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

K.J. GREENE*

* Associate Professor, Thomas Jefferson School of Law, J.D., Yale Law School. Thanks to James Hackney, Shubha Ghosh, Marcy Peek, and Al Brophy for very helpful comment and critique of earlier drafts of this work. ©2008 K.J. Greene.

The institutional music industry has resorted to copyright infringement lawsuits to stem massive Internet piracy in recent years.[1] However, Internet piracy is not merely an enforcement conundrum, but "a widespread social problem."[2] As such, litigation against individual copyright infringers seems doomed to fail unless the music industry can inculcate "copynorms," a shorthand term indicating, a broad cultural shift in social attitudes toward copyright piracy. The recording industry endorses the moral imperative of "copynorms." Industry representatives protest that "it is simply not fair to take someone else's music and put it online for free distribution. No one wants their property taken from them and distributed without their permission."[3] The

[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, 765 (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).

[3] Neil Weinstock Netanel, *Impose a Commercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 HARV. J.L. & TECH. 1, 22 (2004) (citing comments of Hillary Rosen, President of the Recording Industry Association of America).

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 theatres.

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."[4]

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

[4] GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 1073 (1944). There has been no successor to Myrdal's comprehensive analysis of race relations in the United States, originally published in 1944, and some contend that since that time "[r]ace has become America's forbidden theme, with 'bell curves' and other such nonsense substituting for serious discussions of real national and international problems." *See also* Stephen Graubard, *in* AN AMERICAN DILEMMA REVISITED: RACE RELATIONS IN A CHANGING WORLD 1 (Obie Clayton ed., 1996).

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 law 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.

I. 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.[5] A pillar of all IP is the provision of "limited property rights in intangible products of investments, intellect and/or labor."[6] 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.[7] 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."[8]

Maggie Chon has examined the distributional effects of international IP law on developing nations,[9] while Rosemary

[5] *See, e.g.*, MARGRETH BARRETT, INTELLECTUAL PROPERTY 2 (3d ed. 2007).

[6] *Id.* at 2.

[7] *See* Rosemary J. Coombe, *Critical Cultural Legal Studies*, 10 YALE J.L. & HUMAN. 463, 479 (1998) (contending that intellectual property law manifests dynamics of cultural hegemony). *See also* Ann Bartow, *Fair Use and the Fairer Sex: Gender, Feminism, and Copyright Law*, 14 AM. U. J. GENDER SOC. POL'Y & L. 551, 552 (2006) (noting that copyright law plays a role in sustaining "the material and economic inequality between women and men").

[8] Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship,"* 1991 DUKE L.J. 455, 459 (1991).

[9] *See* Margaret Chon, *Intellectual Property and the Development Divide*, 27 CARDOZO L. REV. 2821, 2884 (2006) (setting out contours of substantive equality in IP for underdeveloped countries).

Coombe, Ann Bartow and Rebecca Tushnet have posited that IP law might foster gender inequality.[10] Keith Aoki has examined how patent law may have excluded black slaves from its incentives.[11] Meanwhile, scholars Shuhba Ghosh, Funi Arewa, Angela Riley and Christine Farley have explored how the whole area of indigenous rights protection has exposed problems of inequality in the IP paradigm.[12]

A. *Racial Subordniation 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.[13] 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 commiserate with their enormous creativity. From an economic perspective, black artists sustained losses through deprivation of

[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. 273 (2007).

[11] *See* Keith Aoki, *Distributive and Syncretic Motives in Intellectual Property Law (With Special Reference to Coercion, Agency, and Development)*, 40 U.C. DAVIS L. REV. 717, 722 (2007).

[12] *See* Shubha Ghosh, *Globalization, Patents, and Traditional Knowledge*, 17 COLUM. J. ASIAN L. 73 (2003), Olufunmilayo B. Arewa, Trips and Traditional Knowledge: Local Communities, Local Knowledge, and Global Intellectual Property Frameworks, 10 MARQ. INTELL. PROP. L. REV. 155 (2006), Angela P. Riley, "Straight Stealing": Towards an Indigenous System of Cultural Property Protection, 80 WASH. L. REVL 69 (2005).

[13] *See* K.J. Greene, *What the Treatment of Black Artists Can Teach About Copyright Law, in* INTELLECTUAL PROPERTY AND INFORMATION WEALTH, *supra* note 3, 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.

copyright protection that would constitute a massive sum. Further, given their corporate nature as succesors 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.[15] 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."[16]

Expostulating 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 namelessness."[17] Invisibility, in Ellison's vision, allegorically referenced "the constant struggle to survive in a world that does not recognize . . . [Blacks] as [] vital contributor[s]."[18] 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 AfricanAmericans had made any contribution to the

15 Greene, *supra* note 13, at 340.

16 ANGELA Y. DAVIS, BLUES LEGACIES AND BLACK FEMINISM: GERTRUDE "MA" RAINEY, BESSIE SMITH, AND BILLIE HOLIDAY 44-45 (1998).

17 Cornel West, *Black Strivings in a Twilight Civilization*, *in* HENRY LOUIS GATES, JR. & CORNEL WEST, THE FUTURE OF THE RACE 80 (1996).

18 Marcy L. Tanter, *Steal Away: How the Invisible Man Lights His World*, 25 OKLA. CITY U. L. REV. 989, 994-95 (2001) (remarking that "[the invisible man] is treated as a non-entity, if indeed he is 'treated' in any certain way at all").

creation of jazz. New Orleans 'Dixieland' musicians . . . made it a point of honor never to mix with [B]lack musicians or acknowledge their talents."[19] 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."[20]

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.[21] 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."[22] Similarly, analysts have contended that "Black music's influence and appropriation within the broader American society constitute premiere issues of twentieth-century American cultural history."[23] 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.[24] The leading case articulating the standard of infringement for appropriation of literary works in the film

19 BURTON W. PERETTI, JAZZ IN AMERICAN CULTURE 42-43 (1997).

20 Jeffrey Melnick, *Tin Pan Alley and the Black Jewish Nation*, *in* AMERICAN POPULAR MUSIC: NEW APPROACHES TO THE TWENTIETH CENTURY 41 (Rachel Rubin & Jeffrey Melnick eds., 2001).

21 *See* Leslie Espinoza & Angela P. Harris, *Afterword: Embracing the Tar-Baby-Lacrit Theory and the Sticky Mess of Race*, 10 LA RAZA L.J. 499, 513 (1998) (quoting Clyde Taylor, *The Re-Birth of the Aesthetic In Cinema*, *in* THE BIRTH OF WHITENESS 15 (Daniel Bernardi ed., 1996)) (contending that "obsession with blackness . . . is a central feature of American culture").

22 Taunya Lovell Banks, *Exploring White Resistance to Racial Reconciliation in the United States*, 55 RUTGERS L. REV. 903, 922 (2003). *See also* K.J. Greene, *Copyright, Culture and Black Music*, 21 HASTINGS COMM. & ENT. L.J. 339, 368 (1999).

23 Guthrie P. Ramsey, Jr., *The Power of Black Music: Interpreting its History from Africa to the United States*, http://www.findarticles.com/p/articles/mi_m2298/is_n1_v16/ai_21085991, (citing SAMUEL A. FLOYD JR., THE POWER OF BLACK MUSIC: INTERPRETING ITS HISTORY FROM AFRICA TO THE UNITED STATES (1995)). *See also* Banks, *supra* note 22, at 922; Greene, *supra* note 22.

24 *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994) (holding that rap group 2 Live Crew's parody of Roy Orbison's composition *Pretty Woman* constituted copyright fair use). *See also* SunTrust Bank v. Houghton Mifflin Co., 268 F.3d 1257 (11th Cir. 2001) (holding that the book entitled WIND DONE GONE (2001) satirizing GONE WITH THE WIND (1936) did not constitute copyright infringement based on the fair use defense).

context has Black characters at its center.[25] The sprawling debate over whether digital sound sampling constitutes copyright infringement has a Black Art Form—rap music—at its center.[26] Similarly, the leading case in New York on television idea misappropriation involves African-American parties.[27]

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-stereotypical black situational comedy insufficiently novel to warrant protection from idea appropriation.[28] 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 liability.[29] Courts have also rejected the proposition that a woman 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*.[30] 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

[25] *See* Denker v. Uhry, 820 F. Supp. 722 (S.D.N.Y. 1992) (exploring whether the film DRIVING MISS DAISY (Majestic Films 1989) infringed copyright of play *Horowitz and Mrs. Washington* about an elderly, bigoted Jewish man and his Black physical therapist).

[26] *See* Grand Upright Music Ltd. v. Warner Brothers Records, Inc., 780 F. Supp. 182 (S.D.N.Y 1991). The *Grand Upright* case was the first published opinion on digital sound sampling, and involved rapper Biz Markie's unauthorized sample of Gilbert O'Sullivan's composition, *Alone Again, Naturally*. *See also* Newton v. Diamond, 204 F. Supp. 2d 1244, 1251 (C.D. Cal. 2002) (dismissing the claim of an African-American composer that special performance techniques were entitled to copyright protection because the composer's specific techniques "do not appear in the musical composition, [and so] they are protected only by the sound recording of Plaintiff's performance").

[27] *See* Murray v. Nat'l Broad. Co., Inc., 844 F.2d 988 (2d Cir. 1988) (holding that idea submission for what plaintiff claimed became *The Cosby Show* was ineligible for protection under New York state law of ideas because the concept of a non-stereotypical African-American sitcom was insufficiently novel).

[28] *Id.* The *Murray* court rejected plaintiff's contention "that the nonstereotypical portrayal of a [B]lack middle-class family in a situation comedy is novel." *Id.* at 992.

[29] *See Grand Upright Music*, 780 F. Supp. 182.

[30] *See* Chase-Riboud v. DreamWorks, Inc., 987 F. Supp. 1222, 1233 (C.D. Cal. 1997). The plaintiff contended that her book, ECHO OF LIONS (1989), was unlawfully appropriated by DreamWorks in its film AMISTAD (DreamWorks 1997). Despite numerous similarities between her book and AMISTAD, the court refused to grant a preliminary copyright injunction to stop exhibition of the AMISTAD film.

