assess the relationship between intellectual property and, in Tehranian's words, "subordination,"¹¹⁹ we believe that such a framework cannot do the work of questioning racial liberalism and supplanting Eurocentricism that is central to CRT. As such, Critical IP may replicate some of the same oversights of CLS, inadvertently eliding questions of race.¹²⁰

Valdes, et al. in describing future directions of CRT argue that CRT engages three principle ideas: (1) race consciousness is necessary to address structural racism; (2) racism is not the work of a few "bad-apple[s]" but the result of systemic institutional and ideological discrimination; and (3) intersectionality is important to any critical race analysis.¹²¹ We explicitly describe and advocate for a Critical Race IP in which scholars bring these principal ideas to bear upon intellectual property. At the Race + IP Conference in April 2017, we engaged in many discussions which we believe to be only the tip of the iceberg in terms of the potentially productive topics, issues, and insights that theorizing Critical Race IP might yield. In the next section, we elaborate on the themes that we see as anchoring the development of Critical Race IP up until this point and directing its development into the future.

II. LOCATING CRITICAL RACE IP

In the first plenary session at Race + IP 2017, Boatema Boateng posed the question "why Critical Race IP?"¹²² In part, her query highlighted the need for multiple types of theoretical inquiry into intellectual property's relationships to race and social justice. It further suggested the possibility of using CRT to inform the study of intellectual property without formally naming the resulting scholarship. It also asks us to consider why investment in Critical Race IP as a

perpetuating social hierarchy and subordination.").

¹¹⁹ *Id.*

¹²⁰ *Cf.* Crenshaw et al., *supra* note 17, at xiii–xiv (describing the oversights of CLS that, in part, led to the development of CRT).

¹²¹ Valdes, et al., *supra* note 24, at 2.

¹²² Part of the "why Critical Race IP?" question involves distinguishing the title of the conference, Race + IP, from our conceptualization of Critical Race IP. In contemplating the inclusivity of the conference as well as its exploratory nature, we offered Race + IP as a provocation to consider the aims, methods, and theories that the intersections of race and intellectual property might produce. However, studying the intersections of race and intellectual property does not necessarily involve addressing the questions that Valdes et al. focus on as important to CRT. For instance, a study of the demographics of inventors of color may or may not be invested in race-conscious or intersectional analysis of the intellectual property system. We, therefore, offer Critical Race IP as a narrower inquiry, which while no less important than Race + IP, poses a different set of questions with particular scholarly antecedents.

named area of study is important. We believe naming Critical Race IP is a vital move, not only because it aids in reflecting upon the connections between the work of scholars writing about race, social justice, and intellectual property but also because it creates material stakes in the study of the intersections of those topics. With respect to the former, identifying the themes that tie together works at the intersections of race and intellectual property across disciplines lays the groundwork for imagining new directions for future scholarship. With respect to the latter, naming Critical Race IP quite literally brings into being a new area of study in which new scholars as well as institutions can invest—in material and ideological ways. Though we recognize the liabilities of institutionalizing radical theoretical positions, naming and articulating the stakes of Critical Race IP will bring important countervailing benefits.

Naming practices are necessarily political. Whether in the context of rejecting slave names in lieu of chosen names,¹²³ refusing to acknowledge the interests of groups in political negotiations by *not* naming them,¹²⁴ articulating new legal protections for age-old wrongs,¹²⁵ or developing new names for unprotected practices,¹²⁶

¹²³ Kimberly W. Benston, “*I Yam what I Am*”: *Naming and Unnaming in Afro-American Literature*, 16 BLACK AM. LITERATURE F. 1, 3 (1982) (citing MALCOLM X, MALCOLM X ON AFRO-AMERICAN HISTORY 14 (Merit Publishers 1967)).

Language—that fundamental act of organizing the mind’s encounter with an experienced world—is propelled by a rhythm of naming: It is the means by which the mind takes possession of the named, at once fixing the named as irreversibly Other and representing it in crystalized isolation from all conditions of externality. Malcolm Little, named by the master/father who banished him to his marginal existence, was in some measure the slave his given name signified; a ‘so-called Negro,’ he owned nothing: ‘As long as you allow them to call you what they wish you don’t know who you really are. You can’t lay claim to any name, any home, any destiny, that will identify you as something you should be, as someone you should become: a brother among brothers.’

Id.; see also GRANT FARRER, WHAT’S MY NAME: BLACK VERNACULAR INTELLECTUALS (2003) (on the importance of naming in black political tradition); Derek H. Alderman, *Place, Naming and the Interpretation of Cultural Landscapes*, in THE ASHGATE RESEARCH COMPANION TO HERITAGE AND IDENTITY 195, 201 (Brian Graham & Peter Howard eds., 2008); Ben L. Martin, *From Negro to Black to African American: The Power of Names and Naming*, 106 POL. SCI. Q. 83, 83 (1991) (“Names can be more than tags; they can convey powerful imagery. So naming—proposing, imposing, and accepting names—can be a political exercise.”).

¹²⁴ Danielle Endres, *The Rhetoric of Nuclear Colonialism: Rhetorical Exclusion of American Indian Arguments in the Yucca Mountain Nuclear Waste Siting Decision*, 6 COMM. & CRITICAL/CULTURAL STUD. 39, 50 (2009) (“Instead of explicitly naming American Indians as ‘savages’ (a common strategy identified in the scholarship on rhetorical colonialism), this strategy names American Indian nations as part of the US public by denying government-to-government negotiations, forcing participation in the public comment period and describing all opponents as public critics.”).

¹²⁵ See generally Reva B. Siegel, *Introduction: A Short History of Sexual Harassment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 1, 1–2 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004).

Sexual harassment is a social practice. Social practices have lives, institutional lives and semiotic lives. And so social practices like sexual harassment have histories.

among many other examples, it is clear that the choice of when and how to name is a significant one. This is particularly true in institutional contexts.

One context in which naming consistently comes up is in conversations about academic disciplines and non-disciplines. Discussions about naming Cultural Studies are illustrative. While there are still relatively few institutionalized Cultural Studies programs, the latter retains its identity as an interdisciplinary movement or network, much like CRT. We advocate for a similar path for Critical Race IP as a means of identifying the political project that scholars are undertaking and facilitating more study in that space. An early piece on the importance of naming in Cultural Studies notes:

Yet there are important pressures to define. There is the little daily politics of the college or the school—not so little since jobs, resources and opportunities for useful work are involved. Cultural studies has won real spaces here and they have to be maintained and extended . . . terms. We need definitions of cultural studies to struggle effectively in these contexts, to make claims for resources, to clarify our minds in the rush and muddle of everyday work, and to decide priorities for teaching and research¹²⁷

Names and definitions provide practical grounding and centralized focus, “if not as a *unity* at least as a *whole*.”¹²⁸ They can bring cohesiveness to an intellectual project, in a manner that grounds it. Carbado suggests the same in “Critical What What?” Quoting Crenshaw, he writes, “‘what is in play here is less of a definitive articulation of CRT and more of socio-cultural narrative of CRT.’” In the context of offering this narrative, Crenshaw describes CRT as an intellectual and political dynamic that is constantly being

Considering sexual harassment in historical perspective allows us to ask some fundamental questions about the nature of the practice, the terms in which it has been contested, and the rules and rhetorics by which law constrains—or enables—the conduct in question. My object in these pages is to invite reflection, not only about sexual harassment, but also about the law of sex discrimination itself. It is only quite recently that sexual harassment acquired the name of ‘sexual harassment’ and was prohibited as a form of ‘sex discrimination.’ By examining the process through which a persistent and pervasive practice came to be recognized as discrimination ‘on the basis of sex,’ we learn much about what law does when it recognizes discrimination. Clearly, this act of recognition was a momentous one. For the first time in history, women extracted from law the means to fight a practice with which they had been struggling for centuries.

Id.

¹²⁶ Anjali Vats, *(Dis)owning Bikram: Decolonizing vernacular and dewesternizing restructuring in the yoga wars*, 13 COMM. & CRITICAL/CULTURAL STUD. 325 (2016); see also Chidi Oguamanam, *Patents and Traditional Medicine: Digital Capture, Creative Legal Interventions, and the Dialectics of Knowledge Transformation*, 15 IND. J. GLOBAL LEGAL STUD. 489 (2008).

¹²⁷ Johnson, *supra* note 9, at 41.

¹²⁸ *Id.* (emphasis in original).

reconstituted.”¹²⁹ An approach similar to the one that unfolded in Cultural Studies and CRT is useful in the context of Critical Race IP. Naming Critical Race IP is important for focusing conversations, theoretically and conceptually, and marshalling institutional resources. Moreover, it is helpful for bringing new scholars and activists into the fold. Nevertheless, simultaneously thinking of Critical Race IP as a network of scholars who engage intellectual properties through the lens of race is a helpful way of capturing its conceptual dynamism and constant evolution and avoiding stagnancy or fixity.

Naming Critical Race IP is also conceptually important in delineating how CRT can illuminate the study of intellectual properties. For instance, the name Critical Race IP points to how whiteness operates not only as property but as *intellectual property*. It is impossible to speak of CRT without invoking Cheryl Harris’s essay “Whiteness as Property,” which celebrated its twentieth anniversary in 2013. Harris’s piece is central to CRT, as well as the study of intellectual property and race, in part because it focuses on the significant and complex relationship between race and property rights.¹³⁰ Harris highlights how whiteness operates *as property*, conferring a bundle of social and political rights that are exclusively granted to those who read as white.¹³¹ Harris’s piece now informs a wide body of interdisciplinary scholarship which interrogates legal definitions of property in the United States, the relationship of those definitions to race and personhood, and the ethical considerations of such investments.¹³² The phrase “Critical Race IP” points to the value of CRT’s core themes, particularly its acknowledgment of intellectual property’s investments in whiteness. Analogizing Harris, white racial identity confers not only a bundle of property rights but also *intellectual property rights*.¹³³ Put succinctly, we might rewrite Harris to state that this Article “investigates the relationships between concepts of race and [intellectual] property and reflects on how rights in [intellectual] property are contingent on, intertwined with, and conflated with race.”¹³⁴ Whiteness brings with it a set of privileges and presumptions in the context of intellectual property: whites have historically constructed

¹²⁹ Carbado, *supra* note 14, at 1601.

¹³⁰ Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993). We also note that during Race + IP 2017, the plenary sessions continually returned to Harris’s essay because of its central importance to the topic at hand.

¹³¹ *Id.* at 1725–28.

¹³² As of the date of publication of this Article, shepardizing *Whiteness as Property* returns 523 sources, on topics related to feminism, queer theory, and race. A Google scholar search of the work shows 4,016 citing sources as of May 12, 2018 at 11:59 P.M, further demonstrating its incredible influence outside of the legal academy.

¹³³ See DEIDRÉ A. KELLER & ANJALI VATS, CRT-ICIZING COPYRIGHT (Mar. 28, 2017) (unpublished manuscript) (on file with authors), <https://ssrn.com/abstract=2895866>.

¹³⁴ Harris, *supra* note 130, at 1714.

information regimes in ways which devalue the knowledge and practices of non-whites;¹³⁵ whites have historically held the power and authority to determine the legal structures which govern intellectual property rights;¹³⁶ whites have historically crafted legal doctrines which favor the protection of Western understandings of creativity;¹³⁷ and whites largely continue to manage domestic and international intellectual property rights regimes.¹³⁸

The remainder of this section focuses on articulating not only how Harris's argument regarding property's racial underpinnings in "Whiteness as Property" is, in many ways, analogous to intellectual property but also the landscape of the area of study we call Critical Race IP. We first explore the meaning of "race" and "IP" in the context of Critical Race IP. We then turn to central themes in Critical Race IP scholarship, fleshing out their importance in overall discussions of race and intellectual property as well as future conversations. We identify seven themes which consistently emerge in discussions of race and intellectual property: (1) defining intellectual property; (2) intellectual property's stories; (3) traditional knowledge; (4) the public domain; (5) framing and reframing infringement, counterfeiting, and piracy; (6) access to knowledge (A2K); and (7) Critical Race IP in action.

A. *What is the "Race" in Critical Race IP?*¹³⁹

Race is the socially constructed category used to describe and ascribe value to phenotypic differences between individuals.¹⁴⁰ As demonstrated by scientific advances in genetics, such as the completion of the Human Genome Project, there is no biological basis for treating

¹³⁵ See, e.g., DEBORA J. HALBERT, *RESISTING INTELLECTUAL PROPERTY* (2005) 150 ("Today's biopiracy is simply the extension of the logic behind the doctrine of discovery.").

¹³⁶ See Ruth L. Okediji, *The International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global Intellectual Property System*, 7 *SING. J. INT'L & COMP. L.* 315 (2003).

¹³⁷ Ruth L. Okediji, *The Regulation of Creativity Under the WIPO Internet Treaties*, 77 *FORDHAM L. REV.* 2379 (2009); see also *THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE* (Martha Woodmansee & Peter Jaszi eds., 2d prtg. 1999); RAYVON FOUCHÉ, *BLACK INVENTORS IN THE AGE OF SEGREGATION: GRANVILLE T. WOODS, LEWIS H. LATIMER & SHELBY J. DAVIDSON* (2003); James Boyle, *Foreword: The Opposite of Property?*, 66 *L. & CONTEMP. PROBS.* 1 (2003).

¹³⁸ See, e.g., Peter Drahos, *Developing Countries and International Intellectual Property Standard-Setting*, 5 *J. WORLD INTELL. PROP.* 765 (2002).

