“COPYNORMS,” BLACK CULTURAL PRODUCTION, AND THE DEBATE OVER AFRICAN-AMERICAN REPARATIONS

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industry also sponsors educational campaigns to deter copyright infringement, often using artists to convey the message that copyright infringement equals theft in commercials to captive audiences at motion picture theaters.

To paraphrase Pink Floyd, there's a dark sarcasm in the stance of the entertainment industry regarding "copynorms." Indeed, the "copynorms" rhetoric the entertainment industry espouses shows particular irony in light of its long history of piracy of the works of African-American artists, such as blues artists and composers. For many generations, black artists as a class were denied the fruits of intellectual property protection—credit, copyright royalties and fair compensation. Institutional discrimination teamed with intellectual property and contract law resulted in the widespread under-protection of black artistic creativity. Similarly, black inventors created technical and scientific works that impacted early American industries. Evidence exists that black inventors also faced similar divestiture in the industrial marketplace. The mass appropriation of the work of black artists and inventors reflects the systemic subordination based on race that characterized most of U.S. history.

The entertainment industry also played a large and central role promoting derogatory racial stereotypes, and has not to date formally apologized for selling imagery that facilitated lynching and discrimination. The contrast between the music industry's rhetoric on file-sharing and its dark history of appropriation mirrors the gulf of the classic "American Dilemma," "the ever-raging conflict between . . . the American Creed," where America thinks, talks and acts under the influence of high national and Christian precepts . . . and the reality of group prejudice."**

This article contends that a key component in developing "copynorms" is atonement for the mass appropriation of intellectual property rights for African-American artists. An atonement model of redress, drawn from scholarship on African-American reparations, can provide needed compensation, healing, and closure to a dark chapter in American history. Further, an atonement model promotes a focus on a "bottom-up" oriented vision of artist empowerment rather than a "top down" model that focuses on the interests of large distributors of cultural

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1 See, e.g., Justin Hughes, On the Logic of Suing One's Customers and the Dilemma of Infringement Based Business Models, 22 CARDOZO ARTS & ENT. L.J. 725, 760 (2006) (noting that "unprecedented levels of unauthorized reproduction and distribution of sound recordings via P2P systems has forced record companies to enforce copyright norms [via litigation]");
2 Mark F. Schultz, Copynorms: Copyright Law and Social Norms, in 1 INTELLECTUAL PROPERTY AND INFORMATION WEALTH 201, 217 (Peter K. Yu ed., 2007);
production. However, an atonement model also offers advantages to large distributors in their battle against mass copyright infringement on the Internet.

Part I of this article will place black cultural production and creativity in an historical context, and examine how copyright and contract laws resulted in depriving black artists, as a class, of credit, compensation, and control. Part II explores the mechanics of cultural appropriation through contract, and Part III will explore copyright law's role in mass appropriation. Part IV will very briefly sketch the contours of the debate on African-American reparations, investigate how intellectual property deprivations might fit into a reparations claim, and suggest the obstacles such claims would face. Finally, this article will conclude with some recommendations, particularly that reparations in the music context could be funded from two sources: a levy on works extended by the Copyright Term Extension Act, and a levy from Internet music sales.

1. AFRICAN-AMERICAN CREATIVITY, INVENTION AND INNOVATION IN HISTORICAL CONTEXT

Intellectual property ("IP") law consists broadly of patent, copyright, trademark, trade secret, rights of publicity and idea law. A pillar of all IP is the provision of "limited property rights in intangible products of investments, intellectual, and/or labor." Until recently, IP scholarship focused on doctrine and theory that did not include an examination of social and cultural subordination and inequity. However, IP scholars are increasingly recognizing that the legal regimes of intellectual property are inextricably linked to systems of social and economic inequality. Copyright scholars, for example, have critiqued the seemingly neutral construct of authorship, noting that the concept of authorship is "a culturally, politically, economically, and socially constructed category rather than a real or natural one."

Maggie Chon has examined the distributional effects of international IP law on developing nations, while Rosemary

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5 See, e.g., MARIGRET BARRETT, INTELLECTUAL PROPERTY 2 (3d ed. 2007).
6 Id. at 2.
10 See Coombe, supra note 9; Bartow, supra note 9; Rebecca Tushnet, My Fair Ladies: Sex, Gender and Fair Use in Copyright, 15 AM. U. J. OF GENDER, SOCIAL POL'y & L. 278 (2007).
13 See K.J. Greene, What the Treatment of Black Artists Can Teach About Copyright Law, in INTELLECTUAL PROPERTY AND INFORMATION WEALTH, supra note 5, at 385.
14 The Constitution authorizes Congress to promote the progress of arts and sciences by enacting patent and copyright legislation. U.S. CONST. art. I, § 8.

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Coombe, Ann Bartow and Rebecca Tushnet have posited that IP law might foster gender inequality. Keith Aoki has examined how patent law may have excluded black slaves from its incentives. Meanwhile, scholars Shubha Ghosh, Funi Arewe, Angela Riley and Christine Farley have explored how the whole area of indigenous rights protection has exposed problems of inequality in the IP paradigm.\(^{14}\)

A. Racial Subordination in the Intellectual Property Context

The treatment of black artists provides a wealth of insight into core IP values, including incentive theory, optimal standards for creativity, and IP as mechanism for distributive justice.\(^{10}\) Moreover, the treatment of black artists, much like that of women, exposes the hidden context of subordination in the IP arena. The appropriation of the creative output of black creators for a long period of U.S. history parallels the pervasive subordination of blacks generally under the color of law. Racial discrimination has produced unequal access to capital, education, land and other entitlements under slavery and Jim Crow segregation. Copyright law exists within social structures that historically did not serve the interests of black cultural production.

The problem of structural inequality in the IP context is important for three reasons. First, the issue remains unexplored in the legal arena. This omission is arguably itself a product of "invisibility" that accompanies racial and other forms of subordination. Secondly, the treatment of black artists and inventors as a class directly contravenes a Constitutional norm underlying IP protection: to promote arts and sciences by rewarding creators.\(^{14}\) Black artists did not share rewards commensurate with their enormous creativity. From an economic perspective, black artists sustained losses through deprivations of
copyright protection that would constitute a massive sum. Further, given their corporate nature as successors in ownership, the class of beneficiaries (primarily music publishers and record labels) that profited at the expense of Black artists are both identifiable and continue to benefit given the long terms of copyright protection. This point is underscored by the recent copyright extension that reflected a policy choice to provide a windfall to the largest IP distributors. Third, the treatment of Black artists can inform the debate over "copynorms." Both the treatment of Black artists and Internet piracy involve a problem of mass appropriation and unjust enrichment. This combination of factors parallels the current debate over African-American reparations, as both the institutional music industry and reparations advocates seek to shape norms and redress the taking of property.

B. Invisibility of Black Cultural Production in the Intellectual Property Context

Despite the centrality of black cultural production to U.S. culture, black artists have been the "invisible men [and women]" of copyright jurisprudence. The problem of invisibility is perhaps even more acute in the case of black women, where scholars have contended that the "central part played by women both in the blues and in the history of African-American cultural consciousness is often ignored." Expositing from Ralph Ellison’s classic novel on racial alienation, Invisible Man, scholars have remarked that an "unrelenting assault on [b]lack humanity produced the fundamental condition of [b]lack culture—that of invisibility and nonexistence." Invisibility, in Ellison’s vision, allegorically referenced "the constant struggle to survive in a world that does not recognize... [Blacks] as [a] vital contributor[s]." In the context of cultural production, Ellisonian invisibility is concrete in all its bitter irony. In the face of prolific and innovative Black musical creativity, "[W]hites [in the 1920s] often vehemently denied that African-Americans had made any contribution to the creation of jazz. New Orleans ' Dixieland' musicians... made it a point of honor never to mix with [B]lack musicians or acknowledge their talents." In later years, it was widely conceded that "though African-Americans had certainly invented ragtime and jazz, these musical styles were being brought to their highest levels by [White] outsiders." C. The Centrality of African-American Cultural Production to U.S. Culture and Law

The invisibility of black creators in IP jurisprudence is astonishing in light of the central role they have played in American culture. The construct of race occupies the center of American culture. Similarly, black cultural production has occupied a central place in the development of copyright law and related IP doctrines such as the law of ideas. It has been said that "narrative works considered landmarks in American culture for technical innovation and/or popular success have often importantly involved the portrayal of African Americans." Similarly, analysts have contended that "Black music's influence and appropriation within the broader American society constitute premier issues of twentieth-century American cultural history." Until recently, neither the judicial system nor the legal academy has explicitly addressed the roles of gender and race in IP. Nonetheless, black artists, authors and themes stand at the forefront of the copyright fair use doctrine in the context of music and literary works. The leading case articulating the standard of infringement for appropriation of literary works in the film

23 Catherine P. Ramsey, Jr., THE POWER OF BLACK MUSIC: INTERPRETING ITS HISTORY FROM AFRICA TO THE UNITED STATES (1993). See also Banks, supra note 22, at 922.
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context has Black characters at its center. The sprawling debate over whether digital sound sampling constitutes copyright infringement has a Black Art Form—rap music—at its center. Similarly, the leading case in New York on television idea misappropriation involves African-American parties. Many IP cases reveal judicial indifference or outright hostility to the notion that black cultural production is any way impacted by or related to broader social currents of racial subordination. Courts, for example, have rejected IP protection under the law of ideas for products such as The Cosby Show, finding the concept of non-nostalgical black satirical comedy insufficiently novel to warrant protection from idea appropriation. More tellingly, courts have shown hostility to black art forms such as digital sound sampling, characterizing sampling as simply stealing, and suggesting the extraordinary sanction of criminal copyright of color has any compelling interest in telling the story of a pivotal slave revolt in her own unique voice, especially in light of the motion picture studio's $75 million investment in the film Amistad. The compilation of case law illustrates the under-explored role of race in IP.