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."[31] However, racial minorities were excluded from high-sounding Lockean labor and natural right theories of personal autonomy since slavery flourished throughout the Americas, validated in the United States by the original Constitution.[32]

Black artistic creativity has long been at the forefront of American culture.[33] 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.[34] Slaves resisted oppression in part by "creating new expressive forms out of African traditions."[35] 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.[36] 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 [b]lack domestics that could dance it well enough to teach the [white] lady of the house."[37] Similarly, the minstrel tradition profoundly shaped cultural values in America and was based on "[W]hite performers trying to imitate [B]lacks."[38] By the 1840s, black music forms constituted the most

[31] RICHARD PIPES, PROPERTY & FREEDOM: THE STORY OF HOW THROUGH THE CENTURIES PRIVATE OWNERSHIP HAS PROMOTED LIBERTY AND THE RULE OF LAW 30 (1999) (exploring the concept of property from medieval times).

[32] *See, e.g.*, Andrew E. Taslitz, *Hate Crimes, Free Speech, and the Contract of Mutual Indifference*, 80 B.U. L. REV. 1283, 1309-11 (2000) (noting that "[i]t is now widely acknowledged that the Constitution supported slavery in several critical ways, most specifically with the Three-Fifths Clause and the Fugitive Slave Clause" (internal footnotes omitted)).

[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 cutting edge has been influenced by [B]lack creativity; it's that [B]lack creativity, it so often seems today, *is* the cultural cutting edge." *Id.*

[34] *See* Sterling Stuckey, *African Spirituality and Cultural Practice in Colonial New York, 1700-1770*, *in* CARLA GARDIN PESTANA & SHARON V. SALINGER, INEQUALITY IN EARLY AMERICA 160-61 (1999) (noting that "the harsh conditions of slavery . . . [fertilized the ground] for creativity in the arts . . . [and] creativity in music and dance among blacks at the bottom of society").

[35] Portia K. Maultsby, *Africanisms in African American Music*, *in* JOSEPH E. HOLLOWAY, AFRICANISMS IN AMERICAN CULTURE 326 (2d ed. 2005) (analyzing continuity of African influences in Black music from slavery to contemporary times).

[36] *See* Alfred L. Brophy, *Integrating Spaces: New Perspectives on Race in the Property Curriculum*, 55 J. LEGAL EDUC. 319, 333 (2005) (discussing nuisance lawsuits filed by White property owners in proximity to Black churches).

[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 it on 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."[39] 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.[40] 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.[41] Ragtime music was the first important musical innovation following "the cultural interchange brought about by slavery in the United States."[42] 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, Dizzy Gillespie, Miles Davis, John Coltrane, Ornette Coleman."[43] In music scholarship, the contributions of whites to jazz have been under-appreciated.[44] 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-diasporic communities."[45] Music historians assert that "the most important effect that the advent of [W]hites had on jazz had nothing to do with the

[39] TONY RUSSELL, BLACKS, WHITES & BLUES 11 (1970).

[40] *See* Alfreda Robinson, *Corporate Social Responsibility and African American Reparations: Jubilee*, 55 RUTGERS L. REV. 309, 342 (2003) (noting that "in 1860, two thirds of a slave owner's wealth was derived from the value of slaves" and that "the five cotton states of Alabama, Georgia, Louisiana, Mississippi, and South Carolina derived sixty percent of their agricultural wealth from slave ownership").

[41] *See, e.g.*, AMERICAN POPULAR MUSIC, *supra* note 22, at 3 (noting that "[o]ne certainty that emerges from the exploration of [popular music] crossover for many of the contributors is that [B]lackness—hidden or manifest—is the defining feature of much of American pop . . . . '[N]ationalizing' [B]lack cultural material was one of the major triumphs of Tin Pan Alley songwriting and marketing").

[42] TERRY WALDO, THIS IS RAGTIME 5 (1976).

[43] GUNTHER SCHULLER, EARLY JAZZ: ITS ROOTS & MUSICAL DEVELOPMENT 135 (1968).

[44] *See* Richard M. Sudhalter, *A Racial Divide That Needn't Be*, N.Y. TIMES, Jan. 3, 1998 (critiquing "a dynastic view of jazz history: [B]lack masters, and [W]hite (when present at all) acolytes and exploiters").

[45] DAVID AKE, JAZZ CULTURES 13 (2002).

performance of the music at all . . . . [All] the [W]hite players did was to bring jazz into the American mainstream."[46]

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 "picaninnies, big-mouthed 'Sapphires,' men with bulging eyes and oversized lips, and heavy dialect."[47]

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 disdained Black music, and rejected the notion of a commercial release of sound recordings by none other than the great Bessie Smith.[48] Similarly, Black artists were excluded from performance rights societies such as the American Society of Composers, Authors, and Publishers ("ASCAP").[49] ASCAP was formed in 1914 to protect performance rights in musical compositions and to distribute hundreds of millions of dollars to its members.[50] 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."[51]

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"

[46] JAMES LINCOLN COLLIER, THE MAKING OF JAZZ: A COMPREHENSIVE HISTORY 139 (1978).

[47] DAPHNE DUVAL HARRISON, BLACK PEARLS: BLUES QUEENS OF THE 1920S 50 (1988).

[48] *See* Allan Sutton, *The Edison Blues: Thomas Edison's Personal Correspondence Shows a Man at Odds with His Staff and Determined to Stay Out of the Race Record Market at All Costs*, MAIN SPRING PRESS, Sept. 2, 2005, http://www.mainspringpress.com/edison_blues.html.

[49] *Id.* at 7 (noting that ASCAP "was the established music-licensing organization that oversaw royalty payments to those who created music, at least those [W]hites who created music. ASCAP had traditionally excluded [B]lack, Hispanic, and hillbilly performers").

[50] *See* PAUL GOLDSTEIN, PATENT, COPYRIGHT, TRADEMARK AND RELATED STATE DOCTRINES: CASES AND MATERIALS ON THE LAW OF INTELLECTUAL PROPERTY 693 (4th ed. 1999).

[51] *See* Sutton, *supra* note 48.

divisions of major record companies, and subjected to particularly onerous contracts.[52] Analysts of music history have noted that early blues artists "faced constant discrimination and humiliation [m]ost musicians in Harlem or Chicago's South Side labored in near-poverty while white bands in downtown Manhattan and Chicago made comfortable livings playing black jazz standards."[53] 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."[54] Black artists and their music faced backlash and abuse from the culture making apparatus controlled by the dominant majority.[55] When 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."[56]

F. *The Minstrel Tradition and Cultural Appropriation*

The pattern of appropriation of black expression is illustrated by the minstrel tradition.[57] 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."[58] Its popularity "would dominate popular theatre into the twentieth century . . . [as the vehicle] through which America's first popular songwriters and performers would emerge."[59] 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.*"[60] The minstrel tradition served as a

[52] JAZZ: A FILM BY KEN BURNS (Race Records 2005), *available at* http://www.pbs.org/jazz/exchange).
[53] PERETTI, *supra* note 19, at 56.
[54] ROBERT PALMER, DEEP BLUES: A MUSICAL AND CULTURAL HISTORY OF THE MISSISSIPPI DELTA 17 (1981).
[55] WES SMITH, THE PIED PIPERS OF ROCK 'N' ROLL: RADIO DEEJAYS OF THE '50S AND '60S 17 (1989). "When critics in the churches and news media disdained rock 'n' roll as 'jungle music,' the allusion was hardly subtle. It was just short of calling it 'monkey music.' More artful critics put it down as 'primitive' music, but the racist implications were the same." *Id.*
[56] ARNOLD SHAW, HONKERS AND SHOUTERS: THE GOLDEN YEARS OF RHYTHM AND BLUES xix (1978).
[57] *See* JEFFREY MELNICK, A RIGHT TO SING THE BLUES: AFRICAN AMERICANS, JEWS, AND AMERICAN POPULAR SONG 34 (1999).
[58] MICHAEL PAUL ROGIN, BLACKFACE, WHITE NOISE: JEWISH IMMIGRANTS IN THE HOLLYWOOD MELTING POT 5 (1996).
[59] ARNOLD SHAW, BLACK POPULAR MUSIC IN AMERICA: THE SINGERS, SONGWRITERS & MUSICIANS WHO PIONEERED THE SOUNDS OF AMERICAN MUSIC 18 (1986).
[60] Melnick, *supra* note 20.

foundation for the twin dynamics impacting Black cultural production: appropriation and stereotyping.[61] The minstrel tradition "played an essential role in providing race with the negative meaning it carries today."[62] 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."[63] 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."[64]

Minstrelsy "provided the first real employment for Negro entertainers . . . [and] introduc[ed] the older forms of blues as well as classic blues and early jazz to the entire world."[65] 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."[66] However, this pattern of appropriation is still in place today. The financial control of minstrelsy, with regards to rap music, is retained by whites, "even though the success of [minstrel] troupes depended on black stars."[67]

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

[61] *See* Greene, *supra*, note 22, at 358 (contending that "[p]art of the pattern of cultural appropriation included the predisposition of the dominant [White] culture to stereotype and demean minority cultures").
[62] R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 858-60 (2004) (outlining stereotypical images of Blacks arising out of minstrelsy).
[63] MARTHA BAYLES, HOLE IN YOUR SOUL: THE LOSS OF BEAUTY AND MEANING IN AMERICAN POPULAR CULTURE 27 (1994).
[64] *Id.*
[65] LEROI JONES, BLUES PEOPLE: NEGRO MUSIC IN WHITE AMERICA 86 (1963).
[66] FRANCIS DAVIS, THE HISTORY OF THE BLUES: THE ROOTS, THE MUSIC, THE PEOPLE FROM CHARLEY PATTON TO ROBERT CRAY 37 (1995).
[67] SHAW, *supra* note 56, at 28.

mainstream desire for black artistry.[68] 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 . . . ."[69] 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)."[70]

In keeping with this same pattern, in subsequent years, black artists originated dances while white bands and companies reaped the benefits.[71] 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 [W]hites, not always with the most sympathetic intentions."[72] 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."[73] Similarly, the first blues and jazz recordings in the early Twentieth century comprised white entertainers imitating black musicians.[74]

The minstrel tradition of appropriation continued for much of the history of the music industry.[75] 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

[68] *Id.* Shaw notes that Whites possessed an "insatiable appetite . . . for the sights and sounds of 'pretend' [B]lackness . . . . [T]he nationalization of popular culture products in the 1920s was tied inextricably with a kind of racialization that drew heavily from the century-old tradition of [B]lack face minstrelsy, even as it contributed some major twists." *Id.*

[69] MELNICK, *supra* note 20, at 44.