¹³⁹ This subheading and section is inspired by Hall's essay "What is the 'black' in black popular culture?" in which he contends that blackness itself is hegemonically negotiated. He writes, "mistaking what is historical and cultural for what is natural, biological, and genetic. The moment the signifier 'black' is torn from its historical, cultural, and political embedding and lodged in a biologically constituted racial category, we valorize, by inversion, the very ground of the racism we are trying to deconstruct." Stuart Hall, *What is the "black" in black popular culture?*, 20 *SOC. JUST.* 104 (2009).

¹⁴⁰ See, e.g., MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S* (2d ed. 1994).

race as a meaningful category, and, therefore, no biological basis for deeming some people “superior” and others “inferior.”¹⁴¹ Rather, as Michael Omi and Howard Winant argue, racial difference is socially and materially constructed through racial projects—policy decisions based on historically contingent understandings of the meaning of race. In Omi and Winant’s formulation, the term racial formation describes “the sociohistorical process by which racial categories are created, inhabited, transformed, and destroyed”¹⁴² specifically through “historically situated *projects* in which human bodies and social structures are represented and organized.”¹⁴³ Legislative and judicial definitions of race, as Ian Haney Lopez describes in his groundbreaking text *White by Law*, were and continue to be integral in rhetorically defining racial categories as well as materially shaping race through the grant and denial of rights and privileges.¹⁴⁴ That said, while the definitions of race we engage here are useful starting points for thinking about racial categories and how they are constituted, they do not help us to situate race in particular historical contexts or in specific academic and activist contexts. We now turn to the question of how we might specifically think of the “race” in Critical Race IP.

Race is, in Stuart Hall’s terms, a “floating signifier.”¹⁴⁵ It does not have a fixed meaning; rather, it is term with no clear referent whose meaning is contingent on time, place, and context.¹⁴⁶ To speak of race in CRT or Critical Race IP, then, is not to speak of a static category; it is to speak of an item that is contextually defined. In CRT, race originally centered on black/white binaries in a post-Civil Rights context.¹⁴⁷ That is not to say that Race Critics did not *recognize* the existence of race in other spaces, simply that they chose to *theorize* it primarily vis-à-vis Black/white binaries. Subsequent conversations in CRT resulted in a broader theorization of law and race, through studies of Asians as model

¹⁴¹ ALONDRA NELSON, *THE SOCIAL LIFE OF DNA: RACE, REPARATIONS, AND RECONCILIATION AFTER THE GENOME* 13 (2016) (footnote omitted) (“Under the flashing glare of the international press corps’ cameras, President Bill Clinton—flanked by Venter and National Human Genome Research Institute director Francis Collins, and with Prime Minister Tony Blair of Britain joining in via remote video—breathlessly declared that ‘one of the great truths to emerge from this triumphant expedition inside the human genome is that in genetic terms, all human beings, regardless of race, are more than 99.9 percent the same’”).

¹⁴² OMI & WINANT, *supra* note 142, at 55–56.

¹⁴³ *Id.* (emphasis in original).

¹⁴⁴ IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1997) (For instance, Lopez describes how anti-miscegenation laws, by preventing interracial mixing, affected the physical and biological realities of those who procreated.).

¹⁴⁵ Stuart Hall, Lecture at the Media Education Foundation: Race, the Floating Signifier (1997), (transcript available at www.mediaed.org/transcripts/Stuart-Hall-Race-the-Floating-Signifier-Transcript.pdf).

¹⁴⁶ *Id.*

¹⁴⁷ Crenshaw et al., *supra* note 17, at xiv.

minorities,¹⁴⁸ Latinos as beyond the black/white binary,¹⁴⁹ and racial categories as geographically and temporally bounded social constructions.¹⁵⁰ Moreover, the latter studies resulted in cross-disciplinary and interdisciplinary conversations about the investments of the legal academy and its power structures in whiteness.¹⁵¹ The race in CRT is therefore unfixed. It is a signifier with constantly changing meaning which evolves based on the everyday practices of individuals, including scholars, and the cultural and historical conditions of the times. Echoing Carbadó, we might imagine the race in CRT as a verb—one which describes the process through which institutional and cultural practices, including in law and the academy, make, constitute, and undo racial categories. The race in contemporary CRT scholarship might be more succinctly described as a floating signifier which refers to the tendency of culture and institutions to operate in ways that, implicitly or explicitly, protect the interests of whiteness at the expense of people of color instead of making space for radical equality built on foundations of restorative justice.

We imagine the race in Critical Race IP similarly. Instead of focusing on the social construction of differences based on skin color, we invoke race to describe the many ways intellectual property discourses play a central role in the protection of whiteness. The study of race in the context of intellectual properties must be an intersectional enterprise, involving the coordinated examination of categories such as gender, class, and sexual orientation.¹⁵² An originalist reading of the race in Critical Race IP might limit analysis to only black/white binaries in the United States or legal regimes around civil rights. However, such a definition of race is both overly narrow and inconsistent with the trajectory that CRT has taken over the past decade.

Instead, we encourage a reading of the race in Critical Race IP as a broad intersectional and transnational category of analysis that leaves space for discussions of the Global South with respect to distributive justice, access to knowledge, and even neo-coloniality. Nikhil Pal

¹⁴⁸ See, e.g., Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1241 (1993); Keith Aoki, "Foreign-ness" & Asian American Identities: *Yellowface, World War II Propaganda, and Bifurcated Racial Stereotypes*, 4 UCLA ASIAN PAC. AM. L.J. 1 (1996); Harvey Gee, *Perspective: Beyond Black and White: Selected Writings by Asian Americans Within the Critical Race Theory Movement*, 30 ST. MARY'S L.J. 759 (1999).

¹⁴⁹ See, e.g., Francisco Valdes, *Forward: Under Construction—LatCrit Consciousness, Community, and Theory*, 85 CAL. L. REV. 1087 (1997).

¹⁵⁰ See, e.g., Keith Aoki, *Space Invaders: Critical Geography, the Third World in International Law and Critical Race Theory*, 45 VILL. L. REV. 913 (2000).

¹⁵¹ Perry, *supra* note 20.

¹⁵² Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989).

Singh's writing on the whiteness of police is instructive in thinking about the landscape of the race in Critical Race IP:

Whiteness...does not issue directly from private property. It emerges from the governance of property and its interests in relationship to those who have no property and thus no calculable interests, and who are therefore imagined to harbor a potentially criminal disregard for propertied order.¹⁵³

Studying the race in Critical Race IP entails mapping, theorizing, and remaking understandings of the lawful and just governance of intellectual property, which, like the police in the realm of embodied relations, serves to normalize and reinforce whiteness. It further requires asking who is imagined as a legitimate intellectual property owner and who is envisioned as a threat to the (intellectual) propertied order. Focusing on systems of governance of intellectual property and narratives of transgression reveals the racial contours of intellectual property and offers important starting points for reconceptualizing its racial investments. We are not contending that we ought not contemplate the meaning of race as a culturally constructed lens for understanding and ascribing value to phenotypic difference, rather that we must situate and contextualize that understanding of race, by and through examination of intellectual property governance and the racial stories which we consistently tell around copyrights, trademarks, patents, and so on. Doing so allows us to locate race, not as a static category, but an ever-changing one. We therefore understand the race in Critical Race IP as invoking the *spirit* and *thematic directions* of CRT scholarship, in a manner which attends to that area's core tenets about the investment of culturally constructed institutional regimes in directly or indirectly advancing the interests of whiteness. As discussed through individual themes below, not all questions of racial justice in intellectual property have been previously invoked in CRT. However, insofar as these themes involve questions of racial non-neutrality in intellectual property and knowledge protection contexts, they are consonant with the race in CRT.

B. *What is the "IP" in Critical Race IP?*

Traditionally, intellectual property means the laws of copyrights, trademarks, patents, rights of publicity, trade secrets, and/or unfair competition.¹⁵⁴ Navigating intellectual property requires a broad

¹⁵³ Nikhil Pal Singh, *The Whiteness of Police*, 66 AMERICAN QUARTERLY 1091 (2014).

¹⁵⁴ PETER S. MENELL, MARK A. LEMLEY & ROBERT P. MERGES, INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE (2003).

understanding of the interrelationships between and among these legal doctrines and other areas of law including contracts, constitutional law, and property. While this interrelatedness is not unique to IP, it is notable considering Richard Stallman's critique that intellectual property is a "seductive mirage"¹⁵⁵ through which content owners group together types of law that are, in fact, very different and materially so.

While the "IP" in Critical Race IP is not intended to homogenize the various types of intellectual property law, it nonetheless points to the need to study intellectual property *both* as a mass noun through which policy is obscured and the component parts of that mass noun. Moreover, the work of intellectual property scholars, particularly those concerned with social justice, increasingly reflects the reality that copyrights, trademarks, patents, rights of publicity, trade secrets, and claims of unfair competition are not simply legal regimes confined to the realm of law but cultural objects that move through everyday life.¹⁵⁶ That is increasingly true given the growth of international intellectual property regimes and appeals to human rights norms as a means of protecting the interests of marginalized peoples. Untangling the cultural implications of intellectual properties and intellectual property law, and not simply the legal regimes themselves, is therefore central to the "IP" in Critical Race IP.

Broadly framing "IP" encourages a thorough analysis of the ways intellectual property law implicates race, at domestic and international levels. This broad reading of "IP" is evident in Critical Race IP scholarship. Each of the areas of intellectual property law we have mentioned—copyright,¹⁵⁷ trademark,¹⁵⁸ patent,¹⁵⁹ right of publicity,¹⁶⁰ trade secret,¹⁶¹ and unfair competition¹⁶²—has a healthy and growing

¹⁵⁵ Richard Stallman, *Did You Say "Intellectual Property"? It's a Seductive Mirage*, GNU OPERATING SYS.: PHIL., <http://www.gnu.org/philosophy/not-ipr.html> (last visited Aug. 17, 2017).

¹⁵⁶ COOMBE, *supra* note 28.

¹⁵⁷ See, e.g., MICHAEL D. BIRNHACK, *COLONIAL COPYRIGHT: INTELLECTUAL PROPERTY IN MANDATE PALESTINE* (2012); CAROLINE JOAN S. PICART, *CRITICAL RACE THEORY AND COPYRIGHT IN AMERICAN DANCE: WHITENESS AS STATUS PROPERTY* (2013); ANTHEA KRAUT, *CHOREOGRAPHING COPYRIGHT: RACE, GENDER, AND INTELLECTUAL PROPERTY RIGHTS IN AMERICAN DANCE* (2015); K.J. Greene, *Intellectual Property at the Intersection of Race and Gender: Lady Sings the Blues*, 16 AM. U. J. GENDER, SOC. POL'Y & L. 365 (2008).

¹⁵⁸ COOMBE, *supra* note 28; Sonia K. Katyal, *Trademark Intersectionality*, 57 UCLA L. REV. 1601 (2010); David Dante Troutt, *A Portrait of the Trademark as a Black Man: Intellectual Property, Commodification and Redemption*, 38 U.C. DAVIS L. REV. 1141 (2005).

¹⁵⁹ Nelson, *supra* note 141; DOROTHY ROBERTS, *FATAL INVENTION: HOW SCIENCE, POLITICS, AND BIG BUSINESS RE-CREATE RACE IN THE TWENTY-FIRST CENTURY* (2011); Jonathan Kahn, *Race-ing Patents/Patenting Race: An Emerging Political Geography of Intellectual Property in Biotechnology*, 92 IOWA L. REV. 353 (2007).

¹⁶⁰ See, e.g., Lateef Mtima, *What's Mine is Mine but What's Yours is Ours: IP Imperialism, the Right of Publicity, and Intellectual Property Social Justice in the Digital Information Age*, 15 SMU SCI. & TECH. L. REV. 323 (2012).

¹⁶¹ See, e.g., Deepa Varadarajan, *A Trade Secret Approach to Protecting Traditional Knowledge*, 36 YALE J. INT'L L. 371 (2011).

body of scholarship considering its relationship with race. We both identify and encourage this broad reading of the “IP” in Critical Race IP as a means of theorizing and remedying the many ways intellectual properties are racially non-neutral and mutually constitutive of the category of race and processes of racial formation.

C. (Un)bounding Critical Race IP

During Race + IP 2017, fifteen plenary speakers and several dozen concurrent speakers presented papers speaking to the issues at the intersections of race and intellectual property from a variety of disciplinary vantage points.¹⁶³ We do not endeavor to recap the conference or create a comprehensive list of scholars whose work might be defined as falling within the area of Critical Race IP. Instead, we are interested in tracing themes that repeatedly arise at the intersections of intellectual property, race, and social justice – at the conference and in other scholarly writings – and highlighting the common tenets useful in articulating Critical Race IP. We observe several consistent themes that arise in the work of those concerned with intellectual properties not only as tools for securing legal rights but also as cultural and racial formations with which we engage every day. We have also observed some core tenets that arise from these thematic engagements.

The themes we identify are not intended to (un)bound Critical Race IP. Rather they are best read as a provisional and evolving mapping of the existing work that might inform a Critical Race IP. This spatial metaphor might be best read through the political geography-inspired framework Keith Aoki suggested for CRT.¹⁶⁴ Where Aoki calls for legal scholars to recognize and contest “the inertness and apparent neutrality of space”¹⁶⁵ such as the Third World, we attend to the landscape of Critical Race IP scholarship, often written by “‘outsider’ scholars . . . many of whom are themselves space invaders of academia at large.”¹⁶⁶ Identifying and articulating the central themes of Critical Race IP creates a conceptual overview of the spaces scholars who are doing intersectional race work in intellectual property law: (1) have occupied; (2) continue to occupy; (3) might occupy in the future; and (4) have not yet attempted or succeeded in occupying. Such a provisional mapping allows us to imagine a path forward, one in which “the faces at the bottom” and “outsider” scholars in intellectual property contexts are no longer simply “space invaders” but part of a multiverse

¹⁶² See, e.g., Paul Kuruk, *Protecting Folklore Under Modern Intellectual Property Regimes: A Reappraisal of the Tension between Individual and Communal Rights in Africa and the United States*, 48 AM. U. L. REV. 769 (1999).