D. Black Creativity in the Vanguard of American Culture and Intellectual Property

From its inception, American law protected intellectual property, enshrining those rights in the patent-copyright clause of the U.S. Constitution. Following British philosophical legal traditions, American law sanctified the right to private property and broadened the concept to “not only material objects but everything which the individual had a natural right to claim as his own.” However, racial minorities were excluded from high-sounding Lockean labor and natural right theories of personal autonomy. Once slavery flourished throughout the Americas, validated in the United States by the original Constitution.

Black artistic creativity has long been at the forefront of American culture. African-American artists and inventors created and developed innovative forms of intellectual property since the settlement of America. The furnace of slavery forged Black creation in the arts. Slaves resisted oppression in part by “creating new expressive forms out of African traditions.” Nineteenth-century case law documents that white audiences in early America did not appreciate African slave music and dance, finding it to be a nuisance. Nevertheless, African-based culture profoundly influenced American culture: the “Charleston,” a dance with origins in Africa, “became so popular that a premium was even placed on hiring of black domestics that could dance it well enough to teach the white lady of the house.” Similarly, the minstrel tradition profoundly shaped cultural values in America and was based on “[White] performers trying to imitate [Black]ness.” By the 1840s, black music forms constituted the most


[33] See Henry Louis Gates, Jr., The Parable of the Talents, in GATES, JR. & WEST, supra note 19, at 38. Professor Gates notes that it is “not only that the cultural/creative edge has been influenced by [Black] creativity, it’s that [Black] creativity, it so often seems today, is the cultural cutting edge.” Id.


[37] HOLLOWAY, supra note 35.

[38] Stuckey, supra note 34, at 162-63, 173. Stuckey notes that “[t]he perspective of time enables us to appreciate what the founders could not, the musical genius of slaves working under the blazing sun and singing: ‘I know my robe’s gonna fit me well / I tried on it at the gates of hell.” Id.
popular segment of the music industry: "Negro music, for the first
time spread beyond the plantation [and] through songs like Zip
Coon and Jim Crow, a vogue for slave music was created which took
the entertainment world by storm." Indeed, it has been noted
that "coon" music, also called "nigger songs," was for decades the
most profitable segment of sheet music in the United States.

The agrarian economy of the American South was built on the
backs of African slaves. In large part, the early music industry
was built largely on the creativity and innovation of black
composers and artists. Black composers and performers created
virtually every original American musical genre and profoundly
influenced the development of popular music and culture.

Ragtime music was the first important musical innovation
following "the cultural interchange brought about by slavery in
the United States." Following the ragtime craze in the late
Nineteenth and early Twentieth centuries, blacks created blues
and jazz.

Jazz scholars underscore the dominance of African-American
innovators, noting that "the basic stylistic and conceptual advances
... have been determined by ... great instrumentalists-
improvisers—Louis Armstrong, Earl Hines, Coleman Hawkins,
Lester Young, Charlie Parker, Dinzy Gillespie, Miles Davis, John
Coltrane, Ornette Coleman." In music scholarship, the
contributions of whites to jazz have been under-appreciated.

However, most analysts would agree that "any historical narrative
that emphasizes the immense contributions to jazz by individuals
of color is understandable and well founded—it remains
irrefutable that the vast majority of the genre's most influential
players have originated from the African-diapormic communities."

Music historians assert that "the most important effect that the
advent of [W]hite had on jazz had nothing to do with the
performance of the music at all .... [All] the [W]hite players did
was to bring jazz into the American mainstream." 16

E. Racial Discrimination in Cultural Production

For much of American history, the valuable rights of IP
(including compensation, credit and control) eluded Black artists
operating in a social system of racial discrimination. The structure
of the early music industry reflected social structures of
discrimination in four manifestations: promotion of stereotypes,
exclusion, segregation and discrimination. The record labels of
the early recording industry, in keeping with the times, promoted
stereotypical images of Black people, "portraying [B]lack
performers as "pleasant music, big-mouthed "Sapphires," men with
bulging eyes and oversized lips, and heavy dialect." 17

Black artistic production was also impacted by exclusion.
From its inception, racial subordination led the early recording
industry to resist opening its doors to African-American artists.
Thomas Edison invented the phonograph machine that made the
recording industry possible. However, Edison personally
disbanded Black music, and rejected the notion of a commercial
release of sound recordings by none other than the great Bessie
Smith. 18 Similarly, Black artists were excluded from performance
rights societies such as the American Society of Composers,
Authors, and Publishers ("ASCAP"). 19 ASCAP was formed in 1914
to protect performance rights in musical compositions and to
distribute hundreds of millions of dollars to its members. 20
Analysts have noted that through the formative years of the
recording industry, "ASCAP did little to protect African-American
artists ... notwithstanding an explicit non-discrimination
policy." 21

Segregation also was imposed on black artists. Although the
sale of sound recordings was a big business in the United States by
the 1920's, Black artists were segregated into "race record"
divisions of major record companies, and subjected to particularly onerous contracts. They faced constant discrimination and humiliation in the segregated music industry. Many early blues artists were poor and illiterate: the Blues was created not just by black people but by the poorest, most marginal black people... [most of whom]... could neither read nor write.”

Black artists and their music faced backlash and abuse from the culture making apparatus controlled by the dominant majority. The category of “race” records expanded beyond the Black community in the 1940’s and 50’s, and “white youngsters began buying R&B disks and attending black bashes... all phalanxes of the white world mounted an attack.”

F. The Minstrel Tradition and Cultural Appropriation

The pattern of appropriation of black expression is illustrated by the minstrel tradition. The minstrel tradition had an enormous impact on American culture and society as the “first and most popular form of mass culture in the nineteenth century United States.” Its popularity “would dominate popular theatre into the twentieth century... as the vehicle through which America’s first popular songwriters and performers would emerge.” Minstrelsy impacted all major entertainment media, “from the early radio hit Amos ‘n’ Andy to the success of the first sound film, The Jazz Singer.” The minstrel tradition served as a foundation for the twin dynamics impacting Black cultural production: appropriation and stereotyping. The minstrel tradition “played an essential role in providing race with the negative meaning it carries today.” It established the paradigm of cultural appropriation that besieged each African-American art form from blues to ragtime, jazz, R&B and rap. Each successive art form has conformed in some ways to the minstrel tradition and the dynamic of appropriation.

The minstrel tradition represents one of one of piracy: “white minstrelsy deliberately appropriated the music and comedy of black slaves...” As an imitation art, “blackface minstrelsy was a tribute to the black man’s [sic] music and dance in that the leading figures of the entertainment world spent the better part of the nineteenth century imitating his style.” One of the ironies of the minstrel tradition was that while on the one hand, it “presented blacks as naïve, slap-happy buffoons,” on the other it “gave blacks an opportunity to benefit financially by capitalizing on their own stereotypes (as whites had been doing for years), and provided valuable theatrical experience.”

Minstrelsy “provided the first real employment for Negro entertainers...” and introduced the older forms of blues as well as classic blues and early jazz to the entire world. The minstrel show, “a defining episode in American race relations,” was based on the appropriation of Black creativity, and yet the “appearance on stage of whites masquerading in blackface as Blacks” ultimately paved the way for authentic black performers. However, this pattern of appropriation is still in place today. The financial control of minstrelry, with regards to rap music, is retained by whites, “even though the success of [minstrel] troupes depended on black stars.”

New technologies in the early Twentieth Century vastly expanded America’s culture industries. Black cultural production launched mass sales in the recording industry, based on...
mainstream desire for black artistry. Although Tin Pan Alley relied on black sounds for the rise of the music industry, and Black musical forms stood at "the heart of American popular song ... the rewards went almost completely to white composers ..." Analysts have shown that as a routine practice, "[t]he song and dance of [blacks] ... were appropriated by [whites] via the white-controlled music business (record companies, music publishers, radio stations)."

In keeping with this same pattern, in subsequent years, black artists originated dances while white bands and companies reap the benefits. Black composers created ragtime, yet another example of the dynamic whereby "Whites adapt black forms which are in turn adapted and parodied by blacks, which are one again adapted and parodied by [Whites], not always with the most sympathetic intentions." Although black composer Scott Joplin was the central figure and prime creative spirit of ragtime, it was a white composer, Irving Berlin, who was crowned with public acclaim as "the king of ragtime." Similarly, the first blues and jazz recordings in the early Twentieth century comprised white entertainers imitating black musicians.

The minstrel tradition of appropriation continued for much of the history of the music industry. In the formative period of jazz and blues, white artists such as Paul Whiteman "received the credit, the money, and the publicity for a music essentially not their own[,] ... in effect ... presenting an appropriated music

in heavily diluted form and ... successfully selling it as the real thing." The fleecing of Black artists was the basis of the success of the American music industry and there is a strong probability that "African-Americans were systematically used to write songs without being given the credit which would lead to future earnings." Further, the early institutional music industry, as a matter of practice, frequently saw publishers claim co-authorship for famous blues songs, although the publishers themselves played no role in creating such songs. Such a tradition reflected their "power [over] ... songs created by oft-unlettered [Bl]ack musicians in a virtually unregulated business."