[70] CHARLES KEIL, URBAN BLUES (1966).

[71] *See* JAMES HASKINS, SCOTT JOPLIN: THE MAN WHO MADE RAGTIME 74 (1978). One of the leading dances of the era, the Cakewalk, became incredibly popular in America. "Blacks . . . had subsequently adapted and amended the two-step [spawned by the marching music of John Philip Sousa] and created the 'cakewalk' . . . [a dance whose] primary characteristic was promenading in an exaggeratedly dignified manner. By the mid [1890s], [W]hites had in turn adopted the cakewalk and [W]hite composers would make a fortune selling cakewalk sheet music." *Id.*

[72] *Id.* at 68.

[73] FRANK TIRRO, JAZZ: A HISTORY 96 (2d ed. 1993).

[74] *See* PALMER, *supra* note 55, at 105-06. Palmer notes with some irony that one of the first blues recordings was "'Nigger Blues,' copyrighted by a [W]hite minstrel entertainer from Dallas in 1913 and recorded in 1916 by a Washington lawyer and businessman, George O'Connor." *Id.* at 105. Palmer also notes jazz recording began in 1917 in much the same way, "with a white group, the Original Dixieland Jass Band, recording in a style they'd learned from [B]lacks." *Id.* at 106.

[75] Analysts have argued that "[t]he process of whites stealing from blacks is also the process of osmosis by which [W]hites allowed [B]lack music to enter the commercial mainstream. In this regard, the most influential of modern minstrels have been Al Jolson, Bing Crosby, and Elvis Presley." GARY GIDDENS, RIDING ON A BLUE NOTE 33 (1981).

in heavily diluted form and . . . successfully selling it as the real thing."[76] 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."T[77] 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-illiterate [B]lack musicians in a virtually unregulated business."[78]

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."[79] The history of American music is based on a long tradition of "borrowing" from other works.[80] 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."[81] 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 . . . ."[82] Similarly, the success of early hip-hop/rap music artist included a substantial amount of borrowing of key phrases and techniques.[83] However, when numerous creators take part in the creation of a work, "authorship should be accorded to those who originate the

[76] BEN SIDRAN, BLACK TALK 69 (1971). Sidran postulated that Black innovation developed, in part, as a response to prevent appropriation by Whites: "[N]o sooner had some [W]hites learned the special techniques of [B]lack 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 REDEMPTION 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 Keyes, *Musical Musings: The Case for Rethinking Music Copyright Protection*, 10 MICH. TELECOMM. & TECH. L. REV. 407, 427 (2004) (quoting IRVING SABLOSKY, AMERICAN MUSIC 175 (1969)).

[80] *See, e.g.*, MICHAEL PERELMAN, STEAL THIS IDEA: INTELLECTUAL PROPERTY RIGHTS AND THE CORPORATE CONFISCATION OF CREATIVITY 40 (2002). For an excellent examination of borrowing in the copyright music context, see Olufunmilayo B. Arewa, *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. SAMUELS, THE ILLUSTRATED STORY OF COPYRIGHT 31 (2000).

[82] PAUL OLIVER, ASPECTS OF THE BLUES TRADITION 202-203 (1968).

[83] *See* CHERYL L. KEYES, RAP MUSIC AND STREET CONSCIOUSNESS 70 (2002) (noting that members of New York's rap community contend that the first rap group to obtain national exposure, Sugar Hill Gang with "Rapper's Delight" used rhymes originally created by others). Professor Keyes' book contains a fascinating and detailed chronicle of the rise of rap music in America. *See also* KEMBREW MCLEOD, OWNING CULTURE 80-81 (2001).

expression that is ultimately embodied in the work."[84] 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,"[85] 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.[86]

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."[87] Following the Civil War, Congress "established the right to contract as a foundation of American citizenship."[88] 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.[89] The treatment of Black artists validates the assertion that the "history of American contract law and issues of race and culture are inextricably intertwined."[90] Similarly, scholars have noted that a *core relationship* exists between IP and contract law.[91]

Many of the defining features of contract theory, including

84 F. Jay Dougherty, *Not a Spike Lee Joint: Issues in the Authorship of Motion Pictures Under U.S. Copyright Law*, 49 UCLA L. REV. 225, 245 (2001).

85 WILLIAM 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").

86 *See* Greene, *supra* note 22.

87 PETER MULLER, THE MUSIC BUSINESS: A LEGAL PERSPECTIVE xii, 78 (1994) (noting that "[t]he recording agreement is at the very heart of the artist's professional career").

88 James W. Fox, Jr., *Relational Contract Theory and Democratic Citizenship*, 54 CASE W. RES. L. REV. 1, 23 (2003).

89 HASKINS, *supra* note 71, at 101 (noting that "it was not common to publish works by [B]lack 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").

90 Anthony R. Chase, *Race, Culture, and Contract Law: From the Cottonfield to the Courtroom*, 28 CONN. L. REV. 1, 6 (1995).

91 Scholars postulate that "[a]n interaction between intellectual property and contract rules has always been a primary characteristic of intellectual property rights as distributed in the open market." *See* Raymond T. Nimmer, *Breaking Barriers: The Relation Between Contract and Intellectual Property Law*, 13 BERKELEY TECH. L.J. 827, 830 (1998).

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."[92]

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.[93] However, freedom of contract is just as a 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."[94] 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 egalitarian facade."[95] Contract scholars posit that "consent is at the heart of contract law."[96] However, under a system of racial subordination, blacks could nevertheless "be deprived of their rights by force of law without their consent."[97] Superficially, contract theory is "objective, eschewing any notion of societal iniquities."[98]

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.[99] In the

92 RICK BIGWOOD, EXPLOITATIVE CONTRACTS 140 (2003).

93 *See* Eric L. Talley, Note, *Contract Renegotiation, Mechanism Design, and the Liquidated Damages Rule*, 46 STAN. L. REV. 1195, 1195 (1994) (noting that "freedom of contract holds a singular status, nearly equivalent to that of a natural right").

94 Fox, *supra* note 88, at 27.

95 Blake D. Morant, *Law, Literature, and Contract: An Essay in Realism*, 4 MICH. J. RACE & L. 1, 5 (1998).

96 Randy E. Barnett, *A Consent Theory of Contract*, *in* RANDY E. BARNETT, PERSPECTIVES ON CONTRACT LAW 238 (3d ed. 2005).

97 *Id.* at 237.

98 Blake D. Morant, *The Relevance of Race and Disparity in Discussions of Contract Law*, 31 NEW ENG. L. REV. 889, 890 (1997).

99 *See* DAVID HENDERSON, THE LIFE OF JIMI HENDRIX: 'SCUSE ME WHILE I KISS THE SKY 284-85, 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."[100] 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."[101] 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, "[n]egotiatons between [B]lack laborers and [W]hite landowners still occurred against a background of immense inequality."[102] 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."[103] 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."[104] It should come as no surprise then, that blacks

Jimi Hendrix).

100 Julian S. Lim, *Tongue-Tied in the Market: The Relevance of Contract Law to Racial-Language Minorities*, 91 CAL. L. REV. 579, 603 (2003).

101 Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1174, 1217 (1983) (citing Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 636 (1943)).

102 Aziz Z. Huq, Note, *Peonage and Contractual Liberty*, 101 COLUM. L. REV. 351, 359 (2001).

103 Michael S. Little, Note, *A Citizen's Guide to Attacking Mortgage Discrimination: The Lack of Judicial Relief*, 15 B.C. THIRD WORLD L.J. 323, 324 (1995).

104 Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817, 819 (1991).

experienced a disadvantage in IP transactions, given that courts once rationalized the unfair treatment of African-Americans.[105] 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."[106]

Critical perspectives contend that contract law "continued the oppression of . . . African-Americans[s]."[107] As one commentator of music history notes, the "overexchanged and overbartered record of miscegnated cultural production everywhere bespeaks a racist history of exploitation exclusively weighted to dominant white interests."[108] 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."[109] Black music and performance styles were clearly seen as valuable economic resources from the inception of the recording industry.[110] 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."[111]

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."[112] W.C. Handy was "finagled out of his royalties" from *Memphis Blues*.[113] 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 Virginny*, found his work appropriated by white minstrelsy, who "often published the songs [Bland wrote] under their own names."[114]

105 *See* Anita L. Allen, *Social Contract Theory in American Case Law*, 51 FLA. L. REV. 1, 16 (1999) (noting that "[c]ontractarian arguments were employed by the Antebellum courts to justify slavery and political exclusion").

106 Ayres, *supra* note 104, at 861-62.

107 Chase, *supra* note 90, at 11.

108 ANDREW ROSS, NO RESPECT: INTELLECTUALS & POPULAR CULTURE 68 (1989).

109 Greene, *supra* note 22, at 368.

110 *See* OLIVER, *supra* note 82, at 10. Oliver noted that the economic exploitation of blues involved "[a]ctive talent scouts, perspicacious company managers, effective assessment of the Negro market and equally effective distribution methods devised in order to reach it." *Id.*

111 SHAW, *supra* note 56, at 102. It should be pointed out that Motown itself, although Black-owned, patterned its contracts with artists after "the most onerous [contracts] in the [music] business . . . [making] artists responsible for [excessive costs and deductions.]" GERALD POSNER, MOWTOWN: MUSIC, MONEY, SEX AND POWER 211 (2002).