¹⁶³ Vats et al., *supra* note 3.

¹⁶⁴ Aoki, *supra* note 150.

¹⁶⁵ *Id.* at 956.

¹⁶⁶ *Id.*

of understandings about the creation and management of knowledge, including through the making, evolution, and enforcement of law and its engagements with race.

One way to anchor this provisional mapping is to consider how Critical Race IP orients itself toward ideas of (intellectual) property and personhood. Scholarship in race and intellectual property, like Harris's "Whiteness as Property," has adopted questions about race, property, and personhood as fundamental issues, asking how intellectual property is defined, how it ought to be defined, and the racial and social justice implications that flow from such definitions.¹⁶⁷ A central issue in Critical Race IP scholarship—one which might be called a fundamental tenet of the interdisciplinary movement—is critical analysis of how intellectual property does and should relate to conceptual personhood, particularly for those that were not and are not, explicitly and/or implicitly, considered to be fully human. Widely accepted definitions of intellectual property emerge from Lockean understandings of property, which dictate that engaging in the "sweat of the brow" entitles a person to ownership of the fruits of his labors.¹⁶⁸ Critical Race IP scholars not only push against the sweat of the brow theory, they also reframe it in ways that make different kinds of epistemological understandings of creation possible. In many ways, the themes we identify are all negotiations of a fundamental set of questions: Whose labor is valuable? How is it valued? What systems underpin those definitions of labor? And how do we alter and remake the systems that undervalue the knowledge of people of color and maintain systems of white supremacy?

For instance, Madhavi Sunder, in the piece "Property in Personhood," takes up Margaret Jane Radin's argument from "Personhood and Property" and theorizes some of the ways intellectual property law can serve as a site for the assertion of property rights in personhood in the context of traditional knowledge.¹⁶⁹ Sunder again engages such questions in "IP³,"¹⁷⁰ in which she traces how intellectual

¹⁶⁷ COOMBE, *supra* note 28; Madhavi Sunder, *Property in Personhood*, in *RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW & CULTURE* 164 (Martha M. Ertman & Joan C. Williams, eds., 2005); Sunder, *supra* note 31.

¹⁶⁸ See JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* § 43 (C.B. Macpherson ed. 1980)(emphasis in original)("An acre of land, that bears here twenty bushels of wheat, and another in *America*, which, with the same husbandry, would do the like, are, without a doubt, of the same natural intrinsic value: but yet the benefit mankind receives from the one in a year, is worth 5l. and from the other possibly not worth a penny, if all the profit an *Indian* received from it were to be valued, and sold here; at least, I may truly say, not one thousandth . . . [F]or it is not barely the plough-man's pains, the reaper's and the thresher's toil, and the baker's sweat, is to be counted into the *bread* we eat . . .").

¹⁶⁹ Sunder, *Property in Personhood*, *supra* note 167; see also Radin, *supra* note 104.

¹⁷⁰ Sunder, *supra* note 31.

property can be used to protect “human flourishing.”¹⁷¹ Kristin Carpenter, Angela Riley, and Sonia Katyal, in “In Defense of Property,” also consider definitions of property and personhood in order to advocate for broadening understanding of (intellectual) property to account for the protection of traditional knowledge.¹⁷² These moves to re-conceptualize the property in intellectual property are central to both the race and intellectual property parts of Critical Race IP, in part because, as we argued earlier, whiteness has operated as a marker of the capacity and right to create and own property, including intellectual property.¹⁷³ These are helpful antecedents for thinking about how Critical Race IP reframes questions that are otherwise taken for granted in intellectual property law.

Related to questions of defining (intellectual) property are attempts to redefine the scope of both. Coombe, for instance, writes about interventions by Crazy Horse’s ancestors to invalidate the trademark for Crazy Horse Malt Liquor through legal channels.¹⁷⁴ Lovalerie King identifies Alice Randall’s victory in publishing *The Wind Done Gone* as an example of law and literature accommodating African American memory.¹⁷⁵ Richard Schur discusses the productive politics of hip-hop culture and the racism of refusing to protect the work of black artists.¹⁷⁶ Vats reads Marshawn Lynch’s trademarking of the name Beast Mode as a move to claim intellectual property rights in his black body and contest the narrative of the Black Beast.¹⁷⁷ Minh-Ha T. Pham discusses how extralegal disciplining of Asians in the context of fashion creates racialized copynorms even in the absence of illegality.¹⁷⁸ These examples, which only scratch the surface of discussions on the nature and scope of relations among (intellectual) property and people of color, demonstrate the centrality of questions of *property* and *personhood* in tying together the interdisciplinary movement of Critical Race IP. Conversations in this area continue to evolve, as people of color theorize, enact, and perform new relationships to intellectual properties, discursively and materially, thereby changing the material realities in which they live.

¹⁷¹ *Id.* at 285.

¹⁷² Kristen A. Carpenter, Sonia K. Katyal & Angela Riley, *In Defense of Property*, 118 YALE L.J. 1022 (2009).

¹⁷³ See *supra* notes 130–134 and accompanying text.

¹⁷⁴ COOMBE, *supra* note 28.

¹⁷⁵ LOVALERIE KING, RACE, THEFT, AND ETHICS: PROPERTY MATTERS IN AFRICAN AMERICAN LITERATURE (2007).

¹⁷⁶ RICHARD L. SCHUR, PARODIES OF OWNERSHIP: HIP-HOP AESTHETICS AND INTELLECTUAL PROPERTY LAW 24–41 (2009).

¹⁷⁷ Anjali Vats, *Marking Disidentification: Race, Corporeality, and Resistance in Trademark Law*, 81 S. COMM. J. 237 (2016).

¹⁷⁸ Minh-Ha T. Pham, *Feeling Appropriately: On Fashion Copyright Talk and Copynorms*, 34 SOC. TEXT 51 (2016).

In addition to defining intellectual property in ways which recognize and attempt to undo its protection of the norms and attendant authority of whiteness, our mapping identifies several recurring themes: (1) understanding, situating, and retelling intellectual property's stories; (2) grappling with the problems of "traditional knowledge," "indigenous knowledge," and "folklore" under international intellectual property and human rights regimes; (3) defining and negotiating the scope of the public domain; (4) framing and reframing concepts of "infringement," "counterfeiting," and "piracy;" (5) considering the role of distributive justice and Access to Knowledge (A2K); and (6) remaking intellectual property law to reflect those "faces at the bottom" and with an eye toward real-world solutions. While we have articulated these as distinct themes, they often overlap and cross multiple areas of law. Because a full exploration of the depth and breadth of these themes is beyond the scope of this piece, we offer only broad overviews in the hopes that future Race IP Crits will work through each of the themes with greater detail. The map, one might say, is not a tidy one but one which reflects the (un)bounded nature of intellectual property law. From these themes, we can see Critical Race IP as a network of scholarship focused on how intellectual property scholars take intersectional approaches to considering the ways people of color are deprived of the rights to create and access knowledge, often through justifications that render them less than human, and theoretical and practical approaches to combating such inequality.

1. Storytelling as Critical Race IP Praxis

Storytelling practices familiar to Race Crits pervaded Race + IP 2017. The authors of this Article began and ended the conference with stories of Prince as an intellectual property icon, reading him in the larger context of race, copyright, and musical appropriation.¹⁷⁹ Kembrew McLeod spoke about Clyde Stubblefield's erasure from James Brown's "Funky Drummer" and the subsequent sampling of his unprotected rhythmic work.¹⁸⁰ Richard Schur discussed the importance of storytelling as methodological intervention in relation to Critical Race IP.¹⁸¹ Margaret Chon crafted a narrative history of race and intellectual property, through the work of CRT pioneers such as Keith Aoki and Kimberlé Crenshaw and her own insights about the directions of the interdisciplinary movement.¹⁸² Talks such as these epitomize the storytelling practices that often characterize CRT scholarship, with their emphasis on personal experiences, re-contextualizing familiar

¹⁷⁹ Vats et al., *supra* note 3.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

narratives, centering voices that might otherwise remain unheard, and writing scholarly histories. More intangibly speaking, they also serve important affective functions, such as creating feelings of connection, engagement, and common purpose. Storytelling is alive and well in Critical Race IP.

As each of the themes that we highlight demonstrates, intellectual property law, as much as law more generally, is about crafting narratives which are implicitly or explicitly racialized. Whether through understandings of intellectual property which marginalize people of color by emphasizing labor as creativity,¹⁸³ narratives of piracy which characterize those in the developing world as thieves,¹⁸⁴ or stories of the public domain which erase colonial histories,¹⁸⁵ copyright, trademark, patent, right of publicity, trade secret, and unfair competition law are rife with normative racial discourses of creation. One important function of Critical Race IP scholarship is to render visible through counter-storytelling those narratives that animate intellectual property law's non-neutrality around race. Engaging the underlying characters, plots, and values these stories endorse is a vital step in undoing intellectual property's whiteness. Moreover, we might also read creative works and embodied performances as part of the practice of speaking back to intellectual property law, in the tradition of the legal fiction of scholars such as Derrick Bell and Richard Delgado.¹⁸⁶ For instance, 2 Live Crew's "Pretty Woman," Biz Markie's "Alone Again," and Randall's *The Wind Done Gone* function as their own types of counter-storytelling, operating as "sites of memory"¹⁸⁷ for alternative intellectual property truths. As Schur argues in *Parodies of Ownership*, African American performance, including hip hop and parody, operates as both powerful critique and pragmatic remaking of intellectual property law.¹⁸⁸

Counter-stories need not be literary or musical. For instance,

¹⁸³ SCHUR, *supra* note 176, at 26.

¹⁸⁴ Lawrence Liang, *Piracy, Creativity and Infrastructure: Rethinking Access to Culture* (Working Paper, 2009), <http://www.ssrn.com/abstract=1436229>.

¹⁸⁵ Foster, *supra* note 117; Laura A. Foster, *Patents, Biopolitics, and Feminisms: Locating Patent Law Struggles over Breast Cancer Genes and the Hoodia Plant*, 19 INT'L J. CULTURAL PROP. 371 (2012); *see also*, Chander & Sunder, *supra* note 32.

¹⁸⁶ DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM*, CH. 9 *THE SPACE TRADERS* (1992) [hereinafter *FACES*]. The short story appeared in two earlier slightly different versions. *See* Derrick Bell, *After We're Gone: Prudent Speculations on America in a Post-Racial Epoch*, 34 ST. LOUIS U. L.J. 393 (1990); Derrick Bell, *Racism: A Prophecy for the Year 2000*, 42 RUTGERS L. REV. 93 (1989); DERRICK BELL, *GOSPEL CHOIRS: PSALMS OF SURVIVAL IN AN ALIEN LAND CALLED HOME*, CH. 1 *REDEMPTION DEFERRED: BACK TO THE SPACE TRADERS* (1997); *see also* RICHARD DELGADO, *THE RODRIGO CHRONICLES: CONVERSATIONS ABOUT AMERICA AND RACE* (1995).

¹⁸⁷ King, *supra* note 175, at 1–22.

¹⁸⁸ Schur, *supra* note 176.

protests against Crazy Horse liquor¹⁸⁹ and Marshawn Lynch's trademarking of the nickname BeastMode¹⁹⁰ might be read as embodied and performative practices of storytelling, which both assert different epistemological standpoints than those in dominant culture. Each standpoint is used to understand knowledge production and critique the historical exclusion of people of color, particularly black people, from the privileges of intellectual property ownership. Exploring the role of storytelling in knowledge production, in forms that both comport with and break from those traditionally accepted in the academy, is a productive goal for Critical Race IP, and builds upon a long history in CRT. Storytelling is a practice that has been and remains important to Critical Race IP, as a mechanism for locating the voices of marginalized groups and centering them in legal contexts that otherwise erase them.

2. Protecting Traditional Knowledge

Early conflicts between harmonization of free trade and intellectual property regimes and the developing world often revolved around the management of traditional knowledge. Vandana Shiva's *Biopiracy: The Plunder of Nature and Knowledge* was an important post-TRIPS critique of the practices of bioprospecting that allowed scientists, predominantly in the Western world, to commodify traditional knowledge.¹⁹¹ Since the publication of Shiva's work, race and intellectual property scholars have turned to considering how best to manage the protection of traditional knowledge, indigenous knowledge, cultural property, and folklore under the rubrics currently set out by intellectual property law—or those yet to be constructed. The treatment of traditional knowledge under TRIPS occupied a considerable amount of space in intellectual property conversations through the early 2000s. It remains an important point of conversation in determining how international intellectual property regimes should understand and treat non-Western knowledge.¹⁹² Pioneers in the area of protecting traditional knowledge have considered the contours of protecting TK in the context of different groups; for example, indigenous Australians,¹⁹³ Ghanaian kente weavers,¹⁹⁴ Indian artisans,¹⁹⁵

¹⁸⁹ COOMBE, *supra* note 28.

¹⁹⁰ Vats et al., *supra* note 3.

¹⁹¹ See SHIVA, *supra* note 54.