Clearly, Black innovators in jazz and other genres "borrowed the music from 'Bach to Schonberg.' " This 'full freedom of movement' ... allowed jazz the art form to flourish and thrive." The history of American music is based on a long tradition of "borrowing" from other works. It has been noted that our national anthem, the "Star-Spangled Banner" was comprised of "Francis Scott Key's 1814 poem set to the tune of ... an old English drinking song." The history of cultural production is thus replete with borrowing, and "in general the jazz-blues songs borrowed more from the folk idiom than they fed into it ..." Similarly, the success of early hip-hop/rap music artist included a substantial amount of borrowing of key phrases and techniques.

However, when numerous creators take part in the creation of a work, "authorship should be accorded to those who originate the

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68 Id. Shaw notes that Whites possessed an "insatiable appetite ... for the sights and sounds of 'pretend' [Blacks]. ... [T]he nationalization of popular culture products traversed a century-old tradition of [Blacks] facing minstrelsy, even as it contributed some major sources." 69 MELNICK, supra note 20, at 44. 70 CHARLES REED, URBAN BLUES (1966). 71 See JAMES HARRING & SCOTT JOPLIN, THE MAN WHO MADE RAGTIME 74 (1978). One of "Blacks ... had subsequently adapted and amended the two-step [swung] and created the 'cakewalk' ... [a dance whose] mid [1890s], [Whites had in turn adapted the cakewalk and] White composers would make a fortune selling cakewalk sheet music." Id. 72 Id. at 68. 73 FRANK TIBBO, JAZZ: A HISTORY 96 (2d ed. 1993). 74 See PALMER, supra note 55, at 105-60. Palmer notes with some irony that one of the first blues recordings was "Nigger Blues," copyrighted by a [White] minister entertained from Dallas in 1913 and recorded in 1916 by a Washington lawyer and businessman George O'Meara. Id. at 105. Palmer also notes jazz recording began in 1917 in much the same way, "with a white group, the Original Dixieland Jazz Band, recording in a style they'd learned from [Blacks]." Id. at 106. 75 Plainly, there have argued that "the process of whites stealing from blacks is also the mainstream. In this regard, the most influential of modern minstrels have been Al Jolson, Bing Crosby, and Elvis Presley." GORDON, RIDING ON A BLUE NOTE 33 (1981). 76 BEN SIDran, BLACK TALK 69 (1971). Siradan postulated that Black innovation developed, in part, as a response to prevent appropriation by Whites: "[W]hites learned the special techniques of [Blacks] music than Negro musicians developed new, more difficult techniques to replace them." Id. at 60. 77 MELNICK, supra note 20, at 34. 78 HOWARD REICH & WILLIAM GAINES, JELLY'S BLUES: THE LIFE, MUSIC AND LEGEND OF JELLY ROLL MORTON 91-92 (2003). Reich and Gaines noted that the practice allowed publishers such as Walter Melrose to "double-dip, collecting the publisher's traditional 50 percent of royalties, as well as an additional 50 percent of the songwriter royalties." Id. 79 J. Michael Keys, Musical Missings: The Case for Redistributing Music Copyright Protection, 10 MICH. TELECOMM. & TECH. L. REV. 407, 427 (2004) (quoting IRVING SARLOSH, AMERICAN MUSIC 175 (1969)). 80 See, e.g., MICHAEL PERELMAN, STEAL THIS IDEA: INTELLECTUAL PROPERTY RIGHTS AND THE CORPORATE CONSCIOUSNESS OF CREATIVITY 40 (2002). For an excellent examination of borrowing in the copyright music context, see Olufunmilayo B. Areola, From J. C. Bach to Hip Hop: Musical Borrowing, Copyright, and Cultural Context, 84 N.C. L. REV. 547 (2006) (contending that borrowing in music context can provide incentives for innovation). 81 EDWARD B. SANGER, THE ILLUSTRATED STORY OF COPYRIGHT 31 (2000). 82 PAUL OLIVER, ASPECTS OF THE BLUES TRADITION 202-203 (1968). 83 See CHERRY L. KEYS, RAP MUSIC AND STREET CONSCIOUSNESS 70 (2002) (noting that much of New York's rap community contend that the first rap group to attain national exposure, Sugar Hill Gang with "Rapper's Delight" used rhymes originally created by others). Professor Keys' book contains a fascinating and detailed chronicle of the rise of rap music in America. See also REMNBR AID McLEOD, OWING CULTURE 88-81 (2001)."
expression that is ultimately embodied in the work."46 Certainly, outside of blatant copying, the foundational blues artists deserve credit for their innovative works. The culture of blues production, which "allows for considerable reworking of verses,"47 should not be used against the very artists exploited by outsiders. Further, it has been noted that a glaring feature of music borrowing is its strikingly one way direction.48

II. MECHANICS OF APPROPRIATION – CONTRACTS AND COPYRIGHT LAW

A. Contract Law and Racial Subordination

African-American creativity has been innately bound up with the legal regimes of intellectual property and contract law. In the music industry, "[t]he legal agreement is much more than a mere collection of words and definitions [but rather] a mirror of the character of the musical industry at the time of its writings."49 Following the Civil War, Congress "established the right to contract as a foundation of American citizenship."50 However, contract law, in conjunction with IP law, facilitated the widespread fleecing of Black artists long after the Civil Rights Act of 1876. For example, during the lifetime of Scott Joplin, creator of ragtime, Black composers were routinely deprived of royalties.51 The treatment of Black artists validates the assertion that the "history of American contract law and issues of race and culture are inextricably intertwined."52 Similarly, scholars have noted that a core relationship exists between IP and contract law.53

Many of the defining features of contract theory, including

47 William F. Ferris, BLUES FROM THE DELTA 58 (1978) (noting that a "bluesman's version of a particular song is considered his own even when he admits it [originated] in a different song from another singer").
48 See Greene, supra note 22.
49 Peter Muller, THE MUSIC BUSINESS: A LEGAL PERSPECTIVE 78 (1994) (noting that "[f]or the recording agreement is at the very heart of the artist's professional career").
51 Harris, supra note 71, at 101 (noting that "it was not common to publish works by [Black] composers, and those whose works were published were frequently exploited. White publishers could purchase a tune or song for ten dollars and reap a considerable profit. The hapless composers would take anything to see their work in print").
52 Anthony R. Chase, Race, Culture, and Contract Law: From the Cottonfield to the Courthouse, 28 CONN. L. REV. 1, 6 (1995).

the notion of freedom of contract, the objective theory of contract formation, the doctrine of adequacy of consideration and traditional hostility to undoing bargains absent fraud or duress, facilitated the subordination of Black artists. An unregulated system of contract disadvantages those with the least access to power and information in society. The unacknowledged gorilla in the room, racial stratification, rendered contract protection illusory to a large class of Black creators. Thus, as a pattern and practice, the treatment of Black artists met the two conditions for "a legal contractual exploitation claim:[..] . . . asymmetric bargaining relation[s] . . . [and a] superior party tak[ing] unfair advantage of the opportunities thereby created.54

B. "Freedom of Contract" Against a Backdrop of Racial Subordination

Racial subordination is antithetical to the norm of freedom of contract. Under neoclassical economics, freedom of contract is a paramount concern.55 However, freedom of contract is just as much a socio-historical construct as a legal doctrine. Progressive scholars contend that contract ideology without civil rights of voting and property protection "produces oppression, not freedom."56 Contract law is interpersonal by nature, and thus it has been aptly noted that "[t]he seeming empiricism of contract law may be little more than an egotistical facade."57 Contract scholars posit that "consent is at the heart of contract law."58 However, under a system of racial subordination, blacks could nevertheless "be deprived of their rights by force of law without their consent."59 Superficially, contract theory is "objective, eschewing any notion of societal iniquities."60

In substance, contract law facilitated the appropriation of black cultural production, depriving innovators such as Jelly Roll Morton, Scott Joplin and Jimi Hendrix of creative reward.61 In the

54 Rick Bigwood, Exploitative Contracts 140 (2003).
56 Fox, supra note 88, at 27.
59 Id. at 237.
61 See David Henderson, The Life of Jimi Hendrix: "SMELL ME WHILE I KISS THE SKY" 264-65, 304 (1978) (highlighting unfair music contracts foisted on rock music pioneer
IP context, as in other legal contexts, "contract law is directly implicated in the maldistribution of economic rights based on race." In contrast, the neoclassical view of contracts rejects the notion of contract as a social and not just legal construct. Neoclassical contract law asserts that contract is "the result of the free bargaining of parties who are brought together by the play of the market and who meet each other on a footing of social and approximate economic equality." From a social and historical perspective, the illusory nature of freedom of contract vis-à-vis African-Americans is manifest. After Emancipation of the slaves, "[i]n simulations between [B]lack laborers and [W]hite landowners still occurred against a background of immense inequality." This same background would have affected all IP transactions as well.

C. Race-Neutrality in Contract Making

Contract scholarship and doctrine historically ignored dynamics such as race and gender. In contract texts and treatises, including the Restatement of Contracts, parties to contracts exist as race and gender-neutral "A" and "B." "Critical" perspectives of the law argue otherwise, contending that in society, parties to contracts possess cultural attributes imbued with racial, gender, sexual and socio-economic identities. Race is no longer as salient as it was in earlier centuries, and American society no longer condones lynching and protects fundamental civil rights. Race still plays some roles in transactions today.