112 HASKINS, *supra* note 71, at 101. Joplin, like many artists, agreed to the terms because he "was intent on having is work published and willing to agree to almost any terms." *Id.*

113 DAVIS, *supra* note 66, at 59.

114 EILEEN SOUTHERN, THE MUSIC OF BLACK AMERICANS: A HISTORY 238 (3d ed. 1997).

Jelly Roll Morton, who claimed with some justification to have invented jazz, and 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."[115] Bo Diddley, a foundational blues artist for pioneering the blues label Chess Records, had a hit record in the 1950s, but all it "earned him [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 is 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 l]abel owners . . . with a strike of a pen, [to] spilt 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 laizez-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."[121] 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."[122] Significantly, classic common law "did not develop an explicit

115 COLLIER, *supra* note 46, at 106.

116 JOHN COLLIS, THE STORY OF CHESS RECORDS 117 (1998). In lamenting his exploitation at the hands of Chess Records, Diddley stated bitterly that "Bo Diddley ain't got shit. My records are sold all over the world, and I ain't got a fucking dime . . . . [W]hen I left Chess Records they said I owed them $185,000." *Id.* at 118.

117 *See* SHAW, *supra* note 56, at 34.

118 *See* Dan Hunter, *Culture War*, 83 TEX. L. REV. 1105, 1125 (2005) (contending that "exploitation of the author is coded deep within the copyright system" and outlining historical inequality of treatment in the copyright system).

119 William F. Patry, *The Copyright Term Extension Act of 1995: Or How Publishers Managed to Steal the Bread From Authors*, 14 CARDOZO ARTS & ENT. L.J. 661, 665 (1996) (alteration in original omitted) (quoting WILLIE DIXON, I AM THE BLUES, 99-100 (1989)).

120 CHARLES L. KNAPP, NATHAN M. CRYSTAL & HENRY G. PRINCE, PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS 62 (Little, Brown & Co. 5th ed. 2003).

121 *Id.* (citing FREDERIC DANNEN, HIT MEN 31 (1991)).

122 Lim, *supra* note 100, at 593.

doctrine for dealing with unfair bargains."[123] Indeed, conservative commentators are flatly 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."[124]

There were, of course exceptions to the rule of appropriation. Maime 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."[125] And undoubtedly, some of the exploitation in the music industry was no doubt Black on Black,[126] 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,[127] including literary, audio-visual, choreographic, motion picture and musical works.[128] 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.[129] The purpose of copyright law is to "foster the creation and public communication of original expression."[130]

123 CHARLES L. KNAPP, NATHAN M. CRYSTAL & HARRY G. PRINCE, PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS 565 (5TH Ed. 2003).

124 Richard A. Epstein, *Unconscionability Applied, in* ANTHONY T. KRONMAN & RICHARD A. POSNER, THE ECONOMICS OF CONTRACT LAW 95 (1979).

125 *Id.* at 64. Mamie Smith, nonetheless "died virtually penniless in 1946."

126 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 147. 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").

127 17 U.S.C. § 102(a) (2007).

128 *Id.*

129 Id. at § 106. The rights granted to copyright owners include the rights of reproduction, adaptation, distribution, public performance and digital audio transmission of sound recordings. *Id.*

130 Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 347 (1996).

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.[131] The structure of copyright law, grafted upon broad and pervasive social discrimination, resulted in the widespread denial of copyright protection to black music artists.[132] 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.[133] 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."[134] 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.[135]

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

131 *See generally* Greene, *supra* note 22.

132 *Id.* at 356. Some of the core ideas on black cultural production and copyright in my 1999 article were later asserted (without attribution) in an important book on copyright law by Siva Vydanathan. *See* SIVA VYDANATHAN, COPYRIGHTS AND COPYWRONGS (2001).

133 ROGER E. SCHECHTER & JOHN R. THOMAS, INTELLECTUAL PROPERTY 32 (2003). The idea/expression dichotomy is set forth in section 102(b) of the Copyright Act and provides in part that in "no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle or discovery." 17 U.S.C. § 102(b) (2007).

134 *Id.*

135 To illustrate this point, simply play virtually any of Jelly Roll Morton's compositions, and then listen to Jerry Lee Lewis' style of playing in *Goodness, Gracious, Great Balls of Fire.* Lewis' composition, great though it may be, would be impossible but for the Jelly Roll innovation of piano playing. However, the Lewis song does not constitute copyright infringement, because copyright protection does not extend to style or genres, which are equivalent to "raw" ideas.

abundantly available and widely circulated."[136] The minimal originality standard of copyright law is a low threshold indeed; copyright law essentially protects anything more original than the alphanumerical arrangement of phone numbers in a phone book.[137]

However, I have contended that copyright's standard of minimal originality in essence penalizes the most innovative creators of copyrighted works.[138] 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."[139]

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.[140] 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."[141] Jazz musicians and jazz analysts have long been "aware of the impossibility of notating jazz rhythm accurately using ordinary Western musical notation."[142] 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

136 Keith Aoki, *Authors, Inventors and Trademark Owners: Private Intellectual Property and the Public Domain Part I*, 18 COLUM-VLA J.L. & ARTS 1, 34 (1993).

138 *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991).

139 ERIC NISENSON, BLUE: THE MURDER OF JAZZ 48 (1997).

140 Fixation is a prerequisite for federal copyright protection. 17 U.S.C. § 102(a) (2007). Unfixed works could qualify for state law protection. *See* Dougherty, *supra* note 85, at 237. However, given the checkered history of the treatment of Blacks in state courts, especially in the South, until recent decades, it is fair to infer that state law protection was equivalent to no protection.

141 Greene, *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).

142 PETER TOWNSEND, JAZZ IN AMERICAN CULTURE 21 (2000). Townsend remarked that the "earliest Europeans attempting to write down African-American music found it formidably difficult." *Id.*

until the amended 1976 Copyright Act, was hyper-technical in its application. Before 1976, copyright authors were required to adhere to numerous formalities regarding registration and renewal of copyright.[143] Failure to comply with these arcane formalities in the 1909 Copyright Act (predecessor to the 1976 Act) could and did result in forfeiture of copyright.[144]

The creators of blues music typically did not have the literacy, savvy, legal representation or the wherewithal to navigate the complexities of the 1909 Copyright Act.[145] 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."[146]

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

American copyright law is predicated on protecting the economic interests of authors.[147] 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."[148] U.S. copyright law provides only limited moral rights protection to a narrow range of visual art.[149] 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 most other authors."[150] Yet it is incontrovertible that "[a]uthors of literary, musical, and other copyrighted works are as vulnerable to moral rights violations as

143 *See, e.g.*, William H. Hart & Roy S. Kaufman, *An Overview of the Copyright Renewal Amendment and Its Impact on Renewal Practices Under U.S. Law*, 17 COLUM.-VLA J.L. & ARTS 311 (1993) (discussing the differences between the 1909 and 1976 acts).

144 *See, e.g.*, Jonathan C. Stewart & Daniel E. Wanat, *Entertainment and Copyright Law: Section 303 of the Copyright Act Is Amended and a Pre-78 Phonorecord Distribution of a Musical Work is Not a Divestitive Publication*, 19 LOY. L.A. ENT. L.J. 23, 29 (1998).

145 *See* Greene, *supra* note 22, at 353-54.

146 Neela Kartha, *Digital Sampling and Copyright Law in a Social Context: No More Colorblindness!!*, 14 U. MIAMI ENT. & SPORTS L. REV. 218, 232 (1997).

147 *See, e.g.*, Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945, 1946 (2006).

148 Roberta Rosenthal Kwall, *"Author-Stories:" Narrative's Implications for Moral Rights and Copyright's Joint Authorship Doctrine*, 75 S. CAL. L. REV. 1, 5 (2001).

149 *Id.*

150 Jane C. Ginsburg, *The Right to Claim Authorship in U.S. Copyright and Trademarks Law*, 41 HOUS. L. REV. 263, 282 (2004).

are visual artists."[151]

African-American artists have been particularly vulnerable to moral rights violations of attribution and integrity: "T]he [historical] pattern of cultural appropriation included the predisposition 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."[152] It has been said that:

> '[S]moothing 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 plunders—a metaphor for the submission that dominant groups will upon others.[153]

The minstrel tradition distorted African-American works via gross stereotyping, a violation of integrity rights.[154] 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 anaomolies in themselves do not state a cause of action for copyright infringement. The fleecing of Black artists violates every

151 Kwall, *supra* note 147, at 30.

152 Greene, *supra* note 22, at 358, 373.

153 ARNOLD WHITE, THE RESISTANCE: BEYOND BORDERS 546-8 (2001).

154 *See* GUTHERIE P. RAMSEY, JR., RACE MUSIC: BLACK CULTURES FROM BEBOP TO HIP-HOP 64 (2003) ("Since the advent of minstrelsy in the nineteenth century and the film industry in the twentieth, American popular culture has continually perpetuated negative stereotypes of African-Americans"). *See also* Leonard M. Baynes, *Racial Stereotypes, Broadcast Corporations, and the Business Judgment Rule*, 37 U. RICH. L. REV. 819 (2003). For an analysis of the history and impact of racial stereotyping in the television industry, see Sherri Burr, *Television and Societal Effects: An Analysis of Media Images of African-Americans in Historical Context*, 4 J. GENDER, RACE & JUSTICE 159, 161 (2001). In contrast, conservative commentators have discounted the assertion that popular culture industries perpetuated stereotypes by either denying it occurred or placing blame on minority entertainers themselves. *But see* DAVID HOROWITZ, HATING WHITEY AND OTHER PROGRESSIVE CAUSES 19-20 (1999). Horowitz contends that "[t]he charge that [W]hite Hollywood portrays [B]lacks in a stereotypically negative fashion is a standard protest heard from [B]lack spokesmen . . . [b]ut it has little basis in fact." *Id.* at 18. Horowitz also notes that today's stereotyping is often perpetrated by Blacks themselves, a charge echoed by others. *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 relishing being 'niggers,' with all that implies"). *Id.*

theoretical rationale posited to justify IP law.[155] Nonetheless, it would require a non-traditional mode of judicial inquiry for a reparations-type claim to reach the disenfranchisement of Black artists based on the structure of copyright law. Under such a progressive judicial mode, a judge might ask "whether the [copyright] law . . . adversely affects African-Americans in such a way as to suggest insiderism—unconscious bias or insider privilege."[156]