¹⁹² *Id.*

¹⁹³ See, e.g., Jane Anderson, *The Making of Indigenous Knowledge in Intellectual Property Law in Australia*, 12 INT'L J. CULTURAL PROP. 347 (2005); Kathy Bowrey & Jane Anderson, *The Politics of Global Information Sharing: Whose Cultural Agendas Are Being Advanced?*, 18 SOC. & LEGAL STUD. 479 (2009); Kimberly Christen, *Gone Digital: Aboriginal Remix and the Cultural Commons*, 12 INT'L J. CULTURAL PROP. 315 (2005); Kimberly Christen, *Opening Archives: Respectful Repatriation*, 74 AM. ARCHIVIST 185 (2011); Jane Anderson, *Anxieties of Authorship in the Colonial Archive*, in MEDIA AUTHORSHIP 229 (Cynthia Chris & David A. Gerstner eds., 2013).

and Bolivian music producers.¹⁹⁶ Important parts of the conversation include how intellectual property ought to refer to traditional knowledge, how to break down the binary between Western and traditional knowledge, and how to build digital archives that center the demands and traditions of the indigenous populations. The question of how to handle traditional knowledge is complex. It requires local considerations and nuance which necessitate considerable situated study. In many ways, the work that has been done is merely the tip of the iceberg, particularly given the vast disparities in the production of knowledge in different parts of the world.

These conversations have also notably taken different forms in different areas of intellectual property. For instance, in the context of copyrights, the limited ability to protect jazz and hip hop,¹⁹⁷ yoga,¹⁹⁸ and traditional design¹⁹⁹ have come to the fore. The subject matter in each of those examples is different, though all require a copyright approach that is flexible enough to account for their particularities. In the context of trademarks, the issue is often the opposite; that is, the utilization of racist imagery as alleged source signifiers implicates race more broadly.²⁰⁰ In the context of patents, battles over biopiracy continue, in the form of disputes over the ownership of patented products such as neem oil and turmeric²⁰¹ and access to pharmaceuticals.²⁰² Conversations in these areas often revolve around the best methods for naming, protecting, and remaking traditional knowledge, particularly when it comes into conflict with maximalist intellectual property regimes. For example, some scholars argue that distinguishing between traditional knowledge and “real” knowledge creates a problematic binary between those who can and cannot create.

¹⁹⁴ BOATEMA BOATENG, *THAT COPYRIGHT THING DOESN'T WORK HERE: ADINKRA AND KENTE CLOTH AND INTELLECTUAL PROPERTY IN GHANA* (2011).

¹⁹⁵ See, e.g., Amit Basole, *Whose Knowledge Counts? Reinterpreting Gandhi for the Information Age*, 18 INT'L J. HINDU STUD. 369 (2014); Amit Basole, *Authenticity, Innovation, and the Geographical Indication in an Artisanal Industry: The Case of the Banarasi Sari*, 18 J. WORLD INTELL. PROP. 127 (2015).

¹⁹⁶ Henry Stobart, *Rampant Reproduction and Digital Democracy: Shifting Landscapes of Music Production and 'Piracy' in Bolivia*, 19 ETHNOMUSICOLOGY F. 27 (2010).

¹⁹⁷ See, e.g., Greene, *supra* note 157; SCHUR, *supra* note 176.

¹⁹⁸ See, e.g., Allison Elizabeth Fish, *Laying Claim to Yoga: Intellectual Property, Cultural Rights, and the Digital Archive in India* (2010) (unpublished Ph.D dissertation, University of California, Irvine) (available from ProQuest Central); *The IPKat: India's Yoga Database and Patent Piracy*, IPKAT (May 10, 2011), <http://ipkitten.blogspot.fr/2011/05/indioas-yoga-database-and-patent-piracy.html>.

¹⁹⁹ See BOATENG, *supra* note 194.

²⁰⁰ See, e.g., *Pro Football, Inc. v. Harjo*, 565 F. 3d 880 (D.C. Cir. 2009); Jasmine Abdel-khalik, *Disparaging Trademarks: Who Matters*, 20 MICH. J. RACE & L. 287 (2015).

²⁰¹ See, e.g., Shayana Kadidal, *Subject-Matter Imperialism? Biodiversity, Foreign Prior Art and the Neem Patent Controversy*, 37 IDEA J. L. & TECH. 371 (1997).

²⁰² KAUSHIK SUNDER RAJAN, *PHARMOCRACY: VALUE, POLITICS, AND KNOWLEDGE IN GLOBAL BIOMEDICINE* (2017).

It does so by fundamentally placing traditional or “raw” knowledge in a hierarchy below that which is treated as refined or “cooked” knowledge.²⁰³ Others focus on the best mechanism for protecting traditional knowledge, include international human rights law.²⁰⁴ Still others focus on the remaking of intellectual property law, a legal and performative process we will turn to at the end of this piece.²⁰⁵ Taken together, these conflicts point to the inadequacies of conventional intellectual property law to protect all forms of knowledge, equally and with an eye toward restorative justice.

3. The Public Domain

Critical Race IP scholarship, like intellectual property scholarship generally, is concerned with the public domain. However, unlike their law and economics counterparts, Race IP Critics are concerned with the racial and social justice dimensions of the management of the public domain, especially in ways that refuse to recognize property rights in existing traditional knowledge and hinder access to knowledge. Recent cases such as *Eldred v. Ashcroft*²⁰⁶ and *Golan v. Holder*²⁰⁷ have extended the term and scope of intellectual property rights, posing considerable problems for marginalized groups, particularly with respect to A2K. Unsurprisingly, as per claims of the rise of information feudalism, such transfers of information often unfold along (neo)colonial axes, with the developing world paying the price for the privatization and increasing scope of copyright, patent, and trademark law.²⁰⁸ Intellectual property maximalism in copyright and patent results in a “shrinking” public domain by restricting access to knowledge along distinctly racial lines.²⁰⁹ James Boyle²¹⁰ and Michael Brown²¹¹ offer in-depth accounts of this process, while Sunder and Chander highlight the need to read the public domain as not simply the opposite of intellectual property but also as a space for (neo)colonial ownership claims to traditional knowledge.²¹² “The romance of the public domain” refers to the fetishistic desire to embrace the public domain as an alternative to

²⁰³ See Margaret Chon, *Law Professor as Artist: Themes and Variations in Keith Aoki's Intellectual Property Scholarship*, 90 OR. L. REV. 1251 (2012).

²⁰⁴ See e.g. Rosemary Coombe, *The Recognition of Indigenous Peoples' and Community Traditional Knowledge in International Law*, 14 ST. THOMAS L. REV. 275 (2002).

²⁰⁵ See e.g. Kavita Philip, *What is a Technological Author? The Pirate Function and Intellectual Property*, 8 POSTCOLONIAL STUDIES 199 (2005).

²⁰⁶ *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

²⁰⁷ *Golan v. Holder*, 565 U.S. 302 (2012).

²⁰⁸ DRAHOS WITH BRAITHWAITE, *supra* note 59.

²⁰⁹ *Id.*; SUNDER, *supra* note 39.

²¹⁰ Boyle, *supra* note 137; JAMES BOYLE, *THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND* (2008).

²¹¹ MICHAEL F. BROWN, *WHO OWNS NATIVE CULTURE?* (2004).

²¹² Chander & Sunder, *supra* note 32.

intellectual property maximalism without adequate consideration of its underlying inequalities.²¹³ Meanwhile, as the expansion of trademark law threatened and threatens to make the brand all-powerful, both as a legal and cultural form, it too erodes equal access to the public domain, particularly for those who were racially stereotyped. Jane Gaines and Rosemary Coombe trace this process, demonstrating the increasing value and significance of ownership of the brand as well as resistance to that ownership, particularly when racial symbols are invoked.²¹⁴

As information feudalism has grown more intense in the 2000s, calls for equal access have become more commonplace. Chon, for instance, argues for wide access to educational materials,²¹⁵ one which was borne out in the Delhi University copyright case in which the Indian Supreme Court determined that the policy interest in access to knowledge outweighed the monopoly afforded to publishers.²¹⁶ In contexts such as access to copyrighted materials or access to pharmaceuticals, the public domain is not a universal concept but one that must be situationally redefined to account for the states of development and growth trajectories of nations in the Global South.²¹⁷ While we take up some of these examples in the sections that follow, we observe generally that the public domain is not an unqualified good, nor is its designation as the opposite of property without complications. It is instead a social construction which often erases intellectual property law's protection of white supremacy and denies A2K to the world's most vulnerable populations. The regulation of the public domain and the scope of its contents, therefore, remain important questions for scholars of race and intellectual property.

4. Framing and Reframing "Piracy" and "Counterfeiting"

As Adrian Johns demonstrates in his history of "piracy," the

²¹³ *Id.*

²¹⁴ JANE M. GAINES, *CONTESTED CULTURE: THE IMAGE, THE VOICE, AND THE LAW* (1991); COOMBE, *supra* note 28. The recent case *Matal v. Tam*, 137 S. Ct. 1744 (2017), holding that SLANTS can be registered as a federal trademark because Section 2(a) of the Lanham Act is unconstitutional under the First Amendment, obviously rests at the intersections of race and trademark law. The outcome in that case calls for nuanced analysis about the terms that are available for trademarking, particularly when they have racial implications. *See, e.g.*, Andrew Chung, *Supreme Court ruling leads to offensive trademark requests*, REUTERS (July 23, 2017, 10:07 AM), <https://www.reuters.com/article/us-usa-court-slur/supreme-court-ruling-leads-to-offensive-trademark-requests-idUSKBN1A80L6> ("A small group of companies and individuals are looking to register racially charged words and symbols for their products, including the N-word and a swastika. . .").

²¹⁵ Chon, *supra* note 29.

²¹⁶ Lawrence Liang, *The essence of education*, HINDU (Dec. 13, 2016, 2:00 AM), <http://www.thehindu.com/opinion/lead/The-essence-of-education/article16798107.ece>.

²¹⁷ PRASHANT REDDY T. & SUMATHI CHANDRASHEKARAN, *CREATE, COPY, DISRUPT: INDIA'S INTELLECTUAL PROPERTY DILEMMAS* (2017).

concept is a historically complicated one,²¹⁸ in which infringers such as the United States became protectors of intellectual properties once they had the authority and the incentive to do so. Accordingly, attempts to label those in the developing world as “pirates” have been met with considerable conceptual and legal resistance. In particular, those in the developing world have pushed back against the overarching development narrative of intellectual property law, asserting the existence and import of local approaches to the protection of knowledge.²¹⁹ Moreover, they have articulated alternative economic narratives, which reframe and even justify “Third World” infringement as necessary, beneficial, and unavoidable.²²⁰ For instance, Ravi Sundaram’s concept of the “pirate modernity,” which emerged through his study of the urban modernities in India, calls for recognition that the purportedly universal standards advanced by international intellectual property law do not even begin to describe the material conditions of existence in rapidly developing nations such as India.²²¹ In Sundaram’s retelling of the story of the piracy, the urbanization of the city, as well as its technological development, are integral to understanding the role of infringement, and indeed its unavoidability, within contemporary Indian contexts.²²² Liang tells a tale of Indian counterfeiters turned protectors of their intellectual properties, explaining that the progress of capitalism makes infringement necessary for many to survive.²²³ He identifies capitalism as a core reason for piracy and counterfeiting, discussing the ways its detritus results in left behind individuals who copy protected works of authorship and invention to survive.²²⁴ Liang’s work demonstrates the nuance of the developing world’s orientation toward knowledge production as well as how economic systems determine knowledge production structures.

Sundaram and Liang offer examples of attempts to reframe those narratives of so-called piracy that originate in the Global North. They and others continue to complicate the critique Shiva initiated, refusing reductive stories of infringement as exclusively about economic loss to

²¹⁸ JOHNS, *supra* note 42.

²¹⁹ See, e.g., HALBERT, *supra* note 135; BOATENG, *supra* note 194.

²²⁰ We recognize the limitations of the term “Third World” but nonetheless use it here as a placeholder for the moral opprobrium the United States attaches to copying in the Global South. See, e.g., B. R. Tomlinson, *What was the Third World?* 38 J. CONTEMP. HIST. 307, 307 (2003) (“[A]lthough the phrase was widely used, it was never clear whether it was a clear category of analysis, or simply a convenient and rather vague label for an imprecise collection of states in the second half of the twentieth century and some of the common problems that they faced.”).

²²¹ RAVI SUNDARAM, *PIRATE MODERNITY: DELHI’S MEDIA URBANISM* (Routledge, 1st ed. 2010).

²²² See generally *id.*

²²³ Lawrence Liang, *Porous Legalities and Avenues of Participation*, in SARAI READER 2005: BARE ACTS 6 (2005).

²²⁴ *Id.* at 13–15.

Western nations. Studies of *shanzhai* in China,²²⁵ hip-hop in South Africa,²²⁶ and pharmaceuticals in Mexico and South and Central America²²⁷ ask us to reconsider accepted notions that piracy always flows from North to South. Discussions of cultural appropriation, particularly of traditional designs such as Navajo prints and *adrinka* and *kente* cloth, raise further questions about the nature of piracy.²²⁸ Along these lines, Kavita Philip's work makes important claims about the social construction of the pirate figure, particularly by investigating how it is mobilized in the service of violence in contemporary politics.²²⁹

We would be remiss, though, to suggest that framings of piracy—or any of the other issues that we have identified here—are only contemporary concerns. Rather, practices of labeling racial Others as pirates can be traced to colonial notions that people of color were incapable of producing knowledge of value, a topic we take up further in Part IV of this article.²³⁰ Questions about the definitions and scope of infringement and counterfeiting are not exceptional ones. Rather, they are likely to increasingly frame Critical Race IP scholarship, particularly as developing countries engage arguments for maximalist intellectual property law in the context of opposing histories, narratives, and materialities. The characterization and construction of the figure of the pirate—and infringer more generally—will figure prominently into these discussions and the pushback against intellectual property regimes.

5. Access to Knowledge

An overarching question for race and intellectual property scholars is who receives access to innovations in intellectual property and at what cost. One early and ongoing battle in this area has revolved around pharmaceuticals. After the negotiation of TRIPS, which grants compulsory licenses for certain medications to developing countries,²³¹ India became—and continues to be—the “pharmacy to the developing world” due to its production of low cost generic drugs in large

²²⁵ FAN YANG, *FAKED IN CHINA: NATION BRANDING, COUNTERFEIT CULTURE, AND GLOBALIZATION* (2016).