In recent years, analysts have noted that minority homebuyers are still "denied home loans more than twice as often as comparable Caucasian applicants." Similarly, scholars have highlighted the persistence of racial subordination in commercial transactions, where in the context of car sales, white male consumers "receive significantly better prices than blacks and women." It should come as no surprise then, that blacks experienced a disadvantage in IP transactions, given that courts once rationalized the unfair treatment of African-Americans. In the creative context, as in the marketplace context, "the size and nature of [racial and gender] discrimination may be masked by the process of bargaining." Critical perspectives contend that contract law "continued the oppression of . . . African-Americans[s]." As one commentator of music history notes, the "overexchanged and overbartered record of miscastegated cultural production everywhere bespeaks a racist history of exploitation exclusively weighted to dominant white interests." The defining characteristic of black cultural appropriation has been "its one-way direction — white performers obtaining economic and artistic benefits at the expense of minority innovators." Black music and performance styles were clearly seen as valuable economic resources from the inception of the recording industry. Yet despite the immense contributions of Black artists to popular music, "it is ironic that no black-owned label developed into a substantial enterprise until the 1960s, with the formation of the Motown complex." Ragtime, for example was the most popular music in America in its day, yet its originator Scott Joplin, an African-American composer, "received no money up front [for the seminal composition Maple Leaf Rag] and . . . a royalty of only one cent per copy sold." W.C. Handy was "flaged out of his 'royalties' from Memphis Blues." James Bland, one of the greatest of the minstrels, composer of such early American classics as Oh, Dem Golden Slippers and Carry Me Back to Old Virginia, found his work appropriated by white minstrelsy, who "often published the songs [Bland wrote] under their own names."
Jelly Roll Morton, who claimed with some justification to have invented jazz, was one of the primary innovators of jazz, died indigent, "unnoticed and unsung except by a tiny group of musicians and jazz fans who loved his music." 111 Bo Diddy, a foundational blues artist for pioneering the blues label Chess [was] a station wagon and a check for about $1,200." 116 Similarly, Big Bill Crudup, known as the "father of rock 'n' roll" and the musical force behind the rise of Elvis Presley, "apparently did not receive royalties due to him almost from the beginning of his recording career," and died destitute in 1974. 117

Scholars have opined that exploitation of artists is a natural tendency of our copyright system. 118 The intersection of contract and copyright law resulted in a system of super-exploitation built into an already exploitative industry. Contract law enabled "[record label owners] with a strike of a pen, [to] split song writing credits and therefore royalties by adding names or pseudonyms to the copyright [in music publishing and sound recording contracts]." 119 The paradigm of laize-faire contract law left such transactions subject to private enforcement, notwithstanding unfairness or discrimination.

Classical contract law does not examine the adequacy of consideration: "[I]n ascertaining the presence of consideration, the courts will not `weigh' the consideration, or insist on a `fair' or `even' exchange." 120 Accordingly classic common law would not enjoin the "common trick [of record companies] to pay off a black artist with a Cadillac worth a fraction of what he was owed." 118 Similarly, the doctrine of unconscionability, a doctrine "specifically tailored to account for unfairness issues . . . remain[s] evasive when it comes to socially rich factors such as race." 121 Significantly, classic common law "did not develop an explicit doctrine for dealing with unfair bargains." 122 Indeed, conservative commentators are flinty suspicious of an attempt to use contract doctrine to police social discrimination under the guise of contract, contending that unconscionability should not "be used to protect those who are poor . . . or members of disadvantaged racial or ethnic groups." 123

There were, of course exceptions to the rule of appropriation. Maine Smith, a blues singer whose sound recording Crazy Blues was one of the first blues recordings and a major hit, "was rumored to have earned over $100,000 in royalties during her career." 124 And undoubtedly, some of the exploitation in the music industry was no doubt Black on Black, just as Africans themselves facilitated some of the slave trade.

III. MECHANICS OF APPROPRIATION: COPYRIGHT LAW

Copyright law protects original works of authorship fixed in a tangible of expression, 125 including literary, audio-visual, choreographic, motion picture and musical works. 126 Copyright infringement occurs when a person, intentionally or not, violates any of the exclusive rights granted to authors without a valid defense, such as fair use. 127 The purpose of copyright law is to "foster the creation and public communication of original expression." 128

120 Id. at 64. Mamie Smith, nonetheless "died virtually penniless in 1948."
121 Id. It is said, for example, that "according to legend" the great Fletcher Henderson, an originator of Swing, used numbers written by the legendary Fats Waller by paying "one number for each hamburger Fletcher bought a hungry and indigent Waller." SHAW, supra note 62, at 127. Rock 'n' roll pioneer Chuck Berry was sued by his pianist, Johnnie Johnson for co-authorship rights in fifty songs Johnson claimed he created with Berry, but for which he received no credit. See Johnson v. Berry, 228 F. Supp. 2d 1071 (E.D. Mo. 2002). See also Posner, supra note 114 (noting that artists, writers and producers "complained that just about everyone got ripped off at Motown").
123 Id.
124 See supra note 62, at 34.
125 See supra note 62, at 137. Rock 'n' roll pioneer Chuck Berry was sued by his pianist, Johnnie Johnson for co-authorship rights in fifty songs Johnson claimed he created with Berry, but for which he received no credit. See Johnson v. Berry, 228 F. Supp. 2d 1071 (E.D. Mo. 2002). See also Posner, supra note 114 (noting that artists, writers and producers "complained that just about everyone got ripped off at Motown").
A. Copyright's Structural Disadvantages to Black Cultural Production

1. Idea-Expression Dichotomy

I have argued elsewhere that copyright law's structure predisposes it to disadvantage Black forms of music production. The structure of copyright law, drafted upon broad and pervasive social discrimination, resulted in the widespread denial of copyright protection to black music artists. One such predicate consists of the idea-expression dichotomy of copyright law. The idea-expression dichotomy is a fundamental tenet of copyright law, and mandates that copyright law should not protect ideas but only expression of ideas. Part of the justification for the dichotomy is that "[i]f the first person to articulate a theory, divulge a principle or lay out a plot line could prevent all others from using it for several decades, progress [in creative works] would be stymied rather than promoted." The import of the idea-expression dichotomy is that copyright does not protect styles of performance pioneered by Black innovators. Copyright law in effect rewards imitation that builds on innovation, such as the "style" of a composer such as Jelly Roll Morton.

2. Minimal Originality as a Disadvantage to Innovators

Copyright law has the least restrictive standard of originality of all IP regimes. In theory, the standard of minimal originality "supposedly inspires others to venture out into the realm of facts, 'ideas' and unowned 'sources' and try to do the same as other authors, thereby making sure creative works will be abundant and widely circulated." The minimal originality standard of copyright law is a low threshold indeed; copyright law essentially protects anything more original than the alphanumeric arrangement of phone numbers in a phone book.

However, I have contended that copyright's standard of minimal originality in essence penalizes the most innovative creators of copyrighted works. African-American composers and performers have historically stood at the forefront of musical innovation. Music historians recognize that "[i]nnovation is uniquely central to the jazz aesthetic unlike classical music."

3. Requirement of Fixation in Tangible (Written) Form

Copyright law requires authors to fix musical works in a tangible form, such as sheet music or a recording, to be a protected musical composition. Of course the improvisational mode of Black cultural production in music and the fact that many forms of composition defy notation imposed a disadvantage: "Black culture ... reproduces itself out of an oral [not written] predicate. ... [And] as a result of educational deprivation, many Black artists ... could not functionally read or write." Jazz musicians and jazz analysts have long been "aware of the impossibility of notating jazz rhythm accurately using ordinary Western musical notation." The standard of fixation naturally disfavors Black music forms, and the requirement of written notation disfavors the less literate.

4. Hyper-Technical Copyright Formalities

The 1909 Copyright Act, which governed the music industry

- See Erik Nornson, Blue the Murder of Jazz 48 (1997).
- Suhmoch, supra note 22, at 378. In contrast, patent law has a much more arduous standard of novelty and nonobviousness. It could be argued that the most innovative artists would be better protected under the patent standard of novelty rather than the copyright standard of minimal originality (a point for another day).
- Peter Townsend, JAZZ IN AMERICAN CULTURE 21 (2006). Townsend remarked that the "earliest Europeans attempting to write down African-American music found it formidably difficult."
until the amended 1976 Copyright Act, was hyper-technical in its application. Before 1976, copyright authors were required to register in accordance with numerous formalities regarding registration and renewal of copyright. Failure to comply with these arcane formalities in the 1990 Copyright Act (predecessor to the 1976 Act) could and did result in forfeiture of copyright. The creators of blues music typically did not have the literary, savvy, legal representation or the wherewithal to navigate the complexities of the 1909 Copyright Act. The court in the Bessie Smith case assumed that artists would know the law, but imputing knowledge of complex law is just another form of white domination given the state of Black education and legal representation in the 1920's. It has also been noted that other aspects of copyright law, particularly the compulsory license, which permits "covers" of original compositions, enabled whites to "shanghai the African-American songbook."  

IV. LACK OF "MORAL RIGHTS" PROTECTION UNDER U.S. COPYRIGHT LAW

American copyright law is predicated on protecting the economic interests of authors. In contrast, moral rights regimes, such as those in continental Europe, extend non-economic rights to "protect the personal interests of all authors [and] safeguard the dignity, self-worth, and autonomy of the author." U.S. copyright law provides only limited moral rights protection to a narrow range of visual art. Significantly, explicit moral rights protection under copyright law does not extend to musical works: the Visual Artist Rights Act "does nothing for literary, musical, or other copyright works as are vulnerable to moral rights violations as visual artists."  