A. *Bessie Smith and the Paradigm of Judicial Indifference to Black Artistic Exploitation*

Bessie Smith was known as the "Empress of the Blues," and during her relatively brief recording career was the most influential and best selling blues artist of her time. Over her career, which ended during the Great Depression, "her records had sold an estimated six to ten million copies . . . [and raised the blues] to an art form that was to be the hallmark for every woman blues singer . . . during the 1920s."[157] However, Bessie Smith, whose first record *Down Hearted Blues* sold a phenomenal (for the era) 780,000 records in a just a number of months, "never made a great deal of money from her records."[158] Smith was well paid as an entertainer during her lifetime, yet was the subject of monumental appropriation of her work and wealth. It was not until the 1970s that Smith received a headstone for her previously unmarked grave, ultimately financed in part by singer Janis Joplin.[159]

In 1979, heirs of Smith filed a suit seeking redress for this appropriation. The suit encapsulates the history of the exploitation of Black artists. It alleges, for example, that Columbia Records (today Sony) paid Smith on a flat-fee, per song basis with no record royalties, and also registered compositions by Smith in the name of the record company, thus denying Smith (and her heirs) copyright royalties. The suit also included claims of contract unconscionablity, fraud, and race discrimination based on section 1981 of the Civil Rights Act.

The judge's attitude toward the case is encapsulated in the

155 For an overview of the rationales of intellectual property law, including Lockean labor theory and utilitarianism, see generally Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287 (1988).

156 Roy L. Brooks, *Rehabilitative Reparations for the Judicial Process*, 58 N.Y.U. ANN. SURV. AMER. L. 475, 482 (2003).

157 HARRISON, *supra* note 47, at 52.

158 COLLIER, *supra* note 46, at 116.

159 *See* JOACHIME E. BERENDT, THE JAZZ BOOM FROM RAGTIME TO FUSION AND BEYOND 74 (Dan Morgenstern & Tim Nevill trans., 6th ed.1991).

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."[160] 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."[161] Touring and performing income was often just as elusive to African-American artists as royalty income.[162] 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."[163] 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."[164] 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

160 Gee v. CBS, 471 F. Supp. 600, 610 (E.D. Pa 1979). The judge's sneering opening 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).

161 JOHN P. KELLOGG, TAKE CARE OF YOUR MUSIC BUSINESS: THE LEGAL AND BUSINESS ASPECTS YOU NEED TO GROW IN THE MUSIC INDUSTRY 109 (2000).

162 *See* COLLIS, *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").

163 474 F. Supp. at 613.

164 *Id.* at 626.

doctrine of adverse possession.[165] 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)."[166]

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."[169] 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.[170] Although blues

165 *Id.* at 657.

166 *Id.* at 656.

167 *See* Greene, *Copyright, Culture and Black Music*, 21 HASTINGS ENT. & COMM. L.J. 339, 368.

168 Rhonda V. Magee, Note, *The Master's Tools, From the Bottom Up: Responses to African-American Reparations Theory in Mainstream and Outsider Remedies Discourse*, 79 VA. L. REV. 863, 864 (1993).

169 Roy L. Brooks, Brown v. Board of Education *Fifty Years Later: A Critical Race Theory Perspective*, 47 HOW. L.J. 581, 585 (2004).

170 MARTIN SCORSESE & PETER GURALNICK, MARTIN SCORSESE PRESENTS THE BLUES 24 (Christopher John Farley, Peter Guralnick, Robert Santelli & Holly George-Warren eds., 2003).

legend Willie Dixon alleged that, for a long period, "the record companies would pay black artists less money than anybody else got,"[171] 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.[173] 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."[174] 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.[175] 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 understate the case for compensation . . . [because] . . . in actualtity, 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-

171 Dan Kening, *Passionate Purpose: Willie Dixon Wants to Shed Some Light on the Blues*, CHI. TRIB., Oct. 8, 1990, at C3 (internal quotations omitted).

172 Brooks, *supra* note 169, at 591.

173 *See* RUSSEL SANEK, 3 AMERICAN POPULAR MUSIC AND ITS BUSINESS: THE FIRST 100 YEARS 64 (Oxford Univ. Press 2001).

174 *Id.* at 36.

175 *See, e.g.*, Art Alcausin Hall, *There Is a Lot To Be Repaired Before We Get to Reparations: A Critique of the Underlying Issues of Race that Impact the Fate of African American Reparations*, 2 SCHOLAR 1, 12 (2000) (contending that reparations for Blacks "would be aimed, at its most basic level, at repairing the harm and injustices [that] occur[red] during the Middle Passage and slavery").

176 *See* Adjoa A. Aiyetoro, *The Development of the Movement for Reparations for African Descendants*, 3 J.L. SOC'Y 133, 133 (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").

177 BORIS I. BITTKER, THE CASE FOR BLACK REPARATIONS 12 (1973).

slavery period of legalized American apartheid known as "Jim Crow" segregation.[178] Similarly, the interaction between legal regimes, such as property and contracts, has been a 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."[179] 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."[180] Analysts have noted that there have been "[f]ive major waves of political activism [promoting] the idea of reparations for African-Americans since the emancipation of the slaves."[181] Conversely, it has been noted that "the [B]lack reparations movement ceased to command serious attention from political leaders between the end of Reconstruction in 1876 and the rise of the modern civil rights movement during the 1960s."[182]

However, the reparations debate has taken on new life through a combination of grass roots organizing, legislative initiatives, and lawsuits.[183] 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.[184] Similarly, forums on Black reparations have been held at leading law schools.[185] A leading reparations advocate surveyed the trends and noted that the "number of reparations lawsuits and legislative initiatives at the local and state

178 *See, e.g.*, Charles J. Ogletree, Jr., *Tulsa Reparations: The Survivor's Story*, 24 B.C. THIRD WORLD L.J. 13, 28 (2004) (noting that "Jim Crow reparations litigation forces the prevalence of segregationist practices upon the American public in all of its recency, its breadth, and its depth").

179 *See* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1714 (1993). *See also* Chase, *supra* note 90, at 6.

180 Lee A. Harris, *Political Autonomy as a Form of Reparations to African-Americans*, 29 S.U. L. REV. 25, 25 (2001) (noting that claims for reparations have been characterized in the past as "preposterous"). *See also* Lee A. Harris, *"Reparations" as a Dirty Word: The Norm Against Slavery Reparations*, 33 U. MEM. L. REV. 409, 433 (2003) (contending that norms against reparations inhibit "academia from discussing slavery reparations and contributes to the paucity of academic writing surrounding the issue of slavery reparations").

181 Tuneen E. Chisolm, Comment, *Sweep Around Your Own Front Door: Examining the Argument for Legislative African American Reparations*, 147 U. PA. L. REV. 677, 683 (1999).

182 F. Michael Higginbotham, *A Dream Revived: The Rise of the Black Reparations Movement*, 58 N.Y.U. ANN. SURV. AM. L. 447, 447 (2003).

183 *See id.* at 448 (noting that "in recent years, the drive for Black reparations has gained widespread support and media attention").

184 *See* Donna Lamb, *The Call for Reparations Gains Momentum*, BLACK WORLD TODAY, April 4, 2002, http://news.ncmonline.com. The lawsuit seeks monetary damages from companies such as Aetna Inc., Fleet Boston Financial Corporation and CSX Corporation, and alleges these companies or their predecessors benefited from slave labor. *Id.*

185 *Id.* (describing a symposium held at New York University School of Law in March, 2002, entitled "A Dream Deferred: Comparative and Practical Considerations for the Black Reparations Movement").

level is unprecedented."[186] However, reparations activism (and by inference, scholarship) is considered both controversial and divisive by many.[187]

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."[188] 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.[189] Reparations discourse is, however, closely tied to CRT.[190] A key tenet of CRT is that racism is a fundamental predicate of American culture and society.[191] Reparations discourse is a logical extension of CRT, which seeks to "focus on how race permeates the legal terrain."[192]

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."[193] Some analysts contend that reparations are justified because of the significant economic disparity between

186 Charles J. Ogletree, Jr., *Repairing the Past: New Efforts in the Reparations Debate in America*, 38 HARV. C.R.-C.. L. REV. 279 (2003).

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, N'COBRA. *See* Kibibi Tyehimba, *National Reparations Weekend: A Movement in the Making*, BLACK REPARATIONS TIMES, Mar. 7, 2003, at 7.

188 Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689, 690 (2003) (characterizing reparations literature as "tendentious 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 to the Bottom*, 49 UCLA L. REV. 1283, 1312 (2002) (contending that CRT's position that antiracist policies should apply to those at the bottom of society are "insufficiently theorized").

189 *See* Jeffrey M. Brown, *Deconstructing Babel: Toward a Theory of Structural Reparations*, 56 RUTGERS L. REV. 463, 469 (2004).

190 *See, e.g.*, Spencer Overton, *Racial Disparities and the Function of Property*, 49 UCLA L. REV. 1553, 1560 (2002).

191 Derrick Bell, a leading progenitor of the CRT movement, for example, contends that racism is a permanent part of the American landscape. *See* DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM ix ((1992). *See also* Jerome McCristal Culp, Jr., *To the Bone: Race and White Privilege*, 83 MINN. L. REV. 1637, 1639 (1999). Professor Culp asserts that "White racism in its many guises is deeply buried in the structure of the law and the legal academy").