²²⁶ ADAM HAUPT, *STEALING EMPIRE: P2P, INTELLECTUAL PROPERTY AND HIP-HOP SUBVERSION*, CH. 5–6 (2008).

²²⁷ Cori Hayden, *A Generic Solution? Pharmaceuticals and the Politics of the Similar in Mexico*, 48 *CURRENT ANTHROPOLOGY* 475 (2007); Cori Hayden, *The Proper Copy: The insides and outsides of domains made public*, 3 *J. CULTURAL ECON.* 85 (2010).

²²⁸ See, e.g., BOATENG, *supra* note 194; Minh-Ha T. Pham, *What's in a Name*, *AM. PROSPECT* (Nov. 3, 2011), <http://prospect.org/article/whats-name-3>.

²²⁹ Philip, *supra* note 205; see also LARS ECKSTEIN AND ANJA SCHWARZ, *POSTCOLONIAL PIRACY* (2014).

²³⁰ Greene, *supra* note 30.

²³¹ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round vol. 31, 1869 U.N.T.S. 299, 33 I.L.M. 81 (1994).

quantities.²³² The United States and India, however, quickly disagreed about the latter's production of cheap drugs. As a result, India has spent many years on the United States' Special 301 Priority Watch List and had a number of disputes with the US over pharmaceuticals, such as Novartis' Glivec.²³³ Other nations, including South Africa and Mexico, have had similar conflicts with the United States. Much of the developing world maintains that the limited monopolies granted by patent law are not suitable for the vast majority of the world because they limit access to life-saving medications that can be used to treat HIV/AIDS and cancer.²³⁴

While an important component of the A2K conversation, pharmaceutical access is simply one aspect of a larger problem. Issues of distributive justice and equal access to intellectual properties arise repeatedly in international contexts.²³⁵ Most recently, the Delhi University copyright case has been at the center of conversations about access to scholarship in the developing world. Taking on global fair use standards, the Indian Supreme Court refused to find copyright infringement when a copy shop made unlicensed copies of academic articles and books. India's move highlights the continuing inability of those in the developing world to access many forms of knowledge, a problem that is compounded by the frequent refusal of the developed world to protect many types of traditional knowledge.²³⁶ Keith Aoki, Margaret Chon, and Ruth Okediji laid the groundwork for discussions of distributive justice within intellectual property law, centering questions of protectability of creative works and access to knowledge on people of color.²³⁷ As demonstrated in Sunder's *From Goods to the Good Life* and Foster's *Reinventing Hoodia*, these questions remain live.²³⁸ Human flourishing and equal benefit sharing are not yet issues that intellectual property law is capable of successfully engaging. We note, as well, that such problems are necessarily intertwined with those of personhood and property because they implicate the question of who is read as a full human being worthy of being saved. Moreover, important questions about *how* to achieve equal A2K, particularly in a system of racial capitalism, remain. Because the production and

²³² Robinson Esalimba, *Novartis Persists In Challenge To Indian Patent Law; India Rejects More AIDS Drugs Patents*, INTELL. PROP. WATCH (Feb. 9, 2009), <http://www.ip-watch.org/2009/09/02/novartis-persists-in-challenge-to-indian-patent-law-india-rejects-more-aids-drugs-patents>.

²³³ OFFICE OF THE U.S. TRADE REPRESENTATIVE, EXEC. OFFICE OF THE PRESIDENT, 2016 SPECIAL 301 REPORT (2016).

²³⁴ Halbert, *supra* note 135.

²³⁵ Chon, *supra* note 29; SUNDER, *supra* note 39.

²³⁶ Univ. of Oxford v. Rameshwari Photocopy Servs. (2016) RFA(OS) 81 (Del. HC) (India).

²³⁷ Liang, *supra* note 184.

²³⁸ Sunder, *supra* note 39; LAURA A. FOSTER, *REINVENTING HOODIA: PEOPLE, PLANTS, AND PATENTS IN SOUTH AFRICA* (2017).

circulation of intellectual properties often move along raced lines, it will be impossible to address such questions without considering the underlying racial structures of copyright, trademark, patent, right of publicity, trade secret, and unfair competition. Both remaking and moving beyond law and economics models of IP to engage A2K and distributive justice concerns are themes that remain and will remain central in the work of Race IP Critics.

6. Remaking Intellectual Properties

Developing nations have not readily accepted the landscape of intellectual property law offered to them by developed nations. Quite the contrary, race and intellectual property scholars have traced attempts by those in the developing world to contest international intellectual property regimes, including crafting licenses and exceptions to the TRIPS policies which apply to the developing world. Some of the scholarship we have already cited speaks to the desires and practices around creating new systems of intellectual property law which fully account for the knowledge created by people of color.²³⁹ Halbert traces some of these approaches in her book *Resisting Intellectual Property*.²⁴⁰ Jane Anderson, Kathy Bowrey, Kimberly Christen, and Angela Riley,²⁴¹ among many others, have done considerable work in examining indigenous systems of ownership, highlighting possibilities for creating new licensing schemes, archival practices, and digital information management practices to extend protections to indigenous knowledge. Proposals around these ideas are not without their flaws nor are they completely settled. Rather, they are stepping stones for continuing to reimagine intellectual properties futures. We turn to the question of how one might reimagine intellectual property more fully in Part IV, in which we look at decolonial futures. Notably, while some, such as Sunder, wish to remake intellectual property through the reorientation of its values, investments, and goals, for instance by focusing on human flourishing.²⁴² Others, such as Foster, suggest a need to dig deeper and unpack the (neo)colonial and capitalist underpinnings of law.²⁴³ While engagements with remaking in intellectual properties vary in their pragmatism, all perspectives will be important in intellectual property's remaking.

A number of scholars have also undertaken consideration of the extent to which human rights regimes might be used to re-conceptualize

²³⁹ See, e.g., HALBERT, *supra* note 135.

²⁴⁰ *Id.*

²⁴¹ Anderson, *supra* note 193; Bowrey & Anderson, *supra* note 193; Christen, *supra* note 193; Angela R. Riley & Kristen A. Carpenter, *Owning Red: A Theory of Indian (Cultural) Appropriation*, 94 TEX. L. REV. 859 (2016).

²⁴² Sunder, *supra* note 39.

²⁴³ FOSTER, *supra* note 238.

and remake intellectual property law. In particular, the possibilities for deploying definitions of folklore and cultural property in international human rights documents has been much discussed as a mechanism for expanding the scope of intellectual property rights regimes for the benefit of those in the developing world.²⁴⁴ However, just as with other solutions and interventions described here, it is unclear whether such solutions will be workable within current political constraints. The human rights approach is an example of a practical intervention into intellectual property law. Such practical interventions — Critical Race IP in action one might say — are an important aspect of the future of the interdisciplinary movement. Lateef Mtima conceived of the Intellectual Property Institute for Social Justice to call attention to issues such as those we describe here.²⁴⁵ Similarly, K.J. Greene has remained focused on the practical ways musicians might secure rights to their masters, including through reparations.²⁴⁶ Nonetheless, any and all spaces for remaking intellectual property, at individual or structural levels, remain important for not only making space within existing intellectual property regimes for the knowledge production of people of color but also envisioning new institutions, laws, and practices that do not simply accommodate Other knowledge but embrace it as entitled to protection. In Part IV, in contemplating decolonization, we engage the question of what it might mean to remake the fundamental assumptions not only of intellectual properties but the epistemological understandings of knowledge that undergird them.

III. ALL WE HAVE IS EACH OTHER: COMMUNITY BUILDING AND PUBLIC FEELINGS IN CRITICAL RACE IP²⁴⁷

CRT and Critical Race IP are important tools not only for examining law's tendencies to maintain white supremacy but also for engaging with, mobilizing, and shaping public feelings—including depression, fear, anxiety, love, and especially intimacy²⁴⁸—upon which

²⁴⁴ Coombe, *supra* note 112.

²⁴⁵ *About Us: History of IIPSI*, INSTITUTE FOR INTELL. PROP. & SOC. JUST., <http://www.iipsj.org/index.php/home/about-us> (last visited Feb. 18, 2017).

²⁴⁶ Greene, *supra* note 30; Greene, *supra* note 157; K.J. Greene, *Abusive Trademark Litigation and the Shrinking Doctrine of Consumer Confusion: Trademark Abuse in the Context of Entertainment Media and Cyberspace*, 27 HARV. J. L. & PUB. POL'Y 609 (2004).

²⁴⁷ Phyllis Chesler, *All We Have is Each Other*, in THE WOMAN CENTERED ECONOMY: IDEALS, REALITY, AND THE SPACE IN BETWEEN 105 (Loraine Edwalds & Midge Stocker eds., 1995); Brandon Tensley, Michael C. Richardson & Rejane Frederick, *The 2016 Election Exposed Deep Seated Racism. Where Do We Go From Here?*, MOYERS & COMPANY (Nov. 25, 2016), <http://billmoyers.com/story/2016-election-exposed-deep-seated-racism-go>.

²⁴⁸ ANN CVETKOVICH, DEPRESSION: A PUBLIC FEELING 2 (2012) (discussing depression as a public feeling. She understands “political depression” as negative public feeling through which political action is mobilized: “This is not, however, to suggest that depression is thereby converted into a positive experience; it retains its associations with inertia and despair, if not apathy and indifference, but these feelings, moods, and sensibilities become sites of publicity and

the positive and negative communal connections are built. We are concerned with how public feelings facilitate community building and make both CRT and Critical Race IP possible and effective as academic and activist endeavors. As Crenshaw et al. write:

[I]t would be remiss for us to leave the impression that CRT . . . developed as a disembodied, abstracted, and autonomous intellectual formation. . . . [T]his view of scholarship obscures the shared difficulty that insurgent scholars must negotiate and the importance of developing collective strategies to write about racial power from within the institutions central to its reproduction. A thorough mapping of Critical Race Theory, then, must include a discussion of the role of community-building among the intellectuals who are associated with it²⁴⁹

Community building, as it unfolds in the context of CRT, involves connection and collectivity, trust and vulnerability. It is a practice which involves forming bonds with individuals, namely academics and activists, through the remaking of histories, telling of stories, and mentoring of young scholars.²⁵⁰ By bringing individuals together around the goal of anti-racist activism, CRT creates “public intimacy,”²⁵¹ in Berlant’s terms, facilitating the circulation of shared narratives and the creation of spaces of familiarity, comfort, and safety. Intimacy, as we use it here, describes a quality of closeness, a shared public feeling which binds Race Critics together in a group, a community around the goal of anti-racist activism, particularly in legal spaces. In this section, we focus on both community building and public feelings of intimacy to stress the emotional components of CRT. Put differently, while all intimacy evokes a sense of community and closeness, even if with only one other person, not all communities are bound together by intimacy. CRT and Critical Race IP function best when they involve both strong public feelings of intimacy and practices of community building. We therefore attend to CRT and Critical Race IP as involving both formal practices of community building and emotional practices of intimacy making. Without intimacy, as Crenshaw et al. suggest, anti-racist activism fails, because “insurgent scholars” lack the base from which to speak truth to power. In spaces of connection, both CRT and Critical Race IP thrive and flourish.

community formation. One of the larger goals for Public Feelings is to generate the affective foundation of hope that is necessary for political action.”). We read intimacy in the same vein, as a public feeling of closeness that can be cultivated in community contexts. On the usefulness of emotion in critical race theory, see generally Janine Young Kim, *Racial Emotions and the Feeling of Equality*, 87 U. COLO. L. REV. 437 (2016).

²⁴⁹ Crenshaw et al., *supra* note 17, at xxvii.

²⁵⁰ See generally Angela P. Harris, *Building Theory, Building Community*, 8 SOC. & LEG. STUD. 313 (1999).

²⁵¹ Berlant, *supra* note 5.

Before turning to the ways CRT and Critical Race IP involve both community building and intimacy, we find it useful to contextualize the term intimacy, by way of work on public feelings, emotions, and affect. In the section entitled “Structures of Feeling” in his 1977 book *Marxism and Literature*, Raymond Williams writes:

Such changes can be defined as changes in *structures of feeling*. . . . ‘[F]eeling’ is chosen to emphasize a distinction from more formal concepts of ‘world-view’ or ‘ideology.’ It is not only that we must go beyond formally held and systematic beliefs It is that we are concerned with meanings and values as they are actively lived and felt, and the relations between these and formal or systematic beliefs are in practice variable . . . over a range from formal assent with private dissent to the more nuanced interaction between selected and interpreted beliefs and acted and justified experiences.²⁵²

In recent years, an *affective turn* in the academy has encouraged the study not only of, in Williams’ parlance, structures of feeling and emotion, but also affect itself.²⁵³ The affective turn, of course, is not new.²⁵⁴ It is the resurrection and reanimation of the work of scholars of color, often black feminists and queer scholars, including Audre Lorde and bell hooks, who have explicitly and implicitly focused on emotional networks as fundamental to the survival of marginalized communities.²⁵⁵ Affect is largely a neurobiological term used to describe precognitive intensities, one which some use to trace social and cultural practices.²⁵⁶ In contrast, the term public feelings, which we use interchangeably with emotions, describes those named affective experiences which are named and circulated in public discourse and shared across bodies.²⁵⁷ These definitions, however, are best read as “points of departure for discussion rather than definition,”²⁵⁸ starting points for thinking about how community building practices work in tandem with public feelings in the contexts of CRT, including its

²⁵² RAYMOND WILLIAMS, *MARXISM AND LITERATURE* 132 (1977).