Are African-American artists have been particularly vulnerable to moral rights violations of attribution and integrity. The historical pattern of cultural appropriation included the predissemination of the dominant culture to stereotype and demean minority cultures. . . . [and to] water down the vitality of Black music to make it more palatable for [W]hite audiences. It has been said that: 'Smoothing over' a Black sound . . . is a moralizing act, judging the ethnic traits and meanings of a sound inferior, unbeautiful or bad, somehow in need of [W]hite correction [W]hite appropriation attempts to erase the culture it plunder—a metaphor for the submission that dominant groups will upon others.

The minstrel tradition distorted African-American works via gross stereotyping, a violation of integrity rights. Similarly, the music industry customarily denied credit for Black-created works, a violation of the right of paternity. Copyright law, however, does not protect such rights, further burdening Black cultural production.

Copyright law was not designed with interests of African-American authors in mind. However, copyright law was not intentionally designed to disadvantage Black cultural production. Although the structural predicates of copyright law imposed disadvantages on Black modes of expression, structural anachronies in themselves do not state a cause of action for copyright infringement. The fleecing of Black artists violates every

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149 See Greene, supra note 22, at 353-54.
153 Id.
154 See, e.g., Ellis Cose, THE ENVY OF THE WORLD ON BEING A BLACK MAN IN AMERICA 13 (2002) (noting that the rap stars of today "build multimillion-dollar fortunes by embracing the identity imposed from without, by relying being 'triggered,' with all that implies").
first line of the opinion, where he states that "[f]rom 1923 to 1928
. . . Smith earned from $1,500 to $2,000 per week, a staggering
sum for anyone then to earn, and an awesome achievement for
a black woman of that era." 119 The inference of the court’s opening
salvo is this: Bessie Smith made a lot of money and, as a black
woman, should have no right to complain about exploitation.
This inference wholly misses the mark, and shows deep ignorance
about the music business and IP law: “copyright is the most
valuable asset in the music business.” 120 Touring and performing
income was often just as elusive to African-American artists as
royalty income. 121 Furthermore, performance income ends upon
the death of the artist, whereas royalty income continues post-
mortem to the heirs of copyright owners under copyright law.

The heart of the Smith’s case was the section 1981 claim that
“Columbia Records, during the 1920s and 1930s, discriminated
against all black performers by fraudulently signing them to
contracts with low payment terms and no royalty provisions, while
at the same time signing white performers to contracts for much
greater sums, including royalty provisions.” 122 The court rejected
the 1981 claim because: first, civil rights claims such as 1981 do
not survive the death of the person injured thereby; and second,
even if the claims did survive Smith’s death, the statute of
limitations on those claims had long run by the time of the suit.
The court similarly rejected Plaintiff’s attempt to toll the
statute of limitations based on the fact that Smith had been
induced to sign contracts conveying copyrights to Columbia by
fraud. The court invoked the constructive knowledge doctrine,
holding that “if Bessie Smith were indeed the copyright holder she
knew or should have known that, certain legal rights, including
the rights of licensing, were hers by virtue of those copyrights.” 123
The Gee court refused to examine the adequacy or sufficiency of
consideration in the Smith contracts. On the issue of whether the
claims of the heirs of Smith based on re-issues of Bessie Smith’s
recordings in the 1970s, the court sided with Columbia that the
rights to Smith’s recordings were ceded to Columbia by the

line evokes that of Judge Cardozo’s in Wood v. Lady Duff Gordon, where he begins the
opinion by stating that “[t]he defendant styles herself a ‘creator of fashions.’” 222 N.Y. 88,
90 (1917).
120 JOHN P. KELLOGG, TAKE CARE OF YOUR MUSIC BUSINESS: THE LEGAL AND BUSINESS
ASPECTS YOU NEED TO GROW IN THE MUSIC INDUSTRY 109 (2000).
121 See COLLIER, supra note 116, at 117 (noting that records companies did not pay blues
artists “well or at all, because they insisted that record sales were simply a way of
promoting live gigs, and promoters didn’t pay up either”).
122 474 F. Supp. at 613.
123 474 F. Supp. at 620.
doctrine of adverse possession.160 Columbia had asserted "open and notorious" ownership of the masters from 1951 when it asserted on linear notes to re-issues that "[Bessie] left behind her 160 recordings (everyone of them, incidentally, the property of Columbia Records)."160

Although the Smith lawsuit hardly registered among legal commentators at the time, in retrospect, the Smith suit opened a narrow window to the widespread appropriation of Black music throughout American history. From a copyright perspective, the suit validates the thesis of my previous article on Black artists and copyright law. In that article, I asserted that the work of Black artists was so extensively appropriated as to essentially dedicate Black innovation in cultural production into the public domain.167 The Smith suit's premise corroborates the premise that two core legal regimes, copyright and contract, operated to deny Black creative artists compensation for their creative works. The Smith suit failed to survive a motion to dismiss before a trial on the merits. The suit demonstrates the severe obstacles to providing redress for injury to Black artists as a class through the legal system, perhaps validating that assertion of Critical Race Theorists ("CRT") that "[t]he master's tools cannot be used to dismantle the master's house."168

The Gee opinion illustrates the difficulties any legal claims for redress by Black artists would face. The case seems to validate the contention of CRT proponents that "traditional judicial decision-making . . . fails African-Americans and other persons of color."166 The court, necessarily constrained by the individualistic focus of traditional judicial decision-making, takes a completely ahistorical approach to the issues, refusing to recognize that the treatment of Smith was not an individual aberration, but part of systemic and institutional discrimination against black artists. Arthur Melrose, a producer and talent scout who made Bluebird Records "the most significant blues record label in the 1930s," is said to have appropriated the songs of leading black blues composers, paying the copyright royalties to himself and his heirs.179 Although blues

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Legend Willie Dixon alleged that, for a long period, "the record companies would pay black artists less money than anybody else got,"172 this claim does not state a legal cause of action. It appears that in the context of creative appropriation of Black cultural product that "traditional judicial decision-making is structurally unsuited to meet the needs of African-Americans and other outsider groups."172

The Smith suit cannot be construed as just another example of how the record industry treated all artists, i.e., the "equal opportunity exploiter" theory. The standard early blues artist contract assigned all rights to record companies in exchange for a $25 flat fee per side.175 In contrast to black composers, for example, "the vast majority of Irving Berlin's [hit songs] were eventually controlled by Irving Berlin, Inc., and Berlin was paid $500 weekly in addition to "a six cent royalty on popular songs and eight cents on production numbers."

Black artists and composers faced discrimination and exploitation that went beyond standard music industry practices.

V. BRIEF CONTOURS OF THE DEBATE ON BLACK REPARATIONS

The debate over reparations for African-Americans traditionally has focused on the systemic subordination of Blacks under color of law and has centered upon restorative justice for slavery.176 The underlying basis for reparations arguments lies primarily in the appropriation of African slave labor for hundreds of years.176 However as Professor Boris Bittker noted in his seminal book on reparations, "to concentrate on slavery is to understake the case for compensation . . . [because] . . . in actuality, slavery was followed not by a century of equality but by a mere decade of faltering progress, repeatedly checked by violence."177 Analysts have also extended arguments for reparations to the long, post-

160 Id. at 657.
161 Id. at 656.
162 See Greene, Copyright, Culture and Black Music, 21 HASTINGS ENT. & COMM. L.J. 359, 368 (2000).
166 See Arjoa A. Ayi-Botwe, The Development of the Movement for Reparations for African Descendants, 5 J.L. & POL. 135, 135 (2002) (noting that the "demand for reparations, although firmly based in the enslavement of African peoples in the United States, is a demand for the acknowledgment and repair of the vestiges of slavery").
slavery period of legalized American apartheid known as "Jim Crow" segregation. Similarly, the interaction between legal regimes, such as property and contracts, has been fertile ground for exploration by CRT and reparations scholars. CRT scholars contend that past racial domination impacts current race problems, because through the "entangled relationship between race and property, historical forms of domination have evolved to reproduce subordination in the present." Although reparations discourse is a hot topic of late, reparations scholars on the subject have noted that "there has been little writing on reparations for African-Americans." Analysts have noted that there have been "five major waves of political activism [promoting] the idea of reparations for African-Americans since the emancipation of the slaves." Conversely, it has been noted that "the [Black] reparations movement ceased to command serious attention from political leaders between the end of Reconstruction in 1870 and the rise of the modern civil rights movement during the 1960s." However, the reparations debate has taken on new life through a combination of grassroots organizing, legislative initiatives, and lawsuits. In March, 2002, for example, a group of plaintiffs instituted a class-action lawsuit demanding monetary compensation from U.S. companies that benefited from the transatlantic slave trade. Similarly, forums on Black reparations have been held at leading law schools. A leading reparations advocate surveyed the trends and noted that the "number of reparations lawsuits and legislative initiatives at the local and state levels is unprecedented." However, reparations activism (and by inference, scholarship) is considered both controversial and divisive by many.