192 Cheryl I. Harris, *Critical Race Studies: An Introduction*, 49 UCLA L. REV. 1215, 1234 (2002).

193 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."[194] Slavery and state-enforced segregation resulted in severely diminished opportunity for wealth accumulation by Blacks.[195]

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.[196] Economic discrimination following the Civil War denied Blacks "opportunities to accumulate wealth, in particular opportunities to purchase property."[197] 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.[198]

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.[199] Into the 1990's, survey evidence demonstrates the persistence of negative stereotypes against Blacks and other minority groups.[200] 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.[201] Far from being extinct, evidence exists that "race-contingent decision-

194 Robert Westley, *Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?*, 40 B.C. L. REV. 429, 438 (1998) (noting that the economic predicate for group reparations to Blacks are uncompensated slave labor and the violation of Black civil rights through state-sanctioned segregation) *Id.* at 465-66.

195 *Id.* at 440-44.

196 *See* Comment, *The Alchemy and Legacy of the United States of America's Sanction of Slavery and Segregation: A Property Law and Equitable Remedy Analysis of African-American Reparations*, 43 HOW. L.J. 171, 185-88 (2000) (contending that the "denial of education during slavery and inferior education after slavery ensured that African-Americans remained educationally inferior to Anglo Americans").

197 Note, *Bridging the Color Line: The Power of African-American Reparations to Redirect America's Future*, 115 HARV. L. REV. 1689, 1701 (2002).

198 *Id.*

199 *See* Magee, *supra* note 168, at 872 (noting that "only 3.4% of Black men earn $50,000 or more, compared to 12.1% of white men").

200 *See* Lawrence D. Bobo, *The Color Line, the Dilemma, and the Dream: Race Relations at the Close of the Twentieth Century, in* CIVIL RIGHTS AND SOCIAL WRONGS: BLACK-WHITE RELATIONS SINCE WORLD WAR II 40 (John Higham ed., 1997) (discussing a 1990 survey showing that "[W]hites tend to perceive [B]lacks . . . [as] violence prone, unintelligent, lazy, and to prefer to live off welfare rather than being self-supporting").

201 *See* Ayres, *supra* note 104, at 818.

making is still a pervasive factor in many (but not all) facets of everyday life."[202]

i. Moral Arguments: Reparations as a "Debt"

While economic arguments look to the financial harm caused by slavery and state-sponsored discrimination, moral arguments focus on harm to the community and the need to repair that harm. Thus, both reparation lawsuits and the grass-roots political movement behind them aim to "articulate a moral case for African-American reparations in compelling justice terms—terms the American public has yet to fully engage; terms the American public cannot ignore."[203]

Randal Robinson's book, *The Debt: What America Owes to Blacks*, has proven both controversial and influential.[204] 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."[205] 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."[206]

Proponents of reparations have also invoked the paradigm of corrective justice. Corrective justice has been described as a basic concept: "one 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]."[207] 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.[208] As one leading reparations scholar has contended, "redress cannot primarily be about victim

202 Ian Ayres, *Is Discrimination Elusive?*, 55 STAN. L. REV. 2419, 2420 (2003).

203 Eric K. Yamamoto, Susan K. Serrano & Michelle Natividad Rodriguez, *American Racial Justice on Trial - Again: African American Reparations, Human Rights and the War on Terror*, 101 MICH. L. REV. 1269, 1294 (2003).

204 RANDALL ROBINSON, THE DEBT: WHAT AMERICA OWES TO BLACKS (2000).

205 *Id. See also* Kevin Hopkins, *Forgive U.S. Our Debts? Righting the Wrongs of Slavery*, 89 GEO. L.J. 2531, 2532 (2001).

206 Westley, *supra* note 194, at 473.

207 Kim Forde-Mazrui, *Taking Conservatives Seriously: A Moral Justification for Affirmative Action and Reparations*, 92 S. CAL. L. REV. 683, 707-08 (2004) (noting that the duty to repair a wrong is fundamental "to every legal system in the world").

208 Charles J. Ogletree, Jr., *The Current Reparations Debate*, 36 U.C. DAVIS L. REV. 1051, 1071 (2003).

compensation. No amount of money can return the victim to the status quo ante."[209]

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 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 reparation 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 "over-inclusive, and so fail[] to provide a satisfactory theory of compensation."[214] In addition, reparations claims for slavery raise

209 Roy L. Brooks, *Getting Reparations for Slavery Right - A Response to Posner and Vermeule*, 80 NOTRE DAME L. REV. 251, 273 (2004).

210 WHEN SORRY ISN'T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE 4 (Roy L. Brooks ed. 1999).

211 ROY L. BROOKS, ATONEMENT AND FORGIVENESS: A NEW MODEL FOR BLACK REPARATIONS 142 (2004).

212 *Id.*

213 Dr. Martin Luther King, Jr., Address at the Lincoln Memorial in Washington D.C., (Aug. 28. 1969), *available at* http://www.stanford.edu/group/King/publications/speeches/address_at_march_on_washington.pdf. *See also* Ogletree, *supra* note 210, at 1055 (contending that reparations discourse "comport[s] with Dr. Martin Luther King's vision of the civil rights movement as founded on loving redemption"). *See generally* Anthony E. Cook, *King and the Beloved Community: A Communitarian Defense of Black Reparations*, 68 GEO. WASH. L. REV. 959 (2000).

214 Eric J. Miller, *Preconceiving Reparations: Multiple Strategies in the Reparations Debate*, 24 B.C. THIRD WORLD L.J. 45, 52 (2004) (remarking that "confrontational" reparations focusing on chattel slavery "identif[y] too many [W]hite people as owing a duty to repay and too many African Americans as having suffered the harm").

"a mix of vexing causation issues" difficult to overcome in traditional legal paradigms (such as torts).[215] Analysts have noted that slavery reparations claims are beset by attenuation issues that show the harms of slavery are too remote from today's descendants of slavery and former slaveholders.[216] Finally, even if a sufficiently certain casual connection could be established between the effects of slavery on contemporary African-Americans, as a practical matter, computing damages would be an extremely difficult task. For example, Robinson's book, *The Debt*, made no attempt to calculate it.[217] Even reparations proponents concede that "there are significant problems of computing the debt and of figuring whether the enrichment has already been disgorged . . . by the Civil War[,] . . . by the destruction of Southern wealth[,] . . . and [by] more recent[] affirmative action [programs]."[218]

Moreover, some analysts contend that if cash reparations were paid to individual descendants of slaves, any further remedial action would become untenable, as "non-[B]lack[s] . . . [are] unlikely to accept the premise that they must pay twice for a single wrong."[219]

B. *Judicial Hostility*

The judicial system and traditional modes of legal analysis are overtly hostile to claims for remedial discrimination, and create a hostile environment for reparations claims.[220] Proponents readily concede that "[t]here are numerous legal hurdles that stand in the way of any reparations claim." The system focuses on individual wrongdoers and victims,[221] and reparations advocates

215 For a summary of causation in the reparations context, see James R. Hackney, Jr., *Ideological Conflict, African-American Reparations, Tort Causation and the Case for Social Welfare Transformation*, 84 B.U. L. REV. 1193, 1197 (2004) (noting that causation issues in the reparations context include "identification, boundary and source" problems).

216 *See* Kaimipono David Wenger, *Causation and Attenuation in the Slavery Reparations Debate*, 40 U.S.F. L. REV. 279, 289 (2006).

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 [B]lacks").

218 Alfred L. Brophy, *Some Conceptual and Legal Problems in Reparations for Slavery*, 58 N.Y.U. ANN. SURV. AM. L. 497, 522 (2003).

219 Calvin Massey, *Some Thoughts on the Law and Politics of Reparations for Slavery*, 24 B.C. THIRD WORLD L.J. 157, 169 (2004).

220 Generally, scholars using a CRT framework have tied the hostility of the judicial system to Black empowerment. *See* Brooks, *supra* note 157, at 480 (remarking that classic judicial models fail to incorporate Black values and contending that "[w]hen judges invalidate [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 203, at 1302 (noting that the high barriers for slavery reparations claims include "the absence of directly harmed individuals . . . [and] individual perpetrators").

concede that "the individual victims of past societal discrimination are not readily identifiable."[222] From a legal perspective, reparations claims do not fit the traditional paradigm of "well-identified victims against well-identified wrongdoers."[223] Slavery reparations cases would present plaintiffs with thorny causation problems in establishing a nexus between the past wrong and the contemporary claim.[224]

Further, both immigration and miscegenation create severe difficulties in determining the identity of slavery's descendants, thus "forc[ing] reparations advocates to confront the controversial problem [of] who is 'black.'"[225] The complexities of determining racial identity for slavery reparations alone are close to overwhelming. Given that race is a social rather than a biological construction, "African ancestry may not necessarily lead an individual either to embrace a Black racial identity or to view race as socially salient."[226] 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."[227]

Finally, the statute of limitations comprises 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."[228] In typical reparations claims, the long passage of time is legally problematic,[229] 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.[230]

[222] Forde-Mazrui, *supra* note 207, at 744-45 (conceding that "[t]he problem that victims of past societal discrimination are largely unidentifiable is real and likely to worsen with time)."

[223] Brophy, *supra* note 218, at 502.

[224] *Id.* at 505.

[225] Note, *supra* note 198, at 1697.

[226] Tanya Kateri Hernandez, *Multiracial Matrix: The Role of Race Ideology in the Enforcement of Antidiscrimination Laws, a United States-Latin America Comparison*, 87 CORNELL L. REV. 1093, 1096-99 (2002) (cautioning against discarding race "as a unit of critical analysis and transformative action in the United States").

[227] Daniel J. Sharfstein, *The Secret History of Race in the United States*, 112 YALE L.J. 1473, 1492 (2003).

[228] Keith H. Hylton, *Slavery and Tort Law*, 84 B.U. L. REV. 1209, 1212-13 (2004).

[229] *See* Keith N. Hylton, *A Framework for Reparations Claims*, 24 B.C. THIRD WORLD L.J. 31, 37-38 (2004).