²⁵³ CVETKOVICH, *supra* note 248, at 4 (footnote omitted) (“In a narrower sense, the affective turn has been signifying a body of scholarship inspired by Deleuzian theories of affect as force, intensity, or the capacity to move and be moved.”).

²⁵⁴ CVETKOVICH, *supra* note 248, at 7–8.

²⁵⁵ Audre Lorde, *The Uses of Anger*, 25 *WOMEN’S STUD. Q.* 278 (1997); Jennifer C. Nash, *Practicing Love: Black Feminism, Love-Politics, and Post-Intersectionality*, 11 *MERIDIANS: FEMINISM, RACE, TRANSNATIONALISM* 1 (2013). In this vein, Critical Race IP is also a space for thinking more broadly towards radical intersectionality, vis-à-vis sexuality, gender, class, disability, and other categories of oppression. See also Devon W. Carbado, *Colorblind Intersectionality*, 38 *SIGNS: J. WOMEN IN CULTURE & SOC’Y.* 811 (2013).

²⁵⁶ BRIAN MASSUMI, *PARABLES FOR THE VIRTUAL: MOVEMENT, AFFECT, SENSATION* 30 (2002).

²⁵⁷ CVETKOVICH, *supra* note 248, at 4 (footnote omitted) (“Crucial to such inquiry is the distinction between affect and emotion, where the former signals precognitive sensory experience and relations to surroundings, and the latter cultural constructs and conscious processes that emerge from them, such as anger, fear, or joy.”).

²⁵⁸ *Id.* at 5.

interdisciplinary offshoots, and Critical Race IP. Sara Ahmed explains the central inquiry of public feelings:

How do emotions work to align some subjects with some others and against other others? How do emotions move between bodies? . . . [E]motions play a crucial role in the ‘surfacing’ of individual and collective bodies through the way in which emotions circulate between bodies and signs. Such an argument clearly challenges any assumption that emotions are a private matter, that they simply belong to individuals, or even that they come from within and *then* move outward toward others.²⁵⁹

Ahmed thinks about public feelings as transmitted *between* individuals, in ways which can be theorized and interpreted. In her formulation, representational practices are not simply logically instructive but also emotionally so. The passion of public feeling creates bonds between individuals and ultimately collective identities, even though such feelings do not reside within individuals *per se*. Ahmed continues, “[i]n such affective economies, emotions *do things*, and they align individuals with communities—or bodily space with social space—through the very intensity of their attachments.”²⁶⁰ Per Williams and Ahmed, it is possible to trace and theorize the movement of public feelings across social spaces and between individuals. One such space in which public feelings move is in and through legal structures and among those negotiating them in their everyday lives.

The affective turn has manifested in legal scholarship as well as the academy at large.²⁶¹ As scholars have turned to studying the role of emotion in contexts such as remorse in sentencing,²⁶² vigilante justice,²⁶³ and the death penalty,²⁶⁴ the connections between law and structures of feeling have become increasingly clear. Studies of feeling predate the affective turn and were perhaps the inevitable outcome of intersectional feminist urgings to make the personal political.²⁶⁵ Indeed, in many ways, the central struggle of racial justice in the United States, from Dr. Martin Luther King Jr. to Black Lives Matter, could be articulated as one centered on *moving* public feelings, through interest

²⁵⁹ Sara Ahmed, *Affective Economies*, 22 SOC. TEXT 117, 117 (2004).

²⁶⁰ *Id.* at 119.

²⁶¹ See generally Terry A. Maroney, *Law and Emotion: A Proposed Taxonomy of an Emerging Field*, 30 L. & HUM. BEHAV. 119 (2006) (including a lengthy literature review of existing scholarship at the intersections of law and emotion).

²⁶² See, e.g., Martha Grace Duncan, “*So Young and So Untender*”: *Remorseless Children and the Expectations of the Law*, 102 COLUM. L. REV. 1469 (2002).

²⁶³ See, e.g., Tyler Scully & Kenneth Moorman, *The Rise of Vigilantism in 1980 Comics: Reasons and Outcomes*, 47 J. POPULAR CULTURE 634 (2014).

²⁶⁴ See generally Douglas A. Berman & Stephanos Bibas, *Engaging Capital Emotions*, 102 NW. U. L. REV. COLLOQUY 355 (2008).

²⁶⁵ *Id.*

convergence or moral suasion.²⁶⁶ In the tradition of scholarship engaged with public feelings, this section reads CRT and Critical Race IP as fundamentally intimate anti-racist projects, which thrive through the constitution of community, connection, and mutual investment. Understanding CRT and Critical Race IP as engaged in the work of public feelings—including racial feelings—is helpful in considering how both have evolved and continue to evolve. It also provides insight into structural and material necessities for developing Critical Race IP.

A. *CRT as intimate practice*

As Berlant describes, intimacy is a worldmaking enterprise, one through which individuals build space for connection through shared stories, feelings, and vulnerabilities.²⁶⁷ Moreover, intimacy need not be only between persons in romantic, friendly, or familial relationships, it is a feeling which can be negotiated in a variety of contexts, including jurisprudential ones.²⁶⁸ Indeed, Berlant goes on to explain that, for Jurgen Habermas, intimacy is a vital part of democratic engagement, specifically “the notion of the democratic public sphere thus made collective intimacy a public and social ideal, one of fundamental political interest.”²⁶⁹ The notion of collective intimacy is a helpful one for thinking about radical practices within legal spaces, particularly CRT. For instance, in “The Word and the River: Pedagogy as Scholarship as Struggle,” Charles R. Lawrence III writes:

I feel an immediate kinship with the tradition that [Vincent] Harding describes and names ‘the Word.’ It is a tradition of teaching, preaching, and healing; an interdisciplinary tradition wherein healers are concerned with the soul and preachers with the pedagogy of the oppressed; a tradition that eschews hierarchy in the face of the need for all of us who seek liberation to be both teachers and students.²⁷⁰

The Word, Lawrence reminds us, is “a unifying force, a statement of protest, an expression of courage, an organizing tool, the articulation of utopian dreams or a higher law”²⁷¹ It also requires space for feeling and experience, in a manner that calls upon African traditions as models for passing on information to future generations through modes such as storytelling and oral historical tradition.²⁷²

²⁶⁶ See generally Jeffrey J. Pyle, *Race, Equality and the Rule of Law: Critical Race Theory’s Attack on the Promises of Liberalism*, 40 B.C. L. REV. 787 (1999).

²⁶⁷ Berlant, *supra* note 5.

²⁶⁸ *Id.*

²⁶⁹ *Id.* at 283.

²⁷⁰ Charles R. Lawrence III, *The Word and The River: Pedagogy as Scholarship as Struggle*, 65 S. CAL. L. REV. 2231, 2238 (1992)(footnote omitted).

²⁷¹ *Id.* at 2249.

²⁷² *Id.* at 2278–79.

Lawrence's framing of the Word is thematically similar to the way that other Race Critics talk about CRT as practice of storytelling,²⁷³ finding voice,²⁷⁴ and undoing the perception of racial non-neutrality in the law.²⁷⁵ Each of these practices is deeply interconnected with the circulation of public feelings about law, legal pedagogy, race, and social justice. Even reading foundational CRT texts suggests the community building and intimacy making that was interwoven into the history of the movement. From stories of the original CRT workshops to the familiarity with which scholars in the area refer to one another, making visible the non-racial neutrality of law has always been the practice of cultivating public feelings between comrades, establishing relationships between Race Critics, and making space for radical legal practice. Berlant's language is useful in reading Lawrence's: he describes a process creating shared (counter)stories, ones which center marginalized experiences. In his piece, teaching and learning operate as practices of building community and intimacy between individuals who might otherwise not find a place in the legal academy. CRT is, therefore, as much about building a space for connection between individuals, i.e., doing the world-making work of racial justice, as it is about unseating dominant ideologies in law about race. Indeed, the latter process, which involves understanding CRT as a praxis of radical racial justice in the world, necessarily meant activist-scholars working together on legal matters.²⁷⁶ Naming the processes of community building through intimacy making is a productive exercise, one that makes visible some of the practices through which CRT not only critiqued the law's insistence on its purported racial neutrality but also effectively constructed networks, relationships, and spaces in which people of color could thrive in and through law, in the face of white supremacy.

Perhaps no methodological commitment of CRT illustrates better the process of community building and intimacy making than storytelling. Deeply tied to CRT's investments in anti-racist activism and centering marginalized voices, storytelling operated as a vehicle for making space for equality. In *Faces at the Bottom of the Well* and *The Rodrigo Chronicles*, two landmark CRT texts, Derrick Bell and Richard Delgado adopt a storytelling style, using fiction and narrative to weave parables about race and law.²⁷⁷ Their generic choices themselves – specifically moves to create protagonists who move through legal institutions and tell stories about the law using a set of epistemological

²⁷³ See Mutua, *supra* note 17, at 356 (2006); see also FACES, *supra* note 186.

²⁷⁴ See, e.g., Lawrence, *supra* note 270.

²⁷⁵ See, e.g., Crenshaw et al., *supra* note 17.

²⁷⁶ Kimberlé Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 CONN. L. REV. 1253, 1259–60 (2011).

²⁷⁷ See FACES, *supra* note 186; see also DELGADO, *supra* note 186.

assumptions that are not defaults of the legal system – are in a form that is as much about the intimacies of law as it is about law’s technicalities. “The Space Traders,” one of the most memorable chapters of *Faces at the Bottom of the Well*, tells an evocative science fiction tale which traces the negotiations that might unfold in a world in which aliens promised to fix all of America’s problems in exchange for the nation’s black population.²⁷⁸ While initially the tale might provoke incredulous reactions, it quickly becomes hauntingly real, an accessible and realistic portrayal of the United States’ continual failure to secure racial justice for black people. Stories such as this follow an introduction which reminds us that race and law in America are fundamentally emotional and personal experiences, ones which are prominent in public feelings. Bell writes: “When I was growing up in the years before the Second World War, our slave heritage was more a symbol of shame than a source of pride. It burdened black people with an indelible mark of difference as we struggled to be like whites.”²⁷⁹ Bell speaks not only of the public feelings around the laws which institutionalized racism but also the collective experience of blackness in America, the inherent connectedness of those emotions and their relationship to community and growing up with slaves as ancestors. By articulating the public feelings associated with his experience, Bell forces us to *feel* law, not simply think it.

The Rodrigo Chronicles similarly explores emotions, by narrating a series of dialogic conversations between “Professor” and Rodrigo, a person of color in law school. After the book’s publication, Delgado wrote “Rodrigo’s Eleventh Chronicle,” subtitled, = “Empathy and False Empathy,” which he begins: “I was sitting in my darkened office one afternoon, thinking about my life. To tell the truth, I was missing Rodrigo. Not long ago, I had consigned him to the Great Beyond. But now I was flooded with regret and sadness. I missed his brashness, his insouciant originality. Odd, I had not thought of myself as sentimental.”²⁸⁰ Delgado speaks of the emotions of the fictional law professor, emphasizing the bond between him and his former student. The passage is notable not only because of its description of the emotional bond between Rodrigo and his former professor but because

²⁷⁸ *FACES*, *supra* note 186, at 159 (“And this point constituted the third surprise. Those mammoth vessels carried within their holds treasure of which the United States was in most desperate need: gold, to bail out the almost bankrupt federal, state, and local governments; special chemicals capable of unpolluting the environment, which was becoming daily more toxic, and restoring it to the pristine state it had been before Western explorers set foot on it; and a totally safe nuclear engine and fuel, to relieve the nation’s all-but-depleted supply of fossil fuel. In return, the visitors wanted only one thing—and that was to take back to their home star all the African Americans who lived in the United States.”).

²⁷⁹ *Id.* at 1.

²⁸⁰ Richard Delgado, *Rodrigo’s Eleventh Chronicle: Empathy and False Empathy*, 84 CAL. L. REV. 61, 61 (1996)(footnotes omitted).

Delgado focuses on them in a law review article. He speaks of the community building and intimacy making that happens in law schools, particularly around questions of race and identity. *The Rodrigo Chronicles* highlights through storytelling the process through which mentor and student develop intimacy and come together in common purpose, in a manner that is connected and transformative.

Storytelling, of course, is not significant because it is a new practice but because of the way it brings to light structural inequalities and identity based discrimination that is otherwise erased from view. Moreover, storytelling, through its resonance with individual experience, is an effective means of mobilizing action in the service of racial justice. Crenshaw's groundbreaking "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color," makes explicit the role of community building and intimacy in the struggle to end violence against women of color. She writes, presaging Berlant, "[t]his process of recognizing as social and systemic what was formerly perceived as isolated and individual has also characterized the identity politics of African Americans, other people of color, and gays and lesbians, among others. For all these groups, identity-based politics has been a source of strength, community, and intellectual development."²⁸¹ CRT, as mechanism for navigating the relationship between law and race, is rooted in the need to make public those experiences which often unfold in private and highlight the racism which is rendered institutionally invisible. Therefore, to think CRT is, necessarily, to think community building and intimacy and to move individuals to intervene in oppressive systems. It is to think about strategies for activism in a fundamentally anti-black and anti-people of color justice system, it is to think about surviving *together* in the face of oppression, it is to think about creating spaces for coping with inequality, and it is to think about the connection required to sustainably resist violence against people of color. With CRT's approach to community building and intimacy as a model, we turn to a discussion of community building and intimacy in intellectual property law and intellectual properties generally, as well as the relevance of both in forming a cohesive area of study around Critical Race IP.

B. *Critical Race IP as community building and intimacy making*

In the quote at the beginning of this Article, Claudia Rankine and Beth Loffreda remind us that creative works are always already about race.²⁸² We are, as individuals, inescapably chained to "race and its infiltrations" in ways which manifest in the creation, reception, and

²⁸¹ Crenshaw, *supra* note 18, at 1241–42.