A. Arguments Favoring Reparations

1. Economic Arguments: Economic Inequality Resulting from Slavery and Post-Slavery Apartheid

Some analysts have contended that notwithstanding the "cascade of recent writings on reparations ... the legal and moral analysis of reparations is dramatically undertheorized." Further, just as African-Americans are not a monolithic race, reparations proponents do not agree in monolithic fashion on the aims, approaches, or justifications for reparations. Reparations discourse is, however, closely tied to CRT. A key tenet of CRT is that racism is a fundamental predicate of American culture and society. Reparations discourse is a logical extension of CRT, which seeks to "focus on how race permeates the legal terrain." Proponents of CRT have contended that "the deafness of Congress, courts and individual scholars to persistent calls for reparations portends the persistence of white supremacy as a tacit normative principle." Some analysts contend that reparations are justified because of the significant economic disparity between

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187 By way of example, the Minister Louis Farrakhan, who has made racially incendiary and offensive remarks in the past, supports reparations and is, apparently, openly promoted by a leading reparations activist group, NCCOA. See Kibbi Tchikamba, National Reparations Worked: A Movement in the Making, BLACK REPARATIONS TIMES, Mar. 7, 2005, at 1.
188 Eric A. Foster & Adrian Vermeule, Reparations for Slavery and Other Historical Injuries, 103 COLUM. L. REV. 689, 690 (2003) (characterizing reparations literature as "incoherent and rhetorical ... rather than analytical"). This critique of CRT is fairly standard, even by those apparently sympathetic to its aims. See, e.g., Devon W. Carbado, Critical Race Studies: Race in the Boondocks, 49 UCLA L. REV. 1293, 1312 (2002) (contending that CRT's position that antecedent policies should apply to those at the bottom of society are "insufficiently theorized").
189 Id.
192 Derrick Bell, a leading proponent of the CRT movement, for example, contends that racism is a permanent part of the American landscape. See DERRICK BELL, FACETS AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM ix (1992). See also Jerome McMillan, Can We Ever Be Free?: Race and the Failure of Justice, 83 MINN. L. REV. 1027 (1999). Professor McMillan asserts that "White racism in its many guises is deeply buried in the structure of the law and the legal academy.
194 Magee, supra note 168, at 867.
whites and blacks, contending that "the persistence of those disparities is due in large measure to legally enforced exploitation of Blacks and socially widespread anti-Black racism." Slavery and state-enforced segregation resulted in severely diminished opportunity for wealth accumulation by Blacks.  

In the post-slavery era of de jure and de facto discrimination, Blacks were similarly denied equal opportunity in education, a long-established component of economic mobility in the United States. Economic discrimination following the Civil War denied Blacks "opportunities to accumulate wealth, in particular opportunities to purchase property." The effects of this economic subordination are not of ancient vintage: 

As recently as the 1970s, blacks were frozen out of financial benefits due to discriminatory lending and housing policies sanctioned by the government; thus [w]hen housing prices tripled during the 1970s, affording many whites a 300% increase in the value of their property, blacks again found themselves either unable to enter the housing market or unable to afford property in desirable neighborhoods.

Although significant progress in racial equality has no doubt occurred since the end of the civil rights movement in the 1960's, economic disparities continue to disadvantage African-Americans as a class. Into the 1990's, survey evidence demonstrates the persistence of negative stereotypes against Blacks and other minority groups. Stereotyping has real effects in the marketplace; studies have shown that Blacks pay significantly more for automobiles, for example, as a result of race or color. Far from being extinct, evidence exists that "race-contingent decision-

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making is still a pervasive factor in many (but not all) facets of everyday life." Randal Robinson's book, The Debt: What America Owes to Blacks, has proven both controversial and influential. Robinson's book postulates that the American Dilemma of race will not abate until the nation recognizes and atones for the wrongs of centuries of slavery and state-sponsored discrimination. These wrongs have left a legacy of "legalized American racial hostility." Reparations proponents contend that "[t]he basis of the claim for Black reparations is not need, but entitlement. . . . Reparations as a norm seeks to redress government-sanctioned persecution and oppression of a group. Proponents of reparations have also invoked the paradigm of corrective justice. Corrective justice has been described as a basic concept: "[o]nly who causes harm to another by wrongful conduct is morally obligated to compensate the victim or otherwise remedy the harm. . . . [C]orrective justice suggests a moral obligation on society's part to remedy the effects of racial discrimination." Interestingly, many leading reparations advocates oppose individual reparations payments. Instead, they propose solutions such as distribution of group funds to the poorest segment of the Black community. As one leading reparations scholar has contended, "redress cannot primarily be about victim..."
compensation. No amount of money can return the victim to the status quo ante." 208

ii. The Atonement Model

Pioneered by Professor Roy Brooks, the atonement model is predicated on the notion that “[h]eartfelt contrition” and action in the form of an apology is a significant precursor to reparations. 210 At the core of the atonement model, which is designed to foster healing and racial reconciliation, is the notion that “redress should be about apology first and foremost.” 211 The appeal of the atonement model is that it provides advantages for both perpetrators of atrocities and victims. Apology and atonement “raise[] the moral threshold of a society.” 212 Because an apology in and of itself has no financial cost, it represents the path of least resistance in the reparations context.

VI. CONCEPTUAL AND PRAGMATIC FLAWS OF THE REPARATIONS DEBATE

A. Conceptual

Although appeals to corrective justice and racial healing are arguably “deeply rooted in the American dream,” as articulated by Dr. Martin Luther King, 213 reparations discourse is plagued by problems, both conceptual and pragmatic. Some analysts contend, for example, that slavery reparations are typically “overinclusive, and so fail[] to provide a satisfactory theory of compensation.” 214 In addition, reparations claims for slavery raise


212 Id.


214 Eric J. Miller, Pronouncing Reparations: Multiple Strategies in the Reparations Debate, 24 B.C. THIRD WORLD L. J. 45, 52 (2004) (remark that “counterfactual” reparations focused on chattel slavery “identify[] too many White people as owing a duty to repay too many African Americans as having suffered the harm”).


217 See Hopkins, supra note 207, at 2547-48 (noting that Robinson’s book “avoid[ed] quantifying the specific dollar amount necessary to satisfy the massive debt owed to [Blacks].”)


220 Generally, scholars using a CRT framework have tied the hostility of the judicial system to Black empowerment. See Brooks, supra note 157, at 696 (remarking that classic judicial models fail to incorporate Black values and contending that “[w]hen judges invoke atonement [B]lack values at critical junctures in our culture, they perpetuate the invisible man syndrome— the age-old notion that [B]lacks are not to be taken seriously— and, thus, continue one of the greatest harms the peculiar institution visited upon [B]lacks”).

221 Yamamoto et al., supra note 208, at 1392 (noting that the higher barriers for slavery reparations claims include "the absence of directly harmed individuals . . . [and] individual perpetrator").
concede that “the individual victims of past societal discrimination are not readily identifiable.”272 From a legal perspective, reparations claims do not fit the traditional paradigm of “well-identified victims against well-identified wrongdoers.”273 Slavery problems in establishing a nexus between the past and the contemporary claim.274

Further, both immigration and miscegenation create severe difficulties in determining the identity of slavery’s descendants, thus “force[ing] reparations advocates to confront the controversial racial identity for slavery reparations alone are close to an individual either to embrace a Black racial identity or to view race as socially salient.”275 It is also becoming more widely known (as the Black community has always known), “that a sizable number of people legally and socially accepted as ‘white’ in the post-Reconstruction South had African ancestry.”276

Finally, the statute of limitations compromises one of the greatest obstacles to reparations claims in all contexts. It has been noted that the passage of time “shuts the door on compensation claims based on old and distant injuries.”277 In typical reparations claims, the long passage of time is legally problematic,278 because the freshest cases for reparations would extend back into the 1960s.

C. Hostility to Reparations

White Americans, on the whole, overwhelmingly oppose the notion of remedial measures to rectify past discrimination.279

272 Forde-Mazeui, supra note 207, at 744-45 (conceding that “[t]he problem that victims of past societal discrimination are largely unidentifiable or real and likely to women with time.”).

273 Brophy, supra note 218, at 502.

274 Id at 503.


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Reparations proponents recognize that “the hostility toward reparations is just as intense as it is against racial preferences.”280 From the perspective of many whites, slavery is ancient history and “segregation . . . too . . . is a dinosaur.”281 Opponents of reparations claims find it absurd that “living free and prosperous Black Americans who were never slaves should be compensated for the suffering of their long dead ancestors on the basis of their skin color alone.”282 In general, there is a huge gap between how blacks and whites view race relations and discrimination.283 In the view of some Black analysts, “slavery continues to shape our lives more than a century after abolition because of the link it forged between Blackness and inferiority.”284

Politically conservative thinkers oppose reparations and other remedial measures, contending that any type of racial preference is unjustifiable.285 However, it is probably fallacious to ascribe racial animus to all opponents of reparations.286 Whites tend to oppose remedial measures such as affirmative action in hiring, regardless of whether they bear animus or good will to Blacks.287 Similarly, only 4 percent of whites in recent surveys support black reparations for slavery, whether paid by the government or corporations.288 In contrast, surveys shows that many, if not most, African-Americans endorse the notion of reparations.289 The general hostility by the majority of whites to reparations has important ramifications, because reparations proponents have contended that “[i]f African-Americans have any hope of finding redress from the government for the wrongs of slavery, it almost certainly will be through the legislative process.”290 Recent

unpopularity, even among many members of the beneficiary groups, has created new barriers to inter-racial reconciliation and heightened the salience and divisiveness of race — precisely the opposite of the advocates’ originally [sic] goals.”


282 Id.

283 See, e.g., Babes, supra note 209 (noting that “most” [B]lacks see racial discrimination as a more prevalent problem than do most [W]hites”).