[230] *See, e.g.*, Peter H. Schuck, *Slavery Reparations: A Misguided Movement*, JURIST, Dec. 9, 2002, http://jurist.law.pitt.edu. Professor Schuck argues that "affirmative action's 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."

Reparations proponents recognize that "the hostility toward reparations is just as intense as it is against racial preferences."[231] From the perspective of many whites, slavery is ancient history and "segregation . . . too . . . is a dinosaur."[232] 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"[233] In general, there is a huge gap between how blacks and whites view race relations and discrimination.[234] 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."[235]

Politically conservative thinkers oppose reparations and other remedial measures, contending that any type of racial preference is unjustifiable.[236] However, it is probably fallacious to ascribe racial animus to all opponents of reparations.[237] Whites tend to oppose remedial measures such as affirmative action in hiring, regardless of whether they bear animus or good will to Blacks.[238] Similarly, only 4 percent of whites in recent surveys support black reparations for slavery, whether paid by the government or corporations.[239] In contrast, surveys shows that many, if not most, African-Americans endorse the notion of reparations.[240] 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."[241] Recent

[231] Alfreda Robinson, *Troubling Settled Waters: The Opportunity and Peril of African-American Reparations*, 25 B.C. THIRD WORLD L.J. 139, 147-48 (2004) (discussing positions of reparations opponents, such as Professor Loury).

[232] W. Burlette Carter, *True Reparations*, 68 GEO. WASH. L. REV. 1021, 1026 (2000).

[233] *Id.*

[234] *See, e.g.*, Bobo, *supra* note 200 (noting that "most [B]lacks see racial discrimination as a more prevalent problem than do most [W]hites").

[235] HARLAN L. DALTON, RACIAL HEALING: CONFRONTING THE FEAR BETWEEN BLACKS AND WHITES 156 (John Highman ed., 1995).

[236] *See, e.g.*, HOROWITZ, *supra* note 155, at 55.

[237] *See* PAUL M. SNIDERMAN & EDWARD G. CARMINES, REACHING BEYOND RACE 20 (1997).

[238] *Id.* (noting that "[of] the most racially tolerant 1% of [W]hites . . . [a]pproximately 8 out of every 10 . . . oppose affirmative action in hiring, and about 6 out of every 10 . . . oppose it in college admissions").

[239] *See* Alfred L. Brophy, *The Cultural War Over Reparations for Slavery*, 53 DEPAUL L. REV. 1181, 1183 (2004). The question of reparations was found by pollsters to be "the most racially divisive issue since [polling] began." *Id.* at 1182.

[240] *Id.*

[241] Chad W. Bryan, *Precedent For Reparations? A Look at Historical Movements for Redress*

political history teaches that when activists have couched policy issues "in racial terms . . . [it] has spelled doom for past reform efforts."[242] The outlook for reparations by legislative means is pessimistic to say the least. It has been flatly asserted by those sympathetic to the cause of racial equality that "the claim for reparations will not be successful unless it has substantial white support."[243]

Some proponents of reparations recognize this dynamic. A leading advocate asserts that "reparationists do not seek the endorsement of the majority of the American population or even a majority of the African-American population" in pursuing reparations claims.[244] In contrast, other proponents contend that "before achieving victory in a court of law, African-American reparations must succeed in the court of public opinion."[245] The jury of the public, however, is far from sympathetic to reparation-style claims, making victory in the court of public opinion highly unlikely, at least in the short term.

VII. REPARATIONS FOR CREATIVE PRODUCT

Reparations legal scholars have yet to examine the pervasive appropriation of Black cultural production, such as music. CRT scholars such as Mari Matsuda have recognized that the "black artist's fight to establish progressive language and music is relevant to the legal theorist because the fight over the body and soul of American law is part of the same struggle."[246] No legal scholar has previously attempted to link intellectual property to the calculus of reparation claims in any structured thesis. This article contends that to the degree that advocates press claims for reparations, intellectual property presents as strong (and in some ways stronger) a case as would labor or property claims. Given the centrality of Black cultural production to American society (and to

and Where Awarding Reparations for Slavery Might Fit, 54 ALA. L. REV. 599, 604 (2003).

242 DONNA COOPER HAMILTON & CHARLES V. HAMILTON, THE DUAL AGENDA: THE AFRICAN AMERICAN STRUGGLE FOR CIVIL AND ECONOMIC ECONOMY 235 (1997) (quoting Senator Moniyhan's reluctance to focus on the race aspect of the policy debate on welfare in the 1980s).

243 Robert A. Sedler, *Claims for Reparations Undermine the Struggle for Equality*, 3 WAYNE ST. U. J.L. & SOC'Y 119 (2002).

244 Ogletree, *supra* note 178, at 14.

245 Note, *supra* note 198, at 1692. *See also* Miller, *supra* note 214, at 77 (contending that "[o]ne of the greatest challenges facing reparations activists is persuading a majority of Americans that conversation on race and society, responsibility and redemption, is still necessary").

246 Mari Matsuda, Looking to the Bottom: Critical Legal Studies and Reparations in KIMBERLE CRENSHAW, NEIL GOTANDA, GARY PELLER, KENDALL THOMAS, CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 63, 65-66 (1995) (remarking on transformative power of African-American cultural production).

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 society.[247] 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."[248] 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 individual artists 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,[249] to impose "hermetic control over every access and use of digital content."[250]

In some respects, the case for reparations in the context of intellectual property could not come at a more opportune time.[251] First, there has been a resurgence of interest in foundational music such as the blues.[252] Also, there is increasing recognition in

247 *See* COLLIER, *supra* note 46, at 34. Collier noted that by the 1920's, "the influx of [B]lacks into popular music . . . turned the music business into something of a [B]lack profession." *Id.*

248 *Id.*

249 The Digital Millenium Copyright Act, 17 U.S.C. § 1201 (2000). *See also* H.R. REP. NO. 105-551 (1998).

250 Netanel, *supra* note 3, at 19.

251 In other respects, the timing for reparations claims in the music context may not be as opportune. *See* Lydia Pallas Loren, *Untangling the Web of Music Copyrights*, 53 CASE W. RES. L. REV. 673, 673 (2003). The music industry claims severe economic harm to record sales that it attributes to digital downloading. *Id.* It is an industry "in crisis . . . . [Infringement] is rampant, with little signs of abating." *Id.*

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 Mechanisms for Redistributing Rights*, 69 BROOK. L. REV. 229, 231 (2003) (urging lawmakers to "consider ending copyright as we know it"). *See also* Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263, 300-05 (2001) (calling for the end of copyright for digital music).

252 *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] . . . as 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."[253] 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."[254]

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.[255] Undoubtedly, other "outsider" groups suffered IP deprivations under the same or similar dynamics as Blacks.[256]

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 inequity in music contract formation, [and] there is a possibility that new artists will have more control over their artistic futures."[257] 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

253 Edna Gundersen, *The Thrill isn't Gone: PBS Sings Praises of* The Blues, *in 7-Part Harmony*, USA TODAY, Sept. 26, 2003, at E01.

254 WHEN SORRY ISN'T ENOUGH, *supra* note 210, at 6.

255 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 subdominant minorities or socioeconomic groups." *See* Robert A. Dentler, *The Political Situation and Power Prospects of African Americans in Gunnar Myrdal's Era and Today, in* AN AMERICAN DILEMMA REVISITED: RACE RELATIONS IN A CHANGING WORLD 40 (1996).

256 *See generally* Rebecca Tsosie, *Reclaiming Native Stories: An Essay on Cultural Appropriation and Cultural Rights*, 34 ARIZ. ST. L.J. 299 (2002) (outlining the history of cultural appropriation of Native American art forms). *See also* Rebee Garofalo, *Off the Charts, in* AMERICAN POPULAR MUSIC, *supra* note 22, at 119 (contending that in the "bi-polar division of [B]lack and [W]hite, historians have tended to either render Latinos invisible or simply assign them rather indiscriminately to one or the other group, thus precluding consideration of Latin musical influences as a major contributor . . . [to] rock-and-roll culture").

257 Todd M. Murphy, Comment, *Crossroads: Modern Contract Dissatisfaction as Applied to Songwriter and Recording Agreements*, 35 J. MARSHALL L. REV. 795, 817 (2002).

plaintiffs and defendants. However, the class of claimants is relatively identifiable and discrete in the case of Black music artists, and the class of perpetrators is relatively easy to identify, i.e. the established music industry and its successors in interest.

Reparations claims for the creative output of African-Americans would go beyond mere royalty accounting or copyright infringement lawsuits. The point would be to engender redress, healing and transformation. Even the staunchest opponents of reparations concede that "where African-Americans 'have such clearly defined grievances—as in losses suffered during Twentieth century atrocities in Rosewood, Florida, and in Tulsa, Oklahoma—they have the legitimate right to demand compensation.'"[258] Claims for redress in the creative product context are clearly defined, and avoid some of the problems of slavery reparations as examined below.

A. *Identification*

The victims of appropriation of creative product are more readily identifiable than in slavery reparations cases. Although most of the pioneering blues artists are dead, their heirs are still alive and identifiable. For example, an heir of legendary blues artist Robert Johnson recently received royalty payments arising from the sale of Johnson's recordings.[259] The works of early blues artists were so appropriated that "[f]or years, many assumed that Johnson's music was public domain."[260] The perpetrators of appropriation are primarily corporate defendants. Targeting corporate defendants, at least in theory, "eliminate[s] the weakness of past suits" to secure reparations in the judicial system.[261] It is possible in many instances to determine the corporate predecessors of record companies who engaged in the appropriation of artistic works by African-Americans. In corporate slavery reparations cases, plaintiffs must "trace each [corporation] through mergers, acquisitions and other structural changes over a century and a half."[262] Given the intense concentration of the institutional music business, where five music conglomerates

258 Ogletree, *supra* note 186, at 293 (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").

259 *See* Ellen Barry, *Bluesman's Son Gets His Due*, L.A. TIMES, June 2, 2004, at A1.

260 Jennifer L. Hall, *Blues and the Public Domain - No More Dues to Pay?*, 42 J. COPYRIGHT SOC'Y U.S.A. 215, 216 (1995).