²⁸² Rankine & Loffreda, *supra* note 4.

circulation of creative works. How individuals *make, interpret, and share* creative works is fundamentally affected by their identities, in ways which are not always apparent or even conscious. The problem of “race and its infiltrations,” as we discussed earlier, is not one which is confined to copyright law. Rather, trademark law and patent law are also fundamentally raced enterprises. Moreover, intellectual properties—including, for instance, books like *The Wind Done Gone*, bands like the Slants, and the protection of turmeric for wound healing—are part of the fabric of everyday life, they are objects through which public feelings about race are created, transmitted, and negotiated. In other words, intellectual properties are deeply linked not only to identity but also to public feelings *about* identity. Intellectual property works, as Minh-Ha Pham puts it in the context of copyright, “not as a system that simply controls and regulates the circulation of creative works but more fundamentally as a system that provides institutional infrastructure for privileging some emotional expressions and occluding others.”²⁸³ Through intellectual properties, “[b]odies can catch feelings as easily as catch fire: affect leaps from one body to another.”²⁸⁴

Communities also come together to *respond* to intellectual properties which mobilize public feelings. Returning to the examples above, *SunTrust Bank v. Houghton Mifflin*²⁸⁵ moved African American literary scholars to respond to attempts to erase Alice Randall’s tale of Scarlett O’Hara’s half black sister.²⁸⁶ *Matal v. Tam* prompted Asian American and Native American activists to question the choice to trademark a name that for many still operates as a racial slur.²⁸⁷ The grant of patent protection of turmeric for wound healing sparked outrage among Indian and Indian American communities, resulting a political movement against biopiracy. Such responses demonstrate the potential for intellectual properties to prompt the spontaneous and short lived or long lasting formation of communities that counter their provocations of public feelings. We further argue that, as in the case of CRT, communities of those who are interested in racial justice in the context of intellectual properties have the potential to form long lasting connections, with shared intimacy, around Critical Race IP.

²⁸³ Pham, *supra* note 178, at 68.

²⁸⁴ Anna Gibbs, *Contagious Feelings: Pauline Hanson and the Epidemiology of Affect*, 25 AUSTRAL. HUMAN. REV. (2002), <http://www.australianhumanitiesreview.org/archive/Issue-December-2001/gibbs.html>.

²⁸⁵ *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001).

²⁸⁶ Declaration of Henry Louis Gates, Jr., *SunTrust Bank v. Houghton Mifflin Co.*, 136 F. Supp. 2d 1357 (N.D. Ga. 2001), No. 01-00701-CV-CAP-1; Declaration of Toni Morrison, *SunTrust Bank v. Houghton Mifflin Co.*, 136 F. Supp. 2d 1357 (N.D. Ga. 2001), No. 1:01 CV-701-CAP (N.D. Ga. 2001).

²⁸⁷ *Matal v. Tam*, 137 S. Ct. 1744 (2017).

Race + IP 2017 was an opportunity for scholars with an interest in race and intellectual property to join together in conversations about the topic. The conference, which over 60 individuals attended, brought together an eclectic mix of individuals from across disciplines, including law, communication, Ethnic Studies, anthropology, and Black Studies. During the event, scholars and activists commented on the public feelings the conference elicited, from excitement about the speakers in attendance to anticipation for that which might come next. Talks about particular icons of intellectual property—Prince, Clyde Stubblefield, the Cadillac—evoked sentiments of pride, sadness, nostalgia, and anger. The end of the conference, punctuated by a talk by Simon Tam and as well as an impromptu dance party to the music of the Slants, brought scholars together in a thoughtful and festive manner which, while unconventional for most academic events was perhaps appropriate for a race and intellectual property conference. The point we are trying to make here is that the project of Critical Race IP is one which is *organically disposed* to both community building and intimacy making. Gathering to speak about topics around race, intellectual properties, and social justice naturally lends itself to affective connectedness and public feelings of excitement, frustration, anger, hope, and intimacy which move among bodies. Moreover, recognizing such public feelings and the relationship to the creation of communities around race and activism is in keeping with the tradition of CRT.

The tendency of Critical Race IP to elicit and traffic in public feelings which aid in the creation of community and intimacy is helpful in contemplating the contours of the material structures which might facilitate the growth of the area of study. Events which both recognize and center the affective qualities of intellectual properties in a manner that facilitates community building around racial justice are productive ones for building Critical Race IP. In the context of CRT, community building and intimacy making unfolded at workshops, LatCrit conferences, and through an informal network of scholars committed to mentoring those who wished to join the legal academy. We propose that the future of Critical Race IP involves similar material interventions, which create space for continued discussion of the intersections between race and intellectual properties. Moreover, because Critical Race IP is so intertwined with CRT, considering some of the central questions that Race Critics have grappled with may be helpful in articulating the boundaries and materialities of the incipient field.

For instance, like LatCrit, Critical Race IP would benefit from embracing the “shifting bottoms” and “rotating centers” models upon which Athena Mutua elaborates.²⁸⁸ Mutua asked with respect to the

²⁸⁸ Athena Mutua, *Shifting Bottoms and Rotating Centers: Reflections on LatCrit III and the*

black/white binary in CRT: “What group should be at the center of a given study or enterprise?” “Whose faces are at the bottom of the well?” and “What model should we use to analyze a given paradigm?”²⁸⁹ Though these questions do not precisely port over to our discussion of Critical Race IP, Mutua’s answer to them, which argues for the need to center multiple groups from “the bottom,” resonates with Critical Race IP’s diverse, transnational themes and investments. She writes, “The key to the ‘bottom’ metaphor is that the ‘bottom’ is constructed by the particularities of ‘white power’s’ . . . obsessions, which result in the creation of different racial categories and systems.”²⁹⁰ Race IP Crits might consider how whiteness orients the field of intellectual property and where future research might best unfold. Moreover, as Mutua contends, coalition building is a worthy goal for Race IP Crits. Considering how to reconcile the diverse histories of the “shifting bottoms” as a means for creating “rotating centers” may be helpful in articulating how to conceptualize future events and scholarly works. While we have proposed provisional themes here, we only offer an opening salvo, one, which we hope that Race IP Crits will take up in productive ways. The questions of who might be at the center of Critical Race IP, if the area of study indeed has a center, whose faces are at the bottom of the intellectual property well, and what models should be used to analyze given paradigms are certainly open ones. For the time being, cultivating the ideals of community building and intimacy within the context of Critical Race IP may be a sufficient starting point for answering those questions as well as new and developing ones.

IV. CRITICAL RACE IP AS DECOLONIZING PRAXIS

In the historic piece “Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation,” Derrick Bell, Jr. observes that “Leroy Clark has written that the black community’s belief in the efficacy of litigation inhibited the development of techniques involving popular participation and control, that might have advanced school desegregation in the South.”²⁹¹ Bell, who echoes the criticism of Civil Rights Movement leaders such as Dr. King, goes on to observe that “[t]he problem of unjust laws . . . is almost invariably a problem of distribution of political and economic power.”²⁹² If we accept Bell’s principle as true, then it is necessary to find productive

Black/White Paradigm, 53 U. MIAMI L. REV. 1177 (1999); see also Matsuda, *supra* note 106; cf. FACES, *supra* note 186.

²⁸⁹ See Mutua, *supra* note 288, at 1177–78.

²⁹⁰ *Id.* at 1180.

²⁹¹ Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 514 (1976).

²⁹² *Id.*

extra-legal as well as legal approaches to anti-racist and anti-colonial resistance within the context of intellectual properties, ones which are not invested in conservative law and economics models. Following Bell's lead and his conceptualization of racial realism,²⁹³ we offer as one avenue for locating such radical approaches: decolonial theory. Addressing the structural sources of the unequal distribution of political and economic power that Bell raises as a primary cause of racial non-neutrality in law is a central goal of decolonial theory and practice, which have become increasingly central to anti-racist and anti-colonial strategy among academics and activists. While we do not mean to suggest that decolonial theory is the one right answer to reworking race and intellectual property, we maintain that its understanding of the nexus of (neo)coloniality, narratives of progress, power, and knowledge is a useful one to deploy to undo intellectual property's racial and (neo)colonial logics. Moreover, decolonial theory can be thought together with other types of critical theory, including CRT, feminism, and queer theory in order to imagine new ways of creating radical multiversalities. As such, it creates space for a complex and multifaceted engagement with race, (neo)coloniality and intellectual property that addresses the fundamental historical power dynamics that shaped laws of knowledge production. In short, it is only through the death of the (European/American) human²⁹⁴ that Others can claim their place as radical equal partners in humanity.²⁹⁵

Decoloniality, as Walter D. Mignolo describes it, addresses the "hidden agenda" of modernity,²⁹⁶ namely an investment in coloniality. For him, coloniality "names the underlying logic of the foundation and unfolding of Western civilization from the Renaissance to today of which historical colonialisms have been a constitutive, though downplayed, dimension."²⁹⁷ Darrel Wanzer-Serrano describes decoloniality's centrality in creating systems of power which embrace Otherness, writing "[d]ecoloniality is an alternative accent – one marked by pluriversal commitments, geohistorical attentiveness, and biographical configurations."²⁹⁸ As such, the "coloniality" in decoloniality does not simply describe the *process* and *reparation* of

²⁹³ For an overview of Bell's conception of racial realism, see generally Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363 (1992).

²⁹⁴ Nelson Maldonado-Torres, *The topology of being and the geopolitics of knowledge: Modernity, empire, coloniality*, 8 CITY 29 (2004).

²⁹⁵ Alexander Weheliye's recent book, *Habeas Viscus*, is also a notable intervention in this conversation, one which is consonant with the aims of decolonial theory. ALEXANDER WEHELIYE, *HABEAS VISCUS* (2014).

²⁹⁶ WALTER D. MIGNOLO, *THE DARKER SIDE OF WESTERN MODERNITY: GLOBAL FUTURES, DECOLONIAL OPTIONS 2* (2011).

²⁹⁷ *Id.*

²⁹⁸ DARREL WANZER-SERRANO, *THE NEW YORK YOUNG LORDS AND THE STRUGGLE FOR LIBERATION* 22 (2015).

colonization, it describes the *logics* of progress, enlightenment, development, and democracy which made the domination of Other peoples, in its many racist and (neo)colonial manifestations, a thinkable option. Modernity and coloniality are, therefore, fundamentally intertwined, with the former often offering ideological and narrative justifications for the latter. Per Anibal Quijano, (neo)coloniality operates through a “matrix of power”²⁹⁹ with four component parts: economic control, authority, patriarchal domination, and knowledge and subjectivity.³⁰⁰ Quijano explains the scope of coloniality, as well as its tendency to permeate other forms of oppression:

In the beginning colonialism was a product of a systematic repression, not only of the specific beliefs, ideas, images, symbols or knowledge that were not useful to global colonial domination, while at the same time the colonizers were expropriating from the colonized their knowledge . . . as well as their products and work. The repression fell, above all, over the modes of knowing, of producing knowledge, of producing perspectives, images and systems of images, symbols, modes of signification, over the resources, patterns, and instruments of formalized and objectivised [sic] expression, intellectual or visual. It was followed by the imposition of the use of the rulers’ own patterns of expression, and of their beliefs and images with reference to the supernatural. These beliefs and images served not only to impede the cultural production of the dominated, but also as a very efficient means of social and cultural control, when the immediate repression ceased to be constant and systematic.³⁰¹

For Quijano, the colonization of power was the underlying impetus for the creation of the category of race, the original move which made all other forms of domination possible.³⁰² Moreover, colonization’s objectification of the colonized, i.e. rendering them the *objects of study* instead of *producers of knowledge*, conceptually voids the idea of Other knowledge.³⁰³ The four categories of the colonial matrix that Quijano identifies articulate areas in which colonizers exercised their power to effect total control over the colonized and their knowledge.

Decolonization, therefore, requires a “de-linking” from the colonial matrix of power and its ideological commitments to modernity,

²⁹⁹ *Id.* (While the concept of the coloniality of power originates with Quijano as cited below, Mignolo, as used by Wanzer-Serrano, adopts the term “matrix of power.”).

³⁰⁰ See generally Anibal Quijano, *Coloniality of Power, Eurocentrism, and Latin America*, 1 *NEPANTLA* 533 (2000); see also Walter Mignolo, *Introduction: Coloniality of power and decolonial thinking*, 21 *CULTURAL STUD.* 155 (2007).

³⁰¹ Anibal Quijano, *Coloniality and Modernity/Rationality*, 21 *CULTURAL STUD.* 168, 169 (2007).

³⁰² See generally Quijano, *supra* note 300.

³⁰³ *Id.*

with all its component parts.³⁰⁴ Put differently, decolonial theory and praxis conceives of “epistemological reconstitution,”³⁰⁵ which makes space for “another rationality which may legitimately pretend to some universality.”³⁰⁶ Wanzer-Serrano defines decoloniality as:

[A]ny practice, discursive or otherwise, that facilitates a divestment from modernity/coloniality and invents openings through which decolonial epistemics can emerge. . . . Delinking requires changes in both content and form It requires being oriented toward shifts in our genealogies of thought, including drawing authority from colonized spaces/voices and resisting latent imperialisms—even when such resistance may not be exclusively oppositional.³⁰⁷

Decoloniality is also distinct from dewesternization, a practice which attempts to create radical multiversality through the already existing frameworks of global governance and neoliberal capitalism.³⁰⁸ We are skeptical that dewesternization, as Mignolo defines it, can play any role in undoing intellectual property’s valorization of economic productivity, investment, and profit, or its deep and entrenched fidelity to racial capitalism. The post-*Lochner* and post-Fordist world imagines creatorship as labor performed in the service of national economic survival. Consequently, we imagine the decolonial as the radical departure from law and economics and racial capitalism as well as racism and (neo)colonialism. That is not to say that incrementalism is unimportant in moving toward a decolonized world; rather that the struggle for social justice in intellectual property law appears to necessitate undoing and remaking economic models that fuel racial capitalism.