285 See, e.g., Horgan, supra note 135, at 55.


287 Id. (noting that “[o]f the most racially tolerant 1% of [W]hites . . . [a]proximately 8 out of every 10 . . . oppose affirmative action in hiring, and about 6 out of every 10 . . . oppose it in college admissions”).

288 See Alfredo L. Brophy, The Cultural War Over Reparations for Slavery, 55 DEPAUL L. REV. 1181, 1189 (2004). The question of reparations was found by pollsters to be “the most racially divisive issue since [polling] began.” Id. at 1182.

289 Id.

290 Chad W. Bryan, President For Reparations? A Look at Historical Movements for Redress
IP law, as I will demonstrate, IP deprivations belong in the debate over Black reparations.

Creative intellectual property also belongs in the debate on reparations because inventive and creative activity constituted a significant economic component of Black culture. Creative property was the one form of property that could not be wholly taken during the Middle Passage from Africa and the transition to America. Although "by and large the black man came to America empty-handed . . . [w]hat he contained in his head . . . could not be so easily be stripped from him as his physical possessions," the legal regimes of IP and contract, situated in a matrix hostile to both Black cultural production and to Black economic autonomy, failed to protect the interests of Black creative artists on a grand scale (notwithstanding that certain individuals accrued benefit from the system). If the music industry is serious in its rhetoric about "theft" of IP, it should atone for the theft it itself has facilitated.

The entertainment industry is arguably the prime beneficiary of special interest intellectual property legislation that seeks compensation for even trivial uses of intellectual property. The institutional music and entertainment industries use legislation, such as the Digital Millennium Copyright Act and mass copyright litigation, to impose "hermetic control over every access and use of digital content." In some respects, the case for reparations in the context of intellectual property could not come at a more opportune time.

First, there has been a resurgence of interest in foundational music such as the blues. Also, there is increasing recognition in

287 See COLLIER, supra note 36, at 34. Coller noted that by the 1920's, "the influx of [B]lack into popular music . . . turned the music business into something of a [B]lack profession." Id.

288 Id. Id.


290 Betance, supra note 3, at 19.

291 In other respects, the timing for reparations claims in the music context may not be as opportune. See Lydia Pallas Loren, Unraveling the Web of Music Copyrights, 55 CASE W. RES. L. REV. 673, 673 (2005). The music industry claims severe economic harm to record sales that it attributes to digital downloading. Id. It is an industry "in crisis . . . [I]nfringement] is rampant, with little signs of abating." Id.

292 Furthermore, the expansion of copyright and its socially deleterious effects have led numerous analysts to call for severe limits, if not complete abolition, of copyright protection going forward. See, e.g., Tom W. Bell, Author's Welfare: Copyright as a Statutory Mechanism for Redistributing Rights, 69 BROOK. L. REV. 225, 251 (2003) (urging lawmakers to "consider ending copyright as we know it"). See also Raymond Shih RAY, The Creative Destruction of Copyright: Nipart and the New Economics of Digital Technology, 60 U. CHI. L. REV. 263, 306 (1993) (calling for the end of copyright for digital music).

293 See TOM PIAZZA, BLUES UP AND DOWN: JAZZ IN OUR TIME 125 (1997) noting the recent "flood of CD box sets [devoted to independent jazz and blues labels] . . . their catalogues have been acquired and reactivated by larger [record companies]."
the media that "[b]lues pioneers, primarily black, were cheated out of royalties and recognition while white artists and producers appropriated the sound toward lucrative ends." Perhaps most importantly, as the institutional music industry goes to war over digital copyright infringement, it can hardly afford to have a legal and public relations attack of the industry's unsavory past on its flank. Reparations scholars note that "the success of any redress movement has depended largely on the degree of pressure (public and private) brought to bear upon legislators." The problem of appropriation and exploitation of artists in some respects transcends race, which suggests the possibility of a coalition between artists of different races to attack past deprivations, which continue even to present times. Undoubtedly, other "outsider" groups suffered IP deprivations under the same or similar dynamics as Blacks.

Moreover, significant numbers of white artists also undoubtedly experienced economic appropriation and exploitation. It is said that today's music artists "increasingly oppose the unfairness and inequality in music contract formation, [and] there is a possibility that new artists will have more control over their artistic futures." Far from undercutting the premise that Black artists suffered super-exploitation at the hands of the music industry, the dynamics of appropriation in the music context suggest that the interests of blacks and whites may converge in ways that they do not in other reparations contexts, such as slavery or race discrimination.

The debate over reparations is beset by conceptual, political, and practical problems. Conceptually, the legal obstacles for reparations are many, including the statute of limitations, difficulties in articulating specific harms and locating identifiable

206 WHOM SCARES ENOUGH, supra note 210, at 6.
207 Coalition building has long been a central liberal strategy, as "universal benefits or "everybody wins" social policies are much more likely to succeed than are policies centered upon compensation or investments aimed at subordinate minorities or socioeconomic Americans in Garman Myrdal's Era and Today, in AN AMERICAN DILEMMA: REVISED EDITION (1969).
209 See also Rebee Garofalo, Off the polar division of the [Black and White], historians have tended to either render Latinos invisible or simply assign them rather indistinguishably to one or the other group, thus precluding consideration of Latin musical influences as a major contributing factor...[to rock].
210 Todd M. Murphy, Comment, Crossroads: Modern Contract Desensitization as Applied to Songwriter and Recording Agreements, 35 J. MARSHALL L. REV. 795, 817 (2002).

208 Opereuz, supra note 186, at 289 (noting that reparations opponents E.R. Shipp and David Horowitz "accept as valid the precedent: of making payments to identifiable victims where there is an identifiable harm").
control virtually all recorded music, this should be a far easier task than in slavery reparations cases.

To the degree that appropriation occurred due to the inherent class between the norms of doctrinal copyright law, particularly fixation and the idea-expression dichotomy, which disadvantaged Black cultural modes of production based on improvisation and innovation, causation may be difficult to prove in the music context. Black musical production has been so foundational to American music that the work of Black innovators becomes a mere "idea" not subject to copyright protection. And the oral predicate of Black cultural production, as well as its improvisational nature, also falls outside the scope of copyright protection. However, outside the structural copyright argument, it is possible to show causation of the appropriation of works.

B. Appeal to Corrective Justice

Reparations for slavery look to redistribute wealth, but the corrective justice appeal of reparations is undermined by the fact that the slaves are long dead and redistribution is justified by other principles, such as the continuing benefits of whiteness. In contrast, at least some reparations claims for IP appropriation are of recent vintage, involving living persons or their direct descendants. Unlike, for example, slave labor claims, based on the appropriation of slave’s work, our intellectual property system specifically rewards not only authors, but also their heirs. Reparations claims in the music context would “[t]ouch[ ] white Americans’ sense of injustice [which] is another way of securing white support for claims of racial equality.” The recent enactment of a Copyright Extension for past works also shows that IP law permits backward-looking claims.

C. Interest Convergence

Reparations claims are singularly unpopular with the dominant majority of whites. Professor Bell contends that “[t]he interests of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites.” If we take Bell’s interest convergence theory at face value, only claims that accrue some benefit to the white majority have a likelihood of success. Unlike slavery reparations claims, IP claims, particularly in the music area would be of interest to a substantial number of white artists. The Love suit, had it gone forward, constituted a direct attack on the treatment of artists by the recording industry. It is likely that a class of poor white artists suffered some of the same forms of appropriation as did Black artists, and artists of other races, suggesting a multi-racial coalition might be effective.

Such a coalition would help “link . . . [demands for redress] to some larger vision of social justice that converges with the interests of a broader cross-section of the American population.” A discourse on reparations in the IP context could also provide an impetus for standard slavery and Jim Crow reparations claims. The story of appropriation of works of music familiar to everyone in society, illustrated by the artists and their music could foster a connection between the pain felt by African-Americans and the debt owed them for their contributions. It is a story, told in music and inventions, of how contract law and racially neutral regimes, such as IP, disadvantaged blacks. It is a story of uncompensated effort in the face of towering obstacles. To the extent that powerful Blacks in the entertainment industry, of whom there are many, take on the cause, it could lead to a watershed expansion of consciousness on the reparations debate.

D. The Role of Atonement in Inculcating “Copynorms”

The institutional IP industries also have an interest in atoning for the mass appropriation of Black cultural production. It has been said that "social norms are at the heart of the [music] industry’s inability to deter mass-scale copyright infringement." On the other hand, commentators have contended that changing social norms regarding copying comprises “[t]he music industry’s most efficient and effective strategy for saving itself.” It is said

258 Because the model for IP rights is real property, “c[opyrights are fully alienable . . . (and) may be inherited.” Jessica Litman, The Public Domain, 39 EMORY L.J. 965, 971 (1990).
259 Seeley, supra note 243, at 123 (quoting EDMOND N. CAIN, A SENSE OF INJURIE (1949)).
that as to inculcating "copynorms," "[t]he music industry would benefit greatly from being perceived as fair." Yet, however, the public at large has rejected the notion that digital downloading equals theft, reasoning in part that "copyright owners are hypocritical... [and] copyright law as a whole is illegitimate... [and] serves corporate interests." Nonetheless, if the current pace of downloading lawsuits continues, the music industry will have sued close to fifty thousand people by the end of this decade. If the industry were to tone for its past injustices to Black artists, it might well assist in inculcating norms against Internet appropriation. Atonement would constitute the ultimate "public relations makeover." Atonement could similarly give weight to the music industry's claims that the fight against Internet piracy is truly a fight for artist rights. As Professor Litman has noted, the RIAA's rhetoric about artist rights and norms against copying have fallen flat in the court of public opinion. In part, the industry's moral claims fail to resonate among the public, because it is widely recognized that the "true beneficiaries of recent IP law changes are neither authors nor consumers, but rather corporate content providers." Atonement in the music context would send a strong message that the institutional IP industries are willing to "walk the walk" of artist rights and just compensation for cultural production.