261 *See* Michelle E. Lyons, Note, *World Conference Against Racism: New Avenues for Slavery Reparations?*, 35 VAND. J. TRANSNAT'L L. 1235, 1267 (2002).

262 Robinson, *supra* note 40, at 75 (quoting K. Terrell Reed, *Sins of the Past*, BLACK ENTERPRISE, June, 2002, at 35).

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.[263] 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."[264] 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

263 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).

264 Sedler, *supra* note 243, at 123 (quoting EDMOND N. CAHN, A SENSE OF INJUSTICE (1949)).

whites."[265] 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[266], 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."[267] 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 facially 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."[268] 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."[269] It is said

265 Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980). *See generally* Van B. Luong, *Political Interest Convergence: African American Reparations and the Image of American Democracy*, 25 U. HAW. L. REV. 253 (2002).

266 *See* David Sanjek, *They Work Hard for Their Money*, *in* AMERICAN POPULAR MUSIC, *supra* note 22, at 13 (noting that the "same pattern of exploitation existed with country or 'hillbilly' artists as they were known at the time").

267 Cook, *supra* note 214, at 994.

268 Steven A. Hetcher, *The Music Industry's Failed Attempt to Influence File Sharing Norms*, 7 VAND. J. ENT. L. & PRAC. 10, 11 (2004).

269 Mark F. Schultz, *Fear and Norms and Rock & Roll: What JamBands Can Teach Us About*

that as to inculcating "copynorms," "[t]he music industry would benefit greatly from being perceived as fair."[270] 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."[271] 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.[272]

If the industry were to atone for its past injustices to Black artists, it might well assist in inculcating norms against Internet appropriation.[273] Atonement would constitute the ultimate "public relations makeover."[274] Atonement could similarly give weight to the music industry's claims that the fight against Internet piracy is truly a fight for artist rights.[275] 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.[276] 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."[277] 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.

Persuading People to Obey Copyright Law, 21 BERKELEY TECH. L.J. 651, 655-56 (2006).

270 *Id.* at 721.

271 Mohsen Manesh, *The Immorality of Theft, the Amorality of Infringement*, 2006 STAN. TECH. L. REV. 5, 98 (2006).

272 See Matthew Sag, *Piracy: Twelve-Year Olds, Grandmothers, and Other Good Targets for the Recording Industry's File Sharing Litigation*, 4 NW. J. TECH. & INTELL. PROP. 133, 155 n.1 (2006).

273 There seems to be some evidence that appeals to morality in the file sharing context may actually backfire and lead to decreased compliance. *See* Yuval Feldman & Janice Nadler, *The Law and Norms of File Sharing*, 43 SAN DIEGO L. REV. 577, 614-15 (2006). However, some suggest that if the industry puts forth a greater effort in place of its current strategy, which features weak ad campaigns using popular artists to decry copyright infringement, such an effort "may have the desired effects." *Id.* at 615.

274 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* Note, *Exploitative Publishers, Untrustworthy Systems, and the Dream of a Digital Revolution for Artists*, 114 HARV. L. REV. 2438, 2453 n.94 (2001) (commenting that "[i]nstitutional publishers pressing for legal and technological crackdowns on open digital media are quick to emphasize their concern for the interests of artists").

276 *See* JESSICA LITMAN, DIGITAL COPYRIGHT 168 (2001) (noting that "when musicians are not fairly paid, they continue to play, write songs, perform at concerts and cut records," making the RIAA's rhetoric on artist compensation morally unappealing).

277 *See, e.g.*, JOANNA DEMERS, STEAL THIS MUSIC: HOW INTELLECTUAL PROPERTY LAW AFFECTS MUSICAL CREATIVITY 12 (2006).

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 downloading, 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 audiotapes and a 2 percent levy on the sale of digital audiotape equipment."[278] It has been proposed that Congress "enact a Digital Recording Act" to fund artists as an incentive for the creation of music.[279] 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.[280] Yet some maintain that the unpopularity of reparations fuels legislative hostility towards Black reparations.[281] However, the Copyright Extension Act[282] 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

278 Ku, *supra* note 251, at 312-13.

279 *Id.* at 312.

280 *See* Patry, *supra* note 122, at 664 (noting that "many well-known musicians . . . were forced to sell their rights for a small one-time lump-sum").

281 *See* Alfred Brophy, *The World of Reparations: Slavery Reparations in Historical Perspective*, 3 WAYNE ST. U. J.L. SOC'Y 105 (2002) (contending that "[t]here is substantial opposition to reparations, for the power of conservatism is strong").

282 Sonny Bono Copyright Term Extension Act ("CTEA") of 1998, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (adding a twenty year term to existing and future copyrights). Critics have characterized CTEA as an unwarranted "gimme" to large corporate copyright holders such as Disney, Viacom and other entertainment conglomerates. *See, e.g.*, J. Michael Keyes, *Whatever Happens to Works Deferred?: Reflections on the Ill-Given Deferments of the Copyright Term Extension Act*, 26 SEATTLE U. L. REV. 97 (2002).

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."[283] 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,"[284] 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."[285] 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.[286] Further, minorities are still underrepresented in executive, managerial, and professional capacities in the mass culture industry themselves, despite efforts to increase hiring in

283 Paul M. Schwartz & William Michael Treanor, *Eldred and Lochner: Copyright Term Extension and Intellectual Property as Constitutional Property*, 112 YALE L.J. 2331, 2358 (2003).

284 Marci A. Hamilton, *An Evaluation of the Copyright Extension Act of 1995: Copyright Duration Extension and the Dark Heart of Copyright*, 14 CARDOZO ARTS & ENT. L.J. 655, 659 (1996).

285 Larry Alexander, *What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies*, 141 U. PA. L. REV. 149, 161-62 (1992).

286 *See* GOLDSTEIN, INTELLECTUAL PROPERTY; *supra* note 53, at 69 (noting that in "a small number of cases, courts have given successful unfair competition plaintiffs an award measured by the cost of advertising that the plaintiff would have to undertake to dispel the consumer confusion created by the defendant's conduct").

these fields.[287] A core reason for an "atonement model" of reparations is "to give the perpetrator [of an atrocity] an opportunity to reclaim its moral character."[288] 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."[289]

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.[290] The statute of limitations for contract claims in most jurisdictions is six years.[291] In the copyright context, courts have rejected suits for copyright infringement where a plaintiff waits too long. For example, where a co-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.[292]

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.[293] 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."[294] These amounts paid almost

287 *See, e.g.*, Maurice E.R. Munroe, *The EEOC: Pattern and Practice Imperfect*, 13 YALE L. & POL'Y REV. 219, 279 n.142 (1995) (noting that Blacks "are significantly underrepresented in management sales positions even in the music industry").

288 Brooks, *supra* note 211, at 273-74.

289 *Id.* at 274.

290 *See* Merchant v. Levy, 92 F.3d 51, 57 (2d Cir. 1996), *cert. denied*, 519 U.S. 1108 (1996).

291 *See, e.g.*, N.Y. C.P.L.R. § 213(2) (2007).

292 *Merchant*, 92 F.3d at 57.

293 *See generally* Don E. Tomlinson, *Federal Versus State Jurisdiction and Limitations Versus Laches in Songwriter Disputes: The Split Among the Federal Circuits in* Let the Good Times Roll, Why Do Fools Fall in Love?, *and* Joy to the World, 23 LOY. L.A. ENT. L. REV. 55, 68 (2002).

294 Richard Harrington, *MCA to Pay Royalties to R&B Greats*, WASH. POST, Dec. 7, 1989. The labels promised to double the royalty rate of older artists from 5% to 10% and to forgive negative balances in their accounts, noting that Blues great Muddy Waters, "[a]s recently as 1986 . . . showed a negative balance of $56,000." *Id.*

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 for[297] 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-abidiningness 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

295 *See Music Sales Strong Despite Digital Piracy*, USATODAY.COM, http://www.usatoday.com/life/music/news/2004-04-12-music-sales-up_x.htm, (last visited Nov. 9, 2007).

296 *See* Lateef Mtima, *Intellectual Property and Social Justice: Introduction*, 48 HOW. L.J. 571, 572 (2005). *See also* Margaret Chon, *Intellectual Property and the Development Divide*, 27 CARDOZO L. REV. 2821, 2884 (2006) (setting out the contours of substantive equality in IP for underdeveloped countries).

297 *See* Alan Cohen, *In Pursuit of Pirates*, 14 INTELL. PROP. L. & BUS. ALMANAC 14 (2003) (quoting Harvard Law professor Jonathan Zitrain).

298 *See, e.g.*, Peter K. Yu, *The Escalating Copyright Wars*, 32 HOFSTRA L. REV. 907, 944-45 (2004) (contending that "[t]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").

299 Christopher Jensen, Note, *The More Things Change, the More They Stay the Same: Copyright, Digital Technology, and Social Norms*, 56 STAN. L. REV. 531, 568 (2003).

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.[300] 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."[301] 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."[302] Attempts by the institutional music industry to quell unlawful Internet distribution are hampered severely by the "negative public perception of the music industry."[303] 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 profited disproportionately from it."[304]

300 *See, e.g.*, Jon M. Garon, *Normative Copyright: A Conceptual Framework for Copyright Philosophy and Ethics*, 88 CORNELL. L. REV. 1278 (2003).

301 *Id.* at 1283.

302 Steven A. Hetcher, *Curb Center Special Feature:* The *Music Industry's Failed Attempt to Influence File Sharing Norms*, 7 VAND. J. ENT. L. & PRAC. 10, 10 (2004).

303 Jennifer Norman, *Staying Alive: Can the Recording Industry Survive Peer-to-Peer?*, 26 COLUM. J.L. & ARTS 371, 405 (2003).

304 FRANK KOFSKY, BLACK MUSIC, WHITE BUSINESS: ILLUMINATING THE HISTORY AND POLITICAL ECONOMY OF JAZZ 84 (1997).