In this section, then, we situate decoloniality as a practice which can be used to unmake intellectual property’s investments in whiteness and racial capitalism, particularly because of its overarching engagement with the underlying epistemologies of knowledge production and its transnational scope. We first define coloniality, a practice which is both historical and contemporary, with reference to decolonial understandings of the term and then examine how decoloniality might be used to think through intellectual property’s “possessive investment in whiteness.”³⁰⁹ In doing so, we offer

³⁰⁴ MIGNOLO, *supra* note 296, at 159–60.

³⁰⁵ Quijano, *supra* note 301, at 176.

³⁰⁶ *Id.* at 177.

³⁰⁷ Wanzer-Serrano, *supra* note 298, at 25.

³⁰⁸ Christopher Mattison, *Delinking, Decoloniality & Dewesternization: Interview with Walter Mignolo (Part II)*, CRITICAL LEGAL THINKING (May 2, 2012), <http://criticallegalthinking.com/2012/05/02/delinking-decoloniality-dewesternization-interview-with-walter-mignolo-part-ii>.

³⁰⁹ See generally GEORGE LIPSITZ, *THE POSSESSIVE INTEREST IN WHITENESS: HOW WHITE PEOPLE PROFIT FROM IDENTITY POLITICS* (2006).

decoloniality as an avenue for theoretical and practical exploration vis-à-vis intellectual properties. As we show, spaces of knowledge production that break with the demands of coloniality already exist, and we model what may come next.³¹⁰

Coloniality, as formulated by Mignolo and Quijano, implicitly includes intellectual property regimes, which incorporate core principles of modernity into their frameworks for governing property ownership. Whether understood through the history of devaluing the knowledge of racial Others, including slaves and indigenous peoples, the imposition of predominantly European intellectual property rights regimes on the developing world, the commodification of traditional knowledge, or the implicit imposition of development agendas on the regulation of knowledge production, intellectual property law reinforces the central premises of modernity and beliefs in the inequality of people of color that underlie them. Because intellectual property law is deeply embedded within and committed to reproducing modernity/coloniality, legal reform without undoing its fundamentally European values is unlikely to succeed in creating more racially just information paradigms.³¹¹ Put differently, decolonizing intellectual property is a necessary prerequisite to undoing the racial hierarchies that are embedded within the law itself. While this does not mean that we should abandon attempts at legal reform, it does mean grappling with the underlying power dynamics through which intellectual property regimes were and continue to be produced. Read as such, decolonization is a complementary project to CRT, one that looks beyond even the ideologies which inform law's racial non-neutrality. Decolonial thinking might therefore be read as overlapping with CRT but with a broad commitment to undoing the damage of modernity/coloniality on the world, including its structures for information economies.

Nelson Maldonado-Torres uses the framework of decoloniality to construct a framework for not simply anti-(neo)colonial resistance but

³¹⁰ See, e.g., Dalida Maria Benfield, *Apparatuses, Globalities, Assemblages: Third Cinema, Now* (2011) (unpublished Ph.D. dissertation, University of California, Berkeley) (on file with University of California, Berkeley Electronic Theses and Dissertations); Vats, *supra* note 126.

³¹¹ This premise is complicated by practices of dewesternization, which attempt to remake intellectual property's fundamental Europeaness. See, e.g., MIGNOLO, *supra* note 296, at 48 (defining dewesternization as "economic autonomy of decision and negotiation in the international arena and affirmation of the sphere of knowledge, subjectivity. It means, above all, deracialization: it is the moment in which . . . the 'other' has become 'the same' but with a difference: the wounds inflicted over time by the imperial difference."); Walter Mignolo, *Epistemic Disobedience, Independent Thought and Decolonial Freedom*, 26 THEORY, CULTURE & SOC'Y. 1 (2009); see also Vats, *supra* note 126 (citing Mignolo's definition of dewesternization). While dewesternization may create space for Otherness within the colonial matrix, it remains problematic because of its investments in capitalism—albeit of a less racially inflected type than the status quo—and neoliberalism. As such, dewesternization that does not attend to larger global systems provides its own set of problems.

also anti-racist thinking. Following W.E.B. DuBois and Sylvia Wynter, he argues for the centrality of modernity/coloniality in the construction of racist regimes. For him, as with Fanon, “[d]ecolonization is about the creation of a new symbolic and material order that takes the full spectrum of human history, its achievements, and its failures, into view.”³¹² Yet the path of decolonization is not shaped around “overcoming” Empire or (neo)colonization as Fanon intimates.³¹³ It is constructed through radical departure from the logics of modernity. Maldonado-Torres continues:

Taking Du Bois and Wynter’s lead, I would like to suggest that from the perspectives of the repeatedly racialized groups of modernity, particularly indigenous people and people of African or Afro-mixed ex-slave descent, but also Jews and Muslims, a concept of Being premised on what is often referred to as the dialectics of modernity and the nation, and their supposed overcoming by the emergence of imperial sovereignty or Empire, miss the non-dialectical character of damnation. That is, in short, that what are changes for many, for those whom Frantz Fanon called the condemned of the earth seem rather to be perverse re-enactments of a logic that has for a long time militated against them.³¹⁴

Here, the decolonial is about creating something beyond the dialectic of modernity and coloniality, a framework that can radically embrace and center Otherness. His work is instructive here, as it offers us space for conceiving of how the decolonial accesses the problems of racism and (neo)coloniality in structures of knowledge production. In the remainder of the section, we unpack how delinking might look, as a set of scholarly and activist perspectives, guided by an ethic of decolonial love, that reorients us toward hearing the voices of the Global South so that we might begin disrupting what we know and how we come to know those things, but not necessarily in ways that are accountable or attempt to answer to the West.³¹⁵

Anderson, who spoke on this at Race + IP 2017, dreams of “de-colonial futures” in the context of intellectual property law.³¹⁶ While she predominantly focuses on indigenous knowledge, her work asks us to consider how and why decolonial theory might inform attempts to reimagine intellectual property law. For Anderson, decolonizing indigenous knowledge, at least in part, includes the creation of a new

³¹² Nelson Maldonado-Torres, *The Topology of Being and the Geopolitics of Knowledge: Modernity, Empire, Coloniality*, 8 CITY 29, 36 (2004).

³¹³ See generally FRANTZ FANON, *THE WRETCHED OF THE EARTH* (1963).

³¹⁴ Maldonado-Torres, *supra* note 312 at 42 (emphasis omitted).

³¹⁵ Wanzer-Serrano, *supra* note 298, at 27.

³¹⁶ See *Reimagining IP*, Race + IP, <http://raceipconference.org/sessions/reimagining-ip> (last visited Mar. 30, 2018); see generally JANE ANDERSON, www.jane-anderson.info (last visited Aug. 15, 2017).

system of labels and licenses whereby indigenous peoples have control over how information and objects are managed.³¹⁷ One functional outcome of such licensing projects—as well as the attendant pushes to leverage human rights as a means of protecting traditional knowledge³¹⁸—is to revalue knowledge that has been consistently marginalized, in part by highlighting the right of its creators to dictate how and when it is used. Scholars such as Boateng and Basole also examine ways of addressing the devaluation of traditional knowledge. Both scholars suggest even the terms “traditional knowledge” and “indigenous knowledge” are problematic because they create categories of information within intellectual property regimes.³¹⁹ Identifying traditional knowledge or indigenous knowledge frequently involves differentiating it from information produced in Western contexts in ways which are legible to international intellectual property regimes. However, as Okediji and Coombe point out, such intellectual property regimes were built on a foundation of coloniality which refused to categorize information produced by the colonized as knowledge.³²⁰ These critiques operate as delinking moves, which question the narratives that modernity has laid out for non-European knowledge. They also exemplify the type of critical practice that might aid in reimagining intellectual property law,.

Delinking decoloniality in the context of intellectual property requires the rejection of narratives which categorize Other knowledge as secondary or inferior to that of Westerners, whether implicitly or explicitly. Terms such as “traditional knowledge,” “indigenous knowledge,” and “folklore” are dangerous precisely because they create a bifurcation between that knowledge produced informally, often by non-Westerners, and “real” knowledge. Resisting such narratives, for instance by advancing narratives of bio-piratical theft from the non-Western world and reclaiming memories that might otherwise be erased from the canon, are important first steps in remaking the laws of information. The step, which follows pulling back the curtain on the implications of the modernity/coloniality binary for intellectual property

³¹⁷ See, e.g., Jane Anderson & Kim Christen, “Chuck a Copyright On It”: Dilemmas of Digital Return and the Possibilities for Traditional Knowledge Licenses and Labels, 7 MUSEUM ANTHROPOLOGY REV. 105 (2013); Jane Anderson, *Options for the Future Protection of GRIKTCES: The Traditional Knowledge Licenses and Labels Initiative*, 4 WIPO J.: ANALYSIS INTEL. PROP. ISSUES 73 (2012).

³¹⁸ George Nicholas, Catherine Bell, Rosemary Coombe, John R. Welch, Brian Noble, Jane Anderson, Kelly Bannister & Joe Watkins, *Intellectual Property Issues in Heritage Management*, 3 HERITAGE MGMT 117 (2010).

³¹⁹ BOATENG, *supra* note 194; Basole, *supra* note 195.

³²⁰ Okediji, *supra* note 137, at 324 (writing that “Intellectual property law was not merely an incidental part of the colonial legal apparatus, but a central technique in the commercial superiority sought by European powers in their interactions with each other in regions beyond Europe.” (emphasis omitted)).

law, however, is a more complicated one. Decolonization requires reconstituting universality in a manner, which, instead of substituting the European for the totality, creates space for the embrace of multiple perspectives, in a manner, which is both democratic and cosmopolitan. While we do not offer a model to supplant that of modernity/coloniality, we note that several nations, such as India,³²¹ Ghana,³²² and South Africa,³²³ are remaking intellectual properties through the embrace of digital databases, local models of intellectual property protection, and rejection of international intellectual property regimes. Moreover, decolonizing practices can unfold at the individual level as well, through resistive performative practices, such as discursive interventions and arts. Our goal in highlighting both the undoing of narratives of modernity/coloniality in intellectual property and practices which supplant Western intellectual property law is to point to further avenues of research for Critical Race IP scholars. Existing scholarship in these areas suggests that attending to decoloniality as a means of interrogating the intersections of race and intellectual property is likely to be a fruitful avenue for further research.

CONCLUSION

This article endeavors to name and provisionally map the field of Critical Race IP, an area of study which describes that scholarship concerned with the intersections of race and intellectual property law. In doing so, it situates Critical Race IP in a larger socio-cultural context, in which racial capitalism is a constant but evolving feature of the historical landscape. We contend that the emergence of the Information Economy, after the era of Fordism, resulted in a repackaging of familiar racial projects in and through intellectual properties and pushes for intellectual property maximalism. Critical Race IP represents a relatively new and rapidly growing direction in CRT scholarship, it is an exemplar of the ways the latter must constantly evolve to accommodate changing economic and cultural conditions and racial formations. In articulating Critical Race IP as an area of study, our goal is not necessarily to suggest particular methodologies or even fixed unifying questions that define the interdisciplinary movement. Rather, we are concerned with naming and describing prevalent themes and core tenets in a set of scholarly works that interrogate the inequalities which emerge at the intersections of intellectual property and intersectional racial identities. We hope that project can be a generative move for scholars who wish to research, write, and practice in this area.

³²¹ See generally REDDY T. & CHANDRASHEKARAN, *supra* note 217.

³²² See generally BOATENG, *supra* note 194.

³²³ Foster, *supra* note 238.

In setting forth a history of post-Fordism and the rise of Critical Race IP, we show that, as a product of modernity/coloniality, intellectual property law is always already invested in whiteness and racial inequality in ways which necessitate both examination and undoing. Scholars in a variety of disciplines have started to undertake such examinations, with their works engaging a set of themes which we have highlighted here. Continuing to examine questions related to defining (intellectual) property, understanding intellectual property's stories, the public domain, framing and reframing "piracy" and "counterfeiting," distributive justice, access to knowledge, managing traditional knowledge, and contemplating intellectual properties is an important task, one which we urge scholars to continue to take up in new and innovative ways. We also highlight the significance of personal relationships and public feelings in developing this area of study. One way to facilitate dialogue and scholarship in Critical Race IP is to invest in community building and intimacy making, cornerstones of the growth and development of CRT, both of which play a valuable role in cultivating generative interpersonal connections and structures of feeling through which new ideas can flourish. Conferences and workshops as well as collaborative projects which bring together senior and junior scholars play a significant role in cultivating and retaining Critical Race IP scholars. Finally, in concluding with a discussion of the decolonial turn, we offer a framework for moving beyond the radically unequal systems produced from the vantage point of law and economics, which has been historically complicit in intellectual property law's theoretical and practical centering of whiteness. Decolonization, a process that began to unfold after World War II, is not only a physical process but an epistemological one, which requires addressing intellectual property's embeddedness within practices and ideologies of modernity/coloniality as well as the connections between the latter and racism and neocolonialism. Here, we offer decolonization as a means of beginning to contemplate the remaking of intellectual property law, in ways that not only radically embrace Otherness but make space for non-European ways of thinking, making, and owning knowledge. As we imagine it, Critical Race IP is a space for creating models for the politics of reparation—not simply equal rights or distributive justice—through which oppressed groups can heal the wounds of racism and colonialism.