269 Id. at 721.
272 There seems to be some evidence that appeals to morality in the file sharing context may actually backfire and lead to decreased compliance. See Yvain Feldman & Janice Nader, The Law and Norms of File Sharing, 43 SAN DIEGO L. REV. 577, 614-15 (2006).
273 Professor Schultz has called on the music industry to "consider both a public relations makeover and a change in attitude" to help achieve an image of fairness. Schultz, supra note 269, at 723.
275 See Jessica Litman, Digital Copying, 106 COLUM. L. REV. 168 (2006) (noting that "when musicians are not fairly paid, they too continue to play, write songs, perform at concerts...[and] copyright holders...are not deterred...[but]...there is substantial opposition to reparations, for the power of copyright is strong").

E. Envisioning How Restitution for Cultural Appropriation Might Be Instituted: Internet Download Levy and Levy on Works Extended by the Copyright Term Extension Act

Computing damages for appropriation of creative product would be no easy task in the context of creative product, but certainly not the overwhelmingly daunting task that reparations for slavery present. Given that the institutional music industry is aggressively seeking to achieve compensation for Internet redress for appropriations might look to establish a levy on Internet sales of music. Even a levy of pennies on the dollar will ultimately grow to a stunning sum. These funds could be paid to artists as individuals, and to charitable groups that develop music and education. The notion of a levy on Internet music sales to fund artists is hardly outlandish. Congress, for example, passed the Audio Home Recording Act in 1992, which "imposes a 3 percent statutory levy on the sales of blank digital audiocassettes and a 2 percent levy on the sale of digital audiocassette equipment." It has been proposed that Congress "enact a Digital Recording Act" to fund artists as an incentive for the creation of music. A reparations discourse on IP could ensure that the interests of minority artists are on the table in any such legislation. Further, when Congress extended the term on existing copyrights an additional twenty years in 1999, it arguably provided protection to copyrights wrongfully obtained from Black artists. Yet some maintain that the unpopularity of reparations fuels legislative hostility towards Black reparations. However, the Copyright Extension Act recently provided what is arguably a form of reparations to the institutional copyright industries, the very ones whose predecessors appropriated Black cultural production. The Copyright Extension accordingly could be used

276 Kii, supra note 251, at 513-18.
277 Id. at 512.
278 See Pairy, supra note 192, at 694 (noting that "many well-known musicians...were forced to sell their rights for a small one-time lump-sum").
279 See Alfred Brophy, The World of Reparations: Slavery Reparations in Historical Perspective, 3 WAYNE ST. U.L. SOCY 105 (2002) (contending that "[t]here is substantial opposition to reparations, for the power of copyright is strong").
to justify two alternative arguments. First, the Copyright Extension unlawfully extends protection to non-owners of copyrighted works. Second, the Copyright Extension demonstrates that Congress has inherent authority to provide restorative justice for Black artists, since it is a retroactive reward to holders of existing copyrights. An argument could therefore be crafted that the Copyright Clause would permit restorative justice for Black artists. This seems quite unlikely, given legislative hostility to reparations-type claims. Nevertheless, one cannot ignore the possibility of a class action suit looking to fund monetary payments to individuals or Blacks on a group basis from sales of works extended by the Copyright Extension. Notwithstanding, arguments for such a suit would be burdened by the albatross of traditional modes of legal analysis and legal doctrine. One strong argument for corrective justice is that the institutional music and entertainment industry should pay a portion of profits generated from the copyright extension to redress past harm to Black artists. The Copyright Extension, as Justice Breyer noted in dissent, “represented a billion dollar transfer to existing copyright holders.”

The Copyright Extension shows that Congress can transfer wealth via copyright law when it desires to do so. In contrast to the Copyright Extension, which “benefits the entertainment industries and not authors,” reparations claims would accrue benefits to authors.

As for the stereotyping engaged in by the music, film, and television industries, an appropriate remedy might consist of both a formal apology and a fund to promote more positive images of minorities in society. It is recognized that stereotypes and the biases and discrimination they engender “can have devastating social consequences . . . [both] psychological and material.”

Within the context of IP unfair competition cases, it is not unheard of, for example, to require defendants to spend funds for an advertising campaign to undo the harm caused by false advertising. Further, minorities are still underrepresented in executive, managerial, and professional capacities in the mass culture industry themselves, despite efforts to increase hiring in these fields.

A core reason for an “atonement model” of reparations is “to give the perpetrator [of an atrocity] an opportunity to reclaim its moral character.” The institutional entertainment industry has committed atrocities in the past which have facilitated the subordination of people of color. An appropriate redress is therefore an apology, both as a “necessary precondition for reconciliation and character rebuilding.”

i. Obstacles

Many of the same obstacles to slavery reparations generally would arise in the context of redress for cultural product appropriation. In a legal case, the most glaring would be the statute of limitations. The statute of limitations for copyright claims is three years. The statute of limitations for contract claims in most jurisdictions is six years. In the copyright context, courts have rejected suits for copyright infringement where a plaintiff waits too long. For example, where a composer to the hit song, Why Do Fools Fall in Love? by Frankie Lymon and the Teenagers, waited thirty years to file suit for composing credit and sound recording royalties, the court sharply rejected the claim as time-barred under the statute of limitations.

In general, the statute of limitations and the doctrine of laches will impose severe restrictions on copyright actions in the context of music appropriation claims. The music industry might also claim that it has already made reparations by paying damages in royalty disputes, and by setting aside funds for blues artists. In the 1980s, a number of major labels, such as MCA and Atlantic Records, announced that they would pay “significant royalties to veteran blues and rhythm and blues artists who recorded . . . in the ’50s and ’60s.”

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288 Brooks, supra note 211, at 273-74.
289 Id. at 274.
290 See Merchant v. Levy, 92 F 3d 51, 57 (9th Cir. 1996), cert. denied, 519 U.S. 1108 (1996).
291 Id. at 2132 (2007).
certainly do not approach the amounts actually taken from artists. Finally, the institutional music industry may claim it simply cannot afford to provide redress for past appropriation, likely citing digital downloading as the reason. It is far from clear, however, that the industry really is worse off because of Internet downloading.295

CONCLUSION

The status of African-Americans (and other minorities) in the IP context is woefully unexplored. The reparations debate focuses on measurable harms to the Black community, and IP claims should be an appropriate focus within those broader claims. Analysts are increasingly calling for norms of substantive equality and social justice in the IP context, and a focus on past injustices can sharpen these calls.296 In some respects, claims for297 reparations in the IP context are more tenable both conceptually and pragmatically than slavery reparations claims. IP claims could include live claimants, since the IP system specifically gives credence to claims by heirs and ancestors of creators. The music industry has made token payments to blues artists and has settled royalty dispute cases as well, but the Smith suit indicates that the industry tenaciously fights any claims for past redress.

However, the recording industry is in a well-publicized fight for survival, which includes lawsuits against individuals and attempts to inculcate norms against copyright infringement on a mass scale.298 Enforcement actions via copyright infringement suits clearly "can only be part of the solution... Socialization into a culture of law-abidingness may be even more important than perceptions that legal rules are enforced in determining whether a norm of online copyright compliance develops."299 In the context of digital downloading and file-sharing, analysts have

293 See, e.g., Peter K. Yu, The Exciting Copyright Wars, 32 HOFSTRA L. REV. 907, 944-45 (2004) (contending that "If [o] help bridge the copyright divide, the entertainment industry... needs to make the nonstakeholders understand what copyright is, how copyright is protected, and why they need to protect such property."); Christopher Jensen, Note, The More Things Change, the More They Stay the Same: Copyright, Digital TECHNOLOGY, and Social norms, 56 STAN. L. REV. 581, 588 (2003).

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remarked that "[t]he real battle is a cultural one, trying to get people, especially kids, to internalize the idea that it's unethical to download music for free." Even more so than insurance companies, which have been vulnerable to reparations suits, the recording industry would likely not want its dirty laundry of past appropriation washed in public as it tries to convince teenagers that digital file-sharing and downloading is theft.

Perhaps more important than the stick of negative aspects of the appropriation coming to light via reparations claims is the carrot of creating viable norms to secure copyright and IP compliance in the digital world. The need to create "copynorms" is gaining increased recognition.290 For copyright to be obeyed, it "must be rooted in some deeper understanding of society's regard for creativity, property, economic efficiency, or fundamental justice."291 Similarly, analysts have contended that "[p]iracy would drop off dramatically if enough people came to see file-sharing as morally wrong and acted on that belief."292 Attempts by the institutional music industry to quell unlawful Internet distribution are hampered severely by the "negative public perception of the music industry."293 This suggests that a well-articulated claim for reparations, focusing on fundamental justice in the music context, either through class-action lawsuits or otherwise, might lead to some redress of past appropriation. Such redress might benefit both African-American and minority artists, as well as the institutional mass culture industries themselves. Reparations discourse has the capability of addressing "the single most glaring inequity connected with the production of music: that black artistry has created it while white ownership has profit[ed] disproportionately from it."294

291 Id. at 1283.